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Canada's Ancient and Modern Constitution: Tribalism and Reconciliation

Introduction: Tribalism

Why do we have international borders? The late Justice Alvin Rosenberg, formerly of the Ontario Divisional Court, once said: "All international borders should be abolished." He said that the very concept of international borders was not defensible morally. The central ideas of liberalism: that all people have equal dignity, equal worth, and equal rights, leads ultimately to the idea that boundaries between states have no legitimacy. But states exist, and they exist because human beings are tribal.

Tribalism. The central problem that every constitution tries to solve is the problem of tribalism. What is the boundary of the state? What is the scope of state power over people in different parts of the state, and different people within the state? What are the rights of the rulers and the ruled? Those questions are about nationality, citizenship, sovereignty of distinct peoples, political, economic and property rights based on birth, identity, inheritance, language, shared history[1], and race. All those questions are infused with the concept of <u>us</u> versus <u>them</u>. No matter how big or small is the state, there will be

[1] [470] I conclude that the proper rights holder, whether for Aboriginal title or Aboriginal rights, is the community of Tsilhqot'in people. Tsilhqot'in people were the historic community of people sharing language, customs, traditions, historical experience, territory and resources at the time of first contact and at sovereignty assertion. The Aboriginal rights of individual Tsilhqot'in people or any other sub-group within the Tsilhqot'in Nation are derived from the collective actions, shared language, traditions and shared historical experiences of the members of the Tsilhqot'in Nation. *Vickers, J. in Tsilhqot'in Nation v. British Columbia, 2007 BCSC 1700*

tribal divisions within it. Constitutions attempt to provide legal rules for how the different tribes within the state will treat each other.

Good Tribalism vs Bad Tribalism. We all draw moral boundaries between different kinds of tribalism. We think that some kinds of tribalism are unfair and destructive, and yet we celebrate other kinds of tribalism. For example: racism is inherently detestable, but the right of distinct peoples to self-determination is seen as noble. Exactly where to locate the moral boundary between good tribalism and bad tribalism is one of the most difficult questions of our times. The passionate debate about Brexit in the UK is a good example. Is Brexit the noble assertion of the British people to determine their own destiny, or is it a hostile, xenophobic, nearly racist display of the worst form of identity politics?

What is the Canadian solution? Canada is possibly the most decentralized and tribal of all the modern nation states. Canada has one of the world's oldest written constitutions, and it confirms two kinds of tribalism: the distinct legal powers of the provinces, with particular emphasis on protecting the culture and language of Quebec, and the unique legal continuity of the indigenous nations and their rights. It is an extremely complex solution to the problem of tribalism.

Canada's Ancient and Modern Constitution

The Royal Proclamation of 1763. Canada was founded in 1763[2] under a constitution based on five principles:

1. sovereignty of the British Crown,
2. democracy,
3. the rule of law through access to the courts,
4. protection of Indian lands, and

[2] *Royal Proclamation of October 7, 1763*. Canada is not a new country. This is one of the oldest written constitutions in the world.

5. benefits for veterans. (*this fifth aspect of the constitution is now moribund*)

Over 200 years later, the Supreme Court of Canada said: “In our view, there are four fundamental and organizing principles of the Constitution which are relevant to addressing the question before us (although this enumeration is by no means exhaustive): federalism; democracy; constitutionalism and the rule of law; and respect for minorities.”[3]

What the Royal Proclamation of 1763 does. The *Royal Proclamation of 1763* protects for the “several Nations or Tribes of Indians” the lands “reserved to them … as their Hunting Grounds”. Packed into this fundamental constitutional document from 256 years ago are twelve ideas and doctrines which are relevant to us today.

1. “**The Government of Quebec**” (formerly called New France)

   This document created a new country, which was originally called Quebec, but the name was changed soon after to Canada. The country was established with boundaries and a government. This is one of the oldest written constitutions in the world.

2. “**General Assemblies**”

   The new country will be a democracy. Formerly, it was a monarchist, feudal state. Democracy came to Canada before it came to France, where the French Revolution occurred 26 years later. Canada is one of the oldest democracies in the world.

3. “**Courts of Judicature and public Justice**”

   The Royal Proclamation sets up Courts and the rule of law in the new country. The rule of law could not be taken for granted in pre-revolutionary monarchist France or the Spanish empire, which were the prior governments displaced by the Royal Proclamation.

   The relationship between the Crown and the aboriginal peoples is governed by law. The purpose of setting up courts was for the

[3] Reference re Secession of Quebec, [1998] 2 SCR 217, at paragraph 32.

