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Jennifer Mendoza

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# KTUNAXA NATION V. BRITISH COLUMBIA: A HISTORICAL AND CRITICAL ANALYSIS OF CANADIAN ABORIGINAL LAW

Jennifer Mendoza<sup>†</sup>

*Abstract:* Aboriginal law is a developing and emerging area of the law in Canada. In fact, Aboriginal rights were not constitutionally protected until the ratification of the Canadian Constitution in 1982. What followed was a series of precedent-setting cases that clarified what “rights” meant under Section 35 of the Constitution, how Aboriginal title and rights could be established, and what duty the federal government had to the First Nations when trying to infringe on those rights. In 2017, the Canadian Supreme Court heard *Ktunaxa Nation v. British Columbia*, which was the first case to interpret Aboriginal rights under Section 2(a) religious freedoms claims of the Canadian Charter of Freedom and Rights. There, the Canadian Supreme Court decided that the Ktunaxa Nation did not have religious freedom claim under Section 2(a) over their traditional territory. The decision allowed Glacier Resorts Ltd. and the province of British Columbia to begin building a year-long ski resort that would destroy sacred Ktunaxa land and drive away the grizzly bear population—which played a significant role in the Ktunaxa’s religious beliefs. Given that the Ktunaxa brought a religious freedom claim under Section 2(a) of the Canadian Charter of Rights and Freedoms, their argument was not able to withstand scrutiny in Court. This demonstrated that Aboriginal peoples are instead more likely to succeed with claims under Section 35 of the Constitution. As such, instead of looking at *Ktunaxa Nation v. British Columbia* as another precedent-setting case, this case is arguably of little precedential value given the limited record that was available when the Supreme Court of Canadian heard the case.

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## I. INTRODUCTION

On November 2, 2017, the Supreme Court of Canada ruled in *Ktunaxa Nation v. British Columbia* that the Ktunaxa Nation did not have a religious freedom claim to protect their traditional land.<sup>1</sup> The Ktunaxa had been fighting the construction of a permanent ski resort on Qat’muk, their traditional land,

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<sup>†</sup> The author would like to thank Professor Eric Eberhard for his advice and support throughout the comment-writing process.

<sup>1</sup> *Ktunaxa Nation v. British Columbia*, 2017 SCC 54 (Can.).

for over 20 years. Qat'muk is inhabited by grizzly bears,<sup>2</sup> which are a symbol of great importance to the Ktunaxa's religion as they represent the Grizzly Bear Spirit—who is a symbol of strength, guidance, and protection for their community.<sup>3</sup> However, the Court held that the Crown had not infringed on the Ktunaxa's religious belief or practice and the Crown had also met its consultation obligation with the Ktunaxa.<sup>4</sup>

The Supreme Court of Canada's decision is of limited precedential value because the Ktunaxa Nation did not make a claim under Section 35 of the Canadian Constitution. A claim under Section 35, which governs Aboriginal law, would have been more likely to succeed and to stop the construction of the ski resort on Qat'muk.

Section 35 of the Constitution Act, 1982, provides constitutional protection to the Aboriginal and treaty rights of Aboriginal peoples in Canada.<sup>5</sup> It provides indigenous peoples in Canada with rights that may include access to ancestral lands and resources, and the right to self-government.<sup>6</sup> This section falls outside of the Canadian Charter of Rights and Freedoms (“the Charter”), which guarantees certain political rights to Canadian citizens and civil rights to everyone in Canada. For example, in contrast to Section 35, Section 2(a) of the Charter governs freedom of religion.<sup>7</sup>

Section 35 of the Canadian Constitution prohibits extinguishing existing Aboriginal land rights without the consent of those First Nations holding interest in those lands.<sup>8</sup> Government regulation of Aboriginal land rights is only possible after appropriate and meaningful consultation with the affected Aboriginal communities. This means that if the government wishes

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<sup>2</sup> *Id.* paras. 11–14.

<sup>3</sup> Ktunaxa Nation, *Qat'muk*, <http://www.ktunaxa.org/qatmuk/> (last visited May 3, 2020) [hereinafter *Qat'muk*].

<sup>4</sup> See Carolyn Harris, *Crown*, THE CANADIAN ENCYCLOPEDIA, <https://www.thecanadianencyclopedia.ca/en/article/crown> (last updated Apr. 1, 2016) (Canada is a constitutional monarchy. The current sovereign of Canada is Queen Elizabeth II).

<sup>5</sup> Constitution Act, 1982, Section 35, *being* Schedule B to the Canada Act, 1982, c 11 (U.K.).

<sup>6</sup> William B. Henderson & Catherine Bell, *Rights of Indigenous Peoples in Canada*, THE CANADIAN ENCYCLOPEDIA, <https://www.thecanadianencyclopedia.ca/en/article/aboriginal-rights> (last updated Dec. 11, 2019).

<sup>7</sup> Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, Section 2(a), *being* Schedule B to the Canada Act, 1982, c 11 (U.K.).

<sup>8</sup> “First Nations” and “Aboriginals” will be used interchangeably throughout this case note to refer to the Indigenous people of Canada.

to take land from a First Nation, they must consult with said nation. If the Indigenous peoples do not consent, the government may still be able to take the land by showing that it made a reasonable effort to consult with them and reach an agreement. The Canadian Supreme Court found that the Canadian government demonstrated meaningful consultation and an effort to reach an agreement, which allowed the ski resort on Qat'muk to be built despite objection by the Ktunaxa Nation.

The Canadian Supreme Court has long held that the Canadian government has a fiduciary relationship to Aboriginals under Section 35 of the Constitution Act, 1982.<sup>9</sup> In 1990, under *R. v. Sparrow*, the Supreme Court of Canada held that any denial of Aboriginal rights under Section 35 must be justified and that Aboriginal rights must be given priority, providing that these rights existed at the time of the Constitution Act, 1982; thereby, creating the “Sparrow Test.”<sup>10</sup> In *R. v. Van der Peet*, the Court went beyond the *Sparrow* Test and developed the “Integral to a Distinctive Culture Test,” which is used to determine how to define an aboriginal right.<sup>11</sup> Later, in *Delgamuukw v. British Columbia*, the Court created the “Test of Justification” to determine whether the government can infringe on Aboriginal title.<sup>12</sup> In 2004, the Court in *Haida Nation v. British* held that the Crown has a duty to consult with and accommodate Aboriginal groups with claims to land and Aboriginal rights prior to taking action that may adversely affect those interests.<sup>13</sup> The scope of this duty will vary with the strength of the claim.<sup>14</sup> The strength of the claim for a right or title and the seriousness of the potential effect upon the claimed right or title, will proportionately escalate the duty involved.<sup>15</sup> However, regardless of what the scope of the duty is determined to be, consultation must always be meaningful.<sup>16</sup>

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<sup>9</sup> See generally Isabelle Brideau, *The Duty to Consult Indigenous People 2* (Library of Parliament, Background Paper Publication No. 2019-17-E, 2019), <https://lop.parl.ca/staticfiles/PublicWebsite/Home/ResearchPublications/BackgroundPapers/PDF/2019-17-e.pdf>.

<sup>10</sup> *R. v. Sparrow*, [1990] 1 S.C.R. 1075, paras. 1076–80 (Can.); Erin Hanson & Tanisha Salomons, *Sparrow Case*, FIRST NATIONS & INDIGENOUS STUD.: U. OF B.C., [https://indigenousfoundations.arts.ubc.ca/sparrow\\_case/](https://indigenousfoundations.arts.ubc.ca/sparrow_case/) (last visited May 7, 2020).

<sup>11</sup> *R. v. Van der Peet*, [1996] 2 S.C.R. 507, para. 44–45 (Can.); Erin Hanson & Tanisha Salomons, *supra* note 10.

<sup>12</sup> *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, para. 160–62 (Can.)

<sup>13</sup> *Haida Nation v. British Columbia* (Minister of Forests), 2004 SCC 73, [2004] 3 SCR 511 (Can.)

<sup>14</sup> *Id.* paras. 36–38.

<sup>15</sup> *Id.* paras. 39, 68–71.

<sup>16</sup> *Id.* paras. 41–42.

## II. THE BACKDROP: AN OVERVIEW OF KTUNAXA V. BRITISH COLUMBIA AND THE HISTORY OF CANADIAN ABORIGINAL LAW

### A. *The Parties*

The parties at issue were the Appellants, the Ktunaxa Nation, the Respondents, Glacier Resort Ltd., which wanted to build the ski resort, and the Canadian government, which controlled the land and wanted to allow Glacier Resort to build a ski resort.

