SHIFTING JUDICIAL CONCEPTIONS OF 'RECONCILIATION': GEOGRAPHIC COMMITMENTS UNDERPINNING ABORIGINAL RIGHTS DECISIONS

Michael McCrossan

Over the course of the past twenty years, the Supreme Court of Canada’s discourse concerning ‘reconciliation’ has shifted from moderating federal power to reconciling the preceding presence of Aboriginal people with an established sovereign (Crown) presence. While scholars postulated that the Court was attempting to maintain colonial relations of power, substantive answers for this discursive shift are lacking within the literature. This paper provides a comprehensive explanation of this shift by comparing the hearing transcripts in the ‘Aboriginal rights trilogy’ to their corresponding written decisions. It argues that particular judicial and geographic commitments underlie the concept of ‘reconciliation’ and ultimately serve to represent Aboriginal identity as inescapably ‘Canadian.’

I. INTRODUCTION

The discourse of ‘reconciliation’ figures prominently in the jurisprudence of the Supreme Court of Canada in the area of Aboriginal rights. While the Court has found ‘reconciliation’ to be an animating principle at the core of section 35(1) of the constitution, the Court’s very use and definition of the term has undergone a number of different permutations over the past twenty years. Since the Court’s initial attempt to define the scope and meaning of Aboriginal rights under section 35(1) in its 1990 Sparrow decision, reconciliation has shifted from a means of moderating federal power to one in which the

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1 Section 35(1) of the Constitution Act, 1982 reads as follows: “The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed” Constitution Act, 1982 being, Schedule B to the Canada Act 1982 (UK), c 11.

2 R v Sparrow, [1990] 1 SCR 1075 [Sparrow]. The Sparrow case concerned a claim by Ronald Sparrow to possess an existing Aboriginal right to fish for food and ceremonial purposes.
preceding presence of Aboriginal people is ‘reconciled’ with an already established and permanent sovereign (Crown) presence. This shift has not escaped academic attention. While a number of scholars have charged the Court with magically ‘plucking’ doctrines out of the judicial ether, or using reconciliation as a strategic tool to ‘integrate’ Aboriginal people into the broader Canadian collective, others have tended to view reconciliation in a more positive light.

However, what is lacking within the literature are substantive answers for the judicial shift itself. While legal scholars have postulated that the Court is invoking reconciliation as a way to uphold predominant economic interests and/or maintain the legitimacy of existing colonial paradigms, such surmises have been formed primarily through a surface level reading of the cases. In this regard, scholars seem to be reading judicial motivations off of the text of the decisions with little evidence for those underlying motivations. Therefore, in an effort to complement the existing literature, this paper moves beyond the expressed reasons delivered by Supreme Court justices, situating them instead within the context of their respective hearing transcripts. However, in order to stay as true to the initial judicial context as possible (and the moment the discursive shape of reconciliation changes direction) this paper compares the hearing transcripts in both the Sparrow case and the ‘Van der Peet trilogy’ to the written decisions themselves. Though analyses of court transcripts have been performed at the lower court level in this area, particularly in regards to Chief Justice McEachern’s 1991 decision in the Delgamuukw case, little attention has been paid to the hearing transcripts at the Supreme Court level. This paper attempts to compensate for this absence and provide a more detailed understanding of relations of power embedded within the judicial domain by examining the types of questions posed by members of the


7 See Christie, “Judicial Justification”, supra note 5.


9 The ‘Van der Peet trilogy’ concerned a series of Aboriginal rights cases which were heard together at the Supreme Court of Canada on 27-28 November 1995. All three cases concerned Aboriginal commercial fishing rights. see Van der Peet, supra note 3; Gladstone supra note 3; R v NTC Smokehouse Ltd, [1996] 2 SCR 672 [Smokehouse].


Supreme Court and the manner in which they respond orally to the positions advanced before them. Furthermore, through examinations of the hearing transcripts, this paper aims to provide a more nuanced understanding of the text of Supreme Court decisions by highlighting the extent to which members of the judiciary either ignored, discounted, or embraced the perspectives advanced by Aboriginal parties before the Court. Ultimately, this paper argues that the cognitive frameworks harnessed by judicial actors are organized around a relatively homogenous understanding of territory (and ‘Canadian’ society) which leaves little room for Indigenous territorial conceptions or understandings of the law. In fact, it is at the very moment in which Aboriginal rights under section 35 are linked to alternate conceptions of territorial space before the Supreme Court that a majority of the Court shifts its understanding of reconciliation, offering instead a unified vision of sovereignty which ensnares Aboriginal peoples within ‘Canadian’ territorial and social space.

This paper will begin by providing a brief overview of literature pertaining to ‘reconciliation’ and the rights of Aboriginal people before turning its attention to the jurisprudence of the Supreme Court of Canada. Due to spatial constraints I have chosen to limit my analysis primarily to the shift that occurs in judicial understandings of reconciliation between Sparrow and Van der Peet. In an effort to provide additional reasons for this shift I will use the hearing transcripts in Sparrow and the ‘Van der Peet trilogy’ as interpretive prisms through which to view the corresponding written decisions. However, while the cases of Van der Peet, Gladstone, and Smokehouse were all heard together, I will primarily limit my discussion to an examination of the Van der Peet decision as it resulted in a new conception of reconciliation which would not only prove to be a significant modification of the prior Sparrow decision, but would ultimately form the basis for the Court’s approach to defining Aboriginal rights in the years to follow. By drawing attention to the primary positions advanced by parties during the hearing, I not only highlight the various concerns and underlying ideas prevalent at particular moments in time, but also provide a contextual lens through which to examine whether such concerns were either excluded or admitted within the decisions fashioned by members of the Court. However, while the primary objective of this paper is to account for the doctrinal shift which occurs in the Court’s treatment of reconciliation between Sparrow and Van der Peet, I will conclude with some remarks on the effects of this shift for Aboriginal title claims through an examination of cases such as Tsilhqot’in Nation

II. COMPETING CONCEPTIONS OF ‘RECONCILIATION’

Indigenous legal scholars such as John Borrows have referred to reconciliation as a ‘powerful metaphor’, particularly in terms of its utilization within colonial contexts. It is ‘powerful’ in the sense that the word itself can evoke the possibility of establishing and maintaining post-colonial relationships with Indigenous populations. As Borrows, Blackburn, and Henderson have noted, ‘reconciliation’

\[12\] Tsilhqot’in Nation v British Columbia, [2014] SCC 44 [Tsilhqot’in Nation].
\[14\] Ibid at 617-619.
\[15\] Ibid.
is often portrayed as the process through which settler governments acknowledge and attempt to correct past historical actions by establishing new forms of association predicated upon ‘mutual recognition,’ dialogic interaction, and respect for Indigenous difference. However, while processes of ‘reconciliation’ hold great potential, particularly if governments are committed to seriously engaging with and addressing past historical mistakes, a number of scholars have suggested that the discourse of reconciliation is nothing more than a tool used by colonial actors to legitimize present relations of power. For instance, Carole Blackburn has suggested that in the contemporary treaty-making era, Canadian government officials often invoke reconciliation as a way to “build legitimacy by linking the treaty with the march of progress and the fulfillment of modern, enlightenment values, but they do not acknowledge the relationship between modernity and the colonization of [A]boriginal people.”

In Blackburn’s view, the language of reconciliation ultimately functions as a way to separate the past from the present and ‘produce’ a form of historical ‘closure’ which leaves present colonial relationships and assimilationist practices undisturbed. Similarly, both Gordon Christie and D’Arcy Vermette have highlighted assimilationist tendencies embedded within the jurisprudence of the Supreme Court of Canada. For instance, Gordon Christie has argued that the Supreme Court’s doctrine of reconciliation ultimately serves to bolster the Court’s own authority (and the legitimacy of the Canadian state) by ensuring that Aboriginal people reside within the broader ‘public sphere’ prior to issuing its rulings. Likewise, D’Arcy Vermette has suggested that the Court’s discourse of reconciliation is inscribed with colonial forms of ‘domination’ designed to further processes of assimilation.