"security of the Liberties and Properties" of the "Inhabitants", and of course, the Aboriginal people were inhabitants. A right of appeal to the Privy Council was built into the new court system. Throughout Canadian history Indian people have always used the courts to protect their inheritance, except where actually prevented from doing so.[4]

Since 1763 the word "Indian" has been a legal term, and the questions: "What are the land rights of Indians?" and "What are the Crown's obligations to protect Indian Lands" have been legal questions, justiciable in the courts. Thus, right from the beginning, the Constitution of Canada explicitly or implicitly contemplates:

- Access to the courts by Aboriginal "inhabitants" to protect their "Properties".
- Access to the courts by the Crown to prevent unauthorized transactions with Aboriginal people.
- Access to the courts by Aboriginal people against the Crown when the Crown fails in its protective and fiduciary obligation.

4. "**Indians**"

In 1763 "Indians" becomes a legal and constitutional term. It is the name given by the constitution to the aboriginal occupants of Canada.

Since 1763 the question: "Who is an Indian" has been a legal question.

- Later terms include Eskimo, Inuit, Metis, Aboriginal, First Nations, indigenous, native.
- The identification of a particular class of inhabitants inevitably leads to rules for status as an Indian under the constitution, and under the Indian Act.
- For section 35 rights, means establishing a connection to the ancestors at the time of sovereignty.

[4] Notoriously, in three ways: By the requirement of a fiat to sue the Crown, as in *Calder et al. v. Attorney-General of British Columbia*, [1973] SCR 313; by prohibition against accepting payment from Indians to cover the cost of litigation, as in the *Indian Act*, RSC 1927, c. 28, s. 141; or by the sheer expense of getting into court, as described in *Xeni Gwet'in First Nations v. British Columbia*, 2002 BCCA 434 (advance costs).

5. “**Nations or Tribes of Indians with whom We are connected**”

The “Nations or Tribes” are political entities which already exist, and which compete with the British Crown for some aspects of sovereignty and jurisdiction. These political nations are not created or destroyed by Crown sovereignty, rather, the Crown tolerates and encourages their continued existence under the Crown’s umbrella. This is the origin of the separate legal status of Indian, Inuit, and Metis peoples, their collective and individual identities and rights. “Bands” or “First Nations” are the successors to these political entities. They are called “Indians” in the Constitution of 1867, “aboriginal peoples” in the Constitution of 1982, and “Indigenous peoples” in the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP). All of these are legal terms, with justiciable legal meanings under Canadian law. The Federal Minister is still legally the Minister of Indian Affairs and Northern Development but is now known by the working title of the Minister of Crown-Indigenous Relations, sharing duties with the Minister of Indigenous Services. The British Columbia minister is called the Minister of Indigenous Relations and Reconciliation.

“With whom we are connected”. This is similar to the recognition of foreign states under international law. These are the political organizations of the Indians, recognized diplomatically, and since 1763, legally under domestic law. This is the point of transition from international law to domestic constitutional law.

- Later they became known as “bands” under the Indian Act, “a body of Indians”
- Later – the Indian Act established rules for membership in bands

6. lands “**reserved**”

Origin of the concept of “reserve”. The government sets aside a huge Indian reserve.

- Later, under treaties, lands are set aside as reserves

- In some provinces, including B.C., lands are set aside as reserves even when there are no treaties.

This is the origin of the unique set of laws regarding Indian lands. 1763 is the point of departure from English law. Although the Royal Proclamation says that the new country will be governed "as near as may be agreeable to the Laws of England", the Proclamation is also the root of a distinct body of law which only exists in North America[5], namely the unique set of laws governing Aboriginal lands.

In 1867 Canada was divided into provinces[6] and became a federal state with exclusive federal legislative jurisdiction over Indian, Inuit[7] and Metis[8] matters, including exclusive federal legislative jurisdiction over "Indians and Lands Reserved for the Indians"[9]. Right after Confederation, Parliament passed the first *Indian Act*[10], which continued the pre-Confederation enactments of the Province of Canada. It remains the oldest distinctly Canadian statute on the

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[5] The United States is also subject to the *Royal Proclamation of 1763*. The American Revolution, and Constitution, did not occur until 1776 and 1791, respectively, and the United States Supreme Court quickly affirmed that the underlying body of law founded on the Royal Proclamation would continue to apply. *Worcester v. Georgia*, 31 US 515 (1832), Cohen's Handbook of Federal Indian Law, 2012 Ed., LexisNexis, page 185 ff.

