THE TIN EAR OF THE COURT: *KTUNAXA NATION* AND THE FOUNDATION OF THE DUTY TO CONSULT

ROBERT HAMILTON[*] AND JOSHUA NICHOLS[**]

The recent Ktunaxa Nation *decision of the Supreme Court of Canada provides an opportunity to discuss the fundamental legal presumptions that underlie the Crown's duty to consult and accommodate Aboriginal peoples. The jurisprudence in this area has been based on a "thick" conception of Crown sovereignty as including legislative power and underlying title in relation to Aboriginal lands. This, in the Supreme Court's view, justifies the possibility of the unilateral infringement of Aboriginal rights. This framework assumes that the relationship between the Crown and Aboriginal peoples is a sovereign-to-subjects one. This assumption, however, lacks a legal and factual basis.*

Conversely, Aboriginal peoples articulate their claims in the language of inherent jurisdiction within a nation-to-nation relationship. If the Supreme Court acknowledged that the relationship between the parties is indeed nation-to-nation, the appropriate doctrine would no longer be a duty to consult and accommodate. Following the approach to a similar relationship outlined by the Supreme Court in the Secession Reference*, the appropriate model would be a generative duty to negotiate. This article sets a path to a model that preserves the useful components of the duty to consult while providing a remedy to the distributional inequity in bargaining power created under the current framework, thereby opening avenues for effective conflict resolution.*

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I. INTRODUCTION

The Supreme Court's recent decision in *Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations)*[1] is a landmark in the duty to consult jurisprudence. While this designation is often reserved for hard cases that serve to dramatically change legal doctrine, this does not always need to be the case. *Ktunaxa Nation* does not exhibit that kind of change. The legal doctrine that the Supreme Court employed is neither exceptional, nor particularly innovative. It is consistent with the case law that has developed since *Haida*

[*] Assistant Professor, Faculty of Law, University of Calgary.
[**] Assistant Professor, Faculty of Law, University of Alberta. The authors would like to thank Drs. John Borrows and Thomas McMorrow, as well as the two anonymous reviewers, for helpful comments on drafts of this article. This article chooses to use the term "Aboriginal" since it deals with section 35 jurisprudence which is the term used in that section.

[1] 2017 SCC 54 [*Ktunaxa Nation*].

Nation v. British Columbia (Minister of Forests)[2] and is representative of the law in this area. What makes this otherwise unremarkable case a landmark is the relationship between law and fact. The significance of the case can be seen on the most cursory survey of the facts. The Ktunaxa were attempting to use the judicial system to preserve a part of their traditional territory that they refer to as Qat'muk, which they hold to be sacred. The British Columbia Minister of Forests, Lands and Natural Resource Operations entered into a consultation process with them before approving the development of a ski resort in Qat'muk. The Ktunaxa challenged this decision on the basis that the development would breach their constitutional right to freedom of religion and their Aboriginal rights under section 35 of the *Constitution Act, 1982*.[3] The majority of the Supreme Court found that the Minister had met the procedural requirements of section 35. The decision to build the ski resort on sacred land was upheld. However one may feel about this outcome, this case does not represent a failure to properly apply the duty to consult. The Supreme Court's technical reasoning is defensible. Rather, the decision indicates a foundational failure of the section 35 jurisprudence. As such, it provides an opportunity to reassess the duty to consult and accommodate (DCA).

We can begin to get a sense of the failure *Ktunaxa Nation* represents when we carefully consider how the DCA process distributes power and responsibility between the Crown and Aboriginal peoples and how this, in turn, reflects a particular view of their constitutional relationship. The Supreme Court repeatedly reminds Aboriginal claimants that they cannot make "absolute claims" and that "[s]ection 35 guarantees a process, not a particular result."[4] They are also instructed that they are obligated to "facilitate the process of consultation and accommodation by setting out claims clearly."[5] The process section 35 protects does "not give Aboriginal groups a veto over what can be done with land" and consent "is appropriate only in cases of established rights, and then by no means in every case."[6] The result is judicially supervised procedural protection of asserted Aboriginal rights that limits discretionary Crown authority while nonetheless allowing the Crown to act in the face of Aboriginal opposition.

While the process that DCA case law has generated has doubtlessly had some positive effects, it has been developed on the basis of the assumption that the Crown has sovereignty, legislative power, and underlying title in relation to Aboriginal lands.[7] The Supreme Court's unquestioning acceptance of this constitutional claim has led to the creation of a process whereby the Supreme Court is able to unilaterally determine the weight of Aboriginal claims, situate them on a spectrum, determine the degree of consultation required, and ultimately justify unilateral infringement of constitutional rights. In other words, the DCA has been constructed on the assumption that the relationship between the Crown and Aboriginal peoples is a sovereign-to-subjects one. This presumption, however, lacks both a factual and a principled legal basis. Aboriginal peoples have consistently maintained that they are not subjects of the Crown; rather, they have *nation-to-nation* relationships with the Crown and constitute a third order of government. By reflexively accepting one vision of a contested

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2 2004 SCC 73 [*Haida Nation*].
3 Being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.
4 *Ktunaxa Nation*, *supra* note 1 at para 79.
5 *Ibid*, citing *Haida Nation*, *supra* note 2 at para 36.
6 *Haida Nation*, *ibid* at para 48.
7 *R v Sparrow*, [1990] 1 SCR 1075 at 1103 [*Sparrow*].

constitutional relationship, the Supreme Court has generated a series of complicated legal processes and tests that are weighted towards fitting Aboriginal peoples into a constitutional relationship that they have consistently rejected for the last 150 years. In designing processes of adjudication that presume that the constitutional problem is settled, the Supreme Court has generated a process that is ill suited to facilitating negotiations and sustainably resolving disputes.

The implications of this constitutional presupposition are clearly exemplified in *Ktunaxa Nation* as the Aboriginal claimants attempted to articulate jurisdictional claims over territory that they hold to be sacred within a procedural framework that requires them to adapt their claim to the language of contingent rights. It is also clear in *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*[8] and *Chippewas of the Thames v. Enbridge Pipelines Inc.*[9] that the Aboriginal claimants objected to the notion that the duties arising from their relationship with the Crown can be carried out by arm's length regulatory boards. In effect, the distance between the parties in these cases is not one of degree but of kind (and so it cannot be expressed by a spectrum). Aboriginal peoples articulate their claims in the language of inherent jurisdiction within a nation-to-nation relationship, whereas the Supreme Court speaks the language of contingent rights within a sovereign-to-subjects relationship. The common law offers the courts two very different paths in these scenarios. If the appropriate legal framework is jurisdiction, the applicable areas of law are the division of powers, conflict of laws, and comity. The most appropriate case to model the procedure on is the *Secession Reference,* in which the Supreme Court exercised restraint in detailing particular rights and obligations of the parties, holding that the solution to contested constitutional issues must be negotiated.[10] If the appropriate framework is contingent rights, the correct

8 2017 SCC 40 [*Clyde River*].

9 2017 SCC 41 [*Chippewas of the Thames*].

10 *Reference re Secession of Quebec*, [1998] 2 SCR 217 [*Secession Reference*]. The distinction between the *Sparrow* framework and the *Secession Reference* is categorical. The first relies on *Charter*-like rights that are subject to reasonable limitation via judicial mediation. The later concerns the constitutional obligations that exist between equal partners in confederation. The former presumes a sovereign-to-subject; whereas the latter presumes a nation-to-nation federal relationship. The former uses the presumption of a *thick* version of Crown sovereignty (namely, one that is bundled with legislative power and underlying title) to treat section 35 as if it were subject to justifiable infringement via a section 1 analysis. The substantive content of section 35 is thus subject to a judicially mediated form of unilateral Crown sovereignty. In terms of the constitutional order, Aboriginal peoples are positioned as a special (or *sui generis*) category of subjects. The *Secession Reference* addresses the people of Quebec as a self-determining people within the Canadian division of powers; they are a "participant in the federation" (*ibid* at para 150). They do not require them to prove that they have the right to self-government, nor do they maintain that such a right is subject to justifiable infringements. Rather, they note that each participant in the federation has a right to initiate constitutional change and that "[t]his right implies a reciprocal duty on the other participants to engage in discussions to address any legitimate initiative to change the constitutional order" (*ibid* at 150). If this right is frustrated in such a way that the people of Quebec cannot achieve internal self-determination, their constitutional obligations cannot be used to foreclose the possibility of secession. As the Supreme Court rightly notes, "[i]n our constitutional tradition, legality and legitimacy are linked" (*ibid* at para 33). This link implies a kind of mutual interdependence. The substance of this interdependence can be seen when we consider what the Supreme Court means when it says that "[t]he Constitution is not a straitjacket" (*ibid* at para 150). Simply put, the constitutional obligations of Quebec cannot be used to strictly limit or contain their democratic rights. Nor can their democratic rights be used to unilaterally dissolve these obligations. By rejecting these two absolutist positions they move to an obligation to negotiate (*ibid* at paras 88–92). The distinction between the *Sparrow* framework and the *Secession Reference* is clearest at this point: the presumption of *thick* Crown sovereignty in the former serves to diminish the legal standing of Aboriginal peoples in such a way that the constitutional order is already set whereas in the *Secession Reference* constitutional negotiations are conducted in the open without the presupposition that one party is already in unquestionable possession of sovereignty, legislative power, and underlying title. By adopting a *thick* version of Crown sovereignty, the courts have acted as if the non-justiciability of Crown sovereignty locks Aboriginal peoples into a fixed constitutional order. In doing so they have exercised

approach is to retain the status quo approach of construing section 35 as protecting a limited range of *Charter*-analogous rights.[11] One issue with the Supreme Court's current approach is it assumes that one party's view of the contested constitutional relationship is correct. Processes for mediating disputes which begin on this basis will not result in acceptance by Aboriginal parties and, as a result, cannot provide any legal certainty. If one party feels their claims are not being heard, they will not feel the outcome is legitimate. The party whose views are not reflected in the process will more likely opt to use litigation strategically, as merely one instrument in a larger project of resistance aimed at changing the constitutional problem. This is not a recipe for negotiated settlement. It is one whose more likely products are continued conflict, faction, and escalation.

In this article, we address the Supreme Court's most recent decisions on the DCA (*Ktunaxa Nation*, *Clyde River*, and *Chippewas of the Thames*)[12] and question the fundamental legal presumptions that are operative within them. These cases provide examples of how the DCA has evolved since *Haida Nation* and the opportunity to reassess this area of section 35 jurisprudence. We begin by examining the effects of the presumption of the sovereign-to-subjects framework in the DCA jurisprudence. We then point to the problems that flow from this presumption and how these problems shape the outcomes of cases. After outlining the current state of the duty to consult, we then imagine what the duty would be if the Supreme Court acknowledged that the relationship between the parties is nation-to-nation and that the appropriate legal paradigm for mediating Crown-Aboriginal relations is not rights, but jurisdiction. As we see it, the appropriate doctrine would no longer be a duty to consult and accommodate. This duty, as currently framed, necessarily implies that the Supreme Court has the jurisdiction required to approve unilateral infringement of Aboriginal claims and places the Crown in a superior position vis-à-vis Aboriginal peoples. In its place, this article articulates a generative duty to negotiate that understands the foundational constitutional relationships between the Crown and Aboriginal peoples as nation-to-nation relationships grounded in practices of diverse federalism. This makes it possible to preserve many of the most useful aspects of the DCA doctrine, in particular its ability to address asserted, but unproven, claims, while distributing bargaining power in a manner that can lead to the negotiated resolution of outstanding constitutional issues. This reimagined area of section 35 jurisprudence would play a central role in remapping Canadian federalism by dealing with issues of unsettled jurisdiction not by deciding the issue between the parties but, following

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their discretion in a manner that compromises their "proper role within the constitutional framework" (*Reference Re Canada Assistance Plan (BC)*, [1991] 2 SCR 525 at 545, cited in *Secession Reference*, *ibid* at para 99). They have read Aboriginal peoples into the constitutional order as a cultural minority, but there is no account for how this came to be. The door is closed by the presumption of *thick* Crown sovereignty because once legislative power and underlying title are bundled with it very little space remains. The fact is that negotiations within this ridged constitutional frame "actually undermine the obligation to negotiate and render it hollow" (to repurpose the words of the Supreme Court in *Secession Reference*, *ibid* at para 91).

[11] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, *supra* note 3 [*Charter*].