#### 1. *The Appellants*

The appellants in this case were the Ktunaxa people. The Ktunaxa's traditional territories are located on the international boundary between the United States and Canada.<sup>17</sup> It includes northeastern Washington, northern Idaho, nonwestern Montana, southwestern Alberta and southeastern British Columbia.<sup>18</sup> For thousands of years, the Ktunaxa enjoyed the natural bounty of the land they lived on, seasonally migrating all over their traditional territory to follow the vegetation and hunting cycles.<sup>19</sup> They obtained all of their food, medicine, and materials needed for shelter and clothing from this area—across the Rocky Mountains and on the Great Plains of both Canada and the United States.<sup>20</sup> Located at the northwestern part of their larger territory is an area the Ktunaxa call Qat'muk—a place of spiritual significance for the Ktunaxa “where the Grizzly Bear Spirit was born, goes to heal itself, and returns to the spirit world.”<sup>21</sup> As a result, the land of Qat'muk and the Grizzly Bear Spirit are “inextricably interlinked,” with Qat'muk being the “unique and proper place to celebrate and [honor] this spirit”—akin to a place of worship.<sup>22</sup>

#### 2. *The Respondents*

The respondents were Glacier Resort Ltd. (“Glacier Resorts”). The resort company wished to build a year-long ski resort on Jumbo Valley in

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<sup>17</sup> Ktunaxa Nation v. British Columbia, 2017 SCC 54, para. 1 (Can.).

<sup>18</sup> *Id.* para. 2; Ktunaxa Nation, *Who We Are*, <http://www.ktunaxa.org/who-we-are/> (last visited Apr. 6, 2019) [hereinafter *Who We Are*].

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> Ktunaxa Nation v. British Columbia, 2017 SCC 54, para. 3 (Can.); *Qat'muk*, *supra* note 3.

<sup>22</sup> *Qat'muk*, *supra* note 3; Ktunaxa Nation, *Qat'muk Declaration*, <http://www.ktunaxa.org/who-we-are/qatmuk-declaration/> (last visited May 6, 2020).

Qat'muk with lifts to glacier tuns and overnight accommodations for guests and staff.<sup>23</sup>

*B. Timeline of the Glacier Resort Permanent Ski Resort Project*

The contentious battle between the Ktunaxa people and Glacier Resorts goes back to the 1980s when Glacier Resorts became interested in building a permanent ski resort in the Jumbo Valley, a traditional territory of the Ktunaxa.<sup>24</sup> However, it was not until 1991 that Glacier Resorts filed a formal proposal to build this resort.<sup>25</sup> This triggered the beginning of the consultation process with the Aboriginal peoples inhabiting the land—the Crown has a duty to consult with Aboriginals prior to taking any action that may adversely affect their interests.<sup>26</sup>

Early on, the Ktunaxa and the Shuswap people expressed concern over the impact that this resort project would have on the land.<sup>27</sup> While it is not clear if it was a specific band or tribe involved in the initial consultation, the Shuswap Nation is made up of nine Secwepemc communities in the Southern Interior of British Columbia; thus, they also inhabited part of the land where the resort would be built.<sup>28</sup>

Until 2005, the Ktunaxa and the Shuswap participated jointly in the regulatory processes. However, that same year, the Shuswap changed their position and indicated their support of the ski resort project; they believed that their interests had been reasonably accommodated and that the project would be good for their community.<sup>29</sup> The Ktunaxa, on the other hand, still opposed the project and consultation with them continued.<sup>30</sup> In total, the consultation with the Ktunaxa and the regulatory process for approval of the ski resort took place between 1991 until 2011—over 20 years.<sup>31</sup> In 2011, despite vehement

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<sup>23</sup> Ktunaxa Nation v. British Columbia, 2017 SCC 54, para. 4 (Can.).

<sup>24</sup> *Id.* para. 12.

<sup>25</sup> *Id.* para. 16.

<sup>26</sup> Haida Nation v. British Columbia, 2004 SCC 73, paras. 35, 47 (Can.).

<sup>27</sup> *Id.* para. 5.

<sup>28</sup> *About*, SHUSWAP NATION TRIBAL COUNCIL, <https://shuswapnation.org/about/bands/> (last visited Apr. 6, 2019).

<sup>29</sup> Ktunaxa Nation v. British Columbia, 2017 SCC 54, paras. 6, 14 (Can.).

<sup>30</sup> *Id.* para. 14.

<sup>31</sup> *Id.* paras. 13, 16–43. The regulatory process consist of four stages: “(1) The Commercial Alpine Ski Policy (‘CASP’) process to determine sole proponent status; (2) The Commission on Resources and the Environment (‘CORE’) process to determine best uses of the land; (3) An environmental assessment process

opposition by the Ktunaxa Nation, the Minister approved the ski resort project.<sup>32</sup>

The Ktunaxa sought judicial review of the Minister's decision.<sup>33</sup> The Ktunaxa appealed this decision on the basis that the project would violate their constitutional right to freedom of religion because the grizzly bears who inhabit the area are an important part of their spiritual beliefs.<sup>34</sup> Additionally, they argued that the Minister's decision breached the Crown's duty of consultation and accommodation.<sup>35</sup>

In the beginning of the opinion, the Supreme Court of Canada agreed that the Ktunaxa do have a sincere spiritual connection to the area inhabited by grizzly bears, whose spirit is an important part of their beliefs.<sup>36</sup> However the Supreme Court of Canada ultimately ruled against the Ktunaxa, holding that the project did not in fact violate their freedom of religion, nor was the consultation inadequate.<sup>37</sup> The Court reasoned that the Ktunaxa were not seeking protection for the freedom to believe in the Grizzly Bear Spirit or freedom to manifest that belief, but rather sought to protect the grizzly bears' presence in Qat'muk.<sup>38</sup> The Court stated that this was an overreach of Section 2(a) of the Charter, which protected the religious freedom of indigenous people in Canada.<sup>39</sup> The crux of this decision also rested on the fact that this religious freedom claim was contingent on the assertion that the consultation over the project was inadequate.<sup>40</sup> The Court relied almost exclusively on this detail to determine whether this freedom of religion claim was valid. Upon finding that the consultation was reasonable and adequate, though it took two decades to eventuate an *unsatisfactory* proposal with the Ktunaxa, the Court concluded that everything possible had been done to respect their religious

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to resolve issues related to environmental, wildlife and cultural impact and culminating in an Environmental Assessment Certificate ('EAC'); and (4) submission of a Master Plan which, if approved, would lead to a Master Development Agreement ("MDA") between the developer and the government." The process included the consultation with the Ktunaxa, who participated in every stage.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* para. 7.

<sup>34</sup> *Id.* para. 1.

<sup>35</sup> *Id.* para. 7.

<sup>36</sup> *Id.* para. 69.

<sup>37</sup> *Id.* para. 115.

<sup>38</sup> *Id.* paras. 70–71.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* paras. 89, 104.

rights and concerns.<sup>41</sup> As a result, there was no basis for the religious claim nor was consultation inadequate.

These arguments are not persuasive. While it is true that the consultation between the Crown—in this case the government of British Columbia and Glacier Resorts—and the Ktunaxa Nation lasted a long time and considered the Ktunaxa’s spiritual connection to grizzly bears and the land, the decision ultimately infringes on the nation’s religious rights. There is an undeniable connection between the title to the land and the religious claim of the Ktunaxa. The reason the land is so important to the Ktunaxa is because it plays a central role in their religious beliefs.<sup>42</sup> Without the land, the Ktunaxa essentially lose their place of worship and the grizzly bears will likely be driven out of the area to keep them away from ski resort guests. However, the majority glosses over this fact by simply saying that the Constitution does not cover this type of religious claim, which demonstrates the limited scope that the case was viewed in by the Court.<sup>43</sup>

### C. *Brief History of Aboriginal Law in Canada*

In order to understand how Aboriginal issues are treated in Canada, specifically how Aboriginal law differs from other countries such as the United States, it is important to look at the origins and historical development of this area of the law. Aboriginal law in Canada is complex. A history of colonialism and westward expansion by European powers, at the expense of the Aboriginal people already living on the land, has shaped the relationships between First Nations, the federal government of Canada, and their legal relationship. Overtime, Canadian law concerning Aboriginal people has originated in a “culturally mixed medium drawn together from diverse jurisprudential sources.”<sup>44</sup>

First Nations historically differ from one another much the same way as one country differs from another.<sup>45</sup> As a result, “each group created its own distinctive ceremonies and formalities to renew, celebrate, transfer or abandon their legal relationships” which have evolved to become the foundation for

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<sup>41</sup> *Id.* para. 112.

<sup>42</sup> *Qat'muk*, *supra* note 3.

