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A Sustainable Co-Existence?

Aboriginal Rights and Resource Management in Canada

by

Cheryl Yvonne Sharvit

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Abstract

This thesis argues that the principle of cultural sustainability should guide the implementation of s. 35(1). It further argues that aboriginal jurisdiction over land and resource use is protected as an aboriginal right under s. 35(1) of the *Constitution Act, 1982*. Aboriginal peoples' relationships with their lands, and the rules and institutions designed to ensure the continuity of those relationships, are integral elements of aboriginal societies.

This thesis concludes that provincial legislation is inapplicable to the extent that it impairs the effectiveness of existing aboriginal management systems. Federal legislation interfering with the exercise of unextinguished resource management rights constitutes an infringement of s. 35 that must be justified. Alberta's *Forests Act* and the *Canada Mining Regulations* are examples of legislative schemes that interfere with aboriginal peoples' ability to protect their relationships with their lands. Neither scheme attempts to accommodate aboriginal peoples' management systems or laws.

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1. Introduction

> "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed."[1]

> "Let us face it, we are all here to stay."[2]

The closing statement of Chief Justice Lamer in *Delgamuukw* v. *British Columbia* speaks to the issue at the heart of s. 35(1) of the *Constitution Act, 1982* and Canada's relations with the aboriginal peoples who occupied these lands prior to the arrival of European settlers: co-existence. The legal and political questions that flow from the issue of co-existence are numerous and complicated. This thesis focuses on some of the issues concerning resource use and management in Canada.

Conflicts between aboriginal peoples and resource developments often result from the incompatibility of industrial development and resource use and aboriginal life ways and values.[3] The ability of aboriginal cultures to flourish is jeopardized by large scale forestry and mineral developments. These conflicts often seem unresolvable. Forestry and mining

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1 Section 35(1) of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982 (U.K.)* 1982, c. 11.

2 *Delgamuukw* v. *British Columbia*, [1997] 3 S.C.R. 1010 at para 186, *per* Chief Justice Lamer.

3 Examples of conflicts arising in the context of forestry are *Halfway River First Nation* v. *British Columbia (Ministry of Forests)*, [1997] 4 C.N.L.R. 45 (B.C.S.C.); *Siska Indian Band* v. *British Columbia (Minister of Forests)*, [1998] B.C.J. No. 1661 (QL) (S.C.); and the much litigated forestry dispute involving the Kitkatla Band: *Kitkatla Band* v. *British Columbia (Minister of Forests)*, [1998] B.C.J. No. 1616 (QL) (S.C.); *Kitkatla Band* v. *British Columbia (Minister of Forests)* (1998) 162 D.L.R. (4th) 568 (B.C.C.A.); *Kitkatla Band* v. *British Columbia (Minister of Forests)* [1999] 1 C.N.L.R. 72 (B.C.S.C.); *Kitkatla Band* v. *British Columbia (Minister of Forests)*, [1998] B.C.J. No. 2667 (QL) (S.C.); and *Kitkatla Band* v. *Birtish Columbia (Minister of Forests)*, [1999] B.C.J. No. 177 (QL) (C.A.). Examples of conflicts in the context of mineral development are *Cheslatta Carrier Nation* v. *British Columbia (Environmental Assessment Act, Project Assessment Director)* (1998), 4 Admin. L.R. (3d) 37 (B.C.S.C.); *Tsay Keh Dene Band* v. *British Columbia (Minister of Environment, Lands and Parks)* (1997), 24 C.E.L.R. (N.S.) 66 (B.C.S.C.); *Taku River Tlingit First Nation* v. *Tulsequah Chief Mine Project*, [1999] B.C.J. No. 984 (QL) (S.C.); *Hamlet of Baker Lake* v. *Minister of Indian Affairs* (1979), 72 D.L.R. (3d) 161 (F.C.T.D.); *Attorney General Ontario* v. *Bear Island Foundation*, [1991] 2 S.C.R. (1989), affirming 68 O.R. (2d) 394 (C.A.).

industries insist that their tenures give them rights to log, build roads, carry out exploration activities or develop mines. Governments purport to have authority to grant these tenures. Aboriginal peoples are increasingly finding that their traditional lands have been impacted by development, and they often oppose any development in what little of their territories remain pristine.

The Supreme Court of Canada's decisions on aboriginal rights in 1996 and 1997 have not reduced the conflict and uncertainty surrounding resource developments in aboriginal peoples' territories. They have produced more questions than answers. Litigation continues in the lower courts, sometimes producing inconsistent decisions.[4] While governments have implemented consultation guidelines and policies for avoiding infringements of aboriginal rights, in practice these processes often prove incapable of settling conflicts. The growing body of case law dealing with the "duty to consult" is an indicator that co-existence is difficult to achieve. At the heart of conflicts surrounding resource development there often lie fundamental differences in worldviews.[5]

1.1. Thesis Overview

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[4] See, for example, *Halfway, ibid.;* and *Kelley Lake Cree Nation* v. *British Columbia (Minister of Energy and Mines)*, [1998] B.C.J. No. 2471 (QL) (S.C.).

[5] The *Siska* litigation provides an example of the seemingly irrenconcilable positions taken by aboriginal peoples on the one hand, and government and industry on the other. The Siska Band insisted on a moratorium on logging in the Siska Creek Watershed. The watershed is the only area in the Band's territory that remains free from the impacts of industrial development. The watershed is used for spiritual ceremonies and other culturally important practices including plant and wildlife harvesting. The province will not consider a moratorium and insists that the Band must identify site specific rights that will be infringed by logging and that could be avoided by adjusting logging and road building activities. See *Siska, supra* note 3 in which the Band sought an injunction to prevent construction of a logging road.

This thesis asks the question what is the role of aboriginal peoples in managing Canada's natural resources. While I base my analysis on the existing framework for s. 35 established by the Supreme Court of Canada, I argue that sustainability principles can assist in implementing s. 35(1) in a manner that will achieve the provision's ultimate purpose. That ultimate purpose is cultural sustainability.

While the Court has incorporated sustainability principles into the s. 35(1) analysis, it has not fully embraced those principles. Thus, while the Court recognizes that aboriginal rights and title are integral to the cultural and physical survival of aboriginal peoples, its approach to s. 35(1) will not ensure that those goals are achieved. My hypothesis is that an interpretation of s. 35(1) that is informed by principles of sustainability leads to the conclusion that s. 35(1) protects aboriginal jurisdiction over land and resource use.

Chapter 2 examines the sustainability literature and summarizes some of the basic principles of sustainability. Sustainability principles require that the actions of the present generation preserve the ability of future generations to meet their needs. This thesis adopts a view of sustainability that includes principles of cultural sustainability, which requires us to ensure that our actions do not jeopardize the ability of cultures to flourish and continue into the future. The literature emphasizes the interdependence of ecological and cultural sustainability and summarizes some of the requirements of sustainable resource management and decision making, including integrated management and decentralized decision making by local communities, and the precautionary principle.

Chapter 3 is about resource management and co-management. It begins with a survey of some of the literature on aboriginal resource use and management systems. Those studies reveal that aboriginal societies have rules and institutions governing land and resource use, and that those systems remain integral to aboriginal cultures, worldviews and belief systems.

Aboriginal relations with lands and resources are often sustainable from an ecological viewpoint, and they contribute to cultural sustainability because of the importance of human-land relationships in many aboriginal cultures. This literature also demonstrates the resilience and adaptability of aboriginal cultures and resource use, and shows that change is compatible with, and necessary for, cultural continuity.

The second part of Chapter 3 examines resource management in Canada, and in particular forest management in Alberta and the mineral disposition scheme in the Northwest Territories. These examples show that Canadian approaches to resource management do not embody the sustainability principles described in Chapter 2, and do not accommodate aboriginal management systems or uses of lands and resources. Conflict is inevitable.

The third part of Chapter 3 discusses the co-management literature. Co-management of resources is often supported as a way of integrating aboriginal and government resource management, and as a sustainable approach to resource management. In practice, however, though co-management takes many forms, it usually amounts to aboriginal participation in government management. Aboriginal jurisdiction is not an element of co-management, and the fundamental differences between aboriginal worldviews and the ethic underlying Canadian resource management render aboriginal jurisdiction necessary to achieve cultural sustainability for aboriginal peoples in Canada. The question remains whether cultural sustainability and aboriginal jurisdiction are embodied in s. 35(1).

Chapter 4 is a summary of the case law relevant to the question of aboriginal jurisdiction over land and resource use, and Chapter 5 surveys the literature. These two chapters look at several questions. First, if aboriginal jurisdiction over land and resource use existed, did it survive the assertion of Crown sovereignty? Second, given that the *Constitution Act, 1867*, distributes legislative power and land and resource ownership between the federal and

provincial governments, is aboriginal jurisdiction possible? The case law remains somewhat uncertain, especially with respect to the second question, but the literature provides compelling arguments in favour of affirmative answers to both these questions.

If aboriginal jurisdiction over land and resource use survived the Crown's assertion of sovereignty and Confederation, does s. 35(1) protect aboriginal jurisdiction? In other words, is it an existing aboriginal right for the purpose of s.35(1)?[6] While aboriginal rights are based in part on the principle of cultural sustainability, the Court's test for demonstrating aboriginal rights established in *Van der Peet* does not fully embrace that principle. Some of the literature reviewed in Chapter 5 argues that the test focuses too narrowly on activities and not enough on cultures, and too heavily on the past and not enough on contemporary aboriginal cultures. This thesis argues for an approach to s. 35(1) that explicitly embraces cultural sustainability as a fundamental principle. The effect of fully incorporating cultural sustainability into the analysis would be a shift in focus from pre-contact aboriginal activities to the needs of contemporary aboriginal cultures. Based on the studies of aboriginal resource use and management in Chapter 3, s. 35(1) could recognize aboriginal regulation of land and resource use as an existing aboriginal right that can find expression within Canada's federal structure.

Assuming the existence of aboriginal rights to manage land and resource use, I argue that the *Forests Act* and the Canada Mining Regulations constitute *prima facie* infringements on such rights. The *Forests Act* grants exclusive rights to occupy lands and grants ownership of timber. If aboriginal peoples were to enforce their own laws and prevent someone who has

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[6] Aboriginal title includes the right to decide the use to which lands are put, and thus land and resource management rights are presumably included in title. *Delgamuukw*, supra note 2 at para. I chose to focus on aboriginal rights, and not treaty rights or aboriginal title. Aboriginal title is the most comprehensive form of aboriginal right and the courts take a different approach to it than to other aboriginal rights.

been granted a forest tenure from harvesting timber, they would be violating the provincial forestry legislation. The forest regime gives priority to timber harvesting over all other land uses.

The CMRs authorize the staking of claims on lands that could be subject to existing aboriginal rights to manage the use of those lands. Staking activities themselves may be incompatible with aboriginal peoples' uses of the lands and management goals. The CMRs purport to grant exclusive rights to develop the lands and they require claim holders to carry out representation work to keep their claims. Claim holders are entitled to a lease to develop any minerals discovered. Aboriginal peoples are prevented from exercising rights to choose the activities to be carried out on lands subject to their jurisdiction.

I argue that the appropriate approach to a conflict between aboriginal and government management may depend on whether the provincial or federal government is involved. In the case of provincial legislation, the distribution of powers in the *Constitution Act, 1867*, gives the federal government exclusive legislative authority over "Indians and lands reserved for Indians." The case law leaves open the possibility that provincial laws are inapplicable where they affect land-based aboriginal rights in other than an incidental way. Aboriginal rights to regulate land and resource use may therefore be paramount over inconsistent provincial laws. In circumstances where the effect of a provincial law is to impair the effectiveness of, or the ability to exercise or enforce, an aboriginal law, my conclusion is that the provincial law is inapplicable.

In the event of conflicting federal and aboriginal land or resource laws, I argue that the aboriginal law is paramount unless the federal government can justify the infringement in accordance with the s. 35(1) justification analysis developed by the Court. The first step in the justification analysis requires government to demonstrate that it infringed the aboriginal

right in pursuit of a valid legislative objective. In the context of aboriginal title, the Court incorporates responsibility for present and future generations into the decision making component of the right. I argue in Chapter 6 that the notion of valid legislative objective in the s. 35(1) analysis should incorporate into government power and authority the responsibility to act in the best interests of present and future generations. In the context of forestry and mining laws, the objective of such legislation should be scrutinized and if that objective is to promote unsustainable resource use, the objective should not be recognized as compelling and substantial and valid to justify overriding constitutionally protected aboriginal rights. While this view is supported by the *Sparrow* decision, subsequent decisions may have retreated from the approach to legislative objectives suggested by the *Sparrow* decision. The peace order and good government analysis which allows the federal government to legislate where matters are a national concern may be helpful as well.

The next step in the justification analysis requires government to uphold the honour of the Crown in pursuit of the valid legislative objective. Aboriginal rights to manage resource use amount to aboriginal jurisdiction and thus s. 35 serves as a division of powers provision. The notion of minimal infringement is the most appropriate measure of the justifiability of an infringement in this context. The consultation requirement is closely tied to the minimal impairment requirement where aboriginal jurisdiction is interfered with. My conclusion in Chapter 6 is that an exercise of federal jurisdiction that interferes with the exercise of aboriginal jurisdiction should be justified only if the interference is necessary to achieve a valid objective and is as minimally intrusive on aboriginal jurisdiction as possible. This may require co-management arrangements where federal paramountcy is justified.

Neither the *Forests Act* nor the CMRs recognizes and affirms aboriginal jurisdiction over land and resource use. Neither regime gives aboriginal peoples a role in land use and resource disposition decisions. Both regimes serve goals that could conflict with, and

prevent the realization of, the goals of aboriginal management systems. I argue that the resulting infringements are neither based on a valid legislative objective, nor justified.

Questions concerning how to implement shared jurisdiction in practice must be left for another day. An obvious question is how to give effect to aboriginal jurisdiction in light of the fact that there are many aboriginal peoples in Canada who may be able to prove existing and overlapping rights to exercise jurisdiction of lands and resources.

1.2. Methodology

I conducted research in six areas: (1) sustainability; (2) aboriginal resource management systems; (3) selected resource management schemes in Canada; (4) co-management; (5) aboriginal rights and s. 35(1) of the *Constitution Act, 1982;* and (6) division of powers and ownership of lands and resources in the *Constitution Acts* of 1867 and 1982.

My research on sustainability theory canvassed the general literature on sustainability, as well as some of the literature focussed on forestry and mining. Rather than attempt to cover all of the literature on sustainability, I tried to find commentary that would be relevant to a discussion of s. 35. This led me to focus on the sustainability literature that discussed aboriginal peoples and the literature discussing sustainability in a legal context. To find literature discussing sustainability in law, I searched legal indexes, namely the Current Law Index, and the Index to Canadian Legal Literature (ICLL) database in Quicklaw.[7] For

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[7] I searched under the following subject headings in the Current Law Index: biological diversity; clearcutting; conservation of natural resources; deforestation; ecology; economic development; environmental policy; environmental protection; forest conservation; land use; lumber industry; nature conservation; and sustainable development. In the ICLL database, I searched under: sustainability; and sustainable /1 development.

general literature on sustainability I searched the University of Calgary library catalogue and CD-ROM indexes.

My inquiry into aboriginal resource management was based entirely upon secondary literature, and focussed primarily on anthropological studies. I focused on a handful of investigators, namely Fikret Berkes, Peter Usher, Milton Freeman and Harvey Feit, though I also looked at some other studies. I chose to concentrate on the works of these researchers in consultation with my thesis supervisor, as they seem to have made the largest contribution in the area of co-management. To find literature on aboriginal use and management of resources, I searched the University of Calgary library holdings, CD-ROM indexes,[8] and bound indexes. I do not purport to provide a comprehensive account of aboriginal resource management; my goal was simply to present some examples and common findings in the studies.

My description of Canadian resource management focuses on two areas of resource management: forestry and mining. I use Alberta's *Forests Act* and the Canada Mining Regulations as examples. I chose the areas of forestry and mining for two reasons. The first is that I have done some related work in these areas and have thereby gained familiarity with the regimes and the second is that they represent, respectively, renewable and non-renewable resources whose management has come into question recently both in terms of environmental and sustainability issues and in the context of aboriginal rights. I chose Alberta's *Forests Act* and the Canada Mining Regulations because they are representative of forestry and mining regimes in Canada and my work in forestry and mining has focussed primarily on these two legislative schemes.[9] My goals in this part of my research were to

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[8] These indexes included: the Anthropological Index; Article First; First Nations Periodical Index; and CARL UnCover.

[9] See N. Bankes & C. Sharvit, *Aboriginal Title and Free Entry Mining Regimes in Northern*

gain an understanding of the process and method of decision making, as well as the ethic underlying Canadian resource management. To find legal literature on forestry, mining and resource management, I searched the Current Law Index, [10] the Index to Canadian Legal Literature database on Quicklaw, and the University of Calgary's library holdings. I also relied heavily upon books published by the Canadian Institute of Resources Law.

My research on aboriginal rights, division of powers and s. 35 included case law and secondary materials. To find cases, I searched Quicklaw and the Canadian Abridgement,[11] and often became aware of decisions because they were referred to in more recent case law. To find literature on division of powers, aboriginal rights, s. 35(1) and the fiduciary relationship between the Crown and aboriginal peoples, I searched the Current Law Index,[12] and the ICLL database in Quicklaw.[13] As with the case law, the literature often referred to other relevant literature and therefore served as a source of research.

1.3. Definitions

Canada - Northern Minerals Program Working Paper No. 2 (Yellowknife: Canadian Arctic Resources Committee, 1998); and M.M. Ross & C.Y. Sharvit, "Forest Management in Alberta and Rights to Hunt, Trap and Fish Under Treaty 8" (1998) 36 Alta. L. Rev. 645.

10 I searched under the following terms in the Current Law Index: crown lands; forestry; forest conservation; forest management; forestry law; gold mining; hunting; subsistence hunting; logging; mineral industry; mineral rights; minerals; mines and mineral resources; mining; mining law; natural resources; public lands; and renewable natural resources.

11 Some examples of Quicklaw searches include: aboriginal /1 right; (fiduciary /1 duty) & aboriginal; "Van der Peet"; and Sparrow. I searched the cj global database, the scj database to find Supreme Court of Canada decisions, the cnlr database which focusses on aboriginal law, and the bclr database because much of the recent litigation has occurred in British Columbia.

12 I searched the following headings in the subject index: culture and law; indigenous peoples; constitutional law; fiduciary duties; indigenous peoples; native americans; native peoples' land claims; resource-based communities; tribes; separation of powers; federal government; federal jurisdiction; and federalism.

13 The search terms I used included: aboriginal /1 right!; fiduciary /p aboriginal; Sparrow; "Van der Peet"; aboriginal & constitution; Delgamuukw; division /1 powers; interjurisdictional /1 immunity.

This section defines some key terms that are used throughout this thesis.

Aboriginal rights: Aboriginal rights are the rights of the aboriginal peoples of Canada that are protected by s. 35(1) of the *Constitution Act, 1982.*

Aboriginal title: Aboriginal title is an aboriginal right. It is a right to the land itself, and includes the right to decide what uses will or may be made of the land.

Aboriginal jurisdiction: Jurisdiction is the legal capacity to make laws. This thesis argues for an aboriginal right in the form of jurisdiction over the use of lands and resources. I argue that it is an aboriginal right to make and enforce laws regarding land use. I argue that this aboriginal right can exist independently of aboriginal title.

Aboriginal laws: Aboriginal laws are the laws of aboriginal peoples, which may take the form of oral history and unwritten codes of conduct. Aboriginal jurisdiction allows aboriginal peoples to make, implement and enforce their laws.

Crown: The Crown is a term used to refer to the Sovereign and the Sovereign's rights, duties and prerogatives. In this thesis the term refers to the Executive and Legislative branches of government. Where I refer to the Crown in its legislative capacity I am referring to the Crown as represented by the federal Parliament and provincial legislatures.

The following Chapter is a survey of the sustainability literature and a discussion of some of the principles that may be relevant to the a discussion of aboriginal rights and resource management.

2. Sustainability

There is no general agreement on the meaning or desirability of "sustainability", and there are many differing views on what constitutes sustainable resource use and management. These are ultimately questions of values.[1] A discussion of the philosophical questions concerning sustainability is beyond the scope of this thesis.

This thesis accepts three basic assumptions. First, the natural world imposes limits on economic growth. We rely on the natural world for survival, comfort, well-being and wealth. The earth provides resources and services, serves as a sink for the by-products of human consumption, and is a source of recreation and aesthetics. We must manage our economies and our use of resources within the limits imposed by the natural world in order to ensure a continued supply of these resources and services:

> Population and capital draw materials and most forms of energy from the earth and return wastes and heat to the earth. There is a constant flow or *throughput* from the planetary *sources* of materials and energy, through the human economy, to the planetary *sinks* where wastes and pollutants end up. There are limits to the rates at which human population and capital can use materials and energy, and there are limits to the rates at which wastes can be emitted without harm to people, the economy, or the earth's processes of absorption, regeneration, and regulation.[2]

The second assumption is that we are either approaching, or at risk of approaching in the foreseeable future, the limits of some of the earth's functions. Third, the continued existence of ecosystems, economies and cultures, is desirable. This third assumption is an ethical one

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1 R.M. Verburg & V. Wiegel, "On the Compatibility of Sustainability and Economic Growth" (1997) 19 Environmental Ethics 247 at 247 argue: "The perception and treatment of the issue of sustainable development as a technical problem prevents critical reflection upon the frame of reference in which the problem formulation originates."

2 D.H. Meadows, D.L. Meadows & J. Randers, *Beyond the Limits: Confronting Global Collapse, Envisioning a Sustainable Future* (Post Mills, Vermont: Chelsea Green Publishing Co., 1992) at 45 (emphasis original). The researchers used a computer model, World3, to demonstrate that there are sustainable rates of use of natural resources and emission of pollutants.

based on the position that the present generation owes obligations to future generations. At a minimum those obligations require us to refrain from jeopardizing the capacity of the earth to support the physical survival of future generations.[3] This thesis therefore accepts that sustainable resource management is desirable. Economic activity is sustainable if carried out within the natural world's limits.[4]

The purpose of this Chapter is not to provide what I think is the "correct" definition of sustainability, nor to provide a comprehensive definition of sustainability. This Chapter identifies some key principles of sustainability that emerge from the literature, particularly those relevant to a discussion of aboriginal resource management rights and their co-existence with government jurisdiction over resource management. The emphasis in this thesis, because its focus is aboriginal rights, is cultural sustainability.

2.1. The Concept of "Sustainable Development"

The World Commission on Environment and Development popularized the term "sustainable development" over a decade ago in *Our Common Future*, commonly referred to as the "Brundtland Report". The Brundtland Report argued for development that "meets the needs of the present without compromising the ability of future generations to meet their own needs."[5] Like the term itself, this definition of sustainable development is open to a variety

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[3] M. Jacobs, *The Green Economy: Environment, Sustainable Development and the Politics of the Future* (Vancouver: University of British Columbia, 1993) at 72, notes that the desirability of sustainability depends on accepting that "future people *probably will* want the environment to be preserved, and that the current generation therefore has an obligation to give them an opportunity to enjoy it." Jacobs argues, at 77-79, that if we cannot predict future generations' interests we have two choices: ignore them or impute them.

[4] Verburg & Wiegel, *supra* note 1 at 251.

[5] World Commission on Environment and Development, *Our Common Future* (Oxford: Oxford University Press, 1987) at 43.

of interpretations.[6]

Michael Jacobs offers an "intuitive" interpretation of sustainability: "the capacity to last or continue."[7] He explains the implications for resource use as follows:

> Sustainability means that the environment should be protected in such a condition and to such a degree that environmental capacities (the ability of the environment to perform its various functions) are maintained over time: at least at levels sufficient to avoid future catastrophe, and at most at levels which give future generations the opportunities to enjoy an equal measure of environmental consumption.[8]

While growth may be necessary in order to achieve development in at least some circumstances,[9] proponents of sustainability argue that development can be measured qualitatively.[10] The Brundtland Commission focused on meeting needs, rather than satisfying wants.[11] Sustainable development increases the welfare of the present generation while

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6 Those questions include: What is development? What are needs? How far in the future should we look?

7 Jacobs, *supra* note 3 at 72.

8 Jacobs, *ibid.* at 79-80 (emphasis removed). The capacity of an ecosystem to sustain current or future generations is dependent upon population levels to a certain extent. That is, an activity carried out on an area of land may be sustainable when human populations are small relative to the size of the land, but as the population grows, the land may no longer be able to sustain the same activities carried out by the larger population. Sustainability, as evidenced by the various notions of sustainability discussed below, is also related to human choice to the extent that we make decisions regarding what components, values or functions of lands we want to sustain into the future. An ecosystem is thus a human concept that reflects the values humans place in areas of land.

9 Because of the current state of the world's human population, in particular widespread poverty and rising numbers, growth is seen by many writers, especially from an international perspective, as an essential element of sustainable development. Growth in this context is necessary in order to meet basic needs. Verburg & Wiegel, *supra* note 1 at 255.

10 See, for example, C. Tickell, "Introductory Address: Concepts and Dilemmas of Sustainable Development" in N. Steen, ed., *Sustainable Development and the Energy Industries: Implementation and Impacts of Environmental Legislation* (London: Earthscan Publications, 1994) 25 at 29.

11 D. W. Pearce & J.J. Warford, *World Without End: Economics, Environment, and Sustainable Development* (Oxford: Oxford University, 1993) at 49. U.E. Simonis, *Beyond Growth: Elements of*

maintaining or increasing the welfare of future generations.[12] Economic policy aimed at fulfilling needs is concerned with the distribution of goods and services rather than their accumulation.[13]

Sustainability is most commonly understood in terms of ecological preservation. Ecological sustainability is often seen as conflicting with economic sustainability. Peoples' needs go beyond strictly physical needs.[14]A sustainable society is therefore ecologically, socially and politically sustainable.[15] The sustainability literature recognizes the interdependence of economic, ecological, social and cultural sustainability.

2.2. Social Sustainability

The sustainability literature promotes an understanding of development that includes social and political equity. As we approach the limits of the earth's capacities, one person's accumulation of non-essential goods reduces what is available to satisfy the basic needs of others.[16] Inequity is unjust and socially and ecologically unsustainable because it creates demand for economic growth on the part of the disadvantaged, resulting in increased

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Sustainable Development (Berlin: Edition Stigma, 1990) at 81, cites the following definition of basic needs from the World Employment Conference of 1976: "the regular minimum requirement of food, housing and clothing... vital public services, especially drinking water, sanitary installations, public transport and health, and educational facilities."

12 Pearce & Warford, *ibid.* at 49.

13 Simonis, *supra* note 11 at 81, note that there are institutional limits to achieving equity, because a redistribution of wealth in society is not likely to occur.

14 J. Robinson *et al.*, "Defining a Sustainable Society: Values, Principles and Definitions" (1990) 17:2 Alternatives 36 at 39.

15 Robinson *et. al*, *ibid.* at 38.

16 See Verburg & Wiegel, *supra* note 1 at 255; and Simonis, *supra* note 11 at 10.

resource use and waste production.[17]

Social systems satisfy a variety of human needs including equity, freedom, health, security and education.[18] Socially sustainable policies seek to ensure the continuance of these services.[19] Sustainability requires a balancing of ecological and socio-political considerations: "First, there are the constraints upon human behaviour imposed by the need to promote sustainability in the environmental/ecological realm. Second, there are those characteristics of the socio-political realm that are desirable in themselves from the point of view of socio-political sustainability."[20]

2.3. Cultural Sustainability

Cultural sustainability, explained in the following quote, is particularly relevant in the context of s. 35(1):

> Integral to a comprehensive view of sustainable development is the concept of culturally sustainable development. We define this here as development that meets the material needs of the present without compromising the ability of future generations to retain their cultural identity, social relationships and values, and to allow for change to be guided in ways

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17 Simonis, *ibid.* at 13. The United Nations Development Program offers the concept of human development as an alternative to economic development. Human development is "the process of enlarging the range of people's choices - increasing their opportunities for education, health care, income and employment, and covering the full range of human choices from a sound physical environment to economic and political freedoms." United Nations Development Program, *Human Development Report 1992*, New York and Oxford: Oxford University Press, 1992) at 2, quoted in P. Bartelmus, *Environment, Growth and Development: The Concepts and Strategies of Sustainability* (London: Routledge, 1994) at 71-2.

18 Bartelmus, *ibid.* at 29.

19 Robinson *et al.*, *supra* note 14 at 39.

20 *Ibid.* at 42.

> that are consistent with existing cultural principles of a people.[21]

Community sustainability is a similar concept:

> Sustainable communities are healthy communities. The foundations of community lie in a clearly defined and strongly interwoven understanding of identity, ethics and place. Identity is about knowing and understanding culture and history. Ethics is about what is important and why - about values. Place is about knowing where home is, geographically and spiritually, and about the sense of shared destiny with others that comes with that knowledge. In order to make a contribution to community health, economic activities should strengthen these foundations. Economic "development" that undermines cultural identity, compromises values, or fails to preserve or enhance environmental quality is neither sustainable nor healthy.[22]

Cultural sustainability can also impose limits on ecological sustainability or preservation goals: "the idea of cultural sustainability implies the need for cultural values, and socio-political practices and institutions, that are acceptable to the populace at large. This rules out environmental autocracy as a feasible or desirable response to the problems of unsustainability."[23]

For aboriginal peoples, cultural sustainability often depends upon ecological sustainability. Fikret Berkes argues that lands must be protected in order to sustain many northern communities and cultures.[24] At the same time, sustaining aboriginal cultures can contribute

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21 F. Berkes *et al.*, "Wildlife Harvesting and Sustainable Regional Native Economy in the Hudson and James Bay Lowland, Ontario" (1994) 47(4) Arctic 350 at 358.

22 S. Wismer, "The Nasty Game: How Environmental Assessment is Failing Aboriginal Communities in Canada's North (Proposed Diamond Mine in NWT Opposed by Native Groups)" (1996) 22(4) Alternatives 10 at 11.

23 Robinson *et al.*, *supra* note 14 at 40.

24 F. Berkes, "Co-Management: Bridging the Two Solitudes" (1994) 22(2/3) Northern Perspectives 18 at 19; Ontario Round Table on Environment and Economy, *Report of the Native People's Circle on Environment and Development* (Queen's Printer for Ontario, 1992) at 25.

to ecological sustainability.[25] Aboriginal societies who continue to participate in resource harvesting contribute to our collective knowledge of the natural world. Incompatible development on lands that support aboriginal communities results in the loss of cultures and knowledge.[26] Berkes therefore argues that sustaining aboriginal communities and their alternative relationships with land contributes to Canada's cultural diversity and ecological sustainability.[27]

The literature suggests that sustainable societies are ecologically, economically, socially and culturally sustainable. No society is likely to be perfectly sustainable, and thus the issue of priorities will inevitably arise. The literature identifies some decision making processes and principles that seek to achieve sustainable outcomes.

2.4. Integrated Decision Making

Sustainable resource management requires informed decision making.[28] Decisions which do

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25 Ontario Round Table on Environment and Economy, *ibid.* at 25; F. Berkes & H. Fast, "Aboriginal Peoples: The Basis for Policy-Making toward Sustainable Development" in A. Dale & J.B. Robinson, eds., *Achieving Sustainable Development* (Vancouver: University of British Columbia Press, 1996) 204 at 254, and at 248-249; World Commission on Environment and Development, *supra* note 5 at 12; L. Arragutainaq & B. Fleming, "Community-based Observations on Sustainable Development in Southern Hudson Bay" (1991) 18(2) Alternatives 9 at 9 argue as follows:

> There is a need ... to recognize that country food is more important than mere monetary and nutritional values [footnote omitted]. The constellation of social and cultural values associated with its harvesting, distribution, and consumption are valuable in themselves, for they promote conservation of the complex interrelationships of both human and biological systems.

26 World Commission on Environment and Development, *supra* note 5 at 114-116.

27 F. Berkes, "Environmental Philosophy of the Chisasibi Cree People of James Bay" in M.M.R. Freeman & L.N. Carbyn, eds., *Traditional Knowledge and Renewable Resource Management in Northern Regions* (Edmonton: Boreal Institute for Northern Studies, 1988) 7 at 19-20. Berkes refers to aboriginal hunting cultures as "part of the global heritage of humankind."

28 R. Kumar, E. W. Manning & B. Murck, eds., *The Challenge of Sustainability* (Don Mills, Ont : Centre for a Sustainable Future, Foundation for International Training, 1993) at 62. Robinson *et al.*, *supra*

not recognize the interdependence of the economy and the natural world, and of the various components and members of the natural world, are uninformed and unsustainable. Commentators suggest that current decision making institutions are unsustainable because they do not facilitate integrated decision making.[29]

Integrated decisions reflect the interdependence of the environment and the economy, of humans and the rest of nature, and of the various components of ecosystems.[30] Long term economic sustainability is dependent upon ecological, social and cultural sustainability. Resource use decisions should consider ecological, economic, cultural and social effects together to arrive at informed decisions.

Where resource management systems do not consider and account for all effects of resource use activity, the costs of those effects are externalized. Some authors argue that current approaches to decision making and land and resource management treat natural resources as if they are "free" or without economic value until they become scarce.[31] Resources such as minerals are often treated as "inexhaustible commons open to free exploitation by whoever can first stake a claim."[32] Government regulation is resisted as a restriction on freedom to exploit natural resources, not accepted as government's responsibility as holder of lands and resources on behalf of citizens.[33] To internalize environmental costs, we must treat natural

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note 14 at 38.

29 Meadows *et al.*, *supra* note 2 at 191, argue that sustainability requires us to change the "information links" in our decision making systems.

30 Kumar *et al.*, *supra* note 30 at 37.

31 Bartelmus, *supra* note 17 at 64; Tickell, *supra* note 10 at 30.

32 A. Thompson, "Economic Aspects of the Public Interest: A Lawyer's Perspective" in M. M. Ross & J. O. Saunders, eds., *Disposition of Natural Resources: Options and Issues for Northern Lands* (Calgary: Canadian Institute of Resources Law, 1997) 1 at 5.

33 Thompson, *ibid.* at 6.

resources as capital, not income which can be spent freely in order to accumulate human made capital.[34]

Arbitrary political, economic and structural divisions preclude comprehensive consideration of the effects of developments on ecosystems.[35] Elements of the natural world are divided and made subject to separate decision making processes.[36] Gauthier argues that sustainable wildlife management requires "sector by sector policy changes that may require restructuring of departments of forestry, wildlife, agriculture, soils, power, water, and others to work closely in land-use planning."[37] The sustainability literature promotes a holistic understanding of ecosystems.

The literature also suggests that decisions should consider cumulative effects. The apparent insignificance of the effects of one aspect of a development may mask its full effects.[38] An assessment of a single project may mask cumulative effects resulting from many projects.[39]

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34 Tickell, *supra* note 10 at 30; W.E. Rees *et al.*, eds., *Planning for Sustainable Development: A Resource Book (Symposium Proceedings)* (Vancouver: University of British Columbia Centre for Human Settlements, 1989) at 95.

35 Arragutainaq & Fleming, *supra* note 25 at 10, 11. The authors note that while the James Bay Project had profound implications for Inuit in the NWT, the project took place in Quebec, and the federal and NWT governments did not intervene to protect the Inuit.

36 Kumar *et al.*, *supra* note 28 at 43.

37 D. A. Gauthier, "The Sustainability of Wildlife" in B. Mitchell, ed., *Resource Management and Development* (Addressing Conflict and Uncertainty) (Toronto: Oxford University, 1991) 110 at 127.

38 Arragutainaq & Fleming, *supra* note 25 at 10, note Inuit concerns on the Belcher Islands with respect to the James Bay Project in this regard: "The Islanders are worried by the manner in which the project is being subdivided into components, each subject to a separate environmental review and assessment."#Separating decisions concerning exploration, allocation, extraction, processing, end use, recovery, and reuse of the same resource is unsustainable. Kumar *et al.*, *supra* note 28 at 43.

39 See D. J. Gamble, "Destruction by Insignificant Increments- Arctic Offshore Developments: the Circumpolar Challenge" (1979) 7(6) Northern Perspectives 1-4.

Resource developments can have cumulative effects on cultural sustainability as well.[40]

Sustainable resource management seeks to integrate all of these considerations. For example, while sustained yield forestry (i.e., forest management aimed at securing a perpetual supply of timber), arguably integrates ecological and economic considerations to a certain extent, it fails to acknowledge non-timber values and functions, and the reliance of aboriginal peoples on forests.[41] Sustainable forest management recognizes and values the multiple functions of forests.[42] While commercial timber harvesting may be economically valuable in the short-term, forest management should be directed at sustaining complex forest ecosystems that include and support trees and various other types of plant life, wildlife, fisheries and aboriginal cultures.[43] The literature commonly suggests that tenure reform is necessary in order to achieve integrated and sustainable management of our forests. Commentators argue that forest users other than large scale timber harvesters, including hunters, trappers, outfitters and forest-dependent communities, should be granted long-term area-based tenures, with rights that extend beyond timber harvesting.[44]

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40 Arragutainaq and Fleming, *supra* note 25 at 9.

41 T. O'Riordan, "The Politics of Sustainability" in R. K. Turner, ed., *Sustainable Environmental Management: Principles and Practice* (London: Bellhaven Press, 1990) 29 at 30 argues: "Sustainable utilisation is a prior condition for sustainability, but not a sufficient one." See also R.F. Noss, "Sustainable Forestry or Sustainable Forests?" in G.H. Aplet, *et al.*, eds., *Defining Sustainability* (Washington: Island Press, 1993) 17.

42 J. Dufour, "Towards Sustainable Development of Canada's Forests" in Mitchell, ed., *supra* note 37, 85 at 94: "The forest is a diversified environment; its renewal thus depends on diversity." See also H. Kimmins, *Balancing Act: Environmental Issues in Forestry*, 2d ed. (Vancouver: UBC, 1997) 235 at 238.

43 See P. Matthiessen, *Indian Country* (New York: Viking, 1984) at 173-174; Kimmins, *ibid.* at 26-47.

44 British Columbia, Forest Resources Commission, *The Future of Our Forests* (Victoria: April 1991) at 53, Recommendation 74; D. Haley & M.K. Luckert, "Tenures as Economic Instruments for Achieving Objectives of Public Forest Policy in British Columbia" in C. Tollefson, ed., *The Wealth of Forests: Markets, Regulation and Sustainable Forestry* (Vancouver, University of British Columbia, 1998) 123; and M. M'Gonigle, "Living Communities in a Living Forest: Towards an Ecosystem-Based Structure of Local Tenure and Management" in C. Tollefson, ed., *The Wealth of*

In contrast to forests, mineral resources are non-renewable.[45] Mineral extraction cannot be sustained in the sense of using the resource at a rate no greater than that at which it is replenished.[46] The focus is therefore usually on the impact of non-renewable resource use and the treatment of resource rents.[47] Unlike timber harvesting, which can be compatible with other uses of forested lands, the nature of mineral development often precludes the accommodation of other land uses. Duerden concludes that sustainability can only be achieved in the context of mining by making broader land use decisions which do not give mining priority over other uses.[48] Land use decisions must choose between mineral harvesting and other values or land uses.

Integrated decision making is an informed and comprehensive process that manages ecosystems as ecosystems and considers the economic, ecological, social and cultural implications of the possible choices. The sustainability literature suggests that one of the purposes of integrated decision making is to ensure that when we make decisions, we do not forclose the options of future generations.

Forests: Markets, Regulation and Sustainable Forestry (Vancouver, University of British Columbia, 1998) 152. The danger in expanding the rights of existing tenure holders to include non-timber resources is that the tenure holders, who for the most part are commercial timber companies, can then exclude or charge other non-timber users.

45 Rees *et al.*, eds., *supra* note 34 at 94, define non-renewable resources as "resources which cannot be reproduced within a given management period (e.g., 100 years or some time frame that is appropriate in terms of human planning horizons)."

46 Application of the principle of sustained yield to non-renewable resources would require that their extraction and use not exceed the rate at which they can be replaced by other resources.

47 Rees *et al.*, *supra* note 34 at 95.

48 F. Duerden, "A Critical Look at Sustainable Development in the Canadian North" (1992) 45 Arctic 219 at 223.

2.5 Keeping Options Open

A common understanding of sustainability, rooted in its underlying ethic of intergenerational equity, is that decisions should seek to ensure that future generations have choices at least as broad as ours.[49]Maximizing options for the future does not require us to preserve natural systems exactly as they are.[50] Management systems and institutions must be adaptive and flexible.[51] We should make decisions that maintain the integrity or resilience of ecosystems.[52]

Ecosystem integrity is preserved where the essential characteristics of an ecosystem are maintained.[53] Kimmins argues that a forest ecosystem retains its integrity if "its structure and species composition, the rate of its ecological processes, and its ability to resist change in the face of disturbance or stress, or to recover from disturbance, are within the characteristic range exhibited historically by that ecosystem."[54] Where aboriginal cultures depend upon a forest ecosystem, ecosystem integrity might be understood as including the ability of aboriginal cultures to recover from disturbance. For example, while it may be that a clearcut forest will eventually return to a state in which it can support wildlife, if the time required for recovery is too long, the opportunity to pass knowledge and skills from one generation to the next may be lost. Ecosystem resilience, the ability of ecosystems to recover from stress

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49 Robinson *et al.*, *supra* note 14 at 4; Verburg and Wiegel, *supra* note 1 at 252; and Jacobs, *supra* note 3 at 72.

50 Robinson *et al.*, *supra* note 14 at 40.

51 G. Francis & S. Lerner, "Making Sustainable Development Happen: Institutional Transformation" in Dale & Robinson, eds., *supra* note 25, 146 at 147.

52 C.S. Holling, "The Resilience of Ecosystems: Local Surprise and Global Change" in W.C. Clarke & R.E. Munn, eds., *Sustainable Development of the Biosphere* (Cambridge: Cambridge University, 1986) 292-317. The "New Forestry movement" seeks to harvest timber while maintaining ecosystem resilience: H. Kimmins, *supra* note 42, 172 at 175.

53 Robinson *et al.*, *supra* note 14 at 41.

54 Kimmins, *supra* note 42 at 239, emphasis removed.

or disturbance, is maintained by preserving the diversity of ecosystems, including their cultural diversity.[55]

Aboriginal cultures contribute important knowledge and examples of alternative ways of relating with the natural world. Sustaining aboriginal cultures preserves the cultural and physical options of aboriginal peoples and Canadians as a whole.

To keep options open, and preserve ecosystem diversity and resilience, we should avoid making irreversible choices:

> Since knowledge is rarely lost forever-although tribal knowledge is lost if the tribe disappears-economic irreversibility is likely to be rare. A discontinued machine can be recreated, towns can be rebuilt, and so on. Nevertheless, ecological irreversibility is not unusual: natural species are lost every year, unique ecosystems are destroyed, and environmental functions are irreparably damaged. All this suggests that we should only destroy natural capital stock if the benefits of doing so are very large. Put another way, irreversible destruction of natural capital stock should be avoided unless the social costs of conservation are unacceptably large.[56]

To maximize choice and avoid irreversible consequences, sustainability theorists argue that we should adopt a precautionary approach to decision making when faced with uncertainty.