However, it should be noted that the Court’s initial use of the language of ‘reconciliation’ in its Sparrow decision appeared to both engage and confront such colonialist tendencies. In fact, the Court seemed to suggest that past historical actions made by the Crown (as well as its own subsequent sovereign claims) would no longer be immune from judicial scrutiny. Generally speaking, most of the academic criticism directed at the Sparrow decision has revolved around the perception that the Court entrenched ‘colonial mentalities’ by unreflectingly accepting the sovereignty of the Crown. This perception stems from the fact that the Court makes the following statement in the text of its decision:

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18 Blackburn, supra note 16 at 635.
19 Ibid at 622.
22 Vermette, supra note 5 at 65.
It is worth recalling that while British policy towards the native population was based on respect for their right to occupy their traditional lands, a proposition to which the Royal Proclamation of 1763 bears witness, there was from the outset never any doubt that sovereignty and legislative power, and indeed the underlying title, to such lands vested in the Crown.\textsuperscript{24}

However, it is important to note that the Court’s declaratory statement in relation to the ‘undoubted vesting’ of Crown sovereignty is made in the context of describing the history of relations between the Crown and Aboriginal peoples. Although the Court does indeed make reference to the fact that courts have historically acquiesced to the sovereignty of the Crown, this discussion is used by the Court to set up a distinction between claims to sovereignty both prior to, \textit{and after}, the constitutionalization of Aboriginal rights. In fact, what is most interesting about the Court’s initial attempt to define the scope and meaning of the rights ‘recognized and affirmed’ in section 35 is that the Court appeared to view the constitutional changes themselves as ushering in a new constitutional era unbound by traditional judicial assumptions. According to the Court, foremost among the assumptions now ‘in play,’ is Crown sovereignty itself:

\begin{quote}
\ldots the context of 1982 is surely enough to tell us that this is not just a codification of the case law on [A]boriginal rights that had accumulated by 1982. Section 35 calls for a just settlement for [A]boriginal peoples. It renounces the old rules of the game under which the Crown established courts of law and denied those courts the authority to question sovereign claims made by the Crown.\textsuperscript{25}
\end{quote}

This citation within the text of the Court’s decision is not acknowledged by either Asch and Macklem,\textsuperscript{26} Christie,\textsuperscript{27} or Vermette.\textsuperscript{28} The fact that this passage is cited by the Court in the context of discussing the ‘significance’ of section 35 suggests that its members might be willing to reflexively consider the role that courts have played in upholding Crown sovereignty.\textsuperscript{29} In fact, the very narrative of reconciliation which forms the basis for the citation provides an opening for courts to untether their minds from the realm of precedent and begin questioning the legitimacy of Crown sovereignty over Aboriginal people.\textsuperscript{30} While the Court unfortunately does follow some of the ‘old rules of the game’ by upholding the power of the Crown to regulate Aboriginal rights, it is first useful to examine how the Court arrived at its

\textsuperscript{24} \textit{Sparrow}, supra note 2 at 1103.


\textsuperscript{26} Asch & Macklem, \textit{supra} note 23.

\textsuperscript{27} Christie, “Colonial Reading”, \textit{supra} note 23.

\textsuperscript{28} Vermette, \textit{supra} note 5. Interestingly, Patricia Monture-Angus does acknowledge this passage, see Monture-Angus, \textit{supra} note 23 at 106. However, she then incorrectly suggests at 108 that the ‘most damning’ assertion (i.e the unquestioned acceptance of Crown sovereignty) “followed the progressive interpretation talk” rendering it mute, when, in fact, the assertion of sovereignty preceded talk of altering the ‘rules of the game.’

\textsuperscript{29} \textit{Cf} Mark D Walters, “The Morality of Aboriginal Law” (2005) 31:2 Queen’s LJ 470 at 503; Leonard Rotman, “Crown-Native Relations as Fiduciary: Reflections Almost Twenty Years After \textit{Guerin}” (2003) 22 Windsor YB Access Just 363 at 373. While I realize that it could be argued that I may be placing too much significance on a single quotation within the \textit{Sparrow} decision, it should be noted that this passage was also highlighted by Justice McLachlin (as she then was) in her dissent in \textit{Van der Peet} where she drew upon the passage to bolster support not only for a ‘just settlement’ for Aboriginal people, but also for recognition of a “prior legal regime giving rise to [A]boriginal rights,” see \textit{supra} note 3 at para 229-230.

\textsuperscript{30} See Lyon, \textit{supra} note 25.
decision before dismissing *Sparrow* as nothing more than a reaffirmation of traditional colonial mentalities. That is to say that when the Court’s written decision is placed within the context of the struggle that occurs during the hearing over the meaning of the constitution between members of the judiciary and Crown counsels, it can be argued that *Sparrow* should perhaps more accurately be understood as a transitory vision of Crown sovereignty and judicial power. Though *Sparrow* does reflect a disjuncture between acknowledging the existence of Aboriginal rights and reaffirming the power of the government to regulate those same rights, it also contains the foundations for a new normative order enfolded within a vision of what the law currently ‘is,’ and what the law ‘could be,’ in relation to Aboriginal people. In this regard, *Sparrow* not only points toward the need to move beyond the judicial immunization of sovereign claims, but also presents a vision of reconciliation that is underscored by federal duty (and responsibility) to protect the interests of Aboriginal people.

From the very first words set down in the text of the Court’s decision, it is clear that *Sparrow* is to be understood as a fundamental rethinking of the Canadian constitutional order. The Court notes that it is being called upon, for the first time, to determine the ‘strength’ of section 35 “as a promise” to Aboriginal people. Though it is initially undefined, it becomes apparent over the course of the ruling that, for the Court, the ‘promise’ that section 35 holds is one of sovereign reconciliation, a judicial accounting of both past historical wrongs and a commitment to reshaping the relative balance of power between Aboriginal peoples and the Crown. This acknowledgement of (dis)honour is the context for the judgment that is to follow, a narrative beginning out of a past in which an historically all-encompassing Crown systematically violated the legal and territorial rights of Aboriginal people. It is these rights violations at the hand of the Crown that section 35 is designed to bring to an end by providing Aboriginal peoples with both legal “protection” and a “solid constitutional base” upon which to assert their rights. In effect, the vision at the core of the Court’s judgment is one in which the Crown is not only directed to take ownership of its history in relation to Aboriginal peoples but also to recognize that its own sovereign claims are no longer immune from judicial scrutiny.

Building upon precedents established in *Taylor and Williams* (1981) and *Guerin* (1984), the Court notes that the history of relations between the Crown and Aboriginal peoples calls for an understanding that ‘the honour of the Crown’ is always at stake in disputes concerning Aboriginal rights. Though the Court does not go into any substantive detail regarding the history of colonialism, it is this history itself (and its unspoken effects) that the Court invokes to justify limitations on the sovereign power of the Crown. This justification is given in very direct and blunt terms:

Our history has shown, unfortunately all too well, that Canada’s [A]boriginal peoples are justified in worrying about government objectives that may be superficially neutral but which constitute *de facto* threats to the existence of [A]boriginal rights and interests.

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32 See *Sparrow*, supra note 2 at 1083.
33 *Ibid* at 1103.
34 *Ibid* at 1105.
35 *Ibid* at 1110.
36 *Ibid*. 

Given this history of ‘sharp dealing’,\textsuperscript{37} the Court argues that section 35 holds the Crown to a ‘substantive promise’ requiring that the government “bear the burden of justifying any legislation that has some negative effect on any [A]boriginal right protected under s. 35(1).”\textsuperscript{38} When section 35 is placed within this historical context, it becomes clear that the provision does more than merely codify the existing status quo or legislative powers of Parliament. Rather, it fundamentally alters the ‘old rules of the game’ by both restraining the sovereign powers of the Crown and subjecting its legislative objectives to judicial scrutiny. The emergence of this new normative order is described by the Court as follows:

In other words, federal power must be reconciled with federal duty and the best way to achieve that reconciliation is to demand the justification of any government regulation that infringes upon or denies [A]boriginal rights [...] [b]y giving [A]boriginal rights constitutioal status and priority, Parliament and the provinces have sanctioned challenges to social and economic policy objectives embodied in legislation to the extent that [A]boriginal rights are affected. Implicit in this constitutional scheme is the obligation of the legislature to satisfy the test of justification.\textsuperscript{39}

In effect, the narrative that the Court constructs in Sparrow is one of sovereign power ‘tempered’ by responsibilities to both uphold the honour of the Crown and to ‘protect’ the constitutional rights and interests of Aboriginal peoples.\textsuperscript{40} This narrative seems removed from a simple retrenchment of traditional ‘colonial mentalities.’ In fact, it appears to be a direct response to the positions presented by Crown counsel during the hearing. As discussed below, unlike the arguments advanced by Crown counsel concerning the effects of section 35, the power of the Crown under the Court’s vision is neither unbridled nor beyond the scope of judicial review. Rather, sovereign power is presented in Sparrow as being restrained by the new normative order of 1982, by a judicial realm within which the Crown will be called to account for its past actions and to recognize that its future sovereign claims will no longer be sustained through judicial acquiescence.

For instance, a consistent theme linking the positions of the Crown and interveners during the hearing was one of implicit extinguishment. While federal and provincial Crown counsels argued that the word ‘existing’ in section 35 should be understood as protecting Aboriginal rights in the manner in which they could be exercised in 1982 (i.e strict maintenance of the existing status quo), they also suggested that existing regulations pertaining to Aboriginal people should be understood as further defining, and thus circumscribing, the rights of Aboriginal people. In essence, federal and provincial Crown counsels argued that Aboriginal rights could be infringed upon, and ultimately extinguished, through the mere fact of being regulated by federal law. Though members of the judiciary may have been preconditioned to accept the continuing power of the government to infringe upon Aboriginal rights if necessary, they were not prepared to accept the notion that there were no longer any rights left to infringe. The logical inconsistencies of this argument did not sit well with the judiciary. For instance, both La Forest and Sopinka put forward the following questions to counsel for the federal Crown:

\textsuperscript{37} Ibid at 1107.
\textsuperscript{38} Ibid at 1110.
\textsuperscript{39} Ibid at 1109-1110.
\textsuperscript{40} Cf Christie, supra note 23 at 38.
LA FOREST, J: What then does section 35 give the Indians that they don’t have now? Does it have any effect at all?\(^{41}\)

[...]

