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Gatekeeping Reconciliation: The Supreme Court of Canada's Piecemeal Erosion of Aboriginal Rights

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Article abstract

This paper engages critically with the Supreme Court of Canada's jurisprudence on section 35 to demonstrate that the Court has narrowed the scope of Aboriginal rights and broadened the Crown's power to infringe on recognized rights. It focuses on the Court's view that protected Aboriginal rights must find their roots in integral and distinctive pre-contact practices. By focusing on the challenges of meeting this test, this paper demonstrates that the Court's framework is onerous and ahistorical.

The paper also situates the Court's jurisprudence in the broader context in which section 35 was drafted. It relies in part on this contextual analysis to argue that the Court's framework has impeded the objective of section 35—reconciliation of Aboriginal societies with Crown sovereignty. More specifically, the author shows that the Court's interpretation provides the Crown with an unfair advantage—one often used as leverage in negotiations with Aboriginal communities. This advantage hollows section 35 and erodes its efficacy.

Finally, the paper explores other possible frameworks through which the Court may interpret section 35 and then responds to common concerns that have been expressed to prevent the pursuit of those alternatives. The paper uses section 23's protection of minority language rights as an analogy to aid in advancing our understanding of section 35's proper scope. The author concludes that the relatively broad section 23 rights and the narrow infringement power in section 1 of the *Charter* provide a pragmatic model that can govern the rights protected by section 35 and help push reconciliation forward.

Gatekeeping Reconciliation: The Supreme Court of Canada's Piecemeal Erosion of Aboriginal Rights

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THIS PAPER ENGAGES critically with the Supreme Court of Canada's jurisprudence on section 35 to demonstrate that the Court has narrowed the scope of Aboriginal rights and broadened the Crown's power to infringe on recognized rights. It focuses on the Court's view that protected Aboriginal rights must find their roots in integral and distinctive pre-contact practices. By focusing on the challenges of meeting this test, this paper demonstrates that the Court's framework is onerous and ahistorical.

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CET ARTICLE EXAMINE d'un œil critique la jurisprudence de la Cour suprême du Canada en ce qui concerne l'article 35 afin de démontrer que la Cour a réduit la portée des droits autochtones protégés et a élargi l'étendue du pouvoir de la Couronne d'empiéter sur les droits reconnus. Il met l'accent sur le point de vue de la Cour selon lequel la protection des droits autochtones doit prendre racine dans des pratiques fondamentales et particulières, antérieures au contact européen. En se concentrant sur les défis que pose la réalisation de cet exercice, cet article démontre que le cadre de la Cour est sévère et manque de contexte historique.

L'article situe également la jurisprudence de la Cour dans le contexte historique et politique élargi dans lequel l'article 35 a été rédigé. Il s'appuie en partie sur cette analyse contextuelle pour soutenir que le cadre de la Cour a fait obstacle à l'objectif premier de l'article 35, soit la réconciliation des peuples autochtones avec la souveraineté de la Couronne. Plus précisément, l'auteur démontre que l'interprétation de la Cour donne injustement avantage à la Couronne, ce qui est souvent exploité dans les négociations avec les communautés autochtones. Cet avantage vide de substance l'article 35 et a nui à son efficacité.

Enfin, l'article explore d'autres structures possibles à travers lesquelles la Cour pourrait interpréter l'article 35, et répond aux préoccupations les plus

and the narrow infringement power in section 1 of the *Charter* provide a pragmatic model that can govern the rights protected by section 35 and help push reconciliation forward.

populaires ayant été exprimées afin d'éviter la poursuite de ces possibilités. L'article utilise la protection des droits linguistiques des minorités, prévue à l'article 23, comme analogie pour nous aider à mieux comprendre l'étendue de l'article 35. L'auteure conclut que l'ampleur relativement large des droits de l'article 23 et les limites du pouvoir d'infraction de l'article 1 de la *Charte* fournissent un modèle pragmatique qui peut régir les droits collectifs protégés par l'article 35 et, éventuellement, aider à avancer les efforts de réconciliation.

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Haneen Al-Noman[*]

INTRODUCTION

The Supreme Court of Canada (the Court) claims that the goal of section 35 of the *Constitution Act, 1982*[1] is to achieve the reconciliation of Indigenous societies with the Crown's sovereignty. However, the Court's jurisprudence on Aboriginal rights indicates that it expects Indigenous peoples to reconcile themselves with a *loss* of their sovereignty. The Court may delicately wrap its decisions in inclusive and sensitive wording, but the fact remains that its interpretation of section 35 overly constricts and narrows access to Aboriginal rights while allowing the Crown broad leeway to infringe upon them. This article argues that the Court's section 35 jurisprudence hampers the process of reconciliation by interpreting Aboriginal rights narrowly, and effectively arms colonialism with legal justification.

The article also posits that this lopsided engagement with Aboriginal rights is inconsistent with the Court's other jurisprudence. The Court often justifies its approach to section 35 by framing the provision as one that safeguards collective rights enjoyed by only "one part of Canadian

* Haneen Al-Noman obtained her Juris Doctorate from the Schulich School of Law in May 2022. Haneen would like to thank Professor Naiomi Metallic, Professor Kim Brooks, and Yazan Matarieh for their enduring patience and unwavering support in bringing this article to its final form.

1 *Constitution Act, 1982*, s 35, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Constitution Act, 1982*]. Note that throughout this article, I will refer to the provision on Aboriginal rights as "section 35." I have chosen not to narrow my references to section 35(1) for ease and to support the idea that the provision does not stand alone.

society."[2] However, this framing is inconsistent with its own interpretation of section 35 as a provision that governs a relationship between all members of Canadian society, with Indigenous peoples on one end of that relationship, and the non-Indigenous public on the other. It also neglects the distinct place Indigenous peoples occupy in relation to Canada.

In contrast, the Court adopts a demonstrably different approach to the rights of other groups, particularly those pertaining to minority language rights enshrined in section 23 of the *Canadian Charter of Rights and Freedoms*.[3] This article shows that section 23 of the *Charter* and section 35 of the *Contitution Act, 1982* are comparable: they are both the result of the culmination of a political bargain between different communities, and they are both concerned with the interests of a particular group *vis-à-vis* broader society. Yet, whereas the Court's interpretation of section 35 has proven rigid, narrow, and inaccessible, its section 23 jurisprudence exhibits flexible and broad interpretation. Relying largely on these parallels, the article shows that the Court has the legal justification necessary to depart from its section 35 precedents and move towards a more principled and accessible framework.

I. THE VACUUM WITHIN SECTION 35

At the time of its introduction, section 35 was thought of as a "box of treasures" that would advance legal pluralism and decolonization, primarily by preventing the continued erosion of Aboriginal rights under Canadian law.[4] Through time, it became clear that the provision was more of an "empty box" for the judiciary to fill as it wishes. This section chronicles the history that led to this vacuum.

A. Canada's Failure to Include Indigenous Peoples

When the patriation process first began, Indigenous leaders initially harboured mixed views. Some saw it as an opportunity to create constitutional

2 When discussing section 35, the Court repeatedly refers to Aboriginal rights as "minority rights" or as "special" protections enjoyed by "one part of Canadian society." See e.g. *R v Van der Peet*, [1996] 2 SCR 507 at para 20, 137 DLR (4th) 289 [*Van der Peet*]; *Reference re Secession of Quebec*, [1998] 2 SCR 217 at paras 81–82, 161 DLR (4th) 385 [*Secession Reference*]. Throughout this article, the author is simply noting the Court's language without endorsing it.