2.6. The Precautionary Principle

The precautionary principle addresses the lack of scientific certainty and consensus with

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55 M. Gadgil, F. Berkes & C. Folke, "Indigenous Knowledge for Biodiversity Conservation" (1993) 22 Ambio 151 at 155; Pearce & Warford, *supra* note 11 at 55; Robinson *et al.*, *supra* note 14 at 41. The literature identifies three levels of biodiversity: species biodiversity, genetic biodiversity and ecosystem biodiversity. Loss of any of these narrows options for the future.

56 Pearce & Warford, *ibid.* at 55.

respect to the effects of our actions on natural resources and ecosystems.[57] The United Nations Conference on Environment and Development explains the principle as follows: "where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing effective measures to prevent environmental degradation."[58] The precautionary principle instructs us to make cautious decisions and avoid actions with potentially serious and irreversible consequences.

The precautionary principle instructs that where effects of resource development are unknown we should maintain land "in its present, reversible state."[59] A decision to retain an ecosystem in its natural state will arguably always provide benefits. While land remains in its present state we can obtain more information and avoid foreclosing future options.[60] We learn more about natural systems as time passes.[61] The costs of choosing not to proceed with resource developments are largely measurable financial costs, while the potential costs of damaging or altering ecosystems are often unknown and may be substantial and

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57 D. Ludwig, R. Hilborn & C. Walters, "Uncertainty, Resource Exploitation, and Conservation: Lessons from History" (1993) 260 Science 17 at 17, 36. The authors write that because "controlled and replicated experiments are impossible to perform in large-scale systems" we cannot fully understand these systems. An alternative approach is adaptive management, in which decisions respond to the effects of past management. See M. McDonald, "An Overview of Adaptive Management of Renewable Resources" in Freeman & Carbyn eds., *supra* note 27, 65 at 65. Adaptive management is deliberate experimentation on an ecosystem scale. Because human understanding of nature is imperfect, proponents of adaptive management suggest that human interactions with nature should be experimental. Adaptive policies are experiments "designed from the outset to test clearly formulated hypotheses about the behavior of an ecosystem changed by human use. ... If the policy succeeds, the hypothesis is affirmed. But if the policy fails, an adaptive design still permits learning, so that future decisions can proceed from a better base of understanding." K.N. Lee, *Compass and Gyroscope: Integrating Science and Politics for the Environment* (Washington, D.C.: Island Press, 1993) at 53.

58 United Nations Conference on Environment and Development (June 3-14, 1992, Rio de Janeiro).

59 G.C. van Kooten, *Land Resource Economics and Sustainable Development: Economic Policies and the Common Good* (Vancouver: University of British Columbia Press, 1993) at 183-184.

60 *Ibid.*

61 *Ibid.*

irreversible.[62] Jacobs argues for a "minimising the maximum cost" policy that dictates that we opt for avoiding potential causes of environmental harm, as environmental damage is most often the maximum potential cost.[63]

If an aboriginal culture is part of an ecosystem and we do not know for certain the effects of development on the aboriginal culture, the precautionary principle dictates that we should choose not to proceed if the effects on the aboriginal culture could potentially be serious and irreversible.

Sustainability principles suggest that we should make integrated and cautious decisions. The final principle of sustainability discussed in this Chapter addresses the question who should make decisions concerning natural resources?

2.7 Decentralizing Control over Natural Resources

Two ethical principles often associated with sustainability are equity and justice. Sustainability is ultimately rooted in these principles because it is based upon intergenerational equity. Cragg and Schwartz argue that distributive justice forms the "moral structure" of sustainable development.[64] The costs and benefits of resource development

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62 See for example, Jacobs, *supra* note 3 at 99, where uses the example of climate change. There are arguably social costs as well, which may not be as easily measurable.

63 This approach in economics is often called the "mini-max" approach: Jacobs, *ibid.* at 100. Jacobs uses the example of emissions control efforts, and argues that if our climate change predictions are wrong our choice to control emissions means we will "pay the control costs without getting any benefit from them." However, should we chose not to act and the predictions turn out to be right, the result will be catastrophe. See also C.A. Tisdell, *Natural Resources, Growth and Development: Economics, Ecology, and Resource-Scarcity* (New York: Praeger Publishers, 1990) at 20.

64 W. Cragg & M. Schwartz, "Sustainability and Historical Injustice: Lessons from the Moose River Basin" (1996) 31:1 Journal of Canadian Studies 60 at 65-67.

should be distributed in a fair way, and those who benefit from resource development should bear its costs. Cragg and Schwartz conclude that those who bear the costs of development should be given a role in the decision making process:

> equitable participation in planning and management of resource developments on the part of those on whom a particular development is likely to have an impact is in practice necessary if moral insensitivity in identifying and "costing" costs and benefits is likely to accrue from development and injustice in the distribution of costs and benefits is to be avoided.[65]

Justice dictates that those who are affected by and bear the costs of development should share decision making power. Control over natural resources should therefore be decentralized.[66] Because aboriginal peoples often bear a disproportionate share of the costs of development, and are potentially severely affected by development that threatens their cultural survival, justice demands that they have a say in land use decisions.[67]

Proponents of decentralized decision making argue that it results in ecologically sustainable decisions. Local communities who depend directly on an ecosystem are more likely to avoid irreversible effects. In contrast to companies who can move on to other areas having exhausted the resource base, local communities will continue to live in the area after development. Where those communities are aboriginal they rely on the land not only for livelihood, but for cultural purposes as well.[68] Decentralized decision making may facilitate

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65 *Ibid.* at 75 (italics removed).

66 Kumar *et al.*, *supra* note 28 at 79, argue that sustainability requires participatory democracy.

67 Ontario Round Table on Environment and Economy, *supra* note 24 at 21.

68 F. Berkes, *et al.*, "The Persistence of Aboriginal Land Use: Fish and Wildlife Harvest Areas in the Hudson and James Bay Lowland, Ontario" (1995) 48 Arctic 81 at 92 (references omitted). See also Robinson *et al.*, *supra* note 14 at 45, F. Cassidy & N. Dale, *After Native Claims? The Implications of Comprehensive Claims Settlement for Natural Resources in British Columbia* (Lantzville, B.C.: Oolichan Books & Institute for Research on Public Policy, 1988) at 139 and 168; and E. Ostrom, "Reflections on the Commons" in E. Ostrom, *Governing the Commons: the Evolution of Institutions for Collective Action* (Cambridge: Cambridge University Press, 1990) 1 at 17, where she argues that users of common pool resources can be motivated out of self-interest to develop and enforce rules.

informed and integrated decisions. Decentralized decision making incorporates local knowledge of the affected lands and resources.[69] Aboriginal peoples who rely on their lands for physical and cultural survival have knowledge about the land and effects of land use, and they should therefore participate in decisions concerning the land.[70] Local aboriginal peoples are likely to recognize and rely on multiple uses or values of ecosystems. Some argue that local communities "are in the best position to appreciate and design management activities to realize diverse forest resource values."[71]

Arguments for decision making by local aboriginal peoples are strengthened by the added dimension of aboriginal rights. The Brundtland Report recommended that we should protect aboriginal land and resource rights, along with their regulatory institutions:

> These groups' own institutions to regulate rights and obligations are crucial for maintaining the harmony with nature and the environmental awareness characteristic of the traditional way of life. Hence the recognition of traditional rights must go hand in hand with measures to protect the local institutions that enforce responsibility in resource use. And this recognition must also give local communities a decisive voice in the decisions about resource use in their area.[72]

2.8. Identifying Sustainable Resource Management

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69 A. Gunn, G. Arlooktoo & D. Kaomayok, "The Contribution of the Ecological Knowledge of Inuit to Wildlife Management in the Northwest Territories" in Freeman & Carbyn, eds., *supra* note 27, 22 at 28. See also E. May, *At the Cutting Edge: The Crisis in Canada's Forests* (Toronto: Key Porter Books Ltd., 1998).

70 Ontario Round Table on Environment and Economy, *supra* note 24 at 21; Berkes and Fast, *supra* note 25 at 220.

71 M. K. Luckert, "Tenures as Economic Instruments: Policies to Accommodate Multiple Forest Values" in M.M. Ross, *Forest Management In Canada* (Calgary: Canadian Institute of Resources Law, 1995) 291 at 309.

72 World Commission on Environment and Development, *supra* note 5 at 114-116. See also Ontario Round Table on Environment and Economy, *supra* note 24 at 1; and Principle 22 of the Rio Declaration on Environment and Development (1992), 31 I.L.M. 874.

How can we determine whether we are managing natural resource use sustainably? It is commonly assumed that sustainability can never be achieved, only reinforced.[73] The ability to foretell the future and predict natural occurrences would be a prerequisite to achieving sustainability, as would a consensus on moral questions that must be answered before we can know that a particular state of being is sustainable.[74] A lack of sustainability is more easily identified than the presence of sustainability.[75] I therefore adopt a process-oriented approach to sustainability in this thesis. Sustainable resource management is a continual effort to ensure that our decisions and activities fulfil and protect both present and future physical, cultural and social needs.[76] Discussion of legislation and s. 35 therefore focuses on whether legislation aims at ensuring that decisions are consistent with the principles of sustainability identified in this chapter. Cultural sustainability is particularly difficult to measure.[77] For the purposes of this thesis it will be assessed by asking whether the resource management system in question is structured to enable aboriginal peoples to maintain their cultures into the future and pass them on to future generations.

2.9. Conclusions

This Chapter has summarized some sustainability principles which I suggest may be relevant to the s. 35(1) analysis. To what extent if at all does section 35(1) embody principles of sustainability? The case law summarized in Chapter 4, and the literature on aboriginal rights

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73 Robinson *et al.*, *supra* note 14 at 41.

74 Robinson *et al.*, *ibid.* at 40 note that: "Not only is sustainability a moving target, it has strong normative dimensions which are not subject to scientific resolution."

75 Though the fact that aboriginal cultures have survived on the same lands for thousands of years is evidence of the sustainability of aboriginal societies and their relationships with land.

76 World Commission on Environment and Development, *supra* note 5 at 9.

77 Berkes *et al.*, *supra* note 21 at 358.

discussed in Chapter 5, suggest that cultural sustainability is a central goal of s. 35(1). Sustainability principles may inform the identification of rights protected by s. 35(1). In the context of aboriginal peoples and rights, the principles of sustainability discussed in this Chapter are interdependent and mutually reinforcing.[78] To the extent that control over the use of lands and resources is essential to cultural sustainability, s. 35(1) may protect aboriginal jurisdiction over land and resource use:

> The historic record is clear: Indians want to maintain their precontact position as the people with the first right to use the ... resources in their territories. They have been willing usually to share their fish and other resources in their aboriginal territories but not to surrender all control over management and use of them. They recognize that their own fate is tied to the fate of those resources.[79]

Cragg and Schwartz argue that aboriginal peoples must be able to exercise control over land and resource decisions so that their views values are reflected in natural resource decisions.[80] Aboriginal control over land use allows aboriginal peoples to protect lands and habitats and to ensure the continuity of the institutions and laws governing land and resource use. The continuation of those laws and institutions contributes to cultural and physical survival.[81] The

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78 See Ontario Round Table on Environment and Economy, *supra* note 24 at 1, which concluded that the sustainability of aboriginal communities is integral to sustainable development.

79 D. Newell, *Tangled Webs of History: Indians and the Law in Canada's Pacific Coast Fisheries* (Toronto: University of Toronto Press, 1997) at 210.

80 Cragg & Schwartz, *supra* note 64 at 70-71 and at 69, argue that:

> [The dominant approach to resource management] relies on the substitution of off-setting benefits for costs incurred and, failing that, on compensation. Values readily quantified easily can be assimilated to this approach. The risk, however, is that values that cannot be quantified will be ignored just because the methodology has no way of dealing with them. ... To propose financial compensation for polluted water, or poisoned fish, or the loss of traditional hunting grounds, or flooded grave sites is from a Native perspective to misunderstand in a profound way the nature of the losses for which compensation is being offered.

See also Ontario Round Table on Environment and Economy, *supra* note 24 at 22.

81 Ontario Round Table on Environment and Economy, *ibid.* at 22.

Brundtland Commission found that the isolation of indigenous peoples has allowed them to retain traditional life ways, but it has also left them out of the social and economic development which threatens both the land and indigenous ways of life.[82]

Incorporation of sustainability principles in the s. 35(1) analysis supports my conclusion that aboriginal peoples can establish rights to manage land and resource use. Sustainability principles may also assist, along with constitutional principles, in answering questions regarding the co-existence of aboriginal and government management systems. Sustainability principles may inform the infringement and justification tests, and questions of paramountcy in the event of conflicts between aboriginal and provincial or federal jurisdiction.

The first part of the Chapter which follows surveys some of the literature and studies that describe aboriginal resource management systems. The second part looks at the management of forest and mineral resources in Canada. The final part of the Chapter addresses the co-management literature.

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[82] World Commission on Environment and Development, *supra* note 5 at 114.

3. Resource Use and Management Systems in Canada

This chapter is divided into four parts. The first part surveys the literature on aboriginal peoples' resource use and management. Studies of aboriginal resource use and management systems illustrate the cultural importance of harvesting activities and associated laws and institutions. The literature documents the evolution of management and harvesting practices, and demonstrates the continuity of aboriginal resource management systems. Studies show that aboriginal resource management systems are often both culturally and ecologically sustainable. To the extent that s. 35(1) embodies these principles of sustainability, the literature supports my thesis that s. 35(1) requires governments to allow aboriginal peoples to exercise jurisdiction over resource use.

The second part of this Chapter examines Canadian resource management, focussing in particular on forestry and mining. The review of forest and mineral resource disposition schemes reveals an absence in Canadian resource management of any acknowledgement that aboriginal peoples may have jurisdiction over natural resources. The forest and mineral regimes are not concerned with accommodating aboriginal uses of lands or aboriginal values and beliefs relevant to land and resource use. The examination of Canadian resource management also reveals, at least in the context of the forestry and mining regimes examined here, inconsistency with the sustainability principles outlined in Chapter 2. I argue that this is relevant to the justification analysis applied to infringements of s. 35(1) rights, or to a division of powers analysis where aboriginal and government management are in conflict.

The third part of the Chapter looks at the differences between aboriginal and non-aboriginal resource use and management, and the different perspectives and worldviews reflected in the resource management systems of aboriginal and settler societies. Conflicts between aboriginal resource use and management and government management and disposition of resources highlight the need to give effect to aboriginal management systems in order to ensure cultural survival for aboriginal peoples.

The last section of this Chapter surveys the co-management literature. This literature offers insight into questions concerning the co-existence of aboriginal peoples and settler society. The survey reveals that while co-management seeks to integrate aboriginal and non-aboriginal management of resources, it does not give effect to aboriginal jurisdiction. Government retains jurisdiction over resource management. Aboriginal peoples, as resource users, are given opportunities to influence some resource management decisions. Existing co-management arrangements are usually narrowly focussed on specific projects or on wildlife management. They do not provide for aboriginal input into land use decisions or broad forestry and mineral management regimes. The different worldviews reflected in aboriginal resource management and the regimes of settler societies, and the failure of co-management regimes to incorporate or give effect to aboriginal management systems, lead me to conclude that co-management arrangements fall short of what is required to ensure cultural sustainability. This section therefore looks at alternatives to co-management, such as shared jurisdiction.

3.1. Aboriginal Relationships with Lands and Resources

Most studies of aboriginal resource use and regulation in Canada focus on northern communities. Land use studies have been carried out by and for northern communities since the 1970s in the contexts of land claim negotiations and environmental impact assessments.[1] The relative isolation of some northern aboriginal peoples has allowed them to continue to engage in resource use and regulation until relatively recently. Extensive areas of the north are still used by aboriginal peoples for subsistence activities such as hunting and fishing.[2]

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1 See F. Berkes *et al.*, "The Persistence of Aboriginal Land Use: Fish and Wildlife Harvest Areas in the Hudson and James Bay Lowland, Ontario" (1995) 48 Arctic 81 at 82.

2 See Berkes *et al.*, *ibid.* at 87 and 92; and M.M.R. Freeman, ed., *Report of the Inuit Land Use and Occupancy Project* (Ottawa: Indian and Northern Affairs, 1976). Many aboriginal peoples in southern parts of Canada continue to engage in subsistence practices as well.

The studies discussed in this chapter provide examples of land and resource use systems that persist today as a continuation of pre-contact systems. They are not intended to serve the purpose of proving that the communities or peoples discussed in this section have existing rights under s. 35(1) to manage the use of natural resources.

Usher has identified two paradigms in discussions of aboriginal peoples and their use of resources, and he argues that both paradigms ought to be rejected as invalid. The first paradigm characterizes hunting as a primitive stage in the social evolution of human societies; hunting serves a recreational role in "evolved" or "advanced" societies.[3] This paradigm assumes that it is desirable for peoples to evolve to a point where they no longer rely on subsistence activities.[4] The second paradigm similarly views hunter-gatherers as primitive. The hunter-prey relationship is understood as purely biological and lacking a cultural context, and therefore, rules.[5] This assumption leads to the conclusion that unless governments impose regulations on aboriginal peoples, those peoples will destroy the resources upon which they rely once they gain an advantage over the animals they hunt.[6] Though there is much variability amongst aboriginal cultures, studies of aboriginal resource use support Usher's rejection of both paradigms. Subsistence activities remain important to aboriginal cultures, and aboriginal peoples have rules and institutions to regulate resource

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3 P.J. Usher, "Sustenance or Recreation? The Future of Native Wildlife Harvesting in Northern Canada" in M.M.R. Freeman, ed., *Proceedings: First International Symposium on Renewable Resources and the Economy of the North: Banff, Alberta, May 1981* (Ottawa: Association of Canadian Universities for Northern Studies, 1981) 56 [hereinafter "Sustenance"] at 57.

4 Usher, *ibid.* at 57; see also P.J. Usher, "Working Group Paper: Renewable Resource Development in Northern Canada" in R.F. Keith & J.B. Wright, eds., *Northern Transitions: Volume II: Second National Workshop on People Resources and the Environment North of 60* (Ottawa: Canadian Arctic Resources Committee, 1978) 154 at 154, where he argues that the adoption of this paradigm has led to the following conclusion "that the only economic future for native people lay in the development of [non-renewable] resources. The inevitable consequence of these policies was the neglect of the renewable resources traditionally used by native people, both in terms of their continuing contribution to the well-being of the people and in terms of the development potential of these resources.

5 "Sustenance", *supra* note 3 at 57.

6 "Sustenance", *ibid.* at 57. This is essentially an application of Hardin's "Tragedy of the Commons" theory to aboriginal peoples. G. Hardin, "The Tragedy of the Commons" (1968) 162 Science 1243.

use.[7]

3.1.1. Aboriginal Management Practices

Studies of aboriginal peoples reveal extensive use of land and resources for subsistence activities.[8] For example, Feit found that most active James Bay Cree adults participated in hunting activities, and for forty percent of adults hunting was their major activity.[9] His studies revealed that food harvested in the bush provided between 25 and 55 per cent of the communities' energy needs, and 50 percent of required nutrients.[10] Winter hunting camps comprised 35,000km^2 of land.[11]

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7 See A.L. Booth & H. M. Jacobs, *Environmental Consciousness - Native American Worldviews and Sustainable Natural Resource Management: An Annotated Bibliography* (Chicago: Council of Planning Librarians, 1988).

8 H.A. Feit, "James Bay Cree Indian Management and Moral Consideration of Fur-Bearers" in *Native People and Renewable Resource Management: The 1986 Symposium of the Alberta Society of Professional Biologists* (Alberta Native Affairs/Indian and Northern Affairs Canada, 1986) 49 [hereinafter "James Bay"]; H. Fast & F. Berkes, *Native Land Use, Traditional Knowledge and the Subsistence Economy in the Hudson Bay Bioregion - Technical Paper Prepared for the Hudson Bay Program* (Canadian Arctic Resources Committee & Municipality of Sanikiluaq, 1994); J.A. McDonald, "The Marginalization of the Tsimshian Cultural Ecology: The Seasonal Cycle" in B.A. Cox, ed., *Native People and Native Lands: Canadian Indians, Inuit and Métis* (Ottawa: Carleton University, 1988) 199 at 203 and 209. While the studies in this section primarily describe management of wildlife, that is not to say that the use of other resources was not subject to aboriginal customs, laws and rules. Many aboriginal peoples, particularly on the west coast, made extensive use of trees for totem poles, canoes, masks, bowls, dishes, boxes, long houses, cloths, masks and ceremonial gear. Trees are often spiritually important for aboriginal cultures as well: F. Cassidy & N. Dale, *After Native Claims? The Implications of Comprehensive Claims Settlement for Natural Resources in British Columbia* (Lantzville, B.C.: Oolichan Books & Institute for Research on Public Policy, 1988) at 86-87; *Calder* v. *Attorney-General of British Columbia*, [1970] S.C.R. 313 at 363 and 367.

9 "James Bay", *ibid.* at 50.

10 H.A. Feit, "Hunting and the Quest for Power: The James Bay Cree and Whitemen in the Twentieth Century" in R.B. Morrison & C.R. Wilson, eds., *Native Peoples: The Canadian Experience* (Toronto: McClelland & Stewart, 1986) 171 [hereinafter "Hunting"] at 182; F. Berkes, "Environmental Philosophy of the Chisasibi Cree People of James Bay" in M.M.R. Freeman & L.N. Carbyn, eds., *Traditional Knowledge and Renewable Resource Management in Northern Regions* (Edmonton: Boreal Institute for Northern Studies, 1988) 7 [hereinafter "Environmental Philosophy"].

11 "James Bay", *supra* note 8 at 50.

Researchers commonly conclude that aboriginal peoples deliberately managed, and continue to manage, land and resource use.[12] Feit concludes that Waswanipi Cree engage in "long-term planning."[13] Berkes concludes that Chisasibi Cree systems are aimed at ensuring continued hunting success.[14] While aboriginal harvesting practices are generally efficient, that efficiency is offset by restraint, and hunters and trappers may forego short-term benefits.[15] Berkes found that the Cree of Fort George set less nets than they could, and limited the number of nets and mesh size so as not to take more than required to meet their needs.[16] Feit found that while the Waswanipi Cree harvest "more efficiently harvestable wildlife species more intensively than less efficiently harvestable species", they harvest even the most efficiently harvested species, moose, within sustained-yield levels.[17] Feit concluded that Waswanipi Cree hunters limit moose harvests to sustainable levels, and in response to population monitoring.[18] He also found that while they were capable of hunting moose year-round, they tended to concentrate hunting activities to specific periods of the annual cycle.[19]

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12 H.A. Feit, "Waswanipi Cree Management of Land and Wildlife: Cree Ethno-Ecology Revisited" in Cox, ed., *supra* note 8, 75 [hereinafter "Waswanipi"] at 82-83; D. Newell, *Tangled Webs of History: Indians and the Law in Canada's Pacific Coast Fisheries* (Toronto: University of Toronto Press, 1997) at 40-45; R.K. Nelson, "A Conservation Ethic and Environment: The Koyukon of Alaska", in N.M. Williams & E.S. Hunn, eds., *Resource Managers: North American and Australian Hunter-Gatherers* (Canberra, A.C.T.: Australian Institute of Aboriginal Studies, 1982) 211 at 221; F. Berkes, "The Role of Self-Regulation in Living Resources Management in the North" in Freeman, ed., *supra* note 3, 166 [hereinafter "Self-Regulation"]at 167; F. Berkes, "Fishery Resource Use in a Subarctic Indian Community" (1977) 5:4 Human Ecology 289 [hereinafter "Fishery Resource Use"] at 306; "Hunting", *supra* note 10 at 182; "James Bay", *supra* note 8 at 50; H. Brody, *Maps and Dreams: Indians and the British Columbia Frontier* (Vancouver: Douglas & McIntyre, 1981) at 193, found that aboriginal peoples in northeast British Columbia directly managed forest resources to enhance wildlife habitat by setting fires.

13 "Waswanipi" *ibid.* at 82, 86.

14 "Environmental Philosophy", supra note 10 at 18.

15 F. Berkes, "Fisheries of the James Bay Area and Northern Quebec: A Case Study in Resource Management" in M.M.R. Freeman, ed., *supra* note 3 [hereinafter "Fisheries"] at 152; F. Berkes, "An Investigation of Cree Indian Domestic Fisheries in Northern Quebec" (1979) 32 Arctic 46; "James Bay", *supra* note 8 at 55; and "Environmental Philosophy", *supra* note 10 at 18.

16 "Fishery Resource Use", *supra* note 12 at 304.

17 "Waswanipi", *supra* note 12 at 84.

18 "Waswanipi", *ibid.* at 86.

19 "Hunting", *supra* note 10 at 180.

Aboriginal systems often discourage waste (i.e., harvesting more than is required) and hunting aimed solely at building a reputation or "self-aggrandizement".[20] Aboriginal management strategies include minimization of disturbance,[21] selective harvesting,[22] and maintenance of unharvested sanctuaries or refuges.[23]

Rotational hunting and trapping is a common practice in aboriginal management systems.[24] Areas of land are removed from harvesting to permit animal populations to recover.[25] Hunting territories are larger than the area being harvested at any particular time. Lands being rested are in use though such lands are not currently being harvested.[26] When Brody sought to map the land use of aboriginal peoples in northeast British Columbia he found that:

> Hunters may use parts of this territory infrequently, some locations they may not have seen for twenty years. But no part is therefore dispensable: dependence is upon the territory as a whole. Successful harvesting of its resources requires knowledge of animal movements over the whole area, including parts that are rarely, if ever, visited.[27]

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20 "Fisheries", *supra* note 15 at 152; "Self-Regulation", *supra* note 12 at 167-69; Brody, *supra* note 12 at 187; "Waswanipi", *supra* note 12 at 76.

21 F. Berkes, "Waterfowl Management and Northern Peoples with Reference to Cree Hunters of James Bay" (1982) 30 Musk-Ox 23 [hereinafter "Waterfowl"] at 28; C. Scott, "Hunting Territories, Hunting Bosses and Communal Production Among Coastal James Bay Cree" (1986) 28(1-2) Anthropologica (N.S.) 163 at 168; F. Berkes *et al.*, *The Cree View of Land and Resources: Indigenous Ecological Knowledge* (McMaster University Research Program for Technology Assessment in Subarctic Ontario (TASO) Report, Second Series, No. 8, 1992) at 12-13.

22 "Waterfowl", *ibid.* at 28; "Fishery Resource Use", *supra* note 12 at 304.

23 "Fishery Resource Use", *supra* note 12 at 304; Berkes *et al.*, *supra* note 21 at 13.

24 "Waterfowl", *supra* note 21 at 27-28; Berkes, *et al.*, *ibid.* at 18; Scott, *supra* note 21 at 168; "Environmental Philosophy", *supra* note 10 at 16; F. Berkes & Grand Council of the Crees (Quebec), *Waterfowl Resources and Their Utilization by the Cree People of the James Bay Area* (Montreal, 1978) at 22.

25 "James Bay", *supra* note 8 at 56; Brody, *supra* note 12 at 222.

26 "Waterfowl", *supra* note 21 at 28; Berkes *et al.*, *supra* note 1 at 89; F. Berkes, "Some Environmental Implications and Social Impacts of the James Bay Hydroelectric Project, Canada" (1981) 12 Journal of Environmental Management 157 [hereinafter "Implications"] at 168.

27 Brody, *surpra* note 12 at 174.

3.1.2. The Form and Enforcement of Aboriginal Resource Laws

Most aboriginal land use systems are territorial.[28] Usher found that while territorial boundaries change and may overlap, they are known to land holders and their neighbours. Use without permission constitutes trespass.[29] Most studies reveal persons with authority over specific territories, including authority to decide whether the territory in question should be harvested and to allocate rights to use the territory for harvesting purposes.[30] Lands are held communally. Authority to allocate rights to use lands and resources does not usually encompass authority to alienate lands.[31]

Management and production are not separated in aboriginal systems.[32] Stewards are hunters and often elders. Their authority is therefore respected,[33] and often spiritually sanctioned.[34]

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28 "Self-Regulation", *supra* note 12 at 168; "Waswanipi", *supra* note 12 at 75. Territorial systems are not universal. Berkes found that the Cree of Fort George, James Bay, did not use a territorial system to govern fish harvesting. He suggested that this was because a rigid territorial system would not permit "sufficient flexibility in the distribution of effort to maximize yields". "Fishery Resource Use", *supra* note 12 at 303. See also Scott, *supra* note 21 at 166.

29 P.J. Usher, "Indigenous Management Systems and the Conservation of Wildlife in the Canadian North" (1987) 14(1) Alternatives 3 [hereinafter "Indigenous Management"] at 6; "Sustenance", *supra* note 3 at 67; "Self-Regulation", *supra* note 12 at 168; *Calder*, *supra* note 8 at 371.

30 F. Berkes, P. George & R.J. Preston, "Co-Management: The Evolution in Theory and Practice of the Joint Administration of Living Resources" (1991) 18(2) Alternatives 12 at 14-15; "Waswanipi", *supra* note 12 at 85; "Waterfowl", *supra* note 21 at 27; Berkes and Grand Council of the Crees, *supra* note 24 at 19; Scott, *supra* note 21 at 165.

31 "Indigenous Management", *supra* note 29 at 6; "James Bay", *supra* note 8 at 52; "Self-Regulation", *supra* note 12 at 167; "Waterfowl", *supra* note 21 at 27. In some aboriginal cultures, authority over resource use was based in concepts of ownership. *Calder*, *supra* note 8 at 371.

32 P.J. Usher, "Aboriginal Property Systems in Land and Resources" in G. Cant, J. Overton & E. Pawson, eds., *Indigenous Land Rights in Commonwealth Countries: Dispossession, Negotiation and Community Action: Proceedings of a Commonwealth Geographical Bureau Workshop*, (Christchurch, New Zealand: Department of Geography, University of Canterbury and the Ngai Tahu Maori Trust Board for the Commonwealth Geographical Bureau, 1993) at 40; P.J. Usher, "Devolution of Power in the Northwest Territories: Implications for Wildlife" in *Native People and Renewable Resource Management: The 1986 Symposium of the Alberta Society of Professional Biologists* (Alberta Native Affairs/Indian and Northern Affairs Canada, 1986) 69 [hereinafter "Devolution"] at 71.

33 "Waswanipi", *supra* note 12 at 85; Berkes *et al.*, *supra* note 30 at 14.

34 "Hunting", *supra* note 10 at 184-185.

Feit notes, for example, that stewards repeatedly return to the same lands over many years and thereby accumulate knowledge through observation.[35] Those hunters who have acquired the greatest knowledge, and who have demonstrated an ability to use that knowledge effectively, become stewards.[36]

Stewards[37] are responsible for taking care of the land within their territories.[38] They are responsible for managing resource use, and they are social and spiritual leaders.[39] Berkes and others have described stewards as gatekeepers and information managers who are responsible for upholding the community ethic with respect to human-land relationships.[40] Stewards generally exercise authority through conversation and suggestion, and their decisions are commonly accepted by consensus.[41] Hunters usually follow known rules voluntarily.[42]

Feit found that the hunters he studied in the north closely observed animal populations and their territories. They continuously gathered knowledge from signs left by animals, from the condition of animals, and in the butchering process.[43] In his study of the James Bay Cree, he

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35 "James Bay", *supra* note 8 at 52; "Waswanipi", *supra* note 12 at 75.

36 "Indigenous Management", *supra* note 29 at 7.

37 I use the term "stewards" to refer to those with authority to regulate land and resource use, though the literature identifies "bosses" (see, eg., Scott, *supra* note 21) and "owners" (see, eg., "James Bay", *supra* note 8) as well.

38 "Waterfowl", *supra* note 21 at 28; Scott, *supra* note 21 at 163-168.

39 Berkes *et al.*, *supra* note 21 at 15.

40 Berkes *et al.*, *ibid.* at 16.

41 Berkes *et al.*, *supra* note 30 at 14; "Waswanipi", *supra* note 12 at 85; "Hunting", *supra* note 10 at 184-85; "Indigenous Management", *supra* note 29 at 6; "Self-Regulation" *supra* note 12 at 168-170; and Brody, *supra* note 12 at 186-87. Berkes and Grand Council of the Crees, *supra* note 24 at 17 and 20-21, where the authors note that many rules are followed in communities that do not have bosses.

42 Brody, *supra* note 12 at 186-87; Scott, *supra* note 21 at 179 argues: "If a hunting boss's authority fails to result in collective benefit ... other hunters do not respect his decisions about the use of his grounds and a localized breakdown of the informal rules may occur..."

43 H.A. Feit, "Self-Management and State-Management: Forms of Knowing and Managing Northern Wildlife" in Freeman & Carbyn, eds., *supra* note 10, 72 [hereinafter "Self-Management"] at 78 and at 77, where he notes that Waswanapi Cree hunters gather knowledge because they believe nature leaves them signs to tell them how much can be harvested; this means hunters must engage in

found that the whole community contributed in gathering information.[44] Hunters had extensive knowledge with respect to relative quantities and trends in beaver and moose populations, and some had such knowledge going back fifty years.[45] Hunters were also knowledgeable with respect to habitat, predators, prey and food.[46] Feit concluded that "the parameters monitored are all ones which wildlife biologists have found to be important indicators of the condition of the game populations and useful indicators of management decisions concerning the sustainability of present harvests."[47]

Knowledge in aboriginal resource systems is both a source of information and a means of resource management.[48] Management systems embody local knowledge, gathered in the

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"complex observation and interpretation of weather, snow, vegetation and animal population parameters, all of which are considered as communications from animals and the spirits." See also A. Gunn, G. Arlooktoo & D. Kaomayok, "The Contribution of the Ecological Knowledge of Inuit to Wildlife Management in the Northwest Territories" in Freeman & Carbyn, eds., *supra* note 10, 22 at 23 note that hunters are knowledgeable about the wildlife in the areas they harvest, including their use of land and interactions with other wildlife species. They also found, at 24, that knowledge with respect to wildlife health is acquired through butchering activities.

44 "James Bay", *supra* note 8 at 52; M.M.R. Freeman, "Effects of Petroleum Activities on the Ecology of Arctic Man" in F.R. Engelhardt, ed., *Petroleum Effects in the Arctic Environment* (London: Elsevier Applied Science, 1985) 245 [hereinafter "Effects of Petroleum"] at 246; and "Devolution" *supra* note 32 at 71, where Usher notes that Aboriginal communities accumulate knowledge through "travelling, searching, hunting, skinning, butchering, and eating."

45 "James Bay" *supra* note 8 at 53; see also Newell, *supra* note 12 at 45.

46 "James Bay", *ibid.* at 53.

47 "Self-Management", *supra* note 43 at 79; See also H.A. Feit, "Conflict Arenas in the Management of Renewable Resources in the Canadian North: Perspectives on Conflicts and Responses in the James Bay Region, Quebec" in *National and Regional Interests in the North: Third National Workshop on People, Resources, and the Environment North of 60°*, Yellowknife, Northwest Territories, 1-3 June 1983 (Yellowknife: Canadian Arctic Resources Committee, 1983) 435 [hereinafter "Conflict Arenas"] at 442-443: "Senior Cree hunters who have returned frequently to the same hunting territories, and who know these distinct tracts (which average about 1200km^2) in great detail, have more knowledge of the game populations they hunt and manage than non-native game managers can have for the vast tracts under their management and intermittent observation."

48 Fast & Berkes, *supra note* 8 at 3. M.M.R. Freeman, "Renewable Resources, Economics and Native Communities" in *Native People and Renewable Resource Management: The 1986 Symposium of the Alberta Society of Professional Biologists* (Alberta Native Affairs/Indian and Northern Affairs Canada, 1986) 29 [hereinafter "Renewable Resources"] at 30, notes that while they involve different worldviews and approaches to knowledge, both state and indigenous systems are ultimately founded in observation of the natural world. G. Osherenko, *Sharing Power with Native Users: Co-*

everyday experience of harvesting and from oral transmission of accumulated experience.[49] Knowledge, practices and beliefs are integrated and "co-evolve".[50] Feit concludes that while the Cree understand observed trends as a form of social communication, those observations are used in planning for future harvests in a manner which is similar to the way in which non-aboriginal managers engage in planning.[51] Usher also argues that "observations, like those of the state system's, become coded and organized by a paradigm or set of paradigms that provide a comprehensive interpretation of them."[52] While aboriginal management systems are not codified in a western manner,[53] aboriginal and state management systems achieve similar purposes.[54]

Cree wildlife management has been characterized as a combination of "good practices" and "appropriate ethics".[55] Berkes argues that sustainable resource use requires knowledge, technology, and an environmental ethic or philosophical underpinning that provides "ground rules by which the relation among humans and animals may be regulated."[56] Ethical values and religious or spiritual beliefs play a prominent role in natural resource use and laws.[57]

The following section considers some of those beliefs and ethical principles.

Management Regimes for Arctic Wildlife, CARC Policy Paper 5 (Ottawa: Canadian Arctic Resources Committee, 1988) at 4.

49 "Indigenous Management", *supra* note 29 at 6; "Devolution", *supra* note 32 at 71.

50 M. Gadgil, F. Berkes & C. Folke, "Indigenous Knowledge for Biodiversity Conservation" (1993) 22 Ambio 151 at 155.

51 "Self-Management" *supra* note 43 at 79.

52 "Devolution", *supra* note 32 at 71.

53 Osherenko, *supra* note 48 at 4; "Waterfowl", *supra* note 21 at 31.

54 "Waterfowl", *ibid.* at 31.

55 Berkes *et al.*, *supra* note 21 at 12.

56 "Environmental Philosophy", *supra* note 10 at 7.

57 Booth & Jacobs, *supra* note 7 at 4; J.E. Brown, *The Spiritual Legacy of the American Indian* (New York: Crossroad, 1982) at 2, 73; "Hunting", *supra* note 10 at 184.

3.1.3. Ethics and Beliefs Underlying Aboriginal Relationships with Lands and Resources

While there is much diversity amongst aboriginal values and beliefs concerning relationships with the land, there are also some common elements.[58] My intention is not to suggest that all aboriginal cultures and societies share these values or beliefs or that those who do always act in accordance with those values and beliefs.

Aboriginal cultures generally do not separate religious and secular life.[59] Animals and other members of the natural world often play a central role in aboriginal religions.[60] Aboriginal peoples often view themselves as stewards of their lands for the benefit of other living beings and future generations.[61] Territorial management systems incorporate principles of reciprocity and sharing.[62] Authority over territories is exercised for the common benefit.[63]

Respect for the earth and all its inhabitants is a common theme in the literature on aboriginal ethics.[64] Relationships with the land and its inhabitants form part of peoples' identities in many aboriginal cultures.[65] Humans are members of a larger community.[66] Feit found that

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58 J.E. Brown, *ibid.* at 1.

59 Jimmie Durham, Western Cherokee, testifying against the Tellico Dam project at a Congressional hearing in 1978, as quoted in P. Matthiessen, *Indian Country* (New York: Viking, 1984) at 119.

60 Brown, *supra* note 57 at 37-38, notes that in many aboriginal religions, animals are believed to have been created first, and are therefore thought to be closer to the creator. They act as intermediaries between humans and the creator. See also "Self-Regulation", *supra* note 12 at 169.

61 L. Rotman, *Parallel Paths: Fiduciary Doctrine and the Crown-Native Relationship in Canada* (Toronto: University of Toronto Press, 1996) at 41; "Hunting", *supra* note 10 at 182; N. Lyon, "Canadian Law Meets the Seventh Generation" (1993) 19 Queen's L. J. 350.

62 P. George, F. Berkes & R.J. Preston, "Aboriginal Harvesting in the Moose River Basin: A Historical and Contemporary Analysis" (1995) 32 Canadian Review of Sociology and Anthropology 69 at 72.

63 George *et al.*, *ibid.* at 72, note that "land use was predicated on a flexible balance of respect for the rights of each hunting-trapping group and a reciprocal willingness to accommodate the legitimate needs of those requesting to joint a group on their lands, for some appropriate period of time."

64 Booth & Jacobs, *supra* note 7 at 4-5; and "Waswanipi", *supra* note 12 at 76.

65 Fast & Berkes, *supra* note 8 at 6.

66 Booth & Jacobs, *supra* note 7 at 4; "Hunting" *supra* note 10 at 173-174; Nelson, *supra* note 12 at 218;

the Cree peoples he studied believe all elements of the natural world are beings with intelligence and self-will.[67] Hunters have reciprocal obligations that arise from their relationship with the animals they hunt.[68]

Berkes found that Cishasibi Cree hunters believed animals controlled the hunt. Therefore they must show respect for animals, lest they choose not to give themselves.[69] A sense of respect leads to rules such as that prohibiting waste.[70] Belief in the willful behaviour of prey leads hunters and stewards to closely observe and monitor hunting territories in a search for signs from animals and spirits.[71] Hunters interpret observations and respond to those observations in accordance with their beliefs:

> Thus, if too many animals were killed in the past, the animals would be "mad", and have fewer young or make signs of their presence harder to find. This would indicate that the animals wish to give fewer of themselves, and, out of reciprocal respect, the hunters will take less than in the past.[72]

Religious beliefs and the values that emanate from them are reflected in rituals involved in harvesting, carrying, butchering, distributing, consuming and disposing of wildlife and remains.[73] Moral codes incorporating notions of reciprocity and balance governs relationships of aboriginal peoples with nature, and this, argue Booth and Jacobs, ensures conservation.[74] Feit concludes that belief in the willful behaviour of animals is evidence of

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and Brown, *supra* note 57 at 53.

67 "Waswanipi", *supra* note 12 at 76; and "James Bay", *supra* note 8 at 51.

68 "Hunting", *supra* note 10 at 173-174, 179.

69 "Environmental Philosophy", *supra* note 10 at 10-13. See also Nelson, *supra* note 12 at 218; and Berkes and Council of the Crees, *supra* note 24 at 23.

70 "Waswanipi", *supra* note 12 at 76; "Hunting", *supra* note 10 at 173; and Nelson, *supra* note 12 at 219-221.

71 "Self-Management", *supra* note 43 at 77.

72 "Hunting", *supra* note 10 at 184-185.

73 "James Bay", *supra* note 8 at 54; Brody, *supra* note 12 at 186-187; and "Environmental Philosophy", *supra* note 10 at 13-15.

74 Booth & Jacobs, *supra* note 7 at 4.

the deliberate nature of conservation-oriented decisions.[75] Ethics and beliefs are integral to aboriginal management systems.

3.1.4. Aboriginal Land and Resource Use and Sustainability

Some of the literature presents aboriginal relationships with the land as examples for western cultures to learn from in their efforts to develop more sustainable practices.[76] Booth and Jacobs offer the following warning, however:

> There is ... a sense that we, in seeking to learn from Native American cultures, are as guilty of cultural imperialism as were our ancestors when they attempted to destroy these cultures. Too often, we forget the reality behind our stereotype of the "natural ecologist" or the "savage exploiting hapless game species". Native Americans and their belief and value systems become important and valid only as they support our own arguments and ends.[77]

Studies of aboriginal management systems usually conclude that they are sustainable and effective.[78] Commentators generally agree that aboriginal management systems are adaptive

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75 "Waswanipi", *supra* note 12 at 84.

76 Matthiessen, *supra* note 59 at 1-13; Gadgil *et al.*, *supra* note 50 at 156; and F. Berkes, "Traditional Ecological Knowledge in Perspective" in J.T. Inglis, ed., *Traditional Ecological Knowledge: Concepts and Cases* (Ottawa: International Program on Traditional Knowledge and International Development Research Centre, 1993) 1 [hereinafter "Traditional Ecological Knowledge"] at 5-6, where he suggests that preserving traditional ecological knowledge (TEK) could contribute to ecological sustainability.

