CERTAINTY AND FINALITY
IN THE NISGA’A AGREEMENT

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ABSTRACT

The 1998 Agreement between the Nisga’a people of Northern BC, the federal government, and the government of BC, is a treaty protected under s.35 of the Canadian Constitution. Existing s.35 jurisprudence allows treaties to be infringed by government so long as the government can justify the infringement under the Sparrow test. In the one significant court case dealing with the Nisga’a Agreement, it was assumed that this jurisprudence applied.

In this paper, the author argues that the Sparrow test ought not to be applied in the context of modern treaties such as the Nisga’a Agreement. Modern treaties, negotiated between equal parties in the light of Charter protection, should not be interpreted according to the special rules that have been developed for interpreting pre-Charter agreements. In order to achieve the reconciliation purpose of treaty making, modern treaties should be respected and courts should intervene as little as possible. On the express wording of the Nisga’a Agreement, the parties intended it to be a full and final settlement. The courts should give effect to that intention.

I. INTRODUCTION

The Nisga’a people of northern British Columbia have recently settled their claims with the governments of Canada and British Columbia. The Agreement became effective on May 11, 2000.1 It is a compre-

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1 Nisga’a Final Agreement, (Canada, British Columbia, Nisga’a Nation) August 4, 1998 [hereinafter Agreement].
hensive Agreement covering title to land, financial compensation, re-
source agreements, and self-government provisions. It is explicitly in-
tended to be a "treaty and a land claims agreement within the meaning of
sections 25 and 35 of the Constitution Act, 1982," to be binding on the
parties, and to be a full and final settlement of the Nisga’a people’s s.35
rights. In this paper, I argue that, in order to achieve the purposes of
treaty making, the courts should give effect to this intention.

This argument begins with an exploration of the purposes of s.35,
and how the Nisga’a Agreement fulfills these purposes. There have
already been attempts to invalidate the Agreement in court. The politi-
cal atmosphere in British Columbia and experience with treaties in other

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2 Ibid. at c.2, s.1; Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c.11, ss.25, 35 [hereinafter Constitution Act, 1982]. The text of s.25 reads:

The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including

(a) any rights or freedoms that have been recognized by the Royal Procla-
mation of October 7, 1763; and

(b) any rights or freedoms that now exist by way of land claims agree-
ments or may be so acquired.

[hereinafter s. 25].

The text of s.35 reads:

(1) The existing aboriginal and treaty rights of the aboriginal peoples of
Canada are hereby recognized and affirmed.

(2) In this Act, “aboriginal peoples of Canada” includes the Indian, Inuit and Métis peoples of Canada.

(3) For greater certainty, in subsection (1) “treaty rights” includes rights
that now exist by way of land claims agreements or may be so
acquired.

(4) Notwithstanding any other provision of this Act, the aboriginal and
treaty rights referred to in subsection (1) are guaranteed equally to
male and female persons.

[hereinafter s.35].

3 Agreement, supra note 1 at c.2, s.2.

4 Ibid. at c.2, s.23.


provinces, suggest that the Agreement will continue to be threatened by legal challenges. The purpose of s.35 requires that the Agreement be upheld and recognition and respect be given to the intentions of the parties as documented in the Agreement. The judicial responses to the legal challenges so far have been correct in ultimately upholding the legality of the Agreement, but have unwisely imported the s.35 analysis that has been developed in the context of treaties pre-dating the Charter of Rights and Freedoms. Modern treaties deserve special consideration and protection under s.35.

II. THE PURPOSES OF SECTION 35

Recognition of Aboriginal rights, most notably in the Constitution Act, 1982, has created a dilemma for governments. Although most governments now willingly acknowledge that existing treaties between Aboriginal people and the Crown impose a moral obligation on both parties, governments are increasingly being forced to recognize that these obligations are legally enforceable. Governments must find a way to meet those obligations in the context of a myriad of other obligations and commitments to non-Aboriginals, many of which may be incompatible with the rights of Aboriginal people. For example, an Aboriginal band may lay claim to land that is currently owned, lived on, or worked on, by non-Aboriginal people. These conflicts may also arise in relation to Aboriginal claims to parkland, or lands subject to resource extraction agreements. Determining and enforcing Aboriginal rights without considering these factors would cause chaos. On the other hand, Aboriginal rights exist, and they have gone unrecognized for far too long; Aboriginal people are entitled to have their rights recognized in theory, but also recognised and respected in concrete form. They are not responsible for the competing interests of non-Aboriginals, and should not have their rights abrogated simple because they conflict with those of non-Aboriginal Canadians.

The courts have recognized this dilemma and have been loathe to make unqualified declarations of Aboriginal rights for fear of upsetting the balance between competing interests. Rather, the Supreme Court of Canada has been careful to make clear that the Aboriginal rights recog-
nized by s.35 are qualified by Crown sovereignty. In *Sparrow*, the Supreme Court of Canada held that,

> rights that are recognized and affirmed are not absolute. Federal legislative powers continue... These powers must, however, now be read together with s.35(1). In other words, federal power must be reconciled with federal duty and the best way to achieve that reconciliation is to demand the justification of any government regulation that infringes upon or denies aboriginal rights.\(^6\)

In *R v. Van der Peet*, Chief Justice Lamer (as he then was) said the purpose of s.35 was to “provide the constitutional framework through which the fact that aboriginals lived on the land in distinctive societies, with their own practices, traditions and cultures, is acknowledged and reconciled with the sovereignty of the Crown.” Further, he stated that “[t]he substantive rights which fall within the provision must be defined in light of this purpose.”\(^7\) Clearly, the Supreme Court of Canada is of the view that Aboriginal rights are to be defined by balancing the rights of Aboriginal people and the sovereignty of the Crown. In cases where Aboriginal rights and Crown sovereignty conflict, it is the courts who must decide how the balance should be struck.

In finding this balance, the courts have also made it clear that negotiation is preferable to litigation. In its unanimous judgement in *Sparrow*, the Supreme Court of Canada held s.35(1) provides “a solid constitutional base upon which subsequent negotiations can take place.”\(^8\) In *Van der Peet*, s.35 was called a “constitutional framework for reconciliation.”\(^9\) Perhaps the clearest direction from the court on the issue of negotiation came in *Delgamuukw*:

> [T]he Crown is under a moral, if not a legal, duty to enter into and conduct those negotiations in good faith. Ultimately, it is through negotiated settlements, with good faith and give and take on all sides, reinforced by the judgments of this Court, that we will achieve what I stated in *Van der Peet*... to be a basic purpose of s.35(1) – “the


\(^8\) *Sparrow*, supra note 6 at para. 53.

\(^9\) *Van der Peet*, supra note 7 at para. 42.
reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown". Let us face it, we are all here to stay.10

Section 35 has always been intended to be defined through negotiation and compromise. Section 35 was added at the same time as was s.37, which originally called for one conference on the topic of "constitutional matters that directly affect the aboriginal people of Canada" and was amended to include three additional conferences.11 Although ultimately unsuccessful, the "primary purpose of these conferences was ...to identify and define Aboriginal and treaty rights."12 Subsequent jurisprudence has given s.35 some meaning in the absence of constitutional amendments, but it has also confirmed that the content of s.35 can better be defined through negotiation and agreement.