SOPINKA, J: Mr. Braidwood, could I just get you to explain one thing that I don’t follow. Your argument about the extinguishment of the [A]boriginal right to fish, if you are right, then section 35 would have no further role, would it, because all it protects is [A]boriginal rights?

MR. BRAIDWOOD: That don’t exist.\(^{42}\)

La Forest and Sopinka continue to pose the same questions to Christopher Harvey, a lawyer for the B.C. Wildlife Federation who intervened in the case:

SOPINKA, J: Well, what was Section 35? It was not intended to change anything, not in your argument.

MR. HARVEY: No, no, it was intended to give recognition to [A]boriginal law.

SOPINKA, J: What was the purpose?

MR. HARVEY: It was arguable before that whether [A]boriginal law existed at all, and that argument can no longer be made [...]

SOPINKA, J: But it can regulate them down to nothing.

MR. HARVEY: In my submission it can [...]

LA FOREST, J: If they regulate them down to nothing, then they are not being recognized?\(^{43}\)

In effect, Crown counsels and interveners found themselves caught in a bind. While the general consensus among the parties opposed to Sparrow’s claim was that federal regulations had exhaustively defined (and limited) the right, if taken to its logical conclusion, this would mean that in the absence of such regulations, Aboriginal rights would cease to exist. Or as the federal Crown nonsensically submitted, section 35 recognizes and affirms the non-existence of Aboriginal rights (i.e rights ‘that don’t exist’). Not only does this fail to grant section 35 any corrective or remedial power, but also undermines the ability of the judiciary to derive meaning from the section itself. If the words in section 35 simply point backwards to an empty container, there would ultimately be no role for the judiciary to play in interpreting the constitution as there would be nothing left of the Aboriginal rights that the section was designed to ‘protect.’ It is here then that we can begin to unravel some of the larger implications of the narratives presented by the Crown that have often been overlooked by focusing solely on the text of the Court’s decision. The Crown submissions do not simply remove the power of the judiciary to interpret

\(^{41}\) Supreme Court of Canada, Ronald Edward Sparrow v Her Majesty the Queen (Appeal Proceedings) 3 November 1988, Volume I at 63 [Sparrow Transcripts].

\(^{42}\) Ibid at 100-101.

\(^{43}\) Ibid at 174-175.
the constitution through the notion of ‘non-existence,’ but also explicitly posit that the judiciary does not have the authority to determine the meaning of ‘existing’ Aboriginal rights.

This argument can be seen in the position advanced by counsel for the federal Crown. Both the ‘political’ nature of section 35 and the intention of its ‘framers’ are invoked by the Crown as a means to delegitimize the Court’s adjudicative powers:

MR. BRAIDWOOD: [...] [the word ‘existing’] was inserted in order to allay some of the fears of the provinces that their rights to legislate would not be unduly interfered with [...] ‘The deliberate insertion of the word ‘existing’ in Section 35, coupled with the enactment of Section 37 ... expressed the first part of a political compromise whereby the framers of the constitution of 1982 agreed: (a) to limit the constitutional recognition of [A]boriginal rights to those which survive total or partial extinguishment by validly enacted legislation [...] and (b) to leave the door open for further negotiations with respect to the nature and scope of the rights to be afforded constitutional protection.’

By stressing the ‘political’ character of section 35, the federal Crown makes a clear attempt to undercut the Court’s interpretive authority. Specifically, the invocation of ‘framer’s intent’ can be seen as a discursive reminder to the judiciary that there is a prior, or original, meaning to the section which should be heeded – an original meaning which would, in effect, remove section 35 from the purview of the judicial domain. Not only does the Crown assert that the regulative power of Parliament (and the provinces) continues in the wake of section 35, but the discursive coupling of the section with the promise of political negotiations in section 37 can be seen as an attempt to deny the judiciary the authority to interpret the meaning of ‘existing’ Aboriginal rights. This understanding of the ‘political’ character of section 35 is also expressed by counsel for the provinces of Alberta, Newfoundland, and by counsel for the B.C. Wildlife Federation. However, as the following exchange between Justice Lamer (as he then was) and counsel for the province of British Columbia make clear, these implications were not lost on the judiciary:

LAMER, J: [...] How can we answer – you ask us, you invite us to answer the constitutional question in the negative. Would that not lead us to the conclusion that we cannot answer the constitutional question?

MR. EDWARDS: I would submit not, My Lord [...] even if you assume an [A]boriginal right [...] it is nonetheless not subject to regulatory immunity by virtue of Section 35.

LAMER, J: So then the answer would be, assuming without deciding, that there is such an [A]boriginal right, the answer is no to the question?

MR. EDWARDS: Yes.46

44 Ibid, quoting from factum at 61-62.
45 The attempt to deny the judiciary authority over the meaning of the constitution can be seen in further submissions by Braidwood as he elaborates on the coupling of sections 35 and 37: “And as I say, if the two principles that I have attempted to enunciate are kept in mind, it gives a great scope to what can be done in order, indeed, to allow the balancing of the federal government to continue its role as it always had of balancing competing rights.” See Sparrow Transcripts, supra note 41 at 74 [emphasis added].
46 Ibid at 110-111.
These exchanges between Crown counsels and members of the judiciary demonstrate a fundamental conflict at the core of Sparrow between alternate conceptions of the constitutional order. While Crown counsels seemed to be operating under the assumption that parliamentary sovereignty would continue in relation to Aboriginal rights, their suggestion that the judiciary would have no interpretive role to play in this area fails to appreciate the constitutional changes that occurred in 1982. As section 52(1) of the Constitution Act, 1982 states, the constitution is now the ‘supreme law’ of the land such that any law deemed ‘inconsistent’ with its provisions is rendered unenforceable. To suggest that the Crown had unbridled powers to regulate Aboriginal rights not only fails to situate such regulations within the context of both the ‘inconsistency’ clause in section 52 and the ‘recognition and affirmation’ of Aboriginal rights contained in section 35, but also paradoxically ignores the arena in which such claims are submitted in the first place. It seems logically incoherent for one party to ask the judiciary to rule in its favour while at the same time insinuating that the judiciary has no authority to interpret the constitutional question under dispute. Simply entering the field, and issuing pleadings in accordance with the field’s rules and procedural requirements, can be perceived as a ‘tacit grant’ of acceptance (and legitimation) of the power of the judiciary to resolve the conflict itself.\textsuperscript{47} As Pierre Bourdieu notes, “no one can benefit from the game, not even those who dominate it, without taking part in the game and being taken in by the game.”\textsuperscript{48} In effect, Crown visions of legislative ‘supremacy’ were effectively restrained the moment the Crown submitted its vision to the judiciary for approval. Though the Court is often presented in critical legal scholarship as the willing servant of the state,\textsuperscript{49} the struggle that occurs during the hearing between competing visions of the constitutional order suggest otherwise.

Much of the academic criticism surrounding Sparrow, however, has not just been limited to the (mis)perception that the Court unreflectingly accepted the sovereign power of the Crown. Rather, case commentary on Sparrow has also suggested that by allowing federal regulatory powers to continue in relation to Aboriginal rights, the Court ultimately assumed that Aboriginal laws either did not exist, or could not function on their own, to regulate the fishing right under dispute. For instance, in his ruminations on the Sparrow decision, Kent McNeil set out to answer the question of why the Court decided Aboriginal rights were still subject to federal legislative control.\textsuperscript{50} In McNeil’s view, the Court determined that federal legislative powers would continue because of a concern that a ‘legal vacuum’ would be created if Aboriginal rights were found to exist in a realm beyond the regulatory control of Parliament.\textsuperscript{51} According to McNeil, “the absence of such laws should not be assumed ... [t]he assumption that Aboriginal societies do not have laws governing activities such as fishing should not be made without a factual basis.”\textsuperscript{52} If this assumption did serve as an organizing force within the Court’s decision it would be particularly problematic, but there is no evidence to suggest that this judicial assumption concerning Aboriginal law played any role in marshalling the Sparrow decision along a particular trajectory. McNeil simply points to the Court’s quotation concerning the undoubted nature of

\textsuperscript{49} See Christie, “Colonial Reading”, supra note 23.
\textsuperscript{50} McNeil, “Envisaging Constitutional Space”, supra note 23 at 195
\textsuperscript{51} Ibid at 205.
\textsuperscript{52} Ibid.
Crown sovereignty as evidence that the decision could not have gone any other way. However, an examination of the Sparrow hearing transcripts shows that its outcome cannot simply be explained by charges of ‘judicial activism’ or a deeply entrenched ‘colonial mindset.’ Instead, it would appear that Sparrow’s own lawyer, in his submissions to the judiciary, unwittingly opened the door to the continuation of governmental regulatory regimes.