[6] For the second time. In 1791 the "Province of Quebec" was divided into Upper Canada and Lower Canada. In 1840 those two provinces were united into the "Province of Canada". In 1867 the Province of Canada was divided into Ontario and Quebec.

[7] *Re Eskimo Reference* [1939] SCR 104.

[8] *Daniels v. The Queen*, 2016 SCC 12

[9] *Constitution Act, 1867*, s. 91(24).

[10] It was not called the "Indian Act". It was "*An Act providing for the organization of the Department of the Secretary of State of Canada, and for the management of Indian and Ordnance Lands*" S.C. 1868, c. 42 (31 Vict.). "Management" of Indian lands was found in section 6.

> 6. All lands reserved for Indians or for any tribe, band or body of Indians, or held in trust for their benefit, shall be deemed to be reserved and held for the same purposes as before the passing of this Act, but subject to its provisions; and no such lands shall be sold, alienated or leased until they have been released or surrendered to the Crown for the purposes of this Act.

Note that in 1868 the Act provides for continuation of the previous system -- "for the same purposes as before" -- which was found in the Royal Proclamation and in the statutes of the Province of Canada, and the provinces of Upper and Lower Canada. In 1868 the expression "lands reserved" includes the huge reserve of Aboriginal title lands protected by the Royal Proclamation, not just the tiny reserves which were the result of treaty-making and the Indian Reserve Commission.

books. The *Indian Act* was originally called "*An Act … for the Management of Indian … Lands*", and it might have been more properly called "*An Act to protect the lands of the several Tribes and Nations of Indians*" [referred to in the Royal Proclamation], because its main function has always been to carry forward the policy of the Royal Proclamation to protect Indian lands, and to interpose the Crown between prospective purchasers and the Indian tribes, to prevent fraud and abuse.

Starting with that basic structure successive Parliaments have tacked on provisions regarding taxation, education, wills and estates, prohibition on potlatches, and many other controversial and obnoxious policies, and most of those add-ons have now been repealed or superseded by alternate, optional legislation. But through all that, the underlying protective responsibility of the Crown regarding Indian lands has never been touched.

There are many types of Aboriginal lands in Canada. The Crown obligation to protect Aboriginal lands is more complicated than it was in 1763 because of the proliferation of different types of Aboriginal interests in land. The three main[11] types of Aboriginal interest in land are:

- Aboriginal title lands.
- Reserve lands.
- Land-based Aboriginal rights and treaty rights.

A word about each is necessary to understand the resulting Crown/Aboriginal litigation. I will leave aside land regimes under modern treaties because only a few of British Columbia's First Nations have modern treaties. Tsawwassen is a notable example. In such cases land transactions are governed by the Treaty, which is a constitutional document, and which overrides the Indian Act and any other statute. Because the laws related to treaty lands are unique to each treaty, it is impossible in a short paper like this to draw generalizations.

[11] For a more complete list see: "16 Types of Aboriginal interests in land that may be encountered by lawyers and notaries in B.C." by Jack Woodward, The Scrivener, Vol 25, No. 4, page 65 (Winter, 2016).

Aboriginal title lands. There is only one tract of aboriginal title land known to exist in British Columbia: about 2,000 square km in the Nemiah Valley and north of Chilko Lake which was declared to belong to the Tsilhqot'in people by the Supreme Court of Canada in 2014[12]. It is likely that there are many more areas of Crown land that are subject to aboriginal title within the province. The process for deciding if land is subject to aboriginal title is either under the British Columbia Treaty Process, or, as happened in *Tsilhqot'in*, by court decision. In *Tsilhqot'in* both Canada and B.C. were Defendants.[13]

> **Note: Crown as a party to Litigation**: This raises the question of the proper role of Canada in Aboriginal title litigation. Canada is clearly a necessary party: "Aboriginal rights are a limit on both federal and provincial jurisdiction." *Tsilhqot'in v. B.C.,* 2014 SCC 44 at paragraph 141. Should Canada support, oppose, or remain neutral? Litigation in the United States for Aboriginal title is commonly commenced by the United States as Plaintiff, suing on behalf of the Indian nation, with the state as Defendant. Just prior to resigning as Minister of Justice early in 2019, Hon. Jody Raybould-Wilson promulgated a statement of Canada's policy in this regard, known as: The Attorney General of Canada's Directive on Civil Litigation Involving Indigenous Peoples.