The jurisprudence could have gone a different way. If the purpose of s.35 was only "the recognition of the prior occupation of North America by aboriginal peoples"13 or some other formulation that recognized Aboriginal rights as truly inherent, there would be no basis for Crown limitation of those rights, and no need to negotiate with the Crown in order to give definition to those rights. Arguably, there would be no basis for the assertion of Crown sovereignty in the first place, given that the Constitution "provides no historical context or justification for the assumption that Canada exists."14 In theory this is a supportable interpretation of s.35, but its practical implications are so drastic that it appears never to have been seriously considered by the Supreme Court of Canada. The argument in this paper – that governments should not be able to infringe the s.35 rights that have been defined by the Nisga’a Agreement (and by other post-1982 agreements) – is based on the premises that one of the purposes of s.35 is reconciliation, and that treaties are a recognized way to define s.35 rights in lieu of a constitutional agreement.

12 Ibid. at 475.
14 Asch, supra note 11 at 474.
III. INTERPRETING THE NISGA’A AGREEMENT

1. The Purpose of the Nisga’a Agreement

   The Crown colony of British Columbia refused to recognize Ab-
   original rights, and, up until 1991, B.C. refused to participate in the
   treaty process. The Nisga’a people had been diligently pursuing their
   claim for over a hundred years when the B.C. government finally came
to the negotiating table. In 1885, three Nisga’a chiefs traveled to Ottawa
to meet with Prime Minister John A. MacDonald. In 1886, the Nisga’a
refused to allow land surveying by provincial crews and began an
organized process to support their claim. They traveled to the Legisla-
ture in Victoria in 1887 and were refused entry to the building. In 1907,
ye created the Nisga’a Land Committee and initiated an unsuccessful
petition for recognition to the Privy Council. There was a period of
relative inactivity between 1927 and 1951 when the Indian Act prohib-
ited raising money for the purpose of pursuing land claims. Finally, in
1969 the Nisga’a brought a court action claiming Aboriginal title to their
ancestral land. In Calder v. A.G. of B.C., the majority of the Supreme
Court of Canada recognized the existence of Aboriginal title, although
the Court did not recognize the Nisga’a claim in this case.

   Following the Calder decision, the Federal government began negotiations with
the Nisga’a. In 1991 B.C. agreed to participate.

   The Nisga’a have been seeking an agreement with the Crown for a
long time. Primarily they have sought recognition of their right to their
land. Ancillary to this they have been seeking recognition of their
inherent right to self-government, and a mechanism for exercising that
right, as well as guaranteed access to resources and economic opportuni-
ties. They also wanted financial compensation for the loss of their land
and for the historic suppression of their rights. To make the process
meaningful, it was critical that these rights be guaranteed and that the

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16 Three of the seven judges held that the Nisga’a Aboriginal title had been extinguished and
one judge declined to determine the issue.
17 T.R. Berger, “The Importance of the Nisga’a Treaty to Canadians” (Corry Lecture, Queen’s
University, Kingston, Ontario, October 2, 1999)], online: The People of the Nass Valley
<www.ntc.bc.ca/speeches/berger2.html> (date accessed: February 6, 2001); D. Sanders, “
‘We Intend to Live Here Forever’: A Primer on the Nisga’a Treaty” (1999) 33 U.B.C. L. Rev.
103.
Nisga’a people be able to pursue economic and community development with security and certainty. These goals have all been recognized in the Agreement, although the Nisga’a people have certainly not gotten everything that they wanted.\(^\text{18}\)

In order for the Nisga’a Agreement to effect true reconciliation between the Nisga’a and the Crown, it must reflect the goals of all the parties. Reconciliation requires that the treaty be understood and respected by the non-Native population, as well as the Nisga’a people. In the wake of the British Columbia Court of Appeal decision in *MacMillan Bloedel v. Mullin*, which held that Aboriginal title is an encumbrance on Crown rights to forested land,\(^\text{19}\) it has become widely accepted in B.C. that there is investment uncertainty in logging activity on land claimed by Aboriginals. “If MacMillan Bloedel [now Weyerhaeuser], the largest forest company in the province, can be stopped from exercising logging rights that they hold under provincial law, it is not business as usual.”\(^\text{20}\) Resolving this problem of uncertainty in land claims is an important priority for non-native governments.

The Provincial and Federal Governments have made their goals in treaty negotiations very clear. The B.C. Treaty Commission says that treaties are designed to achieve reconciliation, certainty, reduced conflict, and constitutional protection.\(^\text{21}\) In promotional materials, both the B.C. and Federal Governments have emphasized certainty and reduced conflict, among other things, as the benefits of treaties. From the perspective of non-Aboriginal governments, establishing with certainty their legal and ethical obligation is key to stability in government planning, and serving private-sector investment.

Thomas Berger\(^\text{22}\) described the consequences of British Columbia’s failure to enter into treaties with First Nations as “hostility, uncertainty, mistrust and a multitude of lawsuits.”\(^\text{23}\) These are the problems to which the parties are responding in the Nisga’a Agreement; the Agreement is one step toward achieving the final goals of finality and certainty.

\(^{18}\) The People of the Nass Valley, online <www.ntc.bc.ca> (date accessed: February 6, 2001).


\(^{20}\) Sanders, *supra* note 17 at para. 10.


\(^{22}\) The lawyer who argued *Calder, supra* note 15 on behalf of the Nisga’a.

\(^{23}\) Berger, *supra* note 17.
Moreover, as the B.C. Treaty Commission puts it, the purpose of the Nisga’a Agreement is “to establish a new relationship based on mutual respect, trust, and understanding.”

2. The Relationship Between s. 35 and the Nisga’a Agreement

Peter Hogg has said that the Nisga’a people “already have constitutionally entrenched rights as aboriginal rights, so this [the Agreement] is substituting one set of rights for another.” He says that the treaty should be seen as a formal recognition of existing rights protected by s. 35. This is an endorsement of the idea that the Agreement does not add to the s. 35 rights of the Nisga’a, but rather defines and delineates the existing rights. What the Nisga’a already had was underdetermined, since it was dependent on a judicial statement of their rights and of the extent of the Crown’s ability to infringe those rights. This has been replaced by the Agreement, which represents a comprehensive and binding compromise between the parties.

This is not to say that the Nisga’a Agreement simply defines rights the Nisga’a could have otherwise won in court. There is no way to know with any certainty how a court would have interpreted existing Nisga’a rights. For example, consistent with federal (and provincial) negotiating policy, the Nisga’a Agreement recognizes at least a limited form of inherent self-government. This may well go beyond what the courts would have recognized had the matter been litigated. In R. v. Pamajewon, the Supreme Court of Canada held that the same legal standard applies to self-government as would apply to any other Aboriginal right. This makes it very difficult to establish a right to self-government, given the test laid out in Van der Peet in which the first step is to specifically characterize the right claimed without reference to the significance of the right. Arguably, an Aboriginal group would have to

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24 B.C. Treaty Commission, supra note 22.
25 “Nisga’a deal doesn’t require referendum” The Vancouver Sun (July 30, 1998) online: <www.bc-mining-house.com/news/vs_30g98.htm> (accessed February 6, 2001).
28 Van der Peet, supra note 7.
establish an Aboriginal right “for each and every head of jurisdiction it wishes to exercise”\(^{29}\) using this test.