<sup>43</sup> JOHN BORROWS, *RECOVERING CANADA: THE RESURGENCE OF INDIGENOUS LAW* 4 (2002).

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 3.



many complex systems of law in North America.<sup>46</sup> “[C]ontemporary Canadian law concerning Aboriginal peoples partially originates in, and is extracted from, these legal systems.”<sup>47</sup> However, Canadian law concerning Aboriginals also has looked to and derived from British and American common law, and to a lesser extent, international law.<sup>48</sup> Reasons for this inclusion is that, like Aboriginal systems, these legal systems and sources are “similarly grounded in the complex spiritual, political, and social customs and conventions of particular cultures, in this case those of European nations.”<sup>49</sup>

Historically, Canadian courts have frequently refused to apply Aboriginal law, preferring instead to recognize and apply common law as the sole source of authority for the law in Canada.<sup>50</sup> As a result, the courts have ruled that the Crown and its servants must conduct themselves with honor—the honor of the crown—when dealing with First Nations and Aboriginals.<sup>51</sup>

The honor of the crown is a fundamental principle of Canadian constitutional law.<sup>52</sup> It is a core principle that gives rise to a variety of substantive obligations.<sup>53</sup> In *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, the Supreme Court of Canada traced this principle to the early period of European exploration and settlement when the British Crown claimed title over the vast land in North America – land that was already occupied and governed by Aboriginals.<sup>54</sup> From the conflict of these claims between European and Indigenous folk arose the special relationship between the Crown and the Aboriginal people of Canada.<sup>55</sup> Such relationship required

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<sup>46</sup> *Id.* at 3–4.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* See generally LAW AND THE ORDER OF CULTURE (Robert Post ed. 1991) (ebook) (“cultural creation of legal meaning”).

<sup>50</sup> BORROWS, *supra* note 43, at 4.

<sup>51</sup> KEEPING PROMISES: THE ROYAL PROCLAMATION OF 1763, ABORIGINAL RIGHTS, AND TREATIES IN CANADA 15 (Terry Fenge & Jim Aldridge eds. 2015) [hereinafter “KEEPING PROMISES”].

<sup>52</sup> *Id.*

<sup>53</sup> *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53, para. 42 (Can.); *Haida Nation v. British Columbia*, 2004 SCC 73, paras. 16 & 18 (Can.); *Manitoba Metis Federation Inc. v. Canada*, 2013 SCC 14, para. 73 (Can.).

<sup>54</sup> *Manitoba Metis Federation Inc. v. Canada*, 2013 SCC 14, paras. 66–67 (Can.) (first quoting *Haida Nation v. British Columbia*, 2004 SCC 73, para. 32 (Can.), then quoting *Taku River Tlingit First Nation v. British Columbia* 2004 SCC 74, para. 24 (Can.)).

<sup>55</sup> KEEPING PROMISES, *supra* note 51, at 15.

that the Crown deal honorably with the First Nation aboriginals and this requirement was expressed in the Royal Proclamation of 1763.<sup>56</sup>

The Royal Proclamation of 1763 was the first Constitution of what is known today as Canada.<sup>57</sup> The Proclamation referred to “the several Nations or Tribes of Indians, with whom [the Crown is] connected, and who live under [the Crown’s] Protection” and laid the foundation for the constitutional recognition and protection of Aboriginals in Canada.<sup>58</sup> Under this document, the British authorities in the New World agreed to protect the Aboriginal people living in British-colonized North America against unfair treatment by British settlers, as well as to recognize Aboriginal title.<sup>59</sup> Thus, even today, many indigenous leaders view the Royal Proclamation as guaranteeing their sovereignty.<sup>60</sup> The Courts have concluded that the ultimate purpose of the honor of the Crown is the reconciliation with the First Nations, who lived in Canada pre-European contact, with the assertion of Crown sovereignty.<sup>61</sup> However, the courts have not come to the same interpretation as the indigenous leaders so as to advance and improve Aboriginal rights. In fact, between 1982 and 1985, out of nineteen claims Aboriginals brought to court, *none* prevailed in their favor.<sup>62</sup>

Before 1982, the idea of aboriginal rights in Canada was questioned by both the federal and provincial governments, as well as by non-Aboriginal Canadians.<sup>63</sup> Most of the concern centered on whether these rights even existed. Such denial of Aboriginal rights was made possible by the “dominant discourse” that structured Aboriginal and non-Aboriginal relations at that time.<sup>64</sup> According to Dale Turner, this discourse was reinforced by four

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<sup>56</sup> *Id.* at 15, 33.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*; *Royal Proclamation of 1763: Relationships, Rights and Treaties – Poster*, INDIGENOUS AND NORTHERN AFFAIRS CAN., <https://www.aadnc-aandc.gc.ca/eng/1379594359150/1379594420080> (last visited Dec. 15, 2019) (In Canada the Royal Proclamation of 1763 is recognized as crucially important in establishing protocols, policies, and procedures of enduring treaty relations with Aboriginal people).

<sup>59</sup> KEEPING PROMISES, *supra* note 51, at 15, 33.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*; Nikita Rathwell, *Supreme Court of Canada Expands on the Honour of the Crown in Manitoba Métis Federation Inc. v Canada (Attorney General)*, THECOURT.CA (Mar. 26, 2013), <http://www.thecourt.ca/12233/>.

<sup>62</sup> KEEPING PROMISES, *supra* note 51, at 15, 33.

<sup>63</sup> DIMITRIOS PANAGOS, UNCERTAIN ACCOMMODATION: ABORIGINAL IDENTITY AND GROUP RIGHTS IN THE SUPREME COURT OF CANADA 14 (2016).

<sup>64</sup> *Id.* (citing DALE A. TURNER, THIS IS NOT A PEACE PIPE: TOWARDS A CRITICAL INDIGENOUS PHILOSOPHY 34–35 (2006)).

intertwining beliefs that were held by non-Aboriginal Canadians: 1) policies specific to Aboriginals were discriminatory; 2) every citizen of Canada should have the same legal and political status; 3) treaties should no longer be used; and 4) Aboriginal people should assimilate to mainstream society completely.<sup>65</sup>

The first Aboriginal rights case in Canada was *St. Catherine's Milling v. The Queen*.<sup>66</sup> This case gave rise to two statements that set legal precedent in Canada, with one concerning Aboriginal rights and the other provincial rights.<sup>67</sup> This is significant because at the time provincial rights were of greater importance than Aboriginal rights.<sup>68</sup>

The issue in *St. Catherine's* arose from the long-standing dispute between the province of Ontario and the federal government over Ontario's northwestern boundary.<sup>69</sup> The Aboriginals, whose traditional lands were at stake, were neither consulted nor brought to the witness stand in the ensuing court action.<sup>70</sup> In 1884, the Privy Council in London held in favor of Ontario.<sup>71</sup> However, the federal government delayed enacting the enabling legislation to put the decision into effect.<sup>72</sup> In response, Ontario filed suit in the High Court of Ontario against the federally licensed *St. Catherine's Milling and Lumber Company* for illegal logging on provincial lands.<sup>73</sup> The main argument came down to determining who exactly had control over the Aboriginal lands in Treaty Three.<sup>74</sup> *St. Catherine's* and Ottawa argued that before the Crown purchased the land title, Aboriginals had been the owners of the land, but were restricted to only sell the land to the Canadian government, which meant that the land could not be sold to individuals or provincial governments.<sup>75</sup>

Because of the wording of the Royal Proclamation of 1763, which referred to "lands reserved for Indians," treaties were an essential prerequisite

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<sup>65</sup> *Id.*

<sup>66</sup> *St. Catherine's Milling and Lumber Co. v. R.*, [1887] 13 S.C.R. 577 (Can.).

<sup>67</sup> OLIVE P. DICKSON & WILLIAM NEWBIGGING, *A CONCISE HISTORY OF CANADA'S FIRST NATIONS* 279 (2nd ed. 2010).