77 Booth & Jacobs, *supra* note 7 at 6; see also T Regan, "Environmental Ethics and the Ambiguity of the Native Amercians' Relationship with Nature" in *All That Dwell Therein: Animal Rights and Environmental Ethics* (Berkeley: University of California Press, 1982) 206 at 207; A.L Booth & H.M. Jacobs, "Ties that Bind: Native Environmental Beliefs as a Foundation for Environmental Consciousness" (1990) 12 Environmental Ethics 27 at 42; and D.J. Buege, "The Ecologically Noble Savage Revisited" (1996) 18 Environmental Ethics 71 at 84-85.

78 See for example, "Hunting", *supra* note 10 at 185-86; "James Bay", *supra* note 8 at 58; "Waswanipi", *supra* note 12 at 82; and "Fishery Resource Use", *supra* note 12 at 305-306. Several commentators argue that aboriginal resource use and management is more ecologically sound than the settler society's resource use and management. See for example, J.W. Ragsdale, Jr., "Law and Environment in Modern America and Among the Hopi Indians: A Comparison of Values" (1986) 10 Harvard Env. L. Rev. 417; A.L. Booth, "Learning from Others: Ecophilosphy and Traditional Native American Women's Lives" (1998) 20 Environmental Ethics 81 at 93; Newell, *supra* note 12 at 45; Ontario Round Table on Environment and Economy, *Report of the Native People's Circle on Environment*

and flexible.[79] For example, the practices of resting territories and rotational harvesting usually result in short recovery times for animal populations.[80] Some commentators argue that aboriginal peoples, because of their relationships to the land, and in particular because they seek to maintain their relationships with their lands into the future, are better stewards; they have "more incentives for the sustainable use of that land and its resources than outsiders."[81]

Feit concludes that a combination of ethics, knowledge and authority, places stewards in an optimal position to monitor and assess the effects of land use, and to adjust allocations accordingly.[82] The knowledge base for aboriginal management is based on "long-term historical experience of particular ecosystems" and therefore contributes to resiliency and ecological sustainability.[83] A study of the Omeshkego Cree found that their hunting territories "followed the natural contours of the land [and] consisted of an ecosystem unit by design."[84]

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and Development (Queen's Printer for Ontario, 1992) at 24; "Hunting", *supra* note 10 at 186; "Fisheries", *supra* note 15 at 149-52; "Fishery Resource Use", *supra* note 12 at 306; and F. Berkes *et al.*, "Wildlife Harvesting and Sustainable Regional Native Economy in the Hudson and James Bay Lowland, Ontario" (1994) 47(4) Arctic 350 at 358.

79 Harvesters and stewards can adjust their activities in response to the distribution and condition of animals: "James Bay", *supra* note 8 at 54; Nelson, *supra* note 12 at 223; "Fishery Resource Use", *supra* note 12 at 302; Scott, *supra* note 21 at 165; "Self-Management", *supra* note 43 at 82; "Waswanipi", *supra* note 12 at 80-81; and H.A. Feit, "The Future of Hunters Within Nation-States: Anthropology and the James Bay Cree" in E. Leacock & R. Lee, eds., *Politics and History in Band Societies* (Cambridge: Cambridge University, 1982) 373 at 387.

80 "Waswanipi", *ibid.* at 80-81; "James Bay", *supra* note 8 at 57; Scott, *supra* note 21 at 167; and Gadgil *et al.*, *supra* note 50 at 154 argue that rotational harvesting results in biodiversity conservation and maintenance of habitat productivity.

81 Berkes *et al.*, *supra* note 1 at 82 (references omitted).

82 "James Bay", *supra* note 8 at 52.

83 Gadgil *et al.*, *supra* note 50 at 155.

84 Berkes *et al.*, *supra* note 21 at 16. The researchers found that "the okimah-steward was in charge of a river basin sub-ecosystem, which is a very appropriate unit from an ecological point of view, for wildlife management."

Aboriginal management systems contribute to cultural sustainability as well. Relationships with land and resources are central to aboriginal cultures and identities.[85] Harvesting and management practices socialize and educate younger generations and perpetuate social relations among people and relationships between people and wildlife.[86] Harvesting activities ensure continuation of values such as stewardship and sharing,[87] and management systems reinforce aboriginal ethics and religions.[88] Aboriginal peoples perpetuate their cultures by teaching both the skills and ethics involved in resource harvesting.[89] According to Usher, indigenous knowledge is part of the cultural heritage of aboriginal peoples.[90] Indigenous knowledge is cumulative and the sharing and transmission of that knowledge within and between generations is culturally important.[91]

Berkes suggests that the preservation and continuity of indigenous knowledge contributes to cultural diversity.[92] Berkes argues that aboriginal cultures provide us with alternative environmental philosophies which are part of the "cultural heritage of humankind."[93] He argues that cultural diversity, like biological or genetic diversity, is "the raw material for evolutionarily adaptive responses."[94] Ensuring the continuity of aboriginal management systems may also contribute to ecological sustainability because the survival of aboriginal cultures maximizes options for Canadians: "Just as important as it is to conserve biodiversity

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85 See, for example, "Renewable Resources", *supra* note 48 at 29 and 35; Berkes *et al.*, *supra* note 1 at 82; "Effects of Petroleum", *supra* note 44 at 253-256 and 260; Berkes *et al.*, *supra* note 78 at 356; and Booth, *supra* note 77 at 94.

86 "Effects of Petroleum", *ibid.* at 256; Berkes *et al.*, *ibid.* at 358; and "Sustenance", *supra* note 3 at 61.

87 "Sustenance", *ibid.* at 61.

88 "The Future", *supra* note 79 at 387; and Berkes *et al.*, *supra* note 78 at 356.

89 Berkes et. al., *ibid.* at 358.

90 "Indigenous Management", *supra* note 29 at 7; "Devolution", *supra* note 32 at 71.

91 Gadgil *et al.*, *supra* note 50 at 151.

92 "Traditional Ecological Knowledge", *supra* note 76 at 5-6.

93 "Environmental Philosophy", *supra* note 10 at 7-8.

94 "Environmental Philosophy", *ibid.* at 19-20.

for sustainability, it is as urgent to conserve the diversity of local cultures and the indigenous knowledge that they hold."[95]

3.1.5. Breakdowns of Aboriginal Management Systems

While many writers conclude that aboriginal management systems are sustainable, they note that like all resource management regimes, they are not always successful.[96] Some researchers observe that some indigenous knowledge and resource management systems have disappeared or lost their authority.[97]

Several writers attribute breakdowns of aboriginal management systems to a loss of control over territories due to intrusions from outsiders, and to the imposition of government property systems and rules and regulations.[98] For example, Feit notes that while Waswanipi Cree hunters over-hunted beaver and marten in the 1930s when they were unable to prevent their depletion by non-aboriginal trappers, populations and harvest levels of other animals remained sustainable.[99] Some commentators describe the degradation of aboriginal common property systems into open access, resulting in a "tragedy of the commons".[100] Spry, for example, describes "the transition in western Canada from common property resources, to open access resources, and finally to private property."[101] She argues that a "tragedy of the

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95 Gadgil *et al.*, *supra* note 50 at 156.

96 "James Bay", *supra* note 8 at 62; "Self-Management", *supra* note 43 at 83; Booth & Jacobs, *supra* note 7 at 6; and Buege, *supra* note 77 at 73, who notes the danger that evaluations of the sustainability of aboriginal resource use may be used to deny aboriginal rights.

97 Fast & Berkes, *supra* note 8 at 6-7; Berkes *et al.*, *supra* note 21 at 18; and Osherenko, *supra* note 48 at 5.

98 "Hunting", *supra* note 10 at 186-187; and "Self-Regulation", *supra* note 12 at 170.

99 "James Bay", *supra* note 8 at 59; and "Self-Regulation", *ibid.* at 170.

100 Berkes *et al.*, *supra* note 21 at 19.

101 I.M. Spry, "The Tragedy of the Loss of the Commons in Western Canada" in A.L. Getty & A.S. Lussier, eds., *As Long as the Sun Shines and Water Flows: A Reader in Canadian Native Studies*, Nakoda Institute Occasional Paper No. 1 (Vancouver: University of British Columbia, 1983) 203 at 203.

commons" resulted when open access replaced aboriginal common property systems.[102] The imposition of management systems based on private ownership further prevented aboriginal peoples from accessing their lands and resources.[103]

Aboriginal communal property systems exclude outsiders and regulate resource use.[104] The federal Parliament and provincial legislatures have enacted laws that ignore aboriginal property systems and rules governing access to resources, and that permit outsiders to access and harvest those lands and resources.[105] Where aboriginal peoples overharvest, researchers conclude that their behaviour can often be attributed to a refusal to follow government-imposed rules.[106]

Regardless of the causes of breakdowns in aboriginal management systems, examples of breakdown should not be relied upon to deny the existence or viability of aboriginal management systems:

> It is true that these rules did not work always or invariably, but it is ridiculous to suggest that substantiation of one or even several instances where they did not is grounds for completely rejecting their existence and function throughout the breadth and depth of native peoples' experience on this continent. It is unbecoming in the extreme when that suggestion comes from a society that, by virtue of its own alleged modernity and sophistication, has managed to obliterate more species on the North American continent in less than a century than had disappeared since the Ice Age.[107]

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102 Spry, *ibid.* at 212.

103 Spry, *ibid.* at 219.

104 L.N. Binder & B. Hanbidge, "Aboriginal People and Resource Co-Management: The Inuvialuit of the Western Arctic and Resource Co-Management under a Land Claims Settlement" in Inglis ed., *supra* note 76 at 123; C. Hrenchuck, "Native Land Use and Common Property: Whose Common?" in Inglis ed., *supra* note 76, 69 at 77; "Sustenance", *supra* note 3 at 67; Spry, *supra* note 101 at 210; "Indigenous Management" *supra* note 29 at 6.

105 McDonald, *supra* note 8 at 204.

106 Hrenchuck, *supra* note 104 at 77; "James Bay", *supra* note 8 at 59-60.

107 P.J. Usher, "Property Rights: The Basis of Wildlife Management" in *National and Regional Interests in the North*, *supra* note 47, 389 at 394; see also "Self-Regulation", *supra* note 12 at 170.

3.1.6. Evolution of Aboriginal Cultures and Management Systems

In the following quote, Feit describes a commonly held view of aboriginal peoples:

> If an Indian adopts civilization then he or she is no longer a "real Indian" because Indian is what Europeans are not and they can not become modern. As a result, the idea of the Indian is timeless. Indians are people without history. The concept of progress and evolution of society has changed that a little bit, however, because we see civilization as the triumph of history and it gives the idea that Indians ultimately, in time, will disappear and become like us. The overall consequence of these ideas is that Indians are people without a capacity to be active in the making of their own lives and in the making of a future that is different from our own. In so far as they have a history, it is the history of becoming like us.[108]

Berkes and Fast argue that cultural change should not be equated with cultural loss.[109] Continuity and change are not mutually exclusive.[110] Freeman suggests that cultures are "dynamic and evolving realities," and that a "core of essential elements, constituting the basis of a person's self-perception of who he is, and why his group is distinctive and worthy, does continue to make the intergenerational journey."[111]

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[108] H. Feit, "Colonialism's Northern Cultures: Canadian Institutions and the James Bay Cree" in B.W. Hodgins & K.A. Cannon, eds., *On the Land: Confronting the Challenges to Aboriginal Self-Determination in Northern Quebec & Labrador* (Toronto: Betelgeuse, 1995) 105 at 107; see also H. Brody, *Living Arctic: Hunters of the Canadian North* (Vancouver: Douglas & McIntyre, 1987) at 174-175, where he argues:

> Traditional life loses its force, its very being, if violated by the modern....
>
> And so we force a moral choice upon aboriginal peoples. We consign them to one of two possible categories: traditional or modern. They must be one or the other....
>
> This imposition of a traditional-modern dichotomy is irrational. All people live in both the past and the present. ... All human cultures seek to realize and protect their identity. ... All individuals and communities have traditions and histories of which they are proud.

[109] Fast & Berkes, *supra* note 8 at 7.

[110] "Traditional Ecological Knowledge", *supra* note 76 at 3.

[111] M.M.R. Freeman, "Persistence and Change: The Cultural Dimension" in M. Zaslow, ed., *A Century of Canada's Arctic Islands: 1880-1980* (Ottawa: Royal Society of Canada, 1981) 257 at 258. Freeman notes, *ibid.* at 265, that: "Culture is not the ancient and exotic aspects of a lifestyle..."

Several writers who have studied northern aboriginal peoples have found that their cultures have adapted to contact, and loss of control over their lands and lives, but that such change is not evidence that aboriginal peoples have abandoned their cultures.[112] Northern subsistence economies have evolved into mixed economies that include subsistence activities, commodity production, wage labour, and social assistance and transfer payments.[113]

Mixed economies are a survival strategy.[114] They accommodate, and permit aboriginal peoples to maintain, their cultural values.[115] They are evidence of the resilience of aboriginal cultures, not the loss or abandonment of such cultures. Mixed economies embody a balance of continuity and change.[116] Traditional or subsistence sectors within mixed economies remain culturally important and "quantitatively significant."[117] The manner in which aboriginal communities carry out hunting and related activities has changed, but these activities still play an important cultural role.[118] Usher therefore suggests that it is important to understand the contemporary social and cultural roles of harvesting and related practices.[119] Berkes argues that mixed economies are both culturally and environmentally

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112 See, for example, McDonald, *supra* note 8 at 214-215; and Fast & Berkes, *supra* note 8 at 21.

113 W.A. Rees, "Introduction: A Rationale for Land-Use Planning" in T. Fenge & W.A. Rees, eds., *Hinterland or Homeland? Land-use Planning in Northern Canada* (Ottawa: Canadian Arctic Resources Committee, 1987) 1 at 8; McDonald, *supra* note 8 at 211; Berkes *et al.*, *supra* note 78 at 351; and Fast & Berkes, *supra* note 8 at 1.

114 P.J. Usher, *Assessing the Impact of Industry in the Beaufort Sea Region, A Report to the Beaufort Sea Alliance* (Ottawa, December 1982) at 17.

115 McDonald, *supra* note 8 at 213; Berkes *et al.*, *supra* note 1 at 81-82; and "The Future", *supra* note 79 at 389-95.

116 George *et al.*, *supra* note 62 at 71-73; and "The Future", *ibid.* at 403.

117 Berkes *et al.*, *supra* note 78 at 356-357; George *et al.*, *supra* note 62 at 73 and 81-82; and Fast & Berkes, *supra* note 8 at 1 and 23.

118 In the Moose River Basin, for example, Cree peoples continue to redistribute food from the hunt to non-hunting families, the elderly and the infirm: George *et al.*, *supra* note 62 at 82. See also Berkes *et al.*, *supra* note 1 at 88-91; "The Future", *supra* note 79 at 384-386; and Berkes *et al.*, *supra* note 78 at 358.

119 "Sustenance", *supra* note 3 at 62.

sustainable.[120] Today, mixed economies may be crucial to the survival of aboriginal cultures. Brody makes the following argument:

> No one should be surprised when the Indians of today insist that their ways of looking at the world and harvesting its resources will outlive any other. ... they insist, sometimes with remarkable conviction, that their way of changing is what will guarantee survival. And indeed, in every point in their dealings with European newcomers to the continent, this way has revealed itself. The flexibility, adaptability, and mobility of the Athapaskan people is the background and context for every social and economic innovation that Whites and their institutions have introduced in the North.[121]

Aboriginal management systems change over time as well. Zion argues that aboriginal laws and management systems are evolving relationships, not static sets of rules.[122] Berkes notes that traditional laws must be permitted to evolve in response to outside influences.[123]

Aboriginal societies have always had laws and institutions governing land and resource use. Laws and institutions relating to wildlife are aimed at ensuring continuing success in harvesting activities. Authority is coupled with responsibility to act as a steward of the land. Stewards are hunters and thus their decisions are based upon extensive knowledge gained from experience.

Aboriginal management systems, like the activities they seek to perpetuate, are integral components of aboriginal cultures. Those systems are intertwined with aboriginal beliefs and ethics. Those beliefs and ethics view humans as members of the natural world who owe

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120 Berkes *et al.*, *supra* note 78 at 359.

121 Brody, *supra* note 12 at 86.

122 J.W. Zion, "Searching for Indian Common Law" in B.W. Morse & G.R. Woodman, eds., *Indigenous Law and the State* (Dordrecht, Netherlands: Foris, 1988) 121 at 125, draws an analogy to the common law. See also *Mabo* v. *Queensland* [No. 2] (1992), 175 C.L.R. 1 (H.C.) at 61, where the Court acknowledged that "in time the laws of any people will change."

123 "Self-Regulation", *supra* note 12 at 170 and 172. He notes, for example, that the Cree of the James Bay area adjusted their laws in response to new roads built on their territories for hydro-electric development.

obligations and respect to other members.

Unlike the settler society's resource management regimes, aboriginal management systems are not codified. They are nonetheless deliberate efforts to manage the use of resources and take care of the land.

Most studies conclude that aboriginal management systems are culturally and ecologically sustainable. Stewards are usually knowledgeable and their authority therefore respected. Aboriginal management systems are local systems. Those who rely on the land are responsible for its stewardship. While generally effective, aboriginal management systems, like all management systems, are not always successful.

While aboriginal societies have necessarily changed since pre-contact times, they have not for the most part abandoned their cultures. Mixed economies consisting of subsistence sectors allow aboriginal cultures to continue. Management systems retain their cultural and ecological importance even where aboriginal societies have adopted mixed economies. Those management systems change over time as well, and like the societies of which they are a part, may need to continue to change to remain viable.

The following section examines two examples of Canadian resource management, Alberta's forest management legislation, and the federal mining regime.

3.2. Government Resource Management in Canada

This section examines government approaches to resource management, using Alberta's *Forests Act*[124] and the *Canada Mining Regulations*[125] as examples. I chose these two examples for several reasons: one is provincial and one federal; one relates to a renewable

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[124] R.S.A. 1980, c. F-16.

[125] C.R.C. 1978, c. 1516.

resource and the other to a non-renewable resource; and both are representative examples. My focus is on the disposition of resources and rights to harvest or develop them. Questions concerning production methods and regulation of, for example, pulp and paper production or the operation of mines, are beyond the scope of this thesis.

3.2.1. Forest Management

As in most Canadian jurisdictions, forest management in Alberta is based upon the assumption that the most appropriate use of forests is timber production.[126] Forest management is therefore essentially management of and for timber production.[127]

Forest management begins with delineation of the forest land base, and in particular the identification of lands for timber production.[128] The first step identifies "timber productive" forest lands, which are lands capable of growing commercial timber within an acceptable time period.[129] The next step identifies the "wood production forest", which is the portion of the timber productive forest that is available for commercial timber production.[130] The factors relevant to identifying the wood productive forest include economic accessibility and availability.[131]

Alberta's *Forests Act* gives the Minister of Environmental Protection authority to divide forest land[132] into forest management units, and to determine the annual allowable cut (AAC)

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126 On forest management generally, see G. Baskerville, "Understanding Forest Management" (1986) 62 The Forestry Chronicle 339.

127 M. Howlett & J. Rayner, "The Framework of a Forest Policy in Canada" in M.M. Ross, *Forest Management in Canada* (Calgary: Canadian Institute of Resources Law, 1995) 43 at 45.

128 See Ross, *ibid.* at 3-10.

129 *Ibid.* at 3.

130 *Ibid.* at 4.

131 An example of unavailable timber productive forest is land set aside as a national park. Ross, *supra* note 127 at 4; Howlett & Rayner, *supra* note 127 at 84-85.

132 "Forest land" is defined in s. 1(d) as "public land intermittently covered with forest growth".

for each unit.[133] The Minister may dispose of Crown timber[134] by issuing one of three types of tenures: forest management agreements ("FMA"s); timber licences issued to quota certificate holders; and timber permits.[135] The FMA, a long-term, area-based tenure, is the most extensive tenure, and the main instrument used to dispose of timber in Alberta.[136]

Section 16(1) governs FMAs:

> 16(1) The Minister, with the approval of the Lieutenant Governor in Council, may enter into a forest management agreement with any person to enable that person to enter on forest land for the purpose of establishing, growing and harvesting timber in a manner designed to provide a perpetual sustained yield.

The *Act* provides neither a process nor any criteria for, the granting of FMAs. An FMA is a negotiated agreement between the provincial government and a forest company. Ross concludes that forest management in Canada includes considerable discretion "in the allocation of significant areas of public lands."[137]

The Minister's discretion to negotiate an FMA is limited in that the purpose of an FMA must be timber harvesting and growing aimed at supplying a perpetual sustained yield of timber.[138]

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133 *Forests Act*, *supra* note 124, s. 14.

134 Crown timber is defined in s. 1(c) of the *Act* as "timber grown on public land, except timber harvested pursuant to a timber disposition." A "timber disposition", according to s. 1(m), is "a forest management agreement, timber licence or timber permit."

135 *Forests Act*, *supra* note 124, s. 15.

136 Ross, *supra* note 127 at 126. With the exception of British Columbia, long-term, area based tenures are the primary method of disposing of timber resources in Canada.

137 Ross, *ibid* at 127. Three quarters of Alberta's productive forest lands have been disposed of under FMAs. *Ibid.* at 126. Ross notes that "The Crown ... exercises control over management and remains accountable for the long-term health of the forest land under tenure."

138 In *Reese* v. *Alberta* (1992), 7 C.E.L.R. (N.S.) 89 (Alta. Q.B.) at 113, Justice McDonald considered the term "perpetual sustained yield" in s. 16(1), and held as follows:

> It is understood by the use of the phrase "perpetual sustained yield" that not only over the term of the agreement, but beyond that term and beyond any conceivable extension of the term, the harvesting and regeneration activities in each period will not adversely affect the capacity of that area of land to produce, in all future

Ownership or operation of a wood processing facility, or commitment to construct such a facility, though not mentioned in s. 16, is generally a prerequisite to acquiring an FMA.[139] Timber production is the primary use of land covered by an FMA. The purpose of the agreement is to manage timber harvesting and growing. Other uses of forested lands are provided for, if at all, in policies or terms of FMAs.

An FMA does not grant its holder ownership of the land,[140] but except as against the Crown, an FMA holder owns all Crown timber on lands included in the FMA and is entitled to "reasonable compensation from any person who causes loss of or damage to any of the timber or any improvements created by the holder."[141] An FMA is an exclusive right to harvest timber on the lands covered, but it is not a right to cut timber. The FMA holder must submit plans and obtain yearly cutting permits.[142] FMAs usually require the Minister to issue cutting permits. FMAs are granted for twenty-year terms, and are renewable for another twenty years before the FMA expires.[143]

Timber permits are volume-based. The Minister has an unconstrained discretion to grant or sell timber permits.[144] Timber permits specify the land on which and the period of time

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> periods of the same length, at least the same new volume and quality of timber as has been harvested during that period. Moreover, as the yield must be "sustained" in perpetuity, the forest must be managed in such a way that the yield is a steady, or regular, yield...

139 Ross, *supra* note 127 at 128-129; the terms of FMAs themselves refer to pulp and paper mills.

140 Ross, *ibid.* at 127.

141 *Forests Act*, *supra* note 124, s. 16(2). Where aboriginal title exists on forested lands, the province is purporting to transfer ownership of timber to which it does not have full title. See s. 109 of the *Constitution Act, 1867*; *St. Catherine's Milling and Lumber Co.* v. *R.* (1886), 13 S.C.R. 577, aff'd, *St. Catherine's Milling and Lumber Co.* v. *R.* (1888), 14 App. Cas. 46 (P.C.); *Haida Nation* v. *British Columbia (Minister of Forests)* (1997), 153 D.L.R. (4th) 1 (B.C.C.A.), reversing (1995), 130 D.L.R. (4th) 661 (B.C.S.C.); *Delgamuukw* v. *British Columbia*, [1997] 3 S.C.R. 1010 .

142 See Ross, *supra* note 127 at 141.

143 Most agreements contain "evergreen" provisions, whereby the term is extended at regular intervals by another full term. Ross, *ibid.* at 126.

144 *Forests Act*, *supra* note 124, s. 22(1).

during which timber may be harvested, the timber which may be harvested, and terms and conditions.[145] A permit holder must pay a reforestation levy or reforest lands.[146]

A coniferous timber quota is a volume based tenure that allocates a share of the AAC of coniferous timber within a forest management unit. [147] Deciduous timber quotas may be either area-based or volume-based.[148] The Minister has a discretionary power to allocate quotas.[149] In contrast to the negotiated terms of FMAs, volume based tenures are allocated through competitive bidding and the Minister may prescribe any terms and conditions in allocating timber quotas.[150]Quotas may be issued for terms up to twenty years, divided into five-year quadrants.[151] There is a right of renewal if, "in the Minister's opinion there is adequate timber available in the forest management unit to justify the renewal", subject to any modifications or conditions the Minister considers necessary.[152] As with area-based tenures, the primary concern is timber supply. The Minister appears to have no discretion to refuse to renew on grounds other than timber supply.

Volume-based tenures usually impose less management obligations on tenure holders.[153]The Minister retains primary management responsibility over lands subject to timber quotas, and can therefore fix or alter the volume or area that may be harvested during a quadrant.[154]

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145 *Ibid.*, s. 22(4).

146 *Ibid.*, s. 22(5). The Minister can require the licensee to reforest either the harvested land or an equivalent amount of land within the management unit.

147 *Ibid.*, ss. 1(n) and 17(2).

148 *Ibid.*, ss. 1(n), 17(3).

149 *Ibid.*, s. 17(1).

150 *Ibid.*, s. 18(1).

151 *Ibid.*, ss. 18(1) and 18(5).

152 *Ibid.*, s. 20.

153 On volume-based tenures generally, see Ross, *supra* note 127 at 189-204.

154 *Forests Act*, *supra* note 124, s. 19(1).

To harvest timber, a timber quota holder must obtain a timber licence.[155] A quota holder must be issued a timber licence if he or she has provided a security deposit, complied with the regulations and paid fees and costs.[156] The licence specifies the land on which and the period during which the licensee may harvest timber; the timber that the licensee may harvest; and any terms or conditions of the licence.[157] A licensee must prepare annual operating plans,[158] and reforest harvested lands or pay a reforestation levy.[159]

Quota, licence and permit holders do not acquire rights or interests in land. They are granted rights to enter on the land in order to carry out the activities specified in the licence or permit, or in the *Act* or regulations.[160] A licensee or permit holder owns the timber once cut, and is "entitled, except as against the Crown, to compensation from any person who deprives him of his right to cut and recover any timber."[161]

Management of forests is clearly concerned with timber supply. Licence, permit and FMA holders must record the quantity of timber harvested, manufactured and disposed of, and they must record reforestation information.[162] Where FMA holders engage in intensive silviculture that results in increased yields, AACs are increased, and the tenure holder can harvest the additional timber free of dues or at favourable rates ("allowable cut effect").[163]

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155 *Ibid.*, s. 18(4).

156 *Ibid.*, ss. 21(1) and 21(2).

157 *Ibid.*, s. 21(4).

158 *Ibid.*, s. 21(3).

159 *Ibid.*, s. 21(5). The Minister can require the licensee to reforest either the harvested land or an equivalent amount of land within the management unit.

160 *Ibid.*, s. 28(1).

161 *Ibid.*, s. 28(4).

162 *Ibid.*, s. 29(1).

163 Ross, *supra* note 127 at 169.

The Minister can suspend, cancel, or reduce the terms of a quota, permit or licence, for failure to cut the authorized volume or area, cutting more than authorized, failing to pay Crown charges, failing to comply with terms or conditions, failing to operate in accordance with an operating plan, contravening the *Act* or regulations, or failing to comply with an order of the Minister.[164] If an FMA holder contravenes the *Act* or regulations, fails to comply with a term or condition of the FMA or with an order of the Minister, the Minister may suspend the FMA, or, with the approval of the Lieutenant Governor in Council, may cancel the FMA.[165] If the Minister is of the opinion that it is in the public interest to do so, the Minister can alter or vary any provision or condition, or the area of a permit, quota or licence.[166] This provision would appear to allow the Minister to protect non-timber values.

3.2.1.1. Forest Management and Sustainability

The forest management regime in Alberta is inconsistent with the principles of sustainability outlined in Chapter 2. Forests are not managed as ecosystems.[167] The regime manages forests to ensure a long term supply of fibre to the forest industry.[168] Howlett and Rayner have described the evolution of forest management in Canada. They conclude that the earlier objective of obtaining an economic rent from forested lands continues,[169] and that forest

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164 *Forests Act*, *supra* note 124, s. 25(1). For commentary on "conflict between the government's desire for an orderly and nearly constant flow of fibre and the realities that the industry faces concerning fluctuating markets and product values" see Howlett & Rayner, *supra* note 127 at 90.

165 *Forests Act*, *ibid.*, s.25(2).

166 *Forests Act*, *ibid.*, s. 26. The Minister may pay the holder compensation in an amount the Minister considers just: s. 27.

167 For a discussion of the various uses and values of forests, see Ross, *supra* note 127 at 11-40.

168 See Howlett & Rayner, *supra* note 127 at 63.

169 Thompson explains the concept of economic rent as follows:

> Most economists accept that there is an economic rent in land that can be captured by the owner of the land either through a surplus return on investment of capital and labour or as consideration for the sale or lease of the land to another.... Most economists will also agree that governments can and should capture this rent for the citizens they serve. If they do not, they are, in effect, making a gift of the rent to those to whom they sell or lease the land.

management is now concerned with securing sustained timber yields as well.[170] While forest management therefore recognizes the interdependence of economic and ecological sustainability to a limited extent, it only recognizes one function of forests. Forest management treats forests as if they were tree farms or factories, and does not protect other values or components of forest ecosystems.[171]

Howlett and Rayner note that while non-timber values and non-commercial interests in forests are increasingly recognized, "as placing legitimate constraints on how timber management can be conducted, these other interests have not been able to alter the fundamental timber management paradigm or pattern itself."[172] Similarly, Ross notes that any requirements aimed at protecting non-timber values are "superimposed on a regime of management traditionally focussed on timber production, and continue to be perceived by most forest managers as "constraints" on management."[173] She concludes as follows:

> Since long-term area-based tenures establish timber production as the primary use of the forest, it follows that other existing uses, unless they are specifically protected, become secondary and are only continued or tolerated to the extent that they do not conflict with timber production objectives. When timber harvesting operations are incompatible with other uses of the forest (for example, when large clearcuts remove wildlife habitat critical to the pursuit of hunting or trapping activities), existing uses of the forest are *de*

A. Thompson, "Economic Aspects of the Public Interest: A Lawyer's Perspective" in M.M. Ross & J.O. Saunders, eds., *Disposition of Natural Resources: Options and Issues for Northern Lands* (Calgary: Canadian Institute of Resources Law, 1997) 1 at 4.

170 Howlett & Rayner, *supra* note 127 at 70.

171 See J. Dufour, "Towards Sustainable Development of Canada's Forests" in B. Mitchell, ed., *Resource Management and Development: Addressing Conflict and Uncertainty* (Toronto: Oxford University, 1991) 85 at 94; G.F. Hartman, "Managing Non-Native Renewable Resource Use in the North: Rising Expectations in Unproductive Ecosystems" in Freeman, ed., *supra* note 3, 30 at 49. Ross, *supra* note 127 at 130, notes that preambles of FMAs identify the purpose of these agreements as provision of "a continuous supply of forest products ... to the wood processing plant..."

172 Howlett & Rayner, *supra* note 127 at 45; The *Timber Management Regulation*, AR 60/73, s. 164, provides, in part, as follows: "The Minister shall manage the forest resources in accordance with established forestry principles and in the economic interest of the public..." In contrast, Ontario's *Crown Forest Sustainability Act*, S.O. 1994, c. 25, s. 1, provides that the objective of that Act is the sustainability of Crown forests.

173 Ross, *supra* note 127 at 170.

facto pre-empted.[174]

While Alberta adopts the principle of integrated resource management in policy documents and non-binding guidelines, rules and manuals, it does not, for the most part, accord non-timber users, or non-commercial timber users, rights that can compete with timber harvesting rights.[175] Non-timber values are protected by regulating or restricting forest practices through means such as modified harvesting methods, buffer zones, road planning and water crossing specifications.

Ross summarizes land use planning with respect to forested lands as follows:

> Generally, planning for Crown forest lands has been the prerogative of the Ministries responsible for forests. ... Detailed resource management planning has occurred at the unit level or within the boundaries of allocated tenures. Although the concerns of other resource users are accommodated to the extent possible as they arise, overall planning for Crown forests is rarely conducted within the broader context of a provincial strategy in regard to the forest resource.[176]

The Forests Act exemplifies the disintegrated nature of resource management in Canada. Forest management in Alberta is not concerned with maintaining the resilience, integrity or diversity of forest ecosystems. According to Elder, the principles underlying the *Forests Act* (the *Act*) are that "old-growth forests should be clearcut and that replanted areas should be managed as a single crop, single age-class plantation."[177]

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174 *Ibid.* at 149.

175 *Ibid.* at 118-119. Management principles can also be included in licences and agreements, but the terms and conditions of licences are decided by the Minister exercising his or her discretion, and FMAs are negotiated between industry and the Minister. The exceptions are pre-existing timber rights, and oil, gas, mining and grazing rights. Ross, *supra* note 127 at 149.

176 *Ibid.* at 280. Howlett & Rayner, *supra* note 127 at at 85, describe Alberta's land use planning system as state-directed and clientelistic. It designates lands as either green (forested) or white (settled and agricultural). The authors suggest that this system "is set up to accommodate pre-emptive policy decisions by the state, such as the forest industrial strategy taken for the north in 1986."

177 P.S. Elder, "Biological Diversity and Alberta Law" (1996) 34 Alta. L. Rev. 293 at 341.

Ross contrasts current methods of protecting non-timber values with comprehensive land use planning which "spans and attempts to integrate the entire spectrum of economic, social, cultural, natural, environmental, financial and administrative concerns relevant to decisions about development and environmental protection."[178] In Alberta, the Integrated Resource Planning (IRP) system attempted to achieve integrated decision making. IRPs, however, have no legal status.[179] Ross concludes that a shift in principles to integrated management "necessitates new forms of decision-making processes."[180]

Forest companies who hold FMAs have property rights to the timber and are therefore motivated to ensure a perpetual supply of commercially valuable timber. Forest companies are responsible for deciding how much to log, where to log, where to build roads, what types of logging systems to use, the potential for conflicts with other uses, and potential environmental impacts.[181] Forest management has evolved into a form of self-regulation in which industry foresters are responsible for ensuring a perpetual supply of timber resources.[182] Managers are industry representatives, and management goals are industry goals.[183] This form of delegation or decentralization does not promote sustainable management. It delegates management to those who reap the benefits of timber harvesting, and not those who bear the costs. While government remains responsible for other forest values, it does not generally intervene with the rights of FMA holders. Aboriginal peoples

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178 Ross, *supra* note 127 at 280-281, quoting from Ontario, The Royal Commission on the Northern Environment (J.E.J. Fahlgren, Commissioner), *Final Report and Recommendations* (Toronto: Ministry of the Attorney General, June 1985) at 9-1.

179 Ross, *ibid.* at 283. There is no province-wide IRP, and all but one are subregional or local.

180 *Ibid.* at 39.

181 Howlett & Rayner, *supra* note 127 at 90.

182 Tenure holders are responsible for reforestation, which is aimed at perpetuating one forest value, or one component of forest ecosystems: timber supply. See Howlett & Rayner, *supra* note 127 at 64-65. See also Spry, *supra* note 101, where she describes the tragedy of the commons in western Canada and the transition from aboriginal common property systems, to open access, and then to private property regimes, and the effects on aboriginal peoples of this transition.

183 Howlett & Rayner, *ibid.* at 92-94, suggest that current logging and reforestry practices are not achieving their goal of ensuring sustained timber yields.

and others who value or rely on forests for non-timber purposes are left without a voice in the management of forests.

The *Act* requires tenure holders to gather information on timber harvesting and reforestation only, rather than information on ecosystem or habitat health.[184] In a 1992 report, the Canadian Council of Forest Ministers advocated broadening inventories to include information required to manage forests on an ecosystem basis and provide for a full range of forest values.[185] Howlett and Rayner suggest that tenure holders are interested only in timber and thus information with respect to non-timber values, even if it were required, is not likely to be reliable.[186] Ross notes that information concerning timber supply is often inadequate and incomplete, and that "calculations of future yields and wood supplies tend to be inaccurate".[187]Forest inventories in Alberta are based on aerial photos and some ground surveys.[188] Better information gathering techniques are required to ensure sustainable timber supplies and forests.

Ross notes the particular significance of sustainable forest management in the context of aboriginal peoples' uses of forests. She suggests that aboriginal and government values are often different, and that "Principles of sustained timber yield and full utilization of resources

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184 See Canadian Council of Forest Ministers, *Sustainable Forests: A Canadian Commitment* (Hull, 1992) at 19.

185 *Ibid.* The Alberta government is also apparently aware that information concerning multiple forest values is necessary. FMA holders and the provincial government are developing an "Alberta Vegetation Inventory", which will gather a wider scope of information including tree cover, understory vegetation, habitat and moisture condition. Ross, *supra* note 127 at 8. In British Columbia and Ontario, inventories include recreation, fisheries, wildlife, range and cultural heritage resources. Ross, *ibid.* at 160. British Columbia's *Forest Act*, R.S.B.C. 1996, c. 157, s. 35(1)(d)(ii) requires Tree Farm Licence holders to include non-timber inventories in management plans.

186 Howlett & Rayner, *supra* note 127 at 71.

187 Ross, *supra* note 127 at 5-6.

188 *Ibid.* at 7-8. Ross notes that some regional inventories in the 1984 survey may have overestimated timber volume by as much as thirty percent. E. May, *At the Cutting Edge: The Crisis in Canada's Forests* (Toronto: Key Porter Books, 1998) at 33, notes that the main source of information for Canada's forest inventories is gathered by way of aerial photographs. She comments that "The bird's eye view doesn't even begin to give a picture of volumes on the ground."

... may be incompatible with ... the desire of many First Nations to maintain traditional land uses, such as trapping, while engaging in commercial timber harvesting."[189] The *Forests Act* is not concerned with cultural sustainability or the survival of aboriginal societies. It does not accommodate aboriginal management systems or resource use. The *Act* does not protect or recognize any existing aboriginal rights or interests in forest lands. Aboriginal peoples have no ability to influence the allocation of tenures, except perhaps in policy and IRP processes. Aboriginal peoples and perspectives have limited ability to influence forest management,[190] even though many aboriginal peoples rely on both timber and non-timber forest resources for cultural survival.[191]

3.2.2. The Canada Mining Regulations

The Canada Mining Regulations[192] (CMRs) govern mineral dispositions in the Northwest Territories. The CMRs, like the mineral resource disposition legislation in most Canadian jurisdictions, embody a free-entry scheme.[193] Barton identifies the following three characteristics of free entry disposition systems: 1) there is a right of entry on Crown lands to explore and prospect for Crown owned minerals; 2) there is a right to acquire a claim and thereby take possession of the minerals included in the claim; and 3) there is a right to obtain

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189 Ross, *ibid.* at 152. She cites the definition of "holistic forestry" in the context of aboriginal forest practices from British Columbia, Task Force on Native Forestry, *Native Forestry in British Columbia - A New Approach, Final Report* (Victoria: November 1991) at 45, as a process that considers "all forest values including wildlife, fish, trees, water, soil and plants used for medicinal and spiritual purposes."

190 Aboriginal peoples may be able convince tenure holders or government to protect some forest uses or values at the operational level. As noted above, other values are protected by including buffer zones or adjusting cutblocks. The primary use of forests remains timber production and other values can be protected only to a limited extent.

191 O.P. Dickason, *Canada's First Nations: A History of Founding Peoples from Earliest Times* (2d ed.) (Toronto: Oxford University, 1997) at 379, notes the failure of the Ontario forest management regime to deal with "the possible effects of logging operations on the traditional subsistence base of wild rice harvesting, not to mention fishing, trapping, and hunting."

192 *Supra* note 125.

193 Alberta, Nova Scotia and Prince Edward Island do not have free entry schemes.

a lease on and produce minerals found in the claim.[194]

3.2.2.1. The Right of Entry

Anyone who pays a small fee is entitled to a licence to prospect for minerals in the Northwest Territories.[195]A licence holder is entitled to enter, prospect for, and locate claims on all lands in the Northwest Territories that are vested in the federal Crown or which Canada has power to dispose of.[196] Exceptions to that rule are that a licensee may not prospect for or stake claims on lands:

> (a) to which the National Parks Act applies;
> (b) used as a cemetery or burial ground;
> (c) in respect of which a claim has been recorded and has not lapsed;
> (d) the minerals in which have been granted or leased by Her Majesty;
> (e) set apart and appropriated by the Governor in Council for any purpose described in section 19 [now s. 23] of the *Territorial Lands Act*;
> (f) the entry on which for the purpose of prospecting for minerals and locating a claim thereon is prohibited by order of the Governor in Council, subject to the terms and conditions contained in the order;
> (g) under the administration and control of the Minister of National Defence, the Minister of Energy, Mines and Resources or the Minister of Transport, unless the consent of that Minister has been obtained in writing; or
> (i) the surface of which has been granted or leased by Her Majesty, unless the grantee or lessee consents thereto or an order authorizing entry thereon has been made pursuant to subsection 72(3).[197]

If the government wishes to prevent or limit mineral exploration it must withdraw lands or put them to another listed use before a claim has been staked.[198]Subsection (e) incorporates

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194 B. Barton, *Canadian Law of Mining* (Calgary: Canadian Institute of Resources Law, 1993) [hereinafter *Canadian Law of Mining*] at 115; B. Barton , "The Future of the Free Entry System for Mining in Canada's North" in Ross & Saunders, eds., *supra* note 169 [hereinafter "The Future of the Free Entry System"] at 85.

195 CMRs, *supra* note 125, ss. 7 and 8.

196 *Ibid.*, s. 11(1).

197 *Ibid.*, s. 11(1).

198 *Canadian Law of Mining*, *supra* note 194 at 174, notes that lands can be withdrawn under other legislation, such as the *National Parks Act*, R.S.C. 1985, c. N-14. Subsection (a) confirms that such lands are not open for mineral staking.

the general withdrawal power under the *Territorial Lands Act* and the power of the Governor in Council to set apart and appropriate lands necessary to enable the Government to fulfill obligations under treaties or "for any purpose that the Governor in Council may consider to be conducive to the welfare of the Indians."[199] Under s. 23 (e) of the *TLA* lands may be set apart for public purposes including national forests, game preserves, and game and bird sanctuaries. It will be seen below that despite paragraph (i), a surface holder has no power to refuse entry to a licensee.[200]

3.2.2.2. The Right to Acquire a Claim

To stake a claim in the NWT, a mineral prospector marks the ground to signal to others that he or she has taken up the land as a mineral claim. The maximum size of a claim is 2, 582.5 acres.[201] A prospector must place a post in each of the four corners of the claim, and mark the lines between the posts by erecting further posts at 1,500-foot intervals.[202] The claim is located once all posts are placed and inscribed.[203] The locator must then mark the boundary lines "so that they may be followed throughout their entire length."[204] In treed areas, the boundaries are marked by blazing trees and cutting underbrush.[205] In treeless areas, the

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199 See *Halferdahl* v. *Canada (Mining Recorder, Whitehorse Mining District)*, [1992] 1 F.C. 813 (C.A.).