In contrast, the Agreement gives content to the protected s. 35 rights, regardless of how the courts might have interpreted them otherwise. It is a basic principle of treaty law that “nations may impose on themselves obligations where none existed before”\(^{30}\) and “[n]egotiations among governments and Aboriginal peoples are clearly preferable as the most practical and effective way to implement the inherent right of self-government.”\(^{31}\) Section 35 protects the rights enumerated in treaties regardless of whether they would otherwise have been deemed protected Aboriginal rights.

3. The Content of the Nisga’a Agreement Demonstrates the Intent of the Parties

As I have established, a final and certain determination of rights is a key purpose of the Agreement for all the parties. This is clear from the history of the negotiations and from the motives leading the parties to negotiate. It is also clear from the terms of the treaty itself. The Chapter on General Provisions contains a number of references to finality: specifically, the Agreement states it is binding on the parties;\(^{32}\) prevails over the provisions of any federal or provincial law in the event of an inconsistency or conflict;\(^{33}\) permits no party to challenge or support a challenge to the validity of any provision of the Agreement,\(^{34}\) and requires the agreement of all parties to amend the Agreement.\(^{35}\) There are also a number of provisions that make it clear that the Agreement exhaustively defines the Aboriginal rights of the Nisga’a people\(^{36}\), including exhaustively setting out the s.35 rights of the Nisga’a people.\(^{37}\)


\(^{32}\) Agreement, supra note 1 at c. 2, s. 2.

\(^{33}\) Ibid. at c. 2, s. 13.

\(^{34}\) Ibid. at c. 2, ss. 22-27

\(^{35}\) Ibid. at c. 2, s. 20.

\(^{36}\) Ibid. at c. 2, s. 36.

\(^{37}\) Ibid. at c. 2, s. 23.
The parties would have been aware of the *Sparrow* justification test as they negotiated the Agreement.\(^{38}\) The *Sparrow* test, which was expanded in *Badger* to include treaty rights,\(^{39}\) allows s.35 rights to be infringed if the government can justify the infringement. That is, the government must demonstrate a valid legislative objective and show that the infringement is consistent with the honour of the Crown, including the obligations to consult the affected people, to ensure as little infringement of the right as possible, and to provide compensation.\(^{40}\)

Yet, rather then allow the Agreement to be infringed so long as the infringements could be justified on that standard, the parties choose to give the Agreement internal limitations and justificatory standards. The internal limitations and standards serve the purposes of the parties in a more tailored way than the all-purpose *Sparrow* test. The *Sparrow* test is therefore redundant to resolving disputes arising out of the agreement.

Whereas the *Sparrow* test makes federal and provincial laws paramount where the paramountcy can be justified, the Agreement specifies which laws will be paramount under particular heads of power. Federal or provincial law will prevail in areas such as public order, peace and safety,\(^{41}\) traffic and transportation,\(^{42}\) provision of social services,\(^{43}\) health services,\(^{44}\) and emergency preparedness.\(^{45}\) The government may intervene in these areas without meeting any justificatory standards, presumably because these are areas where the public interest is most pressing. In other areas, Nisga’a laws are paramount, provided that they meet or exceed provincial or federal standards, or receive provincial or federal approval. Such areas include child and family services,\(^{46}\) Aboriginal healers,\(^{47}\) adoption,\(^{48}\) police services,\(^{49}\) and court services.\(^{50}\) In these

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\(^{38}\) *Sparrow* was decided in 1990 and the Nisga’a Agreement in Principle was concluded in 1996.


\(^{40}\) This is not an exhaustive list of justification criteria. *Sparrow*, supra note 6 at para. 83.

\(^{41}\) Agreement, supra note 1 at c.11, s.62.

\(^{42}\) Ibid. at c.11, s.74.

\(^{43}\) Ibid. at c.11, s.79.

\(^{44}\) Ibid. at c.11, s.83.

\(^{45}\) Ibid. at c.11, s.123.

\(^{46}\) Ibid. at c.11, s.91

\(^{47}\) Ibid. at c.11, s.96.

\(^{48}\) Ibid. at c.12, s.4.

\(^{49}\) Ibid. at c.12, s.34.
areas, government can only intervene where its law sets a higher standard than that set by Nisga’a law. Finally, there are areas of core cultural importance where Nisga’a laws are paramount without any ability for provincial and federal intervention.\(^{51}\)

The *Sparrow* test, as it has been expanded in subsequent jurisprudence,\(^{52}\) outlines the types of objectives that will be sufficient to justify infringement. Instead of relying on the operation of *Sparrow*, the Agreement makes clear the objectives that can justify limitation in specific areas. The only objective explicitly deemed relevant to fishing rights in the Agreement,\(^{53}\) and in *Sparrow*, is conservation.\(^{54}\) The Agreement goes further than what was contemplated in *Sparrow*, and makes fishing rights subject to “legislation enacted for the purposes of public health or public safety.”\(^{55}\) Nisga’a law in relation to forest resources must include “forest standards that meet or exceed forest standards established under forest practices legislation applicable to Crown land.”\(^{56}\) The Nisga’a are required to make laws that meet the standards the federal or provincial government determine are in the public interest. The limits in the agreement are generally consistent with the *Sparrow* test, but where there is a difference, the parties must be taken to have intended that difference.

The Nisga’a Agreement as a whole, with its detailed description of the rights of the Nisga’a people, including the limits on those rights, and its express statements of finality, makes it clear that the parties intended the Agreement to be a full and final determination of both Nisga’a right under s.35 and government’s ability to affect those rights.

4. The Effect of Party Intentions on the Government’s Ability to Infringe the Agreement

One might argue that the actual intentions of the parties in negotiating the Agreement are not relevant in determining whether the Agreement can be infringed. After all, the Constitution is the “supreme law of

\(^{51}\) See for example *Ibid.* at c.11, s.40 (Nisga’a Citizenship), s 41 (Culture and Language) and s.115 (devolution of cultural property)

\(^{52}\) See for example *Gladstone,* supra note 13; *Badger* supra note 40.

\(^{53}\) Agreement, *supra* note 1 at c.8, s.1(a)

\(^{54}\) *Sparrow,* supra note 6 at para. 73.

\(^{55}\) Agreement, *supra* note 1 at c 8, s.1(b).

\(^{56}\) *Ibid.* at c.5, s 8.
Canada"⁵⁷ and the Supreme Court of Canada has interpreted the Constitution as allowing governments to infringe treaties so long as they can meet the justificatory standard set out in Sparrow. This argument is based on a misunderstanding of what is necessary to create a workable treaty. Treaties are explicitly recognized by s. 35, and the courts have called on the parties to give effect to s.35 rights through treaties. Therefore, s.35 must create and protect the tools necessary to make and enforce treaties. Those tools include the power to make treaties that achieve the goals of the parties, including certainty and finality.