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

for the colonial expansion into British North America; most importantly, it indicated that only the federal government could engage in that activity.<sup>76</sup> The decision of the Court concluded that since legal ownership of the land had never been attributed to the Treaty Three Aboriginals, they had not conveyed any such rights to the federal government.<sup>77</sup> As such, the license that had been granted to St. Catherine's was invalid. According to the Court, Treaty Three was legally meaningless because the Aboriginals "could treat with the Crown for the extinction of their primitive right of occupancy." However, if they refused to do this, the government could continue with their settlement and expansion efforts, outright displacing Aboriginal people from their lands.<sup>78</sup>

Adding to the notion that Aboriginal rights did not exist was the leading legal precedent, at the time, which characterized Aboriginal rights as "usufructs" by declaring that Aboriginal occupancy of Canadian land was a personal and usufructuary right, dependent upon the will of the government.<sup>79</sup> The term "usufruct" means "the right of using and taking the fruits of property belonging to another."<sup>80</sup> In the context of Aboriginal rights, the usufruct framework meant that even though First Nations and Aboriginals used and benefitted from their traditional lands, the lands ultimately belonged to the Crown.<sup>81</sup>

However, the view of usufruct was called into doubt in *Calder et al. v. Attorney General of British Columbia*.<sup>82</sup> This case, brought before the courts by Nisga'a chief Frank Calder, reviewed the existence of Aboriginal title claimed over lands historically occupied by the Nisga'a people of British Columbia.<sup>83</sup> In *Calder*, the Nisga'a Tribal Council argued that its title to the lands in and around the Nass River Valley had "never been lawfully extinguished."<sup>84</sup> While the Aboriginal plaintiffs technically lost, a majority of justices more generally recognized the Aboriginal right to land in their

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<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> PANAGOS, *supra* note 63, at 14

<sup>80</sup> *Id.* at 15.

<sup>81</sup> *Id.*

<sup>82</sup> *Calder et. al v. Att'y Gen. of British Columbia*, [1973] S.C.R. 313 (Can.).

<sup>83</sup> 1973 - *In the Calder Case, the Supreme court held that Aboriginal rights to land did exist, citing the 1763 Royal Proclamation*, DECOLONIZED, <https://www.decolonize-ed.com/single-post/2017/07/07/1973---In-the-Calder-Case-the-Supreme-court-held-that-Aboriginal-rights-to-land-did-exist-citing-the-1763-Royal-Proclamation> (last visited Apr. 6, 2019).

<sup>84</sup> *Id.*

opinion's reasoning.<sup>85</sup> In other words, it recognized, for the first time, that Aboriginal title has a place in Canadian law.<sup>86</sup> An important result of the *Calder* case was that it led to the establishment of the modern land claims process, which significantly shifted the landscape for Aboriginal rights in Canada.<sup>87</sup>

1. *Section 35 of the Constitution Act, 1982*

Under modern constitutional law, Aboriginal peoples enjoy the same rights and freedoms as other Canadian citizens and are also entitled to the same services and benefits from the government.<sup>88</sup> However, it was not until the 1980s that Aboriginal rights were finally recognized by the Canadian Constitution in Section 35 of the Constitution Act, 1982.<sup>89</sup>

Section 35 of the Canadian Constitution has a robust framework for the protection of indigenous rights.<sup>90</sup> This is one way in which Aboriginal peoples have a variety of unique rights that pertain to them alone that are protected in the fundamental law of the land.<sup>91</sup> Through Section 35 of the Constitution Act of 1982, the Canadian Government recognizes the inherent right of self-government as an existing Aboriginal right.<sup>92</sup> Recognition of this inherent right is based on the perception that the Indigenous Peoples of Canada have the right to govern themselves in matters that are core to their communities, important to their unique cultures, identities, traditions, languages, and institutions, and to their special relationship to their land and resources.<sup>93</sup> Section 35(1) embedded “existing Aboriginal and treaty rights” in the Constitution—meaning that these rights could be extinguished only by constitutional amendment rather than by a more simple act of Parliament.<sup>94</sup>

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<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> PANAGOS, *supra* note 63, at 15; PETER RUSSELL, CONSTITUTIONAL ODYSSEY: CAN CANADIANS BECOME A SOVEREIGN PEOPLE? 94 (2004).

<sup>88</sup> Minister Supply and Serv. Can., *The Aboriginal Constitutional Process: An Historic Overview*, in ABORIGINAL PEOPLES, SELF-GOVERNMENT, AND CONSTITUTIONAL REFORM 13 (1991).

<sup>89</sup> *Id.*; Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11 (U.K.).

<sup>90</sup> The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government, CROWN-INDIGENOUS AND N. AFF. CAN., [www.aadnc-aandc.gc.ca/eng/1100100031843/1100100031844#inhrgs](http://www.aadnc-aandc.gc.ca/eng/1100100031843/1100100031844#inhrgs) (last visited Apr. 6, 2019).

<sup>91</sup> Minister Supply and Serv. Can., *supra* note 88.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> MICHAEL ASCH, ON BEING HERE TO STAY: TREATIES AND ABORIGINAL RIGHTS 21 (2014).

However, the Constitution did not address what “existing Aboriginal rights” consisted of nor how to determine whether there was an existing right.<sup>95</sup>

In 1999, the Supreme Court of Canada issued two separate opinions on the same case regarding a treaty right to fish.<sup>96</sup> This case began in 1999 when Donald Marshall Jr., son of a Mi’kmaq hereditary grand chief, was caught fishing for eels without a license, during the off season, and with illegal nets.<sup>97</sup> Marshall had previously been wrongfully convicted of murder and spent eleven years in prison as a result, so he was wary of the Canadian justice system. Instead of seeking a fishing license through the Canadian government, Marshall asked a Mi’kmaq chief whether he could fish.<sup>98</sup> The chief, in turn, told him that because the Mi’kmaq had signed treaties with the British, Marshall had the right to fish and could continue doing so.<sup>99</sup> Marshall, however, was later arrested and charged with violating federal fishing regulations.<sup>100</sup> He was eventually convicted and his conviction was affirmed by the Nova Scotia Court of Appeal.<sup>101</sup> The Supreme Court of Canada, however, overturned his conviction. His acquittal was a major victory for Aboriginal rights because the court held that under Section 35(1), Aboriginals had the right to hunt and fish, as had been granted to them by treaties made between the First Nations and the British in the late 1700s.<sup>102</sup> The decision includes the caveat that Aboriginal fishing rights protected under Section 35(1) are nonetheless subject to regulation in the best interest of the Aboriginal people.<sup>103</sup> Yet, the *Marshall* decision “emphasized the importance of respecting treaty rights more than the government’s power to regulate treaty rights under certain conditions.”<sup>104</sup>

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<sup>95</sup> *Id.*

<sup>96</sup> *R. v. Marshall* (No. 1), [1999] 3 S.C.R. 456 (Can.); *R. v. Marshall* (No. 2), [1999] 3 S.C.R. 533 (Can.).

<sup>97</sup> *R. v. Marshall* (No. 1), [1999] 3 S.C.R. 456, para. 1 (Can.).

<sup>98</sup> *R. v. Marshall* (No. 2), [1999] 3 S.C.R. 533, para. 6 (Can.).

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> IAN GREENE, *THE CHARTER OF RIGHTS AND FREEDOMS: 30+ YEARS OF DECISIONS THAT SHAPE CANADIAN LIFE* 370–71 (2014).

<sup>103</sup> *Id.* at 373.

<sup>104</sup> *Id.*

## 2. *The Charter of Rights and Freedoms*

The Canadian Charter of Rights and Freedoms is a part of the Canadian Constitution and sets out rights and freedoms Canadians believe are important in a “free and democratic society.”<sup>105</sup> The Charter is separated into seven substantive provisions: 1) fundamental freedoms, 2) democratic freedoms, 3) mobility rights, 4) legal rights, 5) equality rights, 6) language rights, and 7) minority-language educational rights.<sup>106</sup>

The Charter protects every Canadian’s right to be treated equally under the law, with equal application to jurisdictions and authorities governed by Aboriginal governments.<sup>107</sup> This equal application guarantee ensures a balance between individual rights and freedoms and the unique values and traditions of Aboriginal peoples in Canada.<sup>108</sup>

One important section in this charter, which had not been analyzed in court before the *Ktunaxa* case, is Section 2. Section 2 governs fundamental freedoms and subsection (a) specifically states that everyone has the freedom of conscience and religion.<sup>109</sup>

One of the most important cases dealing with freedom of religion under Section 2, which was addressed by the Court in *Ktunaxa*, is *Regina v. Big M Drug Mart Ltd.*<sup>110</sup> This landmark decision struck down the Alberta Lord’s Day Act, which required businesses to close on Sundays, for violating Section 2(b) of the Charter of Rights and Freedoms.<sup>111</sup> The Court used the reasoning in the *Regina* case to support their decision to rule against the *Ktunaxa*’s religious

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<sup>105</sup> *Guide to the Canadian Charter of Rights and Freedoms*, GOV. OF CAN., <https://www.canada.ca/en/canadian-heritage/services/how-rights-protected/guide-canadian-charter-rights-freedoms.html> (last visited Apr. 6, 2019); *Learn about the Charter*, CAN. DEPT. OF JUST., <https://www.justice.gc.ca/eng/csj-sjc/rfc-dlc/ccrf-ccdl/learn-append.html> (last visited Apr. 6, 2019).