[12] This article was prepared and submitted before the Supreme Court released its decision in *Mikisew Cree First Nation v Canada (Governor General in Council)*, 2018 SCC 40 [*Mikisew Cree First Nation*]. Where appropriate, we have made revisions to reflect that decision. A more complete analysis of the case and how it relates to the framework we articulate here is forthcoming.

the example of the *Secession Reference*, by providing them with a constitutional framework that can be legitimated through good faith negotiations.[13]

II. SURVEYING THE DUTY TO CONSULT

Since its first substantive articulation in the *Haida Nation* decision in 2004, the duty to consult has become central to Aboriginal rights jurisprudence in Canada. While the Supreme Court had identified consultation as one factor to be taken into consideration when assessing whether an infringement of an established section 35 right could be justified in *Sparrow*, in *Haida Nation* the consultation requirement was extended to create a constitutional obligation to consult where a proposed action might impact asserted rights.[14] The DCA created procedural safeguards, ensuring that rights were not effectively extinguished while a final determination regarding the scope of the asserted rights was made through negotiation or litigation. The Supreme Court justified the development of this regime in *Haida Nation* on the grounds that "[t]o unilaterally exploit a claimed resource during the process of proving and resolving the Aboriginal claim to that resource, may be to deprive the Aboriginal claimants of some or all of the benefit of the resource. That is not honourable."[15] The establishment of a mechanism for judicial oversight *prior to* an infringement sought to protect Aboriginal rights from further erosion while negotiated claims were underway.[16] The Supreme Court extended the duty to treaty rights a year later in the *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*[17] decision and to the modern treaty context in *Beckman v. Little Salmon/Carmacks First Nation* in 2010.[18] Thus, an obligation to consult prior to undertaking an activity that would impact either asserted or established rights was inserted into the architecture of section 35. This, the Supreme Court held, is both

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[13] *Secession Reference*, *supra* note 10. We recognize that there are ongoing negotiations between the Crown and Aboriginal peoples on a range of issues and that a number of modern treaties and self-government agreements have been concluded as a result. There are examples of negotiations leading to precisely the types of jurisdictional agreements we envision here. The Kunst'aa Guu — Kunst'aayah Reconciliation Protocol, signed between the Haida Nation and the province of British Columbia is one such example, see Coast Funds, "Haida Nation: Kunst'aa Guu–Kunst'aayah — Moving to a Sustainable Future Together," online: <https://coastfunds.ca/stories/kunstaa-guu-kunstaayah-reconciliation-protocol-moving-to-a-sustainable-future-together/>. The modern treaty process as a whole, however, has been hamstrung by, among other things, an insistence on the part of the Crown of fitting Aboriginal peoples into a judicially mediated rights framework that fails to evenly allocate bargaining power to the parties. The insistence on so-called "extinguishment clauses" personifies the power imbalance and explains the difficulty in reaching agreements. As James Anaya wrote in his role as UN Special Rapporteur on Aboriginal Peoples:

> Despite their positive aspects, these treaty and other claims processes have been mired in difficulties. As a result of these difficulties, many First Nations have all but given up on them. Worse yet, in many cases it appears that these processes have contributed to a deterioration rather than renewal of the relationship between indigenous peoples and the Canadian State … the Government minimizes or refuses to recognize aboriginal rights, often insisting on the extinguishment or non-assertion of aboriginal rights and title, and favours monetary compensation over the right to, or return of, lands.

James Anaya, "Report of the Special Rapporteur on the Rights of Indigenous Peoples" (2014) at paras 61–62. Because of these shortcomings, the Inter-American Commission on Human Rights found that the BC Treaty Process is "not an effective mechanism to protect" rights to traditional territory (IACHR, "Report No 105/09 Petition 592-07 Admissibility Hul'qumi'num Treaty Group Canada" (30 October 2009) at para 37).

[14] *Sparrow*, *supra* note 7 at 1119; *Haida Nation*, *supra* note 2 at para 27.

[15] *Haida Nation*, *ibid* at para 27.

[16] *Ibid* at para 7. *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, 2010 SCC 43 at paras 40–41 [*Rio Tinto*].

[17] 2005 SCC 69 [*Mikisew Cree*].

[18] 2010 SCC 53 [*Beckman*].

a legal and a constitutional duty.[19] As the Supreme Court wrote in *Clyde River*: "[i]ts constitutional dimension is grounded in the honour of the Crown," which is brought into the constitution through section 35.[20] The legal aspect of the duty "is based in the Crown's assumption of sovereignty over lands and resources formerly held by Indigenous peoples."[21] Already, the conclusion that the "assumption" of sovereignty is a legal, rather than a constitutional matter begins to reveal the problematic basis of the doctrine.[22] This is examined in detail below. First, it is important to understand clearly the basis of the duty and what the duty does, and does not do.

The source of the duty is the honour of the Crown.[23] The honour of the Crown requires that the Crown "act with honour and integrity" in its dealings with Aboriginal peoples.[24] This is distinct from the Crown's fiduciary duty, which arises in respect of specific Aboriginal interests where the Crown has assumed a discretionary authority in relation to that interest.[25] The honour of the Crown guides all Crown conduct. It also serves as an interpretative, or "gap"-filling, principle for the courts when interpreting rights.[26] The Crown also must act honourably in "defining the rights it guarantees and in reconciling them with other rights and interests."[27] The need to reconcile Aboriginal rights with other rights points to the second principle underpinning the duty to consult: the reconciliation of Aboriginal interests with asserted Crown sovereignty. As the Supreme Court stated in *Haida Nation,* the "duty to consult and accommodate by its very nature entails balancing of Aboriginal and other interests and thus lies closer to the aim of reconciliation at the heart of Crown-Aboriginal relations."[28]

Thus, the duty to consult is one particular instantiation of two general principles: the "purpose" of section 35 as reconciling Aboriginal interests and asserted Crown sovereignty, and the honour of the Crown, which flows from this initial purpose.[29] The need to reconcile claims under section 35, that is, gives rise to the honour of the Crown.[30] The hounour of the Crown, in turn, "gives rise to different duties in different circumstances."[31] In circumstances where unproven rights are asserted, the duty to consult arises. Specifically, "the duty arises when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it."[32] The duty is "triggered" when the Crown considers a course of action which will impact asserted rights

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19 *Haida Nation*, *supra* note 2 at para 10.
20 *Clyde River*, *supra* note 8 at para 19.
21 *Ibid*.
22 The phrase is also loaded in other important ways. The use of the term "assumption" rather than "asserted," as the Supreme Court used in *Haida Nation*, *supra* note 2, posits that the Crown has not only asserted sovereignty, but has acquired it. From that, it is natural for the Supreme Court to conclude that what is at issue are lands and resources *formerly held* by Aboriginal peoples. That is, the Supreme Court concludes from the outset, in its very definition of the legal test, that the acquisition of Crown sovereignty is uncontested and that Aboriginal peoples no longer "hold" the lands and resources in question. As will be detailed below, reading these conclusions into the legal test itself radically tilts the doctrine in favour of the Crown.
23 *Haida Nation*, *ibid* at para 16.
24 *Ibid* at para 19.
25 *Ibid* at para 18.
26 *Beckman, supra* note 18 at para 12.
27 *Haida Nation*, *supra* note 2 at para 20.
28 *Ibid* at para 14.
29 *Ibid* at para 32.
30 *Ibid* at para 17.
31 *Ibid* at para 18.
32 *Ibid* at para 35; *Clyde River, supra* note 8 at para 25; *Rio Tinto*, *supra* note 16 at para 31.

that it knows or ought to know about. Decisions with immediate impacts can trigger the duty, as can a "strategic, high level decision"[33] or the decision-making process of regulatory bodies.[34] The duty to consult is not triggered by the legislative process.[35]

Once the duty has been triggered, what precisely does it require of the Crown? What is the scope and content of the duty to consult? The degree of consultation required in any given case is determined by a prima facie assessment of the strength of the asserted claim and the extent of the impact on the right.[36] Where a claim is "weak" and the impact minimal, the duty may amount to no more than an obligation to give notice and consider feedback. Where there is a strong claim with a high likelihood of success and the impact on the asserted right is substantial, the Crown may have an obligation to "accommodate" the Aboriginal peoples' concerns.[37] What constitutes adequate consultation is a fact dependent inquiry that is shaped both by the unique circumstances of a given case and by the place on the "spectrum" that the case falls. It is not possible to exhaustively list what will constitute adequate consultation, though certain indicia are clear. In *Chippewas of the Thames,* consultation was held to be adequate on the basis that there was "a sufficient opportunity to make submissions to the NEB as part of its independent decision-making process."[38] Of the context surrounding these submissions, the Supreme Court noted that there was an oral hearing, that early notice of the hearing was provided, and that formal participation of impacted peoples was sought. Further, the "NEB provided the Chippewas of the Thames with participant funding which allowed them to prepare and tender evidence including an expertly prepared 'preliminary' traditional land use study."[39] The Chippewas of the Thames were provided with an opportunity to make "formal information requests," which were met with written responses, and to make oral submissions to the NEB.[40] Provision of notice, opportunity to make submission, and inclusion in the decision-making process are indicative of what is likely to be required at the high end of the spectrum.[41] At its most robust, the duty requires "meaningful two-way dialogue" and demonstrable evidence that the Crown has made substantial efforts to accommodate Aboriginal concerns.[42]

In this, the duty to consult ensures that Aboriginal peoples are able to have their concerns about the impact of a project on their rights taken into consideration. Where "reasonable," projects may be modified to accommodate those concerns. What the duty definitively does not do is require Aboriginal consent before a project can move forward. The Supreme Court has emphasized repeatedly that the duty to consult does not amount to what it refers to as a "veto."[43] Rather, the duty to consult establishes a procedural framework through which the government — or a delegated third party — must collect information about the nature of the asserted rights claim and potential impacts on those rights. This gives rise to an important

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33 Thomas Isaac, *Aboriginal Law*, 5th ed (Toronto: Thomas Reuters, 2016) at 370.
34 See *Clyde River, supra* note 8; *Chippewas of the Thames*, *supra* note 9.
35 *Mikisew Cree First Nation*, *supra* note 12.
36 *Haida Nation*, *supra* note 2 at paras 43–44.
37 *Ibid*.
38 *Chippewas of the Thames*, *supra* note 9 at para 52.
39 *Ibid*.
40 *Ibid*.
41 Isaac, *supra* note 33 at 376–77.
42 See *Tsleil-Waututh Nation v Canada (Attorney General)*, 2018 FCA 153, especially at paras 5, 6, 564–84, 598, 627, 760.
43 *Haida Nation*, *supra* note 2 at para 48; *Beckman*, *supra* note 18 at para 14; *Chippewas of the Thames*, *supra* note 9 at para 59; *Ktunaxa Nation*, *supra* note 1 at para 80.

distinction: the duty is not designed to compel the solicitation of Aboriginal peoples' perspectives or wishes regarding a given activity. The duty is to "receive information from rights-bearing communities and to meaningfully consider that information in so far as it concerns adverse impacts on asserted Aboriginal or treaty rights and potential accommodations so as to minimize those impacts."[44] While in practice consultation may also involve the solicitation of views about the desirability of a project, in law that is not the goal of the consultation framework. Whether Aboriginal peoples *want* the project to go ahead is, from a legal perspective, immaterial. What the law requires is that their concerns about the impact of the project on their rights be taken into account during the decision-making process.

As a result, consultation is a procedural rather than substantive right.[45] As the Supreme Court stated in *Haida Nation*, "[i]n discharging this duty, regard may be had to the procedural safeguards of natural justice mandated by administrative law."[46] In *Ktunaxa Nation,* the Supreme Court held that "[t]he s. 35 obligation to consult and accommodate regarding unproven claims is a right to a process, not to a particular outcome."[47] If the procedure required by the consultation framework is followed, no asserted substantive right is owed further protection. The majority put this succinctly in respect of the Ktunaxa claim: "[i]t is true, of course, that the Minister did not offer the ultimate accommodation demanded by the Ktunaxa — complete rejection of the ski resort project. It does not follow, however, that the Crown failed to meet its obligation to consult and accommodate."[48] Thus, the question "is not whether the Ktunaxa obtained the outcome they sought, but whether the process is consistent with the honour of the Crown."[49] Crucially, the majority in *Ktunaxa Nation* held that, while the goal of the consultation process is the reconciliation of Crown and Aboriginal interests, "in some cases this may not be possible."[50] This seems to reverse previous case law in an important respect. The position previously stated was that the purpose of section 35 was the reconciliation of asserted Crown sovereignty and Aboriginal interests. When the procedural safeguards articulated in the consultation framework were met, these interests could be reconciled. In *Ktunaxa Nation*, the majority unambiguously states that reconciliation does not occur when the state meets its procedural obligations only to act in the face of Aboriginal opposition once those obligations are met.[51] That is, the Supreme Court will allow the Crown to frustrate the purpose of section 35 so long as it first meets the judicially crafted procedural requirements. The Supreme Court here lays bare the unilateralism that grounds the duty to consult and the section 35 jurisprudence more broadly. Before exploring this foundational unilateralism in more detail, a final question here is the role of consent in section 35 jurisprudence.

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44 Dwight Newman, "Political Rhetoric Meets Legal Reality: How to Move Forward on Free, Prior and Informed Consent in Canada" (Ottawa: MacDonald Laurier Institute, 2017) at 9, online: <https://macdonaldlaurier.ca/files/pdf/MLIAboriginalResources13-NewmanWeb_F.pdf>.

45 *Mikisew Cree*, *supra* note 17 at para 57.

46 *Haida Nation*, *supra* note 2 at para 41. See also *Clyde River*, *supra* note 8 at para 34.

47 *Ktunaxa Nation*, *supra* note 1 at para 83.

48 *Ibid* at para 114.

49 *Ibid*.

50 *Ibid*.

51 *Ktunaxa Nation*, *supra* note 1 at para 80.