If Sparrow’s lawyer, Marvin Storrow, had consistently argued that the federal government no longer had the power to regulate Aboriginal rights, one might then be able to claim that the cognitive frameworks harnessed by the judiciary presumed that a legal vacuum could occur in the absence of governmental regulations. However, Storrow neither claimed that the Musqueam had absolute immunity from federal regulatory control nor did he attempt to ground the basis of the fishing rights of the Musqueam solely within their own legal orders or customary laws. Instead, Storrow both conceded the possibility of governmental regulations and offered a Section 1 type justification test very similar to the one the Court would eventually adopt:

STORROW: [...] what we have said here is if there is a continuing power to regulate Aboriginal fisheries, it is submitted that government should bear the onus of proving the existence or justification or restrictive regulation in any prosecution of an Aboriginal fisherman. Government bears the onus of proof under Section 1 of the Charter and by analogy the same should be the case for Aboriginal fishing rights which are more securely protected than Charter rights.

In fact, on a number of different occasions throughout the hearing, Storrow continued to acknowledge the possibility of governmental regulations in this area. Thus, to claim that the Court arrived at its decision on its own, or assumed the non-existence of Aboriginal legal orders, fails to consider the arguments presented before the Court on the topic of regulation. Though, to be fair, Storrow did suggest that the federal government’s regulatory power, if it existed, should only be ‘exceptional’ and ‘strictly limited,’ he nevertheless did provide the Court with an opportunity to broaden the scope of federal regulatory control. For instance, during his submission, and in his final remarks to the judiciary, Storrow directed the Court to particular research in the area of Aboriginal rights:

Now, My Lord, we have referred from time to time in our factum to an article called Understanding Aboriginal Rights written by Professor Brian Slattery. Obviously it is not binding on anyone but, in our research, that article is the best article written on this general topic and we would commend the reading of it to Your Lordships and My Ladies.

Unlike the early work of scholars such as Sanders, Barsh and Henderson, McNeil, and even Slattery himself, Slattery did not conclude, in this particular piece, that Aboriginal rights were fully

\[\text{Ibid at 197.} \]
\[\text{Ibid at 191.} \]
\[\text{Ibid at 197.} \]
\[\text{Sparrow Transcripts, supra note 41 at 35-36.} \]
\[\text{Ibid at 16, 17, 30 and 42.} \]
\[\text{Ibid at 16 and 30.} \]
\[\text{Ibid at 20; see also Sparrow Transcripts, supra note 41 at 208.} \]
protected against governmental infringements. In fact, Slattery suggested that a number of problems would flow from recognizing the unrestricted nature of Aboriginal rights in their ‘original form’:

This approach leads to extreme consequences. It suggests, for example, that regulations implementing basic safety precautions in hunting, or protecting a rare species of animal might be invalid.\textsuperscript{64}

In Slattery’s view, governmental regulations which aimed to conserve natural resources or protect the public from harm would qualify as justifiable restrictions on the rights of Aboriginal people. In other words, though he recognized the ‘continuity’ of Aboriginal law and the foundational importance of their legal orders, he seemed to inevitably place those legal orders in a hierarchical relationship with federal laws. In this regard, he did not consider whether Aboriginal peoples had their own laws governing conservation or general safety, but simply declared that ‘extreme consequences’ would result from allowing unextinguished Aboriginal rights to go unregulated. It is this reasoning, attributed to Slattery, that the Supreme Court relies upon in its determination of a ‘justificatory scheme’.\textsuperscript{65} In other words, to suggest that the Court engaged in a form of judicial activism by reinscribing colonial doctrines, both neglects to take into account the arguments presented by Sparrow’s counsel before the Court as well as the sources that such counsel were recommending to the Court for consideration.

While the Court did import a Section 1 type justificatory scheme for Aboriginal rights violations, it also provided an opening to reimagine colonial structures of thought. Not only did Sparrow suggest the possibility of subjecting sovereign claims to judicial scrutiny, but also declared that federal power must be reconciled with federal duty (and responsibility) to protect the interests of Aboriginal people. However, the new normative order signalled by Sparrow would prove to be fleeting. The next major chain of fishing cases to come before the Supreme Court, known as the ‘Van der Peet trilogy’, ultimately recast the decision rendered by the previous Court into one that was far more restrictive and disabling. Rather than discuss the ‘substantive purpose’ and need to reconcile federal power with federal duty, the majority decision in Van der Peet argued that the “purpose” of section 35(1) was designed to ensure that “the [A]boriginal rights recognized and affirmed by s. 35(1) must be directed towards the reconciliation of the pre-existence of [A]boriginal societies with the sovereignty of the Crown.”\textsuperscript{66}

Russell Lawrence Barsh and James Youngblood Henderson have referred to this conception of reconciliation – and its lack of jurisprudential support – as “a doctrine plucked from thin air.”\textsuperscript{67} They argue that this formulation contains a potentially sweeping power of extinguishment due to the implicit suggestion that pre-colonial practices may have already been extinguished “by the mere existence of

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\textsuperscript{63} In an earlier article Slattery interpreted section 35 to mean that Aboriginal rights were now “rendered sure and unavoidable,” see Brian Slattery, “The Constitutional Guarantee of Aboriginal and Treaty Rights,” (1982-83) 8 Queen’s LJ 232 at 254.
\textsuperscript{65} See Sparrow, supra note 2 at 1109-1110.
\textsuperscript{66} Van der Peet, supra note 3 at para 31.
\textsuperscript{67} Barsh & Henderson, “Naïve Imperialism”, supra note 4 at 998.
British settlement.” Other scholars have also voiced concerns with Lamer’s concept of reconciliation. For instance, John Borrows has suggested that Lamer’s understanding of reconciliation demonstrates that “[t]he assertion of non-Aboriginal sovereignty provides familiar ground from which to define Aboriginal.” Similarly, Kiera Ladner has argued that Lamer’s test is inherently limiting given that it ultimately requires Aboriginal people to reconcile themselves to “the supremacy of the laws, rights, and interests of non-Aboriginal Canadians.” These are important definitional points to note in relation to the assumed supremacy of non-Aboriginal laws and assertions of sovereignty found throughout the decision.

However, while much academic commentary has been written on the ‘Van der Peet trilogy,’ scholars have paid insufficient attention to the spatial relations embedded within the text of the Court’s decision. In fact, what is lacking within the literature are substantive reasons for the judicial shift itself. For example, though the Court has been charged with magically ‘plucking’ doctrines out of the jurisprudential ether, or implicitly serving predominant economic interests, it is important to note that this jurisprudential shift occurs at the precise moment that Aboriginal peoples link their rights to alternate legal orders and understandings of territorial space. For Aboriginal parties appearing before the Court, it was continually stressed that they were not simply claiming rights to engage in particular ‘practices,’ but rather were claiming rights which derived from separate legal orders – legal orders which developed through repeated interactions with particular geographic spaces. However, it is precisely these alternate territorial claims which members of the Court would express great difficulty understanding – and reconciling – with their own perceptions of Aboriginal rights. In fact, the manner in which members of the judiciary respond to these assertions suggest that their own schemes of perception limit their ability to seriously entertain such notions. In this regard, when confronted with perspectives which could potentially destabilize predominant legal and territorial understandings, members of the judiciary invoke a relatively homogenous understanding of space (and ‘Canadian’ society) which excludes alternate territorial conceptions or visions of the law.

III. ‘Dangerous Questions’ and Judicial Schemes of Perception

For example, on numerous occasions, counsel representing Indigenous claimants stressed that the rights of Indigenous nations were intimately bound up with the traditional territories in which they fished and could not be understood or expressed through the discourse of ‘practices.’ Louise Mandell, representing Dorothy Van der Peet, described the rights of the Sto:lo as follows:

68  Ibid.
73  For a discussion of how ‘initial’ or ‘original’ assertions of Crown sovereignty structure judicial thinking, see Borrows, “Frozen Rights” supra note 69 at 42-43.
We say that the position which was taken by the majority [in the Court of Appeal] was wrong in their definition of [Aboriginal] rights as pre-contact practices and the error was compounded by the majority searching for pristine practices which must have the characteristics of a market economy. We say the correct approach is this: [Aboriginal] rights arise from the Sto:lo’s occupation of their territory as distinct peoples before 1846. The occupation is a juridical occupation – that of the people in their territory. It is not a site-specific use […] It is a right in the fish and to the fish. Practices may evidence the right but practices do not define the right.\footnote{Supreme Court of Canada, \textit{Dorothy Marie Van der Peet, N.T.C. Smokehouse Ltd. and Donald and William Gladstone} (Transcription of Tapes) 27 November 1995, Vol I at 10-11 [\textit{Van der Peet, Smokehouse, and Gladstone Transcripts}]}

In effect, what Indigenous parties affirmed before the Supreme Court of Canada during the hearings was that they possessed rights to - and territorial control over - particular areas which flowed directly from their own legal orders. Such positions demonstrate that ‘geographic considerations’ were certainly not irrelevant to the framing of Aboriginal rights by Indigenous parties.\footnote{Chief Justice McLachlin claimed in her \textit{Mitchell} decision that “geographical considerations were irrelevant to the framing of the claimed trading right in the [Aboriginal rights trilogy]” see \textit{Mitchell v Minister of National Revenue}, [2001] 1 SCR at para 59.} Instead, the rights claimed by Aboriginal people were – and are – intimately connected to the geographic spaces they have traditionally inhabited.