200 Section 72 requires the surface holder to participate in arbitration.

201 CMRs, *supra* note 125, s. 12. According to Barton, *Canadian Law of Mining*, *supra* note 194 at 243, claim sizes are large in order to facilitate modern exploration techniques, including airborne geophysical surveys.

202 CMRs, *ibid.*, ss. 14(1) and 14(2). The boundaries are marked by placing a wooden post in the ground, cutting off the top of a tree already in the corner and squaring off the top foot of the remaining portion of the tree, or, in treeless areas, by placing a post or constructing a cone-shaped mound of earth or stone.

203 *Ibid.*, s. 14(14).

204 *Ibid.*, s. 16(1).

205 *Ibid.*, s. 16(2)(a).

boundary lines are marked by providing posts or mounds of earth.[206] A licensee must abide by regulations made under the *Territorial Lands Act*, but staking activities are exempt.[207]

The CMRs allow the Chief[208] to issue prospecting permits, which cover between 20,000 and 72,000 acres and accord their holders exclusive rights to prospect and stake claims within the permit area.[209] A permittee must undertake to spend certain amounts on exploratory work.[210] To acquire a claim a permittee must locate and record it in the usual manner.[211]

In contrast to the unfettered discretion to issue forest tenures accorded to the Minister by the *Forests Act*, the CMRs leave the Mining Recorder no discretion to refuse to record a claim that is properly staked.[212] The miner acquires an interest in the minerals through his or her own physical acts of staking the claim.[213] Government representatives have no ability to impose conditions on the granting of a claim.[214]

The holder of a recorded claim has the exclusive right to prospect for minerals and to

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206 *Ibid.*, s. 16(2)(b).

207 *Ibid.*, s. 11(1).

208 Defined in s. 2 of the CMRs *ibid.*, as "the Director, Mining Management and Infrastructure, of the Natural Resources and Economic Development Branch of the Department of Indian Affairs and Northern Development".

209 CMRs, *ibid.*, ss. 29(1) and 29(10), and Sch. V; "The Future of the Free Entry System", *supra* note 194 at 83. Permits remain effective for three years south of the 68th parallel and for five years north of the 68th parallel: s. 29(14).

210 CMRs, *ibid.*, s. 31(1).

211 *Ibid.*, ss. 33 and 34.

212 *Ibid.*, s. 24(3). The recorder must submit a properly completed application form, and pay a fee of ten cents per acre: s. 24(2), Schedule I, Schedule III.

213 According to Barton, "The Future of the Free Entry System", *supra* note 194 at 86, the free entry system is based upon "self-initiated title, or unilateral appropriation of title to resources." He also notes, *Canadian Law of Mining*, *supra* note 194 at 156, that where map staking is in place, the free entry nature of the scheme remains intact, because the rule that the first comer has a right to the minerals is not changed.

214 See Barton, "The Future of the Free Entry System", *ibid.* at 89.

develop any mine within the claim area.[215] A claim holder may remove, sell or dispose of minerals with a gross value of up to $100,000 every year.[216] A claim holder must obtain a surface lease or grant of the land to erect any building to be used as a dwelling, or any mill, concentrator or mine building, and to create any tailings or waste disposal area related to commencing production.[217]

The CMRs require a claim holder to perform representation work to keep the claim.[218] Representation work can be quite intrusive, particularly where lands are being used for aboriginal subsistence or spiritual purposes. Section 38(1) identifies the activities that qualify as representation work:

> (a) work done in stripping, drilling, trenching, sinking shafts and driving adits or drifts;
> (b) geological, geochemical and geophysical investigations of a claim made on the ground or from an aircraft;
> (c) exploratory work other than that described in paragraph (a) or (b), or of a kind and to the extent approved by an engineer of mines;
> (d) a survey of the claim approved by the Surveyor General;
> (e) work done in constructing roads or airstrips to provide access to the claim.

A claim holder is subject to the Territorial Lands Use Regulations (TLURs),[219] which govern land use in the Northwest Territories, and the *Northwest Territories Waters Act* and Regulations. [220] Exploration work will often escape the restrictions imposed by the TLURs and water use regulations, however, because these regulations only impose restrictions once

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215 CMRs, *supra* note 125, s. 27(1). A claim holder requires permission of the Mining Recorder to enter on a right-of-way for the purpose of prospecting or development: *ibid.*, s. 11(2).

216 *Ibid.*, s. 27(2).

217 *Ibid.*, s. 27(3).

218 *Ibid.*, s. 38(2); 58(7). Work carried out in excess of the amount required to maintain a claim can be carried out indefinitely: *ibid.*, s. 38(3). A claim holder may hold his or her claim for a maximum of ten years from the date of recording. A Mining Recorder must issue a certificate of work to a claim holder who has done the required representation work on a recorded claim: *ibid.*, s. 41(5).

219 *Ibid.*, s. 27(1); Territorial Land Use Regulations, C.R.C., c. 1524.

220 S.C. 1992 c. 39; SOR 93/-303.

operations reach a certain size or scope.[221] Similarly, the *Canadian Environmental Assessment Act*[222] does not require an assessment of prospecting and staking activities.

A surface holder (a lessee or registered holder of surface rights to land) has no power to refuse entry or restrict prospecting activities or mine development.[223] Where a locator wishes to enter a claim in order to prospect for or develop a mine, and the surface holder refuses entry or sets terms and conditions of entry that the locator considers unreasonable, the locator may file a notice of intention to prospect or develop the mine.[224] The Mining Recorder must attempt to effect a settlement of any dispute between a locator and surface holder, and if the Mining Recorder is unable to achieve settlement, the parties must arbitrate.[225] The arbitration panel will determine the extent to which and terms and conditions on which the locator may enter the land, and the amount of compensation to by paid by the locator to the surface holder.[226]

3.2.2.3. The Right to Obtain a Lease and Produce Minerals

A claim holder is entitled to a lease of his or her claim.[227] A lease confers a right to produce

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221 TLURs, *supra* note 219, ss. 8 and 9. Section 6(b) clarifies that the TLURs do not apply to prospecting, staking and locating activities unless they involve the use of equipment or material that requires a permit under the Regulations. Barton, *Canadian Law of Mining*, *supra* note 194 at 20, notes that construction and operation of mines will often trigger environmental regulations, but that exploration work will usually escape such regulation.

222 *Canadian Environmental Assessment Act*, S.C. 1992, c. 37; see also *Mackenzie Valley Resource Management Act*, S.C. 1998, c. 25, not yet in force (Royal Assent 18 June 1998); and the *Exemption List Regulations*, SOR/99-13, the *Mackenzie Valley Land Use Regulations*, SOR/98-429 and the *Preliminary Screening Requirement Regulations*, SOR/99-12.

223 CMRs, *supra* note 125, s. 70(1).

224 *Ibid.*, s. 70(4).

225 *Ibid.*, ss. 71(1) and 71(2).

226 *Ibid.*, s. 72.

227 *Ibid.*, s. 58(2). The only preconditions to obtaining a lease are that the claim holder must file an application, record a survey of the claim with the Mining Recorder, pay a fee of $25.00 and rental for the first year (one dollar per acre), and either record ten dollars of representation work per acre or undertake to commence production on the claim.

and dispose of minerals.[228] Leases are granted for 21 year terms, and a lessee who has complied with the terms and conditions of the lease is entitled to a renewal.[229] A lessee must pay rent of one dollar per acre per year.[230] A lease may contain terms and conditions prescribed by the CMRs and other applicable legislation.[231] A lessee must pay annual royalties on mineral production in excess of ten thousand dollars per year.[232]

3.2.2.4. Free-Entry Mineral Disposition Regimes and Sustainability

The basic assumption underlying a free entry system, as stated by Barton, is that "mineral exploration is always a legal land use."[233] The purpose of the CMRs is to facilitate mineral exploration and development.[234] Lands which may contain minerals ought to be explored and lands containing minerals ought to be mined.[235]

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228 *Ibid.*, s. 27(2).

229 *Ibid.*, ss. 59(1) and 59(2). However, when a renewal term expires, the Minister has discretionary authority to decide whether to further renew the lease: *ibid.*, s. 59(2.1).

230 *Ibid.*, s. 60(1) and Sch. I.

231 *Ibid.*, s. 61(1). The Minister may prescribe any terms and conditions on a lease issued under s. 59(2.1).

232 *Ibid.*, s. 65(1).

233 "The Future of the Free Entry System", *supra* note 194 at 85; The federal government's policy reflects the assumption that mineral exploration is the highest and best use of lands. See Government of Canada, *The Minerals and Metals Policy of the Government of Canada: Partnerships for Sustainable Development* (Ottawa: Public Works and Government Services, 1996) at 14: "For the minerals and metals industry to continue to make its important contribution to the Canadian economy, new mineral deposits must be discovered. As well, for Canada to realize the full potential of its mineral endowment, the industry, within specified limits, must have access to the widest possible land base for exploration purposes." The federal government's policy in establishing protected areas, described *ibid.* at 15, is to "fully take into account the mineral potential of the area in question before taking decisions to create protected areas on federal lands" and to "impose land withdrawals that preclude mineral development activities only when specific conditions justify such action, and only after economic and social impacts have been fully considered."

234 Associated Mining Consultants Ltd., *Review of the Canada Mining Regulations* (Discussion Paper Submitted to the Department of Indian Affairs and Northern Development, April 8, 1996) at 2.

235 See W.A. Rees *et al.*, eds., *Planning for Sustainable Development: A Resource Book (Symposium Proceedings)* (Vancouver: University of British Columbia Centre for Human Settlements, 1989) at 93 for a discussion of the unsustainability of mining. In light of the known and other potential effects

Like forest management, mineral resource management is not based on principles of integrated resource management, nor is it aimed at ensuring the resilience or integrity of ecosystems, or at keeping options open for future generations. Barton notes that free entry mineral disposition schemes give the mining industry rights to enter and take possession of land "that is of value or under use for many other purposes."[236] There is no consideration of non-mineral values or uses of the land. There is no process or mechanism in place to ensure that options for future generations are not foreclosed. Government agencies must exercise their power to withdraw lands if they wish those lands to be put to a use other than mining.[237] As Barton notes, the withdrawal power is a blunt and "clumsy" resource management instrument that must be exercised before claims have been staked.[238] Protection of non-mineral values may also be achieved through regulation, which is superimposed on the free-entry system. Barton concludes that this creates "a tension between regulation and free entry."[239] Unlike forest management, the free-entry regime is not aimed at securing a perpetual supply of minerals to the mining industry.[240]

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of mineral activity, the assumption that lands with mineral potential should be explored and mines developed is questionable.

236 *Canadian Law of Mining*, *supra* note 194 at 165. Rees has commented that while northern lands contain a wide range of values and may be put to a variety of different uses, the government gives precedence to the value of extracting non-renewable resources for the benefit of southern Canada's economy: Rees, *supra* note 113 at 6.

237 "The Future of the Free Entry System", *supra* note 194 at 89. Alternatively, if governments wish to preclude mineral development on lands where claims have already been acquired, it must expropriate and may have to compensate.

238 *Canadian Law of Mining*, *supra* note 194 at 166. Once a claim has been staked, it must be expropriated and the claim holder compensated.

239 *Canadian Law of Mining*, *ibid.* at 166-167; see also J. Leshy, *The Mining Law: A Study in Perpetual Motion* (Washington, D.C.: Resources for the Future, 1987) at 68, who makes a similar argument with respect to mineral legislation in the United States.

240 Because minerals are non-renewable resources, it is impossible to ensure a sustained yield as in forestry. Rees, *supra* note 113 at 93, argue that Canadians are using non-renewable resources as if there were an infinite supply.

As Barton notes in the following quote, regulation of mining activities does not address land use questions:

> While many mining projects are acceptable if they are built in an environmentally sound fashion, there are some that will never be acceptable, no matter how well they are built. ... The free entry system makes dealing with these cases particularly difficult, because once a company has a lease that gives it a right to mine, it will concede that its project will be subject to environmental restrictions, but will be slow to accept that such regulation can legitimately stop the project completely.[241]

Land use decisions in a free entry scheme are made by prospectors and miners.[242] Andrew Thompson notes that rules governing land use choices embody a tradeoff between individual freedom of choice, and freedom of choice for the society as a whole.[243] In a free-entry system individual freedom of choice for miners is wide. Society's freedom to make land use choices is constrained, and aboriginal peoples are precluded from choosing to continue culturally important practices and from protecting the lands upon which their cultures depend for survival.

Barton argues that where there is a conflict over the environmental acceptability of a mine, regardless of environmental precautions, that conflict must be resolved at an earlier stage of the decision making process, and cannot be dealt with by environmental regulations and processes which are added on to a free entry system and applied to production decisions and permits.[244] Barton concludes that "links should ensure that rights under the Canada Mining Regulations to enter, prospect and mine are expressly subject to all environmental, land use and other laws."[245] In particular, "The rights to explore and mine can and should be

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241 "The Future of the Free Entry System", *supra* note 194 at 92-93.

242 *Ibid.* at 89. Barton, *Canadian Law of Mining*, *supra* note 194 at 156, describes the free entry system as "self-initiating."

243 Thompson, *supra* note 169 at 2.

244 "The Future of the Free Entry System", *supra* note 194 at 113.

245 *Ibid.* at 99.

transformed to rights to explore and mine in priority over any other claimant, if and as permitted by environmental legislation. Environmental compliance would be at the heart of the right that is issued."[246]

Barton contrasts free entry schemes with discretionary disposition regimes, under which government can control the pace and location of mineral exploration and production,[247] and engage in land and resource use decision making.[248]

As with forest management, the delegation of land use decisions to the mining industry is not the kind of decentralized decision making contemplated in the sustainability literature. Those who bear the costs of mineral development do not benefit from developments and have no decision making role. Those who benefit from mining, and who generally leave the area after mining it, make the important decisions.

Free-entry regimes are not culturally sustainable. The CMRs do not accommodate or recognize aboriginal resource management systems or uses of lands. Aboriginal peoples are not involved in decisions respecting what lands are open for staking, whether claims are disposed of or whether a claim may go into production.[249] Unless lands are withdrawn or expropriated, a miner's decision to prospect, stake a claim and then put a mine into production trumps any decision making by aboriginal peoples where they wish to put lands to a use incompatible with mining. Questions of aboriginal rights and uses of lands are only considered, if at all, in permitting questions and once mineral development has reached the stage where decisions concerning production are made. Aboriginal peoples cannot impose

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246 *Ibid.* at 99-100. The potential for conflict between aboriginal and government management could be addressed by making compliance with aboriginal laws a condition of the right issued under government legislation.

247 *Canadian Law of Mining*, *supra* note 194 at 151.

248 *Ibid.* at 165.

249 First Nations have some limited involvement in the withdrawal process where the parties have reached fairly advanced stages in land claims negotiations.

regulatory restrictions on mineral activities. As with forest development, aboriginal uses are usually accommodated, if at all, only to the limited extent to which they may be accommodated by adjustments to development plans.

To become sustainable, as Barton suggests, mineral dispositions must be linked with environmental and broader resource management decision making. To become culturally sustainable, particularly on lands used by aboriginal peoples, mineral dispositions must be linked to decisions that seek to ensure the continued ability of the land to support aboriginal cultures.

3.3. Difference and Conflict

Government and aboriginal management systems are based on different values, beliefs, knowledge bases and goals.[250] While aboriginal systems usually attempt to work within the constraints imposed by the natural world, the settler society's systems often alter and manipulate natural systems significantly in order to achieve economic goals.[251] In contrast to the ethical underpinning of Canadian resource management, aboriginal world views generally accept the interdependence of all members of the natural world, including humans. In the aboriginal management systems described above, authority is equated with responsibility. Aboriginal resource management is often based on stewardship rather than ownership.[252] Most aboriginal management systems are based upon the principle that the land belongs to future generations.

Canadian resource management reflects a belief that humans are separate from nature. We compartmentalize the natural world into separately managed components. Forests are

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250 On differences between western science and traditional ecological knowledge (TEK), see "Traditional Ecological Knowledge", *supra* note 76 at 3-5.

251 Booth & Jacobs, *supra* note 7 at 2.

252 Berkes *et al.*, *supra* note 30 at 14; "Self-Management", *supra* note 43.

managed for timber production and lands with mineral potential for mineral production. Wildlife conservation and management is pursued primarily by regulating hunting.[253] In other words, as Peter Usher suggests, "management of fish and wildlife resources becomes separated from the management of the lands and waters that sustain them."[254] As was seen in the discussion above of the *Forests Act*, rather than manage forest ecosystems, including all plants, animals, habitat and water resources together, we manage forests primarily for commercial timber production. The other components of forest ecosystems are managed if at all, as an afterthought at the operational level, after timber resources are disposed of and a decision to cut timber (though the specific location, timing and manner of harvest may as yet be undecided) has been made.

The forest and mineral regimes discussed in this chapter are not concerned with maintaining the resilience or integrity of ecosystems. Consideration of ecosystem values occurs only at the operational level, after decisions to interfere with the ecosystems have already been made.[255] Aboriginal rights and cultures are likewise accommodated, if at all, through minor adjustments to resource development activities.[256]Aboriginal uses of forest resources are not protected in the *Forest Act* or under FMAs, nor are they protected under the CMRs. Conflicts between aboriginal peoples and government managers may result where governments regulate aboriginal harvesting, and where aboriginal overharvesting is blamed for decreases in wildlife populations while habitat destruction and fragmentation from development of non-wildlife resources have more severe effects on wildlife.[257]

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253 See N. Elberg, "Comprehensive Claims, Culture and Customary Law: the Case of the Labrador Inuit" in Morse & Woodman, eds., *supra* note 122,167 at 175; Lyon, *supra* note 61 at 351.

254 "Devolution", *supra* note 32 at 71.

255 For example, timber harvesters may be required to leave buffer zones along river banks.

256 For example, forest companies will be required to cut around a culturally modified tree or archaeological site.

257 Elberg, *supra* note 253 at 175, suggests that this situation results from compartmentalization of nature resources in government management: "It is such an alienated approach which allows a government to encourage the building of an open-pit mine in an important breeding ground of a caribou herd, while at the same time restricting the hunting of the animals by Inuit in order to protect the herd."

While aboriginal peoples often bear the cost of development, they usually have little influence over resource developments. Hrenchuk notes that government resource management that emphasizes industrial development generates conflict "at the local level where the major social costs to such development are felt."[258] In his opinion, there is a fundamental conflict between government's treatment of resources as the common property of Canadians, and the communal tenure which pre-existed government resource management. Researchers suggest that aboriginal management systems are effective until disrupted by government-authorized industrial developments.[259] Hrenchuk argues that unless this conflict is recognized and reconciled, "development will likely continue to ignore, and to impair, the access of Native communities to their traditional base of resources."[260] Duerden suggests that non-aboriginal people who engage in resource development in aboriginal territories are often transient and have no vested interest in maintaining environmental quality or ecosystem integrity.[261] Hrenchuk concludes that "Some measure of authority over the entire resource base which supports the culture would be preferable. In this way, those with the most to lose would gain some control over their territory."[262]

The need to give effect to pre-existing land and resource management systems of aboriginal peoples is reinforced by the fact that aboriginal and non-aboriginal people often envision different futures for lands and resources.[263] Lands which are frontiers to industry and governments may be homelands of aboriginal peoples.[264] Canadian governments often

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258 Hrenchuck, *supra* note 104 at 77.

259 "Waswanipi", *supra* note 12 at 89; "Implications", *supra* note 26 at 168.

260 Hrenchuck, *supra* note 104 at 79.

261 F. Duerden, "A Critical Look at Sustainable Development in the Canadian North" (1992) 45 Arctic 219 at 220-221.

262 Hrenchuck, *supra* note 104 at 78.

263 B.A. Cox, "Changing Perceptions of Industrial Development in the North" in Cox, ed., *supra* note 8 , 223 at 223.

264 P.J. Usher, "Northern Development, Impact Assessment and Social Change" in N. Dyck & J.B.

manage land and resources in aboriginal territories with a view to securing short term economic profits for the settler society.[265] Aboriginal peoples may want certain areas removed from development, while forest and mineral legislation allows or requires the disposition of forest and mineral tenures on those same lands.[266] Moreover, mineral claim and forest tenure holders, to keep their interests, are required to carry out work.[267] Usher argues that this utilitarian, economic approach to lands and resources denies the sacred.[268] There is no room for aboriginal practices, cultures and worldviews that require forests or lands with mineral potential to remain intact. Resource management such as the forest and mineral legislation discussed in this chapter gives little if any consideration to the role of lands and resources in fulfilling the cultural and physical needs of aboriginal peoples.[269]

Finally, aboriginal resource management systems are valuable in themselves for ecological and cultural reasons. Outside intrusions into aboriginal management systems jeopardize not only aboriginal uses of lands and resources and aboriginal management systems, but their knowledge base as well. The loss of indigenous knowledge and management systems is both an ecological and cultural loss. Wildlife populations may recover, but knowledge is

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Waldram, eds., *Anthropology, Public Policy, and Native Peoples in Canada* (Montreal: McGill-Queen's University Press, 1993) 98 at 103-110; S. Fuller & T. McTiernan, "Old Crow and the Northern Yukon: Achieving Sustainable Renewable Resource Utilization" (1987) 14(1) Alternatives 19 at 25; and N. Kassi, "This Land has Sustained us" (1987) 14(1) Alternatives 20 at 21.

265 P.F. Wilkinson, "Some Thoughts Towards a Policy for the Rational Use of Renewable Resources in the Canadian North" in Freeman, ed., *supra* note 3, 72 at 74. S.D. Hazell, "Sustainable Development in Canada's North: Federal Law Reform Issues" in *Report of the Canadian Bar Association Committee on Sustainable Development in Canada: Options for Law Reform* (Ottawa: Canadian Bar Association, 1990) 251 at 253, notes that while the benefits of northern development mostly go to southern Canadians, the environmental and social costs remain in the north.

266 Cassidy & Dale, *supra* note 8 at 168-169.

267 Usher, "Property Rights" *supra* note 107 at 407.

268 Usher, *ibid.* at 408-409.

269 Dickason, *supra* note 191 at 378. E.F. Roots, "Comments on the Realities and Conflicts of Ecosystems, Economic Systems and Cultural Expression in the Northern Environment" in Freeman, ed., *supra* note 3 at 1.

transmitted through practice.[270] Transmission of skills, knowledge and belief from older to younger generations ensures that cultures continue.[271] Freeman thus concludes that when habitat is threatened, "the very means by which that group of people seek to perpetuate their identity and sense of community, and to ensure a knowledgeable future for their children, is under direct attack."[272]

Noel Lyon argues that to achieve sustainability we must reconcile aboriginal and non-aboriginal world views:

> ...it is not a matter of choosing one of two competing visions, 'our' way and 'their' way. Each way of understanding the world and of living in it has important contributions to make to our common future, whether this understanding involves sharing the land in ways that respect the right of the seventh generation to healthy hillsides, valleys, plains, and groves, or using the liberating tools of a modern industrial society which can permit a fulfilling existence to all who seek it.
>
> The real challenge of the present is to reshape our laws, our institutions, and, above all, our way of thinking, to achieve the balance that is the essence of sustainability.[273]

Usher makes a similar argument for combining aboriginal and government resource management:

> Every system of resource management is based on certain assumptions, frequently unstated, about social organization, political authority, and property rights, all of which are closely interrelated. As no two societies or cultures are identical in these respects, there can be no such thing as a scientifically or technically neutral management regime that is equally applicable and acceptable to both. Consequently, where two social systems share an interest in the same resources, there must be some accommodation in the sphere of property, as well

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270 "James Bay", *supra* note 8 at 60-61.

271 *Ibid.* at 60-61.

272 "Renewable Resources", *supra* note 48 at 35. See also McDonald, *supra* note 8 at 210, where he notes that after Tsimshian lands are developed, Tsimshian harvesters feel "like strangers on their own territory because they could no longer find the old familiar natural landmarks, or the ancient resource sites that their lineages had groomed over the centuries."

273 Lyon, *supra* note 61 at 352.

> as in the system of management, unless one is to be completely obliterated by the other.[274]

For aboriginal cultures to survive, aboriginal peoples need to be able to continue their use of resources, including their management systems. The difference in worldviews and goals, and the effect of government resource management on aboriginal cultures, highlight the need to accommodate aboriginal worldviews. One method of accommodating aboriginal worldviews and management systems is through co-management of natural resources. The following section surveys the co-management literature.

3.4. Co-management

The term co-management describes a variety of processes in which harvesters and government resource managers share or influence control, or through which local and government management systems are combined.[275] Co-management widens the range of participants in resource decision making, traditionally restricted to government and industry.[276]

3.4.1. Levels of Authority Transfer in Co-management Arrangements

While co-management may be a means of transferring decision making power from government to local communities, the term itself does not describe the degree, if any, to which aboriginal or local co-managers exercise control over land and resource use.[277] Pikret

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274 Usher, "Property Rights" *supra* note 107 at 390.

275 K.L. Roberts, *Co-management: Learning from the Experience of the Wildlife Management Advisory Council for the Northwest Territories* (M.A. Thesis, University of Calgary, 1994) at 1. T. Campbell, *Aboriginal Co-management of Non-renewable Resources on Treaty or Traditional Territory* (M.A. Thesis, University of Calgary, 1996) at 7; Berkes *et al.*, *supra* note 30 at 12. F. Berkes, "Co-management: Bridging the Two Solitudes" (1994), 22:2-3 Northern Perspectives 18 at 18 defines co-management as "various degrees of integration of local-level and state-level systems."

276 T. Campbell, *ibid.* at 47.

277 F. Berkes *et al.*, *supra* note 30 at 18; F. Berkes, "Co-management", supra note 275; Osherenko, *supra*

Berkes has identified the following seven "levels" of co-management:[278]

> (1) informing communities after making decisions;
> (2) consultation, in which community concerns are heard are but not necessarily heeded;
> (3) cooperation, which includes use of local knowledge;
> (4) communication, in which information flows in both directions and local concerns enter management plans at least to some extent;
> (5) advisory committees;
> (6) management boards;
> (7) partnership/community control meaning a partnership of equals, where joint decision-making is institutionalized, and power is delegated to the community where feasible.

The seventh level is based on the principle "as much local-level management as possible; only so much government regulation as necessary."[279] Even at this highest level, power is delegated to local communities and aboriginal peoples, and government retains primary responsibility and authority.[280]Existing co-management arrangements usually take the form of boards consisting of aboriginal and government representatives that make recommendations to government.[281]They are based on the assumption that the provincial or

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note 48 at 94, sees co-management as a way in which decision-making power can be shared with aboriginal communities without government delegating or relinquishing authority or jurisdiction.

278 See F. Berkes *et al.*, ibid.; and F. Berkes, "Co-management", *ibid.* at 19. The levels of co-management are modelled on S.A. Arnstein, "A Ladder of Citizen Participation" (1969) 35 Journal of the American Institute of Planners 216 whose ladder ranged from manipulation to citizen control.

279 Berkes, *et al.*, *supra* note 30 at 14. According to these authors, ibid. at 16, government intervention is necessary where local management has broken down and over-harvesting is a threat. See also F. Berkes and D. Feeny, "Paradigms Lost: Changing Views on the Use of Common Property Resources" (1990) 17(2) Alternatives 48 at 52.

280 W. Moss, "Inuit Perspectives on Treaty Rights and Governance Issues" in Royal Commission on Aboriginal Peoples, *Aboriginal Self-Government: Legal and Constitutional Issues (Papers Prepared as part of the Research Program of the Royal Commission on Aboriginal Peoples)* (Ottawa: Supply and Services, 1995) 55 at 78-79, distinguishes between a delegation of powers and devloution of powers. A devolution of powers can be permanent. Moss argues that devolution is "more consistent with recognition of the inherent right of self-government than delegation would be." If s. 35 protects aboriginal legal systems no devolution or transfer of powers is necessary.

281 See for example, the Beverley-Kaminuriak Barren Ground Caribou Management Agreement, 1982, and the agreement between the DFO and Anguvigaq, discussed in Osherenko, *supra* note 48 at 15, 25. Recent land claim agreements such as the Nunavut and Inuvialuit Final Agreements establish bodies that include aboriginal representatives and make recommendations to government decision

federal government is the only party to the co-management arrangement with legal jurisdiction over natural resources.[282]

Arguments for co-management are for the most part utilitarian rather than rights based. Co-management contributes to effective resource management by giving governments access to local aboriginal knowledge, and allowing governments to obtain the cooperation of aboriginal resource users.[283] Feit notes that local management "tends to be legitimated and viewed from the point of view of its contribution to national and international management planning," and that this is insufficient.[284] To the extent that government must obtain the cooperation of aboriginal peoples, it may take their concerns into account or follow their recommendations. However, governments are not required to follow aboriginal peoples' decisions or recommendations, and aboriginal jurisdiction is not recognized.

While co-management arrangements may in practice allow aboriginal peoples to protect their resources or guarantee access to resources, the arrangements assume that aboriginal peoples do not have any legal jurisdiction over resource use.[285] Osherenko argues that in practice, the

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makers.

282 G. Osherenko, *ibid.* at 13, footnotes omitted.

283 "Conflict Arenas", *supra* note 47 at 444; E. Pinkerton, "Introduction: Attaining Better Fisheries Management through Co-Management - Prospects, Problems, and Propositions" in E. Pinkerton, ed., *Co-operative Management of Local Fisheries: New Directions for Improved Management and Community Development* (Vancouver: University of British Columbia Press, 1989) 3 at 14; "Self-Management", *supra* note 43 at 83-84; G. Osherenko, "Wildlife Management in the North American Arctic: The Case for Co-Management" in Freeman & Carbyn, eds., *supra* note 10, 92 at 102. Osherenko, *supra* note 48 at 36, notes that the focus on increasing aboriginal compliance with government resource regulation may divert attention away from the more pertinent resource management and ecological sustainability issues:

> Some residents of the [Yukon-Kuskokwim] Delta believe that native hunters are being used to give the appearance that the federal government is responsive to migratory bird declines, when the more critical problems are not caused by native hunters but by habitat destruction and contamination of the wintering grounds, as well as by sport hunting in California.

284 "Self-Management", *supra* note 43 at 74.

285 G. Osherenko, *supra* note 283 at 102. Co-management is also promoted as a remedy to over-

aboriginal or local co-managers are effectively given joint jurisdiction over wildlife resources, because government requires their cooperation:

> In each of the arrangements discussed here, however, public authorities have openly acknowledged that they cannot manage the relevant wildlife species without the co-operation of the user groups, and they have, therefore, accorded user groups a substantial role in management decisions, a role beyond that of "consultant" or "adviser". The role of the user group or joint government-user board created by the agreement may be termed "advisory", but if the user group does not concur in major management decisions regarding the relevant species, the co-management regime will fall apart, and the user group will no longer be obligated to participate or comply with regime rules.[286]

Co-management arrangements allow government to accommodate pre-existing local aboriginal management systems into government resource management, and may result in resource management decisions that reflect local values and protect resources and lands that are important in aboriginal cultures.[287] In practice, aboriginal management systems as such are not accommodated. Aboriginal peoples are stakeholders, not decision makers. Co-management arrangements treat aboriginal interests as "special interests" which government

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regulation of local harvesters by government, thereby giving aboriginal peoples control over their internal affairs, and allowing aboriginal management systems to work. Berkes *et al.*, *supra* note 30 at 15. For example, government initiated registered trapline systems interfere with local management. Ian McTaggart-Cowan, *Wildlife Conservation Issues in Northern Canada* (Ottawa: Canadian Environmental Advisory Council Report No. 11, October 1981) notes that: 1) Aboriginal people are capable of depleting wildlife resources and that enforcement of government regulations on them can be problematic; and 2) modern development has negative impacts on these same wildlife populations. He proposes cooperation of subsistence hunters through local participation in government management of wildlife, thus only addressing the first issue, and limiting the resolution of the problem to harvester participation in *government* management.

286 Osherenko, *supra* note 48 at 13, footnotes omitted.

287 E. Pinkerton, *supra* note 283 at 14; "Self-Management", *supra* note 43 at 85; F. Berkes & H. Fast, "Aboriginal Peoples: The Basis for Policy-Making toward Sustainable Development" in A. Dale & J.B. Robinson, eds., *Achieving Sustainable Development* (Vancouver: University of British Columbia Press, 1996) 204 at 251 and 255. Traditional ecological knowledge is thought to include management as the end product of resource knowledge: Gunn *et al.*, *supra* note 43 at 22; see also Newell, *supra* note 12 at 205.

must balance along with the "public interest" when making decisions.[288]

Beckley and Korber's description of a co-management arrangement between a company with a tree farm licence (TFL) and a local community is illustrative.[289] The company was allocated forest resources and management responsibilities prior to establishment of the co-management arrangement. The terms of the long term tenure arrived at outside of the co-management process were not on the table.[290] The co-management arrangement was negotiated and implemented within the government's existing forest management framework. The basic assumptions and values of forest management and timber production were not open for discussion and aboriginal input occurred only at the operational level.

Co-management arrangements that operate within the settler society's existing legal framework and world view, are limited in their ability to incorporate aboriginal world views and management systems:

> At the political level, the uneven power relationship between aboriginal peoples and non-aboriginal decision-makers has provided little opportunity to shift discussion from conceptual frameworks rooted in western legal traditions towards some more neutral ground... . Needless to say, Inuit are placed at some disadvantage in attempting to express Inuit perspectives of Inuit rights through an alien legal system.[291]

Aboriginal participation in Canadian management may be incapable of contributing to cultural sustainability for aboriginal peoples when the basic assumptions and ethical views underlying Canadian management remain unchanged. Absent recognition of aboriginal jurisdiction, it will be difficult to accommodate holistic aboriginal management systems

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288 "Devolution" , *supra* note 32 at 76.

289 T.M. Beckley & D. Korber, *Clear Cuts, Conflict, and Co-management: Experiments in Consensus Forest Management in Northwest Saskatchewan* (Northern Forestry Centre Information Report NOR-X-340) (Natural Resources Canada and Canadian Forest Service, 1996).

290 *Ibid.* at 12.

291 Inuit Tapirisat of Canada, Submission to the Royal Commission on Aboriginal Peoples, 31 March 1994 at 8, as cited in Moss, *supra* note 280 at 81.

within the settler society's fragmented approach to resource management. An alternative to current conceptions of co-management is the notion of co-jurisdiction, which recognizes that both Canadian and aboriginal governments have jurisdiction over land and resource use.

3.4.2. Co-jurisdiction

Feit argues that aboriginal peoples must be able to exercise some degree of control over non-aboriginal use of land. He argues that aboriginal peoples cannot manage or use their resources without "extensive and effective means of participating in the decisions taken in the wider society which profoundly affect the future of the resources and their use."[292] At the same time, government wildlife managers cannot carry out their tasks effectively "without effective means of participating in the decisions taken in Native society which profoundly affect the future of the wildlife resources and their use."[293] While Feit's approach is utilitarian, it recognizes both aboriginal and federal and provincial decision making.

Michael Asch similarly argues that management of renewable resources in the North must promote "traditional institutions and values." He argues that the only way to achieve this goal is for aboriginal peoples to have "the power to determine for themselves their political and economic future within Confederation, including, among other powers, the right to control and tax all economic developments undertaken in the traditional homelands of these people."[294]

Comanagement strategies, Usher notes, "do not ... necessarily serve to incorporate elements

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292 "James Bay", *supra* note 8 at 62.

293 *Ibid.* at 62.

294 M.I. Asch, "Capital and Economic Development: A Critical Appraisal of the Recommendations of the Mackenzie Valley Pipeline Commission" in Cox, ed., *supra* note 8 at 237. The author argues that taxation and royalties, as opposed to cash lump sum payments, would mean Aboriginal peoples do not need to let all their lands be mined, and their traditional economies can continue. They do not need to work in industry and abandon the traditional economy.

of the indigenous *system* as such,.... On the contrary, they are much more likely to result in the continuation of the state management system in a decentralized but largely unchanged form."[295] Only aboriginal control can give effect to aboriginal values and world views.[296] Usher argues that participation in the state management system, and appropriation of indigenous knowledge by, the state system are incapable of achieving these goals. He argues that state and aboriginal systems should be harmonized.[297]

Discussion in the literature of possible barriers to and difficulties with co-management offer further support for the argument that cultural sustainability cannot be achieved within co-management models that contemplate government jurisdiction only. Cooperation may be difficult when parties have divergent values, beliefs and interests.[298] Governments have been generally unwilling to consider "no development" options insisted upon by aboriginal peoples.[299]

The degree to which aboriginal peoples actually have an enforceable say in resource use decisions is important if co-management is to contribute to cultural sustainability. Also crucial is the scope of co-management and the kinds and level of decisions which aboriginal peoples are able to influence.

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295 "Indigenous Management", *supra* note 29 at 8.

296 Kassi, *supra* note 264 at 21.

297 P.J. Usher, "The Beverley-Kaminuriak Caribou Management Board: An Experience in Co-Management" in Inglis, ed., *supra* note 76, 111 at 117. This, he argues is the only way to fully utilize the knowledge of indigenous harvesters and the only way to understand their views and incorporate them into the management process.

298 See for example N. Dale, "Getting to Co-Management: Social Learning in the Redesign of Fisheries Management" in E. Pinkerton, ed., *supra* note 283, 49 at 55; F. Berkes and H. Fast, *supra* note 287 at 220; Berkes *et al. supra* note 30 at 12. However, see ssues in resource management can only be investigated by technical science (26). "Self-Management", *supra* note 43 at 78: "all systems of human knowledge are created by similar processes and are more alike than the focus on their surface differences appears to indicate...."

299 See for example Twin Sisters Co-management Advisory Committee (CMAC) process discussed in T. Campbell, *supra* note 276 at 86, and *Kelly Lake Cree Nation* v. *Canada (Minister of Energy and Mines)* [1998] B.C.J. No. 2471 (QL) (S.C.).

3.4.3. The Scope and Subject Matter of Co-Management

Berkes' levels of co-management are silent on the "management functions and purposes" served by co-managing bodies. Pinkerton has identified the following seven categories of in the context of fisheries:

> (1) data gathering and analysis . . .; (2) logistical harvesting decisions, such as licensing (who can fish), timing (when they can fish), location (where they can fish), and vessel or gear restrictions (how they can fish): to prevent over-exploitation, allow a sustainable yield, and (for highly mobile species) to prevent undue interception of shared stocks; (3) harvest allocation decisions (how much can be fished by whom) among individuals within local groups, among several local groups or gear types, and among local and non-local groups (to allow equitable access); (4) protection from habitat or water quality damage by other water resource users: to preserve health of resource; (5) enforcement of regulations or practices guiding harvesting logistics, allocation, and resource protection; (6) enhancement and long-term planning (where to concentrate management effort and what is desired); (7) broad policy decision-making.[300]

Pinkerton argues that enhancement, long-term planning and habitat protection are particularly important as they give communities influence over their own development, and give them opportunities to prevent depletion or destruction of the resources upon which they depend.[301] In practice, co-management boards with advisory roles have been influential with respect to species management, but government has been less willing to follow their recommendations on habitat protection.[302]Existing co-management arrangements generally

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300 E. Pinkerton, *supra* note 283 at 6. In the context of forestry, Beckley & Korber, *supra* note 289, offer eight functions for the forestry context as follows: 1) Data gathering and analysis; 2) Long-term planning; 3) harvest allocation decisions (how much); 4) short-term planning (operating plans); 5) implementation (annual operating plans); 6) enforcement of regulations; 7) monitoring; 8) policy decision-making.

301 Pinkerton, *ibid.* at 7.

302 Osherenko, *supra* note 48 at 17,18. See also "Beverley-Kamimuriak", *supra* note 297 at 114.

focus either on one resource or animal population or on a specific area.[303] In other words, co-management arrangements operate within the Canadian approach and worldview, and therefore the compartmentalization and separate management of the various members and components of ecosystems serves to limit aboriginal influence over habitat, which is managed separately from wildlife.

Pinkerton's seventh function, broad policy making, is arguably as important as enhancement and habitat protection, because distant resource users or harvesters, or developments of other resources, often affect locally managed resources.[304] Existing co-management arrangements do not include land use planning and decisions respecting competing land uses.[305] According to Hugh Brody, "the possibility of hunting and trapping requires a constant check on frontier activities that impede the possible coexistence of different kinds of northern economic life."[306] Brody argued that aboriginal peoples have to be able to choose what way of life they wish to follow, and that they will have no choice if their lands and cultures are destroyed by incompatible activities and developments.[307] Berkes and Fast argue that aboriginal peoples cannot protect their cultures' uses of resources unless they can influence these broader decisions:

> Natural resources are needed to develop local and regional economies, yet the

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303 Berkes & Fast, *supra* note 287 at 252-253. Some are aimed at resolving conflict over a particular project or development. See, for example, the Twin Sisters Co-management Advisory Committee. Arctic Institute of North America, *Final Report of Twin Sisters Co-management Advisory Committee (CMAC)* (Calgary: Arctic Institute of North America, 1994). The subject of the CMAC process was Amoco's proposed development. See *Kelly Lake*, *supra* note 299; and Campbell, *supra* note 276 at 77-86. Many agreements are entered into in response to population declines. See for example, the Beverly-Kaminuriak Barren Ground Caribou Management Agreement, 1982, and the agreement between the DFO and Anguvigaq, discussed in Osherenko, *supra* note 48 at 15, 25.

304 "Self-Management", *supra* note 43 at 84. Osherenko, *supra* note 283 at 97 and 99, notes that local harvesters are less likely to abide by harvesting restrictions when population declines may have been caused by the failure of the government to protect habitat.

305 The CMAC process resulted in a small area being removed from development: See *Kelly Lake*, *supra* note 299.

306 Brody, *supra* note 108 at 223.

307 *Ibid.* at 223.

> resource base is being constricted by policies favouring competing land uses from hydro-electric development, large-scale forestry, and mining. New policies are needed to tip the balance in favour of recognizing the priority of local land and resource use over export-oriented resource development.[308]

While aboriginal management systems may not have been designed for these kinds of conflicts, Feit argues that "traditional forms of self-management must respond to these threats to wildlife resources and to environments by extending self-management to new forms which regulate the actions of individuals and agencies outside the local or regional groups."[309]

3.4.4. Co-management and Sustainability

While co-management is promoted in the literature as a sustainable form of decision making, a form of management that recognizes or accommodates aboriginal jurisdiction could be more consistent with both ecological and cultural sustainability. Co-management is a form of decentralized decision making, which, as was noted in chapter 2, is a form of decision making promoted in the sustainability literature.[310] However, co-management arrangements that are limited in scope and in their accommodation of aboriginal jurisdiction do not sufficiently empower those who bear the costs of developments to protect the resources upon which their physical and cultural survival depend.

Proponents of co-management argue that it results in better decisions, because co-management benefits from more accurate and complete knowledge and information than

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308 Berkes & Fast, *supra* note 287 at 234. One might ask if this notion of priority is compatible with the principle of according priority to Aboriginal rights in the case law.

309 "Self-Management" *supra* note 43 at 84; and "Conflict Arenas", *supra* note 47 at 444.