The Supreme Court has been unequivocal: "[w]here adequate consultation has occurred, a development may proceed without the consent of an Indigenous group."[52] Consent is not, however, completely absent from Canadian law. Where Aboriginal title has been established, consent of the Aboriginal title holders is required.[53] Even here, however, the Crown retains the power to unilaterally infringe.[54] Should the Crown choose to infringe, consultation would be part of the justificatory analysis.[55] Thus, consent and consultation exist in two distinct legal spheres: consultation must occur where rights are asserted but not yet proven or where the Crown seeks to justify an infringement. In the latter case, the consultation must occur prior to the proposed infringement. Consent, on the other hand, applies only where rights or title are established, and is then still subject to unilateral infringement according to a proportionality analysis. Further, the incredible difficulty and cost associated with establishing Aboriginal title or negotiating a settlement through the modern treaty process means that consent as a standard in Canadian law is almost non-existent even if we ignore the Crown's power to unilaterally infringe established rights. This unilateralism prevents meaningful negotiation and dialogue about the scope of Crown and Aboriginal rights and obligations, resulting in uncertainty and ongoing litigation. Put somewhat differently, the presumption of *thick* Crown sovereignty leads the court to fall into precisely the kind of legal absolutism that makes the constitutional order into a straightjacket. This can be contrasted with a *thin* version of sovereignty that would restrict it to minimal settings (for example, external legal personality, territorial integrity, and so on) while leaving the issues of legislative power and underlying title as questions subject to federal negotiations.[56] This position lacks any claim to democratic legitimacy. As the Supreme Court so clearly argues in the *Secession Reference:*

> Refusal of a party to conduct negotiations in a manner consistent with constitutional principles and values would seriously put at risk the legitimacy of that party's assertion of its rights, and perhaps the negotiation process as a whole. Those who quite legitimately insist upon the importance of upholding the rule of law cannot at the same time be oblivious to the need to act in conformity with constitutional principles and values, and so do their part to contribute to the maintenance and promotion of an environment in which the rule of law may flourish.[57]

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52 *Ibid* at para 83.

53 *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at paras 2, 76 [*Tsilhqot'in Nation*]; *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at para 168 [*Delgamuukw*].

54 *Ibid.*

55 *Sparrow*, *supra* note 7.

56 Jeremy Webber has made a similar point using different terminology. Webber identifies five "types" of sovereignty: the final power of decision, status as a state in international law, the originating source of law, unified and rationalized order of law, and unified representation of political community. Like us, Webber argues that the notion or type of sovereignty that is put to work has a considerable impact on shaping the legal and constitutional relationships between parties. Understanding how parties are using the concept differently can open up ground for negotiated solutions. See Jeremy Webber, "Contending Sovereignties" in Peter Oliver, Patrick Macklem & Nathalie Des Rosiers, eds, *The Oxford Handbook of the Canadian Constitution* (Oxford: Oxford University Press, 2017) 281 at 291–99. The need to restructure federal relations around less absolute conceptions of sovereignty has been noted elsewhere: see Francois Rocher & Marie-Christine Gilbert, "Re-Federalizing Canada: Refocusing the Debate on Decentralization" in Ruth Hubbard & Gilles Paquet, eds, *The Case for Decentralized Federalism* (Ottawa: University of Ottawa Press, 2010) at 121; Philip Resnick, "The Crisis of Multi-National Federations: Post-Charlottetown Reflections" (1994) 1 Rev Const Stud 189. As Resnick writes, "sovereignty of the 18th or 19th century kind has lost many of its attractions. There is the need to balance off aspirations to linguistic and cultural autonomy and political forms of self-rule with commonality of purpose and interaction in the external arena" (*ibid* at 196).

57 *Secession Reference*, *supra* note 10 at para 95.

This reminds us of what is at stake: the relationship between legality and legitimacy. The current DCA framework has constructed a model of negotiations that begins from the unquestioned presumption of *thick* Crown sovereignty and positions Aboriginal peoples as cultural minorities *within* Canada. This move effectively bypasses the question of legitimacy via the non-justiciability of Crown sovereignty. The constitutional order that results from this is legally rigid, but its claim to legitimacy is unsound. In bypassing the constitutional questions of jurisdiction at the heart of Crown-Aboriginal relations, the DCA framework creates a stalemate. Understanding the foundations of the duty to consult can provide insight into alternatives that move beyond this stalemate.

III. FOUNDATIONAL PRESUMPTIONS: VETOES, VACUUMS, AND THE LIMITS OF REASON

The Supreme Court places great emphasis on the fact that section 35 does not give Aboriginal peoples a veto over development and that consent is required only for a limited set of *proven* claims. This talk of vetoes seems to borrow its sting from an unstated background presumption that Aboriginal peoples are subjects of the Canadian sovereign and possess rights that are subject to reasonable limitations. This presumption is built into the very foundations of section 35 jurisprudence in *Sparrow*, which relies on unquestionable (and apparently previously *almost* unlimited) "federal power" under section 91(24) to treat section 35 as if it is part of the *Charter*.[58] We should remember that it is only through both analogizing and drawing an equivalence between section 35 and *Charter* rights that the court can rationalize the imposition of procedurally justified limitations on section 35 rights (we will refer to this as the *Sparrow* Framework). It also begs the question of the legitimacy of a *thick* version of the concept of Crown sovereignty and forces Aboriginal peoples into a sovereign-to-subjects framework. This framework brings with it the notion that a veto is constitutionally inappropriate in almost all cases. This kind of magical disappearing act, in which the question of constitutional authority always recedes from view, is also on display when the Supreme Court claims that applying the doctrine of interjurisdictional immunity to exclude provincial law from Aboriginal title lands could lead to "legislative vacuums."[59] The problem with this line of reasoning stems from the presumption that the Tsilhqot'in Nation lacks the legal capacity to make their own laws; they are a group of subjects with a special form of land title. They lack legislative capacity.

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58 We stipulate "almost" because, prior to patriation in 1982, the sovereignty of the Crown was limited by the Crown's fiduciary duty (we can see clear examples of this in early cases like *St Catherine's Milling and Lumber Company v The Queen*, (1887) 13 SCR 577 [*St Catherine's Milling*]; and *In the Matter of a Reference as to whether the Term "Indians" in Head 24 of Section 91 of the British North America Act, 1867, Includes Eskimo Inhabitants of the Province of Quebec*, [1939] SCR 104; as well as post-1982 cases like *Guerin v The Queen*, [1984] 2 SCR 335 [*Guerin*]) and whatever self-imposed limits on Crown discretionary authority Parliament "inherited" in 1867 (for example, *The Royal Proclamation, 1763* and the historical treaties). For a thorough and nuanced examination of the Supreme Court's use of fiduciary law in relation to Aboriginal peoples, see Ryan Beaton, "The Crown Fiduciary Duty at the Supreme Court of Canada: Reaching across Nations, or Held Within the Grip of the Crown?" in Oonagh E Fitzgerald, Valerie Hughes & Mark Jewett, eds, *Reflections on Canada's Past, Present and Future in International Law* (Waterloo: CIGI Press, 2018). Nevertheless, we need to remember that prior to 1982 these limitations could be unilaterally extinguished by legislation and so Parliamentary supremacy remained firmly in place.

59 *Tsilhqot'in Nation*, *supra* note 53 at para 147.

These two examples help point to a problem that lies at the heart of the DCA jurisprudence: what does the Supreme Court mean when they state that Aboriginal claimants should "outline their claims with clarity"?[60] When Aboriginal peoples are told that they must clearly define the elements of their claim and not take "unreasonable positions to thwart the Crown from making decisions," they are being told to articulate their claim as subjects of the sovereign Crown and in the language of rights.[61] In other words, the Supreme Court is instructing them that, in order for their claim to even be considered, they must fit themselves into a view of the constitutional order *that they are in fact contesting*. We can see the problem through an analogy with the *Charter*: imagine a court saying of a section 7 claim that the claimant must not take a position that would "thwart the government from making decisions." This would be an absurd statement precisely because that is understood to be the *purpose of the right*. This requirement bars Aboriginal peoples from having the legal capacity to refuse the Crown's unilateral infringement of their Aboriginal and treaty rights. The neutrality of the commonplace requirement of clarity can immediately be seen to be superficial.[62] This framework attempts to jump over the problem of sovereign legitimacy.

Chief Justice Marshall of the US Supreme Court captured the essence of the problem of sovereign legitimacy in *Worcester v. Georgia* when he noted that the idea that sovereignty could be acquired by assertion alone was "extravagant and absurd."[63] The effect of discovery, he clearly held, was limited to European states and "could not affect the rights of those already in possession" of land.[64] Of course, the rights Chief Justice Marshall had in mind were already circumscribed to an extent, as he envisioned Aboriginal peoples holding a form of "internal" sovereignty that was diminished by European sovereignty.[65] This diminished form of sovereignty, however, did not affect the internal sovereignty or rights of self-government of Aboriginal peoples. They remained autonomous, self-governing nations in the vision Marshall put forward in *Worcester*. This stands in contrast to a competing historical view of "Indian title" which considered that title be no more than a mere right of "occupancy."[66]

This distinction between occupancy and "full" sovereignty was based on a combination of the agriculturalist and the civilization theses, which are less distinct theses and more of a loose hodgepodge of arguments cobbled together from the work of numerous authors from the sixteenth century onwards including Alberico Gentili, Thomas More, Hugo Grotius, John Locke, and Emer de Vattel.[67] While the precise combination of authors and arguments varied (and were often inconsistent with one another) the general effect was strikingly similar: the

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60 *Haida Nation*, *supra* note 2 at para 36, cited in *Ktunaxa Nation*, *supra* note 1 at para 80.

61 *Ktunaxa Nation*, *ibid*.

62 In this it plays the same role that the Supreme Court's "characterization" of the right does in *R v Pamajewon*, [1996] 2 SCR 821 at paras 26–27 [*Pamajewon*], where the Supreme Court "characterized" the claim so as to effectively preclude claims to a right of governance *qua* governance.

63 6 Pet 515 (US 1832) at 544–45 [*Worcester*].

64 *Ibid* at 544, cited in *Calder v Attorney-General of British Columbia*, [1973] SCR 313 at 385.

65 *Worcester*, *ibid* at 542–48.

66 As described by Chief Justice Marshall in *Johnson v M'Intosh*, 21 US 543 (1823) at 592 [*M'Intosh*].

67 See e.g. Robert J Miller et al, eds, *Discovering Indigenous Lands: The Doctrine of Discovery in the English Colonies* (Oxford: Oxford University Press, 2010); Anthony Pagden, *Lords of all the World: Ideologies of Empire in Spain, Britain and France c.1500 — c.1800* (New Haven: Yale University Press, 1995); Robert A Williams Jr, *The American Indian in Western Legal Thought: Discourses on Conquest* (Oxford: Oxford University Press, 1990); David Armitage, *The Ideological Origins of the British Empire* (Cambridge: Cambridge University Press, 2000); Andrew Fitzmaurice, *Sovereignty, Property and Empire, 1500-2000* (Cambridge: Cambridge University Press, 2014).

arguments relating to civilization served to establish a set of criteria that were used to determine the legal personality of Aboriginal peoples and the extent of their claims to land. This served to diminish both the degree of sovereignty they could claim and the extent of their territories in ways that were specifically tailored to the needs and desires of European settlers and colonial empires. In 1725 the Reverend John Bulkley aptly summarized the legal effect of these theoretical suppositions when he stated that it was "knavish and ignorant to assume they had large tracts of land" as to his mind it was clear that "[t]hey had only a few spots of enclosed and cultivated land."[68] While one may wonder about the relevance of this eighteenth century articulation of colonial property law in the current context, its relevance can be quickly seen in reading through contemporary case law.

The argument for using the standard of efficient use as a measure for occupancy has not been entirely discarded as its recent appearance in *Tsilhqot'in Nation* clearly demonstrates. The British Columbia Court of Appeal found that the trial judge had erred in law by accepting a "territorial" theory of Aboriginal title.[69] According to the Court of Appeal:

> Aboriginal title must be proven on a site specific basis. A title site may be defined by a particular occupancy of the land (e.g., village sites, enclosed or cultivated fields) or on the basis that definite tracts of land were the subject of intensive use (specific hunting, fishing, gathering, or spiritual sites). In all cases, however, Aboriginal title can only be proven over a definite tract of land the boundaries of which are reasonably capable of definition.[70]

The reasoning here follows the same line that we see in the Reverend John Bulkley, only lacking his self-assurance. It is no longer "knavish and ignorant" to assume the Aboriginal peoples had large tracts of land, rather, any claim to a tract must be "defined by a particular occupancy of land" on a "site specific basis."[71] The presumption that Aboriginal peoples are only entitled to lands which they put to "intensive use" thus appeared as though it may have been the governing standard at Canadian law as recently as 2012.

The Supreme Court rightly rejected the specific-site or definite-tract standard in favour of the common law standard of exclusivity, but that in itself does not remove the effects of the civilization thesis. The related notion of Aboriginal peoples only having a claim to "occupancy" (as opposed to European sovereignty) is still put forward as a limit on both the nature and extent of Aboriginal title, but it is a notion whose basis cannot be articulated. If you inquire as to why Aboriginal peoples are characterized as having claims based on *occupancy* and not on the fact that they governed themselves and their lands as *sovereign peoples*, you quickly find yourself confronted by the aforementioned hodgepodge of civilizational arguments whose normative force had only ever been built on the ardent beliefs of their beneficiaries and has long since been expended.

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68 Cited in James Tully, *An Approach to Political Philosophy: Locke in Contexts* (Cambridge: Cambridge University Press, 1993) at 167.