Treaties are, by definition, compromises: each party gets some of what they want and neither party gets everything they want. If one party has the power to unilaterally shift this balance and, if the intentions of all parties are not relevant in determining what is protected, then a treaty does not "establish a new relationship based on mutual respect, trust, and understanding."⁵⁸ Section 35, as the courts have interpreted it, requires that the treaty process have credibility. The credibility of the treaty process requires that the intentions of the parties in negotiating agreements be respected. Berger put the issue this way:

It is unrealistic to think that, if the Nisga’a Treaty is scuttled, it will be possible to negotiate with First Nations in this province. You can’t tear up a document painfully arrived at after 20 years of negotiation, and expect the Nisga’a to negotiate for another 20 years.

If we reject the Nisga’a treaty, the goodwill that has been won, the treaty process that is under way, the steps towards reconciliation that have been taken – all will be lost in a welter of hostility and recrimination.⁵⁹

It has been argued more generally that it is inappropriate⁶⁰ to apply the Sparrow test to treaties at all.

The solemn nature of treaties as representative of the agreements made between the Crown and Aboriginal peoples and their existence as

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⁵⁷ Constitution Act, 1982, supra note 2 at s.52(1) The text of this section reads: The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.
⁵⁸ B.C. Treaty Commission, supra note 22.
⁵⁹ Berger, supra note 17.
⁶⁰ Especially when the range of objectives that can serve to justify infringements is broadened beyond conservations as it was in Gladstone, supra note 13.
negotiated compacts suggest that any attempt to abrogate the rights contained within them ought to be subject to a more onerous test than that applied to Aboriginal rights.61

The Supreme Court of Canada has clearly rejected this argument.62 However, the argument is stronger in the context of modern treaties that are evidently intended to be an exhaustive description of the rights and obligations of the parties. There is an opportunity for courts to distinguish previous case law on this basis. At a minimum, there must be a recognition that the parties intended it to be very difficult, if not impossible, to unilaterally alter the terms of the Agreement.

IV. Threats To The Agreement

1. Campbell v. Attorney-General of British Columbia

Shortly after the Agreement was signed it was challenged in court by then Leader of the B.C. Liberal Party and now Premier of B.C., Gordon Campbell. The B.C. Supreme Court rejected the claim.63 At the time Mr. Campbell declared an intention to appeal the decision,64 although since being elected Premier he has dropped the appeal in favour of holding a provincial referendum on treaty negotiations in general.

The political context of the court challenge makes the threat particularly interesting. Although the argument failed in court, there is obviously political will to undermine the Agreement. The window for government intervention that s.35 jurisprudence has left open is of particular concern in this context.

In Campbell, the plaintiffs made three arguments. First, they argued that ss.91 and 92 of the Constitution Act, 186765 create an exhaustive division of legislative power, and therefore, the legislative jurisdiction granted to the Nisga’a people by the Agreement is inconsistent with the

63 Campbell, supra note 5.
Constitution. Justice Williamson considered the preamble to the Constitution Act, 1867, which “invites the use of... organizing principles to fill out the gaps in the express terms of the constitutional scheme”\(^{66}\) and found that it provides recognition of the diminished form of self-government that was recognized by British Imperial policy. He found that the purpose of the federal-provincial division of powers was “not to extinguish diversity (or aboriginal rights).”\(^{67}\) He also considered the finding in *Mitchell v. Peguis Indian Band* that “[f]rom the aboriginal perspective, any federal-provincial divisions that the Crown has imposed on itself are internal to itself and do not alter the basic structure of Sovereign-Indian relations.”\(^{68}\) Justice Williamson concluded that “after the assertion of sovereignty by the British Crown, and continuing to and after the time of Confederation, although the right of aboriginal people to govern themselves was diminished, it was not extinguished.”\(^{69}\)

In coming to this conclusion, Justice Williamson relied on the proposition in *Sparrow and Badger* that the Crown retains the right to infringe Aboriginal and treaty rights, “subject to its ability to justify such interference in a manner consistent with the honour of the Crown.”\(^{70}\) According to the court, this limitation on treaty rights “is an answer to the submission that the constitutional entrenchment of the Nisga’a Treaty amounts to a permanent abdication by Parliament of its right to interfere with decisions of the Nisga’a Lisims Government taking into account the impact of those decisions upon the greater public good.”\(^{71}\)

The second argument made by the plaintiffs in *Campbell* was that since the Nisga’a Agreement permits laws that do not require assent from either the Governor General or the Lieutenant Governor, it is a violation of the principle of Royal Assent, set out in s. 55 of the Constitution Act, 1867.\(^{72}\) The plaintiffs relied on a statement in *re The

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\(^{67}\) Ibid. at para. 78.


\(^{69}\) Ibid. at para. 179.

\(^{70}\) Ibid. at para. 121.

\(^{71}\) Ibid. at para. 128.

\(^{72}\) Constitution Act, 1867, *supra* note 66 at s.55. The text of the section reads:

Where a Bill passed by the Houses of the Parliament is presented to the Governor General for the Queen’s Assent, he shall declare, according to
Initiatives and Referendum Act, that while a legislature can delegate legislation

"... it does not follow that it can create and endow with its own capacity a new legislative power not created by the British North America Act to which it owes its own existence."\(^{73}\)

This statement was obiter, but the Supreme Court of Canada has said that

"it may stand for the wider proposition that the power of constitutional amendment given to the provinces by s.92(1) of the Constitution Act, 1867 does not necessarily comprise the power to bring about a profound constitutional upheaval by the introduction of political institutions foreign to and incompatible with the Canadian system."\(^{74}\)

Justice Williamson distinguished the Nisga’a Agreement from the kind of “profound constitutional upheaval” envisioned by that case by pointing out that the powers granted to the Nisga’a are limited both by the internal terms of the treaty and by the limited promise of s.35, meaning that s.35 protects treaties subject to justified government infringement. He also pointed out that the wording of s.55 does not “on its wording apply to other [non Parliamentary] law making bodies.”\(^{75}\) However, in responding to both this and the previous argument about division of powers, he relied heavily on the fact that the Nisga’a powers are limited and therefore not an undue abrogation of Parliamentary authority.

The final argument made by the petitioners is that the Agreement violates s.3 of the Charter,\(^{76}\) which provides the right to vote in elections for the House of Commons or the Legislative Assembly. Justice Williamson dealt with this point summarily, pointing out that the rights

\(^{73}\) Campbell, supra note 5 at para. 147 citing [1919] A.C. 935 (J.C.P.C.) at 945.

\(^{74}\) Ibid. at para. 148 citing OPSEU v. Ontario (Attorney General), [1987] 2 S.C.R. 2 at 47.

\(^{75}\) Ibid. at para. 150.

\(^{76}\) Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, supra note 2 at s.3. The text of this section reads:

Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein.
guaranteed by s.3 are limited to the House of Commons and the Legislative Assembly. As well, he found that s.25,\textsuperscript{77} which protects treaty rights from abrogation by the Charter, provides a complete defence to this argument.