Indian Act reserves:

> **Indian Act**
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> **18 (1)** Subject to this Act, reserves are held by Her Majesty for the use and benefit of the respective bands for which they were set apart, and subject to this Act and to the terms of any treaty or surrender, the Governor in Council may determine whether any purpose for which lands in a reserve are used or are to be used is for the use and benefit of the band.

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[12] *Tsilhqot'in Nation v. Canada and B.C.*, 2014 SCC 44.

[13] The model pleadings in an Aboriginal title case are briefly sketched in Bullen & Leake& Jacob's Canadian Precedents of Pleadings, Third Edition, Volume 1, page 11, however, the "bare-bones" nature of these pleadings was criticized by Myers, J. in *Nuchatlaht v British Columbia*, 2018 BCSC 796.

The *Indian Act* carries forward a policy for reserves that is almost identical to the policy set down by the *Royal Proclamation of 1763*. There are over 600 bands in Canada, with over 2,000 reserves, and the Indian Act governs most of them. Most reserves remain communally-held lands controlled by the Chief and Council of the band. It is trespass for a non-member of the band to be on a reserve without a lawful excuse:

> **Indian Act**
> **30** A person who trespasses on a reserve is guilty of an offence and liable on summary conviction to a fine not exceeding fifty dollars or to imprisonment for a term not exceeding one month or to both.

An action for trespass, either criminal or civil, may be brought by Canada[14], by the band[15], or by an individual member of the band[16]. These trespass cases are deemed to be a "proceeding by the Crown" and take place in Federal Court.[17] Despite rampant trespass on Indian reserves in Canada, such proceedings by the Crown are currently very rare.

The leading case on the protective obligation of Canada is *Guerin v. The Queen*, [1984] 2 SCR 335. *Guerin* decided or confirmed these fundamental points:

1. The Indians' interest in their lands is a pre-existing legal right not created by the *Royal Proclamation of 1763*, by s. 18(l) of the *Indian Act,* or by any other executive order or legislative provision.
2. The nature of the Indian interest in land is the same for reserve land as for aboriginal title land. At its heart, the Indian interest in land is best characterized by its inalienability, coupled with the fact that the Crown is under

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[14] *Indian Act*, s. 31(1).
[15] *Indian Act*, s. 31(3).
[16] *Indian Act*, s. 31(3) applies to criminal trespass on a reserve. There is some doubt about the ability of an individual Indian to bring a civil action for trespass. See the cases collected at note 14, paragraph 9:120, in Woodward, Native Law, Thomson/Reuters/Carswell.
[17] *Indian Act*, s. 31(2).

an obligation to act as protector of the Indian interest in any dealings with the land.

3. The nature of Indian title places upon the Crown an equitable obligation, enforceable by the courts, to deal with the land for the benefit of the Indians. This fiduciary relationship puts the courts in a central role in regulating the relationship between the Crown and the Indians.

Land-based Aboriginal rights and treaty rights. Almost every part of British Columbia is subject to either aboriginal rights or treaty rights. Those rights are typically the rights to hunt, fish, trap and gather. There is no registry or public database in which the existence of those rights to a particular tract of land is recorded. Fee simple lands are often subject to such rights,[18] though the impact is obviously diminished when there are no longer any big game animals to hunt or any fur-bearing animals to trap. To date, most litigation about these rights has been confined to the Crown acting as prosecutor against native people charged with offences under the Wildlife Act, who raise their Aboriginal or treaty rights as a defence.

A notable exception is the decision of the late Vickers, J. in *Tsilhqot'in Nation v. B.C.* 2007 BCSC 1700, in which he issued a declaration against the Crown that the Tsilhqot'in people have:

"an Aboriginal right to hunt and trap birds and animals throughout the Claim Area for the purposes of securing animals for work and transportation, food, clothing, shelter, mats, blankets and crafts, as well as for spiritual, ceremonial, and cultural uses. This right is inclusive of a right to capture and use horses for transportation and work, and an Aboriginal right to trade in skins and pelts as a means of securing a moderate livelihood."[19]

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[18] *R. v. Bartleman*, 12 DLR (4th) 73; 55 BCLR 78; 13 CCC (3d) 488; [1984] 3 CNLR 114, is a B.C. Court of Appeal case that upheld a treaty right to hunt on some fee simple lands just north of Duncan. There are dozens of similar examples, and they cover virtually the whole province.