69 *William v British Columbia*, 2012 BCCA 285 at paras 229–31 [*William*]. For discussion see Kent McNeil, "Aboriginal Title in Canada: Site-Specific or Territorial?" (2014) 91:3 Can Bar Rev 745; Robert Hamilton, "After *Tsilhqot'in Nation*: The Aboriginal Title Question in Canada's Maritime Provinces" (2016) 67 UNBLJ 58 at 59–76.

70 *William*, *ibid* at para 230.

71 See Joshua Nichols, "Claims of Sovereignty—Burdens of Occupation: *William* and the Future of Reconciliation" (2015) 48:1 UBC L Rev 221 at 243–51.

This presents a distinct problem for the Canadian courts. Without the power of colonial legal fictions such as the doctrine of discovery and *terra nullius,* or the favourable weights and measures that the civilization thesis supplied, there is an explanatory gap in the judico-historical narrative that grounds Crown sovereignty. The courts seem to find themselves reaching for old arguments in new clothes as we can see in *Tsilhqot'in Nation* when the Supreme Court attempts to support their unilateral removal of the doctrine of interjurisdictional immunity by raising the specter of legislative vacuums.[72] As John Borrows rightly argues,

> The Supreme Court's assumption of a legal vacuum is unfortunately consistent with a version of the *terra nullius* doctrine that discriminatorily denigrates Aboriginal peoples. It implies that legal vacuums exist wherever Indigenous rights exist, and that these vacuums must be filled by the Crown's overriding and undergirding interests. This is a sad commentary on the state of the law in Canada.[73]

The fact is that despite the Supreme Court's repeated insistence that the Crown's claims to sovereignty, legislative power, and underlying title have never been doubted, the question of the actual basis of the Crown's claims remains unsettled and the character and limits of federal power in relation to "Indians, and lands reserved for the Indians" under section 91(24) of the *Constitution Act, 1867*[74] are therefore in question.[75] In other words, if there is a vacuum to be found in this picture, it is at the basis of the Crown's claim to sovereignty.

We can see the Supreme Court attempting to avoid this question in *Clyde River* when it states that the legal dimension of the DCA "is based in the Crown's assumption of sovereignty over lands and resources formerly held by Indigenous peoples."[76] The problem here is the assumption that the lands and resources were *formerly* held by Aboriginal peoples. That is, consultation standards themselves are explained in a manner which presumes Aboriginal dispossession and excludes Aboriginal peoples from "holding" lands and resources before any adjudication on the matter is undertaken. This framing is evident in all the duty to consult cases — in particular in the emphasis in *Haida Nation* that the Crown now has de facto sovereignty — that is, control of the land and resources.[77] The Supreme Court is able to play with time to effect the very dispossession they identify as having happened at some point in the past. It is only because the lands are characterized as *formerly* held by the Aboriginal peoples — who are in reality presently occupying them — that the Crown may act in the face of Aboriginal disagreement, subject only to the sliding scale of

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72 *Tsilhqot'in Nation*, *supra* note 53 at para 147.

73 John Borrows, "The Durability of *Terra Nullius*: *Tsilhqot'in Nation v British Columbia* " (2015) 48:3 UBC L Rev 701 at 740.

74 (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5.

75 *Sparrow*, *supra* note 7 at 1103.

76 *Clyde River*, *supra* note 8 at para 19.

77 The de facto/de jure distinction in *Haida Nation*, *supra* note 2 can be something of a trip wire. Its power, from one perspective, is that it calls into question the legality of the state's sovereignty and opens up the critiques from scholars like Kent McNeil and Felix Hoehn that the legal basis must then be international or Aboriginal law, neither of which can ground sovereignty by unilateral assertion (at least the current version of International law cannot — its imperial European foundations were structured and restructured to meet just this challenge). See Felix Hoehn, *Reconciling Sovereignties*: *Aboriginal Nations and Canada* (Saskatoon: Native Law Centre, 2012); Kent McNeil, "Sovereignty and Aboriginal Peoples in North America" (2016) 22:2 U California Davis J Intl L & Policy 81. *But,* we need to remember that this distinction is double-edged. The de facto/de jure distinction also accedes to factual Crown sovereignty, which is a performative statement of dispossession, and understates the co-dependency of legal and factual sovereignty: sovereignty is both built and maintained by law.

consultation. The phrasing in *Clyde River* also obscures the fact that the Crown's historical *assumption* of sovereignty, was over lands held by Aboriginal peoples — when the Crown assumed sovereignty, the vast majority of the peoples in the territories they claimed were Aboriginal. Thus, this phrasing erases both past and present Aboriginal presence on, and jurisdiction in relation to, the lands and resources in question. In doing so, it provides the justification for a legal regime that requires Aboriginal peoples to prove their claims in court while Crown interests are presumed.

The unsettled question of the legitimacy of the *thick* version of Crown sovereignty can be seen in the very basis of the Supreme Court's approach to section 35 in *Sparrow*. As Chief Justice Dickson and Justice La Forest acknowledged, section 35(1) is not a part of the *Charter* and so there is "no explicit language in the provision that authorizes this Court or any court to assess the legitimacy of any government legislation that restricts aboriginal rights."[78] In other words, if the presumption of so-called "federal power" in section 91(24) lacks a legitimate basis within the constitutional order, then section 35(1) is not subject to the reasonable limitations found in the *Charter*; rather, it is jurisdictional in nature.[79] As Justice Abella wrote in *Mikisew Cree First Nation*,

> while the *Charter* defines a sphere of rights for individuals that are protected from state action, the majority of the Constitution, including s. 35, allocates power between governing entities, such as the division of powers between the provincial and federal governments, or the separation of powers between the branches of government. In the same way, s. 35 defines the relationship between the sovereignty of the Crown and the "aboriginal peoples of Canada."[80]

Put somewhat differently, the background assumptions of the *Charter*-like version of section 35 are reliant on the *thick* concept of Crown sovereignty, which cannot be legitimated within the framework of current constitutional norms. The upshot of this is that without the inflated version of "federal power" under section 91(24) the court can no longer justify the application of a *Charter*-like section 1 analysis. Therefore, the appropriate legal paradigm for section 35 is the jurisdictional model that is set out in *Secession Reference*. Thus far the courts have not addressed this instability. One could assume that they have not done so because of the concerns that Chief Justice Marshall articulated in *M'Intosh* regarding the connection between the sovereignty of the colonial state and the jurisdiction of its courts.[81] This approach, however, creates a blind-spot in the rule of law whose consequences are not easily contained. By refusing to raise the question of Crown legitimacy, the courts have built

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78 *Sparrow*, *supra* note 7 at 1109.

79 We would like to note here that while section 35(1) read on its own within the scheme of the *Constitution Act, 1982*, *supra* note 3, is not subject to justified infringement, it also lacks specific content. This taken on its face could lead the courts to believe that it does not provide a basis for them to limit the legislative authority of the Crown. This would be patently absurd as it would render section 35(1) into a hollow provision and this could not hope to hold up to any reasonable attempt at constitutional interpretation. Nonetheless there remains the question of what "existing aboriginal and treaty rights" are. These questions were addressed in Parliament of Canada, Special Committee on Indian Self-Government, *Indian Self-Government in Canada* (Ottawa: Ministry of Supply and Services, 1983) [*Penner Report*] and Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples: Looking Forward, Looking Back*, vol 1 (Ottawa: Supply and Services Canada, 1996) which offered constitutional processes for transitioning Canada's federal structure to include Aboriginal peoples within the division of powers.

80 *Supra* note 12 at para 88.

81 *Supra* note 66.

in a set of procedures that continually place the onus on Aboriginal peoples to "prove" claims and limits the scope of their claims under the seemingly neutral banner of reasonableness. This asymmetry creates problems for all involved parties. The presumption of Crown sovereignty, legislative power, and underlying title does not provide the procedural clarity and legal certainty that the Crown requires or promises to third parties.[82] Rather, by skipping over the question of Crown legitimacy, the courts have simply negated the good faith that is required for parties to adhere to their legal decisions that run contrary to their interests. This maintains a systemic power imbalance whereby Aboriginal parties who refuse to comply with a court's findings face incarceration, while federal departments that refuse to do so are always assumed to be acting within their legal authority until some subsequent infringement case is brought.[83] In other words, a court's failure to question the legitimacy of a *thick* version Crown sovereignty undermines "judicial legitimacy" in the eyes of one of the parties.[84] In failing to question these Crown pretensions, a court is seen to have already

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82 See e.g. Shin Imai, "Consult, Consent, and Veto: International Norms and Canadian Treaties" in John Borrows & Michael Coyle, eds, *The Right Relationship: Reimagining the Implementation of Historical Treaties* (Toronto: University of Toronto Press, 2017) at 382–86 where Imai looks at circumstances in which industry may prefer the consent standard as providing a more sound basis for establishing working relationships with Aboriginal peoples.

83 See e.g. *R v Marshall*, [1999] 3 SCR 456 [*Marshall*]; *R v Marshall*, [1999] 3 SCR 533.

84 The question of whether or not the Crown is in possession of sovereignty at all is beyond the jurisdiction of the Canadian courts. It is a political question. For a detailed account of this limitation see Kent McNeil, *Common Law Aboriginal Title* (Oxford: Clarendon Press, 1989). This still leaves open the question of what legal consequences flow from Crown sovereignty and, while the Supreme Court has bundled it with underlying title and legislative power, this is not a necessary combination. The question of what legally flows from Crown sovereignty is a significant one as they can range from a full "power over" account of Crown sovereignty to a limited "power with" account (which results in a nation-to-nation federal-like relationship of shared sovereignty). In practical terms this means that while a court cannot raise the question of whether or not the Crown is sovereign (without paradoxically denying its own jurisdiction) they have an obligation to determine and explain the legal consequences that flow from this. The Supreme Court touches on this "obligation" from a somewhat different angle when it addresses the question of justiciability in *Secession Reference*, *supra* note 10. The Supreme Court begins by pointing out that the notion of justiciability is one that is linked to "the notion of appropriate judicial restraint" (*Secession Reference*, *ibid* at para 99). These notions require an exercise of judicial discretion; a court is tasked with determining the limits of its jurisdiction. But this discretion is not simply free-floating or arbitrary. As the Supreme Court stated in *Operation Dismantle v The Queen*, [1985] 1 SCR 441 at 459, justiciability is a "doctrine … founded upon a concern with the appropriate role of the court as the forum for the resolution of different types of disputes" (cited in *Secession Reference*, *ibid* at para 99). This point is driven home by Chief Justice Dickson: "[t]here is an array of issues which calls for the exercise of judicial judgment on whether the questions are properly cognizable by the courts. Ultimately, such judgment depends on the appreciation by the judiciary of its own position in the constitutional scheme" (*Canada (Auditor General) v Canada (Minister of Energy, Mines and Resources)*, [1989] 2 SCR 49 at 91, cited in *Secession Reference*, *ibid* at para 99). The question in regards to Aboriginal peoples is whether the Supreme Court's position within the constitutional scheme is one that submits to Crown sovereignty. This may well seem to be common sense; the judiciary derives its jurisdiction from the sovereignty of the Crown. But there is the question of the degree of submission. It is one thing to set a Crown sovereignty outside the bounds of cognizability. It is another matter altogether to bundle Crown sovereignty with legislative power and underlying title and set this entire bundle aside as non-justiciable. It is difficult to see the space between the judiciary and the executive in this picture of the constitutional order. This picture of the constitutional order is the straightjacket the Supreme Court was concerned with in the *Secession Reference*. In effect, one of the partners within the confederation has been able to both unilaterally determine the legal position of another and interpret the nature of its obligations. When the Supreme Court accepts this *thick* concept of Crown sovereignty they show a kind of "submissive deference" to administrative power that threatens to create "grey holes" within the constitutional order. As David Dyzenhaus rightly cautions, "grey holes permit the government to have its cake and eat it too, to seem to be governing not only by law but in accordance with the rule of law, they and their endorsement by judges and academics might be even more dangerous from the perspective of the substantive conception of the rule of law than true black holes" (David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (Cambridge: Cambridge University Press, 2006) at 42). In addition, the jurisprudence of Chief Justice Marshall from *M'Intosh*, *supra* note 66 to *Cherokee Nation v Georgia*, 30 US 1 (1831), and finally to *Worcester*, *supra* note 63 can be seen as working through the question of the legal implications of the claim of sovereignty in order to find a balance between arbitrary sovereign power and the rule of law. For more on this see Philip P Frickey,

adopted one party's view of a contested constitutional relationship. As the Supreme Court noted in the *Secession Reference*, "[t]o the extent that the questions are political in nature, it is not the role of the judiciary to interpose its own views on the different negotiating positions of the parties."[85] In the view of many Aboriginal peoples, this is precisely what the courts have done in upholding a *thick* conception of Crown sovereignty. The practical consequences that flow from this are significant. Where processes are perceived to be unfair, the party at a disadvantage is increasingly motivated to use litigation as a tactical instrument for delay rather than seeking a neutral arbiter and accepting their decision as binding. What likely follows a loss in the courts is a change in tactics as resistance is moved outside the legal sphere. The outcome reached through the judicial process therefore provides no certainty. This illustrates that the issue of legitimacy cannot be neatly contained in the past by presuming it as the framework that sets the limits of clarity and reasonableness.