<sup>106</sup> GREENE, *supra* note 102, at 65.

<sup>107</sup> Human Rights in Canada, CANADIAN HUM. RTS. COMM’N, <https://www.chrc-ccdp.gc.ca/eng/content/human-rights-in-canada> (last visited Dec. 16, 2019); The Government of Canada’s Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government, INDIGENOUS AND N. AFF. CAN., <https://www.rcaanc-cirnac.gc.ca/eng/1100100031843/1539869205136> (last visited Apr. 6, 2019).

<sup>108</sup> *Id.*

<sup>109</sup> Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, Section 2, *being* Schedule B to the Canada Act, 1982, c 11 (U.K.).

<sup>110</sup> *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 (Can.).

<sup>111</sup> Patrick Stothers-Kwak, *What R v Big M Drug Mart Can Teach the US Supreme Court about Corporate Religious Freedom*, THECOURT.CA (Feb. 17, 2014), <http://www.thecourt.ca/what-r-v-big-m-drug-mart-can-teach-the-us-supreme-court-about-corporate-religious-freedom/>.

freedom claim.<sup>112</sup> Specifically, they emphasized that the court in *Big M Drug Mart Ltd.* defined Section 2(a) “as protecting ‘the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hinderance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination.’”<sup>113</sup> The Court concluded that Section 2 has two aspects.<sup>114</sup> The first aspect was that people have the freedom to hold religious beliefs.<sup>115</sup> The second aspect was that they also had the freedom to manifest those beliefs.<sup>116</sup> This definition has been adopted by other subsequent cases.<sup>117</sup> The Court concluded that the Ktunaxa would be free to believe in the Grizzly Bear Spirit and practice their religion despite the construction of the ski resort, so construction of the ski resort would not violate Section 2(a).<sup>118</sup>

If there is any threat to land title or fundamental freedoms, Aboriginal and First Nations communities are, in theory, able to use both Section 2(a) of the Charter and Section 35 of the Constitution to fight back in court. Section 35 of the Constitution Act, 1982 is meant to protect Aboriginal rights from erosion by Parliament or provincial legislature. However, that does not always mean Aboriginals are guaranteed to win or receive a favorable outcome, especially when using a provision that has not been directly applied to Aboriginal rights before.

Given that there is more case law dealing with Aboriginal rights under Section 35 of the Constitution, Aboriginal rights are more likely to be upheld directly under this provision than under the Charter of Rights and Freedoms.<sup>119</sup>

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<sup>112</sup> Ktunaxa Nation v. British Columbia, 2017 SCC 54, para. 62 (Can.).

<sup>113</sup> *Id.* (quoting R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295, at para. 336).

<sup>114</sup> *Id.* at 63.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> See *Loyola High School v. Quebec*, 2015 SCC 12, para. 58 (Can.); *Mouvement laïque québécois v. Saguenay*, 2015 SCC 16, para. 68 (Can.); *Multani v. Commission Scolaires Marguerite-Bourgeoys*, 2006 SCC 6, para. 32 (Can.); *Whatcott v. Saskatchewan Human Rights Tribunal*, 2013 SCC 11, para. 159 (Can.).

<sup>118</sup> Ktunaxa Nation v. British Columbia, 2017 SCC 54, para. 115 (Can.)

<sup>119</sup> GREENE, *supra* note 102, at 82.



D. *Aboriginal Case Law: Aboriginal Rights vs. Aboriginal Title*

Based on Canadian case law, Aboriginal rights and Aboriginal title appear to be entwined with one another.<sup>120</sup> The Supreme Court of Canada has concluded that Aboriginal title is just one category of Aboriginal rights.<sup>121</sup> Certain free-standing Aboriginal rights—for example fishing or hunting—can exist even without Aboriginal title over the land.<sup>122</sup> Thus, the tests for determining whether an Aboriginal *right* exists or whether there is Aboriginal *title* are different, although they tend to connect to one another.<sup>123</sup> While Aboriginal title is a *type* of Aboriginal right recognized and affirmed by Section 35(1), it is different from other Aboriginal rights because it “arises where the connection of a group with a piece of land ‘was of a central significance to their distinctive culture.’”<sup>124</sup> Thus, the intertwinement between Aboriginal rights and Aboriginal title is not only strong, but also to an extent, inseparable. However, decisions from the Supreme Court of Canada have confirmed that existing Aboriginal and treaty rights tend to be interpreted more generously under Section 35.<sup>125</sup> Furthermore, Section 35 affords these rights stronger constitutional protection from erosion by governments.<sup>126</sup>

1. *Aboriginal Rights: Determining Whether an Aboriginal Right Exists and How an Aboriginal Right Should Be Defined*

a. *R. v. Sparrow*

The first Canadian Supreme Court case considering Aboriginal rights and whether they existed under Section 35 was *R. v. Sparrow* in 1990. In this precedent-setting case, a member of the Musqueam Indian Band was charged with violating the Fisheries Act.<sup>127</sup> He alleged that the right to fish was an immemorial right protected by treaty by virtue of Section 35.<sup>128</sup> The Supreme Court found that the tribal member had a protected right to fish and set out a

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<sup>120</sup> See Kent McNeil, *Aboriginal Title and Aboriginal Rights: What's the Connection?*, ALTA. L. REV. 117–48 (1997).

<sup>121</sup> *Id.* at 147.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, para. 137 (Can.).

<sup>125</sup> *Minister Supply and Serv. Can.*, *supra* note 88.

<sup>126</sup> *Id.*

<sup>127</sup> *R. v. Sparrow*, [1990] 1 S.C.R. 1075, 1083 (Can.).

<sup>128</sup> *Id.*

criteria for interpreting rights under Section 35.<sup>129</sup> The court held that the government of Canada have a fiduciary relationship with Aboriginals under Section 35 of the Constitution Act, 1982; any denial of Aboriginal rights under Section 35 must be justified and Aboriginal rights must be given priority.<sup>130</sup> It also did not set limits on the types of rights that can be categorized as Indigenous rights and emphasized that the rights must be interpreted a flexible manner “sensitive to the Aboriginal perspective.”<sup>131</sup> The Court stated that Section 35 only protects rights that were not extinguished (i.e., surrendered) prior to the date the Constitution Act, 1982 came into effect.<sup>132</sup>

Under the *Sparrow* Test, one must first determine whether or not a right has been infringed upon.<sup>133</sup> Infringement is found if government activity: 1) imposes undue hardship on the First Nation; 2) is considered by the court to be unreasonable; and 3) prevents the right-holder from exercising that right.<sup>134</sup>

Second, the test outlines what might justify an infringement upon an Aboriginal right.<sup>135</sup> Infringement can be justified if: 1) it serves a valid legislative objective—i.e., conservation of natural resources; 2) there has been minimal infringement as possible in order to achieve the desired result; 3) fair compensation was provided; 4) and Aboriginal groups were consulted.<sup>136</sup>

b. *R. v. Van de Peet*

In *R. v. Van der Peet*, two Aboriginal men went fishing for sockeye salmon.<sup>137</sup> The men had a license that allowed them to fish legally but prohibited them from selling the fish.<sup>138</sup> The salmon was later sold by the common-law wife of one of the men, Dorothy Van der Peet, who was a member of the Sto:lo Nation.<sup>139</sup> Van der Peet was later charged, under British Columbia Fishery Regulations, with having unlawfully sold fish that was caught under a food-only fish license.<sup>140</sup> The issue before the court was

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<sup>129</sup> *Id.* at 1076.

<sup>130</sup> *Id.* at 1109.

<sup>131</sup> *Id.* at 1112.

<sup>132</sup> *Id.* at 1076.

<sup>133</sup> *Id.* at 1078.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* at 1079.

<sup>136</sup> *Id.*

<sup>137</sup> *R. v. Van der Peet*, [1996] 2 S.C.R. 507, para. 6 (Can.).

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.* para. 5.

whether the law preventing the sale of the fish infringed the Aboriginal right of fishing under Section 35.<sup>141</sup> Ultimately, the court ruled that Aboriginal fishing rights did not extend to commercial selling of fish.<sup>142</sup>

The Court developed an “Integral to a Distinctive Culture Test,” which modified the *Sparrow* Test, to determine how to define an Aboriginal right as protected by Section 35(1) of the Constitution Act, 1982.<sup>143</sup> The Test has ten main parts:

- (1) Courts must take into account the perspective of Aboriginal peoples themselves
- (2) Courts must identify precisely the nature of the claim being made in determining whether an Aboriginal claimant has demonstrated the existence of an Aboriginal right
- (3) In order to be integral a practice, custom or tradition must be of central significance to the Aboriginal society in question
- (4) The practices, customs and traditions which constitute Aboriginal rights are those which have continuity with the practices, customs and traditions that existed prior to contact
- (5) Courts must approach the rules of evidence in light of the evidentiary difficulties inherent in adjudicating Aboriginal claims
- (6) Claims to Aboriginal rights must be adjudicated on a specific rather than general basis
- (7) For a practice, custom or tradition to constitute an Aboriginal right it must be of independent significance to the Aboriginal culture in which it exists

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<sup>141</sup> *Id.* para. 2.