It is this understanding of law and territoriality that members of the judiciary seem to have enormous difficulty reconciling with their own understandings (and present day concerns). The following exchange between members of the judiciary and Louise Mandell demonstrates the extent to which such perspectives concerning Indigenous rights to territorial resources disturb predominant understandings of the law:

\begin{verbatim}
IACOBUCCI J.: I am just having some trouble with this point you are making about practices being not the way to focus, to look at the rights, but these cases have underlying them a look at practices. Do they not? I mean when you say that there was occupancy of the land, well, sure there was a practice of occupancy of the land. Native people occupied the land. So in each of these, one could say that there was an antecedent practice behind each of these rights and conclusions as the excerpts show. So, what is wrong with going to a practice? […]

MS. LOUISE MANDELL: My Lord, I would say that the practices evidence the right. They are not the only thing that evidence the right. Also do the customs of the people and the laws of the people. Those evidence the right too. But practice is one of the things that evidences the right. Once you have the evidence, the court then finds the right. Now the right is not the right to the practice. The right is a larger right of occupancy and possession of the land […]

SOPINKA J.: They are not written down so the only way you can determine what the rights were is to look at what happened. I mean, unless they are written down somewhere, the only other alternative I see – maybe there is another one – but you look at what they actually did and that leads you to practices […] certainly you say they have the right to occupy the land; they have the right to live there. What else does it entail? What did they do with it? […] I do not understand this argument that somehow you divine by picking out of the sky what the rights were without looking at the practices.\footnote{\textit{Van der Peet, Smokehouse, and Gladstone Transcripts}, supra note 74 at 35-38.}
\end{verbatim}
These questions posed by members of the Supreme Court concerning ‘what is wrong’ with focusing on manifestations of particular practices reveal the extent to which Indigenous conceptions of law and territory are excluded from judicial consideration. What is removed from this discussion is any serious consideration of Aboriginal legal orders and governing institutions. To suggest that lawyers representing Aboriginal clients were practicing forms of ‘divination’ by plucking rights ‘out of the sky,’ both completely ignores and fails to engage with the perspectives being advanced before them. Members of the Court could have asked about Indigenous legal orders and the extent to which Aboriginal people had laws governing their interactions with traditional fisheries. Such questions should not have been unthinkable given that arguments were continually voiced by Aboriginal parties before the Court in relation to customary laws and rights to traditional fisheries. Instead, the existence of such legal orders is obfuscated and subsumed within a discourse which simultaneously privileges a judicial vantage point that both begins – and ends – with a consideration of particular practices rather than a consideration of the legal orders governing the practices themselves.

The ramifications of such a vantage point can be observed in an exchange between Iacobucci J., Chief Justice Lamer, and David M. Rosenberg representing N.T.C. Smokehouse Ltd. In a manner similar to Louise Mandell, Rosenberg also attempts to ground the fishing rights of the Sheshaht in the customary laws of the people. However, the questions posed by members of the judiciary in response to this position not only demonstrate the continuing cognitive importance given to ‘practices’, but also a larger concern underpinning the schemes of cognition harnessed by the judiciary:

MR. DAVID M. ROSENBERG: […] The reason I say the test is the way I have said is because I submit it does not flow from the practice of trading or selling fish. The right flows from the fact that this was the traditional fishery of the [A]boriginal group […] The point is it was their fishery. Now, can they sell or trade it today? The only reason they cannot is because the regulations which limit their right to that fishery says they cannot. But there is no legal justification for that. In other words, it is the internal customs and laws of these people that determine what they can do with that fish subject to justified limitations by the Crown.

IACOBUCCI J.: I hear the words and I hear your conclusion. Can you tell me why you come to it?

MR. DAVID M. ROSENBERG: Well, I come to that basically because of the common law, the way it was applied when sovereignty came to British Columbia in 1846 […]

IACOBUCCI J.: What, if you like, is the policy under infrastructure, if I can put it in those terms, that lead you to conclude that it is the fishery that one must look at in looking at the [A]boriginal right, not practices relating to the fishery?

MR. DAVID M. ROSENBERG: It is because of the statements from this Court and the Marshall decisions in the States that the rights arise from the organized society having a relationship with their land […] What was protected was these people’s right to their land […]

LAMER C.J.: Would that apply to – you say once it established that the fishery was theirs and from there on in it is irrelevant what they were doing with it at the time, what they have been doing with it recently or what they will be doing with it in the future. Their right to deal with their fishery as they see fit is entrenched.

[...]
MR. DAVID M. ROSENBERG: Yes.

LAMER C.J.: Now we are talking about fish. Then I guess we can move over to animals. Then I guess we can move over to people. Can we?

MR. DAVID M. ROSENBERG: Well, it is an interesting question. Let us talk about regulation of their –

LAMER C.J.: It is a dangerous question.

MR. DAVID M. ROSENBERG: Yes.

LAMER C.J.: What do we do with people? The way they treated their people at the time of sovereignty was theirs to treat.

MR. DAVID M. ROSENBERG: Yes.

LAMER C.J.: And it is protected. So that the manner in which they treat each other is part of their [A]boriginal right and they can do whatever to each other as they see fit even though it would be quite contrary to what they were doing to each other at the time. That is where it leads. 

This exchange represents a clear moment where the Chief Justice offers a glimpse into the concerns occupying the edges of his thoughts. While his colleague, Iacobucci J., claims to ‘hear’ Rosenberg’s words and ‘conclusions,’ he then either forgets Rosenberg’s argument concerning the ‘internal customs and laws’ of the Sheshat or simply ignores them entirely, instead asking questions that focus solely on the fishery. The end result, however, is the same under either scenario: Aboriginal legal orders are effaced and discounted at the very moment they are spoken. The words of the Chief Justice, on the other hand, indicate that David Rosenberg’s conclusions were clearly heard. It is evident from the Chief Justice’s statements that he is clearly troubled by these conclusions or, more specifically, by the implications of recognizing Indigenous legal orders at a later date. For the Chief Justice, the very recognition that Indigenous peoples had legal rules governing the management of their fisheries could potentially open the door to further claims over territorial resources and populations. While it is unclear exactly what Lamer C.J. is referring to in relation to ‘treat[ing] people,’ it is evident that he is perturbed by the possibilities of recognizing Aboriginal rights in the future. The fact that Lamer C.J. states that such (unnamed) Aboriginal rights would mean that ‘they can do whatever to each other as they see fit’ implicitly suggests that there are no internal limitations within Aboriginal governing structures or legal regimes. Moreover, the fact that the Chief Justice refers to such considerations as ‘dangerous’ indicates that claims to alternate legal orders face significant barriers to achieving recognition within the judicial realm.

IV. ‘CONJURING’ NEW CHAPTERS OF RECONCILIATION

However, when these passages are read in the context of Chief Justice Lamer’s written decision in the Van der Peet case some tentative outlines of the ‘juridical field’ begin to materialize and take form. 

77 Van der Peet, Smokehouse, and Gladstone Transcripts, supra note 74 at 111-114.
78 See Bourdieu, supra note 47.
For instance, the discussions that occurred during the hearing in relation to notions of ‘territoriality’—discussions which accounted for the bulk of the questions posed to the lawyers representing Indigenous parties—are silenced by the Chief Justice in his definition of how to properly approach the rights contained in section 35(1) of the Constitution Act, 1982:

In considering whether a claim to an Aboriginal right has been made out, courts must look at both the relationship of an Aboriginal claimant to the land and at the practices, customs and traditions arising from the claimant’s distinctive culture and society. Courts must not focus so entirely on the relationship of Aboriginal peoples with the land that they lose sight of the other factors relevant to the identification and definition of Aboriginal rights.  