Ktunaxa Nation provides a pronounced example of how the Supreme Court's presumption of *thick* Crown sovereignty in its section 35 doctrine serves to shape and limit its jurisprudence. We can see this when we reconsider the Supreme Court's emphatic insistence that Aboriginal claimants must "outline their claims with clarity."[86] As mentioned above, the precise meaning of "clarity" here is key, as it shapes both how the Supreme Court apportions responsibilities between the parties and the range of administrative outcomes that the courts will see as fitting within the scope of reasonableness. As Chief Justice McLachlin states in *Haida Nation*:

> At all stages, good faith on both sides is required. The common thread on the Crown's part must be "the intention of substantially addressing [Aboriginal] concerns" as they are raised (*Delgamuukw*, supra, at para. 168), through a meaningful process of consultation. Sharp dealing is not permitted. However, there is no duty to agree; rather, the commitment is to a meaningful process of consultation. As for Aboriginal claimants, they must not frustrate the Crown's reasonable good faith attempts, nor should they take unreasonable positions to thwart government from making decisions or acting in cases where, despite meaningful consultation, agreement is not reached.[87]

At first glance this may well seem like an entirely reasonable articulation of the minimal requirements of good faith that enable parties to resolve a conflict. However, this is not a *neutral framework*. Its actual significance hinges on what it excludes. The terms "sharp dealing" and "unreasonable position" form the actual substantive content of the somewhat commonplace procedural model of good faith negotiations. What this means is that if the Supreme Court holds a background assumption that the Crown holds *thick* sovereignty, including legislative power and underlying title then *this assumption determines the limits of reasonableness*.

This emphasis on clarity has a direct effect on the appropriate standard of review in duty to consult cases. It would appear that in order to meet the standards of clarity and reasonableness the Ktunaxa Nation would have to have fit their claims into the Minister's

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"Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law" (1993) 107:2 Harv L Rev 381.

85 *Secession Reference*, *supra* note 10 at para 101.

86 *Haida Nation*, *supra* note 2 at para 36; *Ktunaxa Nation*, *supra* note 1 at para 80.

87 *Haida Nation*, *ibid* at para 42.

understanding of its weight. That is, to clearly and reasonably articulate one's claims is to do so in a manner which accords with a preconceived conclusion as to their weight. After all, if they hold a different opinion of its weight, they would do well to remember that a court reviewing an administrative decision does not decide a constitutional issue *de novo*. This has major implications as the complicated legal and factual basis of the case can be lost on a court that is limiting their inquiry in this way. This limited inquiry may well be deferential to the expertise of decision-makers, but the legitimacy of this notion of deference necessarily presumes that the decision-maker has the required jurisdiction to decide the matter.[88] In other words, there is a presumption that the parties agree that the decision-maker has legitimate authority to adjudicate disputes between the parties: that they are an agent of the sovereign mediating disputes between subjects. This presumption holds for almost all cases, understandably residing in the background. Yet, in the area of Aboriginal rights this background assumption is not stable. The section 35 case law has been constructed on the assumption that "sovereignty and legislative power, and indeed the underlying title, to such lands vested in the Crown."[89] But, in each case that appears before the Supreme Court the work of aligning the facts to fit this presumption requires feats of jurisprudential acrobatics that have more in common with the equants and epicycles of Ptolemy's geocentric model of the universe (or, as John Borrows suggests, alchemy) than formal legal reasoning.[90] In *Ktunaxa Nation* this magical process of alignment takes place as the Supreme Court endeavors to take the Minister's reasons and interpret them so that they fall within the "range of reasonable outcomes."[91] While this is a serious judicial question it is magical because it manages to leap over the problem that is actually at the heart of the case: what gives the Minister the authority to make this decision in the first place?[92] The Supreme Court jumps over the substantive constitutional question of sovereignty, legislative authority, and underlying title by adopting the tools of administrative law. While these tools are useful they

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88 There is also an issue concerning the actual nature of the deference that the reviewing court grants to the decision-maker. In *Ktunaxa Nation* the Supreme Court cites the seminal article by David Dyzenhaus,"The Politics of Deference: Judicial Review and Democracy" in Michael Taggert, ed, *The Province of Administrative Law* (Oxford: Hart, 1997) 279, as support for their acceptance of the Minister's (minimal) reasons in this case. This citation is symptomatic of a general problem within the Administrative case law regarding the provision of reasons and the appropriate standard of review. Simply put, if the Supreme Court is too flexible in accepting minimal reasons and then working to bolster them by reading between the lines in favour of the decision-maker they risk blurring the lines that Dyzenhaus used to differentiate "submissive deference" (which follows AV Dicey's positivistic constitutionalism which held that the judiciary should submit to the intent of the legislature) from "deference as respect." This further runs the risk of creating gaps within the rule of law as the courts simply supply decision-makers with reasons without inquiring further. This problem is further complicated within the context of Aboriginal-Crown relations as Dyzenhaus is clear that "deference as respect" is "inherently democratic." By this Dyzenhaus means that deference as respect "adopts the assumption that what justifies all public power is the ability of its incumbents to offer adequate reasons for the decisions which affect those subject to them" (*ibid* at 305). This assumption obscures the actual conflict between Aboriginal peoples and the Crown and so necessarily distorts the problem. The question of the Minister's decision is a constitutional one as it concerns the nature of the relationship between the Crown and the Ktunaxa Nation. By seeing this as a problem of administrative law to be addressed on the reasonableness standard the courts assumed that the relationship was sovereign-to-subjects.

89 *Sparrow*, *supra* note 7 at 1103.

90 John Borrows, "Sovereignty's Alchemy: An Analysis of *Delgamuukw v. British Columbia*" (1999) 37:3 Osgoode Hall LJ 537.

91 *Ktunaxa Nation*, *supra* note 1 at para 140, citing *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 26.

92 While there was also a section 2(a) *Charter* claim in the case, the Supreme Court worked to hold the section 2(a) and section 35 analysis apart in terms of the use of *Doré v Barreau du Québec*, 2012 SCC 12 [*Doré*]. The *Doré* framework only applied in respect of the section 2(a) claim and, therefore, is only dealt with by the concurring minority.

rely on the democratic principle and so they operate under the presumption that the question of sovereign legitimacy is settled.

This shows us that the background presupposition of the sovereign-to-subjects relationship is required for the norms of administrative law to apply (that is, the democratic principle supplies the necessary — but not sufficient — conditions for legitimating administrative authority). If the relationship between the parties is not sovereign-to-subjects, but nation-to-nation, then relying on the former as a background presumption produces nothing but endless question begging. That is, attempting to mediate nation-to-nation relationships through a sovereign-to-subjects framework leaves hanging questions as to the source, scope, and legitimacy of Crown authority. In *Ktunaxa Nation* the Supreme Court is, at least in part, aware of this problem. In their view, the problem in this case is that the Ktunaxa Nation asked the courts to make a declaration "on the validity of their claim to a sacred site and associated spiritual practices" and, while this is a question that the courts can address through section 35, they cannot do so in the judicial review of an administrative decision.[93] The gist of this argument is that the case was improperly pleaded, as it is an Aboriginal rights case being argued through a combination of the DCA and *Charter* rights. To a certain extent, this is a reasonable position to take. The problem with their position is in the details. The Supreme Court states:

> Without specifically delegated authority, administrative decision makers cannot themselves pronounce upon the existence or scope of Aboriginal rights, although they may be called upon to assess the *prima facie* strength of unproven Aboriginal claims and the adverse impact of proposed government actions on those claims in order to determine the depth of consultation required. Indeed, in this case, the duty to consult arises regarding rights that remain unproven.[94]

There is quite a bit to unpack here. First, the claim that Parliament could specifically delegate authority to an administrative decision-maker to determine the existence or scope of Aboriginal rights is deeply problematic. The only legal basis of support for this kind of decision-making power is an interpretation of section 91(24) that holds that Parliament has unlimited *power over* Indians and their lands. Even if we were to concede this point, it seems to beg the question of the role of the courts as a check on Parliamentary sovereignty after patriation. What would the role of the courts be if Parliament elected to delegate this kind of authority?

This is a thorny problem as the analytical approaches of administrative and constitutional law crisscross and overlap in complicated ways in this scenario. It would seem that the decisions of such an empowered administrator would be subject to judicial review through section 35, but would this mean that the actual work of proving the right through the *Van der Peet*[95] test could be unilaterally bypassed? It is difficult to speculate about what exactly the Supreme Court has in mind with this claim, but if we imagine Parliament empowering an administrator to make these kinds of unilateral determinations in relation to *Charter* rights, then it seems that what is being proposed is something akin to permitting a blind-spot within

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93 *Ktunaxa Nation*, *supra* note 1 at para 84.
94 *Ibid* at para 85; *Haida Nation*, *supra* note 2 at para 37.
95 *R v Van der Peet*, [1996] 2 SCR 507 [*Van der Peet*].

the rule of law (the state of emergency being the ultimate form of this). While it is true that administrative decision-makers are empowered in some cases to "balance" *Charter* rights against other interests, this is tightly bound to context.[96] In order to see the force of the comparison, we have to imagine what would result in the *Charter* context if the discretion of the administrative decision-maker extended beyond balancing the rights in question to determining their very existence and character. In this case, it would seem to us that the distinction between sovereign authority and the rule of law would be obscured by an overinflated version of reasonableness.

The relationship between administrative law and the duty to consult is by no means straightforward.[97] As Kate Glover Berger has argued, in many respects the approach to judicial review in Aboriginal law cases has tracked broader shifts in administrative law.[98] Thus, the courts have become increasingly deferential to administrative decision-makers, confident in their ability to manage complex constitutional issues.[99] Following *Chippewas of the Thames* and *Clyde River*, it is clear that administrative decision-makers must consider whether their decisions meet the Crown's constitutional obligations, including the adequacy of consultation. There are two distinct, yet not necessarily co-exclusive, ways to view this. On the one hand, Justices Karatkasanis and Brown emphasize that allowing administrative decision-makers to act without considering the constitutionality of their conduct has severe drawbacks. Decision-makers must be compelled to consider the constitutional dimensions of their decisions to ensure constitutional rights are protected in administrative processes.[100] From another perspective, however, this dilutes the protections afforded by the constitution. In *Doré*, the Supreme Court sought to dispel this fear, arguing that the application of a reasonableness standard upon judicial review would in effect be indistinguishable from the proportionality analysis under section 1. In each case it would be the reasonableness of the limitation in the particular factual circumstances that would be at issue, and whether under the heading of "reasonableness" in a judicial review or under an *Oakes*[101] analysis, decisions with an undue impact on constitutional rights would be caught.

Whether this is defensible or not in a *Charter* context, in an Aboriginal context it poses unique problems.[102] In *Ktunaxa Nation* the Supreme Court held that a ministerial decision about whether adequate consultation had occurred would be reviewed on a reasonableness

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96 *Loyola High School v Quebec (Attorney General)*, 2015 SCC 12 at para 4, as the Supreme Court states "where a discretionary administrative decision engages the protections enumerated in the Charter — both the *Charter*'s guarantees and the foundational values they reflect — the discretionary decision-maker is required to proportionately balance the *Charter* protections to ensure that they are limited no more than is necessary given the applicable statutory objectives that she or he is obliged to pursue." Regarding the contextual nature the Supreme Court states in *Doŕe*, *supra* note 92 at para 7 "the nature of the reasonableness analysis is always contingent on its context" and so, we must remember that the context of section 35 is not the same as the *Charter* (namely, the constitutional relationship between the parties is contested), see *Doré*, *ibid* at para 7.

97 We are referring here to the intersection of Aboriginal rights claims and administrative decision-makers, not to the field of "Aboriginal Administrative Law" which focuses more strictly on structures and principles of review concerning the decisions of Aboriginal decision-makers or governance institutions. See Lorne Sossin, "Indigenous Self-Government and the Future of Administrative Law" (2012) 45:2 UBC L Rev 595.

98 *Ibid*.

99 Kate Glover Berger, "Diagnosing Administrative Law: A Comment on *Clyde River* and *Chippewas of the Thames First Nation*" (2019) 88 SCLR (2d).

100 *Clyde River*, *supra* note 8 at para 22.

101 *R v Oakes*, [1986] 1 SCR 103.