3 Part I of the *Constitution Act, 1982*, *supra* note 1 [*Charter*].

4 See Ardith Walkem & Halie Bruce, eds, *Box of Treasures or Empty Box?: Twenty Years of Section 35* (Canada: Theytus Books, 2003).

protections that would safeguard Aboriginal and treaty rights.[5] Others were concerned that patriation would jeopardize the rights that Indigenous peoples had secured through existing treaties and their relationship with the British Crown, which is best exemplified in the *Royal Proclamation of 1763*.[6] However, all were in agreement that constitutional revisions engaged Indigenous interests in a significant way and that meaningful Indigenous participation was necessary. As early as 1978, the National Indian Brotherhood identified meaningful participation in negotiations as one of its two main goals with respect to patriation—the other being the entrenchment of Aboriginal and treaty rights into the Constitution.[7]

The fact that Indigenous leaders' *starting* position was concerned with meaningful participation is important. It shows the inherent disadvantage that Indigenous leaders faced as the patriation process began. In contrast to other orders of government that were presumed from the beginning to have a seat at the table, Indigenous peoples' right to participate was not recognized.[8] The federal and provincial governments simply failed to see Indigenous peoples' distinct place in Canada's constitutional order. In fact, even at its peak, Indigenous peoples' involvement in the patriation process was limited to three national organizations led by the National Indian Brotherhood, which acted merely as observers.[9] However, limited observer status proved insufficient to secure meaningful input, especially since many of the meetings were closed to observers.[10] Therefore, by the time Indigenous leaders were able to address the country's first ministers, their focus was on process, not substance, as they demanded a greater role in the negotiation process.[11]

5 See Douglas E Sanders, "The Indian Lobby" in Keith Banting & Richard Simeon, eds, *And No One Cheered: Federalism, Democracy and the Constitution Act* (Agincourt, Ontario: Methuen Publications, 1983) 301 at 303.

6 *Ibid*; George R, Proclamation, 7 October 1763, reprinted in RSC 1985, App II, No 1.

7 Sanders, *supra* note 5 at 304.

8 See Madeline Rose Knickerbocker & Sarah Nickel, "Negotiating Sovereignty: Indigenous Perspectives on the Patriation of a Settler Colonial Constitution, 1975-83" (2016) 190 BC Studies 67 at 78, online (pdf): <ojs.library.ubc.ca index.php/bcstudies/article/download/187229/186089/202443>.

9 Sanders, *supra* note 5 at 304.

10 *Ibid*.

11 *Ibid*.

B. The First Draft: Lack of Participation as Cover

By the spring of 1980, largely due to Indigenous leaders' continued advocacy, a growing number of Canadian political leaders began to see that Indigenous involvement in patriation was necessary, but this change in attitude came late. In the summer of 1980, the federal and provincial governments had already identified a dozen issues to prioritize in the course of their negotiations and other matters were left for later discussions.[12] Of the short-listed issues, Indigenous interests were mentioned incidentally, constrained only to the question of jurisdiction over fisheries.[13] In the fall of 1980, when the federal government developed its first draft of what would later become the *Constitution Act, 1982*, the document engaged Aboriginal rights only through what is now section 25 of the *Charter*.[14] The provision stated that the *Charter* "shall not be construed as denying the existence of…any rights or freedoms that pertain to the native peoples of Canada."[15]

The jurisprudential context at the time of the first draft demonstrates how hollow this draft really was. By then, it had been over half a decade since the Court held that Aboriginal rights could be extinguished.[16] Yet, the 1980 draft provided no constitutional protections for Aboriginal rights, and without such constitutional protections, the risk remained that Aboriginal and treaty rights would continue to erode. The draft also failed to acknowledge any right to self-government, which was a frequent request of Indigenous leaders as they asserted their claim for a seat at the negotiating table.[17] By all measures, the draft showed little regard for Indigenous peoples' interests.

According to the accounts of several premiers and ministers involved in negotiations, the reason Indigenous demands were not included in the shortlist—and, later, the first draft—was that, unlike other matters, there had not been sufficient agreement between those involved as to their

12 See memorandum from officials titled "Report to Cabinet on Constitutional Discussions, Summer 1980, and the Outlook for the First Ministers Conference and Beyond" (30 August 1980) (known as "the Kirby Memorandum").

13 *Ibid*.

14 *Charter*, *supra* note 3, s 25.

15 Publications Canada, *The Canadian Constitution 1980: Proposed Resolution Respecting the Constitution of Canada*, (Ottawa: Publications Canada, 1980), s 24, online: <primarydocuments.ca/the-canadian-constitution-1980-proposed-resolution-respecting-the-constitution-of-canada/>.

16 See *Calder v AG of British Columbia*, [1973] SCR 313, 34 DLR (3d) 145 [*Calder* cited to SCR].

17 Sanders, *supra* note 5 at 307.

substance.[18] The irony is that the lack of agreement on substance was due to the fact that Indigenous leaders' right to meaningful representation in the patriation process was never fully recognized.[19] It was therefore the federal and provincial governments' refusal to allow Indigenous peoples any meaningful participation in the patriation process that translated into a constitutional proposal that neglected their demands. The "box of treasures" was not merely empty; at this point, it did not even exist. This troubling result could have been avoided by permitting Indigenous peoples an equal and meaningful voice.

C. The Second Draft: Aboriginal Rights as an Outcome of Direct Pressure

Opposition grew, largely out of the federal and provincial governments' failures to respond to Indigenous peoples' demands.[20] Indigenous leaders pursued direct action and appeals for international pressure. In 1980, they began organizing parallel conferences to develop a unified position.[21] Hundreds of Indigenous activists from across the country travelled to Ottawa aboard the "Constitution Express," a passenger train that would continue on to the United Nations headquarters in New York.[22] A delegation of Indigenous leaders pressed on, securing a visit with several British parliamentarians in the United Kingdom and calling for the British government to block any patriation proposal that did not secure their interests.[23]

The federal government was aware of the pressure being applied by Indigenous leaders, and acutely so. One internal document noted the embarrassment that the government felt on the international scene.[24] This, combined with the breakdown of negotiations between the federal and provincial governments, led the federal government to acquiesce to some of the Indigenous leaders' demands to secure support and recognition in the patriation process. The precursor of section 35 was added to the draft

18 See Melvin H Smith, "Some Perspectives on the Origin and Meaning of Section 35 of the *Constitution Act, 1982*" (2000) 41 Pub Pol'y Sources 1 at 9, online (pdf): <fraserinstitute.org/sites/default/files/PerspectivesonSection35.pdf>.