For Chief Justice Lamer, the other ‘relevant’ factors would prove to be the existence of integral practices, customs, and traditions. There is no indication when reading Lamer’s characterization of Dorothy Van der Peet’s claim that it was based on a conception of territorial occupation or that it was linked to separate legal orders. What is clear, however, is that such claims were a primary concern for members of the judiciary during the hearing deliberations. Though Lamer does begin by acknowledging that Dorothy Van der Peet attempted to shift the boundaries of the debate by arguing that the rights asserted were “not simply Aboriginal practices,” he does not accurately characterize or fully account for her position. According to Lamer, Van der Peet’s main submission is that the fishing rights of the Sto:lo are ‘pre-existing legal rights’ (as opposed to pre-contact activities) ‘based in Aboriginal societies and cultures.’ This, however, was only part of the narrative. As discussed, Dorothy Van der Peet’s full submission stated that Aboriginal rights were manifestations of Indigenous relationships with territory and alternate legal traditions. Thus, one could argue that Van der Peet was attempting to give meaning to the sui generis nature of Aboriginal rights by conceptualizing them as originating both outside of the Canadian constitution and as part of Indigenous legal orders.

This absence within the written decision is highly significant, particularly when viewed in the context of the shift that occurs in Van der Peet in relation to judicial notions of ‘reconciliation’. In effect, the moment in which Aboriginal rights under section 35 are linked to alternate conceptions of law and territorial space before the Supreme Court, a majority of the Court retreats from Sparrow’s insistence on jettisoning the ‘old rules of the game,’ offering instead a unified vision of sovereignty which discursively subsumes or ‘merges’ Aboriginal peoples into ‘Canadian’ territorial and social space. As Chief Justice Lamer notes in regards to the correct way to interpret section 35, “what the court must do is explain the rationale and foundation of the recognition and affirmation of the special rights of Aboriginal peoples; it must identify the basis for the special status that Aboriginal peoples have

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79 Van der Peet, supra note 3 at para 74 [emphasis in original].
80 Ibid at paras 76-80.
81 Ibid at para 16.
82 Ibid.
83 Interestingly, Chief Justice Lamer makes the location of Aboriginal rights abundantly clear in his decision: “Courts adjudicating Aboriginal rights claims must […] be sensitive to the Aboriginal perspective, but they must also be aware that Aboriginal rights exist within the general legal system of Canada,” see Van der Peet, supra note 3 at para 49.
within Canadian society as a whole."\(^{84}\) In other words, when read in concert with the hearing transcripts, it becomes apparent that the unspoken concern underpinning the Supreme Court’s decision in *Van der Peet* is that the recognition of Dorothy Van der Peet’s claim has the potential to disturb the Crown’s territorial integrity by entrenching rights which could exist in a potentially limitless and unregulated form. To reduce this territorial threat, Chief Justice Lamer presents a homogenizing vision of reconciliation which equates Aboriginal identity with ‘Canadian’ society and territorial space.

This vision of reconciliation that Chief Justice Lamer presents in *Van der Peet* is framed as a logical outcome of the purposes underlying the enactment of section 35 of the constitution. Though Lamer does begin by acknowledging that Dorothy Van der Peet attempted to shift the boundaries of the debate by arguing that the rights asserted were “not simply [A]boriginal practices,”\(^{85}\) he ignores manifestations of Indigenous relationships with territory and alternate legal traditions by arguing that Van der Peet’s position (as he has described it) “takes s. 35(1) too far from that which the provision is intended to protect. Section 35(1), it is true, recognizes and affirms existing [A]boriginal rights, but it must not be forgotten that the rights it recognizes and affirms are [A]boriginal.\(^{86}\)” How does recognizing rights “based in Aboriginal societies and cultures” extend section 35 ‘too far’ from its intended purpose? On the surface of the written decision it is not entirely clear how this statement logically follows Lamer’s characterization of Van der Peet’s position. However, when viewed through the prism of the hearing transcripts, Chief Justice Lamer’s statement is remarkably similar to one that Justice La Forest makes during the hearing in response to notions of ‘territoriality’:

> [...] but to say that, well, what this is all about is occupancy from which any right can come certainly goes further than any case has had to go and well beyond what Lambert J., who was on your side, had to say, I think. He was at least relying on this kind of practice, but you can do it an entirely different way taking in modern things, and the problem then becomes whether this can be really viewed as [A]boriginal. But to interpret it as widely as I gather you are takes us a little farther afield than even those on your side in the Court of Appeal were willing to go.\(^{87}\)

In effect, what I am suggesting is that while Van der Peet’s full position concerning territoriality is absent from the written portion of the text, Lamer’s decision nevertheless should be understood as a continuation of the majority’s main concern during the hearing that the right asserted by Dorothy Van der Peet threatens the territorial integrity of the state by providing Aboriginal peoples with unlimited and unregulated rights outside the purview of the Crown. To suggest that the rights asserted by Van der Peet would be unlimited and unregulated could only make logical sense if one either ignored the relevancy of Aboriginal ancestral laws, or believed them to be non-existent in the first place.

It is within this context of solidifying the Crown’s legal and territorial integrity that Chief Justice Lamer presents a wholly different vision of reconciliation than that found in the Court’s *Sparrow* decision. According to Lamer, section 35 was enacted to fulfill the following purpose:

\(^{84}\) *Ibid* at para 27. Lamer employs similar phrases on a number of occasions: “The Court must neither lose sight of the generalized constitutional status of what s. 35(1) protects, nor can it ignore the necessary specificity which comes from granting special constitutional protection to one part of Canadian society,” see *Van der Peet*, supra note 3 at para 20.

\(^{85}\) *Van der Peet*, supra note 3 at para 16.

\(^{86}\) *Ibid* at para 17[emphasis in original].

\(^{87}\) *Van der Peet, Smokehouse, and Gladstone Transcripts*, supra note 74 at 38-39.
[...] what s. 35(1) does is provide the constitutional framework through which the fact that [A]boriginals lived on the land in distinctive societies, with their own practices, traditions and cultures, is acknowledged and reconciled with the sovereignty of the Crown. The substantive rights which fall within the provision must be defined in light of this purpose; the [A]boriginal rights recognized and affirmed by s. 35(1) must be directed towards the reconciliation of the pre-existence of [A]boriginal societies with the sovereignty of the Crown.\footnote{Van der Peet, supra note 3 at para 31.}

This statement concerning reconciliation is invoked multiple times throughout the written decision. On numerous occasions Lamer speaks of Aboriginal rights, Aboriginal societies, and pre-existing Aboriginal claims as being reconciled with the sovereignty of the Crown.\footnote{Ibid paras 42, 43, 49, 50, 57, 61.} Unlike the Sparrow decision, there is no mention here of reconciling federal power with federal duty. Instead, Lamer’s version of reconciliation appears designed to temper the future territorial claims of Aboriginal people rather than tempering the power of the Crown, or reconciling the Crown to the pre-existence of Aboriginal sovereignty and ancestral laws.\footnote{See also Kent McNeil, “Reconciliation and the Supreme Court: The Opposing Views of Chief Justices Lamer and McLachlin” (2003) 2 Indigenous LJ 1; Christie, “Judicial Justification”, supra note 5; Walters, supra note 29.}

However, it is also important to consider the manner in which Lamer frames his argument as it can be read as a further denial of Aboriginal laws and territoriality. As Lamer notes, the goal of section 35 is directed towards “the reconciliation of pre-existing [A]boriginal claims to the territory that now constitutes Canada, with the assertion of British sovereignty over that territory.”\footnote{Van der Peet, supra note 3 at para 36.} While one could argue that Lamer’s endorsement of a strict division between Aboriginal title and Aboriginal rights\footnote{See ibid at para 74.} resulted in the narrowing of Dorothy Van der Peet’s claim away from any consideration of the legal orders governing Sto:lo territorial relationships and rights to land, what is clear from Lamer’s description of section 35, however, is that the present territorial space of ‘Canada’ is never far removed from judicial lines of sight. By suggesting that the reconciliation of Aboriginal claims involves both the present reality of Canadian territory \textit{and} prior assertions of British sovereignty over that territory, Lamer ultimately produces a form of spatial enclosure which fully locates Aboriginal people inside the geographic and temporal boundaries of the Canadian state. There is no discussion here of the historical processes, interactions, and resistances which might have occurred after the assertion of British sovereignty; instead, it is the current territorial and social boundaries resulting from that assertion which define the parameters of Indigenous legal orders and spatial conceptualizations.\footnote{For a discussion of the recursive relationship that exists between sovereignty and territorial space, see Nicholas Blomley, \textit{Law, Space, and the Geographies of Power} (New York: Guilford Press, 1994). For further discussions of how the ‘mere assertion’ of sovereignty defines Aboriginal title claims, see Borrows, “Sovereignty’s Alchemy”, supra note 20; see also Bhandar, supra note 8.} In other words, it is the taken for granted existence of the current territorial borders of the Canadian state which ultimately leads to the production of a ‘homogenizing narration’\footnote{See Sparke, supra note 10.} of ‘Canadian’ territorial space. In effect, when read alongside the hearing transcripts, Lamer’s written decision appears to be designed to ensure the
territorial integrity and sovereignty of the Crown by denying Aboriginal territorial understandings and legal orders.