102 We identify these problems as unique, yet in some ways they are simply the clearest illustration of the problems raised by judicial deference on issues of constitutionality.

standard. This overturned, without comment, the holding in *Beckman*, where the Supreme Court held that a correctness standard applied in assessing determinations as to the adequacy of consultation.[103] In so doing, the Supreme Court in *Ktunaxa Nation* revealed the constitutional preconceptions that shaped their decision-making. Since *Dunsmuir v. New Brunswick*,[104] the standard of review has been decided on the basis of which category the issue falls into, with questions of fact and mixed fact and law being given greater deference.[105] Crucially, questions of administrative jurisdiction, as well as constitutional issues such as "the division of powers or the principles of fundamental justice"[106] are assessed on a correctness standard. Administrative decision-makers have been shown deference in relation to their findings on *Charter* rights, but not on constitutional issues of jurisdiction and division of powers. Applying the reasonableness standard in *Ktunaxa Nation*, then, clearly conceives of section 35 rights as *Charter*-like in nature, rejecting a jurisdictional approach to section 35 and continuing the conflation of section 35 and *Charter* rights which began in *Sparrow.* The *Doré* approach to reasonableness, whatever its possible merits in the *Charter* context, only makes sense if this conflation is relied on to subject section 35 to proportionality limits. As a result, "we are left wondering why an executive decision-maker is owed more deference in the context of procedural obligations arising under s.35(1) than under the *Charter* or at common law."[107]

This brings us to the second issue. In cases where no such authority is delegated, administrative decision-makers can assess the prima facie strength of unproven Aboriginal claims. This is by no means surprising, as it is the basis of the DCA case law, but it does bring us back to the hidden background assumptions concerning the constitutional relationship between the parties. That is, it brings us back to what the Supreme Court means when it maintains that Aboriginal claimants must "outline their claims with clarity" or, expressed negatively, that they must *not* take "unreasonable positions."[108] The Supreme Court is clear that in their view the Ktunaxa Nation adopted an unreasonable (or "absolute") position when they argued that "no accommodation was possible because permanent structures would drive Grizzly Bear Spirit from Qat'muk."[109] It seems that the only option available to the Ktunaxa would be to accept accommodation of some form, accepting that the Crown holds a superior legal position that allows it to act unilaterally where agreement is not achieved. That is, unless they were to argue the case through section 35 Aboriginal rights doctrine. But here the *Van der Peet* test confronts claimants with a complicated set of evidentiary and doctrinal requirements with no obvious legal basis (for example, the requirement that the activity be demonstrated to have been integral to the distinctive culture at the time of contact).[110] These procedural requirements present claimants with an evidentiary burden that is difficult and costly to meet and, even if this is overcome, the claimed right can be subject to re-characterization on appeal (see *Pamajewon*).[111] When we

[103] *Beckman*, *supra* note 18 at para 48.
[104] 2008 SCC 9.
[105] Berger, *supra* note 99 at 18.
[106] *Ibid*.
[107] *Ibid* at 19.
[108] *Haida Nation*, *supra* note 2 at para 42
[109] *Ktunaxa Nation*, *supra* note 1 at para 87.
[110] See e.g. Russel Lawrence Barsh & James Youngblood Henderson, "The Supreme Court's Van der Peet Trilogy: Native Imperialism and Ropes of Sand" (1997) 42:4 McGill LJ 993.
[111] Bradford W Morse, "Permafrost Rights: Aboriginal Self-Government and the Supreme Court in *R. v. Pamajewon*" (1997) 42:4 McGill LJ; *Pamajewon*, *supra* note 62.

see the cases in this light it seems that what the Supreme Court has in mind, with both the requirement of "clarity" in the DCA case law and the correct "characterization" of the right post-*Van der Peet*, would be better expressed as translation.[112] That is, the Supreme Court will only address claims that are articulated as contingent rights within a sovereign-to-subjects framework. The Aboriginal perspective only counts when it clearly situates its claims as being subject to unilateral infringement by the Crown and definition by the courts.[113] If an Aboriginal claimant chooses to speak the language of inherent jurisdiction, shifting the relationship to a nation-to-nation basis, their claim is presented as being "unreasonable" and so it falls on tin ears.[114]

What this all boils down to is that the Supreme Court is setting the terms of constitutional negotiations between the parties and it is doing so when the interpretation of the constitutional relationship between them is precisely what is in question. The process that the courts have designed places Aboriginal peoples in the very subjects-to-sovereign position that they have actively contested for over 150 years. In reality the distinction that the Supreme Court makes between an administrative decision-maker who is unilaterally empowered to determine the existence or scope of Aboriginal rights and one who may only do so on a prima facie basis is an empty one. In *Ktunaxa Nation* the Minister made a determination on a prima facie basis and the Supreme Court held that the determination was reasonable. The actual constitutional issue remains in the background of this process as it does for every asserted breach of section 35 interests. As a result, the only reconciliation possible through the courts is for Aboriginal peoples to recognize that the Crown's claim to sovereignty, legislative power, and underlying title cannot be put into question. The courts have set the limits of reason in such a way that the process ensures the result: while the outcome of any given consultation may be uncertain, the Crown's superior position vis-à-vis Aboriginal peoples is not. The options available to Aboriginal peoples through litigation are limited. However, this does not need to be the case.

It is possible to reimagine the interpretive approach that the courts have adopted to section 35. We would suggest that one way to accomplish this is to revisit the meaning of section 91(24).[115] This means moving away from the kind of narrowly positivistic interpretation that

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[112] *Marshall*, *supra* note 83 at para 8; *R v Bernard*, 2005 SCC 43 at para 48; *Van der Peet*, *supra* note 95. As Brian Slattery argues, the process of translation "artificially constrains and distorts the true character of Aboriginal title and risks compounding the historical injustices visited on Aboriginal peoples. Far from reconciling Aboriginal peoples with the Crown, it seems likely to exacerbate existing conflicts and grievances" (Brian Slattery, "The Metamorphosis of Aboriginal Title" (2007) 85:2 Can Bar Rev 255 at 281).

[113] This is evidenced by some examples of what the "Aboriginal perspective" means in *Tsilhqot'in Nation*, *supra* note 53 (for example, carry capacity of land).

[114] At the trial level of *Delgamuukw*, *supra* note 53, a Gitxsan elder wanted to sing her *limx'oy* (songs that are part of the *adaawk*) and the judge responded by saying "I can't hear your Indian song Mrs. Johnson because I have a tin ear" (*Delgamuukw v British Columbia* (8 March 1991), Smithers No 0843 (BCSC)).

[115] The Supreme Court recently took up the question of the meaning of section 91(24) in *Canada (Indian Affairs) v Daniels*, 2016 SCC 12 [*Daniels*]. Its interpretive approach is certainly consistent with the previous case law, but that is by no means a virtue. Rather, in the *Daniels* case the courts (and here we mean all three levels of the decision) simply assume *thick* Crown sovereignty. We can see this clearly in Justice Abella's use of the trial judge's account of the historical purposes of section 91(24). She reads section 91(24) in "relation to the broader goals of Confederation" and this leads her to state that "[w]ith jurisdiction over Aboriginal peoples, the new federal government could 'protect the railway from attack' and ensure that they did not resist settlement or interfere with construction of the railway. Only by having authority over *all* Aboriginal peoples could the westward expansion of the Dominion be facilitated" (*Daniels*, *ibid* at para 25). This account of this history is absurdly narrow. There is no inquiry into the justifications that were used to legitimate the means used to pursue these "broader goals" of

has characterized the jurisprudence since *St. Catherine's Milling*, which has, without question or inquiry, upheld section 91(24) as federal power *over* Indians much in the same manner that it has upheld the Crown's claims to sovereignty, legislative power, and underlying title. The revision we propose requires the Supreme Court to remember that it is not bound by the limits of originalism: the question of what the drafters and legislators imagined themselves to be doing at the time of drafting does not determine the future of the constitutional order. As Viscount Sankey maintained, "[t]he British North America Act planted in Canada a living tree capable of growth and expansion within its natural limits."[116] This means that the Supreme Court can revisit its interpretive approach to section 91(24) and characterize it in a way that would allow Parliament to "negotiate with nations and peoples who occupy and possess territory that Canadian authority wished to acquire."[117] This would undo the Gordian knot that the Supreme Court tied around section 35 in *Sparrow*: section 35 could no longer be treated as if it was part of the *Charter* and subject to unilateral infringement via the procedural justice of section 1. Section 35 could then take on a *jurisdictional* character.[118] The constitutional relationship that the Supreme Court mapped out in the *Secession Reference* would also apply to Aboriginal peoples, who could be recognized as having a place as actors with defined jurisdiction in Canada's federal constitutional order. This brings us to our next question, what role the DCA jurisprudence can play in this paradigm shift within the constitutional order of Canada, one which includes a transformative vision of section 35.

IV. MOVING FROM RIGHTS TO JURISDICTION: TREATY FEDERALISM AND THE DUTY TO NEGOTIATE

The current judicial framework for interpreting section 35 is based on the Supreme Court's unquestioned assumption of a *thick* version of Crown sovereignty. This has effectively painted the courts into a corner. They have the task of legitimating this *thick* version of Crown sovereignty, but the constitutional order that derives from it necessarily maintains the colonial vision of *St. Catherine's Milling* (namely, Aboriginal peoples remain a quasi-municipal part of Canada). There are no grounds for an explicitly legitimating vision

confederation. Nor is there an inquiry into what gave the new federal government "authority over *all* Aboriginal peoples." What possible legal basis could the Imperial Crown or the Dominion use in order to legitimate policies of control, extinguishment, and assimilation? If there is none, how can they possibly be accepted as the purposes of this head of power today? The Supreme Court offers no constitutional analysis on these points. Rather, it simply accepts that the Crown's claim to an all-encompassing *thick* version of sovereignty and then determines the meaning by section 91(24) by looking at how it was used. See also *Canada (Indian Affairs) v Daniels*, 2014 FCA 101; *Daniels v Canada,* 2013 FC 6. For an excellent critical analysis of the arguments in the case, see Larry Chartrand, "The Failure of the Daniels Case: Blindly Entrenching a Colonial Legacy" (2013) 50:1 Alta L Rev 181.

116 *Edwards v Attorney-General for Canada*, [1930] AC 124 at 136 [*Edwards*].

117 Chartrand, *supra* note 115 at 185.

118 Ascribing a jurisdictional nature to section 35 is not new. This was what Aboriginal parties negotiated in the *Charlottetown Accord: Draft Legal Text* (Ottawa: Queen's Printer, 1992), based on the *Consensus Report on the Constitution: Charlottetown* (28 August 1991). See Juan D Lindau & Curtis Cook, "One Continent, Contrasting Styles: The Canadian Experience in North American Perspective" in Curtis Cook & Juan D Lindau, eds, *Aboriginal Rights and Self Government* (Montreal & Kingston: McGill-Queen's University Press, 2000) at 15. Kiera Ladner has persuasively argued that many rights claims are better understood as Aboriginal assertions of jurisdiction. See Kiera L Ladner, "Up the Creek: Fishing for a New Constitutional Order" (2005) 38:4 Can J Political Science 923. Brian Slattery argues that the "constitutional restrictions on Federal and Provincial powers regarding Aboriginal lands are more akin to the limits enshrined in the division of powers between the Federal government and the Provinces, than they are to the protections afforded to individual rights in the *Canadian Charter of Rights and Freedoms*" (Brian Slattery, "The Constitutional Dimensions of Aboriginal Title" (2015) 71:2 SCLR 45 at 66).

in the modern era. It was constructed on an amalgam of racist legal fictions, doctrines, principles, and theses that have long since lost their persuasive force. Thus, the courts are left in a position where their unquestioned presuppositions have brought them to develop a legal analysis in which the results of the cases are set in advance. While the Supreme Court has emphasized that the duty to consult is a right to a process, not a particular outcome, it has always already chosen an outcome on crucial constitutional questions. This has produced a convoluted and contradictory jurisprudence that does little but beg the question of Crown legitimacy by stacking the deck, thereby undermining judicial legitimacy. In other words, the current section 35 framework, including the duty to consult, undermines the possibility for a nation-to-nation relationship grounded on the negotiation of areas of shared and exclusive jurisdiction. The reason it does this should be clear from the foregoing: by promulgating constitutional interpretations that entrench unilateral Crown authority, the courts have maintained a hierarchical ordering of legal systems and peoples that has reduced Aboriginal claims to contingent, *Charter*-analogous rights. In developing the duty to consult in relation to those rights, the courts moved some bargaining power to Aboriginal peoples.[119] Yet, in maintaining colonial presumptions about the constitutional structure in shaping the duty to consult, the courts did not distribute negotiating power evenly enough to compel meaningful negotiation. As a result, the courts have undermined their laudable attempts to motivate the Crown and Aboriginal peoples to negotiated solutions.[120]

Understanding section 35 as jurisdictional in nature necessitates a revision of the legal tools used to adjudicate section 35 claims. We propose that re-framing the duty to consult as a duty to negotiate could remedy the distributional inequity created under the current framework. This re-framing serves to draw our attention to the unquestioned background assumptions within the DCA case law that have led the courts into their current predicament. While there would continue to be radical imbalances in the negotiating power of the parties owing to the Crown's superior resources, the economic plight of many Aboriginal peoples, and so on, the imbalance in their *legal position* could be remedied. In practical terms, this would minimally require the following steps:

(a) The courts would continue to operate on the presumption of Crown sovereignty, but it would be a version of sovereignty that would no longer be bundled with underlying title and legislative power (that is, the version of sovereignty would tilt away from *M'Intosh* and towards *Worcester*). This clearly re-situates both sections 91(24) and 35 as provisions relating to the division of powers and a third order of government. Aboriginal peoples are recognized as *peoples* who are in a complicated multinational federal relationship with the Crown. They are not a *sui generis* set of the Canadian body politic whose rights are subject to the "reasonable" limitations of the courts. A more minimalist conception of sovereignty undoes the colonial straightjacket that *St. Catherine's Milling* put in place. This has the benefit of opening up a clear line of legitimation for the constitutional order through a

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119 On the "distributive function" of the courts in this context, see Patrick Macklem, *Aboriginal Difference and the Constitution of Canada* (Toronto: University of Toronto Press, 2001) at 96.