19 Sanders, *supra* note 5 at 307.

20 Knickerbocker & Nickel, *supra* note 8 at 75.

21 Sanders, *supra* note 5 at 308.

22 Knickerbocker & Nickel, *supra* note 8 at 79.

23 Sanders, *supra* note 5 at 312.

24 *Ibid*.

in early 1981, guaranteeing for the first time that "[t]he aboriginal and treaty rights of the aboriginal people are hereby recognized and affirmed."[25]

The ensuing back-and-forth between the federal government, the provincial governments, and Indigenous leaders saw the provision removed in November 1981.[26] It was added again after Indigenous protests intensified, but with an amendment to limit protected rights to those that were already "existing."[27] This tumult soured the federal government's relationship with Indigenous leaders, who distrusted the federal government's promises and begrudged the lack of specific language recognizing the content of Aboriginal rights. This included the inherent right of self-government, which some Indigenous leaders articulated into a practical model that fit within Canadian federalism and whereby Indigenous governments would be given powers akin to those of provincial governments.[28]

The most the federal government was willing to provide was a promise of further negotiations post-patriation, the aim of which could be to create a more detailed Aboriginal rights framework.[29] That promise was enshrined in section 37 of the *Constitution Act, 1982*. However, as one internal government document acknowledged as early as 1980, further entrenchment after patriation would "be enormously difficult."[30] By April 1982, the *Constitution Act, 1982* received royal assent. Now, the "box of treasures" was entrenched in Canada's constitution, but it was left empty, not as a fluke, but as a political decision by the federal and provincial governments and as a consequence of their refusal to recognize Indigenous peoples' place at the negotiating table.

The events between 1978 to 1982 give rise to three important lessons. First, section 35 cannot be understood without proper consideration of its historical and political context. It was, first and foremost, a response to Indigenous peoples' demand for *broad* protections of their rights, driven precisely out of fear that federal and provincial governments would continue to erode and extinguish their rights. Second, the right to self-government was the subject of persistent demands, not only through the language of the provision, but also through the very act of seeking a seat at the negotiating table and presenting practical models that fit within

25 Smith, *supra* note 18 at 5.
26 Sanders, *supra* note 5 at 319.
27 *Ibid* at 321.
28 Knickerbocker & Nickel, *supra* note 8 at 75.
29 *Ibid* at 83.
30 Sanders, *supra* note 5 at 312.

modern Canadian federalism. Third, by leaving what is now section 35 vague and empty of any clear description, the federal and provincial governments were not denying Aboriginal rights. Instead, they were purposefully leaving the matter for discussion in later forums.

D. The Failure of the First Ministers' Conferences between 1983–1987

In March 1983, the First Ministers' Conference with Indigenous leaders was held as mandated by the *Constitution Act, 1982*.[31] It was only then that politicians and bureaucrats made it clear that, though section 35 was open to interpretation, their support for the provision was predicated on the assumption that it would not create new Aboriginal rights.[32]

The first conference ended with an agreement to include new language in the *Constitution Act, 1982* that: (i) outlined a process to negotiate how to define Aboriginal rights; (ii) mandated sexual equality of Indigenous persons; (iii) enshrined consultation with Indigenous peoples as a requisite of future constitutional amendments; and (iv) extended the scope of section 35 to protect future land-claim agreements.[33]

The three conferences that followed mainly addressed the issue of Indigenous self-government, but failed to yield an accord.[34] Some government actors lacked any desire to reach an agreement.[35] Others wanted to run out the clock, going through the motions without committing to anything until the constitutionally prescribed meetings were over.[36] On the other hand, some government actors thought Indigenous leaders adopted an "all or nothing" position.[37] Ultimately, no progress was made in explicitly recognizing or defining the right to self-government through these negotiations. Instead, the First Ministers' Conferences failed to reach an accord and left section 35 in its ambiguous and unclear state.[38] The scope and

31 Knickerbocker & Nickel, *supra* note 8 at 84.

32 Smith, *supra* note 18 at 11.

33 See David C Hawkes, *Aboriginal Peoples and Constitutional Reform: What Have We Learned?* (Kingston, ON: Institute of Intergovernmental Relations, 1989) at 7.

34 *Ibid* at 8.

35 *Ibid* at 10–11.

36 *Ibid*.

37 *Ibid* at 12–13. There were four Indigenous organizations present and they did not share the same position, but this distinction in views may not have been fully understood by the government actors.

38 *Ibid* at 15.

content of Aboriginal rights were therefore left for the courts to determine.[39] No other attempts to reach an agreement on the Aboriginal rights framework have been successful.[40]

II. THE JUDICIARY'S PROHIBITIVE ENGAGEMENT WITH SECTION 35 RIGHTS

The following section outlines the framework that the Supreme Court of Canada has adopted to discern what lies within the "empty box" that is section 35. After demonstrating that the Court's interpretation narrows the scope of Aboriginal rights, this article proceeds to compare it with the Court's interpretation of some *Charter* provisions.[41] It focuses specifically on the section 23 protection of minority language rights, which provides some insight into alternative interpretations.

A. The Court's Narrow Framework for Identifying Protected Aboriginal Rights

In *Van der Peet*, the Court engaged with the appropriate approach for identifying an Aboriginal right. The Court's majority adopted the highly-critiqued "integral to a distinctive culture" test (the "*Van der Peet* test"): after narrowly characterizing the claimed activity, Indigenous claimants must demonstrate that the activity is integral to their distinctive culture and has been continually practised by the Indigenous claimant or group.[42] First Nations claimants must also show that the distinctiveness is tied to

39 See John Borrows, *Freedom and Indigenous Constitutionalism* (Toronto: University of Toronto Press, 2016) at 125.

40 This section did not recount the Meech Lake Accord or the Charlottetown Accord as the article relies heavily on the context of the drafting of the *Constitution Act, 1982*, but a great summary can be found in Jeremy Webber, *Reimagining Canada: Language, Culture, Community, and the Canadian Constitution* (Kingston, ON: McGill-Queen's University Press, 1994). See especially Chapter 5: "After Patriation: Aboriginal Rights, Meech Lake, and Charlottetown, 1982–1992" at 121.

41 It is true that section 35 rights are distinct from *Charter* rights. However, the Court's implementation of the justification standard to section 35 significantly echoes section 1 of the *Charter* and therefore merits this comparison.

42 *Van der Peet*, *supra* note 2 at paras 44–47. See also *R v Pamajewon*, [1996] 2 SCR 821, 138 DLR (4th) 204 [*Pamajewon* cited to SCR] (further reinforces the requirement to narrowly characterize Aboriginal rights).

pre-contact culture.[43] Métis claimants must show that the distinctiveness is rooted in their culture as it was prior to settler control.[44]

The above elements of the *Van der Peet* test impose an onerous burden on any Indigenous claimant seeking the constitutional protection assured by section 35. It is insufficient for the claimant to show that a practice is important to their culture. Instead, the claimant must demonstrate a heightened level of importance: being *integral* and *distinctive*. Under these criteria, practices shared with non-Indigenous peoples may not gain constitutional protection under section 35. Additionally, even if a practice that developed over the past several hundred years grew to be an integral and distinct feature of an Indigenous community's culture, it may still not be protected because it was not rooted in pre-contact times.

The Court's justification for using such a narrow interpretation merits scrutiny. As Chief Justice Lamer stated on behalf of the majority, section 35's protections are not enjoyed by the general public, but a subset of it.[45] Nor are they extended to all rights, only to Aboriginal rights.[46] To give it proper effect, Chief Justice Lamer continued, the "Aboriginal" in "Aboriginal rights" must first be discerned.[47] In essence, the Court sees Aboriginality as a collection of cultural relics. Section 35, the Court appears to imply, is a provision that protects those past practices only.