310 J. Benidickson, "Co-management Issues in the Forest Wilderness: Stewardship Council for Temagami" in M.M. Ross & J.O. Saunders, eds., *Growing Demands on a Shrinking Heritage: Managing Resource Use Conflicts: Essays from the Fifth Institute Conference on Natural Resources Law* (Calgary: Canadian Institute of Resources Law, 1992) at 258.

government management imposed from a distance.[311] Integrated approaches to decision making facilitate the combination of indigenous and government knowledge.[312] Because indigenous knowledge integrates knowledge, practice and belief, the best way to benefit from indigenous knowledge is to give effect to the entire system.[313] Usher argues that integration of state and indigenous systems can bring together the best features of both systems to solve problems that neither is capable of solving alone. [314] The scope and subject matter of co-management or shared jurisdiction must be broad enough to fully integrate aboriginal and government knowledge and management.

According to Osherenko, a cooperative approach to wildlife management is a more sustainable alternative than creating islands of aboriginal jurisdiction, because political boundaries rarely correspond to ecological ones:

> In addition to political problems of institutionalizing a zonal system, divisions of jurisdiction would lead to illogical boundaries for managing species that regularly traverse political boundaries, making ecosystem management difficult if not impossible. Already, the jumble of jurisdictions between federal and state, provincial, and territorial governments produces confusion for user groups. Creating enclaves of tribal jurisdiction could lead to more costly and confusing results that fail to protect wildlife and habitat.[315]

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311 Osherenko, *supra* note 48 at 8 writes:

> Where co-operation rather than confrontation occurs ... the frontiers of knowledge about wildlife can expand rapidly. ... But the two sets of data must be integrated to produce a full picture of the wildlife population dynamics and to generate assessments credible to both communities.

See also Osherenko, *supra* note 283 at 94; Berkes *et al.*, *supra* note 30 at 15; Gunn, *supra* note 43 at 26. "Self-Management", *supra* note 43 at 83 argues that government management has cut itself off from Aboriginal knowledge "under conditions in which it can ill afford not to use all the available information."

312 Osherenko, *supra* note 48 at 19; Berkes *et al.*, *supra* note 21 at 23.

313 Gadgil *et al.*, *supra* note 50 at 155.

314 "Devolution", *supra* note 32 at 78.

315 Osherenko, *supra* note 48 at 12; A.R. Thompson & H.R. Eddy, "Jurisdictional Problems in Natural Resource Management in Canada" in *Background Study for the Science Council of Canada, May 1973, Special Study No. 27: Essays on Aspects of Resource Policy* (Ottawa: Science Council of Canada, 1973) 67 at 73, argue that because of spillovers, political boundaries are ecologically interdependent, and therefore intergovernmental cooperation is necessary.

Co-management can contribute to the ecological sustainability of resource management. These benefits of co-management can be achieved through shared jurisdiction. Shared jurisdiction also contributes to cultural survival for aboriginal peoples.

3.4.4.1. Co-management, Shared Jurisdiction and Cultural Sustainability

Aboriginal peoples assert that they must be able to protect their lands in order to ensure survival of their cultures.[316] Co-management can potentially give effect to aboriginal management systems,[317] and can reinforce the authority of community leaders.[318] Its incorporation of local management renders it "more aware of and compatible with local needs" than government management.[319] Co-management facilitates local participation in stewardship activities and preserves local knowledge.[320] Co-management can allow aboriginal communities to keep their future options open, by allowing their relationships with land to continue. Freeman has noted that "It seems reasonable to conclude that to the extent which a society is able to influence the 'rules of the game', so they will correspondingly enhance their likelihood of remaining adaptive."[321] A merger of aboriginal and state management, knowledge, goals and worldviews could contribute to ecological and cultural sustainability.[322] Shared jurisdiction, because it gives effect to the aboriginal management system as such, and empowers aboriginal peoples to protect the resources and lands that are integral to their cultural survival, is more conducive to achieving cultural

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316 P. Ittinuar, "The Inuit Perspective on Aboriginal Rights" in M. Boldt & J.A. Long, eds., *The Quest for Justice: Aboriginal Peoples and Aboriginal Rights* (Toronto: University of Toronto Press, 1985) 47 at 47; Ecotrust Canada, *More Than the Sum of Our Parks: People, Places and a Protected Areas System for British Columbia* (Vancouver: Ecotrust Canada, 1997) at 5-6.

317 F. Berkes and H. Fast, *supra* note 287 at 221; Gunn *et al.*, *supra* note 43 at 28.

318 Berkes *et al.*, *supra* note 30 at 16.

319 Berkes *et al.*, *ibid.* at 16; see also E. Pinkerton, *supra* note 283 at 14.

320 F. Berkes *et al.*, *ibid.* at 16.

321 "Effects of Petroleum", *supra* note 44 at 247.

322 Berkes *et al.*, *supra* note 21 at 23.

sustainability than co-management arrangements are.[323]

3.5. Conclusion

The co-management literature is helpful to the extent that it offers insight into the benefits of government and aboriginal knowledge and management systems. However, my view is that co-management arrangements do not empower aboriginal peoples to protect their lands and resources. Aboriginal peoples cannot make land use decisions and have little input into the fundamental principles embodied in legislation such as the *Forest Act* and CMRs:

> It is the genuine fear of losing a shared fundamental set of values, and thus a vital base of cultural identity, over issues which other groups see basically in terms of economy, resource management and conservation, but not of identity, that gives northern resource questions aspects of intractability and sometimes desperation.[324]

Aboriginal peoples are unable to protect their lands and resources within a paradigm that gives precedence to the values of the settler society. Roots concludes that management rights over the land that supports aboriginal cultures is necessary.[325] The differences between the values and principles underlying aboriginal and government management systems may be such that the only way to implement resource management rights, or to ensure cultural survival for aboriginal peoples, is to give effect to aboriginal systems and worldviews, as opposed to giving aboriginal peoples roles to play in government systems.

Sustainable resource management requires a process of decision making that is aimed at

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323 N. Bankes, "Co-management vs. co-jurisdiction: notes for remarks by Nigel Bankes at a conference on co-management", University of Calgary, February 1995, unpublished; and Ecotrust Canada, *supra* note 316 at 27.

324 Roots, *supra* note 269 at 5.

325 L. Staples, "Land-Use Planning in the Yukon: A Struggle for Constitutional Development" in W.E. Rees, ed., *supra* note 113 at 113, 71 at 84; see also J.U. Bayly, "Large-Scale Oil and Gas Extraction from the Beaufort-Mackenzie Delta Region: Can Land-Use Planning Help the Native Residents?" in Rees, ed., *supra* note 113 at 117.

finding an appropriate balance amongst users and uses. To the extent that aboriginal peoples value lands in unique ways, aboriginal involvement is crucial to achieving an ecologically and culturally sustainable balance.

Co-management, and especially forms of shared decision or co-jurisdiction, can contribute to ecologically and culturally sustainable resource management. The rest of this thesis asks to what extent s. 35 requires co-management and/or shared jurisdiction over resource management in Canada. Does s. 35(1) embody principles of ecological and cultural sustainability? Is there room in our Constitution for aboriginal jurisdiction or power over the use of lands and resources? The next two chapters consider the law and scholarly commentary relating to aboriginal rights and jurisdiction over natural resources.

4. The Constitutional Framework of Aboriginal Rights in Canada

The sustainability literature and the literature on aboriginal and Canadian resource management systems suggest that aboriginal jurisdiction over natural resources is desirable for reasons relating to cultural and ecological sustainability. Is aboriginal jurisdiction protected as an aboriginal right under s. 35(1)? If so, what is the nature of such protection? This Chapter considers Canada's constitutional framework and the law of aboriginal rights. The case law leaves some questions unanswered. Chapter 5 reviews the scholarly commentary on the relevant law in order to assist in filling in some of those gaps.

The first part of this Chapter considers whether aboriginal jurisdiction over land and resource use could have survived the Crown's assertion of sovereignty and the entry of the federal government and provinces into the federation. While the courts consider questions of extinguishment after they consider whether the right in question has been established, if aboriginal jurisdiction was necessarily extinguished either by the Crown's assertion of sovereignty or the division of powers between the federal and provincial governments, there is no need to go through the exercise of establishing the right. The second part examines s. 35(1) of the *Constitution Act, 1982*, and the case law interpreting that provision. In particular, it considers whether s. 35(1) protects aboriginal jurisdiction over lands and resources. The next topic is the division of powers between the federal and provincial governments, because the justification analysis under s. 35(1) may not be available to a province that interferes with the exercise of aboriginal rights in relation to land. The third section considers the question of extinguishment. The fourth section asks what would constitute a *prima facie* infringement of an aboriginal right to regulate the use of lands and resources. Finally, this Chapter reviews the justification analysis developed for s. 35(1).

4.1. Crown Sovereignty, Confederation and Aboriginal Jurisdiction

The discussion of whether aboriginal jurisdiction or laws survived the assertion of Crown

sovereignty or establishment of Canada arguably belongs in the discussion below of extinguishment of aboriginal rights. I discuss these questions at this point because if the Crown's assertion of sovereignty over the territories now included in Canada extinguished any pre-existing aboriginal jurisdiction, or, alternatively, if the division of powers in the *Constitution Act, 1867* precludes the possibility of continued aboriginal jurisdiction, there is no need to consider whether aboriginal jurisdiction can be established as a right under s. 35(1).

Two basic questions generally arise as a consequence of the Crown's assertion of sovereignty over the territory now comprising Canada. The first is whether the Crown thereby acquired ownership of the lands within Canada's boundaries. The second is whether the assertion of sovereignty extinguished the pre-existing laws or jurisdiction of aboriginal peoples. While aboriginal title is not directly relevant to this thesis, questions concerning the continuity of aboriginal title have received more judicial consideration than questions concerning the continuity of aboriginal jurisdiction. The case law on the continuity of aboriginal title sheds some light on the question of continuity of aboriginal jurisdiction.

4.1.1. The Courts' Ability to Consider the Consequences of the Crown's Acquisition of Sovereignty

The Crown asserted sovereignty over Canada under the doctrine of discovery. It occupied lands, including aboriginal peoples' territories, as though they were vacant (*terra nullius*).[1]

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[1] On the application of the *terra nullius* doctrine in Canada see *Delgammuukw* v. *British Columbia* (1993), 104 D.L.R. (4th) 470 (B.C.C.A.), especially the judgment of Lambert J.A. at 660-661, where he distinguishes between colonized lands occupied by organized societies and ones where there was no organized society. In the former case, indigenous laws are recognized as continuing until changed. Mr. Justice Lambert concluded that the area in question in central British Columbia was not a vacant land or *terra nullius* when the first colonizers arrived. In *R.* v. *Van der Peet*, [1996] 2 S.C.R. 507 at paras. 106-268 Madame Justice L'Heureux-Dubé discusses the application of the settlement thesis and doctrine of discovery to Canada; see also *R.* v. *Côté*, [1996] 3 S.C.R. 139. The most thorough treatment of the doctrine of *terra nullius* is in *Mabo* v. *Queensland [No. 2]*, (1992), 175 C.L.R. 1 (H.C.) *per* Brennan J. at 32-3, *per* Deane and Gaudron JJ. at 77. For commentary on the *terra nullius* and settlement doctrines see J.J. Borrows & L.I. Rotman, *Aboriginal Legal Issues: Cases, Materials & Commentary* (Toronto: Butterworths, 1998) at 6, 11-20, and 89-91.

The Act of State doctrine denies municipal courts the jurisdiction "to review the manner in which the Sovereign acquires new territory."[2] The courts can, however, consider the basis and consequences of the assertion of sovereignty.[3] The courts can also revisit and overturn unjust precedents and could revisit and overturn unjust laws so long as the "skeleton of principle which gives the body of law its shape and internal consistency" is left intact.[4]

In Canada, the enactment of s. 35(1) may require a re-examination of common law rules that are inconsistent with the recognition and affirmation of aboriginal rights. While legislation prevailed over aboriginal rights under the common law, after 1982, legislation can only interfere with the exercise of aboriginal rights where justified. Similarly, while legislation may have prevailed over aboriginal laws prior to 1982, that may no longer be the case.

4.1.2. The Continuity of Aboriginal Title

As a matter of law, the Crown could not acquire ownership by occupying land that was already occupied by indigenous peoples.[5] Aboriginal title survived the assertion of sovereignty and establishment of colonies in what is now Canada.[6] What the Crown did gain when it asserted sovereignty was an exclusive right to acquire the aboriginal interest in the land.[7] The Crown acquired an ultimate title which "became the plenum dominium whenever

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2 *Calder* v. *Attorney-General of British Columbia*, [1973] S.C.R. 313 at 404 *per* Justice Hall.

3 *Mabo, supra* note 1 at 31-32 *per* Brennan J., and at 179-183 *per* Toohey J. In *Calder, ibid.* at 405-406, Justice Hall held that the Act of State doctrine does not preclude the courts from considering whether settlement of Nisga'a territory extinguished their aboriginal title.

4 *Mabo, ibid.* at 29 *per* Brennan J. Justice Brennan held, *ibid.* at 30, that "it is necessary to assess whether the particular rule is an essential doctrine of our legal system and whether, if the rule were to be overturned, the disturbance to be apprehended would be disproportionate to the benefit flowing from the overturning.

5 *Mabo, ibid.* at 45.

6 *St. Catherine's Milling and Lumber Co.* v. *The Queen* (1886), 13 S.C.R. 577 at 608, *per* Strong J; *Calder, supra* note 2.

7 *Calder, ibid.* at 383. Aboriginal peoples could no longer dispose of their lands except to the discovering nation.

that [aboriginal] title was surrendered or otherwise extinguished."[8]

Chief Justice Marshall of the United States Supreme Court similarly held in a series of decisions in the first half of the nineteenth century that discovery did not extinguish aboriginal title in that country. The discovering nation had the exclusive right to acquire lands from indigenous peoples, but those peoples retained their rights to occupy their lands and use them "according to their own discretion" until they disposed of their lands voluntarily.[9]

The continuity of aboriginal title after the Crown's assertion of sovereignty is reflected in the *Royal Proclamation* of 1763, by which King George III instructed the Governors and Commanders in Chief of its North American colonies that lands which had not been ceded to or purchased by the Crown were to remain in the possession of their aboriginal owners.[10]

In *Mabo*, the High Court of Australia overturned a series of judicial decisions holding that when the Crown assumed sovereignty over an Australian colony by settling it, "it became the universal and absolute beneficial owner of all the land therein..."[11] Those decisions were based on accepting the fiction of *terra nullius*, which was the basis upon which the Crown

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8 *St. Catherine's Milling* v. *R.*, (1888), 14 App. Cas. 46 at 55 (P.C.).

9 *Worcester* v. *The State of Georgia* (1832), 6 Peters 515 (U.S.S.C.); *Johnson* v. *McIntosh* (1823), 8 Wheaton 543 at 587; *United States* v. *Alcea Band of Tillamooks et al.*, (1946), 329 U.S. 40. In *Minnesota v. Hitchcock*, 185 U.S. 373, 388-89 (1902), Chief Justice Vinson held that aboriginal title could only be extinguished by consent, "and then upon such consideration as should be agreed upon." *United States* v. *Santa Fe Pacific R. Co.* (1941), 314 U.S. 339 at 347 held, however, that Congress could extinguish aboriginal title by possession. The Court further held that:

> The manner, method and time of such extinguishment raise political, not justiciable, issues. ... And whether it be done by treaty, by the sword, by purchase, by the exercise of complete dominion adverse to the right of occupancy, or otherwise, its justness is not open to inquiry by the courts. *Beecher v. Wetherby*, 95 U.S. 517, 525.

10 R.S.C. 1985, App. II, No. 1.

11 *Mabo, supra* note 1 at 28-9 and 43 *per* Brennan J. Justice Toohey held at 182 that "The Crown did not acquire a proprietary title to any territory except that truly uninhabited."

acquired sovereignty over the lands in question.[12] The Court rejected the expanded notion of *terra nullius,*[13] and held that the Crown did not acquire ownership of lands occupied by indigenous peoples when it asserted sovereignty over those lands.[14] Under the common law applicable to the colonies upon their establishment, the Crown's title was "reduced or qualified" by aboriginal title.[15]The Crown acquired "a radical, ultimate or final title," which enabled it to exercise sovereign power "to grant an interest in land to be held of the Crown or to acquire land for the Crown's demesne."[16] Justice Brennan held as follows in *Mabo*:

> Nor is it necessary to the structure of our legal system to refuse recognition of the rights and interests in land of the indigenous inhabitants. The doctrine of tenure applies to every Crown grant of an interest in land, but not to rights and interests which do not owe their existence to a Crown grant. The English legal system accommodated the recognition of rights and interests derived from occupation of land in a territory over which sovereignty was acquired by conquest without the necessity of a Crown grant.[17]

Aboriginal title continued and reduced the Crown's title until the Crown exercised sovereign power.[18] *Delgammukw* confirmed that aboriginal title survived the Crown's assertion of sovereignty over British Columbia.[19] Prior to 1982, the Crown in its legislative capacity could unilaterally extinguish aboriginal title and aboriginal rights.[20]

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12 *Ibid.* at 40.

13 *Ibid.* at 41.

14 *Ibid.*, *per* Brennan J. at 45 and 48-9, *per* Deane and Gaudron JJ. at 80-81, and *per* Toohey J. at 182.

15 *Ibid.* at 109 *per* Deane and Gaudron JJ.; *In Re Southern Rhodesia*, [1919] A.C. 211 at 233; *Amodu Tijani*, [1921] 2 A.C. 399 at 407.

16 *Mabo, ibid.* at 48-9, 80-81, and at 182.

17 *Ibid.* at 48-9 and 80-81.

18 *Ibid.* at 50-51, and 53.

19 *Delgamuukw* v. *The Queen*, [1998] 3 S.C.R. 1010.

20 *Calder, supra* note 2 at 328-329. Justice Judson, at 330-331, examined dispatches between the Colonial Office and Governor Douglas. Those communications reveal that the Governor was under an obligation to purchase aboriginal lands before allowing settlers to occupy them. He concluded at 331-333, 337 and 344, that the aboriginal title of the Nisga'a had since been extinguished when legislation opened up the lands for settlement. Justice Hall, at 410-413, held that the aboriginal title of the Nisga'a had not been extinguished. He held, *ibid.* at 402 and 404, that aboriginal title could only be extinguished by a surrender to the Crown or by specific legislation evincing a clear and plain

4.1.3. The Continuity of Aboriginal Jurisdiction

The courts have held that after the Crown asserted sovereignty, indigenous occupants did not retain "complete sovereignty as independent nations..."[21] The Crown gained "supreme legal authority" over the territory.[22] However, under the doctrine of continuity, indigenous laws continue in discovered colonies, and indigenous peoples continue to be governed by their own laws, until those laws are altered or extinguished by positive acts of the Crown.[23] Aboriginal laws become part of the common law,[24] and rights arising under indigenous peoples' laws "are no less enforceable than rights arising under English law."[25]

In *Advocate-General of Bengal* v. *Ranee Surnomoye Dossee* (1863 PC), the Privy Council held that while English law governed the settlers in British colonies, it did not extend to indigenous peoples who retained their own customs. The sovereign could alter the laws of indigenous peoples in the colonies, but until it did so by positive laws, indigenous jurisdiction remained intact.[26] As noted by Chief Justice Marshall of the United States Supreme Court, the policy of the British Crown was not to interfere with indigenous peoples' internal self-government.[27]

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intention to extinguish aboriginal title.

21 *Calder, ibid.* at 383.

22 *Mabo, supra* note 1 at 36 and 48 *per* Brennan J. Justice Brennan held that the Crown could "prescribe what parcels of land and what interests in those parcels should be enjoyed by others and what parcels of land should be kept as the sovereign's beneficial demesne." see also Deane and Gaudron JJ. at 80.

23 *Calder, supra* note 2, *per* Justice Hall at 388 and 389; *Mabo, ibid.* at 34; and *Worcester, supra* note 9 at 544.

24 *Roberts* v. *Canada (AG)*, [1989] 1 S.C.R. 322 at 340.

25 *In Re Southern Rhodesia, supra* note 15 at 233.

26 4 Bomb. HCR 17, as cited in J. Y. Henderson, "The Doctrine of Aboriginal Rights in Western Legal Tradition" in M. Boldt, J.A. Long & L. Little Bear, eds., *The Quest for Justice: Aboriginal Peoples and Aboriginal Rights* (Toronto: University of Toronto, 1985) 185 at 201.

27 *Worcester, supra* note 9 at 547. The Royal Commission on Aboriginal Peoples, *Partners in Confederation: Aboriginal Peoples, Self-Government and the Constitution* (Ottawa: The Commission, 1993) at note 21 provides a list of cases and commentaries on aboriginal laws. The Supreme Court of Canada in *Sioui* also quoted from *Worcester*, in which Chief Justice Marshall summarized Great

In Canada, the Courts have upheld aboriginal laws governing internal matters such as marriages, including the rules governing the sharing of property between husband and wife and the rules governing the distribution of property upon the death of a husband or wife.[28] While French or English law was applicable to the settlers in the colonies, the political organization and laws of indigenous peoples continued.[29]These laws survived the assertion of sovereignty and continue under the common law.[30]

However, a majority of the British Columbia Court of Appeal in *Delgamuukw*, decided before *Pamajewon*, held that the exercise of British sovereignty over British Columbia extinguished any pre-existing aboriginal jurisdiction or self-government rights. The imposition of English law in the colony in 1858 superseded "any vestige of aboriginal law-making competence."[31] Alternatively, the majority held, British Columbia's entry into Confederation and the exhaustive distribution of powers between the provincial and federal governments extinguished aboriginal law-making power: "The division of governmental powers between Canada and the Provinces left no room for a third order of government."[32] The Supreme Court of Canada held that it did not have the necessary facts before it to determine whether the claim to self-government could succeed, and that the claim to self-government was also too broad to be "cognizable under s. 35(1)."[33] The Court concluded

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Britain's dealings with indigenous peoples in the mid 1700s as recognizing them as nations capable of governing themselves under Great Britain's protection: *R.* v. *Sioui*, [1990] 1 S.C.R. 1025 at 1054.

28 *Connolly* v. *Woolrich*, [1867] 11 L.C.J. 197 (Que. S.C.), aff'd [1869] R.L. 253 (Que. C.A.).

29 *Ibid.* at 83-84.

30 See *Connolly*, *ibid.* Aboriginal peoples' laws are often referred to as custom or customary laws. J.W. Zion, "Searching for Indian Common Law" in B. W. Morse & G.R. Woodman, eds., *Indigenous Law and the State* (Dordrecht, Holland: Foris, 1988) 121at 123 suggests that using the term "custom" in reference to aboriginal laws "implies something that is somehow less or of lower degree than 'law'."

31 *Delgamuukw*, *supra* note 1, *per* Macfarlane J.A. at 519.

32 *Ibid.* at 520 *per* Macfarlane J.A. and at 592 *per* Wallace J.A. Justices Lambert (at 716-717) and Hutcheon (at 761) held that the Gitksan and Wet'suwet'en retained their right to self-regulation; see also *A.G. Ontario* v. *A.G. Canada (Reference Appeal)*, [1912] A.C. 571 (P.C.) at 583.

33 *Supra* note 19 at para. 170.

that the question of self-government had to be decided at a trial in accordance with the *Pamajewon* decision, thus leaving open the possibility that the claimants could establish self-government rights.[34]

In *Sparrow,* the unanimous reasons of the Supreme Court of Canada included the following statement:

> 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.[35]

However, the Court also adopted the following comment of Noel Lyon on s. 35(1):

> . . . the context of 1982 is surely enough to tell us that this is not just a codification of the case law on aboriginal rights that had accumulated by 1982. Section 35 calls for a just settlement for aboriginal 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.[36]

Counsel for Sparrow argued that the Musqueam right to fish included the right to use the resource in the Band's discretion and therefore a right to regulate use of the resource.[37] The Court interpreted this submission as an argument for a right to be immune from regulation of harvesting activities. The Court held that s. 35(1) could not grant such immunity "in a society that, in the twentieth century, is increasingly more complex and sophisticated, and where exhaustible resources need protection and management..."[38] The Court did not address the role of aboriginal peoples in that protection and management.

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34 *Ibid.* at para. 171.

35 *R.* v. *Sparrow*, [1990] 1 S.C.R. at 1075 1103.

36 *Ibid.* at 1106, quoting N. Lyon, "An Essay on Constitutional Interpretation" (1988) 26 Osgoode Hall L.J. 95 at 100.

37 *Sparrow, ibid.* at 1002.

38 *Sparrow, ibid.* at 1110.

The High Court of Australia has rejected the view that when the Crown acquired sovereignty through discovery, the common law automatically applied to the colony and its indigenous inhabitants became British subjects.[39] The enlarged notion of *terra nullius* assumed that there was no law in indigenous territories.[40] The Court held that this assumption could no longer be relied upon: "an inhabited territory which became a settled colony was no more a legal desert than it was a "desert uninhabited" in fact."[41] The Court therefore rejected the common law rules denying aboriginal rights and interests in land:

> The facts as we know them today do not fit the "absence of law" or "barbarian" theory underpinning the colonial reception of the common law of England. That being so, there is no warrant for applying in these times the rules of the English common law which were the product of that theory. ... the supposedly barbarian nature of indigenous people provided the common law of England with the justification for denying them their traditional rights and interests in land...[42]

In *Van der Peet*, Chief Justice Lamer, on behalf of the majority, adopted the doctrine of continuity and held that aboriginal rights and title are based on "traditional laws and customs."[43] The Court did not address the issue of aboriginal jurisdiction, however, nor did it consider aboriginal laws. The question whether aboriginal jurisdiction independent of title and beyond internal matters survived Confederation and the establishment of the division of powers under the *Constitution Act, 1867*, remains unsettled in the case law, particularly after the enactment of s. 35(1). I will return to this issue in Chapter 6, and argue that the case law supports the conclusion that the division of powers between the federal and provincial governments does not preclude or extinguish aboriginal jurisdiction of resource use

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39 *Mabo*, *supra* note 1 *per* Justice Toohey at 182 and *per* Justices Deane and Gaudron at 80.

40 *Mabo*, *ibid.* at 36 per Brennan J. Justice Brennan noted that "the indigenous inhabitants of a settled colony had no recognized sovereign, else the territory could have been acquired only by conquest or cession."

41 *Ibid.* at 58.

42 *Ibid.* at 39.

43 *Van der Peet*, *supra* note 1 at para. 40.

extending beyond self-government. Aboriginal jurisdiction could potentially have been an existing right in 1982. The following section considers the judicial interpretation of s. 35(1).

4.2. The Protection of Aboriginal Rights Under Section 35(1) of the *Constitution Act, 1982*

Section 35(1) of the *Constitution Act, 1982*, accords constitutional protection to aboriginal and treaty rights:

> **35.** (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

Section 52(1) of the *Constitution Act, 1982* provides:

> **52.** (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

A law that is inconsistent with the recognition and affirmation of aboriginal rights is of no force or effect to the extent of that inconsistency. A resource disposition authorized by such legislation is likewise of no force or effect to the extent of any inconsistency with s. 35(1).[44] The courts have not considered whether and to what extent s. 35(1) places constraints on land use decisions such as determining what lands are potentially available for forestry or mining, before interests are granted or resources allocated. The reasoning in *Gladstone*, where the Court examined the cumulative effects of the entire management scheme for herring roe on

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[44] See, for example, *R.* v. *Nikal*, [1996] 1 S.C.R. 1013 at para. 112-115, where the majority held that because the conditions attached to the appellant's licence were unconstitutional and inseparable from the licence, the licence itself was invalid. Dispositions to third parties may be quashed as well. Thus far this has occurred in the context of judicial review proceedings and s. 88 of the *Indian Act*, R.S.C. 1985 c. I-5, rather than under s. 52(1): see for example, *Halfway River First Nation* v. *British Columbia (Minister of Forests)*, [1997] 4 C.N.L.R. 45 at para. 103, where Justice Dorgan held that the setting aside of lands for logging could constitute an infringement of treaty rights to hunt and gather plants; *Saanichton Marina Ltd.* v. *Claxton* (1989), 36 B.C.L.R. (2d) 79 (B.C.C.A.). In *Quebec (Attorney General) v. Canada (National Energy Board)*, [1994] 1 S.C.R. 159, the Court stated that a decision granting a licence to export electrical power was open to scrutiny under s. 35(1). Legislation such as the *Canadian Environmental Assessment Act*, S.C. 1992, c. 37, s. 2(1), recognizes that any decision or project which may have an adverse effect on the environment may adversely affect the exercise of aboriginal rights.

kelp, suggests that s. 35(1) and the justification analysis may apply to these higher level decisions.[45]

4.2.1. A Principled Analysis

Despite a recent series of Supreme Court of Canada decisions on aboriginal rights, the implications of s. 35(1) remain uncertain. The Court considers s. 35(1) on a case by case basis and continually adjusts the tests in response to new fact situations and issues.

Principles of constitutional interpretation, and those governing the interpretation of laws and legal documents relating to aboriginal people play a continuing role in the application of s. 35(1). The Constitution is a "living tree capable of growth and expansion"; it is intended to evolve along with changing circumstances in society.[46] It "express[es] a vision of society as we would like it to be."[47] As that vision changes and develops, the constitution is meant to evolve. Only a principled approach to s. 35(1) will permit the provision to so evolve.

Section 35(1) must be interpreted purposively.[48] Interpretation of s. 35(1) should be guided by the reason for its inclusion in the Constitution, and the mischief it was meant to remedy. Section 35(1), and all treaties and statutes relating to aboriginal people, must be given a generous, liberal interpretation in favour of aboriginal interests.[49] Aboriginal perspectives on their rights must be taken into account when interpreting s. 35(1).[50] The following section

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45 *R. v. Gladstone*, [1996] 2 S.C.R. 723.

46 *Edwards v. Attorney General of Canada*, [1930] A.C. 124 (P.C.) at 136; See also *Attorney General of Ontario v. Attorney General of Canada*, [1947] A.C. 127 (P.C.) at 154; *Attorney General of Quebec v. Blaikie et al.*, [1979] 2 S.C.R. 1016 at 1029-1030.

47 Lyon, *supra* note 36 at 96. See also *Re Manitoba Language Rights*, [1985] 1 S.C.R. 721 at 745.

48 *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 at 344; *Sparrow*, *supra* note 35 at 1106; *Van der Peet*, *supra* note 1 at para. 22.

49 *Sparrow*, *ibid.* at 1106; *Nowegijick v. The Queen*, [1983] 1 S.C.R 29 at 36.

50 *Van der Peet*, *supra* note 1 at para. 49; *Delgamuukw*, *supra* note 19 at para. 84.

discusses the Supreme Court of Canada's view of the purposes underlying s. 35(1).

4.2.1.1. The Supreme Court's View of the Purposes Underlying Section 35(1)

According to the Supreme Court of Canada, s. 35(1) embodies two purposes: it recognizes and acknowledges the prior occupation of Canada by distinctive aboriginal societies with their own practices, traditions, customs and cultures; and it seeks to reconcile that prior occupation with the sovereignty of the Crown.[51] Aboriginal rights bridge aboriginal and non-aboriginal cultures.[52]

Aboriginal rights are "rights held by a collective [that] are in keeping with the culture and existence of that group."[53] Section 35(1) seeks to preserve "the integral and defining features of distinctive aboriginal societies" within Canadian society.[54] The purpose of aboriginal title is to ensure that aboriginal relationships with their lands continue over time.[55] The Court's approach thus suggests that cultural sustainability is a fundamental principle underlying s. 35(1).

The reconciliation of prior aboriginal occupation with Crown sovereignty should be considered in the context of the mischief that s. 35(1) seeks to remedy. The Court has implied that that mischief is the denial of aboriginal rights, and the unjust treatment of aboriginal peoples. In *Sparrow* the Court agreed with Professor Lyon that "Section 35 calls for a just settlement for aboriginal peoples."[56] In *Côté* the Court referred to the "noble and

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51 *Van der Peet, ibid.* at paras. 31 and 43.

52 *Delgamuukw, supra* note 19 at para 81.

53 *Sparrow, supra* note 35 at 1112.

54 *R. v. Adams*, [1996] 3 S.C.R. 101 at para. 33; *Delgamuukw, supra* note 19 at para. 136; and *Côté, supra* note 1 at para. 52. *Sparrow, ibid.* at 1099, held that the Musqueam had fishing rights because the fishery was integral to their physical and cultural survival.

55 *Delgamuukw, ibid.* at paras. 125, 126 and 128.

56 *Sparrow, supra* note 35 at 1106, quoting from Lyon, *supra* note 36 at 100.

prospective purpose" of the provision, and "the historical injustice suffered by aboriginal peoples at the hands of the colonizers who failed to respect the distinctive cultures of pre-existing aboriginal societies" and their rights.[57]

There are four basic steps to the s. 35(1) analysis. First, the court inquires into whether the aboriginal party has established an aboriginal or treaty right. Second, the Court asks whether the right was extinguished prior to the coming into force of the *Constitution Act, 1982*. Third, the court considers whether the government has infringed the right. Fourth, the Court inquires into whether any infringement is justified.

4.3. Establishing the Existence of an Aboriginal Right Under s. 35(1)

Section 35(1) protects both aboriginal and treaty rights. This thesis does not consider treaty rights. The Court has developed separate tests for establishing aboriginal title and activity-based aboriginal rights. As is the case with government ownership of lands and resources, aboriginal title includes the power to decide to what use to put the land.[58] This thesis is limited to a discussion of whether aboriginal jurisdiction over land and resource use may be established as a right independent of title.

The onus is on aboriginal litigants to establish aboriginal rights. Section 35(1) protects common law aboriginal rights that were not extinguished prior to 1982, though it is not limited to protecting only those rights recognized under the common law.[59]

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57 *Côté, supra* note 1 at para. 53; *Delgamuukw, supra* note 19 at para. 153.

58 In *Delgamuukw, ibid.* at paras. 122 and 126, Chief Justice Lamer held that aboriginal title encompasses rights to the resources, including minerals, and the right to determine the use to which aboriginal title lands are put (though the decision-making component is limited such that aboriginal peoples cannot, unless they surrender their title, choose to put heir lands to uses that "destroy the ability of the land to sustain future generations of aboriginal peoples"). Under s. 91(1A) of the *Constitution Act, 1867*, the federal government has power to make laws with respect to property that it owns, while s. 92(5) gives the provinces authority over provincial lands.

59 *Delgamuukw, ibid.* at paras. 133 and 136.

The majority judgment of Chief Justice Lamer in *Van der Peet* set out the following test for establishing an aboriginal right: "in order to be an aboriginal right an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right."[60] The scope and content of aboriginal rights are determined on a case-by-case basis.[61] Rights may be site specific, "depending on the actual pattern of exercise of such an activity prior to contact."[62]

The majority in *Van der Peet* placed considerable emphasis on precisely characterizing aboriginal rights,[63] while acknowledging that such characterization must take account of the reality that pre-contact practices, traditions or customs may be exercised in a contemporary form.[64] Chief Justice Lamer quoted the following excerpt from *Mabo*: "The nature and incidents of native title must be ascertained as a matter of fact by reference to those laws and customs [of the indigenous inhabitants of the territory in question]."[65] Lamer C.J.C. held that aboriginal rights are determined in the same manner.[66] Aboriginal rights are based on

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60 *Van der Peet, supra* note 1 at para. 46. This test seized upon a few words in *Sparrow*, in a different context. In that decision, *supra* note 35 at 1099, the Court found the salmon fishery to be integral to Musqueam life and culture. The test developed in *Van der Peet* seems narrower than the approach in *Sparrow* where the Court found the fishery, rather than the physical activity of harvesting fish for food, was integral to Musqueam culture.

61 *Van der Peet, ibid.* at para. 69.

62 *Côté, supra* note 1 at para. 39; and *Adams, supra* note 54 at para. 30.

63 *Van der Peet, supra* note 1 at paras. 51-54; *Côté, ibid.* at paras. 55-57; *Adams, ibid.* at paras. 35-36; *R.* v. *NTC Smokehouse*, [1996] 2 S.C.R. 672 at para. 16; *Gladstone, supra* note 45 at para. 23; and *R. v. Jones and Pamajewon*, [1996] 2 S.C.R. 821at para. 26. In determining the precise nature of the claim, the Courts consider the nature of the action which the Aboriginal claimants assert to have been carried out pursuant to the right, the government regulation which they argue has infringed the right, and the practice, tradition or custom relied on to establish the right.

64 *Van der Peet, ibid.* at para. 54. In the same paragraph, Chief Justice Lamer held that the activities which led to the appellant being charged for violating fishing regulations had to be "considered at a general rather than at a specific level" when being used to determine the nature of her claim.

65 *Van der Peet, ibid.* at para. 40, quoting from *Mabo, supra* note 1 at 58.

66 *Van der Peet, ibid.* See also *Amodu Tijani, supra* note 15, where the Privy Council found, at 404, that in order to ascertain the rights of indigenous people the particular community's customs and laws must be studied.

"traditional laws and customs ... passed down and arising from the pre-existing culture and customs of aboriginal peoples."[67] The Court has not, however, explicitly considered aboriginal laws in determining the nature and incidents of aboriginal rights, nor has it considered the question of aboriginal jurisdiction as a right under s. 35(1) independent of aboriginal title. The Court applies the "integral to a distinctive culture" test as an objective factual inquiry into the activities of aboriginal peoples and cultures.[68]

4.3.1. The Integrality of Customs, Practices and Traditions

A practice, custom or tradition is integral if it is of "central significance" to, or "a defining feature of, the culture in question."[69] The practice, custom or tradition need not distinguish the aboriginal culture from others, but it must be something that makes the culture what it is.[70] The practice, custom or tradition must be "independently significant", which means that it must itself be of integral significance to the aboriginal society and not merely incidental to an integral practice, custom or tradition.[71] Incidental rights which are necessary for the effective exercise of an aboriginal right, or "meaningfully related" to the exercise of an

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67 *Van der Peet, ibid.* at para. 40.

68 This approach can be contrasted with that of McFarlane J.A., in *Delgamuukw, supra* note 1, where he held that the nature and content of aboriginal rights are determined by asking what aboriginal societies regarded as integral to their cultures. The Supreme Court's approach, by contrast, though it purports to take into account aboriginal perspectives, approaches the question of what is integral to aboriginal cultures as if it could be answered in an objective manner by judges who are not members of the aboriginal culture.

69 *Van der Peet, supra* note 1 at paras. 55-59.

70 *Van der Peet, ibid.* at paras. 71-72.

71 *Van der Peet, ibid.* at para. 70. For example, in *NTC Smokehouse, supra* note 63 at paras. 22-27, the Supreme Court found trade at potlaches to be incidental to such an event and therefore lacking the independent significance necessary to give rise to a right. Trade and exchange at the potlach, however, served several important roles in Aboriginal societies, including the establishment of political rank and authority, and distribution of wealth. See P. Tennant, *Aboriginal People and Politics: The Indian Land Question in British Columbia, 1849-1989* (Vancouver: UBC Press, 1990) at 7. From aboriginal perspectives, the potlach may be one way of carrying out economic and political functions which are integral to their cultures. It is a manifestation of a right, not a right itself.

aboriginal right, are, however, protected with the right.[72]

4.3.2. Continuity

An aboriginal right must find its origin in a pre-contact practice, custom or tradition.[73] There must be continuity between pre-contact activities and contemporary practices carried out in the exercise of rights:

> Where an aboriginal community can demonstrate that a particular practice, custom or tradition is integral to its distinctive culture today, and that this practice, custom or tradition has continuity with the practices, customs and traditions of pre-contact times, that community will have demonstrated that the practice, custom or tradition is an aboriginal right for the purposes of s. 35(1).[74]

The pre-contact significance of the practice may be demonstrated through evidence of the integrality of a practice at or post-contact.[75] Continuity does not require an "unbroken chain." An aboriginal group may cease to engage in a practice, custom or tradition and resume it at a later date, particularly where the disruption in the exercise of a right is attributable to the unwillingness of European colonizers to recognize rights.[76]

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72 In *Simon v. The Queen*, [1985] 2 S.C.R. 387 at 403, the Court held that "the right hunt to be effective must embody those activities reasonably incidental to the act of hunting itself, an example of which is travelling with the requisite hunting equipment to the hunting grounds." In *Côté*, *supra* note 1 at para. 56, the Court found that "a substantive aboriginal right will normally include the incidental right to teach such a practice, custom or tradition to a younger generation." Teaching by demonstration is necessary in order for aboriginal fishing rights to continue. Most recently, in *R.* v. *Sundown*, [1999] S.C.J. No. 13 (QL) at para. 30, the Court held that treaty rights include protection of "meaningfully related or linked" activities.

73 *Van der Peet*, *supra* note 1 at paras. 60-67. According to Lamer C.J.C., this flows from the purpose which s. 35 serves of recognizing the occupation of Canada by aboriginal peoples prior to European arrival.

74 *Van der Peet*, *ibid.* at para. 63.

75 *Adams*, *supra* note 54 at para. 44; and *Van der Peet*, *ibid.* at para. 62.

76 *Delgamuukw*, *supra* note 19 at paragraph 153; *Van der Peet*, *ibid.* at para. 65.

4.3.3. Cultural Change and Aboriginal Rights

A custom, tradition or practice that exists solely because of European influence does not qualify as an aboriginal right, but if it was integral to the aboriginal culture prior to contact and was adapted in response to the arrival of Europeans, it will qualify as an aboriginal right.[77] Customs, practices and traditions may evolve and are recognized and affirmed in their contemporary forms.[78]

4.3.4. Self-Government and Regulatory Rights

In *Pamajewon* the Court considered whether there was a right to regulate gambling on the reserve. Though the Court rejected the possibility of broad and general rights to self-government, it found that there can be rights to regulate or govern certain activities, so long as there is evidence to support pre-contact regulation of the specific activity in question.[79] The test for establishing an aboriginal right will be applied to each such activity. The activity itself must be shown to be an aboriginal right.[80]

Nikal is the only decision of the Supreme Court of Canada to directly consider aboriginal rights to regulate resource use. The Court held that the Moricetown Band's aboriginal fishing rights included rights to regulate resource use internally, including rights to choose when to fish and the method and manner of fishing.[81] However, the majority held that Nikal did not have "a right not to comply with the directions of the Department of Fisheries and Oceans."[82] The Court reasoned that aboriginal rights do not amount to "freedom to live without any

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77 *Van der Peet, supra* note 1 at para. 73.

78 *Sparrow, supra* note 35 at 1093; *Van der Peet, supra* note 1 at para. 54.

79 *Pamajewon, supra* note 63 at para 27.

80 *Ibid.* at para 28.

81 *Nikal, supra* note 44 at para 88. The judgement of Millward J. is reported at [1991] 1 C.N.LR. 162 (B.C.S.C.).

82 *Ibid.* at para 90 (emphasis added).

laws."[83] The Court held that if a central government could not impose a licensing scheme as "the essential foundation for a conservation program", the salmon fishery would not survive and the aboriginal right to fish would become meaningless.[84] While the Band had a right to regulate the exercise of fishing rights internally, government regulation still applied to Nikal.[85] The Court did not find that the Band has resource management or stewardship rights or jurisdiction over resource use.

4.3.5. Evidence

The Courts must give weight to aboriginal perspectives on their practices, traditions, customs, and relationships with land.[86] The laws of evidence must be adapted in order to admit and give weight to oral histories, despite the fact that they serve social goals beyond the recording of fact, such as expressing "the values and mores" of a culture,[87] and notwithstanding that such evidence would otherwise be hearsay under the common law.[88] Oral histories must be placed on an "equal footing" with conventional historical evidence.[89]

4.3.6. Extinguishment of Aboriginal Rights

Section 35 recognizes and affirms "existing" rights. It does not revive rights which were extinguished prior to 1982.[90] Government has the onus to demonstrate a clear and plain

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83 *Ibid.* at para 92.