In the final analysis, Justice Williamson rejected each of the arguments that would have invalidated the Agreement. He says that “what Canada, British Columbia and the Nisga’a have achieved in the Nisga’a Final Agreement is consistent both with what the Supreme Court of Canada has encouraged, and consistent with the purpose of s.35 of the Constitution Act, 1982.”\textsuperscript{78} However, I believe that by relying on the ability of the Crown to infringe s.35, he actually provided the opening for “what the Supreme Court of Canada has encouraged” and “the purpose of s.35” to be undermined. As I have outlined above, Justice Williamson had an alternate ground for rejecting each argument that the Nisga’a Agreement is unconstitutional. He did not need to rely on the idea that s.35 provides limited protection. Any limits on the rights of Aboriginal people that are constitutionally required in order to reconcile those rights with Crown sovereignty are provided by the limitations that the parties have chosen and are already included within the framework of the Nisga’a Agreement.

Interestingly, the Nisga’a Nation accepted, for the purposes of the Campbell proceedings, that the Nisga’a Agreement was negotiated “in full knowledge of the limited effect... of the constitutional promise of s.35.”\textsuperscript{79} Most likely, in the context of the dispute, this was not seen as the most effective or appropriate battle. Alternatively, the ability of governments to infringe treaty rights may have become so entrenched in Canadian jurisprudence that it did not occur to the Nisga’a Nation (or their counsel) to question it. It is a premise that has been simply assumed in the limited Canadian judicial and academic pronouncements on the subject.\textsuperscript{80} Nonetheless, it remains a premise open to serious question.

2. Experience with Other Agreements

The experience of other First Nations with modern land claims agreements further suggests that those who are concerned with the

\textsuperscript{77} Constitution Act, 1982, supra note 2 at s. 25.
\textsuperscript{78} Campbell, supra note 5 at para. 171.
\textsuperscript{79} Ibid. at para. 182.
\textsuperscript{80} See for example Sanders, supra note 17 at para. 56.
success of the treaty process in achieving good will, certainty, trust and an end to litigation have reason to be concerned. The 1975 *James Bay and Northern Quebec Agreement* (JBNQA) is the longest standing “modern” treaty. The self-government rights in the JBNQA are much more limited than those in the Nisga’a agreement. It was primarily intended to be an agreement dealing with rights to land and resource development. In spite of its differences, it provides some insight into the problems that can arise throughout the life of an agreement, despite the best intentions of the parties at the time of entering the agreement.

The federal and Quebec governments have a “reputation [of] being unable and unwilling to implement” the terms of the JBNQA. The Quebec government has taken the position that it maintains unilateral control over native self-government and has used the JBNQA to support its argument that the claims of other Aboriginal people have been extinguished. This assertion of unilateral power over a negotiated agreement, as well as the pitting of one Aboriginal group against another, has continued to breed mistrust. The result of this mistrust is that the Cree “have been in court virtually every year over the past twenty years to defend their rights and ensure their just entitlements.”

This is precisely the kind of result that should be avoided. As I have already discussed, and as the courts have repeatedly pointed out, it is not in anyone’s best interest to have continued litigation over Aboriginal rights. The JBNQA is a cautionary tale. It tells us that, over the long

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81 *An Act approving the Agreement concerning James Bay and Northern Quebec*, S.Q. 1976, c. 46 [hereinafter JBNQA].


84 Smith, supra note 83; G. St. Louis, “The Tangled Web of Sovereignty and Self-Governance: Canada’s Obligation to the Cree Nation in Consideration of Quebec’s Threats to Secede” (1996) 14 Berkeley Journal of International Law 380, online: WL (JLR).

85 Joffe, supra note 83 at para. 56.

86 Ibid. at para. 57.

87 The Inuit have been much less involved in the litigation. Ibid. at para. 70.

88 Ibid.
term, we cannot simply rely on the good faith of the parties involved to enforce an agreement. It must be given legally enforceable protection against threats that may arise in the future, as governments and priorities change. In addition, it tells us that that protection must be clear and unequivocal to prevent a litany of litigation as parties continue to test the limits.

The Quebec position is unique, and it could be argued that other governments will not behave in the same way. For example, Quebec has “repeatedly asserted that it will develop the Cree Nation territory at its own sovereign discretion” and that a referendum on the Cree’s right to determine their own future will not be recognized. The Quebec government has taken the position that in a secessionist Quebec, Quebec will be able to assume the obligations of the federal government and subject treaties to a new Quebec Constitution. This result was never negotiated and is an example of the kind of unilateral assertion of power that has bred uncertainty and mistrust. It does not necessarily apply in other provinces.

However, all governments are concerned with maintaining, and in many cases increasing, their legislative authority. The provincial and federal governments are consistently involved in jurisdictional disputes with each other. In many of these cases, these disputes arise from legitimate and sincere disagreements as to how the needs of Canadians as federal and provincial citizens are best served. Is there any reason to think that these same kinds of disputes will not arise between provincial/federal governments and the Nisga’a government? They may not arise in the same political context as in Quebec, but it is likely that they will arise nonetheless. The difference is that, if the existing s.35 jurisprudence is applied, provincial and federal governments will potentially be able to argue that the assertion of their laws is in the broader public interest and therefore unilaterally infringe the jurisdictional agreements found in the Agreement, rather then being forced to stay within their constitutional jurisdiction.  

89 St. Louis, supra note 85 at 384.
90 Joffe, supra note 83.
3. Nisga’ā Assertions of New Rights

Thus far, I have considered only the consequences of infringements by non-Aboriginal governments. It is this kind of infringement that is contemplated by the s.35 jurisprudence and specifically by the Supreme Court of B.C. in *Campbell*. Such infringement would violate the express terms of the Nisga’ā Agreement. For example, s.13 of the Agreement states that the Agreement prevails over any federal or provincial law to the extent of any inconsistency and s.36 provides that amendments to the Agreement may be made only with the consent of all three parties. Presumably the argument that provincial and federal governments can unilaterally infringe is based on s.52 of the Constitution.93 That is, s.35 is part of the “supreme law of Canada.” If s.35, properly interpreted, allows infringement, then this takes priority over the contrary terms of the Agreement.

It must, however, be recognized that the Nisga’ā can potentially use the same argument. The Agreement says that it “exhaustively sets out Nisga’a section 35 rights, the geographic extent of those rights, and the limitations to those rights.”94 As the jurisprudence evolves, it seems likely that other Aboriginal groups will be successful in having previously unrecognized rights recognized under s.35. Some of these may well be rights that, in the absence of an Agreement, the Nisga’ā would have been in a position to claim. For example, if an Aboriginal right not to pay taxes or at least not to pay taxes in certain circumstances were recognized,95 the Nisga’ā would be barred from claiming such a right by the Agreement, which states that the Nisga’ā will lose their income tax exemption.96 The court could also have made a specific finding about an Aboriginal right to a share in the fishery that surpassed the share that is provided for in the Agreement.97 These findings would not automati-

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92 The range of valid objectives was broadened in *Gladstone*, supra note 13 at para. 73 to include infringement for objectives which are “of compelling and substantial importance to that community as a whole.”