<sup>142</sup> *Id.* para. 93.

<sup>143</sup> *Id.* paras. 48–74.

- (8) The integral to a distinctive culture test requires that a practice, custom or tradition be distinctive; it does not require that that practice, custom or tradition be distinct
- (9) The influence of European culture will only be relevant to the inquiry if it is demonstrated that the practice, custom or tradition is only integral because of that influence.
- (10) Courts must take into account both the relationship of Aboriginal peoples to the land and the distinctive societies and cultures of Aboriginal peoples.<sup>144</sup>

Here, the Court found that the specific right claimed was the right to exchange fish for money.<sup>145</sup> As such, this is the right that must be considered an integral part of the distinctive culture of the Sto:lo community. However, the Court concluded that while the Sto:lo did exchange fish for money pre-Europeans contact, it was not a significant, integral or defining feature of their society.<sup>146</sup> The reasoning for this conclusion was that: 1) pre-contact fish exchanges were done primarily for food purposes, 2) there was no indication that the exchanges were widespread enough to suggest that they were a defining feature of the society, 3) the exchange between the Sto:lo and the Hudson Bay Company occurred due to European influence, and 4) there was an absence of specialization of the exploitation of fishery within the society.<sup>147</sup> Therefore, there was no aboriginal right found to sell the fish and the Court did not proceed to the rest of the test.<sup>148</sup>

2. *Aboriginal Title: Its Scope, the Importance of the Duty to consult, and Meaningful Consultation*

a. *Delgamuukw v. British Columbia*

*Delgamuukw v. British Columbia*, a Canadian Supreme Court case decided in 1997, became a landmark decision on Aboriginal title.<sup>149</sup> While the newly adopted 1982 Constitution enacted Section 35 and added protection for

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<sup>144</sup> *Id.*

<sup>145</sup> *Id.* para. 77.

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Id.* at 91.

<sup>149</sup> *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 (Can.); STAN PERSKY, THE SUPREME COURT OF CANADA DECISION ON ABORIGINAL TITLE: DELGAMUUKW 1 (1998).

existing Aboriginal rights, it did not specify what those rights were, which *Delgamuukw* helped clarify.<sup>150</sup> The decision described the scope and type of the protection given to Aboriginal title under Section 35 of the Constitution Act, 1982, defined how a claimant can prove Aboriginal title, and clarified how the justification test from *R. v. Sparrow* applies when Aboriginal title is infringed.<sup>151</sup>

In *Delgamuukw*, hereditary chiefs from the Gitksan and the Wet'suwet'en attempted to negotiate jurisdiction, recognition of ownership, and self-government since Europeans first began settling on their traditional lands in the 1800s.<sup>152</sup> The Canadian federal government and the British Columbia provincial government “rebuked all efforts by the Gitksan and Wet'suwet'en Chiefs to negotiate on ownership.”<sup>153</sup> The Chiefs then filed suit claiming unextinguished Aboriginal title over the land in question.<sup>154</sup>

This groundbreaking ruling by the Supreme Court contained the first clear and definitive statement on Aboriginal title in Canada and the scope of protection that the title is afforded under the Constitution Act of 1982.<sup>155</sup> It held that Aboriginal title included the right to exclusive use and occupation of land for purposes that are not necessarily aspects of the Aboriginal community's essential practices, customs, and traditions, as long as they are not irreconcilable with the Aboriginal community's attachment.<sup>156</sup> It included language from *Sparrow* which said Section 35(1) “provides a solid constitutional base upon which subsequent negotiations can take place” to outline the justification test for infringements of Aboriginal title.<sup>157</sup> The justification test included: 1) the infringement of the Aboriginal or First Nation must be in furtherance of a legislative objective that is compelling and substantial; and 2) there must be an assessment of whether the infringement

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<sup>150</sup> PERSKY, *supra* note 149, at 6.

<sup>151</sup> *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, 1014–1020 (Can.)

<sup>152</sup> *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, para. 7 (Can.).

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> Andrew Kurjata, *20 Years Ago, This Court Case Changed the Way Canadians Understood Indigenous Rights*, CBS NEWS, (Dec. 11, 2017, 7:22 AM), <https://www.cbc.ca/news/canada/british-columbia/delgamuukw-vs-british-columbia-20-years-rights-titles-1.4440703>.

<sup>156</sup> *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, para. 111.

<sup>157</sup> *Id.* para. 186.

is consistence with the special fiduciary duty relationship between the Crown and the Aboriginal people.<sup>158</sup>

Three aspects of Aboriginal title are relevant here.<sup>159</sup> First, Aboriginal title includes the right to exclusive use and occupation of the land.<sup>160</sup> Second, it also encompasses the right to choose what uses land can be put to, subject to the ultimate limit that those uses cannot destroy the ability of the land to sustain future generations of Aboriginals.<sup>161</sup> Finally, the lands held pursuant to Aboriginal title have an inescapable and inevitable economic component.<sup>162</sup> Therefore, negotiations should include all Aboriginal nations which have a stake in the territory claimed and should be entered into in good faith by the Crown.<sup>163</sup> It also set a precedent for Indigenous rights and the use of oral testimony in Canadian courts.<sup>164</sup> The Court acknowledged that oral history is typically the only record that Aboriginals have of their past.<sup>165</sup> While oral testimony evidence does present some challenges as “out-of-court statements, passed on through an unbroken chain across the generations of a particular aboriginal nation to the present-day,” the Court ruled that the law of evidence must be adapted so as to accommodate and place oral testimony and an equal footing with other types of historical evidence (e.g. historical documents) which the courts are familiar with.<sup>166</sup> Failure to do this would create and impose a difficult burden of proof on Aboriginals.<sup>167</sup>

*b. Haida Nation v. British Columbia*

*Haida Nation v. British Columbia (Minister of Forests)* is the leading Supreme Court decision on the Crown’s duty to consult Aboriginal groups prior to exploiting lands to which they may have claims.<sup>168</sup> The case’s history traces to more than forty years before it was decided. In 1961, the provincial government of British Columbia issued a “Tree Farm License” on the Queen

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<sup>158</sup> *Id.* paras. 161–62.

<sup>159</sup> *Id.* para. 166.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> *Id.* paras. 160–71.

<sup>165</sup> *Id.* para. 84.

<sup>166</sup> *Id.* paras. 86–87.

<sup>167</sup> *Id.*

<sup>168</sup> *Haida Nation v. British Columbia*, 2004 SCC 73 (Can.).

Charlotte Islands, located off its coast.<sup>169</sup> At the time, the Haida Nation had a pending claim to the island land, which had not yet been recognized at law.<sup>170</sup> The Haida Nation also claimed an Aboriginal right to harvest red cedar in that area. In 1999, the Minister of Forests authorized a transfer of the license to the Weyerhaeuser Company without consent from or consultation with the Haida Nation.<sup>171</sup> In 2000, the Haida Nation brought suit, requesting that the replacement and transfer be set aside.<sup>172</sup> The issue before the Court was whether there was a duty to consult with the Aboriginal nation and if so, what that duty entailed.<sup>173</sup> The Court held that the Crown had a duty to consult with and accommodate Aboriginal groups with claims to land and Aboriginal rights prior to taking action that may adversely affect those interests.<sup>174</sup> The specific duty varies depending on the strength of the claim and degree of the harm and cannot be delegated to third parties.<sup>175</sup>

*c. Tsilhqot'in Nation v. British Columbia*

In 2014, forty-one years after the Supreme Court held in *Calder* that the concept of Aboriginal title exists under Canadian law, the Court formally declared that the Tsilhqot'in people have Aboriginal title in a specific area of British Columbia historically occupied by them.<sup>176</sup> *Tsilhqot'in Nation v. British Columbia* is an important Canadian Supreme Court decision that “had an immediate impact on First Nations communities that held Aboriginal title or were claiming Aboriginal title, but which had not been consulted—or felt they had not been consulted in good faith—about commercial developments on their traditional lands.”<sup>177</sup> The Nation consisted of six bands of several thousand Aboriginals who had lived in land they considered rightfully theirs in central British Columbia for centuries.<sup>178</sup> However, there were no treaties or land claims agreement that applied to their traditional land base.<sup>179</sup>

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<sup>169</sup> *Id.* para. 4.