The Court's reasoning fails to recognize that, like all human societies, Indigenous societies grow and develop. European colonialism alone was an enormous shock, one that required much adjustment. As Indigenous communities change, past practices may find modern expressions. They may even be replaced by new practices altogether. To limit the applicability of section 35 to the practices of the past renders its protections increasingly irrelevant to the Indigenous claimant.

Moreover, the Court's framework creates several practical problems that render section 35 increasingly inaccessible. First, even if one were to concede the appropriateness of the *Van der Peet* test's elements, the evidentiary burden required to prove that a practice was integral, distinct, and traceable to *pre-contact* culture offers practical limits that compound the problem.[48] More importantly, the view that the claimed right must be char-

43 *Van der Peet*, *supra* note 2 at para 60.

44 See *R v Powley*, 2003 SCC 43 at para 37 [*Powley*].

45 *Van der Peet*, *supra* note 2 at paras 19–20.

46 *Ibid* at para 20.

47 *Ibid* at para 20.

48 See Robert Hamilton, "Indigenous Peoples and Interstitial Federalism in Canada" (2019) 24:1 Rev Const Stud 43 at 71.

acterized as narrowly as possible inevitably means that any constitutional protection recognized under section 35 is incremental and piecemeal.

The incremental and narrow nature of the Court's framework is particularly troubling for the Aboriginal right to self-government. Under the Court's approach, the Aboriginal right to self-government is far too broad to even consider.[49] Perhaps in some circumstances one community may be successful in showing a right to regulate one specific matter or other, but the notion that the same community is entitled to regulate its own affairs more generally is not something that the Court's framework entertains. This has been borne out in case law, where the Court narrowed an Indigenous claimant's broad claim to self-government.[50] This is despite the fact that Indigenous peoples demonstrably practiced self-government pre-contact and continue to do so.[51] Indigenous peoples' inherent right to self-government is therefore fragmented and splintered through the Court's interpretation.

The stringent constraints imposed by the Court also run counter to the demonstrable historical context in which section 35 was drafted. As demonstrated above, section 35 was drafted largely in response to Indigenous peoples' demand that their rights be recognized *broadly*. The fact that negotiators gave in to this demand begrudgingly and hesitantly does not alter the fact that they acquiesced to it in early 1981. While some may argue that, by adding the term "existing" in late 1981, the extent of constitutional protection was qualified, that qualification could hardly be used to narrow section 35's protections to the extent adopted by the Court.

B. Two Very Large Backdoors: Extinguishment and Justifiable Infringement

Even if a practice is recognized as an Aboriginal right, the Court's framework in *Van der Peet* permits derogation from it in one of two ways. First, the Crown can demonstrate that it had in fact extinguished the right prior to its constitutional entrenchment in 1982.[52] Second, the government can

49 *Pamajewon*, *supra* note 42 (the Court in *Pamajewon* applies the *Van der Peet* test to a self-government claim in such a way that effectively excludes the possibility of any future successful self-government claims under the Court's current interpretation).

50 *Ibid* at para 26.

51 See Centre for First Nations Governance, "A Brief History of Our Right to Self-Governance: Pre-Contact to Present" (last visited 12 October 2022) at 6, online (pdf): <fngovernance.org/wp-content/uploads/2020/05/Self-Governance_Right_CFNG.pdf>.

52 *R v Sparrow*, [1990] 1 SCR 1075 at 1091–99, 70 DLR (4th) 385 [*Sparrow* cited to SCR].

infringe on an Aboriginal right in certain circumstances.[53] One may take the view that such derogation is reasonable since no right is absolute, particularly in light of section 35's focus on "existing" Aboriginal and treaty rights. However, once examined, it becomes clear that the "fine print" beneath these two mechanisms of derogation goes further than what a reasonable balancing of rights and interests would require.

1. Extinguishment

In *Sparrow*, the Court adopted the standard of extinguishment first articulated in the dissent of Justice Hall in *Calder*.[54] According to that standard, an Aboriginal right ceases to exist at all if the Crown can demonstrate that it had a "clear and plain" intention to extinguish the right prior to 1982.[55] This is an incredibly broad allowance that ignores the far-reaching effects of Canada's aggressive and tenacious colonial history.

Once again, the Aboriginal right to self-government offers a good example to demonstrate this point. One can easily argue that the act of colonialism clearly and plainly challenged Indigenous self-government prior to patriation. The Canadian government's legal response to Indigenous political structures was to outlaw them over a century before patriation. The *Indian Act*[56] sought to replace Indigenous governments with band councils whose narrow powers rested entirely on Canadian delegation.[57] In other words, the Court's extinguishment standard is almost inevitably going to be met. This is especially true for inherent general rights, such as Indigenous self-government, as the act of colonialism clearly and plainly intends to challenge such rights.

2. Justified Infringement

Even where an Aboriginal right is not extinguished, the Crown is still able to infringe on it with the right justification. In *Sparrow*, the Court acknowledged that section 35 was not part of the *Charter* and therefore not subject to section 1.[58] Yet, despite the absence of any textual basis, the Court chose to read in such a limitation anyway. To do this, the Court stated that the

53 *Ibid* at 1108–09.

54 *Ibid* at 1098–99; *Calder*, *supra* note 16 at 404.

55 *Sparrow*, *supra* note 52 at 1099.

56 RSC 1985, c I-5.

57 See John Giokas, *The Indian Act: Evolution, Overview and Options for Amendment and Transition* (Ottawa: Royal Commission on Aboriginal Peoples, 1995) at 34, online (pdf): <publications.gc.ca collections/collection_2016/bcp-pco/Z1-1991-1-41-130-eng.pdf>.

58 *Sparrow*, *supra* note 52 at 1108–09.

purpose of section 35 is to reconcile the interests of Indigenous peoples with the Crown's sovereignty and that the provision must therefore allow for some Crown infringement.[59]

The Court then developed a two-step test that the government must meet to justify infringing on Aboriginal rights through its laws or actions. First, the Crown must show that there is a "valid legislative objective" behind the infringement.[60] Once such an objective is found, then the Crown has the burden of proving that the measures taken to meet this objective are consistent with the "honour of the Crown" and its fiduciary duty towards Indigenous peoples.[61] If the government fails to meet this test, then its infringement will be unjustified and therefore unconstitutional.

Even if one were to accept that some leeway for infringement is necessary, the Court's approach remains concerning. The Court justified the Crown's infringement on Aboriginal rights so broadly as to give extensive power to the Crown. This approach constricts what is already a narrow pathway created to recognize Aboriginal rights. Since *Sparrow*, the Court has broadened the Crown's power to infringe even further. To demonstrate further infringement, I examine both elements of the infringement justification test and discuss some of the related Court decisions.