84 *Ibid.* at para 94.

85 Similarly, Justice McFarlane held in *Delgamuukw, supra* note 1 at 151, that if a right is recognized and affirmed by s. 35(1), institutions under which it is protected are as well, including the ability to self-regulate and self-govern.

86 *Delgamuukw, supra* note 19 at para 84.

87 *Ibid.* at paras. 84 and 86.

88 *Ibid.* at para 86.

89 *Ibid.* at para. 87.

90 *Sparrow, supra* note 35 at 1091.

legislative intent to extinguish the right in question.[91] The relevant regulations and legislation must demonstrate a "consistent intention" to extinguish the right.[92] Extensive regulation and non-recognition of aboriginal rights do not amount to extinguishment.[93] Failure to grant special protection to a right in legislation aimed at another purpose, such as conservation, does not constitute a clear and plain intent to extinguish the right.[94] Provincial legislation could not extinguish aboriginal rights.[95] As I showed in section 4.1, the case law is unsettled with respect to whether aboriginal jurisdiction was extinguished upon the assertion of Crown sovereignty or entry into Confederation.

The rest of this chapter focuses on the constraints that s. 35(1) rights place on decision makers. This involves discussion of the third and fourth stages of the s. 35 analysis. In light of the fact that most natural resource decision making occurs at the provincial level, the constitutional division of powers must be considered as well. If provincial legislation cannot be upheld under the division of powers, there is no need to consider the s. 35(1) analysis.

4.4. Division of Powers

As most resource related legislation is provincial, the extent to which the provinces may interfere with the exercise of aboriginal rights or title is an important question. Section 35 does not save legislation that is invalid or inapplicable under the Constitution's division of powers. If a provincial law is inapplicable or invalid under the division of powers because of interference with aboriginal rights, the province does not have the option of demonstrating

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91 *Sparrow, ibid.* at 1099.

92 *Gladstone, supra* note 45 at para. 34.

93 *Sparrow, supra* note 35 at 1097; and *Gladstone, ibid.* at paras. 31-38.

94 In *Gladstone, supra* note 45 at paras. 34-37, the majority held that regulations subjecting the aboriginal commercial fishery to the provincial regulatory system did not extinguish commercial fishing rights because the purpose of the regulation was not to eliminate these rights.

95 *Delgamuukw, supra* note 19 at paras. 173 and 178. See also W. Pentney, "The Rights of the Aboriginal Peoples of Canada in the Constitution Act, 1982 Part II - Section 35: The Substantive Guarantee" (1988) 22 U.B.C. L. Rev. 207 at 244.

that the infringement is justified.

The division of legislative powers between the federal and provincial governments is found in ss. 91 to 95 of the *Constitution Act, 1867*. Section 91(24) of the *Constitution Act, 1867* provides that the federal government has exclusive authority to legislate with respect to matters falling within the subject "Indians and lands reserved for Indians". In *Delgamuukw*, the Supreme Court of Canada confirmed that these are two separate heads of power.[96]

In *Bell Canada*, Beetz J. held that there is "a basic, minimum and unassailable content" of each head of federal power which cannot be *affected* by the provinces.[97] In *Irwin Toy* the Court held that the province could not *impair* "a vital part" of a federal undertaking.[98] This doctrine is called the "inapplicability of provincial laws" or "interjurisdictional immunity" doctrine.[99]

Provincial legislation which is "in pith and substance"[100] in relation to Indians or lands reserved for Indians is *ultra vires* and invalid. The provinces may not legislate in relation to these matters.[101] Accordingly, the provinces cannot directly regulate the exercise of

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96 *Ibid.* at paras. 173-178.

97 *Bell Canada* v. *Quebec* [1988] 1 S.C.R. 749 at 839 (emphasis added); see also *ibid.* at 859-860.

98 *Irwin Toy* v. *Quebec*, [1989] 1 S.C.R. 927at 955 (emphasis added).

99 Professor Hogg has described the rationale underlying the doctrine of interjurisdictional immunity as follows:

> There is no doubt, of course, that a provincial law (or municipal by-law) that specifically prohibited the posting of federal election signs would be invalid, because it would be characterized as in relation to a federal matter (federal elections). The doctrine of interjurisdictional immunity insists that the same result cannot be accomplished by the enactment of a broader law that, by reason of its non-federal applications, could be characterized as in relation to a provincial matter (land use).

P. Hogg, *Constitutional Law of Canada (1997 Student Edition)* (Toronto: Carswell, 1997) at 368.

100 The "pith and substance" of a law refers to its dominant characteristic.

101 *Delgamuukw, supra* note 19 at para 178.

aboriginal rights.[102] Provincial laws cannot single out aboriginal people, or intend to regulate "Indians *qua* Indians".[103] A provincial law of general application in relation to a matter that falls within a subject included s. 92 can incidentally affect matters within federal jurisdiction, including matters falling under s. 91(24), but not the core of s. 91(24).[104] Provincial laws of general application thus apply to aboriginal people of their own force unless they affect "Indians in their Indianness", "Indians *qua* Indians" or the "status and capacity of Indians".[105] Aboriginal rights are included in "Indianness" and the "status and capacity of Indians."[106]

The core of s. 91(24) protected from provincial intrusion includes aboriginal rights.[107] The phrase "lands reserved for the Indians" includes reserve lands, lands reserved for aboriginal peoples under the *Royal Proclamation, 1763*,[108] and lands subject to unextinguished aboriginal title.[109] Aboriginal rights in relation to land are included in the lands reserved head of s. 91(24) as well:

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102 *Ibid.* at para. 178.

103 *R.* v. *Sutherland*, [1980] 2 S.C.R. 451 at 455; *Moosehunter* v. *The Queen*, [1981] 1 S.C.R. 282 at 293; *Dick* v. *The Queen*, [1985] 2 S.C.R. 309 at 322-326; *Delgamuukw*, *supra* note 19 at para 179.

104 In *Delgamuukw*, *ibid.* at 177 and 181, Chief Justice Lamer applied the *Bell Canada* version of the inapplicability of provincial laws doctrine, and held that a core of Indianness is protected from provincial intrusion. The portion of Chief Justice Lamer's judgment concerning the division of powers represents a unanimous opinion: *Delgamuukw*, at para 206 *per* La Forest J. See also *Simon*, *supra* note 72 at 411.

105 *Four B Manufacturing Ltd.* v. *United Garment Workers of America*, [1980] 1 S.C.R. 1031 at 1047-1048; *Natural Parents* v. *Superintendent of Child Welfare*, [1976] 2 S.C.R. 751 at 760-761; *Kruger and Manuel* v. *The Queen*, [1978] 1 S.C.R. 104 at 110; *R.* v. *Alphonse*, [1993] 5 W.W.R. 401 at 415-416 (B.C.C.A.); and *Dick*, *supra* note 103 at 315-317 and 326.

106 *Dick*, *ibid.* at 321; *Alphonse*, *ibid.* at 418-419; *Delgamuukw*, *supra* note 19 at para 181. *Simon*, *supra* note 72 at 411 held that s. 91(24) includes exclusive power to derogate from treaty rights. The impact on "Indianness" is the same whether the government derogates from treaty or Aboriginal rights. "Status and capacity" includes status under the *Indian Act*, *supra* note 44 and "rights so closely connected with Indian status that they should be regarded as necessary incidents of status...": *Four B Manufacturing*, *ibid.*

107 *Delgamuukw*, *supra* note 19 at para 178.

108 *Supra* note 10. The Royal Proclamation reserves unceded hunting grounds and lands occupied by aboriginal peoples.

109 *Delgamuukw*, *supra* note 19 at para 174; The Privy Council, in *St. Catherines*, *supra* note 8 at 59, held that lands reserved includes "all lands reserved, upon any terms or conditions, for Indian occupation."

> ...*Adams* clearly establishes that aboriginal rights may be tied to land but nevertheless fall short of title. Those relationships with the land, however, may be equally fundamental to aboriginal peoples and, for the same reason that aboriginal title must vest with the federal government, so too must the power to legislate in relation to other aboriginal rights in relation to land.[110]

Lamer C.J.C. suggested that site specific aboriginal rights are rights in relation to land and therefore fall under the lands reserved head of s. 91(24):

> The picture which emerges from *Adams* is that aboriginal rights which are recognized and affirmed by s. 35(1) fall along a spectrum with respect to their degree of connection with the land. At the one end, there are those aboriginal rights which are practices, customs and traditions that are integral to the distinctive aboriginal culture of the group claiming the right. However, the "occupation and use of the land" where the activity is taking place is not "sufficient to support a claim of title to the land" (at para. 26). Nevertheless, those activities receive constitutional protection. In the middle, there are activities which, out of necessity, take place on land and indeed, might be intimately related to a particular piece of land. Although an aboriginal group may not be able to demonstrate title to the land, it may nevertheless have a site-specific right to engage in a particular activity. ... At the other end of the spectrum, there is aboriginal title itself.[111]

The significance of distinguishing between rights falling under the "Indians" head of power and those falling with the "lands reserved" head, is that the implications of s. 88 of the Indian Act[112] may differ. Section 88 of the *Indian Act* provides as follows:

> Subject to the terms of any treaty and any other Act of the Parliament of Canada, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that such laws are inconsistent with this Act or any rule, regulation or by-law made thereunder, and except to the extent that such laws make provision for any matter for which provision is made by or under this Act.

In *Dick*, the Supreme Court of Canada held that s. 88 renders provincial laws which affect Indianness, or impair the status or capacity of aboriginal peoples, applicable to *Indian Act*

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110 *Delgamuukw, ibid.* at para 176.

111 *Ibid.* at para 138.

112 *Supra* note 108.

Indians, unless such impairment is the provincial legislature's intent.[113] Section 88 of the *Indian Act* referentially incorporates provincial laws of general application that cannot apply to aboriginal people of their own force.[114]

Section 88 provides that provincial laws of general application are subject to the terms of any treaty. In *Saanichton Marina* v. *Claxton*, the Court considered treaty rights to fish. It upheld an injunction preventing a company from constructing a marina and parking lot, because the development would limit access to the resource and destroy habitat necessary for the survival of the fishery.[115]

Whether s. 88 applies to the lands reserved head of s. 91(24) remains uncertain. Section 88 does not mention lands reserved, and thus provincial laws of general application may be inapplicable to title lands and inapplicable where they affect or impair rights in relation to land.[116] Given that legislation such as the *Indian Act* must be interpreted purposively in favour of aboriginal peoples, the failure to include lands reserved in s. 88 should preclude the application of provincial laws to and in respect of lands reserved.[117]

Resource ownership has implications for jurisdiction as well. The federal government has

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113 *Dick, supra* note 103 at 327. Previously, *Kruger and Manuel, supra* note 105 at 110, held that s. 88 did not make laws which affect Indianness applicable to Indians. The interpretation in *Dick* has been reaffirmed in *Derrickson* v. *Derrickson*, [1986] 1 S.C.R. 285 at 297; and in *R.* v. *Francis*, [1988] 1 S.C.R. 1025 at 1030.

114 *Dick, ibid.* at 327-328. *R.* v. *White and Bob*, (1964), 50 D.L.R. (2d) 613 (B.C.C.A.) at 618, aff'd (1965), 52 D.L.R. (2d) 481 (S.C.C.). A majority of the British Columbia Court of Appeal held that legislation that abrogates or abridges treaty rights to hunt is "legislation in relation to Indians because it deals with rights peculiar to them."

115 *Supra* note 44.

116 See *Stoney Creek Indian Band* v. *British Columbia*, [1999] 1 C.N.L.R. 192 (B.C.S.C.); *Reference re Stony Plain Indian Reserve* [1982] 1 W.W.R. 302 (Alta. C.A.); *Four B Manufacturing, supra* note 105; *Delgamuukw, supra* note 19 at para. 179, suggest that by virtue of s. 88, provincial lands of general application apply to lands reserved.

117 See N. Bankes, "*Delgamuukw*, Division of Powers and Provincial Land and Resource Laws: Some Implications for Provincial Resource Rights" (1998) 32 U.B.C. L. Rev. 317.

authority to legislate with respect to federal public property under s. 91(1A). Section 109 of the *Constitution Act, 1867* provides as follows:

> All Lands, Mines, Minerals, and Royalties belonging to the several Provinces... at the Union, and all sums then due or payable for such Lands, Mines, Minerals, or Royalties, shall belong to the several Provinces ... in which the same are situate or arise, subject to any Trusts existing in respect thereof, and to any Interest other than that of the Province in the same.

The *St. Catherine's* case held that aboriginal title is an interest other than that of the province within the meaning of s. 109. The Crown's title only becomes a *plenum dominium* when the aboriginal title is acquired through constitutional means.[118] Until the aboriginal title is extinguished, the full proprietary interest is not with the province and the province cannot control and dispose of interests in lands which it does not own.[119] However, s. 91(24) does not give the federal government a beneficial interest in lands reserved, though it gives Parliament authority to legislate in respect of lands reserved.[120] This authority allows Parliament to extinguish or purchase the aboriginal interest, but once the aboriginal title is extinguished, it is the province who owns the lands.

The extent to which provincial laws of general application can apply to lands on or with respect to which there are existing aboriginal rights remains somewhat uncertain. Assume for example, that a First Nation with an existing aboriginal right to make laws in relation to the use of a forest ecosystem has made a law prohibiting logging or the issuance of forest tenures in a particular area, and that the province purports to issue an FMA covering the same area. Is the FMA valid? The right in question most logically falls under the lands reserved and not the Indians head of power. The provincial law impairs the core of the lands

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118 *St. Catherine's, supra* note 8 at 55.

119 In *Attorney General for Canada* v. *Attorney General for Ontario*, [1897] A.C. 199 at 210-211 (P.C.) the Privy Council held that if the beneficial interest in lands is in a province the federal government cannot grant those lands. For cases holding that legislative power does not grant ownership rights, see *Attorney-General for British Columbia* v. *Attorney-General for Canada*, [1914] A.C. 153 (P.C.) and *Attorney-General for Canada* v. *Attorney-General for Ontario*, [1898] A.C. 700 (P.C.).

120 *St. Catherine's, supra* note 8 at 59.

reserved head because it purports to override conflicting aboriginal decisions made in the exercise of an aboriginal right. Unless the phrase "to and in respect of Indians" in s. 88 can be read as "to and in respect of Indians and lands reserved for Indians", in my opinion the province cannot issue the FMA referred to in the above example. I will consider this question again in Chapter 5, which reviews the literature on this subject.

If the province cannot dispose of resources on lands subject to existing aboriginal rights to manage the use of the land or resources in question, because it is prevented from doing so by the division of powers, then it cannot attempt to justify the interference. The federal government may, however, interfere with the exercise of aboriginal rights in relation to land if the infringement is justified. The remainder of this Chapter considers the justification analysis.

4.5. The Justification Analysis

Prior to 1982, rights were subject to government regulation and extinguishment.[121] Where legislation was inconsistent with the exercise of an aboriginal right, the legislation prevailed. As suggested by Kent McNeil, the texts of ss. 35(1) and 52(1) could have been interpreted as rendering invalid any law which interferes with the exercise of an aboriginal or treaty right.[122] The Supreme Court of Canada held, however, that s. 35(1) rights are not absolute. Section 35(1) does, however place "some restraint on the exercise of sovereign power."[123] Federal power under s. 91 of the *Constitution Act, 1867* must be read together with s. 35(1).[124] Federal power must be reconciled with federal duty, and the Court held that this is best achieved by requiring government to justify any regulation infringing upon or denying

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121 *R.* v. *Derriksan* (1976), 71 D.L.R. (3d) 159 (S.C.C.).

122 K. McNeil, "The Constitutional Rights of the Aboriginal Peoples of Canada" (1982), 4 Supreme Court L. Rev. 255 at 256. See also B. Slattery, "The Hidden Constitution: Aboriginal Rights in Canada" (1984) 32 Am. J. Comp. L. 361 at 384.

123 *Sparrow, supra* note 35 at 1109.

124 *Ibid.* at 1109.

aboriginal rights.[125]

The Court incorporated the fiduciary relationship into the s. 35 analysis to impose limits on the exercise of sovereign power. The justification requirement is meant to hold the Crown "to a high standard of honourable dealing with respect to the aboriginal peoples of Canada..."[126]

The next step in the analysis requires aboriginal litigants to demonstrate an infringement of the right in question.

4.5.1. *Prima Facie* Infringement

At the third stage of the s. 35(1) analysis, the aboriginal litigant must establish a *prima facie* infringement.[127] Legislation that interferes with or adversely affects the exercise of an existing aboriginal right constitutes a *prima facie* infringement of that right.[128] In *Sparrow* the Court identified several factors which are relevant at this stage of the analysis: "First, is the limitation unreasonable? Second, does the regulation impose undue hardship? Third, does the regulation deny to the holders of the right their preferred means of exercising the right?"[129] Subsequent decisions have held that these questions do not constitute the test for establishing a *prima facie* infringement, but rather are examples of *prima facie* infringements.[130] The *prima facie* infringement test is aimed at ensuring that "only meritorious claims are considered. The onus on the applicant is not heavy."[131]

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125 *Ibid.*; *Delgamuukw*, *supra* note 19 at para 160.

126 *Sparrow*, *supra* note 35 at 1109.

127 *Ibid.* at 1120.

128 *Ibid.* at 1110 and 1112.

129 *Ibid.* at 1112. Questions of whether a limitation is unreasonable or a hardship undue arguably should be considered in the second half of the justification analysis, not the *prima facie* infringement stage.

130 *Gladstone*, *supra* note 45 at para. 43; *Côtè*, *supra* note 1 at para 75.

131 *R.* v. *Sampson* (1995), 16 B.C.L.R. (3d) 226 (B.C.C.A.) at 239-240.

Justice Dorgan suggested in *Halfway* that whether or not there is a *prima facie* infringement will often be a matter of common sense.[132] There is a *prima facie* infringement where a fee requires aboriginal people to pay for the privilege of exercising their rights.[133] In *Côté*, however, a fee did not infringe the rights in question because it was imposed only on motor vehicle access to the fishing grounds, and there were other means of access. The appellants could exercise their fishing rights without paying a fee.[134] The Court in that case also stressed that the fee was not aimed simply at revenue-generation, but went towards repairing and improving the roads, which the Court found actually facilitated rather than interfered with the exercise of the treaty rights.[135]

Of particular importance in determining whether there has been an interference is aboriginal peoples' specific relationships with land and resources. Thus, for example, the British Columbia Court of Appeal found a *prima facie* infringement where the government attempted to meet aboriginal food fish requirements through hatchery fish and licences to fish in other areas.[136]

Justice Cory delivered the majority judgment in *Nikal*. He considered the three questions identified in *Sparrow* and held that the licence requirement itself (as opposed to its conditions) did not constitute a *prima facie* infringement.[137] The Wet'suwet'en right to fish included regulatory rights, including rights to choose when to fish, and the method and manner of fishing.[138] The appellant argued that he ought to be able to follow his Band's

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132 *Supra* note 44.

133 *R.* v. *Badger*, [1996] 1 S.C.R. at 771 at 820.

134 *Côté*, *supra* note 1 at para. 77.

135 *Ibid.* at 188.

136 *R.* v. *Jack* (1995), 16 B.C.L.R. (3d) 201 (C.A.) at 214, 216.

137 *Nikal*, *supra* note 44 at para 99.

138 *Ibid.* at para. 88.

discretion in exercising the right to fish, and that a licence requirement constitutes a *prima facie* infringement because "it infers that government permission is needed to exercise the right and that the appellant is not free to follow his own or his band's discretion in exercising that right."[139] The majority rejected this argument:

> It has frequently been said that rights do not exist in a vacuum, and that the rights of one individual or group are necessarily limited by the rights of another. The ability to exercise personal or group rights are necessarily limited by the rights of others. The government must ultimately be able to determine and direct the way in which these rights should interact. Absolute freedom in the exercise of ... a ... constitutionally guaranteed aboriginal right ... without any restriction necessarily infers a freedom to live without any laws. Such a concept is not acceptable in our society.[140]

Even though the Court held that the Wet'suwet'en had regulatory rights, its conclusion that a licence requirement is not an infringement of the aboriginal right must be based on the assumption that aboriginal peoples have no laws, or that such laws are not protected by s. 35(1).

Legislation which grants unstructured discretion, the exercise of which risks infringing aboriginal rights, constitutes a *prima facie* infringement. In *Adams*, the challenged regulatory scheme prohibited fishing without a licence and gave the minister an unstructured discretion to issue special permits authorizing aboriginal people to fish for subsistence.[141] The Court held that the provision itself constituted a *prima facie* infringement regardless of the manner in which the discretion was in fact exercised:

> In light of the Crown's unique fiduciary obligations towards aboriginal peoples, Parliament may not simply adopt an unstructured discretionary administrative regime which risks infringing aboriginal rights in a substantial number of applications in the absence of some explicit guidance. If a statute confers an administrative discretion which may carry significant consequences for the exercise of an aboriginal right, the statute or its delegate

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139 *Ibid.* at para 91.

140 *Ibid.* at para. 92.

141 *Adams, supra* note 54 at para 51.

> regulations must outline specific criteria for the granting or refusal of that discretion which seek to accommodate the existence of aboriginal rights. In the absence of such specific guidance, the statute will fail to provide representatives of the Crown with sufficient directives to fulfil their fiduciary duties, and the statute will be found to represent an infringement of aboriginal rights under the *Sparrow* test.[142]

The courts have not considered discretionary powers to grant interests or rights to third parties which may interfere with the exercise of aboriginal rights.[143] The courts have also not considered provisions such as those in the CMRs which give no discretion, but rather compel the issuance of interests in land and resources which risk interfering with the exercise of rights in a substantial number of applications.[144]

In the context of licencing schemes, the Court has examined the effects of individual licences or restrictions and the cumulative effects of regulatory schemes on the exercise of rights.[145] In *Gladstone* the Court considered whether "the entire approach taken by the Crown to the management of the herring spawn on kelp fishery" infringed the Heiltsuk's harvesting rights.[146] The Court held:

> The Category J licence requirement ... cannot be scrutinized for the purposes of either infringement or justification without considering the entire regulatory scheme of which it is a part. The requirement that those engaged in the commercial fishery have licences is ... simply a constituent part of a larger regulatory scheme setting the amount of herring that can be caught, the amount of herring allotted to the herring spawn on kelp fishery and the allocation of herring spawn on kelp amongst different users of the resource. All the aspects of this regulatory scheme potentially infringe the rights of the

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142 *Ibid.* at para. 52. Chief Justice Lamer, for the majority, held that the unstructured discretion imposed undue hardship and interfered with the appellant's preferred means of exercising his rights.

143 The reasoning arguably applies to such legislation. In either case the legislation grants powers whose exercise may infringe aboriginal rights and does not seek to accommodate those rights or ensure that the exercise of the discretion does not interfere with their exercise.

144 Again, the reasoning implies that this type of legislation may be a *prima facie* infringement, because it authorizes dispositions and uses of lands and resources that may interfere with the exercise of aboriginal rights, and it does not seek to accommodate the exercise of aboriginal rights.

145 *Gladstone, supra* note 45 at para. 52 ; *Adams, supra* note 54 at para. 50.

146 *Gladstone, ibid.* at para. 40.

> appellants in this case...[147]

The Court held that at the *prima facie* stage of the analysis the cumulative effect of the regulatory regime had to be considered, while at the justification stage the various stages in the regulatory scheme could be considered separately:

> Because each of these constituent parts has a different objective, and each involves a different pattern of government action, at the stage of justification it will be necessary to consider them separately; however, at the infringement stage the government scheme can be considered as a whole. The reason for this is that at the infringement stage it is the cumulative effect on the appellants' rights from the operation of the regulatory scheme that the court is concerned with. The cumulative effect of the regulatory scheme on the appellants' rights is, simply, that the total amount of herring spawn on kelp that can be harvested by the Heiltsuk Band for commercial purposes is limited.[148]

In the context of forestry and mining, while the courts have to date only considered cutting permits, the reasoning in *Gladstone* suggests that broader management schemes can be scrutinized to determine their cumulative effect on aboriginal rights. Land use decisions might therefore be challenged, as might, for example, the free entry basis of mineral disposition legislation.

If a court finds a *prima facie* infringement, the government has the onus of demonstrating that it is justified.[149] The fiduciary duty imposes a high standard of justification on government.[150] The Court has developed a justification test similar to that developed for s. 1 of the *Canadian Charter of Rights and Freedoms*.[151] First, the Court asks whether the government was acting pursuant to a valid legislative objective. Second, the Court inquires

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147 *Ibid.* at para. 41.

148 *Ibid.* at para. 52.

149 *Sparrow*, supra note 35 at 1110.

150 *Sparrow, ibid.* at 1109.

151 Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982*, c. 11 (U.K.). See *R. v. Oakes*, [1986] 1 S.C.R. 103.

into whether the government has chosen means to meet that objective which uphold the honour of the Crown. This involves an examination of both the process and the result of government decision making.

4.5.2. Valid Legislative Objective

A legislative objective is valid for the purpose of s. 35(1) if it is sufficiently "compelling and substantial" to justify an infringement of constitutionally protected aboriginal rights.[152] The Court began in *Sparrow* with what appeared to be a strict standard for legislative objectives, but has since significantly broadened the scope of potentially valid objectives.

In *Sparrow*, the Court held that conservation and resource management is a valid legislative objective.[153] This kind of objective was consistent with preserving s. 35(1) rights.[154] In one part of the judgment, the Court cited with approval the Court of Appeal's statement that "*proper* management and conservation" is a valid objective.[155] The Court referred to the following excerpt from *Kruger* v. *The Queen*:

> Game conservation laws have as their policy the maintenance of wildlife resources. ... the measures taken by the British Columbia Legislature were taken to maintain an effective resource in the Province for its citizens and not to oppose the interests of conservationists and Indians in such a way as to favour the claims of the former.[156]

In *Nikal*, the majority held as follows:

> ...the aboriginal right to fish must be balanced against the need to conserve the fishery stock. The existence of an aboriginal right to fish cannot automatically deny the ability of the government to set up a licensing scheme or program since the exercise of the right itself is dependant on the continued

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152 *Sparrow, supra* note 35 at 1113; *Delgamuukw, supra* note 19 at para 161.

153 *Sparrow, ibid.* at 1113-1114.

154 *Ibid.* at 1113 and 1114.

155 *Ibid.* at 1113, emphasis added.

156 *Supra* note 113 at 112

> existence of the resource. The very right to fish would in time become meaningless if the government could not enact a licensing scheme which could form the essential foundation of a conservation program.[157]

While the Court's approach is arguably paternalistic in its assumption that only government conservation programs can ensure the continued existence of resources and the continued ability to exercise aboriginal rights, the Court does incorporate notions of responsibility into government authority. It might have been thought after *Sparrow* and *Nikal* that a valid legislative objective had to be consistent with the continued exercise of aboriginal rights.[158]

The Court held in *Sparrow* that serving the public interest was too vague an objective.[159] "Shifting more of the resource to a user group that ranks below the Musqueam" would also be an unconstitutional objective.[160] In *Gladstone* the Court held that as a general principle, an objective is compelling and substantial if it is directed at either the recognition of prior occupancy by aboriginal societies or at the reconciliation of that prior occupation with the sovereignty of the Crown.[161] Chief Justice Lamer held further that reconciliation of prior aboriginal occupation with the Crown's assertion of sovereignty "may well be the most relevant."[162] He explained as follows:

> Aboriginal rights are a necessary part of the reconciliation of aboriginal societies with the broader political community of which they are a part; limits placed on those rights are, where the objectives furthered by those limits are of sufficient importance to the broader community as a whole, equally a necessary part of that reconciliation.[163]

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157 *Nikal*, *supra* note 44 at para 94; see also para. 102, where Cory J. writes: "It is the federal government which will be required to manage the fishery and see to the improvement and the increase of the stock of that fishery."

158 See *Sparrow*, *supra* note 35 at 1113.

159 *Sparrow*, *ibid.* at 1113.

160 *Ibid.* at 1121.

161 *Delgamuukw*, *supra* note 19 at para 161; *Gladstone*, *supra* note 45 at para 72.

162 *Gladstone*, *ibid.* at para. 72.

163 *Gladstone*, *ibid.* at para. 73 (emphasis original).

Lamer C.J. concluded that the following legislative objectives were potentially valid:

> Although by no means making a definitive statement on this issue, I would suggest that with regards to the distribution of the fisheries resource after conservation goals have been met, objectives such as the pursuit of economic and regional fairness, and the recognition of the historical reliance upon, and participation in, the fishery by non-aboriginal groups, are the type of objectives which can (at least in the right circumstances) satisfy this standard. *In the right circumstances*, such objectives are in the interest of all Canadians and, more importantly, the reconciliation of aboriginal societies with the rest of Canadian society may well depend on their successful attainment.[164]

In the right circumstances, and once conservation goals have been met, advancing the non-constitutional interests of non-aboriginal peoples in the distribution of the resource may constitute a valid reason for infringing on the constitutional rights of aboriginal resource users.[165]

In *Delgamuukw* the Court reinforced these objectives as valid.[166] Chief Justice Lamer also held that:

> In the wake of *Gladstone*, 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 cultures exist within, and are a part of, a broader social, political and economic community" (at para. 73). 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 these aims, are the kinds of objectives that are consistent with this purpose and, in principle, can justify the infringement of aboriginal title.[167]

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164 *Ibid.*

165 This seems to be a retreat from *Sparrow*, where shifting more of a resource to a group without constitutional rights was held to be an invalid objective.

166 *Delgamuukw*, *supra* note 19 para 161.

167 *Delgamuukw*, *ibid.* at paras 165 and at 202.

However, advancing "relatively unimportant" objectives, for example "sports fishing without a significant economic component" will not qualify.[168]

None of the potentially valid objectives cited in *Gladstone* and *Delgamuukw* have been considered in context, and we therefore do not know when they will be valid.[169] In Chapter 6 I consider whether sustainability principles may assist in determining whether an objective is valid in the circumstances.

The Court in *Sparrow* also quoted the following passage from *R.* v. *Hare and Debassige*:

> Since 1867 and subject to the limitations thereon imposed by the Constitution, which of course now includes s. 35 of the *Constitution Act, 1982*, the constitutional authority and responsibility to make laws in relation to the fisheries has rested with Parliament. Central to Parliament's responsibility has been, and continues to be, the need to provide for the proper management and conservation of our fish stocks, and the need to ensure that they are not depleted or imperilled by deleterious practices or methods of fishing.[170]

4.5.3. Upholding the Honour of the Crown

An infringement of an aboriginal right in pursuit of a compelling and substantial legislative objective is only justified if it upholds the honour of the Crown and is consistent with the

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168 *Ibid.* at para 161; *Adams, supra* note 54 at para. 58 Chief Justice Lamer, wrote on behalf of the majority as follows:

> I have difficulty accepting, in the circumstances of this case, that the enhancement of sports fishing *per se* is a compelling and substantial objective for the purpose of s. 35(1). While sports fishing is an important economic activity in some parts of the country, in this instance, there is no evidence that the sports fishing that this scheme sought to promote had a meaningful economic dimension to it.... sport fishing, without evidence of a meaningful economic dimension, is not "of such overwhelming importance to Canadian society as a whole" (*Gladstone, supra* at para. 74) to warrant the limitation of aboriginal rights.

169 See *Adams, ibid.* at para. 56.

fiduciary obligations of the Crown.[171] The duty arises from the nature of aboriginal title (specifically the inalienability of aboriginal title and reserve lands except upon surrender to the Crown), and the resulting discretion which the Crown has in dealing with aboriginal lands.[172] Under the common law, the fiduciary relationship imposes "trust-like" obligations on the Crown. A fiduciary must act with utmost loyalty to, and in the best interests of, its beneficiary.[173] One might ask how any infringement could be consistent with the fiduciary duty of the Crown. If we move to the justification analysis that must mean that the government has decided to serve other interests by passing legislation which interferes with the exercise of aboriginal rights. How can the government uphold its fiduciary obligations while at the same time seeking to justify an interference with the exercise of the constitutional rights of the beneficiaries? The fiduciary duty does not fit neatly into the s. 35(1) analysis and yet it is the general guiding principle for that analysis.

While government is not precluded from infringing aboriginal rights, the fiduciary duty "may place a heavy burden on the Crown."[174] Government is required to act in the best interests of aboriginal peoples so far as possible in achieving valid legislative objectives. Rather than demand utmost loyalty from the Crown, the Court appears to be balancing the Crown's fiduciary obligations to aboriginal peoples and its obligations as government to advance the interests of all Canadians.[175]Government must refrain from interfering with aboriginal rights

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170 (1985), 20 C.C.C. (3d) 1 (Ont. C.A.) at 17, quoted in *Sparrow, supra* note 35 at 1118.

171 *Sparrow, ibid.* at 1110; *Delgamuukw* at para 162.

172 See *Blueberry River Indian Band* v. *Canada*, [1995] 4 S.C.R. 344 (also known as "*Apsassin*")at 362. In *Opetchesaht v. Canada*, [1997] 2 S.C.R. 119 at para 86, the Court stated that the Crown has a fiduciary duty to act in the best interests of Aboriginal people. In *R.* v. *Lewis*, [1996] 1 S.C.R. 921, an earlier decision, at para 52, the Court suggested that the Crown did not breach any fiduciary duty it owed when it established a reserve for the Squamish Band because failure to secure larger access to the fishery did not amount to exploitation.

173 *Guerin* v. *The Queen.*, [1984] 2 S.C.R. 335, *per* Wilson J. at 354 and *per* Dickson J. at 389.

174 *Sparrow, supra* note 35 at 1119.

175 In *Adams, supra* note 54 at para. 54, and *Côté, supra* note 1 at para. 76, the Court suggested that legislation which potentially interferes with the exercise of aboriginal rights, or regulations made under such legislation, must at the very least seek to accommodate the existence of aboriginal rights.

so far as possible when advancing legitimate, compelling and substantial legislative interests for the benefit of Canadian society as a whole. The federal and provincial governments must therefore accord the requisite degree of priority to aboriginal rights, minimize any necessary interference, and engage in meaningful consultation when making decisions that may interfere with aboriginal rights.

4.5.3.1. Priority

Whether government has complied with the requirements of the fiduciary duty depends on the "legal and factual context"[176] including the nature of the right at issue.[177] In *Sparrow* and *Gladstone*, the Court held that government must accord aboriginal peoples' rights to harvest resources priority over other users when allocating the resource.[178] Rights to harvest for food or ceremonial purposes receive absolute priority once conservation needs are met.[179] The Court held in *Sparrow* that once fish were allocated to conservation, it was possible that government would be constrained in its allocation of the remainder of the fishery to the extent that an exclusive aboriginal harvest would be required:

> If, in a given year, conservation needs required a reduction in the number of fish to be caught such that the number equalled the number required for food by the Indians, then all the fish available after conservation would go to the Indians according to the constitutional nature of their fishing right. If, more realistically, there were still fish after the Indian food fish requirements were met, then the brunt of conservation measures would be borne by the practices of sport fishing and commercial fishing.[180]

The fiduciary duty requires government to ensure that aboriginal peoples bear the costs of pursuing valid legislative objectives only to the extent necessary; the brunt of the consequences of measures taken to achieve conservation must be borne by others.

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176 *Delgamuukw*, *supra* note 19 at para 162.

177 *Ibid.* at paras 162 and 163.

178 *Ibid.* at para 162.

179 *Sparrow*, *supra* note 35 at 1116.

180 *Ibid.*

In the context of commercial harvesting rights, the Court has subsequently held that while government had to accord priority to the right, the concept of priority had to be modified from that described in *Sparrow*.[181] The Court held that whereas one can estimate the amount of fish required to meet peoples' food requirements, there is no inherent limit to the amount of fish required to satisfy a commercial right. The only limit is demand and thus application of the priority doctrine as articulated in *Sparrow* would leave no room for a non-aboriginal (or other aboriginal) harvest. The Court described the following modified priority requirement for rights lacking internal limits:

> Where the aboriginal right is one that has no internal limitation then the doctrine of priority does not require that, after conservation goals have been met, the government allocate the fishery so that those holding an aboriginal right to exploit that fishery on a commercial basis are given an exclusive right to do so. Instead, the doctrine of priority requires that the government demonstrate that, in allocating the resource, it has taken account of the existence of aboriginal rights and allocated the resource in a manner respectful of the fact that those rights have priority over the exploitation of the fishery by other users. This right is at once both procedural and substantive; at the stage of justification the government must demonstrate both that the process by which it allocated the resource and the actual allocation of the resource which results from that process reflect the prior interest of aboriginal rights holders in the fishery.
>
> The content of this priority -- something less than exclusivity but which nonetheless gives priority to the aboriginal right -- must remain somewhat vague pending consideration of the government's action in specific cases.[182]

The Court held that the following questions, while not an exhaustive list, could assist a court in determining whether the government has given priority to the aboriginal rights holders:

> Questions relevant to the determination of whether the government has granted priority to aboriginal rights holders are those enumerated in *Sparrow* relating to consultation and compensation, as well as questions such as whether the government has accommodated the exercise of the aboriginal right to participate in the fishery (through reduced license fees, for example),

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181 *Gladstone, supra* note 45 at paras. 61-62.

182 *Gladstone, ibid.* at para. 62; see also *Delgamuukw, supra* note 19 at para. 164.

> whether the government's objectives in enacting a particular regulatory scheme reflect the need to take into account the priority of aboriginal right holders, the extent of the participation in the fishery of aboriginal rights holders relative to their percentage of the population, how the government has accommodated different aboriginal rights in a particular fishery (food versus commercial rights, for example), how important the fishery is to the economic and material well-being of the band in question, and the criteria taken into account by the government in, for example, allocating commercial licenses amongst different users.[183]

Arguably the requirements of the fiduciary duty should depend not only on the nature of the aboriginal right in question, but also on the nature of the government's legislative objective. It may be appropriate to ask to what extent a particular objective can justify an interference with aboriginal rights. Just as one can estimate what is required to satisfy food fishing requirements, one can estimate how much of a resource must be free from harvesting in order to achieve valid conservation goals. Conversely, just as a commercial harvesting right may lack this kind of internal limitation, the government's economic goals and objectives such as development of forestry and mining are potentially limitless. In *Gladstone* the Court held that market, or demand, could not be the only limit on commercial harvesting rights because the result would be an exclusively aboriginal harvest. If market considerations or demand are the only limits on government objectives such as development of forestry and mining, aboriginal peoples may be precluded from continuing to exercise aboriginal rights. External limits might need to be placed on objectives such as forestry or mining so that aboriginal rights can be accommodated. In Chapter 6 I suggest that sustainability principles might assist the courts in placing external limits on potentially limitless objectives.[184] To the extent that s. 35(1) embraces the principle of cultural sustainability, it may require a balance between development and conservation that allows aboriginal cultures to continue.

In other instances priority in allocation will be an inappropriate articulation of the fiduciary

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[183] *Gladstone, ibid.* at para. 64.

[184] *Ibid.* at para. 75 suggested that economic objectives ranked below conservation.

duty.[185] Where priority is not the appropriate, or the only appropriate articulation of the fiduciary duty, a court may ask the following questions in determining whether the infringement upheld the honour of the Crown:

> 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.[186]

4.5.3.2. Minimal Interference

A valid legislative objective takes precedence over aboriginal rights only where and to the extent necessary.[187] The Court in *Sparrow* stated that to justify an infringement of the appellant's right to fish, the Crown would have to show that the regulation sought to be imposed, in that case a net length restriction, was "*required* to accomplish the needed limitation."[188] While accepting conservation as a valid legislative objective, the Court suggested that only reasonable and necessary conservation measures could be justified.[189] The British Columbia Court of Appeal has found government measures to be in violation of s. 35(1) where government could have implemented less invasive means of achieving a valid objective.[190]

In *Nikal*, the Court found that it will not always be necessary for the government to show that

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185 *Delgamuukw, supra* note 19 at para 162.

186 *Sparrow, supra* note 35 at 1119; *Delgamuukw, ibid.* at para 162.

187 *Sparrow, ibid.* at 1115.

188 *Ibid.* at 1121 (emphasis added).

189 *Ibid.* at 1115 and 1116: "The constitutional nature of the Musqueam food fishing rights means that any allocation of priorities after *valid* conservation measures have been implemented must give top priority to Indian food fishing." This approach is similar to the rational connection requirement under the Charter: *Oakes, supra* note 151.

190 *Jack, supra* note 136 at paras. 65 and 89; and *Sampson, supra* note 131at paras. 91-92.

the means it chose were in fact as minimally intrusive as was possible:

> So long as the infringement was one which in the context of the circumstances presented could reasonably be considered to be as minimal as possible then it will meet the test. The mere fact that there could possibly be other solutions that might be considered to be a lesser infringement should not, in itself, be the basis for automatically finding that there cannot be a justification for the infringement.[191]

This should not be seen as easing the burden on the Crown, however. Rather, it is meant to prevent a finding that the Crown could have chosen a less intrusive means when it could not have been known at the time that such means were available.

4.5.3.3. Consultation

The fiduciary duty governs not only decisions, but decision making processes as well. In *Sparrow*, the Court held that government must consult with affected aboriginal peoples when making decisions concerning the appropriate scheme for regulating the fishery and deciding on appropriate conservation measures.[192] Consultation has become a precondition for a finding that an infringement of an aboriginal right is justified,[193] though the nature and extent of consultation varies with the circumstances.

Absent consultation, it should be difficult if not impossible for the government to claim it has infringed the aboriginal rights in question as little as possible,[194] nor can the Crown claim

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191 *Nikal*, supra note 44 at para 110.

192 *Sparrow, supra* note 35 at 1119.

193 See *Sampson, supra* note 131 at paras. 250-252; *Jack, supra* note 136 at 221-223; *R. v. Little* (1995), 16 B.C.L.R. (3d) 259 (B.C.C.A.) at 279; *Klahoose First Nation v. British Columbia (Minister of Forests)* (1995), 13 B.C.L.R. (3d) 59 at 62-63 (S.C.); *R. v. Jones* (1993), 14 O.R. (3d) 421 at 451; and *Delgamuukw, supra* note 1 at 423.

194 In *Halfway River, supra* note 44 at para 66, Dorgan J. asked: "How can one reach any reasonable conclusion as to the impact on Halfway's rights without obtaining information from Halfway on their uses of the area in question?"

that the means used uphold the honour of the Crown, are consistent with the Crown's fiduciary duty, and seek to reflect the priority of aboriginal rights. Any attempt to understand the aboriginal resource use of an area and how aboriginal reliance upon the resource is affected by government or government-sanctioned activities, and any true attempt to accord priority to aboriginal rights cannot be successful, and indeed appears to be insincere, unless the process of choosing the appropriate means to achieve the government objective includes extensive consultation with aboriginal peoples. As will be seen in Chapters 5 and 6, consultation is a method of reducing the conflict of interest situation which government finds itself in when infringing aboriginal rights. In the context of resource management rights, this rationale may require shared decision making.

4.5.3.3.1 The Nature and Scope of Consultation

Government must initiate consultation, rather than wait for aboriginal people to come forward, and thus it is up to government to ensure that an appropriate process is in place.[195] Decision makers owe aboriginal peoples more than procedural fairness as understood in administrative law.[196] That standard requires that a person who is affected by a decision must be informed and given an opportunity to respond before the proposed decision becomes final.[197] Where the decision may affect aboriginal rights, the fiduciary duty imposes more stringent requirements and decision makers must engage in meaningful consultation with aboriginal peoples.[198]

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195 *Sampson, supra* note 131 at 252; and *Jack, supra* note 136 at 222.