Further evidence of this denial can be observed in Lamer’s decision in *Gladstone* (1996). In this instance, however, when faced with a large scale commercial fishing right, Lamer continues the process begun in *Van der Peet* by discursively submerging Aboriginal peoples and their legal orders within the legal, social, and political boundaries of the larger Canadian society:

> Because, however, distinctive [A]boriginal societies exist within, and are a part of, a broader social, political and economic community, over which the Crown is sovereign, there are circumstances in which, in order to pursue objectives of compelling and substantial importance to that community as a whole (taking into account the fact that [A]boriginal societies are a part of that community), some limitation of those rights will be justifiable.\(^95\)

As Gordon Christie has noted, this reasoning seemingly justifies additional limitations on Aboriginal rights based on the grounds of the ‘common’ or ‘public interest’ of all Canadians, implicitly ignoring Indigenous legal understandings.\(^96\) Given Lamer’s orientation towards the existing boundaries of the state, the discursive placement of Aboriginal people within ‘Canadian society’ ensures that the national boundaries of Canada will not be unduly threatened by Aboriginal claims. Ultimately, by not engaging with the idea that Aboriginal rights are defined (and limited) by Aboriginal laws and customs, Lamer’s presentation of reconciliation in both *Van der Peet* and *Gladstone* ultimately silences the presentations made before the Court concerning the applicability of Aboriginal laws and territorial jurisdictions.

Though the Supreme Court of Canada’s decision in *Sparrow* provided a glimpse towards a future world in which the sovereign claims made by the Crown might be questioned by the Courts and tempered by Crown responsibility and Crown ‘honour,’ this glimpse would prove to be fleeting. At the very moment in which the Court is presented with conceptions of rights grounded in territorial understandings and alternate legal systems, a majority of the Court retreat towards a familiar playing field conditioned by the ‘old rules of the game’ and the looming presence of the sovereignty of the Crown. What is apparent from an examination of the hearing transcripts is that members of the judiciary express clear difficulty with the idea that Indigenous claims are not simply about a desire to engage in particular practices, but rather a recognition and affirmation that the practices themselves flow out of territorial relationships and prior legal orders. Ultimately, when presented with conceptions of rights under section 35 linked to alternate conceptions of law and territorial space, a majority of the Court turns away from *Sparrow*’s vision of jettisoning ‘old rules of the game,’ offering instead a unified vision of sovereignty which submerges Aboriginal peoples within the legal, social, and spatial boundaries of the ‘Canadian’ state.

### IV. SPATIAL RELATIONS OF POWER AND JUSTIFIABLE INCURSIONS

However, while a majority of the Supreme Court in *Van der Peet* may have turned away from *Sparrow*’s vision of reconciliation, on 26 June 2014, the Court released a decision where it granted a

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\(^95\) *Gladstone*, *supra* note 3 at para 73.

\(^96\) See Christie, “Judicial Justification”, *supra* note 5; see also Ladner, *supra* note 5.
declaration of Aboriginal title to the Tsilhqot’in Nation.\footnote{See Tsilhqot’in Nation, supra note 12.} As the first time in which the Court has granted Aboriginal title under section 35, the decision is particularly significant. Not only does the Court seemingly return to some aspects of Sparrow’s presentation of reconciliation, but by also stressing that the Tsilhqot’in Nation has the ability to “reap the benefits” resulting from their rights to “use and control the land,”\footnote{Ibid at para 2.} the decision appears to move away from homogenizing understandings of ‘Canadian’ territorial space. Indeed, while the decision has commonly been referred to as a “game-changer”\footnote{Ibid at para 2.} within media circles, it is worthwhile to consider how the decision is framed within the context of reconciliation and notions of the ‘broader society.’ The Tsilhqot’in Nation ruling, written by Chief Justice McLachlin, in fact continues the trajectory observed in Van der Peet, and later entrenched in Aboriginal title cases such as Delgamuukw,\footnote{See Delgamuukw, supra note 3.} by outlining various ways in which governments can justify “incursions” on Aboriginal title.\footnote{See Amber Hildebrandt, ‘Supreme Court’s Tsilhqot’in Nation ruling a game-changer for all,” CBC News (27 June 2014), online: <http://www.cbc.ca/news/aboriginal/supreme-court-s-tsilhqot-in-first-nation-ruling-a-game-changer-for-all-1.2689140>; see also Bruce Johnstone, “SCOC ruling a game-changer,” The StarPhoenix (28 June 2014) C1 (ProQuest).} In this regard, when the decision is considered within the context of a field of spatial power relations, it becomes apparent that the Tsilhqot’in Nation decision has, in actuality, left those relations largely undisturbed.

On the one hand, the Court should certainly be applauded for granting a declaration of Aboriginal title under section 35. According to Chief Justice McLachlin, the trial judge was correct to find that the evidence supported the Tsilhqot’in Nation’s claim to Aboriginal title. At trial, the Tsilhqot’in Nation were found to have established occupation by demonstrating that they made “regular and exclusive” use of the land in question.\footnote{Ibid at para 27.} In McLachlin’s view, the trial judge did not err when concluding that the Tsilhqot’in Nation had proven the test of ‘exclusivity’ by showing that “prior to the assertion of sovereignty, [the Tsilhqot’in] repelled other people from their land and demanded permission from outsiders who wished to pass over it.”\footnote{Ibid at para 58.} Though it was stressed that the Crown obtained underlying or ‘radical’ title to all land in the province upon the assertion of sovereignty,\footnote{Ibid at para 69.} McLachlin noted that those groups found to possess Aboriginal title “have the right to the benefits associated with the land – to use it, enjoy it and profit from its economic development […] the Crown does not retain a beneficial interest in Aboriginal title land.”\footnote{Ibid at para 70.}

These statements appear to be particularly positive developments. Not only did the Court agree that the Tsilhqot’in had made ‘regular and exclusive use’ of their traditional territories, but in so doing, the Court overturned the far narrower test utilized by the Court of Appeal (and articulated by the Crown) which would have called upon Aboriginal peoples to “prove that [their] ancestors intensively used a definite tract of land with reasonably defined boundaries at the time of European sovereignty.”\footnote{Ibid at para 28 [emphasis in original].} As
noted by Chief Justice McLachlin, such an approach would have substantially reduced the size of territories potentially subject to Aboriginal title.\(^{107}\) The alternative approach expressed by McLachlin appears to move away from purely homogenizing territorial understandings by recognizing the existence of ‘larger territories’ subject to Aboriginal title – territories in which “the title-holding group has the right to choose the uses to which the land is put and to enjoy its economic fruits.”\(^{108}\) While the Chief Justice did not question the fact that the Crown continues to possess radical or underlying title, she did note that Sparrow’s interpretation of section 35 not only “constitutionally entrenches the Crown’s fiduciary obligations towards Aboriginal peoples” but also “requires the Crown to reconcile its power with its duty.”\(^{109}\) In effect, the framework outlined by McLachlin not only appears to provide Aboriginal people with a greater measure of control over how their lands will be utilized and developed, but also ensure that Crown powers are tempered by its responsibilities to act in the best interests of Aboriginal people.

On the other hand, further examination of the Chief Justice’s treatment of reconciliation in the Tsilhqot’in Nation decision reveals a number of increasingly stark measures of territorial control possessed by the Crown. For example, though McLachlin references Sparrow’s understanding of reconciliation, she stresses throughout the Tsilhqot’in Nation decision of the need to achieve the reconciliation ‘project’ outlined by the Court in Delgamuukw.\(^{110}\) Interestingly, the very first time that Chief Justice Lamer (as he then was) invoked reconciliation in Delgamuukw occurred in the context of the need to relax the rules of evidence so as to better accommodate the perspectives of Aboriginal people. According to Lamer, “[t]he justification for this special approach can be found in the nature of [A]boriginal rights themselves. I explained in Van der Peet that those rights are aimed at the reconciliation of the prior occupation of North America by distinctive [A]boriginal societies with the assertion of Crown sovereignty over Canadian territory.”\(^{111}\) As discussed above, Lamer’s treatment of reconciliation in Van der Peet ultimately produced a form of spatial enclosure which situated Aboriginal people inside the territorial and temporal boundaries of the Canadian state. It is this project of reconciliation which would not only be further affirmed by Lamer in Delgamuukw, but given far greater strength by Chief Justice McLachlin in the Tsilhqot’in Nation decision.

For example, as McLachlin makes clear, while Aboriginal peoples might have the ability to ‘control’ how their lands are used to the extent that governments must seek Aboriginal ‘consent’ when desiring to use land held under Aboriginal title,\(^{112}\) this measure of control appears to provide meagre protection against the interests of the broader Canadian society. As McLachlin notes, one of the foremost principles of reconciliation expressed in Delgamuukw is that ‘Aboriginal interests’ must be reconciled with “the broader interests of society as a whole.”\(^{113}\) Indeed, under the guise of furthering the goal of reconciliation, Lamer noted in Delgamuukw that an array of ‘compelling and substantial’ objectives could justifiably infringe Aboriginal title:

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\(^{107}\) Ibid at para 29.

\(^{108}\) Ibid at para 67.