120 As Macklem explains, while there may be many reasons that negotiation is preferable to litigation, negotiations take place within confines shaped by legal doctrine. He writes: "[a]rguments that favour negotiation over litigation, however, overlook the distributive function of judicial choice regarding the scope and content of Aboriginal title" (*ibid* at 96). The same could be said of the duty to consult, which distributes bargaining power to the parties.

combination of the treaty-making process and the model of internal self-determination set out in the *Secession Reference*.[121] It also makes it clear that the constitutional order is not a straightjacket. Aboriginal peoples are not locked into a model of self-determination that they cannot shape. If the path to internal self-determination becomes perpetually frustrated then the binding effect of judicial legitimacy can suddenly give way as the various participants of confederation unilaterally seek secession. In this case the distinction between the rule of law and the rule by law becomes blurred (namely, the question of the constitutional legitimacy of *thick* Crown sovereignty is unanswerable).

(b) Following from a minimal form of Crown sovereignty the courts would now approach both sections 91(24) and 35 through the lens of jurisdiction. This means that they would no longer be applying a *Charter* framework and determining the measure of reasonable infringement. Rather, they would be mediating between three orders of government. The unique problem that they would be confronted with is that whereas the powers of Parliament and the legislatures are set out in sections 91 and 92, the diverse set of Aboriginal governments would not have this set-in place.[122] This is precisely where the duty to negotiate can provide an intermediate step that can help the courts navigate the process of re-building an operating constitutional order. The DCA case law is triggered when the Crown contemplates conduct that may impact *asserted* Aboriginal rights. This provides a process that does not require the immense evidentiary burden and (obscure) principles of requiring Aboriginal peoples to establish facts from time out of mind. Put another way, there is no need to continue the model of reconciliation that tasks Aboriginal peoples and the courts with the tilting historical windmills. The duty to negotiate would retain this procedural flexibility and place the courts within a more familiar position. They would not be tasked with defining the content of terms between the parties prior to their negotiated constitutional articulation. Rather, the courts would be mapping out the legitimate procedure for constitutional negotiation and holding the parties to this. This means that a primary tool the courts will need to rely on within the duty to negotiate is injunctive relief as it has the benefit of holding back infringements and allowing the time and space required for legitimate negotiations.

These two steps do not provide an all-in-one solution to the problem of reconciliation. Rather they offer the courts an *intermediate step* towards a constitutional order that can reconcile

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121 As noted in *Penner Report*, *supra* note 79 at 46:

> The treaty-making process also provided a direct government-to-government link between the Crown and Indian peoples. This, in the Indian view, was confirmed by the setting aside of "Indians, and Lands reserved for the Indians" in a unique manner when the British North America Act was passed in 1867. They therefore viewed the passage of successive Indian Acts as a misinterpretation of federal authority. Instead of continuing to enter into agreements with Indian nations, the Federal Government legislated over them and imposed restrictions on them.

122 In place of the *St Catherine's Milling* picture of federalism and its colonial foundations, this move would shift Canada towards an asymmetrical model (which, we should note, aligns well with Quebec's view of federalism as being a "sovereign association") that the *Penner Report*, *ibid*, aptly summarized at 56:

> These styles will reflect historical and traditional values, location, size, culture, economy, and a host of other factors. This diversity is to be respected. It can further be expected that these developments will proceed at different paces, and no time limits or pressures should be imposed. Indian governments will benefit from each other's experience. Needs will also change as conditions evolve and as structures appropriate for one stage cease to be appropriate for another.

Canada's "multicultural and multinational diversity with the requirements of unity in culturally diverse societies over time, as a continual activity."[123] With this more modest aim in mind, we have subdivided the final section of the article into two parts: first, we provide a brief survey of what the courts have said thus far about a duty to negotiate. Second, we outline how these statements — when coupled with a restrained version of Crown sovereignty (namely, not bundled with underlying title and legislative power) — can serve as legal tools for practically reworking section 35 into a "generative constitutional order" (to borrow Brian Slattery's evocative phrase)[124] that can reconcile the multicultural and multinational diversity of Canada.

A. THE EXISTING DUTY TO NEGOTIATE

Does the Crown have an existing duty to negotiate with Aboriginal peoples? Certainly no such duty has become a "rule of the game" in the way that the duty to consult has. Yet, there are suggestions in the case law that such a duty may arise in some circumstances. One difficulty in parsing the state of the law regarding a duty to negotiate is that the term has rarely been decoupled from the phrase "in good faith." In nearly every instance in which negotiation is raised, the operative phrase is "duty to negotiate in good faith." This has opened the door for courts to find that there is "no duty upon the Crown to negotiate"; rather, *once negotiations have begun* "the 'honour of the Crown' require[s] the Crown to negotiate in good faith."[125] Thus, when Chief Justice Lamer stated in *Delgamuukw* that "the Crown is under a moral, if not a legal, duty to enter into and conduct those negotiations in good faith,"[126] it can be argued that he was not imposing a duty to negotiate. He was stating that *when* the Crown enters into negotiations, it must do so in good faith. Similarly, lower courts have held that when the Supreme Court stated in *Tsilhqot'in Nation* that "[g]overnments are under a legal duty to negotiate in good faith to resolve claims to ancestral lands,"[127] the Supreme Court intended only to suggest that good faith is a legal requirement of negotiations, not that negotiations must be legally compelled. The British Columbia Supreme Court held in *Sam v. British Columbia* that "*Tsilhqot'in* must be read in the context of what was at issue in that litigation. In my view, the court did not create a new principle of general application compelling negotiation in all aboriginal litigation."[128]

In its own words, however, the Supreme Court has not been so definitive in confining the duty to negotiate. In *Daniels,* the Supreme Court held that *Haida Nation, Tsilhqot'in Nation*, and *Powley* "already recognize a context-specific duty to negotiate when Aboriginal rights are engaged."[129] In *Haida Nation* the Supreme Court stated:

> Put simply, Canada's Aboriginal peoples were here when Europeans came, and were never conquered. Many bands reconciled their claims with the sovereignty of the Crown through negotiated treaties. Others, notably

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[123] James Tully, *Public Philosophy in a New Key Volume I: Democracy and Civic Freedom.* (Cambridge: Cambridge University Press, 2008) at 191 [Tully, *Public Philosophy*].

[124] Brian Slattery, "The Generative Structure of Aboriginal Rights" (2007) 38 SCLR 595 [Slattery, "Generative Structure"].

[125] *Sam v British Columbia*, 2014 BCSC 1783 at para 10 [*Sam*], citing *Gitanyow First Nation v Canada*, 66 BCLR (3d) 165 (SC) at paras 68–70.

[126] *Delgamuukw*, *supra* note 53 at para 186.

[127] *Tsilhqot'in Nation*, *supra* note 53 at para 18.

[128] *Sam*, *supra* note 125 at para 19.

[129] *Daniels*, *supra* note 115 at para 56.

> in British Columbia, have yet to do so. The potential rights embedded in these claims are protected by s. 35 of the *Constitution Act*, *1982*. The honour of the Crown requires that these rights be determined, recognized and respected. This, in turn, requires the Crown, acting honourably, to participate in processes of negotiation. While this process continues, the honour of the Crown may require it to consult and, where indicated, accommodate Aboriginal interests.[130]

And further:

> Where treaties remain to be concluded, *the honour of the Crown requires negotiations leading to a just settlement of Aboriginal claims….*Treaties serve to reconcile pre-existing Aboriginal sovereignty with assumed Crown sovereignty, and to define Aboriginal rights guaranteed by s. 35 of the *Constitution Act, 1982*. Section 35 represents a promise of rights recognition, and "[i]t is always assumed that the Crown intends to fulfil its promises" (*Badger*, *supra*, at para. 41). *This promise is realized and sovereignty claims reconciled through the process of honourable negotiation*.[131]

In the companion *Taku River* decision, the Supreme Court stated:

> The duty of honour derives from the Crown's assertion of sovereignty in the face of prior Aboriginal occupation. It has been enshrined in s. 35(1) of the *Constitution Act, 1982*, which recognizes and affirms existing Aboriginal rights and titles. Section 35(1) has, as one of its purposes, negotiation of just settlement of Aboriginal claims.[132]

In *Manitoba Métis,* the majority held that the "[t]he honour of the Crown governs treaty-making and implementation … leading to requirements such as honourable negotiation."[133] In this articulation, the Crown's honour requires it to negotiate treaties where Aboriginal claims are outstanding. The Crown's asserted sovereignty and the promises of section 35, can only be reconciled if a solution to outstanding claims is negotiated. This is not insignificant — the honour of the Crown is an established constitutional principle, one which the Crown has a *constitutional obligation* to uphold.[134] Fulfilling this promise requires the negotiation of outstanding claims. That is, the Crown is under a constitutional obligation to negotiate asserted Aboriginal claims.

Further, the honour of the Crown should not be considered to be exhausted by the duty to consult. As the majority wrote in *Beckman,* "[t]he concept of the duty to consult is a valuable adjunct to the honour of the Crown, but it plays a supporting role, and should not be viewed independently from its purpose."[135] That purpose, the Supreme Court has repeatedly stated, is to reconcile the Crown and Aboriginal peoples. The fiduciary duty of the Crown is also important to consider. While the duty to consult applies to asserted rights, where established rights are at issue the fiduciary duty may well give rise to more robust Crown obligations.[136]

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130 *Haida Nation*, *supra* note 2 at para 25.
131 *Ibid* at para 20 [emphasis added].
132 *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, 2004 SCC 74 at para 24 [*Taku River*].
133 *Manitoba Métis Federation Inc v Canada (Attorney General)*, 2013 SCC 14 at para 73 [*Manitoba Métis*].
134 *Clyde River*, *supra* note 8 at para 19; *Beckman*, *supra* note 18 at para 42; *Constitution Act, 1982*, *supra* note 3.
135 *Beckman*, *ibid* at para 44.
136 See e.g. *Guerin*, *supra* note 58.

Indeed, the plaintiffs in *Ahousaht Indian Band and Nation v. Canada (Attorney General)* argued that "once an aboriginal right is proven, as here, the duty to consult is elevated to a fiduciary duty and the Crown's obligation becomes more substantive."[137] This more substantive obligation, they argued, could "potentially require consent."[138] A consent standard would clearly require negotiation to resolve areas of disagreement. The Supreme Court has consistently pushed the negotiated settlement of outstanding claims. The incentives it has created, however, are insufficient to the task. Relying on the doctrine just outlined to shift to a full "duty to negotiate" would remedy this. Before returning to this duty, we will briefly address the question of whether it is within the jurisdiction of the courts to compel negotiation.

In *Uukw v. British Columbia*, the British Columbia Court of Appeal held that the courts have no jurisdiction to compel negotiation between the Crown and Aboriginal people.[139] This decision appears to be an outlier. In the *Chippewas of Sarnia Band v. Canada (Attorney General)* decision, the Ontario Court of Appeal considered whether to compel negotiation in relation to conflicting Aboriginal title and private property claims. The Ontario Court of Appeal did not hold that such a remedy was outside the Court's jurisdiction, though it did decline to provide this remedy, suggesting it was a novel, and thereby equitable and discretionary remedy: "any remedy compelling negotiation between parties would be a novel remedy, not available as of right, and therefore available only at the discretion of the court."[140] In *Manitoba Métis,* the majority explicitly recognized the importance of extra-judicial negotiations, finding for the plaintiffs despite, or perhaps because, of the fact that the Manitoba Métis Federation sought "this declaratory relief in order to assist them in extra-judicial negotiations with the Crown in pursuit of the overarching constitutional goal of reconciliation that is reflected in s. 35 of the *Constitution Act, 1982*."[141] While not compelling negotiation as a remedy, the Supreme Court gave no inclination that doing so would be beyond its jurisdiction and based its decision in part on the effect it would have on extra-judicial negotiations. Perhaps most important, in the *Secession Reference* the Supreme Court explicitly recognized a "duty to negotiate."[142] The Supreme Court described what circumstances and principles could give rise to this duty:

> The federalism principle, in conjunction with the democratic principle, dictates that the clear repudiation of the existing constitutional order and the clear expression of the desire to pursue secession by the population of a province would give rise to a reciprocal obligation on all parties to Confederation to negotiate constitutional changes to respond to that desire…. The corollary of a legitimate attempt by one participant in Confederation to seek an amendment to the Constitution is an obligation on all parties to come to the negotiating table.[143]

137 *Ahousaht Indian Band and Nation v Canada (Attorney General)*, 2018 BCSC 633 at para 777.
138 *Ibid*.
139 *Uukw v British Columbia*, [1986] BCJ No 1413 (QL) (CA), cited in *Sam*, *supra* note 125 at para 11.
140 *Chippewas of Sarnia Band v Canada (Attorney General)* (2000), 51 OR (3d) 641 at para 282 (CA). For critique, see Kent McNeil, "Extinguishment of Aboriginal Title in Canada: Treaties, Legislation, Jurisprudence" (2002) 33:2 Ottawa LR 30; James I Reynolds, "Aboriginal Title: The Chippewas of Sarnia" (2002) 81:1 Can Bar Rev 97; Robert Hamilton, "Private Property and Aboriginal Title: What is the Role of Equity in Mediating Conflicting Claims?" (2018) 51:2 UBC L Rev 2.
141 *Manitoba Métis*, *supra* note 133 at para 137.
142 *Secession Reference*, *supra* note 10 at para 90.
143 *Ibid* at para 88.