196 See *Martineau v. Matsqui Inmate Disciplinary Board*, [1990] 1 S.C.R. 602; and *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643. Where rights under s. 7 of the Charter are affected by an administrative decision, the Courts have indicated that a more stringent duty of fairness is applicable. See *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177; and *Howard v. Stony Mountain Institution* (1985), 19 D.L.R. (4th) 502 (F.C.A.).

197 *Re Webb and Ontario Housing Corporation* (1978), 93 D.L.R. (3d) 187 (Ont. C.A.).

198 See *Halfway, supra* note 44; *Cheslatta Carrier Nation* v. *British Columbia (Environmental Assesment Act, Project Assessment Director)* (1998), 4 Admin. L.R. (3d) 37 (B.C.S.C.); and *Kelley Lake Cree*

The fiduciary duty requires that "consultation must be in good faith, and with the intention of substantially addressing the concerns of the aboriginal peoples whose lands [or other rights] are at issue."[199]The nature of the required consultation remains somewhat unclear and as with most considerations in the s. 35(1) analysis is dependent upon the context.[200]

Government must fully inform potentially affected aboriginal peoples regarding conservation measures and resource use decisions. It must give aboriginal people details regarding the potential effects of an infringing measure on their resource use and on other users.[201] Aboriginal peoples are entitled to be informed regarding the steps taken in arriving at a decision affecting their rights, and the reasons for any measures which interfere with the exercise of aboriginal rights.[202]

Decision makers are required to become as familiar as possible with the resource use of the aboriginal group in question and also of their view of any conservation measures being considered.[203] Aboriginal peoples are entitled to expect government representatives to make fully informed decisions where aboriginal rights may be affected.[204]

The Court held in *Delgamuukw* that in some circumstances, particularly in the context of aboriginal title, governments must obtain the consent of aboriginal rights holders before infringing their rights.[205] The Court did not engage in a discussion of what those

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Nation v. *British Columbia (Minister of Energy and Mines)*, [1998] B.C.J. No. 2471 (QL) (S.C.).

199 *Delgamuukw, supra* note 19 at para. 168.

200 *Sampson, supra* note 131 at 251.

201 *Delgamuukw, supra* note 19 at 423; *Jack, supra* 136 at 222; *Sampson, supra* note 131 at 252.

202 *Sampson, ibid.* at 252; and *Little, supra* note 193 at 279.

203 *Jack, supra* note 136 at 222.

204 *Kitkatla Band* v. *British Columbia (Minister of Small Business, Tourism and Culture)*, [1999] 1 C.N.L.R. 72 at para. 49 (B.C.S.C.).

205 *Supra* note 19 at para. 168.

circumstances are.[206]The consent requirement in the context of title flows from the content of aboriginal title, which includes a right to decide to what uses aboriginal title lands are put. In *Nunavik Inuit*, in the context of aboriginal title, the Federal Court held that government must consult when creating national park reserves, and must negotiate in good faith when creating national parks.[207]While the Court has not considered the question of jurisdictional rights independent of title, it should follow that in at least some circumstances aboriginal consent will be necessary in the context of such rights. I return to this issue in Chapter 6.

The co-management arrangements discussed in Chapter 3 are one form of consultation. Chapter 6 asks whether, in the context of aboriginal jurisdiction or resource management rights, consultation can ever be enough. The recognition of prior occupation by aboriginal peoples with laws regulating land and resource use and reconciliation of that prior occupation with Crown sovereignty may require co-management or some form of shared jurisdiction over land and resource dispositions and use.

In the context of aboriginal harvesting rights, the courts have not generally required governments to obtain the consent of the aboriginal people, though they have noted that consent is "desirable".[208] In *Noel*, the Court held that government must consider seriously alternatives suggested by an affected aboriginal group.[209] This suggests that government should have to justify not implementing those alternatives. The B.C. Court of Appeal has suggested that in some circumstances government may need aboriginal peoples' consent, but it has not elaborated on those circumstances.[210]The Ontario Court of Appeal has found that

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206 The example provided in *Delgamuukw, ibid.*, is the enactment of provincial hunting and fishing regulations.

207 *Nunavik Inuit* v. *Canada (Minister of Heritage)*, [1998] 4 C.N.L.R. 68 (F.C.T.D.) at paras. 121and 122.

208 *Delgamuukw, supra* note 19 at 423; *Jack, supra* note 136 at 223; *Sampson, supra* note 131 at 252.

209 *R.* v. *Noel*, [1995] 4 C.N.L.R. 75 (N.W.T. Terr. Ct.) at 95.

210 *Jack, supra* note 136 at 223.

s. 35(1) does not require negotiation.[211]

While necessary, consultation alone will not suffice to justify an infringement. As noted above, the decision itself must uphold the honour of the Crown and be in keeping with the fiduciary relationship.

4.5.4. Justification of *Prima Facie* Infringements Resulting from Unstructured Legislation

In *Côté* and *Adams* the Supreme Court of Canada held that where legislation contains an unstructured discretion whose exercise risks infringing aboriginal rights, that legislation will itself constitute an infringement. While exercise of the discretion in a manner which accommodates the aboriginal right will not preclude a finding of a *prima facie infringement*, it is unclear whether the exercise of the discretion could justify the infringement.[212]

4.5.5 Justifying Infringements of Rights to Regulate Resource Use

In *Sparrow*, the first Supreme Court of Canada decision to interpret and apply s. 35(1), the aboriginal appellant claimed a right to use the fishery resource in the band's discretion. The appellant argued that the right to fish included the right to regulate the fishery, and that this right limited Parliament's powers to legislate under ss. 91(24) and 91(12) of the *Constitution Act, 1867* where the result would be to interfere with the aboriginal right: "Any continuing governmental power of regulation would have to be exceptional and strictly limited to regulation that is clearly not inconsistent with the protective and remedial purposes of s.

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211 *Ardoch Algonquin First Nation* v. *Ontario* (1997), 148 D.L.R. (4th) 96 (Ont. C.A.), leave to appeal dismissed, [1997] S.C.C.A. No. 429 (QL).

212 It may be that the unstructured and discretionary nature of the power itself must be justified, because that is the source of the infringement.

35(1)."[213] Consequently, counsel argued, an infringement would be justified in the following circumstances:

> "in certain circumstances, necessary and reasonable conservation measures might qualify" (emphasis added) - where for example such measures were necessary to prevent serious impairment of the aboriginal rights of present and future generations, where conservation could only be achieved by restricting the right and not by restricting fishing by other users, and where the aboriginal group concerned was unwilling to implement necessary conservation measures. The onus of proving a justification for restrictive regulations would lie with the government by analogy with s. 1 of the Charter.[214]

In *Nikal* the appellant similarly argued that Wet'suwet'en fishing rights include the right to follow the Band's discretion rather than the rules imposed by government. The Court essentially held in both instances that aboriginal rights were not rights to live without laws.[215] The Court assumed that the federal government has ultimate responsibility for managing natural resources and must choose how the rights of aboriginal peoples are to interact with the rights of others.[216] That responsibility apparently leaves no room within which aboriginal management systems can operate.[217] The Court has thus not recognized aboriginal jurisdiction as a right, and therefore has not explicitly considered how the justification analysis would apply to that type of right.

4.6. Conclusion

This Chapter considered the case law relevant to the question whether Canada's constitution includes space within which aboriginal peoples can determine the use of lands within their

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213 *Sparrow, supra* note 35 at 1102.

214 *Ibid.* (emphasis original)

215 *Nikal, supra* note 44 at para 90.

216 *Ibid.* at para 92.

217 *Sparrow, supra* note 35 at 1110.

territories. I have considered whether s. 35(1) protects that space as an aboriginal right independent of aboriginal title.

The case law suggests that aboriginal laws and legal institutions survived the Crown's assertion of sovereignty until actually altered by positive acts. The case law is unsettled with respect to the effect of the division of powers in ss. 91 and 92 of the *Constitution Act, 1867* on aboriginal jurisdiction. Self-government or internal regulation is protected by s. 35(1) so long as such powers are precisely identified. The case law is unclear with respect to whether territorially-based aboriginal jurisdiction was extinguished by the entry of the federal and provincial governments into confederation and the exhaustive division of powers between their legislatures. Some of the literature discussed in the next Chapter suggests that the *Constitution Act, 1867,* does not contain the requisite clear and plain legislative intent to extinguish aboriginal law making powers.

The extent to which s. 35(1) empowers aboriginal peoples to protect their lands and resources, and their cultures, from outside intrusions such as industrial resource developments, remains unclear. Some of the literature discussed in the following Chapter provides persuasive arguments that aboriginal jurisdiction can extend beyond internal regulation of the exercise of rights, and can include protection of the lands and resources upon which aboriginal cultures depend for survival. The literature also offers some insight into the division of powers and justification analyses that may assist in determining what kind of protection s. 35(1) accords to existing aboriginal law making powers.

5. Literature Review: Aboriginal Rights and Jurisdiction

This Chapter parallels Chapter 4 for the most part, and surveys the literature on aboriginal rights, self-government and Canada's constitutional framework. The Chapter begins with a discussion of whether any pre-existing aboriginal jurisdiction was extinguished either by the Crown's assertion of sovereignty or the entry of the provinces and Canada into the federation. The literature surveyed generally concludes that aboriginal laws continued after the Crown's assertion of sovereignty until altered or extinguished by positive acts, and that confederation, or the exclusive distribution of powers between the federal and provincial governments, did not extinguish aboriginal laws and legal systems. Those laws and legal systems may therefore now be protected by s. 35(1).

The Chapter then discusses the current approach to establishing rights under s. 35(1). The literature reveals that the court has taken a narrow approach to aboriginal rights that focusses on objective inquiries into pre-contact activities, rather than on contemporary aboriginal cultures and the prerequisites for their survival. Several commentators argue that s. 35(1) protects aboriginal government and in particular rights to regulate land and resource use, but the literature does not discuss whether the *Van der Peet* analysis allows for such rights to be established, particularly where they extend beyond internal regulation and to activities not engaged in prior to contact.

Once a right has been established, the next step is the *prima facie* infringement test. This Chapter does not discuss this stage in the s. 35(1) analysis because the literature does not focus on the infringement test. The next section considers the division of powers, because if a province cannot interfere with the exercise of an aboriginal right as a result of the division of powers, the province cannot justify the infringement. The literature offers compelling arguments that the lands reserved head of power is off limits to the provinces completely. Aboriginal rights to regulate land and resource use, being rights in relation to

land, may therefore be paramount over conflicting provincial laws.

In the event of a conflict between aboriginal and federal jurisdiction, the literature suggests that the justification analysis might apply. The first step in the justification analysis requires government to establish a compelling and substantial legislative objective. Commentators note that this stage in the analysis has become insignificant because of the wide range of objectives that, at least in principle and under certain circumstances, apply. Literature on division of powers offers suggestions for alternative views of what constitutes a valid exercise of power. In chapter 6 I revisit the issue of government power and argue that responsibility and sustainability can be implied in government power with the effect that a government may exceed its authority where it acts contrary to the responsibility associated with the power.

The last stage in the s. 35(1) analysis scrutinizes government's means of achieving its objective. Discussion of the fiduciary duty, minimal impairment and the consultation requirement may be particularly helpful in the context of aboriginal rights to manage the use of lands and resources.

Assuming that aboriginal peoples can establish rights to govern land and resource use, the next step in the judicial analysis asks whether those rights have been extinguished. As was noted in Chapter 4, there remains some uncertainty in the existing case law with respect to two questions. The first is whether the Crown's assertion of sovereignty extinguished any existing aboriginal jurisdiction over land and resource use? The second is whether the enactment of the *Constitution Act, 1867*, and in particular the division of property and legislative authority included in that Act, extinguished aboriginal jurisdiction. The following section discusses whether aboriginal laws and resource management systems could have survived the Crown's assertion of sovereignty. As in Chapter 4, I discuss these issues of extinguishment at the outset because if either of these two events extinguished aboriginal jurisdiction, there is no need to consider the s. 35(1) analysis.

5.1 Did the Crown's Assertion of Sovereignty Extinguish and Pre-Existing Aboriginal Jurisdiction?

Patrick Macklem describes the manner in which the Crown asserted sovereignty over Canada as follows:

> During [the period of initial colonial contact], it was accepted practice among European nations that the first among them to discover vacant land acquired sovereignty over that land, to the exclusion of other future claimants. ... The law deemed North America to be vacant, and territorial sovereignty was acquired by European powers through the mere acts of discovery and settlement.[1]

Aboriginal peoples are not future claimants, because they occupied the territories in question before the Crown did. Henderson describes the principle of discovery as a contractual principle.[2] Discovery gave jurisdiction relative to other European nations to trade with indigenous peoples and to seek a voluntary disposition of their lands by 'fair and honest' purchase.[3] Great Britain instructed the colonial governors in Canada to respect indigenous peoples' rights to remain in possession of their lands, and to acquire indigenous peoples' lands by treaty or purchase.[4] Governments could not grant lands claimed by indigenous peoples until they purchased those lands, and they were instructed to remove trespassers from aboriginal lands.[5] Henderson argues that while the prohibition against granting

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1 P. Macklem, "What's Law Got to Do With It? The Protection of Aboriginal Title in Canada" (1997) 35 Osgoode Hall L.J. 125 at 132-3.

2 J.Y. Henderson, "The Doctrine of Aboriginal Rights in Western Legal Tradition" in M. Boldt, J.A. Long & L. Little Bear, eds., *The Quest for Justice: Aboriginal Peoples and Aboriginal Rights* (Toronto: University of Toronto Press,) 185 at 192-193.

3 Henderson, *ibid.* at 188-190 and 192-193. He concludes that discovery gives a "perfectable entitlement" or "pre-emptive right". See also Macklem, *supra* note 1 at 133.

4 Henderson, *ibid.* at 193. Henderson notes, *ibid.* at 187-188, that the original rules governing relations between Europeans and aboriginal peoples in North America were found in the terms of papal grants. Fancis de Vitoria, in an opinion requested by Spain, stated that aboriginal peoples had ownership rights to the lands of the New World under their own laws and customs, and that discovery and papal grants could not convey ownership to the crown.

5 Henderson, *ibid.* at 198. These rules were included in the *Royal Proclamation of 1763* R.S.C. 1985,

indigenous peoples' lands was frequently ignored by colonial governments, those prohibitions legally "remained equivalent to constitutional limitations on the power of colonial governments."[6] He argues that grants to immigrants were speculative, and "could not justify confiscation of treaty or aboriginal rights..."[7]

Macklem suggests that the fiction of the Crown's underlying title allowed the Crown to dispose of aboriginal peoples' lands and resources:

> Based on the legal fiction that the Crown was the original occupant of all the lands of the realm, Canadian property law holds that the Crown enjoys underlying title to all of Canada. Property owners possess and own their land as a result of grants from the Crown. Ownership confers a right to use and enjoy the land in question and a right to exclude others from entering onto one's land.
>
> ...
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> While, in England, underlying Crown title was accompanied by legal recognition of initially fictional grants to actual occupants, thereby having the effect of legitimating the existing pattern of landholdings, only one half of this equation was imported to Canada, thereby severely disrupting the existing pattern of landholdings in Canada. The Crown was imagined as the original occupant of all of Canada, but actual occupants were not recognized as owning their land through fictional Crown grants. Because the law posited the Crown as the original occupant and did not imagine the Crown to have granted title to Aboriginal occupants, the Crown was free to grant third-party interests to whomever it pleased, which it did: to settlers, mining companies, forestry companies, and the like.[8]

While the doctrine of aboriginal title provides that aboriginal peoples have a right to remain in possession of their lands, aboriginal title is inalienable except to the Crown. Prior to 1982, the Crown in its legislative capacity, or Parliament, could unilaterally extinguish aboriginal title and thereby perfect its own underlying title.[9]

App. II, No. 1.

6 Henderson, *ibid.* at 198.

7 Henderson, *ibid.* at 208.

8 Macklem, *supra* note 1 at 133.

9 Macklem, *ibid.* at 133-135. Since 1982, the Crown may no longer extinguish aboriginal title by passing legislation. It is unclear in the case law whether extinguishment, as opposed to infringement,

Under the British common law, when the Crown asserted sovereignty over a colony the existing laws of indigenous inhabitants remained in force until actually altered by the sovereign or Parliament.[10] The Royal Commission on Aboriginal Peoples observed that the French and British historically acknowledged that aboriginal peoples were "autonomous political units capable of holding treaty relations with the Crown",[11] and having power to choose whether to grant their lands and rights.[12]

The Commissioners conclude that the relationship between aboriginal peoples and the Crown was "confederal".[13] The law of aboriginal rights incorporates "the presumptive terms under which Aboriginal nations entered into confederal relationships with the Crown - terms that, in a modified form, continue to govern their links with the Canadian Crown today."[14] In the Commissioners' view, the law of aboriginal rights allows aboriginal and non-aboriginal legal systems "to operate harmoniously, each within its proper sphere."[15] The common law doctrine of aboriginal rights therefore includes self-government rights.[16]

The distribution of powers in ss. 91-95 of the *Constitution Act, 1867*, however, is generally viewed as exhaustive, meaning that "the totality of legislative power is distributed between

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can be justified by the federal government. As Macklem notes, in practice, it is assumed that there is no aboriginal title until it is proven. For example, business essentially proceeds as usual in British Columbia, because *Delgamuukw* did not hold that any particular group in British Columbia has existing aboriginal title. The Court sent the Gitksan and Wet'suwet'en back to trial to prove their aboriginal title.

10 Henderson, *supra* note 2 at 191, 193. See also K. McNeil, *Common Law Aboriginal Title* (Oxoford: Clarendon Press, 1989) at 113-114.

11 Royal Commission on Aboriginal Peoples, *Partners in Confederation: Aboriginal Peoples, Self-Government, and the Constitution* (Ottawa: Royal Commission on Aboriginal Peoples, 1993) at 13.

12 *Ibid.* at 11-13 and 16. The *Royal Proclamation of 1763*, for example, acknowledged that indigenous peoples were autonomous nations with "political authority over their territories."

13 *Ibid.* at 17.

14 *Ibid.* at 19.

15 *Ibid.* at 20.

16 *Ibid.* at 21, citing *R.* v. *Sioui*, [1990] 1 S.C.R. 1025, *St. Catherine's Milling Co.* v. *R.* (1888), 14 A.C.

the federal Parliament and the provincial legislatures."[17] The implication that flows from the exhaustive nature of the distribution of powers is that there is no room remaining for non-delegated aboriginal government. Further, s. 91(24) gives the federal Parliament authority to legislate with respect to "Indians, and Lands reserved for the Indians." Does this mean that aboriginal jurisdiction was extinguished at Confederation?

5.2 Did the Distribution of Legislative Powers between the Federal and Provincial Governments Extinguish Aboriginal Jurisdiction?

While the *Constitution Act, 1867*, may have been a comprehensive distribution of powers between the federal and provincial governments, it did not necessarily extinguish aboriginal governmental powers by failing to explicitly acknowledge their existence.[18] Aboriginal peoples did not consent to the distribution of powers in the 1867,[19] and, as Professors Hogg and Turpel note, "the doctrine of exhaustiveness was developed without regard for the Aboriginal reality in Canada..."[20] Section 129 of the 1867 Act also supports the continuity of aboriginal powers.[21] Ryder concludes that the *Constitution Act, 1867* does not embody a clear and plain intent to extinguish aboriginal laws. He argues that the federal structure is consistent with the continuity of aboriginal laws and powers:

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46 (P.C.) and *Worcester* v. *State of Georgia* (1832), 6 Peters 515 (U.S.S.C.) in support.

17 B. Ryder, "The Demise and Rise of the Classical Paradigm in Canadian Federalism: Promoting Autonomy for the Provinces and First Nations" (1991) 36 McGill L.J. 308 at 310.

18 Royal Commission on Aboriginal Peoples, *supra* note 11 at 33.

19 Ryder, *supra* note 17 at 316. See also P.W Hogg & M.E. Turpel, "Implementing Aboriginal Self-Government: Constitutional and Jurisdictional Issues" (1995) 74 Can. Bar Rev. 186 at 192, where they note that "the doctrine developed in the context of federal-provincial jurisdictional disputes in which Aboriginal peoples played no role." See also Royal Commission on Aboriginal Peoples, *ibid.* at 32, where they distinguish between the scope of federal and provincial powers and their exhaustiveness.

20 Hogg & Turpel, *ibid.* at 192.

21 Royal Commission on Aboriginal Peoples, *ibid.* at 34. Section 129 provides: "Except as otherwise provided for by this Act, all Laws in force in Canada, Nova Scotia, or New Brunswick at the Union ... and all legal Commissions, Powers, and Authorities, ... shall continue ... subject nevertheless ... to be repealed, abolished, or altered by the Parliament of Canada, or by the Legislature of the respective Province, according to the Authority of the Parliament or that Legislature under this Act."

> Prior to the enactment of the *Constitution Act, 1982*, the First Nations did not consent to nor did they participate in any alteration of their special, horizontal relationship to the Crown. Moreover, the *Constitution Act, 1867* adopted the federal principle as the best means of preserving and respecting cultural differences in the newly formed Canadian state. By guaranteeing political spaces to the founding cultural groups in which they could define their own policies and preserve their institutions, the constitution sought to respect the right to cultural difference. These elements of Canadian constitutional history provide the foundations for an autonomist interpretation of the meaning of federal jurisdiction over "Indians and lands reserved for Indians." Respecting the distinct constitutional and cultural status of First Nations people requires that they be accorded political autonomy in the definition of their collective and individual destinies.[22]

The Royal Commission on Aboriginal Peoples has suggested that the "compact theory", which governed the entry of the provinces and the Imperial Parliament into Confederation, should apply to aboriginal peoples' entry into the confederation.[23] The Commissioners conclude that like the provinces, aboriginal peoples kept whatever powers they did not cede to the federal government, and "they retained their ancient constitutions so far as these were not inconsistent with the new relationship."[24] The *Constitution Act, 1867*, while it embodies

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22 Ryder, *supra* note 17 at 362-3. See also Inuit Tapirisat of Canada, "Inuit in Canada: Striving for Equality", constitutional position paper presented to the Rt. Hon. Joe Clark, 6 February 1992, as cited in W. Moss, "Inuit Perspectives on Treaty Rights and Governance Issues" in Royal Commission on Aboriginal Peoples, *Aboriginal Self-Government: Legal and Constitutional Issues (Papers Prepared as part of the Research Program of the Royal Commission on Aboriginal Peoples)* (Ottawa: Supply and Services, 1995) 55 at 80:

> > Other distinct regions of the country have negotiated entry into Confederation and have been allowed the exercise of exclusive legislative powers over matters of local concern. Aboriginal peoples have not been permitted this same opportunity to conclude terms of union with Canada and have them reflected in the Constitution. ... In past rounds of constitutional discussions, the debate has focussed on whether aboriginal peoples should accept delegated powers from the federal or provincial governments. Aboriginal peoples continue to insist we have never given up our self-governing rights and therefore, they cannot be delegated to us by others.
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> In the absence of an agreement on the terms of union between aboriginal societies and Canada, aboriginal jurisdiction can continue under the existing constitutional framework.

23 Royal Commission on Aboriginal Peoples, *supra* note 11 at 22.

24 *Ibid.* at 23.

the terms governing the joining of the provinces and Parliament, is not the only source of the terms of the Canadian Confederation:

> The process of building Confederation is not restricted to the historic pact struck in the 1860s between the French- and English- speaking representatives of Lower Canada, Upper Canada, Nova Scotia and New Brunswick, which gave rise to the *Constitution Act, 1867* and the modern state of Canada. It incorporates the treaties and other processes whereby the Indigenous peoples of America became affiliated with the Crown and eventually entered the Confederation of Canada.[25]

Today, s. 35 forms part of the terms of the Canadian federation. The provision "serves to confirm and entrench the status of Aboriginal peoples as original partners in Confederation."[26] Section 91(24) gives the federal Parliament exclusive jurisdiction over "Indians and Lands reserved for the Indians", as between the federal Parliament and the provincial legislatures. The provision does not speak to the division between federal and aboriginal jurisdiction.[27] Sections 91(24) and 35(1) may provide for concurrent jurisdiction.

Ryder argues that while the Parliament may have had the capacity to extinguish aboriginal government rights, it did not in fact extinguish them.[28] While prior to 1982, the federal government did not recognize aboriginal governments or allow them to operate, Ryder argues that "that is a far cry from saying that Aboriginal governmental traditions and practices ceased to exist and thus are not constitutionally protected after 1982 by section 35."[29] This view holds that s. 35(1) embodies the principle of continuity and recognizes and affirms aboriginal laws and governmental institutions:

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25 *Ibid.* at 22.

26 *Ibid.* at 29. The Royal Commission, *ibid.* at 33-36, notes that legislation enacted both before and after the *Constitution Act, 1867* suggests that aboriginal political systems survived.

27 The Commissioners note, *ibid. at* 33, that the powers enumerated in sections 91 and 92 were concurrent with powers exercised by the Imperial Parliament, and that in principle, imperial statutes prevailed over federal or provincial statutes in the event of conflict.

28 B. Ryder, "Aboriginal Rights and *Delgamuukw* v. *The Queen*" (1994) 5 Constit. Forum 43 at 44 (references omitted) at 46.

29 Ryder, *ibid.* at 46.

> Sec. 35(1) adopts and confirms the common law doctrine of aboriginal rights. This doctrine holds that the Crown's acquisition of North American territories was governed by a principle of continuity, whereby the property rights, customary laws, and governmental institutions of the native peoples were presumed to survive, so far as this result was compatible with the Crown's ultimate title ...[30]

An approach to s. 35 that focuses on the nation-to-nation or confederal relationship, is consistent with the remedial purpose of s. 35(1). The Supreme Court of Canada has recognized this remedial purpose of s. 35(1).[31]Macklem suggests that s. 35(1) rejects those aspects of the common law which, prior to 1982, "accepted the legitimacy of assertions of Crown sovereignty, thereby excluding or at least containing Canadian legal expression of Aboriginal sovereignty."[32]

Walters argues for an interpretation of s. 35(1) that gives effect to the doctrine of continuity and recognizes a confederal relationship between aboriginal peoples and Canada. He argues

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30 B. Slattery, "The Hidden Constitution: Aboriginal Rights in Canada" (1984) 32 Am. J. Comp. L. 361 [hereinafter "The Hidden Constitution"] at 366. See also B. Slattery, "Understanding Aboriginal Rights" (1987) 66 Can. Bar Rev. 727 [hereinafter "Understanding"] at 738; B. Slattery, "The Organic Constitution: Aboriginal Peoples and the Evolution of Canada" (1996), 34 Osgoode Hall L.J. 101 [hereinafter "Organic Constitution"] at 110, where he writes: "Generally speaking, Aboriginal peoples emerged from their dealings with the Crown as partially autonomous entities living under the Crown's protection, with the right to govern their internal affairs." In another article, he argues as follows:

> [T]he Aboriginal right of self-government under section 35...originates from within Aboriginal communities as a residue of the powers they originally held as independent nations prior to European settlement. It does not stem from Constitutional grant; that is, it is not a *derivative* or *created* right. Nevertheless, the right of self-government is recognized within the Canadian legal system, both under the common law of Canada and section 35 of the Constitution. So, while the right is inherent in point of origin, as a matter of current status it is a right held under Canadian law and enforceable in the ordinary courts (emphasis original).

B. Slattery, "First Nations and the Constitution: A Question of Trust", (1991) 71 Can. Bar Rev. 261[hereinafter "Question of Trust"] at 281.

31 See *R.* v. *Sparrow*, [1990] 1 S.C.R. 1075; *R.* v. *Côté*, [1996] 3 S.C.R. 139; *R.* v. *Adams*, [1996] 3 S.C.R. 101. Patrick Macklem argues that: "The law must acknowledge that colonization is an issue of distributive justice, and that its distributions of legislative and proprietary power, premised as they are on Aboriginal exclusion, are unjust." Macklem, *supra* note 1 at 134.

32 Macklem, *ibid.* at 134.

for an interpretation of s. 35(1) that incorporates what he calls a "complex settlement" rule.[33] Under this rule the courts would recognize that the assertion of sovereignty over Canada by Britain was based on the fiction of *terra nullius*.[34] Aboriginal societies were not primitive, uncivilized, and without a legal system and polity. Walters suggests that s. 35(1) allows the courts to reconsider these assumptions which have suppressed aboriginal legal systems.[35] He argues that s. 35(1) incorporates legal pluralism, and that aboriginal rights incorporate Canadian and aboriginal legal systems and perspectives.[36]

There are thus compelling arguments in the literature to support a conclusion that aboriginal jurisdiction over land and resource use continued after the acquisition of sovereignty and was not extinguished by the division of powers and property between the federal and provincial governments.[37] To the extent that such aboriginal jurisdiction was not lawfully extinguished

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33 M. Walters, "British Imperial Constitutional Law and Aboriginal Rights: A Comment on *Delgamuukw v. British Columbia*" (1992) 17 Queen's L.J. 350 at 376 and 403.

34 Walters, *ibid.* at 374, argues that "It should be open to courts to recognize the existence of an indigenous legal system which, though intelligible to the British, cannot be made suitable to the British..."

35 Walters, *ibid.* at 374.

36 Walters, *ibid.* at 413. Ironically, the Court in *Van der Peet* adopted this quote from the last paragraph of the article, and took it out of the context in which it was presented, in order to limit the scope of the rights claimed.

The Royal Commission on Aboriginal Peoples, *supra* note 11at 8, argues that governmental authority in Canada does not flow only from the Crown to Parliament and the provincial legislatures. Rather, "the laws of Canada spring from a great variety of sources, both written and unwritten, statutory and customary." Professor Ryder argues that "the principle of parliamentary sovereignty has never been absolute in the Canadian constitution, and it is less so since 1982." Ryder, *supra* note 17 at note 4, p. 311. Ryder comments, *supra* note 28 at 44, that "The legal basis for untrammelled British, and later Canadian, sovereign authority over Aboriginal nations has never been adequately explained." See also M. Asch & P. Macklem, "Aboriginal Rights and Canadian Sovereignty: An Essay on *R. v. Sparrow*" (1991) 29 Alta. L. Rev. 498at 507; Macklem, *supra* note 1 at 134; M. Asch, "Aboriginal Self-Government and the Construction of Canadian Constitutional Identity" (1992) 30 Alta. L.Rev. 465 at 489; "Organic Constitution", *supra* note 30 at 109, argues that "Canada represents, at some level, a *merging* of the sovereignties..."; K. McNeil, "Envisaging Constitutional Space for Aboriginal Governments" (1993) 19 Queen's L.J. 95 at 119, 132; the Royal Commission on Aboriginal Peoples, *supra* note 11 at 32, argued that the doctrine of exhaustiveness may go to the scope of jurisdiction and not its exclusiveness; Hogg & Turpel, *supra* note 19 at 192.

37 H. Foster, "Aboriginal Title and the Provincial Obligation to Respect It: Is *Delgamuukw* v. *British Columbia* 'Invented Law'?" (1998) 56 Advocate 221 at 226, argues that protection in s. 35(1) of aboriginal rights should mean they cannot now be extinguished, because that would not met the minimal impairment requirement. He cites in support Justice Lambert in *Delgamuukw* v. *British*

prior to 1982, it is now protected by s. 35(1). I will consider the literature arguing for aboriginal jurisdiction under s. 35(1) after considering some of the more general literature under s. 35(1).

5.3 Section 35(1): Principles and Legal Tests

The Court has considered s. 35(1) mostly in the context of quasi-criminal offences, and has formulated the s. 35(1) analysis while determining whether aboriginal defendants are bound by laws that regulate activities undertaken pursuant to aboriginal rights. Catherine Bell suggests that this focus on individual prosecutions has obscured the real issues and conflicts involved, and precluded consideration of some of the more profound issues and implications of s. 35(1).[38]

After the *Sparrow* decision, Ian Binnie, now a justice of the Supreme Court of Canada, suggested that the s. 35(1) analysis developed in the context of the direct regulation of aboriginal rights may be difficult to apply to indirect interferences:

> While the test is proposed as a general test, it appears to be premised on government efforts at *direct* regulation. The more usual conflict between governments and Aboriginal peoples arises in the context of *indirect* interference ... where government purports to authorize economic development that may (indirectly) affect the exercise of Aboriginal or treaty rights. ... A similar conflict could arise in the context of Aboriginal rights, and it is not easy to see how the *Sparrow* test applies to resolve such a conflict.[39]

Columbia (1993), 104 D.L.R. (4th) 470 (B.C.C.A.) at paras. 846-847. Foster also notes however, at 226, that Justice La Forest's judgment in *Deglamuukw*, and the judgment in *Sparrow*, *supra* note 31 at 1119, refer to the expropriation of aboriginal title and rights for fair compensation.

38 C. Bell, "New Directions in the Law of Aboriginal Rights" (1998) 77 Can. Bar Rev 36. For the most part, the cases which have had an effect on the lives of aboriginal people have held that they are not bound by legislation and regulations that restrict their ability to exercise aboriginal rights to harvest natural resources.

39 W.I.C. Binnie, "The Sparrow Doctrine: Beginning of the End or End of the Beginning?" (1990) 15 Queen's L. J. 217 at 232. The court's constant adjusting of the tests to address different kinds of rights and circumstances arguably indicates that there are problems with the approach itself.

The tests developed in *Sparrow* and *Van der Peet* may not be up to the task of addressing questions concerning land and resource use conflicts, and in particular the question whether s. 35(1) requires Canadian and aboriginal governments to share jurisdiction over land and resource use.

Noel Lyon predicted that the principles of s. 35(1) might be subordinated as the courts replace the constitutional provision with tests. Lyon cautioned against allowing precedent to replace s. 35(1), and argued that judicial consideration of s. 35(1) should always begin with the provision itself and first principles, not the case law.[40] Henderson also suggested that a judicial focus on legal analyses might divert judicial attention away from principles of s. 35(1):

> The law has had great difficulty dealing with the doctrine of aboriginal rights. Whereas lawyers and the courts tend to view aboriginal rights as a question of law, native people view the issue as one of justice, having to do with what is right, fair, reasonable, or equitable. Canadian judges do not like to make the broad statements about justice that are necessary to deal fairly and equitably with aboriginal rights. The law is an imperfect device for dealing with questions of justice. ... The law is primarily concerned with problem-solving.[41]

The courts may deny just claims when they attempt to apply judicially crafted tests that are not designed to answer the questions before them. Commentators such as Lyon and Henderson thus argue for a principled approach to s. 35(1), either as an alternative to the "test" approach, or as a context in which the tests must be applied and developed.

Henderson indicated in the above quote that justice is the foundation of aboriginal rights. Several authors argue that the related principles of self-determination and cultural survival

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40 N. Lyon, "An Essay on Constitutional Interpretation" (1988), 26 Osgoode Hall L.J. 95 [hereinafter "An Essay"] at 121-124. See also N. Lyon, "The Charter as a Mandate for New Ways of Thinking About Law" (1983), Queen's L.J. 241 [hereinafter "The Charter"] at 244, 259-261.

41 W. B. Henderson, "Canadian Legal and Judicial Philosophies on the Doctrine of Aboriginal Rights" in Boldt *et al.*, eds., *supra* note 2 , 221 at 222.

are at the heart of aboriginal rights and their protection under s. 35(1).

5.4 Self-Determination and Contemporary Cultural Survival

Lyon has argued that self-determination is the most fundamental of aboriginal rights.[42] Darlene Johnston argues that the principle of self-determination is inherent in the communal nature of aboriginal rights, because self-preservation is the most fundamental group right.[43] Pentney suggests that self-determination, including the ability of aboriginal peoples to ensure continuance of their cultures, is at the core of s. 35(1).[44] Arguments that aboriginal rights empower aboriginal peoples to determine their own future are based on the notion that purpose of aboriginal rights is cultural survival.[45]

The Court, in adopting the "integral to a distinctive culture" test embraces the view that s. 35(1) is aimed at ensuring the survival of aboriginal cultures.[46] However, Borrows and Rotman argue that the current judicial approach to s. 35(1) fails to support *contemporary* cultural survival:

> Aboriginal rights have two primary components, a theoretical and a material element. The theoretical element is a constant, and concerns the underlying purpose for the right in question - namely the contemporary cultural and physical survival of Aboriginal societies. Meanwhile, the material element of the right involves its practice, which is fact and site-specific. Therefore,

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42 "An Essay", *supra* note 40 at 102.

43 Self-determination is defined as "the right of groups to maintain themselves and to pursue their distinctive courses." R.R. Garet, "Communality and Existence: The Rights of Groups" (1983), 56 Southern California L. Rev. 1001 at 1002, as cited in D.M. Johnston, "Native Rights as Collective Rights: A Question of Group Self-Preservation" (1989) 2 Can. J. Law & Jur. 19 at 25.

44 W. Pentney, "The Rights of the Aboriginal Peoples of Canada in the Constitution Act, 1982 Part II - Section 35: The Substantive Guarantee" (1988) 22 U.B.C.L. Rev. 207 at 258-9.

45 See R. Kuptana, "Speaking Notes for the North American Indigenous Nations UN Satellite Meeting", 1 April 1993, as quoted in Moss, *supra* note 22 at 70: "It is not our race in the sense of our physical appearance that binds Inuit together, but rather it is our culture, our language, our homelands, our society, our laws and our values that make us a people. Our humanity has a collective expression."

46 As was noted in Chapter 4, this is not the test for aboriginal title or treaty rights, but this thesis does not consider those rights.

> under the *sui generis* formulation, rights which are integral to the distinctive cultures of Aboriginal societies are, simultaneously, universal *and* site-specific.[47]

The concepts of contemporary cultural and physical survival referred to in the above quote mirror the principles of cultural and ecological sustainability. Instead of inquiring into whether what is being claimed as a right contributes to contemporary cultural survival, however, the Supreme Court of Canada focuses its inquiry from the outset on fact and site-specific activities.[48] This preoccupation with the material element and tests aimed at scrutinizing individual activities to determine if they qualify as aboriginal rights, narrows and decontextualizes the inquiry and fails to give effect to what Borrows and Rotman identify as the universal element of aboriginal rights.

The next section surveys the literature which considers the first step in the s. 35(1) analysis - establishing an aboriginal right, and in particular some of the critiques of the Court's approach to s. 35(1). Section 5.6 will focuses on the body of literature that suggests that s. 35(1) protects aboriginal jurisdiction or government as aboriginal rights.

5.5 Critiques of the "Integral to a Distinctive Culture" Test

The most common criticisms of the s. 35(1) case law focus on the manner in which aboriginal rights and their scope are identified. For the most part, criticisms of the Court's approach to questions concerning the nature and scope of aboriginal rights may be traced back to the inadequate attention paid to the principles referred to above. What emerges from the literature is that the Court's focus on developing tests and narrowing the inquiry to fact and site specific questions, has prevented a principled approach to s. 35(1) and precluded the provision from being implemented and applied in a manner that will enable aboriginal

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[47] J.J. Borrows & L.I. Rotman, "The *Sui Generis* Nature of Aboriginal Rights: Does It Make a Difference?" (1997) 36 Alta. L. Rev. 9 at 39.

[48] *Ibid.* at 39 and 41.

cultures to flourish. Some of the literature criticizes the very notion of non-aboriginal judges defining the rights of aboriginal peoples within a Canadian legal framework. Lyon argued as follows in a pre-*Sparrow* article:

> The idea of non-native judges proceeding to "interpret" section 35 armed with books of precedent and anthropology, is once again repugnant to the fundamental right of self-determination. The courts are not equipped to do the job, and it would be unfair to them and grossly unfair to the aboriginal peoples to lay the task at their door.[49]

Similarly, Andrea Bowker asks the following question: "if we are to view Aboriginal rights from the perspective of the Aboriginal rightholders, how is it legally valid to take away the ability of self-definition from the Aboriginal people involved?"[50] Given that questions of aboriginal rights and s. 35(1) are likely going to continue at least for the near future, to be considered by Canadian courts composed primarily of non-aboriginal judges, one method of incorporating aboriginal perspectives into the identification and characterization of aboriginal rights is to inquire into the laws of aboriginal societies.

5.5.1 Aboriginal Perspectives and Laws

The Court has held that aboriginal law is intersocietal; it is a *sui generis* body of law that incorporates and bridges the gulf between aboriginal and common law perspectives.[51] The laws of aboriginal peoples are integral to the exercise of aboriginal rights, and give meaning to aboriginal peoples' practices and traditions.[52] Several scholars have argued that to give aboriginal and common law perspectives equal weight in the application of s. 35(1), the

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49 "An Essay", *supra* note 40 at 103; see also A. Bowker, "*Sparrow*'s Promise: Aboriginal Rights in the B.C. Court of Appeal" (1995), 53 U.T. Fac. L. Rev. 1 at at 27.

50 Bowker, *ibid.* at 19.

51 "Understanding", *supra* note 30 at 732, 744-45; and J. Borrows, "With or Without You: First Nations Law (in Canada)" (1996), 41 McGill L.J. 629 [hereinafter "With or Without You"] at 642.

52 "With or Without You", *ibid.* at 642 and 645. Borrows points out that acceptance of aboriginal laws might also solve the Court's dilemma in giving effect to rights which appear to have no internal limits. He argues that aboriginal rights should properly be seen as being limited by aboriginal laws and traditions.

courts should give effect to aboriginal laws, or look to them for guidance, when defining aboriginal rights.[53]

In Chapter 4 I noted that according to the Court, s. 35(1) recognizes the prior occupation of Canada by organized aboriginal societies. Professor Borrows argues that this recognition implies a recognition that aboriginal peoples' laws and legal systems existed prior to the imposition of colonial and Canadian laws.[54] Professor Borrows argues that the laws of aboriginal peoples are the foundation for aboriginal rights.[55]

The courts have not yet given much consideration to the laws of aboriginal peoples.[56] The Court's focus is on activities.[57] Barsh and Henderson note that failure to give explicit attention to the laws of aboriginal peoples has led the Court to assume "authority to determine from extrinsic evidence - and centuries after the fact - what made each Aboriginal society what it was."[58] The first step in the Court's approach to s. 35(1) is to reformulate the right claimed by aboriginal parties to litigation.

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53 J. Borrows, "The Trickster: Integral to a Distinctive Culture" (1997) 8 Constitutional Forum 27 [hereinafter "Trickster"] at 31; "With or Without You", *supra* note 51 at 632. Walters, *supra* note 33 at 352. See also R.L. Barsh & J.Y. Henderson, "The Supreme Court's *Van der Peet Trilogy*: Naive Imperialism and Ropes of Sand" (1997) 42 McGill L.J. 993 at 1007.

54 "With or Without You" *ibid.* at 640 and at 646, where he argues that if Courts were to use First Nations laws to give meaning to aboriginal rights they could develop a more principled approach while at the same time deciding facts on a case by case basis; see also J. Borrows, "Fish and Chips: Aboriginal Commercial Fishing and Gambling Rights in the Supreme Court of Canada" (1996) 50 C.R. (4th) 230 [hereinafter "Fish and Chips"] at 238.

55 "With or Without You", *supra* note 51.