[19] *Tsilhqot'in Nation v. B.C.* 2007 BCSC 1700, "Executive Summary" provided by the Court. The Aboriginal rights aspect of the decision was upheld on appeal to the B.C. Court of Appeal in *William v. British Columbia*, 2012 BCCA 285, and did not form a part of the Supreme Court of Canada appeal.

7. "**should not be molested or disturbed"** (in their lands)

It is trespass to go into Indian lands.

- Carried through into the Indian Act.
- No seizure or sale of Indian reserve lands.

Leads to freedom from taxation, so the nations will not lose their traditional territories through tax sales. This is the origin of the modern tax exemptions under the Indian Act

8. "**as their Hunting Grounds**"

The government promised to preserve the economic base for the Indian Nations. This was their food security, their cultural base, and their main asset.

- Each nation or tribe had a territory, later called a traditional territory.
- Aboriginal rights, aboriginal title, and treaty rights all derive from the traditional territories.

- **Environmental protection**. Increasingly, the enforcement of Aboriginal and treaty rights in court is becoming the most potent aspect of Canadian law for the protection of the environment.[20] When Federal and provincial governments fail to protect lands and waters from destructive industrial development, First Nations use the courts to invoke their constitutionally protected rights to hunt, fish, gather, and otherwise manage the biological productivity of their lands. Cases about Aboriginal and treaty rights inevitably become cases about biology – what is the harvestable surplus? what is the cumulative impact of development? – these are the type of questions which arise in Aboriginal litigation. 256 years after the Royal Proclamation, the defence of "Hunting Grounds" remains a central issue in Canadian courts. The Proclamation

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[20] For example, a high-priority, Crown-owned, interprovincial pipeline, that was described by the federal Minister of Finance as "critically important to the economy" was stopped by the courts at the instance of First Nations with environmental concerns: *Tsleil-Waututh Nation v. Canada (Attorney General),* 2018 FCA 153.

guarantee that Indian people can make a living from the land, and in modern times, to protect the ecological systems necessary to sustain the exercise of aboriginal and treaty rights, may be the strongest set of environmental laws in the world.

9. "**great Frauds and Abuses have been committed in purchasing Lands of the Indians**"

The government will protect the Indians and their lands from unscrupulous traders.

- Note that by 1763 there had already been "great Frauds and Abuses", that came to the attention of the British government in London.
- The history of colonization of the Americas is the history of those frauds and abuses, by the Spanish, French, Dutch, English, etc..
- This is the first formal declaration by a European colonizer that this behavior must stop.
- The antecedent to UNDRIP. Recognition that the land rights of indigenous peoples are to be protected.

10. "**if at any Time any of the Said Indians should be inclined to dispose of the said Lands**"

The rule of consent: The assent of the nation or tribe must be obtained, in a transparent process.

- This became the surrender provisions of the Indian Act
- Similar concept now found in Article 10 of UNDRIP: "free, prior and informed consent".

11. "**shall be Purchased only for Us, in our Name, at some public Meeting or Assembly of the said Indians**"

The Indian Act surrender requirements:

- A valid surrender requires a band vote

- There must be a membership list to determine who can vote (who are the "said Indians"?)

Then there became two kinds of surrenders: conditional and absolute:

- Conditional surrenders allow for leasing of reserve lands, now called "designation", one of the main tools of economic development for First Nations.
- Recently, designations can be done by referendum.

12. "**to be held for that Purpose by the Governor or Commander in Chief of our Colony … conformable to such Directions and Instructions as We or they shall think proper**"

A solemn meeting in the presence of the Crown is needed for sale of Indian lands, and the Crown will control the process. The government acts as supervisor, trustee, or fiduciary for the Indian Nations, to guarantee that the process will be fair.

- Leads to the modern law of fiduciary obligations for reserve lands.
    1. A duty coupled with a discretion gives rise to a fiduciary obligation.
    2. The governments of Canada owe fiduciary obligations to the Indian people whenever their lands are being impacted.

- Leads to the rule of justification regarding section 35 rights:
    1. A valid overriding legislative objective.
    2. The honour of the Crown must be upheld
    3. This is the origin of the requirement for consultation and accommodation.

- The Crown is the protector, interposing itself between the settlers and the Indian nations, because "great Frauds and Abuses have been committed in purchasing Lands of the Indians, to the great Prejudice of our Interests, and to the great Dissatisfaction of the said Indians". This is the origin of the fiduciary obligation of the Crown, the separate Federal

> jurisdiction under section 91(24) of 1867, the Indian Act, and the great body of federal legislation concerning Aboriginal peoples. In the early part of Canadian history[21] , and in the United States to this day[22] , the government uses the court system to actively protect Indian lands from encroachment.