First is the requirement for a valid legislative objective. A valid legislative objective is broadly understood as one that is "compelling and substantial."[62] The Court held that a legislative objective cannot be considered valid simply because it is "reasonable." The Court initially seemed to also reject the notion that a valid legislative objective is one that is generally in the "public interest."[63] It stressed that the government cannot simply state that a certain action or law is a "valid objective"—rather, it must *show* that it is.[64] Yet, in *R v Gladstone*,[65] a decision that followed *Sparrow*, the Court expanded and broadened what constitutes a valid legislative objective to include, at least potentially, whatever is of importance to Canadians

59 *Ibid*; *Van der Peet*, *supra* note 2 at paras 28–31.
60 *Sparrow*, *supra* note 52 at 1113.
61 *Ibid* at 1114.
62 *Ibid* at 1113.
63 *Ibid*.
64 *Powley*, *supra* note 44 at para 48.
65 [1996] 2 SCR 723, 137 DLR (4th) 648 [*Gladstone* cited to SCR].

generally.[66] In both *Delgamuukw v British Columbia*[67] and *Tsilhqot'in Nation v British Columbia*,[68] the Court confirmed the ease with which a legislative objective will be validated:

> [T]he range of legislative objectives that can justify the infringement of aboriginal title is fairly broad…In my opinion, the development of agriculture, forestry, mining, and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations to support those aims, are the kinds of objectives that are consistent with this purpose and, in principle, can justify the infringement of aboriginal title.[69]

Ironically, this trend was one that Justice McLachlin (as she then was) warned against in the dissent in *Van der Peet*, which was decided in the same year as *Gladstone*.[70] It therefore cannot be said that the Court's mind had not turned to the risk of increasingly broadening infringement justifications.

Second is the Crown's duty to ensure that infringements remain consistent with the honour of the Crown and its fiduciary duty to Indigenous peoples.[71] To discharge this duty, the Crown must engage in consultation and show that the infringement is minimally impairing, rationally connected to its objective, and proportional to its impact.[72] The Crown must also ensure not to deprive future generations of the interest, and to provide fair compensation where there is expropriation.[73] When it pertains to regulating access to scarce resources in a manner that infringes on the rights of an Indigenous claimant, the Crown is expected to have accommodated

66 *Ibid* at paras 73, 75 (Lamer CJ states that "objectives such as the pursuit of economic and regional fairness" could in fact be considered "compelling and substantial" in the right circumstances).

67 [1997] 3 SCR 1010, 153 DLR (4th) 193 [*Delgamuukw* cited to SCR].

68 2014 SCC 44 [*Tsilhqot'in*].

69 *Ibid* at para 83, citing *Delgamuukw*, *supra* note 67 at para 165.

70 *Van der Peet*, *supra* note 2 at paras 304–06.

71 *Sparrow*, *supra* note 52 at 1108.

72 *Tsilhqot'in*, *supra* note 68 at para 87.

73 *Sparrow*, *supra* note 52. See also *R v Badger*, (1996) 1 SCR 771 at para 96, 133 DLR (4th) 324 (the Court confirmed that this test applies to all Aboriginal rights including treaty rights); *Gladstone*, *supra* note 65 at para 73 (further provides the specific application of this test to commercial Aboriginal rights).

Indigenous rights-holders by allocating priority to access to the resource with as little infringement as possible.[74]

One observes, then, that while the test for Indigenous claimants to prove their rights is narrow and rigid, the Crown's leeway to infringe can be motivated by one of a broad selection of objectives. While the Court will review the proportionality of the infringement in light of the objective and desired impact, it will not necessarily demand that the affected Indigenous community consent in all cases or require a negotiated agreement. Instead, the Crown may develop a solution to meet the above criteria unilaterally, so long as they engage in consultation. The concern here is that these are procedural guarantees that elevate the status of the Crown relative to Indigenous nations. The Crown could, and often will, engage in mechanisms of consultation that fail to accept Indigenous nations as equal partners, and that forgo substantive contributions from Indigenous communities in favour of other interests.[75] Any attempt to object to the substance of the infringement must pass muster with Canada's own judiciary. It is difficult to accept this as an adequate framework for reconciliation between nations.

C. The End Result: Narrow Rights, Broad Infringements

Perhaps nowhere are the consequences of the Court's section 35 jurisprudence more palpable than with respect to Indigenous peoples' inherent right to self-government. The Court's reliance on the *Van der Peet* test thwarts the ability of Indigenous peoples to exercise self-government by splitting the components of governance into a set of narrow rights. It then protects only those rights that are distinct, integral, and continuously practiced since pre-contact times.[76]

Where a narrow component of Indigenous self-governance survives this onerous test, the door remains open for the Court to find that the right to that practice was extinguished as an outcome of colonialism.[77] Even where the right to self-government is not extinguished, the Crown is still able to infringe upon it with an infringement standard that elevates the authority

74 *Sparrow*, *supra* note 52 at 1086.

75 See Ryan Beaton, "De facto and de jure Crown Sovereignty: Reconciliation and Legitimation at the Supreme Court of Canada" (2018) 27:1 Const Forum Const 25 at 30–31.

76 *Van der Peet*, *supra* note 2 at paras 44–74.

77 *Calder*, *supra* note 16 at 386.

of the Crown over Indigenous nations and that is more concerned with procedural safeguards than with a nation-to-nation relationship.

In short, the Court's section 35 jurisprudence construes Aboriginal rights as narrow and the Crown's ability to extinguish and infringe them as broad. It does so with little textual basis and contrary to the historical context behind the drafting of section 35. The Court's framework splinters self-government into a set of fragmented rights that are extinguishable pre-1982 and infringeable post-1982. If section 35's promise was to secure Aboriginal rights in Canadian law and society, the Court's framework frustrates this purpose and renders it hollow.

III. THE COURT'S SECTION 35 FRAMEWORK IN CONTEXT

In *Van der Peet*, the Court justified its narrowing of section 35 by claiming that Aboriginal rights are constitutional protections granted only to "one part of Canadian society,"[78] thereby neglecting the unique place that Indigenous nations hold in relation to Canada. Moreover, the premise underlying this justification is inconsistent with the Court's own jurisprudence. According to the Court's prior precedents, section 35 is not an entitlement provision that benefits Indigenous peoples to the exclusion of others. Instead, it regulates the relationship between Indigenous communities and non-Indigenous society (represented by the Crown).[79] In other words, it brings together the interests of *all* and therefore affects *everyone*. As Justice McLachlin (as she then was) acknowledged in the dissent in *Van der Peet*:

> [Section 35] recognizes not only prior aboriginal occupation, but also a prior legal regime giving rise to aboriginal rights…And it seeks not only to reconcile these claims with European settlement and sovereignty but also to reconcile them in a way that provides the basis for a just and lasting settlement….[80]

Justice McLachlin concluded that the provision must therefore be construed purposively and liberally.

The judiciary often claims that broadly recognizing Aboriginal rights would interfere with the political process of negotiating the collective interests that concern the relationship between the Crown and Indigenous

78 *Van der Peet*, *supra* note 2 at paras 19–20.

79 *Ibid* at paras 31, 43.

80 *Ibid* at para 230.

peoples.[81] But in reality, failing to do so abandons the Court's role of protecting the rule of law. As Justice Abella stated in *Mikisew Cree First Nation v Canada (Governor General in Council)*, the Court has a vital role to play in maintaining the rule of law and preserving constitutional rights, including section 35 rights:

> …while the judiciary must respect the separate roles of each institution in our constitutional order, its own role is to maintain the rule of law and protect the rights guaranteed by the Constitution. It would be a mistake, in my respectful view, to interpret parliamentary sovereignty in a way that eradicates the obligations under the honour of the Crown that arose at its assertion.[82]

To construe section 35 as providing no more than narrow entitlements to a minority[83] is unfair to Indigenous peoples, since the prejudicial effects of the Court's narrow interpretation reverberate beyond the courtroom. The Court's interpretive approach therefore leaves Indigenous peoples with little leverage and power when entering negotiations, especially because this limited framework is relied on throughout discussions between the Crown and Indigenous peoples. For example, the majority of claims for self-government that have been concluded since 1982 have been created and agreed to largely within the limits of the Court's narrow section 35 framework.[84] Far from empowering Indigenous peoples, the unequal relationship that exists between the Crown and Indigenous peoples is exacerbated by the Court's section 35 framework. The goal of the provision to create a just and lasting settlement is therefore frustrated. Ultimately, as the Royal Commission on Aboriginal Peoples warned, courts have in fact "become unwitting instruments of division rather than instruments of reconciliation."[85]

81 *Delgamuukw*, *supra* note 67 at para 186.