93 Constitution Act, 1982, supra note 2 at s.52:
94 Agreement, supra note 1 at c.2, s.23.
96 Agreement, supra note 1 at c.16, s.6.
97 Agreement, supra note 1 at Schedules A and B.
cally apply to the Nisga’a, since Aboriginal rights are specific to the group claiming, but the only thing preventing the Nisga’a from claiming them would be the terms of the Agreement. However, if s.35 protects those rights, then, according to the logic employed in the argument for government infringement, that protection should take priority over the terms of the Agreement. The Nisga’a should be able to seek a judicial declaration of what rights are included in s.35 and enforce those rights as a matter of constitutional law, despite the fact that they are not included in the Agreement.

The result of such an argument is uncertain. A court might well limit the Nisga’a to their Agreement, despite the fact that provincial and federal governments are not so limited. For example, a court might say that the government right to infringe treaties was part of s.35 before the existence of the Nisga’a treaty, while the hypothetical new s.35 rights of the Nisga’a were not. This argument is specious in that the law is supposed to exist independently of judicial pronouncements on the subject. Nevertheless, this, or some other ground, might well be used to deny the Nisga’a claim. The result of any such claim is uncertain. Certainty and an end to litigation are undermined by the very possibility of these kinds of claims being successful.

V. The Unique Position of Modern Agreements

1. Canadian Principles of Interpretation

Crown sovereignty implies a Crown right to infringe Aboriginal and treaty rights. In order to balance this with the prior occupation of Aboriginal people, the courts have developed generous principles of interpretation to protect Aboriginal people. A fiduciary responsibility has also been imposed on the Crown to prevent it from entering into unfair or exploitative agreements with Aboriginal people. These principles have largely been formulated in the context of either undocu-

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98 Van der Peet, supra note 7 at para. 69.
100 Sparrow, supra note 6.
mented Aboriginal rights or treaties that were created in a context of extreme power imbalance. Rightly, the courts have been protective of First Nations and have sought out principles by which they could judicially determine what balance was required for the fair reconciliation of Aboriginal rights with Crown sovereignty.

In *Nowegijick v. The Queen*, the Supreme Court of Canada said that “treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indians.”102 This means that treaties should be considered in the complete historical and legal context in which they were made, which involves consideration of extrinsic evidence.103 Treaties should be given the meaning that the parties, particularly the Aboriginals, would have understood them to have. Any provisions that restrict the rights of Aboriginal people should be narrowly construed104 and the court is not limited to the plain meaning of the words in the text. “The honour of the Crown is always at stake in its dealings with Aboriginal peoples,”105 and (prior to 1982) a “clear and plain” intention is necessary to extinguish treaties.106 These principles have been repeated many times.107 “Sui generis” treaties are derived from grants from Aboriginal nations to the imperial Crown, so the principles of interpretation “require a justice who is reviewing a challenge to an Indian treaty to move into an interpretive consciousness that allows alternate views of time, law, and culture.”108

All of this is based, at least in part, on a foundation of inequality between the parties. The interpretative principles are an “attempt to overcome the limitation of existing precedent on treaties,”109 which was developed in the context of an extreme power imbalance.

106 Christie, *supra* note 104 at para. 61, online: QL (JOUR); *Calder, supra* note 15 at 325.
108 Henderson, *supra* note 31 at 47.
Historically the Crown was in a position to take advantage in a number of ways. First, the negotiating situation was one easily subverted by the Crown’s representatives to further Crown interests in acquiring territory and removing both Aboriginal interests in the land and Aboriginal peoples themselves. Second, the situation in Canada developed within an evolving historical context marked by a growing imbalance between Euro-Canadian settlers and Aboriginal peoples. Finally, as a result of the historic interaction between the Crown and Aboriginal peoples, a fiduciary relationship developed, one wherein the Crown came to exercise immense power in relation to the fundamental interests of the Aboriginal peoples.\(^{110}\)

Because of this foundation of inequality, s.35 has been interpreted to require judicial oversight of how to create the appropriate balance between the parties. It must be understood that this is fundamentally different from rules of interpretation applied in other contexts. The ordinary rule of contract interpretation does not apply to agreements with Aboriginal people. That is, that

\[\text{[i]f the parties have seen fit to put their contractual intentions into writing, it must be because they wanted their meaning to be clearly and unequivocally established. There should be no room for argument about what has been agreed. The written word should make plain beyond doubt or question what were the requirements of the contract that was entered into by the parties.}^{111}\]

Nor is there a principle of deference whereby the courts could recognize that the parties are in a better position to do the balancing then the court, as there is for example in judicial review of certain administrative bodies.\(^{112}\) This judicial control has been necessary because of the vulnerability of Aboriginal people and the potential for exploitation by the Crown.

2. American Principles of Interpretation

The canons of interpretation for treaties with American Indians are very similar to the principles used in Canada. The first rule is that “treaty terms are to be interpreted as the Indians themselves would have under-

\(^{110}\) Christie, *supra* note 104 at para. 88.


stood them and according to the dictates of Justice.”\textsuperscript{113} This principle is justified because treaties must be interpreted “as ‘that unlettered people’ understood it and ‘as justice and reason demand... where power is exerted by the strong over those whom they owe care and protection.’\textsuperscript{114} That is, “[f]rom their very weakness and helplessness there arises the duty of protection.”\textsuperscript{115} Flowing from this is the principle that ambiguities are to be resolved in favour of the Indians.\textsuperscript{116} In sum, Indian treaties are to be liberally construed in favour of the Indians.\textsuperscript{117}

The issue of interpretation of modern treaties does not technically arise in the United States, since Congress put a stop to treaty making in 1871.\textsuperscript{118} In the U.S., these principles of interpretation are applied primarily to pre-1871 treaties,\textsuperscript{119} so the justifications for the principles apply to the circumstances that existed before 1871. The language of “weakness and helplessness” sheds light on some of the paternalistic values that unfortunately underlie what appear to be generous principles of interpretation. “In a certain sense, turn-of-the-century legal thinking was the embodiment of colonialism in its most mature form, animated by an unquestioned confidence in the superiority of Western Civilization.”\textsuperscript{120}

In certain contexts, protective principles of interpretation are obviously required to give effect to the spirit of the agreement that was actually negotiated. Angela Hoeft cites negotiations with the Chippewas as one example:

\begin{quote}
[T]he President’s relationship to the Chippewa (was) that of a ‘good father’ who would treat them justly, and the Chippewa reciprocated the analogy, addressing Dodge as ‘my father’ and referring to themselves as his ‘children.’ Through their conduct and the concerns they
\end{quote}

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\textsuperscript{116} Meyers, \textit{supra} note 114 at 87.

\textsuperscript{117} Meyers, \textit{ibid.} at 87. See also Hoeft, \textit{ibid.}

\textsuperscript{118} McSloy, \textit{supra} note 116 at 264.