While the question before the Supreme Court was the secession of a province, the principle logically extends to other political communities who express a democratic will to re-work the constitutional order, be it through secession or, as most often in the Aboriginal context, through re-working the division of powers to recognize a third order of government.[144] In short, given the court's wide discretionary authority and recognition of a duty to negotiate in an analogous context, there is little ground to support the view that it lacks jurisdiction to compel negotiations. Further, we should recall that "consultation" itself is a form of negotiation, one which the Supreme Court has been comfortable compelling between the state and Aboriginal peoples for over a decade. It is a negotiation, however, in which the bargaining power of the parties remains tilted by the legal doctrine governing the proceedings.

Before moving on, though, we must cast a critical eye toward the duty to negotiate articulated in this section and sound a note of caution about this vision of the duty to negotiate. The potential of the duty to negotiate may be undermined if it remains too tied to the past or constrained by problematic aspects of existing doctrine. The discussion of negotiation in *Haida Nation,* for example, requires negotiation where treaties have yet to be concluded. The presumption has historically been that the Crown has a legal obligation to negotiate a surrender of Aboriginal rights and interests in lands over which it has asserted sovereignty before taking up the land for its own purposes. Indian Commissioners Andersen and Vital, for example, argued in 1849, prior to the signing of the Robinson-Huron Treaties, that they would negotiate a surrender of Aboriginal title, but also believed that the exercise of unilateral Crown sovereignty was within the Crown's authority. The role of underlying Crown sovereignty remains the constant. That sovereignty gives rise to a duty to negotiate a cession of Aboriginal claims where treaties have yet to be concluded. In other words, there is a risk that a vision of negotiation built on the same constitutional vision carried by nineteenth century colonialists, in which the extinguishment of Aboriginal interests is the primary goal, could prevail if certain longstanding presumptions are not shed. This historical architecture requires negotiation only where title is yet to be ceded, and only in order to acquire a cession of that title. It is not built to support the existence of equal partners in a diverse federalism, but to extinguish Aboriginal rights to land to secure legal certainty in accessing lands and resources. It is not our view that the duty to negotiate articulated by the courts is entirely constrained by this historical approach. Yet, neither has it completely moved beyond it. We now turn to a re-articulation of the duty to negotiate which could meaningfully motivate the negotiation of Crown-Aboriginal jurisdiction in relation to contested claims.

B. A GENERATIVE DUTY TO NEGOTIATE AND PRACTICES OF DIVERSE FEDERALISM

This article envisions a generative duty to negotiate. This duty would build on the existing DCA, borrowing its useful doctrinal features. The duty would be "triggered," for example, where the Crown has real or constructive knowledge of an Aboriginal claim and proposes

144 It should, of course, be noted that the federal and provincial governments agreed to the recognition of such a third order of government in the *Charlottetown Accord*, *supra* note 118, only to see it fail at referendum as part of a broader set of reforms: Webber, *supra* note 56 at 285–87.

an activity which might impact the subject matter of that claim. That subject matter, however, would best be considered not as a right to a particular, site-specific activity, but as jurisdiction in relation to lands and resources. The "trigger" of the duty would then be re-cast as a jurisdictional dispute. Where Crown and Aboriginal jurisdiction come into conflict, the courts would look to the toolkit of constitutional law resources appropriate to resolving jurisdictional disputes. In time, this may include doctrines such as interjurisdictional immunity and paramountcy. The parties to the constitutional arrangement, however, must agree to the application of such doctrines. The courts cannot legitimately impose these or other constitutional doctrines. Thus, a preliminary step is to compel the parties to negotiate the resolution of their competing jurisdictional claims and the frameworks that will mediate those claims. While courts may retain the ability to oust purely vexatious litigants, a jurisdictional approach is not amenable to a spectrum analysis that unilaterally assigns the bargaining power of the parties. Absent weighted legal doctrines and the power to act in the face of Aboriginal opposition, meaningful negotiation can take place. Again, this reflects the substantive and procedural underpinnings of the duty to negotiate articulated in the *Secession Reference.* There the Supreme Court held that where the citizens of a province express a desire to re-work the constitutional framework that binds them, the federal and provincial governments have an obligation to negotiate. The Supreme Court rejected the proposition that a will to secede would oblige other parties in confederation to accept secession as a given and negotiate only the logistical details.[145] Yet, the Supreme Court also rejected "the reverse proposition, that a clear expression of self-determination by the people of Quebec would impose no obligations upon the other provinces or the federal government."[146] Where one party to the federation seeks to modify the constitutional parameters of their inclusion, this creates obligations on the other parties. The imposition of a constitutional order on an unwilling political community undermines the legitimacy required to ground that constitutional order. As the Supreme Court writes, "[a] political majority that does not act in accordance with the underlying constitutional principles we have identified puts at risk the legitimacy of the exercise of its rights."[147] These principles apply equally in the context of Crown-Aboriginal relations.[148] Where inherent Aboriginal jurisdiction is asserted, there is an obligation on constitutional partners to negotiate the scope of that jurisdiction and, eventually, its place in the constitutional order. A duty to negotiate drawing on the current duty to consult and the *Secession Reference* could facilitate this. This would require an exercise of judicial restraint in mediating claims in which the courts were limited to questions "relating to the constitutional framework within which political decisions may ultimately be made."[149] That is, where Aboriginal jurisdiction is asserted in a manner which conflicts with asserted Crown authority, the duty to negotiate would be triggered and would require the parties to enter into good faith negotiations. The courts would not "resolve" the dispute as between the parties, but would present the outline of a constitutional framework in which competing claims could be negotiated.

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[145] *Secession Reference*, *supra* note 10 at para 91.

[146] *Ibid* at para 92.

[147] *Ibid* at para 93.

[148] We say this recognizing that the Supreme Court in the *Secession Reference* distinguished Aboriginal peoples from provinces in its analysis. In fact, it grouped Aboriginal peoples with other cultural minorities whose discrete rights must be protected by judicial oversight of Crown activity. As we detailed above, the incorporation of Aboriginal peoples as a cultural minority in the Canadian body politic requires precisely the type of constitutional imposition the Supreme Court rightly rejects in the *Secession Reference*.

[149] *Ibid* at para 100.

In practical terms, what this would mean is that where conflicts arise between proposed Crown activities and asserted Aboriginal jurisdiction, the courts would compel negotiation of these outstanding *jurisdictional* claims before a project could move forward. The *Secession Reference* provides the rationale for the court situating itself in this way when mediating constitutional disputes. Of course, these negotiations need not come to a resolution if Aboriginal consent is granted, the seeking of which is at least a tacit recognition of jurisdiction. As the Supreme Court wrote in *Tsilhqot'in Nation,* "[g]overnments and individuals proposing to use or exploit land, whether before or after a declaration of Aboriginal title, can avoid a *c*harge of infringement or failure to adequately consult by obtaining the consent of the interested Aboriginal group."[150]

While some may object that this would create grounds for interminable negotiations and make it impossible for federal and provincial governments to make important decisions impacting the broader public, this objection misses two important points. First, it overlooks the powerful incentives both sides have to find common solutions. Second, while a judicial framework which allows for unilateral Crown action may seem at first glance to streamline decision-making, this overlooks the fact that judicial processes which Aboriginal peoples do not consider legitimate do not lead to certain and stable outcomes. Recent disputes over pipelines should be ample evidence of this.[151] If Aboriginal peoples have a hand in shaping the rules that govern their relationships with the Crown, it is our view that they will be much more likely to consider the outcomes those rules produce as legitimate. The duty to negotiate envisioned here works toward that goal. Both parties will be less likely to rely on litigation, as it will not provide a conclusive remedy favouring either party until such time as the parties negotiate the terms by which their constitutional relationship will be mediated.

In his 2007 essay *The Generative Structure of Aboriginal Rights*, Brian Slattery argued that in *Haida Nation* and *Taku River*

> [t]he Court effectively portrays s. 35 as the basis of a generative constitutional order—one that mandates the Crown to negotiate with indigenous peoples for the recognition of their rights in a form that balances their contemporary needs and interests with those of the broader society.[152]

There has been over a decade of further development in the DCA case law since this was written and, on this basis, we can see that this is not the path that the Supreme Court followed. Its use of section 35 has undoubtedly been "generative," but precisely what has been generated is open for debate. What it has not generated is a constitutional order that can hope to provide meaningful reconciliation. As we can see in *Ktunaxa Nation*, the promise that Slattery saw in *Haida Nation* and *Taku River* has become yet another

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150 *Supra* note 53 at para 97.
151 Robert Hamilton, "Uncertainty and Indigenous Consent: What the Trans-Mountain Decision Tells Us About the Current State of the Duty to Consult" (10 September 2018), *Ablawg* (blog), online: <ablawg.ca/wp-content/uploads/2018/09/Blog_RH_TMX_Sept2018.pdf>.
152 Slattery, "Generative Structure," *supra* note 124 at 25.

component of the colonial straightjacket. James Tully drives home the stark reality of our current context:

> An alien constitution, the constitution of the surrounding nation-state, is imposed over Indigenous peoples and their territories without their consent and to which they are subject. Their internal self-determination presently exits within the Constitution, which functions as a closed structure of domination over which they have no effective say.[153]

In 1983 the Special Committee on Indian Self-Government pointed to this problem in the epigraph they selected for the *Penner Report*:

> I sit on a man's back choking him and making him carry me and yet assure myself and others that I am sorry for him and wish to lighten his load by all possible means—except by getting off his back.[154]

This image captures the nature of the last 150 years of the relationship between the Crown and Aboriginal peoples, but it also highlights the risk the judiciary takes when it submits to the authority of this colonial version of sovereignty (namely, what we have termed the *thick* or *St. Catherine's Milling* version). Should the courts continue to unquestioningly accept this colonial form of sovereignty as their guiding rule, then the only possible destination for our constitutional odyssey is the shipwreck of secession.

This does not mean that the promise of the "generative constitutional order" has been exhausted. After all, the more hopeful and open-textured possibilities of Canada's complicated constitutional order have been pointed to before (we have in mind here Sakej Henderson's "Treaty Federalism"[155] and John Borrows' "Indigenous Constitutionalism"[156]). The current moribund proceduralism of the DCA is, as we have argued, the product of the Supreme Court continuing to tilt the jurisprudence towards the most deeply colonial strands of the case law. By maintaining their unquestioned assumption of a *thick* version of Crown sovereignty (namely, packaging it with underlying title and legislative power) they have constructed a constitutional order that has the structural integrity of a house of cards. The Supreme Court does not have to continue this pattern of expending their judicial legitimacy in order to prop up a nineteenth century version of Crown sovereignty. It is still possible to retrieve the promise of *Haida Nation* and *Taku River*. As Slattery helpfully reminds us

> The Aboriginal Constitution forms a vital part of the Constitution of Canada — as significant in its own way as the federal pact between the provinces, and the individual guarantees in the *Canadian Charter of Rights and Freedoms*. Section 35(1) of the *Constitution Act, 1982* recognizes and affirms important elements of the Aboriginal Constitution, but that section is not its source. The roots of the Aboriginal Constitution lie in the ancient relations between Aboriginal peoples and the Crown going back to the earliest days of European settlement — relations recognized in the *Royal Proclamation* and given concrete form in Treaties between the Crown and Aboriginal peoples.[157]

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153 Tully, *Public Philosophy*, *supra* note 123 at 286.

154 *Penner Report*, *supra* note 79 at 2. The words are from Leo Tolstoy's *What Then Must We Do?* (a non-fiction work on the social conditions of Russia published in 1886). The *Report* credits the citation itself to a submission to the Special Committee by the Mayo Indian Band.

155 James Youngblood Henderson, "Empowering Treaty Federalism" (1994) 58 SCLR 276.

156 John Borrows, *Freedom and Indigenous Constitutionalism* (Toronto: University of Toronto Press, 2016).

157 Brian Slattery, "The Aboriginal Constitution" (2014) 67 SCLR 319 at 336.

The Aboriginal Constitution is not simply an unexplored alternative or latent component to the current Canadian constitutional order. It is, and has continually been, active in the practices of Aboriginal peoples. There are numerous examples of Aboriginal nations taking the initiative to exercise authority and governance powers on lands and water. The current section 35 and duty to consult frameworks predispose the Crown to see these actions in an adversarial light. This leads to the kind of internecine mixture of strategic litigation and unilateral political remedies that draws us ever closer to a full-blown constitutional crisis. The duty to negotiate provides an intermediate step that can de-escalate these tensions. By renouncing the colonial version of Crown sovereignty, the courts can place themselves between the parties (as opposed to its current tilt towards the Crown) and thereby retain its claim to judicial legitimacy. The courts can then escape the shallows of "narrow and technical construction" and begin the work of tending to the constitution as a "living tree capable of growth and expansion within its natural limits."[158] The duty to negotiate would facilitate the growth and expansion of these crisscrossing and overlapping Crown-Aboriginal relationships by making consent the floor of the process. In this, it provides a possible means of aligning domestic constitutional law with international standards such as Free, Prior, and Informed Consent. This would also provide the procedural clarity and legal certainty that third-party proponents require, no longer subjecting projects to endless litigation on consultation and infringement, and ultimately, to direct action where unilateral decisions are taken by the Crown. Finally, it would provide the intermediate step that would provide the courts with the practical tools for supporting the negotiated construction of a constitutional order that can openly meet the challenge of internal self-determination *with* Aboriginal peoples.

[158] *Edwards*, *supra* note 116 at 136.