82 2018 SCC 40 at para 91 [*Mikisew*].

83 *Van der Peet*, *supra* note 2 at paras 19–20.

84 Hamilton, *supra* note 48 at 45.

85 Canada, Royal Commission on Aboriginal Peoples, *Looking Forward, Looking Back: Report of the Royal Commission on Aboriginal Peoples*, vol 1 (Ottawa: Canada Communication Group, 1996) at 9.

IV. *CHARTER* RIGHTS IN COMPARISON

Comparing the Court's interpretation of section 35 to its interpretations of other constitutional protections is useful. The comparison allows for greater appreciation of the errors in the Court's engagement of section 35. Moreover, it provides models for more appropriate interpretations. The *Charter* offers a litany of jurisprudential reasoning on which to rely.[86] Here, I engage with the general trends in *Charter* jurisprudence and then focus on one provision in particular: section 23's protection of minority language education rights.

A. General Trends from the *Charter*

Peter Hogg observes that the Court's general trend in interpreting guaranteed *Charter* rights is to effectively broaden its scope.[87] Only then is the Court able to provide a relaxed standard for infringing or limiting those rights. Conversely, the narrower the scope of the rights, then the more stringent the standard for infringement is.[88] Generally, courts do not provide broad leeway to derogate what is already a narrow protection.

However, as demonstrated earlier in this article, with section 35 rights, the Court adopts the opposite approach: Aboriginal rights are construed narrowly, even though the Crown's power to infringe is made broad and flexible. One cannot help but observe that the Court's inverted attitude is even more out-of-step given the absence of a strong textual or historical basis to permit infringement in the language of section 35.

As will be discussed more thoroughly later in the article, the Court also interprets *Charter* rights in a manner that acknowledges historical growth and evolution, but fails to do the same with Aboriginal rights.[89] Instead, it confines Aboriginal rights to historical practices that find their origins in pre-contact times.[90] This interpretation of section 35 makes European con-

86 In both *Van der Peet* and *Mikisew*, the Court distinctly differentiated section 35 rights from *Charter* rights. In *Van der Peet*, Chief Justice Lamer claimed that Aboriginal rights needed to be defined narrowly as they are "special constitutional protection [granted] to one part of Canadian society" at para 20. See also *Mikisew*, *supra* note 82.

87 See Peter W Hogg, "Interpreting the Charter of Rights: Generosity and Justification" (1990) 28:4 Osgoode Hall LJ 817 at 818–19, 825.

88 *Ibid* at 819.

89 See John Borrows, "Challenging Historical Frameworks: Aboriginal Rights, The Trickster and Originalism" (2017) 98:1 Can Historical Rev 114 at 115 [Borrows, "Changing Historical Frameworks"].

90 *Ibid*.

tact the "all or nothing moment for establishing Aboriginal rights."[91] Thus, if the Court's interpretation persists with time, section 35 may become too rigid to respond to Indigenous peoples' evolving circumstances and changing needs.[92] The Court's arbitrary limitation, therefore, negates the purpose of section 35: the reconciliation of *today's* Indigenous peoples with non-Indigenous society and Crown sovereignty.

B. The Specific Example of Section 23 of the *Charter*

Section 23 provides a parallel model of interpretation that lays bare the Court's out-of-step approach to section 35. This is particularly so since both provisions have analogous origins and purposes. For example, if the Court's view that section 35 is meant to protect the rights of Indigenous communities amidst a numerically dominant settler society, the same can surely be said of section 23. Section 23 of the *Charter* provides guarantees only to the "English or French linguistic *minority* population of the province in which they reside."[93] Both provisions also arose out of the patriation process as a political compromise between various "segments" of Canadian society. Both provisions aim, in part, to protect rights that pertain to culture in one way or another.[94] Both provisions also seek to reconcile or improve relations between different communities.[95] They are, then, provisions designed to affect all of us. Yet, whereas section 35 is given a rigid and narrow interpretation, section 23 is broader and more flexible.

1. Understanding the Court's Jurisprudence of Section 23

A thorough understanding of section 23 must begin by acknowledging that it is an outgrowth of political compromise. The drafters of section 23 of the *Charter* intended to end the century-long neglect of Canada's francophone minorities. Ultimately, the purpose of section 23 is to bring about the flourishing of Canada's official minority languages and cultures.[96]

Juristically, the Court finds section 23 to be a remedial provision designed to address French-speaking Canadians' right to have their

91 *Ibid* at 115–16, citing *Van der Peet, supra* note 2 at para 247.

92 Borrows, "Challenging Historical Frameworks", *supra* note 89.

93 *Charter*, *supra* note 3, s 23(1)(a) [emphasis added].

94 *Van der Peet*, *supra* note 2 at para 157; *Mahe v Alberta*, [1990] 1 SCR 342, 68 DLR (4th) 69 [*Mahe*].

95 *Van der Peet*, *supra* note 2 at para 31; *Conseil scolaire francophone de la Colombie-Britannique v British Columbia*, 2020 SCC 13 at paras 20, 57 [*CSF de la C-B*].

96 *Mahe*, *supra* note 94 at 362.

children receive French education in English-speaking provinces.[97] As Chief Justice Dickson explained in *Mahe*, section 23 was crafted to remedy, on a national scale, the gradual erosion of minority language speakers.[98] The goal of minority language rights is, therefore, "linguistic and cultural preservation"[99] by means of an equal partnership between "the two official language groups in field education."[100]

The analysis of section 23 by Chief Justice Dickson effectively set the tone for section 23's place in Canada's constitutional architecture. It is specifically emphasized that constitutional protection of this minority right is vital to maintain and develop linguistic and cultural vitality.[101] The Court's jurisprudence since *Mahe* has, therefore, consistently recognized that section 23 is to be accorded a liberal and purposive interpretation with the purpose of preserving and developing official language communities in Canada.[102]

What is interesting is that the Court's appreciation of the political context underlying the drafting of section 23 does not affect its jurisprudence; in fact, the Court specifically rejected this very early on. As Justice Bastarache stated in *R v Beaulac*,[103] the fact that "constitutional language rights result[ed] from a political compromise" is not unique to language rights and does not affect their scope."[104] On the occasion that the Court does acknowledge the history behind section 23, it uses it as grounds to "breathe life into a [political] compromise that is clearly expressed."[105] This, to the Court, meant that section 23 must be afforded a broad and liberal scope.