\textsuperscript{119} The principles are also applied to “treaty-like” instruments. Meyers, \textit{supra} note 114 at 88.

\textsuperscript{120} Hoeft, \textit{supra} note 114 at 256.
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raised, the Chippewa evidenced an understanding that the relationship they were establishing with the United States would be ongoing and that, like a 'good father,' the President invited their trust and offered them protection.\footnote{121}

In later interpretation, ambiguous phrases such as ‘during the pleasure of the President’ were interpreted in favour of the Band as not granting the President an unfettered discretion. This kind of interpretation makes sense in the historical context.

3. Critique of the Principles of Interpretation

While on one hand these generous principles of interpretation are intended to be a benefit to Aboriginal people, they can also be seen to serve a suspect and outdated set of values. In “Reading the Colonizer’s Mind,” Olufemi Taiwo argues that colonization depends on “sociocryonics, the frozen preservation of outmoded and moribund social forms.”\footnote{122} Colonization involves treating the colonized like perennial children and “we do not ordinarily put before children complex social rules or expect them in infancy to comprehend the principles that enable and justify those rules. We do not hold children responsible for many of their actions, and we therefore exclude them from much of responsibility discourse.”\footnote{123} He uses the example of exempting the colonized from ordinary British Law in order to prevent them gaining the benefit of principles such as equality before the law.\footnote{124} He concludes that sociocryonics

“deprived Africans of the opportunity to engage critically with their own culture for the purposes of moving it along, expunging those elements that had outlived their usefulness, keeping in altered forms those that remained relevant, and generally borrowing from other cultures whenever they felt the need for new forms that their indigenous structures lacked.”\footnote{125}

\footnote{121}{Ibid. at 241.}
\footnote{122}{O. Taiwo, “Reading the Colonizer’s Mind: Lord Lugard and the Philosophical Foundations of British Colonialism” in S.E. Babbitt & S. Campbell, eds., Racism and Philosophy (Cornell: Cornell University Press, 1999) 157 at 159.}
\footnote{123}{Ibid. at 168.}
\footnote{124}{Ibid. at 176.}
\footnote{125}{Ibid. at 186.}
Arguably, the principles of interpretation freeze Aboriginal treaty rights in the manner in which they would have been understood in their historical and legal context. They are also principles that apply only to Aboriginal people and can be seen, for example, as depriving Aboriginal people of the full value of the deals they make.

B.W. Morse points out that focusing only on how things would have been understood in the past "tells Aboriginal people that what is relevant about them is their past... It also excludes what may have later become, or what may become in the future, integral to the very survival of Aboriginal cultures." He makes the point in relation to defining Aboriginal rights, but it applies as well to interpreting treaties. Interpreting treaties that were intended to define an ongoing relation only in their historical context also ignores "the way in which cultures in fact evolve, adapt and transform over time."

Even in the American context, where the canons of construction are being used to interpret 19th century treaties, Hoeft calls them "rusting canons in a changing world." She argues that trying to figure out how the Indians would have understood a treaty requires "reconstruction" of an increasingly distant past," using an academic version of history that is an "institution of the dominant, non-native culture." Most importantly, she is concerned that relying on history "reinforces cultural stereotypes by freezing Indians in the past and ignoring the reality of who they are today."

Further, Hoeft is concerned about non-natives being the ones to interpret treaties and to decide what is in the best interest of the Aboriginal group. She says that "federal solutions have consisted of 'answers to the wrong questions, for the questions were framed by the wants and desires of a western, expansionary society, not by the needs and values of tribal communities.'" She concludes that

One bitter result of this history is that the canons still used to protect treaty rights from federal or state encroachment bear the imprint of values and assumptions which run contrary to that end. At its heart, the

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126 Morse, supra note 30 at 1031-32.
127 Ibid. at 1032.
128 Hoeft, supra note 114 at 249.
129 Ibid.
130 Ibid.
131 Ibid. at 248.
colonial paradigm is premised on the colonizer’s superiority over the colonized. Translated into judicial doctrine, the colonial paradigm lends itself to a presumption of Native incompetence and governmental benevolence: Indian people are presumed incapable of understanding and adapting to the changes imposed by an advanced civilization, and federal authorities are presumed capable of assessing Indian needs and making decisions in their best interests. The twofold presumption of Native incompetence and governmental benevolence continues to be present in treaty litigation.\textsuperscript{132}

Many of these same issues have been pointed out in the Canadian context. It is fine to say that treaties should be considered in their complete context, but contexts are “neither static nor neutral; they are constantly modified to rationalize changing regimes of European thought.”\textsuperscript{133} It is an extremely difficult task to develop a view of history that is truly mutual, especially when one is attempting to do so using potentially biased historical records written in languages that incapable of embodying Aboriginal world views.\textsuperscript{134}

Gordon Christie, among others, has argued that the application of the principles of treaty interpretation has been inconsistent and does not always achieve the purposes for which the principles were ostensibly developed. In fact, he says, “the principles seem to act to reinforce... vulnerability.”\textsuperscript{135} As an illustration of this inconsistency, he asks

\begin{quote}
Did the signatories understand and accept that the treaties could be violated at will by the Crown so long as it did so with a clear intent? Why would any Aboriginal party have entered into such an absurdly weak agreement, surrendering its birthright...in exchange for no real protection?\textsuperscript{136}
\end{quote}

These same questions, although with lesser force, could be asked about entering into agreements expecting that they can be infringed in accord with the \textit{Sparrow} test.

As Leonard Rotman points out, “[p]art of the difficulty with the use of these principles is that while they are well-known, the reasons for

\begin{footnotesize}
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\item\textsuperscript{132} Ibid. at 254.
\item\textsuperscript{133} Henderson, \textit{supra} note 31 at 57.
\item\textsuperscript{134} Ibid.
\item\textsuperscript{135} Christie, \textit{supra} note 104 at para. 96.
\item\textsuperscript{136} Ibid. at para. 64. This criticism is made in the context of pre-1983 extinguishment.
\end{enumerate}
\end{footnotesize}
their existence are not.” Interpreting treaties in favour of Aboriginal people was designed as a method to give effect to the true intention of the parties, assuming that both parties intended to fulfill their promises, not as a way to undermine that intention. “‘Generous’ rules of interpretation should not be confused with a vague sense of after-the-fact largesse. The special rules are dictated by the special difficulties of ascertaining what in fact was agreed to.” Treaties in general are different from Aboriginal rights. “Treaties are analogous to contracts, albeit of a very solemn and special, public nature. They create enforceable obligations based on the mutual consent of the parties.” The goal should always be to determine the true intentions of the parties.

A paternalistic system whereby governments and judges determine what is best for Aboriginal people does not help to determine the true intent of equal parties with equal legal rights. Resolving contractual ambiguities in favour of Aboriginal people presumes they are not able to say what they mean and mean what they say, as is expected of everyone else. The fiduciary doctrine assumes that it is easy to take advantage of Aboriginal people and that they always need a special level of protection that is otherwise usually afforded to children, people receiving medical care, and others in special positions of vulnerability. Surely it cannot be assumed that the entire population of Aboriginal people have always and will always be in need of this special protection. Where the facts do not support the need for protection, applying protective principles is simply stereotyping and is not in the long-term interests of Aboriginal people.