Reconciliation through consultation. The overarching purpose of s. 35(1) of the Constitution Act, 1982 is reconciliation.[23] The courts require the Crown and First Nations to engage in a dialogue about potential encroachments on lands and rights protected under section 35, with a view to reconciliation. The legal duty to consult can arise in two ways: Firstly, prior to proof of rights, there is a duty to consult about potential infringements.[24] Secondly once rights have been established, there is a duty to consult about and justify proposed infringements.[25] There is an extensive, complex and growing body of case law about the duty to consult.[26] Under the *Sparrow* analysis, the duty to consult comes near the end of the process of justification. Here is a quote from the headnote of *Sparrow*:

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[21] *Regina v. Baby* (1854), 12 U.C.Q.B. 346 (Upper Canada Queen's Bench, on appeal). In this case the predecessor to the Ontario Court of Appeal upheld the conviction of a purchaser of Indian lands because he did not have government consent.
[22] The American Bureau of Indian Affairs routinely brings actions on behalf of Indian tribes to protect their lands and resources from encroachment. For a recent example see the vast body of litigation under the style of cause "*United States v. Washington*", especially 520 F.2d 676 (1975), [the "Boldt decision"], and supplementary cases under that style of cause well into this century.

[23] *Haida Nation v. B.C.*, 2004 SCC 73 at paragraph 14.
[24] This is the basis for the body of consultation cases deriving from *Haida Nation v. B.C.,* 2004 SCC 73
[25] This is the basis for the body of consultation cases deriving from *R. v. Sparrow* [1990] 1 S.C.R. 1075
[26] There is an attempt to collect, digest and organize this body of law in Chapter 5 in: Woodward, Native Law, Thomson/Reuters/Carswell, updated every two months.

> If a *prima facie* interference is found, the analysis moves to the issue of justification. This test involves two steps. First, is there a valid legislative objective? … If a valid legislative objective is found, the analysis proceeds to the second part of the justification issue: the honour of the Crown in dealings with aboriginal peoples. The special trust relationship and the responsibility of the government vis-à-vis aboriginal people must be the first consideration in determining whether the legislation or action in question can be justified. … The justificatory standard to be met may place a heavy burden on the Crown. …
> Within the analysis of justification, there are further questions to be addressed, depending on the circumstances of the inquiry. These include: whether there has been as little infringement as possible in order to effect the desired result; whether, in a situation of expropriation, fair compensation is available; and whether the aboriginal group in question has been consulted with respect to the conservation measures being implemented. This list is not exhaustive. *(edited and emphasis added)*

In *Tsleil-Waututh Nation v. Canada (Attorney General),* 2018 FCA 153, the Federal Court of Appeal briefly summarized the origin, purpose, and nature of the duty to consult:

> [486] The duty to consult is grounded in the honour of the Crown and the protection provided for "existing aboriginal and treaty rights" in subsection 35(1) of the *Constitution Act, 1982*. The duties of consultation and, if required, accommodation form part of the process of reconciliation and fair dealing (*Haida Nation*, paragraph 32).

> [487] The duty arises when the Crown has actual or constructive knowledge of the potential existence of Indigenous rights or title and contemplates conduct that might adversely affect those rights or title (*Haida Nation*, paragraph 35). The duty reflects the need to avoid the impairment of asserted or recognized rights caused by the implementation of a specific project.

> [488] The extent or content of the duty of consultation is fact specific. The depth or richness of the required consultation increases with the strength of the *prima facie* Indigenous claim and the seriousness of

> the potentially adverse effect upon the claimed right or title (*Haida Nation*, paragraph 39; *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, [2010] 2 S.C.R. 650, paragraph 36).

One might conclude that the recent emphasis on the adequacy of consultation has overshadowed some of the other equally important Crown obligations outlined in *Sparrow*: valid legislative objective, honour of the Crown, minimal impairment, compensation, etc. One would expect litigation on each of these heads equally extensive as litigation about consultation in the years to come. The first fully litigated justification case was decided in August, 2018,[27] paving the way for extensive opportunities to clarify and refine that body of law.

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[27] *Ahousaht Indian Band and Nation v. Canada (Attorney General)*, 2018 BCSC 633, appeal to BCCA heard early 2019.