2. Section 23 and Section 35 Compared

The Court's interpretation of section 23 is mindful of the unwritten constitutional principle that mandates protection for minorities. The principle "anchors those guarantees to the values at the core of the Canadian

97 *Ibid* at 393.
98 *Ibid* at 344.
99 *Doucet-Boudreau v Nova Scotia (Minister of Education)*, 2003 SCC 62 at para 26 [*Doucet-Boudreau*].
100 *Mahe*, *supra* note 94 at 344.
101 *Ibid* at 350.
102 *Ibid* at 364–65. See also *Arsenault-Cameron v Prince Edward Island*, [2000] 1 SCR 3 at para 27; *Doucet-Boudreau*, *supra* note 99.
103 [1999] 1 SCR 768, 173 DLR (4th) 193 [*Beaulac* cited to SCR].
104 *Ibid* at para 24.
105 *Mahe*, *supra* note 94 at 365.

Confederation."[106] According to the Court, Canada's commitment to uphold the rights of minorities "continue[s] to exercise influence in the interpretation of [the] Constitution."[107] Although the term "minority" is not apt to describe the place of Indigenous peoples in Canada, this unwritten principle is not without relevance. Yet, it does not appear to animate the Court's jurisprudence of section 35 of the *Constitution Act, 1982* in the way it does so for the Court's interpretation of section 23. This is apparent upon review of the Court's approach to section 35 compared to its engagement with section 23 of the *Charter*.

The first main difference in interpretation lies in the Court's use of historical contexts to limit or widen the scope of the respective provisions. As noted above, the Court's interpretation of section 35 renders its protections limited to those practices that are integral and distinctive to the Indigenous community's *pre-contact* (or, in the case of Métis claimants, *pre-control*) culture. Aboriginal rights are, therefore, said to be frozen in that arbitrary historical moment.[108] Section 23 is not similarly limited, despite it being the outcome of a political compromise—one meant to safeguard the unique culture and interests of one group in relation to a larger one.

To bring this point home, one may think of the following examples. Unlike with section 35, in none of its decisions does the Court suggest that section 23 should be limited to French dialects that predate Britain's triumph over France in North America. Nor does the Court ever propose that section 23's guarantees are limited to regions where French Canadians have a strong historic presence. Instead, as the majority in *Beaulac* noted, section 23's history in no way informs its scope:

> There is no basis in the constitutional history of Canada for holding that any such political compromises require a restrictive interpretation of constitutional guarantees. I agree that the existence of a political compromise is without consequence with regard to the scope of language rights.[109]

The second main difference lies in the Court's willingness to interfere when asked to protect constitutional interests that are subject to ongoing negotiation. Section 35's jurisprudence is riddled with judicial reservation

106 Michel Bastarache, "Chapter 1: Introduction" in Michel Bastarache, ed, *Language Rights in Canada*, 2d ed (Cowansville, QC: Yvon Blais, 2004) at 31.

107 *Secession Reference*, *supra* note 2 at para 81.

108 Borrows, "Challenging Historical Frameworks", *supra* note 89 at 122.

109 *Beaulac*, *supra* note 103 at para 24.

against influencing a political dispute, even if the dispute pertains to the exercise of one group's legal rights. In contrast, the Court appears not only willing, but also eager and swift to rely on section 23 to recognize positive duties on governments to give it effect.[110]

The third notable difference relates to the Court's willingness to differentiate between different levels of interests being protected. The Court's interpretation of section 23 recognizes a "sliding scale" of positive duties on governments, whereby the larger the number of minority language students there are in a jurisdiction, the higher the obligation upon a government to provide that jurisdiction with minority language instruction, and the easier it is for the minority language community to assert its interests.[111] However, that flexibility is absent from the Court's interpretation of section 35. Indigenous claimants must all pass the onerous and narrow *Van der Peet* test no matter the differences between the rights that are being claimed.[112] They are all subject to the same standard of extinguishment and are all prone to a broad power to infringe. Thus, an Indigenous community's general right to govern their own affairs must pass the same muster as their right to regulate their right to fish, even though the two rights would have different implications.

Finally, the fourth key difference lies in governments' ability to infringe. As Hogg notes, it is only when the Court interprets rights broadly that it can also permit infringements flexibly.[113] Yet, while both section 23 and section 35 are construed very differently—the first being far broader in scope than the second—the Court provides the government with less leeway to infringe when dealing with section 23 rights.[114] Thus, as with all section 1 infringements, the legislative purpose behind the infringement must be pressing and substantial, and the infringement must remain minimal, balanced, and rationally connected to the goal.[115]

The different approaches to infringement adopted to the two constitutional rights lead to very different results. In the case of section 23, the flexible test to infringement complements a broad legal right. Yet in the case of section 35, broad infringement powers only exacerbate an already narrow

110 *Ibid* at paras 20, 25.

111 *Mahe*, *supra* note 94 at 366.

112 *Van der Peet*, *supra* note 2 at para 46.

113 Hogg, *supra* note 87 at 819.

114 Several violations of section 23 have been found to be unjustified under section 1 of the *Charter*. See *CSF de la C-B, supra* note 95; *Quebec* (*Education, Recreation and Sports*) *v Nguyen*, 2009 SCC 47.

115 *R v Oakes*, [1986] 1 SCR 103 at 105–06, 26 DLR (4th) 200.

and rigid rights framework that elevates the Crown's decision-making over that of Indigenous peoples. One may even claim that section 35's infringement framework is more permissive than section 1, given the large set of valid legislative goals articulated in *Delgamuukw*.[116] If true, this only serves to compound the problem.

V. LOOKING BACK TO MOVE FORWARD: POTENTIAL ALTERNATIVE INTERPRETATIONS[117]

The political and historical overview of section 35 demonstrates that the fight to constitutionally affirm and recognize Aboriginal rights was a hard one. However, the promises to negotiate and flesh out section 35 in greater detail were left largely unmet. The judiciary was therefore left with the task of ensuring that section 35 was interpreted purposively. It failed.

The Court's narrow interpretation of what constitutes an Aboriginal right has thus far served only to frustrate reconciliation and undercut Indigenous peoples' pursuit of wider and more meaningful recognition of their rights. Thus, once more, Indigenous peoples find themselves beholden to governments that will go through the motions while running out the clock. Adding fuel to the fire, the Court's current interpretation provides those governments with relatively easy grounds to argue that a claimed right was extinguished or that a government infringement is justified. In turn, the Court's flawed interpretation permeates its way into negotiation rooms, ensuring that governments enter with greater leverage.[118] As the following sections show, the Court has ample grounds to depart from this troubling state of the law, as well as several frameworks from which it may learn.

A. Making Use of Existing *Charter* Analysis

Much can be borrowed from the Court's *Charter* jurisprudence to enrich section 35's framework. It is true that section 35 is a unique and distinct

116 *Delgamuukw*, *supra* note 67 at para 165.

117 Certainly, the best possible result would be achieved if Indigenous legal orders are used alongside genuine good faith, consensual, and participatory negotiations. However, this is beyond the scope of this article. Instead, I focus here on situations and cases that ultimately end up before the Supreme Court of Canada and how decisions from the Court can affect change. This stems from the fact that many negotiated proceedings end up being based on the limitation set by the section 35 framework constructed by the Court (for example, self-government agreements). See e.g. Hamilton, *supra* note 48.

118 *Ibid* at 71.

provision that is separate from the *Charter*,[119] but there is no reason to view this distinction as grounds for a wholly different approach to interpretation, particularly where such differences would frustrate section 35 rather than give it effect.