4. Application to Modern Treaties

In Eastmain Band v. Canada (Federal Administrator) in the context of the JBNQA, the Federal Court of Appeal said that:

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138 Henderson, supra note 31 at 48.
140 Badger, supra note 40 at para. 76.
141 Although these are not the only possible applications. The fiduciary doctrine has, for example, also been applied in the business context. P.W. Hutchins & D. Schulze “When Do Fiduciary Obligations to Aboriginal People Arise?” (1995), 59 Sask. L. Rev. 97 at 112, online: QL (JOUR).
We must be careful, in construing a document as modern as the 1975 Agreement, that we do not blindly follow the principles laid down by the Supreme Court in analyzing treaties entered into in an earlier era. The principle that ambiguities must be construed in favour of the Aboriginals rests, in the case of historic treaties, on the unique vulnerability of the Aboriginal parties, who were not educated and were compelled to negotiate with parties who had a superior bargaining position, in languages and with legal concepts which were foreign to them and without adequate representation.

In this case, there was simply no such vulnerability. The Agreement is the product of a long and difficult process of negotiation. The benefits received and concessions made by the Aboriginal parties were received and given freely, after serious thought, in a situation which was, to use their counsel’s expression, one of ‘give and take.’

This decision has been criticized for overestimating the degree of equality between the parties. In 1975 Aboriginal rights remained subject to unilateral extinguishment by the federal government, as they were at all times prior to receiving constitutional protection in 1982. In their strong critique of Eastmain, Hutchins and Schulze point out that the situation is not really equal when one party can unilaterally take the rights being defined away. “[I]t is not so much the relative positions of the parties negotiating the treaty which is determinative. Rather it is the legal – and moral – context in which the treaty is negotiated, as well as the context established by the treaty instrument which may result in legal vulnerability for one of the parties.”

5. Application to the Nisga’a Treaty

Post-1982 the legal and moral context has changed, and the conclusion in Eastmain has become much more compelling. In 1982, the Nisga’a gained the bargaining chip of legally enforceable rights that were not within the control of the provincial and federal governments. Both parties knew that if an agreement was not reached, the courts

142 [1993] 1 F.C. 501 at para. 21, 99 D.L.R. (4th) 16 [hereinafter Eastmain cited to F.C.]. A similar point was made in R. v. Howard, [1994] 2 S.C.R. 299 at para. 9, 115 D.L.R. (4th) 312. The Supreme Court of Canada said that “[t]he historical context summarized above does not provide any basis for concluding that the terms of the 1923 Treaty are ambiguous or that they would not have been understood by the Hiawatha signatories... The 1923 treaty does not raise the same concerns as treaties signed in the more distant past.”

143 Badger, supra note 40 at para. 47.

144 Hutchins & Schulze, supra note 142 at 133.
could simply enforce Nisga’a rights regardless of the consequences for other levels of government. After Delgamukw, the parties knew that the courts were willing to take that step if negotiations were unsuccessful. The Nisga’a negotiated with what is perhaps an unprecedented degree of equality in terms of knowledge and resources. The negotiations had been ongoing since just after the Calder decision in 1973. They had experienced negotiators and financial resources. The Agreement is the product of a vigorous defence of each party’s interests by both parties. In this context, significantly more weight should be given to the actual agreement of the parties and significantly less to the traditional s.35 analysis, which is based on inequality between the parties.

The Agreement itself makes it clear that it is not intended to be treated like any other treaty under s.35. For example, “[t]here is no presumption that doubtful expressions, terms or provisions in this Agreement are to be resolved in favour of any particular party.”145 As discussed earlier, the parties included the limitations and justifications that they thought were appropriate within the terms of the Agreement, rather than leaving that to be dealt with by way of judicial interpretation under s.35. In this case, applying the principles of interpretation would be a refusal to acknowledge “what in fact was agreed to.”146

There are also external guides that suggest the parties intended the Agreement to be treated differently. The Federal Policy Guide on Aboriginal Self-Government says that Aboriginal self-government may change the nature of the Crown’s “unique, historic, fiduciary relationship with Aboriginal peoples in Canada.”147 The policy states that:

In circumstances where Aboriginal groups wish the Crown to have certain ongoing obligations, self-government jurisdiction or authority will, correspondingly, be limited. In such cases, continuing Crown obligations should be clearly defined. There is no justifiable basis for the Government to retain fiduciary obligations in relation to subject matters over which it has relinquished its control and over which an Aboriginal government or institution has, correspondingly, assumed control.148

145 Agreement, supra note 1 at c.2, s.57.
147 Federal Policy Guide, supra note 27. The Nisga’a Agreement was negotiated outside of the formal treaty process. Nonetheless, government policy documents serve as a good indication of what the government is seeking to achieve through all treaty negotiations.
148 Ibid. at 10.
Through this Policy Guide, the federal government has expressed its intention to relinquish control. This is inconsistent with an intention to maintain the “residual power” to pass laws that “may infringe upon aboriginal rights.” That residual power requires that the fiduciary obligation be retained in all its force in order to justify such infringements. It would be ironic indeed if treaties could decrease the Crown’s responsibilities and consequently make it easier for the Crown to infringe them in a manner consistent with their now reduced fiduciary responsibility. Rather, the fiduciary responsibility that “evolve[s] as a natural consequence both of Aboriginal peoples’ changing roles in shaping their own lives and communities, and of the Crown’s diminished control and authority in relation to the them” should become a tool that can be used to ensure that governments honour the agreements they have entered.

The Federal Policy Guide is not an authoritative source from which to determine what effect the Agreement has on the Crown’s fiduciary obligation. The government cannot wish their fiduciary obligation away. But it is an important indicia of what the parties are attempting to achieve through negotiations. There is also some academic support for the idea that “the Treaty will... secure a measure of autonomy for the Nisga’a, [and therefore] the fiduciary obligations of the federal and provincial governments will lessen.” The bottom line is that if the courts do not allow the parties to achieve their goals, there will be no incentive to negotiate, and the purpose of s. 35 and of reconciliation through treaty making is undermined.

VI. CONCLUSION

The underlying theme behind both the Sparrow test for justifying infringements of treaty rights, and generous principles of interpretation in favour of Aboriginal people, is judicial supervision. The courts will determine what kinds of objectives are sufficient to justify the infringement of a treaty right and what standards the justification must meet.

149 Campbell supra note 5 at para. 119.
151 Sanders, supra note 17 at para. 58.
The courts will determine what the parties must have meant, what is consistent with the honour of the Crown, and what is in the best interests of Aboriginal people. This supervisory role is understandable, indeed even necessary, in the context of inherently unequal parties. A neutral third party is required to protect the interests of the vulnerable. But as the courts have recognized, reconciliation is better served by agreement between the parties than by judicially imposed solutions. The corollary is that once such reconciliation is achieved, with all the compromises and concessions that entails, the court should give effect to the intentions of the parties and intervene as little as possible.