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> *Id.* para. 6.

<sup>174</sup> *Id.* para. 67.

<sup>175</sup> *Id.* paras. 69–71.

<sup>176</sup> *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44 (Can.).

<sup>177</sup> GREENE, *supra* note 102, at 381.

<sup>178</sup> *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44, para. 3 (Can.).

<sup>179</sup> *Id.* para. 4.

By 1983, the British Columbia provincial government granted a permit to a logging company to cut trees in the area claimed by the Tsilhqot'in.<sup>180</sup> Reasonably, the Nation objected and began land claims litigation for part of their territory where several thousand of them resided.<sup>181</sup> Negotiations continued until 2012, when the British Columbia Court of Appeal decided that the Tsilhqot'in had not established their land claim, although it could potentially be established in the future.<sup>182</sup> The decision was appealed to the Supreme Court, which recognized the Tsilhqot'in's Aboriginal title over the land.<sup>183</sup>

The Court relied heavily on the *Haida Nation* decision. The Justices pointed out that the government of British Columbia did not make any attempt to consult with the Tsilhqot'in or to accommodate the concerns the Tsilhqot'in had about logging in their territory.<sup>184</sup> British Columbia asserted two reasons for their support of the logging. First was that the logging was necessary to battle pine-battle infestation.<sup>185</sup> Second, that there would be economic benefits to the people of British Columbia from the logging, which constituted a legislative objective substantial and compelling enough to infringe Aboriginal interests without consultation.<sup>186</sup> The Court found that government failed to provide compelling evidence for these claims and even with compelling evidence, consultation have been required because there was substantial evidence supporting a valid land claim by the Tsilhqot'in.<sup>187</sup>

To prove a valid land claim, occupation must be 1) sufficient, 2) continuous, and 3) exclusive.<sup>188</sup> The Court concluded that the evidence indicated that the Tsilhqot'in had continuously occupied the land for centuries and that their occupation was "exclusive" because other Aboriginal groups would need permission to pass through Tsilhqot'in territory.<sup>189</sup> As to the duty to consult, the Court concluded that the degree of consultation and accommodation required is "proportionate to the strength of the claim and to the seriousness of the adverse impact the contemplated governmental action

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<sup>180</sup> *Id.* paras. 5–6.

<sup>181</sup> *Id.*

<sup>182</sup> *Id.* para. 8.

<sup>183</sup> *Id.* para. 153.

<sup>184</sup> *Id.* para. 96.

<sup>185</sup> *Id.* paras. 126–127.

<sup>186</sup> *Id.*

<sup>187</sup> *Id.* paras. 93–94.

<sup>188</sup> *Id.* para. 25.

<sup>189</sup> *Id.* para. 63.



would have on the claimed right.” Greater requirement of consultation and accommodation is needed where title has been established.<sup>190</sup> If consultation is found to be inadequate, the decision of the government can be suspended or quashed by the courts.<sup>191</sup> Furthermore, the Crown must also “ensure that the proposed government action is substantively consistent with the requirements of” Section 35 of the Constitution Act, 1982—requiring both a compelling and substantial government objective and that the proposed action is consistent with the fiduciary duty of the Crown to the Aboriginal people.<sup>192</sup> Where Aboriginal title is unproven, the Crown still owes a procedural duty imposed by the honor of the Crown to consult with the First Nation and, if and when appropriate, accommodate the unproven Aboriginal interest.<sup>193</sup>

### 3. *Application of Case Law in Ktunaxa Case*

#### a. *Aboriginal Rights Tests*

In *Ktunaxa*, the Court made no direct findings as to the existence of the Ktunaxa’s religious right. Had the Ktunaxa brought their claim under Section 35, the Court would have been required to consider whether or not the claimed religious right existed prior to enactment of the Constitution Act, 1982. The religious claim could have been proven using oral history as evidence of the Ktunaxa’s deeply held spiritual, and religious belief in the grizzly bear and its connection to Qat’muk since time immemorial, at the trial stage.<sup>194</sup> If such evidence would have been introduced and deemed valid, the Court would have likely found that the Ktunaxa’s religious right did in fact exist prior to 1982, and therefore should have been afforded protection.

Had the Canadian Supreme Court used the *Sparrow* Test, they would have likely concluded that there was a definite infringement on the religious freedom right of the Ktunaxa in connection to their land. First, the construction of the ski resort would not only drive away an essential part of the Ktunaxa’s religion, the grizzly bears, but also completely obliterate their traditional land. The important relationship between Qat’muk’s and the Grizzly Bear Spirit is also inseparably intertwined with its importance for

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<sup>190</sup> *Id.* para. 79.

<sup>191</sup> *Id.*

<sup>192</sup> *Id.* para. 80.

<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

living grizzly bears now and in the future.<sup>195</sup> Destroying this traditionally sacred land would create a domino effect which would drive away the important physical connection the Ktunaxa have to the Grizzly Bear Spirit and would simultaneously forever do away with their place of worship of thousands of years. For the Crown and Court to argue that the Ktunaxa can easily find another place to worship would gravely undermine the serious impact that the government action is creating. Because destruction of the land and removal of the grizzly bears harms the Ktunaxa's spiritual connection at Qat'muk, there would be a challenge to determine whether the Ktunaxa would be able to practice their religious beliefs at all. Second, this hardship would likely be viewed as unreasonable because this land and spiritual connection are not tangibly replaceable. The Ktunaxa cannot simply find another sacred site with the same spiritual and religious significance. This land is irreplaceable and as such not likely to be given an appropriate monetary value in the eyes of the Ktunaxa Nation. Third, as mentioned before, with the land and the grizzly bears gone, the Ktunaxa would likely no longer have their spiritual connection to the Grizzly Bear Spirit, or at least the connection would likely not be as strong. Thus, under *Sparrow*, there would exist a clear infringement on the Ktunaxa's religious freedom.

Moving to the second part of the test, whether infringement is justified, this infringement is not justifiable because while the Ktunaxa Nation was consulted and may possibly have been offered compensation, the first two factors are not met. In this case, there is no valid legislative objective since the primary reason that the Ktunaxa land is in dispute is that the government intended to build a permanent ski resort. This would destroy land and force wildlife, such as the grizzly bears, from their homes, contrary to what the Court deemed as a valid legislative objective, e.g. conservation. Additionally, this would mean excessive infringement because 1) a significant portion of Ktunaxa land would be taken away, along with their sacred land, and 2) the grizzly bear population would be driven away, thereby destroying the foundation of the spiritual connection the Ktunaxa have to the land. This is a clear infringement on the Ktunaxa's right to their land and their religious freedom.

Modern Courts use the ten-part "Integral to a Distinctive Culture Test" from *Van der Peet*, to identify an Aboriginal right in Section 35(1) of the

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<sup>195</sup> *Qat'muk*, *supra* note 3.

Constitution Act, 1982, specifically, practices, traditions and customs central to the Aboriginal societies that existed prior to contact with the Europeans.<sup>196</sup>

First, considering the perspective of the Ktunaxa, it is evident that they feel their religious freedom is an integral part of their society as the “Grizzly Bear Spirit” is an important source of guidance, strength, protection and spirituality.”<sup>197</sup> Second, the precise nature of the claim brought by the Ktunaxa is that the creation of a permanent ski resort on their land would drive away the grizzly bear population, which in turn would impact their fundamental worshipping practices. The grizzly bear is an important aspect of their religion and connection to the land, the ski resort would completely change and more than likely destroy that connection. Third, the Ktunaxa’s belief is distinct from other Aboriginal societies because they are the only ones that have been identified as to both have a stake in Qat’muk and a religious connection to the land in question.<sup>198</sup> Fourth, the Ktunaxa likely can prove continuous control of the land prior to contact with the use of oral, as mentioned before, or anthropological evidence. The fifth factor is related to factor four in that it requires courts to consider the difficulties that First Nations may experience in providing evidence given that their practices, customs, and traditions did not include written records.<sup>199</sup> Sixth, the claim is adjudicated on a specific basis since it is specifically asserting a religious right tied to the Ktunaxa’s ancestral land and the impact they would suffer as a result of destruction of the site. Seventh, the religious claim is likely of independent significance to the Ktunaxa. There is no mention of it arising from another practice or custom. Eighth, the religious claim would make the Ktunaxa a distinctive culture, under *Van der Peet*, in that it is an important and fundamental part of their society as whole which is interconnected to their land. Ninth, there is no evidence presented that this religious practice was affected by European culture, and even if it was “European arrival and influence cannot be used to deprive an Aboriginal group of an otherwise valid claim to an Aboriginal right.”<sup>200</sup> Finally, as mentioned before, the religious freedom claim is inevitably tied to the Ktunaxa’s land since the grizzly bears, who plays an

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<sup>196</sup> R. v. Van der Peet, [1996] 2 S.C.R. 507, para. 44 (Can.).