\(^{109}\) Ibid at para 119.

\(^{110}\) Ibid at para 23; see also ibid at para 16.

\(^{111}\) Delgamuukw, supra note 3 at para 81.

\(^{112}\) Tsilhqot’in Nation, supra note 12 at para 76.

\(^{113}\) Ibid at para 82.
… the range of legislative objectives that can justify the infringement of [Aboriginal title is fairly broad. Most of these objectives can be traced to the reconciliation of the prior occupation of North America by [Aboriginal peoples with the assertion of Crown sovereignty, which entails the recognition that ‘distinctive [Aboriginal societies exist within, and are a part of, a broader social, political and economic community’ … In my opinion, the development of agriculture, forestry, mining, and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations to support those aims, are the kinds of objectives that are consistent with this purpose and, in principle, can justify the infringement of [Aboriginal title.\footnote{Delgamuukw, supra note 3 at para 165 [emphasis in original].}

However, what is interesting about McLachlin’s treatment of this passage in \textit{Tsilhqot’in Nation} is that she adds her own emphasis to the section concerning “the development of agriculture, forestry, mining, and hydroelectric power” and “the settlement of foreign populations to support those aims.”\footnote{See Tsilhqot’in Nation, supra note 12 at para 83.} Though McLachlin does attempt to temper these objectives by stressing that they must be “consistent with the Crown’s fiduciary duty towards Aboriginal people,”\footnote{Ibid at para 84.} the fact that McLachlin not only places specific emphasis on these particular objectives, but also presents them in the context of justifying governmental ‘incursions’ (as opposed to ‘infringements’) suggests that the decision does not substantially depart from earlier geographic considerations.

In fact, McLachlin’s substitution of the term ‘incursion’ for ‘infringement’ throughout the decision should not be overlooked. This is the first time that the Court has used the term ‘incursion’ in an Aboriginal title case – or even an Aboriginal rights case for that matter – under section 35 of the constitution. To what extent might this development be important in the context of geographic concerns and understandings of territory? It should be noted that one instance where the term does appear is in Roger William’s Appellant’s Factum submitted to the Supreme Court where it is used to describe forms of territorial control practiced by the Tsilhqot’in in the following manner:

The Tsilhqot’in people exclusively controlled the lands at issue in this appeal before 1846 and long after, and they fiercely defended their land from incursion by other First Nations and from unauthorized entry by settlers and traders.\footnote{Supreme Court of Canada File No 34986, “Appellant’s Factum” (30 May 2013) at 1, online: Supreme Court of Canada <http://www.scc-csc.gc.ca/WebDocuments-DocumentsWeb/34986/FM010_Appellant_Roger-William.pdf> [“Appellant’s Factum”].}

Indeed, David M. Rosenberg, representing Roger William and other members of the Tsilhqot’in Nation at the Supreme Court hearing, continued to stress this form of territorial control in his opening remarks before members of the judiciary.\footnote{See Supreme Court of Canada, Roger William, on his own behalf and on behalf of all other members of the Xeni Gwet’in First Nations Government and on behalf of all other members of the Tsilhqot’in Nation v Her Majesty the Queen in Right of the Province of British Columbia and the Regional Manger of the Cariboo Forest Region, et al (StenoTran Transcription of Compact Disc), 7 November 2013 at 4 [Tsilhqot’in Nation Transcripts].} In other words, when faced with an Aboriginal claim to exclusive control of territory where the land itself was vigorously protected against incursions by both First
Nations and settlers, McLachlin responds in the decision by ensuring that future invasions by ‘settler populations’ can be legally justified. While the Court does recognize that Aboriginal laws can potentially be used to demonstrate title – particularly Aboriginal laws concerning the defence of territory\(^{119}\) – the strength of those laws appear to hold relatively little weight against ‘valid’ governmental infringements (or incursions) committed on behalf of “all Canadians.”\(^{120}\) Indeed, while recognizing that Aboriginal laws could be used as one means of demonstrating exclusive occupation, the Court ultimately noted that the power of provincial governments to ‘regulate’ and ‘manage’ forests located within Aboriginal title lands should continue to apply.\(^{121}\) There is little indication here of the ability of Aboriginal laws themselves to regulate and manage forests within Aboriginal territories. Instead, the \textit{Tsilhqot’in Nation} decision ultimately demonstrates that the ‘project’ at the core of the Court’s framework for reconciliation since \textit{Van der Peet} is one which aims to facilitate the ongoing settlement of ‘Canadian’ territorial space while simultaneously undercutting the strength of Indigenous legal orders.

V. CONCLUSION

While a number of scholars have proposed possible reasons for the doctrinal shift that occurs in the Court’s treatment of reconciliation from \textit{Sparrow} to \textit{Van der Peet} - reasons which range from implicitly serving economic interests\(^{122}\) to legitimizing sovereign powers of the Crown and the Court itself\(^{123}\) - this paper has argued that it is at the very moment in which Indigenous parties define their rights in relation to the control of particular territories in accordance with their own laws that the Supreme Court retreats from the vision of reconciliation initially offered in \textit{Sparrow} and subsumes the identities of Aboriginal people within the borders of the larger Canadian community. The effects of this doctrinal shift can be further observed in the Supreme Court’s \textit{Tsilhqot’in Nation} decision. In the same decision in which the Court not only grants a declaration of Aboriginal title, but also stresses that Aboriginal people have the ability to control how their lands will be utilized, the very strength of this ‘power’ – and the legal orders potentially at the core of Aboriginal title claims – appear to exist in a relatively precarious position in relation to the interests of ‘all Canadians.’ What is perhaps most surprising about these developments is just how explicit Supreme Court justices have been during appeal hearings in relation to their own underlying schemes of cognition and ways of ordering the world. Not only have members of the

\(^{119}\) See \textit{Tsilhqot’in Nation}, supra note 12 at para 49-58. Further evidence of the difficulty individual Supreme Court Justices encounter when attempting to comprehend Indigenous legal systems (particularly when ‘modern’ legal institutions are taken as the defining standard) can be seen in comments made by Justice Rothstein during the \textit{Tsilhqot’in Nation} hearing where he pondered establishing Aboriginal title on the basis of Aboriginal laws in the following manner: “I guess I’m just not understanding how that could operate. I mean there were no Courts […] it’s a little hard to understand what today we would call a legal occupation or a legal title.” See \textit{Tsilhqot’in Nation Transcripts}, supra note 118 at 33.

\(^{120}\) See \textit{Tsilhqot’in Nation}, supra note 11 at para 125.

\(^{121}\) See \textit{Ibid} at para 147-151. Though McLachlin determined in this particular case that the \textit{Forest Act} did not apply to Aboriginal title lands, she bluntly stated the ‘obvious’: “I add the obvious — it remains open to the legislature to amend the Act to cover lands held under Aboriginal title, provided it observes applicable constitutional restraints.” See \textit{Ibid} at para 116.

\(^{122}\) See Christie, “Judicial Justification”, supra note 5.

\(^{123}\) See Barsh & Henderson, \textit{supra} note 4; Bhandar, \textit{supra} note 8; Vermette, \textit{supra} note 5.
judiciary expressed confusion with regard to conceptualizing Aboriginal rights outside of particular practices on the land, they have also discounted claims concerning the persistence of Indigenous laws in relation to particular territorial spaces. While members of the Court have suggested that ‘geographical considerations’ were irrelevant to the framing of the rights in the ‘Van der Peet trilogy,’ such considerations certainly did not seem irrelevant to the positions expressed by Aboriginal parties during the hearings. In fact, when comparing the hearing transcripts to the written decisions themselves, one could also argue that such considerations were neither irrelevant to members of the judiciary for it is at the very moment in which Aboriginal peoples argue for control over particular territories that the Court presents a vision of sovereignty and territorial space which merges Aboriginal legal orders, territorial jurisdictions, and conceptions of identity within the larger boundaries possessed and policed by the sovereign. Indeed, when it would later face a claim for Aboriginal territorial control based upon an ability to repel historic intrusions by both First Nations and settlers in *Tsilhqot’in Nation*, the Court would ultimately respond by outlining justifiable ‘settler incursions’ on Aboriginal title lands in the name of promoting the interests of the broader Canadian society. In effect, what emerges from this reading of both the hearing transcripts and the corresponding written decisions is a judicial construction of Aboriginal identity as inescapably ‘Canadian’ which ultimately serves to reconcile Aboriginal rights (or ‘practices’), legal orders, and territorial understandings with the current ‘reality’ of Canadian sovereignty and territorial space. This movement demonstrates the need for more research into both the orally expressed concerns of Supreme Court justices and the consequent spatial relations of power inscribed within the text of their decisions. Ultimately, a more ‘honourable’ reconciliation will require that the judiciary confront and reflect upon their own underlying presuppositions concerning the spatial effects of sovereignty so that the legal orders inscribed within the constitutional text of section 35 can be given life and room to breathe within the current territorial spaces claimed by ‘Canada.’