This is not without precedent. Peter Hogg and Daniel Styler, for example, recognized that the test for justified infringement has evolved to resemble the infringement test under section 1 of the *Charter*.[120] Although this development has its problems (as was argued above), it provides support to the claim that *Charter* jurisprudence can be imported to address the shortcomings of the section 35 framework. Here, I focus on the potential lessons the Court may utilize from current section 23 precedents.

One way to expand access to section 35 is to remove the historical requisite embedded in its current framework. That is to say that Aboriginal rights must not be limited to practices that existed pre-contact or pre-control. Jurisprudential precedent for this exists. In *Van der Peet*, the dissents of both Justice McLachlin (as she then was) and Justice L'Heureux-Dubé provide an appropriate model to follow. There, both jurists adopt a more dynamic view of Aboriginal rights, whereby a claimed practice is permitted to grow, evolve, and change to adapt into modern forms and expressions.[121] Doing so detaches section 35 from an arbitrary cut-off date and brings it in line with other constitutional provisions like section 23, which the Court explicitly interprets as an evolving, flexible, and contextual provision not limited by one historical era or other.[122]

If the Court is to rely on history at all to inform its section 35 jurisprudence, it must do so to *broaden* the scope of protected Aboriginal rights or to restrict the Crown's power to extinguish or infringe those rights. For example, the Court may weigh in the brutal effects of European colonialism or the Crown's consistent failure to negotiate and carry out agreements in good faith (including the agreement to engage with Indigenous leaders post-patriation) to explain why an Aboriginal right may have adapted away from its original pre-contact expression or why there are gaps in practice. This can then supplement those section 35 requirements that are notoriously difficult to meet. The Court may also use those same historical facts to place a positive duty upon the Crown to repair and restore

119 *Van der Peet*, *supra* note 2 at para 20; *Mikisew*, *supra* note 82 at para 88.

120 See Peter Hogg & Daniel Styler, "Statutory Limitation of Aboriginal or Treaty Rights: What Counts as Justification?" (2015) 1:1 Lakehead LJ 3 at 4.

121 *Van der Peet*, *supra* note 2, McLachlin & L'Heureux-Dubé JJ, dissenting.

122 *CSF de la C-B*, *supra* note 95 at paras 73, 101; *Beaulac*, *supra* note 103 at para 24.

Aboriginal rights, including the right to practice self-government in a variety of arenas. Doing so would be consistent with the Court's willingness to compel governments into taking positive actions to fulfil their obligations under section 23.

By no means do I suggest that by invoking the use of history the judiciary's interpretation of section 35 should not be bound by the drafters' intentions. On the contrary, I suggest that considering the context of the federal and provincial governments' failure to negotiate or carry out its promises to Indigenous peoples in good faith will assist in explaining the modern realities of Indigenous peoples and, by extension, their rights. If history is to be used at all, it must be to give greater effect to section 35's protections, not to narrow their scope.

B. Briefly Addressing the Court's Hesitation: *Stare Decisis*

Some may argue that the Court is bound by the existing narrow framework governing section 35 due to the principle of *stare decisis*. However, judicial precedents to depart from bad law exist. They are there to assist courts in adapting to the needs of society, and to depart from bad precedents. As the Court itself notes, *stare decisis* is not a "straitjacket that condemns the law to stasis."[123] Instead, it is a mechanism to balance the need for consistent application with the necessity of incremental development.[124] In trying to manage this fine balance, the Court has articulated a pathway that allows it to move on from its own precedents,[125] and that allows lower courts to depart from binding authority.[126] This indicates that there is in fact a plausible route for the Court to leave behind its flawed interpretation of Aboriginal rights.

Legal scholars have in fact already recognized that lower courts would be justified in departing from the Court's existing Aboriginal rights framework.[127] The legal prerequisite to do so is to balance the virtue of certainty

123 *Carter v Canada (Attorney General)*, 2015 SCC 5 at para 44 [*Carter*].

124 *Ibid*. See also Karen Drake, "*R v Pamajewon*, 2020 INC 4" in Kent McNeil & Naiomi Metallic, eds, *Canadian Native Law Reporter: Judicial Tales Retold: Reimagining Indigenous Rights Jurisprudence*, special ed (Saskatoon: Indigenous Law Centre, 2020) 73 at 81–82.

125 The Supreme Court of Canada has in past overturned its own earlier judgments. See e.g. *Health Services and Support—Facilities Subsector Bargaining Assn v British Columbia*, 2007 SCC 27.

126 *Carter*, *supra* note 123 at para 44.

127 Drake, *supra* note 124 at 82.

in the law against the Court's obligation to articulate the law correctly.[128] In the case of section 35, for all the reasons and analysis explored above, there is a clear need to depart from the Court's existing precedents. The Court's current approach exacerbates the power imbalance between Indigenous peoples and the Crown, and fails to achieve the purpose of section 35. Therefore, the current precedent is sufficiently wrong.

Moreover, far from being a matter where certainty is sacrificed for correctness, displacing the Court's existing jurisprudence with an improved framework will *enhance* legal certainty by leaving Indigenous claimants with a clearer understanding of what their constitutionally protected rights encompass. In fact, the Court has already changed, updated, and tweaked elements of its section 35 framework. Ultimately, there are more than enough grounds to depart from its existing faulty interpretation of section 35.

CONCLUSION

The journey to enshrine Aboriginal rights in Canada's constitution was a long and difficult one. However, Indigenous leaders ventured forward in the hope of rightfully reclaiming their rights. After countless hurdles and obstacles, the *Constitution Act, 1982* promised to secure Aboriginal rights, as well as provide a pathway for meaningful negotiations with the government to carve out new nation-to-nation relationships. When these talks failed, the promise of section 35 of the *Constitution Act, 1982* was left uncertain. The judiciary was then tasked with creating an Aboriginal rights framework that recognizes the inherent rights of Indigenous peoples, and promotes reconciliation. In this, it has failed.

By exploring the Court's section 35 framework, it is clear that Aboriginal rights have been interpreted narrowly. The Court continues to sidestep any real recognition of Aboriginal rights, opting instead to provide the Crown with sufficient deference to encourage out-of-court negotiations. But in doing so, the Court has bestowed the Crown with broad allowances to infringe on Aboriginal rights and has weakened the bargaining power of Indigenous peoples.

The Court continues to justify the approach it uses to interpret section 35 by arguing that the provision only bestows rights to a specific segment of Canadian society. The premise of this position is simply false, and

128 *Ontario (Attorney General) v Fraser*, 2011 SCC 20 at paras 133–38.

even if one accepts it, it is clear that the same reasoning does not follow with other minorities in Canada, as evidenced by the Court's broad and liberal interpretation of the *Charter's* right to minority language education.

Section 23 of the *Charter* provides insight into the framework the Court uses to analyze the collective rights of a different minority group in Canada. In this framework, minority rights are viewed purposively and flexibly, history is relied on to expand the breadth of their application, and infringements are construed narrowly. Juxtaposing the Court's existing section 35 framework with its jurisprudence on section 23 lays its errors bare. As the article demonstrates, the uncertainty, unfairness, and inconsistency in section 35 jurisprudence provides sufficient grounds to displace it with a new framework altogether, one that broadens Aboriginal rights and limits the Crown's power to infringe.