<sup>197</sup> *Qat’muk*, *supra* note 3.

<sup>198</sup> There was no mention of whether the Shuswap brought any religious claim over the land.

<sup>199</sup> R. v. Van der Peet, [1996] 2 S.C.R. 507, para. 68 (Can.).

<sup>200</sup> *Id.* para. 73.

important role in their religion as symbols of the Grizzly Bear Spirit, inhabit it.

*b. Aboriginal Title Tests*

Had the Ktunaxa brought a claim for land title instead of a religious freedom claim, they would have likely been more successful and had an easier time meeting the requirements outlined in *Delgamuukw*, *Haida Nation*, and *Tsilhqot'in*.

Using *Delgamuukw*'s justification for infringement test, the first part of the test is not met. Construction of a permanent ski resort is not in furtherance of a legislative objective that is compelling and substantial.

Not only does building a ski resort disregard the Ktunaxa's interest, but it also damages the reconciliation of the Ktunaxa with the broader community. This differs from *Delgamuukw* in which the Court found that the Aboriginal and the broader community had a shared interest in the conservation of fisheries and that that interest was a compelling and substantial objective.<sup>201</sup> The conservation recognized fishing as an integral part to many Aboriginal cultures and sought to reconcile Aboriginal societies and the broader communities by ensuring that there are fish enough for everyone.<sup>202</sup> No such argument can be made here for building a ski resort. Given that the first requirement would not be met, it is inevitable the second requirement would not be met either.

Applying *Tsilhqot'in* to *Ktunaxa* further supports that the Ktunaxa might have had a more favorable outcome had the Ktunaxa gone through the provincial government tribunals instead of the federal administrative court system. First, the Ktunaxa would likely be able to establish title with oral history as was done in both the *Delgamuukw* and *Tsilhqot'in* cases. There is some indication that the evidence could have been compelling, given that even the Supreme Court Justices noted that the Ktunaxa had been living on Qa'muk for thousands of years. Second, even though the Court found consultation to be sufficient, building a year-long ski resort would not constitute a legislative objective substantial and compelling enough to infringe Aboriginal interests. While the British Columbia government can argue that the ski resort would

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<sup>201</sup> *Id.* para. 161.

<sup>202</sup> *Id.*

benefit the Ktunaxa people by, perhaps, creating jobs for them, it is clear that based on the sentiments of the Ktunaxa people over the construction of this project, they are unlikely to seek out jobs from it. As such, the government of British Columbia would need to accommodate the Ktunaxa's concerns. If this cannot be done, the government action cannot proceed because it has not justified infringing on the Aboriginal group's right.

#### 4. *Implications for Future Aboriginal Cases*

While the *Ktunaxa* decision should not be looked at for precedential value, there are major implications that arise from it, specifically regarding the duty to consult, religious freedom claims, and judicial review. The case may push other First Nations to look at the possible connection between a religious claim and their lands—thereby bringing future religious claims under Section 35 of the Constitution Act, rather than Section 2 of the Charter of Freedoms and Rights. Moreover, these claims will likely be brought in a trial setting vs. administrative tribunal setting so that a trial court can make adequate conclusions as to the validity of the claims presented.

##### a. *Duty to Consult*

Early on in *Ktunaxa*, the Court critically analyzed two issues: 1) the issue of the sacred site being raised “late” in the consultation process and 2) the issue of whether Ktunaxa were not willing to accept any of the accommodation offered, or willing to compromise on the matter of the destruction of the sacred site through the construction of the permanent ski resort.<sup>203</sup> The first issue was viewed by the Court as the Ktunaxa not asserting their rights in a timely manner.<sup>204</sup> Given how late in the process these concerns were raised, the Court did not weigh or find them persuasive in the outcome of consultation.<sup>205</sup>

However, it is worth recognizing that the consultation in this case began well before any of Aboriginal law precedent-setting cases were decided. This was not mentioned by the Court or was it acknowledged in any way.

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<sup>203</sup> *Ktunaxa Nation v. British Columbia*, 2017 SCC 54, para. 6 (Can.); *Nation v British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54 – Case Summary, MANDELL PINDER LLP BARRISTERS & SOLICITORS (Nov. 14, 2017), <http://www.mandellpinder.com/ktunaxa-nation-v-british-columbia-forests-lands-and-natural-resource-operations-2017-scc-54-case-summary/>.

<sup>204</sup> MANDELL PINDER LLP, *supra* note 203.

<sup>205</sup> *Id.*

Furthermore, no other case before or after *Ktunaxa* has determined what an appropriate amount of time to bring a claim would be or whether a claim should be brought by a certain time. Thus, without further guidance, Aboriginal nations are left to wonder whether there is a time limit to bringing claims and whether their claims will be taken less seriously if not brought immediately in the during consultation process.

If the Ktunaxa could prove that their connection to the land—for religious worship and practices—has continued over many generations and is directly connected to how and whether future generations will continue religious practices, the Ktunaxa’s claim for title under Section 35 would be very strong. That showing would likely require the government to halt any construction efforts that would adversely affect the Ktunaxa’s interests in the land.

*b. Religious Freedom*

The Court also implicitly reasons that Section 2(a) of the Charter does not recognize that spiritual beliefs and practices can be fundamentally connected to specific locations. Therefore, Section 2(a) does not extend to the “object of beliefs” or the “spiritual focal point of worship.”<sup>206</sup>

This conclusion is not persuasive. If one was to compare religious belief and its connection to a certain location in the context of a church, mosque, or synagogue, the courts would likely find that destruction of these sites would fundamentally interfere with the ability to worship.<sup>207</sup> However, the Court did not recognize these parallels and instead seemed to have downplayed the importance of the Ktunaxa’s religious belief in the grizzly bear.

As of now, there is no other case that has been brought before the Canadian courts by a First Nation that asserts a religious freedom claim connected to their ancestral land. Given the disappointing outcome of the *Ktunaxa* case, Aboriginals will likely not use Section 2(a) as a tool to protect the spiritual importance of a specific sacred site. Thus, best chance of success will be to bring a land claim under Section 35 of the Constitution Act, 1982.

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<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

c. *Judicial Review*

On judicial review, the Ktunaxa sought to have the Court declare Qat'muk a sacred site to the nation in order to prevent permanent construction on that site.<sup>208</sup> However, the Court concluded that an administrative decision maker, and subsequently a judge on judicial review, is not able to rule on the existence of a claim to a Section 2(a) Charter right.<sup>209</sup> Specifically, the Court stated that “the solution is not for courts to make far-reaching constitutional declarations in the course of judicial review proceedings incidental to, and ill-equipped to determine, Aboriginal rights and title claims.”<sup>210</sup>

The decision of the Court infers that there is a limit as to what can be determined on judicial review in the context of the duty to consult and accommodate, indicating that judicial review does not function as a forum for the adjudication of the existence of rights.<sup>211</sup> Instead, this determination must take place in a trial setting, where the Ktunaxa's claims could have been heard through evidence presented to the trial court.<sup>212</sup>

### III. CONCLUSION

The Ktunaxa's claim of religious infringement by the construction of a permanent ski resort on their ancestral land was amply supported by their oral history and religious practices. Construction of the permanent ski resort will have an irreparable impact on their land. However, the record did not adequately explore the religious significance of this land and the Supreme Court ultimately ruled for the government. While this is not the right outcome, it is what the Aboriginal people and the courts are left with. Had the Ktunaxa instead brought an Aboriginal land claim instead of a religious freedom claim, they would have had a better chance of preventing the construction of a ski resort on their land. While no precedential value should be given to this case due to the undeveloped record, the implications of this decision are clear: Aboriginal nations must rely on Section 35 claims of the Constitution Act, 1982 to stop the government from infringing on their rights. A further consideration is that as time goes on, less evidence of First Nations

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<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

<sup>210</sup> *Id.*; Ktunaxa Nation v. British Columbia, 2017 SCC 54, para. 86 (Can.).

<sup>211</sup> MANDELL PINDER LLP, *supra* note 203.

<sup>212</sup> *Id.*

occupation, practices, and customs will be available as traditional use of oral history is dying out. This negatively impacts future generations of Aboriginals who will be left with little use to support claims to their rights and land titles. History and the present ongoing issues in Aboriginal law indicate that this, unfortunately, is very likely to happen.