56 "Trickster", *supra* note 53 at 31 - 32. Professor Borrows notes, at 31, that "While the Court asserted that Aboriginal rights are based on 'traditional laws and customs ... passed down and arising from the pre-existing culture and customs of aboriginal peoples' nowhere in these cases does the Chief Justice use the laws of the people charged, or the laws of any other Aboriginal people, to arrive at the standards through which he will define these rights."

57 "Fish and Chips", *supra* note 54 at 238. The case by case approach could still apply to determine the contents of the laws.

58 Barsh & Henderson, *supra* note 53 at 1008.

5.5.2 Framing the Issues and Identifying the Nature of the Right Claimed

At the first step in the *Van der Peet* analysis the Court precisely identifies the aboriginal rights. In practice this has been a narrowing exercise which contradicts the Court's own direction that aboriginal perspectives must be taken into account. According to Rotman, the Court has failed to acknowledge the distinction between rights and their exercise:

> There is a significant distinction between an Aboriginal or treaty right and a practice that is derived from those rights. In *Pamajewon*, the power of economic self-determination claimed by the bands, which they translated, in part, into their ability to regulate high-stakes gambling, flowed directly from their claimed right of self-government. By considering the regulation of high-stakes gambling as a distinct right, however, the Supreme Court was able to dismiss the appellants' claim by finding that such regulation was not an integral part of the distinctive cultures of either the Shawanaga or Eagle Lake First Nations prior to contact with Europeans.[59]

The Court developed the s. 35(1) analysis in the context of government attempts to enforce regulations upon aboriginal peoples. The result has been that the right claimed is equated with the specific activity that triggered the arrest.[60] While consistent with a common law perspective in that it sets out a test to apply to fact-specific situations, this approach removes rights from their cultural contexts and makes little sense from aboriginal perspectives.[61]

This decontextualized approach has led the Court to separate what it determines to be

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[59] L. I. Rotman, "Creating a Still-Life Out of Dynamic Objects: Rights Reductionism at the Supreme Court of Canada" (1997) 36 Alta. L. Rev. 1 at 2. Rotman also argues, *ibid.* at 3, that instead of asking whether the defendant in *Van der Peet* had an aboriginal right "to sell fish for fifty dollars", the Court could have inquired into whether there was a broader right to fish of which selling fish was a part.

[60] Bowker, *supra* note 49 at 27, argues that while separating practices "from the culture in which they are rooted, may enable a court to more easily translate the interests s. 35(1) protects into rights-talk, ... it does not do justice to the purposes of s. 35(1)." She concludes that while it has held that government policy and regulation does not determine the content of aboriginal rights, the Court interprets rights according to the manner in which resources are regulated by non-aboriginal governments.

[61] While government regulation treats fishing for food separately from fishing for sale, Bowker asks: "is there any justification, flowing from *Musqueam* culture and society, for conceiving of separate rights to fish for food and for commercial purposes? Indeed, is there any reason for contemplating a 'right to fish' rather than a 'right to survive' or, for that matter, a 'right to regulate fishing?'" Bowker, *ibid.* at 8. See also Rotman, *supra* note 59 at 3.

incidental practices or activities from those which it determines are central to aboriginal cultures. Barsh and Henderson argue that this approach is both inappropriate and incomprehensible from the perspectives of aboriginal peoples:

> Making any such distinction presumes that cultural elements can exist independently of one another, so that the loss of one element does not compromise the perpetuation or enjoyment of others. This presumption of independence is, in and of itself, utterly incompatible with Aboriginal philosophies, which tend to regard all human activity (and indeed all of existence) as inextricably *inter*-dependent. At the same time, we consider that it is empirically fallacious. The notion of centrality in human society is, we contend, as absurd as arguing that an ecosystem remains the same after the removal of a few "incidental" species.[62]

As noted by Professor Borrows, the "integral to a distinctive culture" test is rooted in an observation by the Court in *Sparrow* that the *fishery* has always been integral to the distinctive culture of the Musqueam.[63] The Court noted that the Musqueam "always fished for reasons connected to their cultural and physical survival," and that "the right to do so may be exercised in a contemporary manner."[64] Both Borrows and Bowker conclude that the *Sparrow* Court intended to implement s. 35(1) in a manner that protects cultures, not activities.[65] The *Van der Peet* test is arguably inconsistent with the principles that should provide the context for s. 35(1).

To be consistent with cultural survival and self-determination for aboriginal peoples, the approach to s. 35(1) should be contextualized and sensitive to Aboriginal perspectives. For

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62 Barsh & Henderson, *supra* note 53 at 1000-1001 (footnotes omitted). See also L.I. Rotman, "Hunting for Answers in a Strange Kettle of Fish: Unilateralism, Paternalism and Fiduciary Rhetoric in *Badger* and *Van der Peet*" (1997), 8 Constit. Forum 40 at 44 where he argues: "the judiciary's compartmentalisation of Aboriginal practices into 'integral' rights and 'incidental' rights demonstrates a profound inability or reluctance to recognise that aboriginal rights ought to be understood as broad, theoretical constructs." See also L'Hereux-Dubé's dissent in *R.* v. *Van der Peet*, [1996] 2 S.C.R. 507 at para 156.

63 "Fish and Chips", *supra* note 54 at 236.

64 "Fish and Chips", *ibid.* at 236.

65 "Fish and Chips", *ibid.* at 236. Practices, in this view, are properly understood as manifestations of rights. See also Bowker *supra* note 49 at 27 - 29.

example, Oren Lyons equates aboriginal rights with responsibility, including responsibility to protect the land for future generations.[66] An approach to s. 35(1) which protects harvesting activities independently of their cultural context may not allow aboriginal peoples to fulfil their responsibilities, and may not permit aboriginal cultures to flourish.

The following section discusses a second criticism of the Court's approach, the imposition of a cut-off date for the development of aboriginal rights.

5.5.3 Frozen Cultures

> We are not looking back. We do not want to remain static. We do not want to stop the clock of time. Our old people, when they talk about how the Dene ways should be kept by young people. . . they are not looking back, they are looking forward. They are looking as far ahead into the future as they possibly can. So are we all.[67]

Despite the Court's rejection of a frozen rights approach to s. 35(1), it defines aboriginal rights as practices, customs and traditions that can be traced to the practices, customs and traditions that were integral to pre-contact aboriginal cultures. Professor Borrows suggests in the following quote that this arbitrary imposition of a cut-off date is inconsistent with contemporary cultural survival:

> As promised, Chief Justice Antonio Lamer has now told us what Aboriginal means. Aboriginal is retrospective. It is about what was, "once upon a time," central to the survival of a community, not necessarily about what is central, significant and distinctive to the survival of these communities today.[68]

The cut off date is arbitrary, particularly from the perspectives of aboriginal peoples.[69] As

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66 O. Lyons, "Traditional Native Philosophies Relating to Aboriginal Rights" in Boldt *et al.*, eds., *supra* note 2 at 19-21.

67 G. Erasmus, Yellowknife, 1977, as quoted in H. Brody, *Living Arctic: Hunters of the Canadian North* (Vancouver: Douglas & McIntyre, 1987)at 9.

68 "Trickster", *supra* note 53 at 28-29.

69 Bowker, *supra* note 49 at 22.

Borrows suggests, aboriginal cultures under the *Van der Peet* test are pre-contact cultures, and the Court's tests protect activities that were elements of those pre-contact cultures. While the method of exercising a narrowly defined right can evolve (for example, the tools used to hunt), the customs, traditions and practices that are integral to aboriginal societies are not permitted to evolve.[70] The *Van der Peet* test implies that changes in response to post-contact conditions amount to "abandonment of an Aboriginal group's identity,"[71] and that cultural change amounts to cultural loss.

Brody has suggested that the traditional-modern dichotomy generally imposed on aboriginal peoples can be relied upon to deny rights, "for it establishes a basis for concluding that the people who originally used and owned the land no longer benefit from it, or fail to make the right kind of use of it."[72] Once aboriginal peoples adopt or support anything modern, the settler society insists that aboriginal peoples no longer have the right to oppose any modern development, because support of the modern is equated with abandonment of aboriginal ways of life.[73]

The literature discussed in Chapter 3, however, demonstrates the relationship between change and continuity in aboriginal cultures and suggests that adaptability is essential to cultural survival. Scott argues that "profound innovations may be justified in the name of tradition ... and it is a specious double standard that equates changes in custom with a loss of rights for aboriginal peoples (yet not for Europeans)."[74]

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70 B.W. Morse, "Permafrost Rights: Aboriginal Self-Government and the Supreme Court in *R.* v. *Pamajewon*" (1997) 42 McGill L.J. 1011 at 1036.

71 "Understanding", *supra* note 30 at 747. Note however the most recent Supreme Court of Canada decision considering treaty rights, *R.* v. *Sundown*, [1999] S.C.J. No. 13 (QL), where the Court held that a contemporary form of exercise of an incidental right was protected. While prior to contact a lean-to was used for shelter during hunting expeditions, today a log cabin is appropriate.

72 Brody, *supra* note 67 at 181.

73 *Ibid.* at 182-83.

74 C.H. Scott, "Custom, Tradition, and the Politics of Culture: Aboriginal Self-Government in Canada" in N. Dyck & J.B. Waldram, eds., *Anthropology, Public Policy, and Native Peoples in Canada* (Montreal: McGill-Queen's University Press, 1993) 311 at 323.

The current approach does not protect practices which aboriginal peoples adopted out of necessity. As Professor Borrows argues in the following quote, to survive, aboriginal cultures had to adapt to European arrival and its effects on aboriginal ways of life:

> the adoption of new practices, traditions and laws in response to new influences is always integral to the survival of any community in its relations with another. Reconciliation should not require Aboriginal peoples to concede those practices which allow them to survive as a contemporary community. However, the Court's new test threatens Aboriginal cultures precisely on this point, since in adapting to new situations they do not have protection for the practices devised in meeting challenges solely as a result of European influence.[75]

Borrows argues that preventing post-contact development of rights is inconsistent with the intersocietal nature of aboriginal law.[76] Aboriginal rights, including customary laws and governmental institutions, are always in development and should not be artificially restricted.[77] He argues that s. 35(1) should be understood as requiring reconciliation today: "the idea that this reconciliation should take place *upon contact* finds no support in either Aboriginal or non-Aboriginal law."[78]

Brody suggests that aboriginal peoples who assert their rights seek to defend "neither the traditional nor the modern, but their right to choose the components of their own lives."[79] Self-determination includes the right to change.

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75 "Trickster", *supra* note 53 at 32. See also "Fish and Chips" *supra* note 54 at 236-237 and "Understanding", *supra* note 30 at 747. Bowker, *supra* note 49 at 22, argued that by assuming that all changes in aboriginal societies post-contact can be attributed to European influence, the Court overstates the importance of European arrival and fails to give weight to aboriginal perspectives.

76 "Trickster", *ibid.* at 31; "Fish and Chips", *supra* note 54 at 241; *Van der Peet, supra* note 62 at para 42.

77 "The Hidden Constitution", *supra* note 30 at 373. Rotman argues that imposing the contact cut-off date is incompatible with maintaining the honour of the Crown, and thus with the guiding principle for s. 35(1). Rotman, *supra* note 62 at 43.

78 "Trickster", *supra* note 53 at 31.

79 Brody, *supra* note 67 at 185.

5.5.4 True of Every Society

Lamer C.J.C. stated in *Van der Peet* that a custom, tradition or practice cannot form the basis of an aboriginal right if it is an aspect of every human society. McNeil argues that this part of Lamer C.J.C.'s reasons should be disregarded:

> I have difficulty reconciling Lamer C.J.C.'s assertion that the practice, custom or tradition in question does not have to be distinct with his statement that it cannot be an aspect of the society which is true of every human society. ... fishing for food is hardly distinct in the sense of being unique to the Musqueams, as it is practiced by *many* societies around the world. So would it cease to qualify as an Aboriginal right, as Lamer C.J.C. seems to have suggested, if it were shown that all human societies fish for food? With all due respect, that would make no sense, as it would not make fishing for food any less distinctive for the Musqueams.[80]

My conclusion in Chapter 6 relies upon accepting the argument that while all societies likely have rules and institutions to regulate land and resource use, aboriginal rights to regulate resource use should not be denied on that ground alone.

A common thread in the criticisms of the current approach to s. 35(1) is the absence of aboriginal perspectives in defining rights, and the failure to identify and characterize rights in a manner consistent with principles of justice, self-determination and cultural survival. The next section considers the literature that argues for an interpretation of s. 35 that protects regulatory rights.

5.6 Arguments for Rights to Control Land and Resource Use

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[80] K. McNeil, "Aboriginal Title and Aboriginal Rights: What's the Connection?" (1998) 36 Alta. L. Rev. 117 at 124 (footnote omitted).

Arguments for internal regulation of resource use are common in the legal literature, and as noted in Chapter 4, recognized by the Court as protected under s. 35(1) in *Nikal*.[81] This section focusses on the literature supporting my hypothesis that rights to control resource use should extend beyond internal regulation. Some arguments are based on first principles such as self-determination, cultural survival and equality, while others are based on application of the existing case law.

5.6.1 Arguments for Rights to Regulate Resource Use based on Principles

Several commentators make principled arguments, based on self-determination and cultural survival, for aboriginal rights to govern resource use and development. The studies discussed in Chapter 3 reveal that in many aboriginal cultures, relationships with lands and resources are central, and knowledge, practice and belief are inseparable. Some commentators thus argue that the survival of many aboriginal cultures depends upon "recovery of the right to decide their own destiny and the patterns of resource use they wish to pursue. This in turn calls for empowering communities of indigenous people to manage their own resource base."[82]

Kapashesit and Klippenstein argue that the collective nature of s. 35(1) implies certain necessary rights, including authority to conduct external relations or coordinate the exercise of group rights with those who are not members of the group.[83] They argue that s. 35(1) protects aboriginal ecological management systems, including rights to restrict access to

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81 "Understanding ", *supra* note 30 at 745. The federal government's self-government policy recognizes an inherent right to internal self-government, and recognizes that self-government over internal matters is an existing right under s. 35, but takes the position that authority over matters that have impacts that go beyond individual communities remains with the federal and provincial governments, whose laws prevail in the event of conflict with Aboriginal peoples' laws. Indian and Northern Affairs Canada, Federal Policy Guide, *Aboriginal Self-Government: The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government* (Ottawa: Minster of Public Works and Government Services, 1995) at 2-6.

82 M. Gadgil, F. Berkes & C. Folke, "Indigenous Knowledge for Biodiversity Conservation" (1993) 22 Ambio 151 at 155.

83 R. Kapashesit & M. Klippenstein, "Aboriginal Group Rights and Environmental Protection" (1991) 36 McGill L.J. 925 at 951 at 955.

outsiders in order to protect stocks, and rights to protect stocks and habitat from external threats.[84] Similarly, Pentney argues that to enable aboriginal peoples to ensure the continuity of their cultures, s. 35(1) should be understood as protecting "the power to make choices about how and when external influences, such as resource development, will affect an aboriginal society..."[85]

Because aboriginal peoples historically governed their lands and resources, some argue that justice requires Canada to allow aboriginal peoples to exercise those powers today. The Royal Commission on Aboriginal Peoples concluded that a just relationship between aboriginal peoples and the rest of Canada would embody aboriginal control over lands and resources:

> We make the case, ...not only for more just treatment of Aboriginal people now and in the future but also for restorative justice, by which we mean the obligation to relinquish control of that which has been unjustly appropriated: the authority of Aboriginal nations to govern their own affairs; control of land and resources essential to the livelihood of families and communities ...[86]

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84 *Ibid.* at 957-8.

85 Pentney, *supra* note 44 at 260. See also P. Macklem, "First Nations Self-Government and the Borders of the Canadian Legal Imagination" (1991) 36 McGill L.J. 382 at 451; Kapashesit & Klippenstein, *ibid.* at 951; The Native Circle's Report to Ontario's Round Table on Environment and Development similarly recommended that aboriginal peoples play a lead role in managing resources whose harvest is culturally important, and that they should be "co-managers with genuine decision-making powers" in the management of resources such as forests. Ontario Round Table on Environment and Economy, *Report of the Native People's Circle on Environment and Development* (Queen's Printer for Ontario, 1992) at 20.

86 Report of the Royal Commission on Aboriginal Peoples, *Volume 1: Looking Forward, Looking Back* (Ottawa: Minister of Supply and Services, 1996) at 6; Patrick Macklem suggests that principles of equality are embodied within aboriginal rights. He argues that to achieve equality aboriginal peoples must be self-governing, because loss of control has resulted in adverse social and economic conditions for aboriginal peoples, and has jeopardized aboriginal cultures. P. Macklem, "Normative Dimensions of an Aboriginal Right of Self-Government" (1995), 21 Queen's L. J. 173 at 217.

5.6.2 Resource Management Rights under the Existing Framework for Establishing Aboriginal Rights

Ryder has argued that once it is accepted that prior to the arrival of Europeans or the Crown's assertion of sovereignty aboriginal peoples with organized societies occupied Canada, "the conclusion seems inescapable that a right of self-government was an "integral part of their distinctive culture," and thus was incorporated into the common law doctrine of aboriginal rights."[87] In the same vein, the organized aboriginal societies which occupied Canada likely had land and resource use rules and institutions that were integral to their cultures. Recognition of the prior occupation of Canada by aboriginal peoples thus may support aboriginal resource management rights.

To the extent that the case law adopts the principles referred to in the previous section, it may support resource regulation rights. Asch and Macklem have argued that the *Sparrow* decision supports resource management rights because of the centrality of resource use systems to aboriginal cultures and the inseparability of resource use activities and rules from the perspectives of aboriginal peoples:

> The right to fish was viewed by the Court as a right because of its centrality to Musqueam culture. If fishing is central to the Musqueam Nation, the ability to determine how this activity will be carried out on Musqueam lands, between the Musqueam and others, and among the Musqueam themselves must also be central to its self-definition. That is, the ability to pass laws or rules governing how the practice of fishing is to occur, under the theory of aboriginal right adopted by the Court in *Sparrow*, equally ought to qualify as an aboriginal right under s. 35(1).[88]

Professor Borrows has argued that the Supreme Court of Canada's decision in *Simon*, which held that practices "reasonably incidental" to the exercise of a right, or necessary in order to

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87 Ryder, *supra* note 28 at 44 (references omitted); "With or Without", *supra* note 51 at 640 and 646; and "Fish and Chips", *supra* note 54 at 238.

88 Asch & Macklem, *supra* note 36 at 506. The authors refer to *Mahe* v. *The Queen* (1990), 68 D.L.R. (4th) 69 (S.C.C.), where the court held that s. 23 of the Charter, which grants minority language educational rights to minority language parents, encompasses management and control.

make a right effective, are protected along with the right, supports rights to manage resource use:

> Practices embraced by Aboriginal or treaty rights must include First Nations laws because these laws give content and meaning to First Nations customs and conventions. ... Taking the facts in *Simon* as an example, if an Aboriginal person has a right to hunt, he or she also has an associated right to travel with a gun to the place where that right can be exercised. More broadly, if a First Nation has a particular right, it also has those associated liberties necessary to make effective the activity protected by that right. Certainly, the Aboriginal right to hunt is made effective by associated First Nations laws and customs. Under the principles set forth in *Simon*, therefore, the existence and protection of First Nations laws are implied in the exercise of other specific Aboriginal rights.[89]

While Professor Borrows does not explicitly argue for control over the activities of people who are not members of the aboriginal culture in question, his approach does support rights to exercise external control where necessary to enable the exercise of resource use rights. Peter Usher made a similar argument prior to judicial consideration of s. 35, which highlights the relation between the notion of incidental rights, self-determination and contemporary cultural survival. He argued that:

> guaranteed rights of access, even on an exclusive or preferential basis, are not sufficient. The right to hunt in an inanimate landscape is clearly not a useful one. If Native northerners are to defend their essential interests in their resource base, and the environment that sustains it, then they will have to have property and management rights in wildlife.[90]

The existing literature does not discuss resource management rights in the context of the *Van der Peet* test. In Chapter 6 I argue that the studies of aboriginal management systems in Chapter 3 suggest that land and resource management rights can be established under that test.

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89 "With or Without You", *supra* note 51 at 642-643; see also "Fish and Chips", *supra* note 54 at 243.

90 P.J. Usher, "Indigenous Management Systems and the Conservation of Wildlife in the Canadian North" (1987) 14(1) Alternatives 3 at 6.

Wendy Moss has reasoned that the settler society has been unable to accept aboriginal laws and governing institutions because their forms are so different from those of the settler society. The Inuit, for example, managed their own affairs prior to contact, though they did not have a "centralized authority such as the state," or formal government institutions and written laws.[91] McNeil argues in the following quote that the absence of institutions resembling Canadian ones should not bar the recognition of aboriginal laws:

> The assumption that Aboriginal societies do not have laws governing activities such as fishing should not be made without a factual basis. Furthermore, one should not expect Aboriginal laws necessarily to be enacted by legislative bodies, or to be written down. Those expectations would be ethnocentric and inappropriate, as they would involve imposing Euro-Canadian standards on Aboriginal societies.[92]

Richstone notes that "Canada is a country founded on legal pluralism," as evidenced by the coexistence of civil and common law systems in Canada.[93] The difference in form between aboriginal and non-aboriginal laws should thus not bar their protection in the Canadian Constitution.

5.6.3 Identifying the Subject-Matter of Aboriginal Jurisdiction

Sections 91 and 92 divide legislative power between the federal and provincial governments. Section 91 lists those matters over which the federal Parliament has exclusive legislative authority, and provides that the federal government has a residual power to legislate for the

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91 Moss, *supra* note 22 at 60 [references omitted].

92 "Envisaging" *supra* note 36 at 124-125. See also M. Asch, "Errors in *Delgamuukw*: An Anthropological Perspective", in F. Cassidy, ed., *Aboriginal Title in British Columbia: Delgamuukw v. the Queen: Proceedings of a Conference held Sept. 10 & 11, 1991* (Lantzville, B.C.: Oolichan Books, 1992) at 224-225.

93 J. Richstone, "The Inuit and Customary Law: Constitutional Perspectives" in B. W. Morse & G.R. Woodman, eds., *Indigenous Law and the State* (Dordecht, Holland: Foris, 1988) 239 at 248; see also Royal Commission on Aboriginal Peoples, *supra* note 11 on at 24-25. The Royal Commission notes that Canadian constitutional law includes written sources as well as "unwritten principles and rules, which can be described as the common law of the Constitution."

peace, order and good government of Canada. For the most part, the provinces have jurisdiction over local matters and over provincial property, while the federal government has jurisdiction over national and interprovincial matters. Section 35 does not list matters over which aboriginal peoples have jurisdiction.

The section addresses the issue of identifying the subject matter of aboriginal jurisdiction. Professors Hogg and Turpel have argued that "only political discussions can adequately address matters of jurisdiction, financing and intergovernmental cooperation."[94] Nonetheless, the legal positions of parties are relevant to bargaining positions and therefore to political discussions.[95]

One possibility under the *Van der Peet* test would be to inquire into what the scope of jurisdiction was pre-contact.[96] However, a different approach may be more appropriate if the underlying purpose of s. 35(1) is contemporary cultural survival.

Professors Hogg and Turpel suggest the following modified version of the Charlottetown Accord's contextual statement as the appropriate expression of aboriginal self-government rights generally:

> The exercise of the right of self-government includes the authority of the duly constituted legislative bodies of Aboriginal peoples:
> (a) to safeguard and develop their languages, cultures, economies, identities, institutions and traditions; and
> (b) to develop, maintain and strengthen their relationship with their lands, waters and environment
> so as to determine and control their development as peoples according to their own values and priorities and ensure the integrity of their societies...[97]

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94 Hogg & Turpel, *supra* note 19 at 190, note 9.

95 See for example, British Columbia, Ministry of Aboriginal Affairs, *Consultation Guidelines* (September 1998), available at www.aaf.gov.bc.ca/aaf, which instructs decision makers not to admit explicitly or implicitly to the existence of aboriginal title until proven in court by the relevant aboriginal people.

96 See *R.* v. *Jones and Pamajewon*, [1996] 2 S.C.R. 821.

97 Hogg & Turpel, *supra* note 19 at 195.

This approach identifies the subject matter of aboriginal jurisdiction in accordance with the purposes and objectives to which the right is to contribute to.[98] The contextual statement forms "the foundation upon which a list of powers can be developed by a particular Aboriginal people."[99] Self-determination, contemporary cultural and physical survival, and cultural sustainability, principles reflected in the above contextual statement, may therefore be the starting point for identifying aboriginal rights to govern land and resource use.

Another issue is whether aboriginal rights to govern land and resource use would be based on personal or territorial jurisdiction. Territorial jurisdiction contemplates aboriginal powers over a specific territory that would apply to aboriginal and non-aboriginal people.[100] Personal jurisdiction is jurisdiction over First Nation citizens, regardless of where they are. An example is provision of social services.[101] While the existing case law recognizes personal jurisdiction such as internal regulation of fishing rights, in Chapter 6 I argue for territorial jurisdiction over land and resource use.

Slattery argues that while aboriginal legal systems pre-existed and survived the Crown's assertion of sovereignty and the establishment of the Canadian confederation, those systems must now find expression within the federal system.[102] Walters argues that s. 35(1) allows

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98 *Ibid.* at 193.

99 *Ibid.* at 195.

100 *Ibid.* at 198. These powers could include: "The management of the land, the regulation of activity on the land, including hunting, fishing, gathering, mining and forestry, the licensing of businesses, planning, zoning and building codes, environmental protection and the administration of justice...."

101 *Ibid.* at 199.

102 Slattery argues that: "the right of self-government is not unlimited in scope and it does not support a claim to independence. It operates under the aegis of the Canadian Constitution, and confers powers consistent with the needs and circumstances of Aboriginal peoples and their historical links with the larger community." "Organic Constitution", *supra* note 30 at 110. The Royal Commission on Aboriginal Peoples, *supra* note 11 at 36, came to the same conclusion:

> [A]s a matter of current status [self-government] is a right held in Canadian law. The implication is that, although Aboriginal peoples have the inherent legal right to govern themselves under section 35, this constitutional right is exercisable only

Canadian and aboriginal laws to operate cooperatively.[103] Similarly, Moss concludes that self-determination does not necessarily require complete independence, and can be expressed within Canada's existing federal framework.[104]

To accommodate aboriginal rights to govern land and resource use, the federal and provincial governments may have to change decision making processes and institutions. Before turning to the division of powers and justification analysis, the following section therefore considers whether s. 35(1) can be interpreted as requiring Canadian governments to change their resource management structures.

5.7 Shield or Sword?

If s. 35(1) protects aboriginal management systems, or requires the government to develop institutions to share jurisdiction over resource management with aboriginal peoples, the provision arguably must be capable of use as a sword. This is especially so if s. 35(1) allows aboriginal peoples to govern resource use by people who are not members of the group. Patrick Macklem has argued that s. 35(1) includes positive rights, and may require governments to take positive action or to change institutional structures.[105]

> within the framework of Confederation. Section 35 does not warrant a claim to unlimited governmental powers or to complete sovereignty, such as independent states are commonly thought to possess. Aboriginal governments are in the same position as the federal and provincial governments: their powers operate within a sphere defined by the Constitution. In short, the Aboriginal right of self-government in section 35 involves *circumscribed* rather than *unlimited* powers.

103 Walters, *supra* note 33 at 412, quoting from P. Monture, "Now that the Door is Open: First Nations and the Law School Experience"(1990) 15 Queen's L.J. 179 at 191. According to Borrows and Rotman, the approach to aboriginal rights definition should harmonize aboriginal and non-aboriginal laws. Borrows & Rotman, *supra* note 47 at 13.

104 Moss, *supra* note 22 at 65. See also Ryder, *supra* note 17 at 362-363; and "Organic Constitution", *supra* note 30 at 109, where he argues that Canada represents a merging of sovereignties, and that aboriginal peoples retain some of that sovereignty within the existing constitutional framework.

105 Macklem "Aboriginal Rights", *supra* note 36 at 100-102, citing *Mahe* v. *Alberta*, [1990] 1 S.C.R 342 at 365; but see *Ardoch Algonquin First Nation* v. *Ontario* (1997), 148 D.L.R. (4th) 96 (Ont. C.A.), leave to appeal dismissed, [1997] S.C.C.A. No. 429 (QL), where the Ontario Court of Appeal held that s. 35(1) is not a sword. On the other hand, in *Saanichton Marina Ltd.* v. *Claxton* (1989), 36

As noted in Chapter 4, there are three possible approaches to conflicts between aboriginal and Canadian jurisdiction. One approach is to treat conflicts as division of powers conflicts, and the other is to treat them as infringements of s. 35(1). The third approach combines the first two.

5.8 The Division of Powers and Resource Ownership in Canada

Government authority over lands and resources stems from two sources: property (executive power) and legislative jurisdiction.[106] A property owner generally has the right to dispose of resources and attach conditions to dispositions or sales of rights to exploit such resources.[107] Provincial resource management is usually founded in provincial resource ownership under s. 109 of *Constitution Act, 1867*, and reinforced by s. 92, while federal power to regulate resource use in the provinces is usually found in a head of legislative power under s. 91.[108] While resource dispositions in the provinces are effected under provincial legislation, federal authority can affect resource use in the provinces:

> Where both ownership and all aspects of legislative authority coincide there is plenary power over the resource and the government has full and exclusive authority to manage the resource. ... But where, as is the more usual case,

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B.C.L.R. (2d) 79 (C.A.), the Court held that the province could not authorize a marine development that would destroy fish habitat that support a treaty right to fish.

106 A.R. Thompson & H.R. Eddy, "Jurisdictional Problems in Natural Resource Management in Canada" in *Background Study for the Science Council of Canada, May 1973, Special Study No. 27: Essays on Aspects of Resource Policy* (Ottawa: Science Council of Canada, 1973) 67 at 74.

107 *Ibid.* at 74; G.V. La Forest, *Natural Resources and Public Property under the Canadian Constitution* (Toronto: University of Toronto, 1969) at 75-84 and 134-136; and B. Barton, *Canadian Law of Mining* (Calgary: Canadian Institute of Resources Law, 1993) at 5.Aboriginal title includes these rights, though they are limited. Lands and resources held under aboriginal title may only be alienated to the Crown, and while aboriginal peoples have the right to decide to what use their title lands are put, they must surrender their lands where they wish to put them to a use which is incompatible with continuing the relationship of the aboriginal culture in question and their lands.

108 M. Howlett & J. Rayner "The Framework of a Forest Policy in Canada" in M.M. Ross, *Forest Management in Canada* (Calgary: Canadian Institute of Resources Law, 1995) 43 at 60. Parliament has, under s. 91(1A), exclusive legislative authority over the public debt and property, while the provinces, under s. 92(5), have exclusive legislative authority with respect to the sale and management of public lands belonging to the provinces, including timber and wood.

> ownership and legislative authority are divided, no one legislative body or government can unilaterally control the destiny of that resource.[109]

Examples of federal legislative authority restricting resource use in a province are when navigable waters or fisheries are affected.[110] Thus, as La Forest noted, "administration and control of the lands reserved for Indians ... is in the federal government, even though the land belongs to the provinces."[111] This thesis is concerned with forest and mineral dispositions, and thus the more relevant issues concern the effect of s. 91(24) on provincial jurisdiction, and the extent to which aboriginal rights to govern land and resource use restrict provincial ownership.

5.8.1 Legislative Power

Ryder has identified two approaches to division of powers questions. The classical paradigm views the heads of power enumerated in sections 91 and 92 as "watertight compartments" and prevents overlap either by ruling laws to be *ultra vires* or by reading them down so that

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[109] Thompson & Eddy, *supra* note 106 at 74; see also B. Funston, "Disposition of Mineral Rights: Legal and Constitutional Parameters" in M.M. Ross & J.O. Saunders, eds., *Disposition of Natural Resources: Options and Issues for Northern Lands* (Calgary: Canadian Institute of Resources Law, 1997) 8 at 12 and 14.

[110] Thompson & Eddy, *ibid.* at 78. La Forest, *supra* note 107 at xiii-xiv writes that:

> ... the federal parliament has considerable powers in respect of provincial natural resources because, in legislating within its power, its authority is paramount. Thus if a province wants to develop its fisheries or develop power or exploit minerals in navigable waters, it must comply with any applicable federal legislation. It is obvious, therefore, that much of Canada's resource cannot be developed without co-operation between federal and provincial governments.

See also LaForest, *ibid.* at 147-148: "if federal legislation affecting provincial property truly falls within federal legislative power, it will prevail over provincial legislation respecting that property."

[111] La Forest, *supra* note 107 at 114. La Forest added at 115 that "once the Indians surrender their title the province has the complete beneficial interest in the land and the federal government ceases to have the control and administration thereof." See *St. Catherine's, supra* note 16. Activities may also be subject to provincial legislation though they are carried out on federally-owned or controlled property: Barton, *supra* note 107 at 7.

they do not encroach on the other government's jurisdiction.[112] Incidental effects are permitted only to the extent that they "are absolutely necessary to the achievement of the valid legislative objective."[113] In contrast, the modern paradigm embraces the double aspect doctrine, which holds that "subjects which in one aspect and for one purpose fall within s. 92, may in another aspect and for another purpose fall within s. 91."[114] In a pre-*Delgamuukw* article, Ryder noted that the case law primarily applied the modern paradigm to s. 91(24), thereby allowing valid provincial laws to have incidental effects on Indians and lands reserved for Indians.[115]

Professor Bankes argues that in *Delgamuukw,* the Supreme Court of Canada applied what he calls the "modern test for the non-application of provincial laws" to s. 91(24). Under that test, provincial laws cannot apply of their force where they touch or affect, in other than a purely incidental way, the core of s. 91(24). Bankes suggests that the implications for resource management and disposition could be substantial, because "a division of powers analysis is shorn of the balancing and reconciling justificatory approach that characterizes any s. 35 analysis."[116] Bankes argues that while the case law has generally been inconsistent with respect to whether the threshold for the inapplicability of provincial laws is that they impair, or affect, an area of primary jurisdiction,[117] a provincial law that purports to allow a third party the exclusive right to exploit the minerals, oil and gas, or forest resources of the

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112 Ryder, *supra* note 17 at 312.

113 Ryder, *ibid.* at 322-3.

114 *Hodge* v. *R.*, (1883) 9 App. Cas. 117 (P.C.) at 130; Ryder, *ibid.* at 323.

115 Ryder, *ibid.* at 364.

116 N. Bankes, "*Delgamuukw*, Division of Powers and Provincial Land and Resource Law: Some Implications for Provincial Resource Rights" (1998), 32 U.B.C. L. Rev. 317 at 320.

117 Ryder notes that cases involving federally incorporated companies held provincial laws that "impaired" or "sterilized" a company's operations were inapplicable in those circumstances. When the court subsequently considered cases involving labour legislation, it "abandoned the "impairment" test in favour of a test that prohibited the application of provincial legislation to federal undertakings when it would affect 'a vital or essential part of the operation as a going concern.'" Ryder, *supra* note 17 at footnote 114, pp. 335-6.

title lands of a First Nation should be inapplicable" in either case.[118] He suggests that while the actual decision in *Delgamuukw* was that a provincial law of general application cannot extinguish title, the decision leaves open the possibility that provincial resource disposition laws are inapplicable where they impair or affect "lands reserved". [119]

Presumably aboriginal rights to exercise jurisdiction of land and resource use are rights in relation to land and therefore "lands reserved". In the event of a conflict between aboriginal and provincial laws governing land and resource use, aboriginal jurisdiction may be paramount. No justification analysis applies.

5.8.2 Property

The provinces' ability to dispose of timber and mineral resources is limited to the extent that provincial ownership is encumbered by aboriginal title.[120] As noted in Chapter 4, it is only once the Crown's title is disencumbered of aboriginal title that the beneficial interest in lands referred to in s. 109 of the *Constitution Act, 1867*, become available to the provinces as a source of revenue.[121] Hamar Foster argues that lands subject to an existing aboriginal title are not available to the provinces as a source of revenue, "British Columbia was able to avoid the effect of this decision only by steadfastly maintaining that, uniquely, there is no Aboriginal title here to extinguish."[122]

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118 Bankes, *supra* note 116at 333.

119 Bankes *ibid.* at 335; Foster, *supra* note 37 at 226 argues that "it is not entirely clear how provincial laws could, of their own force, even infringe upon such title, let alone extinguish it." See also Hughes, "Indians and Lands Reserved for the Indians: Off Limits to the Provinces?" (1983) 21 Osgoode Hall L.J. 82; K. Lysyk, "The Unique Constitutional Position of the Canadian Indian" (1967) 45 Can. Bar Rev. 513 at 515; *Reference re Stony Plain Indian Reserve* [1982] 1 WWR 302 (Alta. C.A.); *Four B Manufacturing Ltd.* v. *United Garment Workers of America et al* (1979), 102 D.L.R. (3d) 385 at 398; *Delgamuukw* v. *British Columbia*, [1997] 3 S.C.R. 1010; and *Stoney Creek Indian Band* v. *British Columbia*, [1999] 1 C.N.L.R. 192 (B.C.S.C.).

120 See *Haida Nation* v. *British Columbia (Minister of Forests)* (1997), 153 D.L.R. (4th) 1 (B.C.C.A.), reversing (1995), 130 D.L.R. (4th) 661 (B.C.S.C.).

121 Foster, *supra* note 37 at 221; *St. Catherine's*, *supra* note 16 at 59.

122 Foster, *ibid.* at 221.

I will return to the literature discussing what rules might apply to disputes between aboriginal and government jurisdiction after considering the literature that comments on the judicial analysis developed for justifying infringements of aboriginal rights. This Chapter does not address the issue of *prima facie* infringement, which has received less attention in the literature.

5.9 Compelling and Substantial Objectives

As noted in Chapter 4, the valid legislative objective requirement has become an insignificant step in the justification analysis. While the public interest as such was held an invalid objective in *Sparrow*, McNeil notes that specific public interest objectives will now, at least in principle be sufficiently compelling and substantial to justify infringements of s. 35(1) rights.[123] McNeil suggests that objectives such as regional and economic fairness, and recognition the historical reliance on resources by non-aboriginal harvesters, should not be allowed to justify infringements on aboriginal rights:[124]

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[123] K. McNeil, "How Can Infringements of The Constitutional Rights of Aboriginal Peoples be Justified?" (1997), 8 Constit. Forum 33 at 35.

> We are tired of hearing third parties complain about threats to their livelihood and their interests because they still don@t accept the fact that all we are asking for is our fair share so that we, too, can make a living. We have done our homework, and we can show how our economies were systematically dismembered so that the others could reap the benefit. If third parties have anything to lose, it is becuase they took it from us in the first place.

Robert Debassige, Executive Director/Tribal Chairperson of the United Chiefs and Councils of Manitoulin (UCCM), speaking to the RCAP, as quoted in Royal Commission on Aboriginal Peoples, *Public Hearings: Toward Reconciliation: Overview of the Fourth Round* (Ottawa: Supply and Services, 1994) at 79.

[124] It might be suggested that these objectives are inconsistent with the conservation objective. Usher asks: "Can fisheries authorities impose restrictions on aboriginal fishing if at the same time, through insufficient application or enforcement of the law, fisheries stocks are being diminished or polluted by forestry, mining or other industrial activities?" P.J. Usher, "Some Implications of the *Sparrow* Judgement for Resource Conservation and Management" (1991) 18(2) Alternatives 20 at 20.

> We need to be clear that what Lamer C.J. was referring to here was not reconciliation through agreements negotiated with Aboriginal peoples, but rather reconciliation through unilaterally imposed legislative infringements
>
> of their constitutional rights. ... While one can appreciate that the interests of non-Aboriginal groups in the fishery are also involved, the fact is that if those interests are in conflict with Aboriginal fishing rights today, then the historical reliance upon and participation in the fishery by those groups in the past was probably in violation of Aboriginal rights as well. Can reconciliation really be achieved by judicially-authorized perpetuation of past injustices rather than sitting down and working out mutually-acceptable solutions to these conflicts?[125]

An alternative approach to the question of valid objectives might draw upon Noel Lyon's discussion of the division of powers between the federal and provincial governments.

Lyon has argued that while in 1867 the law of federalism was about power, the division of powers in the *Constitution Act, 1867*, should be read today as a division of powers and responsibilities: "Legislative powers are conferred for a purpose, ... Perhaps the greatest enemy of principled interpretation has been the idea of legal federalism as a competition between governments for power and wealth."[126]

According to Lyon, public lands are held in trust for the public.[127] Jurisdiction over natural resources should lie with the level of government which "is better situated to ensure that the

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125 McNeil, *supra* note 123 at 36. See also Binnie, *supra* note 39 at 232:

> The Court will have to balance airports against gathering rights, jobs against caribou, oil self-sufficiency against qualitative changes in a traditional way of life. These will inevitably be rather subjective assessments on the part of judges. There are no manageable standards to apply. It is difficult to "balance the interests" when the equities do not occur on the same plane.

126 N. Lyon, "Canadian Law Meets the Seventh Generation" (1993) 19 Queen's L. J. 350 at 361.

127 *Ibid.* at 353. Lyon argues, *ibid.* at 357, for an interpretation of ss. 91 to 95 of the *Constitution Act, 1867* that embodies the principle that "Just as the Crown assumed responsibility for protecting First Nations lands and cultures, resulting in a fiduciary duty, so the Crown assumed at the outset responsibility for managing and protecting the people's lands and resources, resulting in a trust."

trust is respected."[128] Lyon argues that sustainability should guide the division of powers.[129] For example, "Management" in s. 92(5) should be defined in accordance with sustainability principles because that is the contemporary purpose for which the power is conferred.[130] He argues that "Legislation that defeats rather than advances the purposes for which the relevant power is conferred ... should ... be seen as colourable and *ultra vires*."[131] These principles could inform the division of powers between the federal and aboriginal governments as well.

In Chapter 6 I argue that this view of legislative power could guide the resolution of disputes between government and aboriginal jurisdiction.[132]

5.10. Resolving Jurisdictional Disputes

One possible approach to disputes between aboriginal and federal resource management is a division of powers analysis. The self-government literature addresses questions concerning the relationship of aboriginal jurisdiction to provincial and federal jurisdiction.[133] Two questions are relevant. First, is aboriginal jurisdiction exclusive or concurrent? Second, if

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128 *Ibid.* at 354.

129 *Ibid.* at 354. Lyon argues, *ibid.* at 353, that federalism should incorporate the responsibilities of the *Charter* "as a condition of the exercise of powers."

130 *Ibid.* at 369.

131 *Ibid.* at 370. On the colourability doctrine in division of powers, see for example, *Re Upper Churchill Water Rights* [1984] 1 S.C. R. 297.

132 P.F. Wilkinson, "Some Thoughts Towards a Policy for the Rational Use of Renewable Resources in the Canadian North" in M.M.R. Freeman, ed., *Proceedings: First International Symposium on Renewable Resources and the Economy of the North: Banff, Alberta, May 1981* (Ottawa : Association of Canadian Universities for Northern Studies, 1981) 72 at 83 argues:

> In my opinion, the right of the Native peoples to a special role in the development of the renewable resources of the Canadian North derives from the fact that, with few exceptions, they are the only truly permanent residents of northern Canada and that they are the only collectivity that possesses the knowledge, expertise, and inclination required for the proper exploitation of the renewable resources of the Canadian North.

133 Hogg & Turpel, *supra* note 19; J.M. Olynyk, "Approaches to Sorting Out Jurisdiction in a Self-Government Context" (1995), 53 U.T. Fac. L. Rev. 235 at 240-241 argues that in the division of powers between aboriginal and federal and provincial governments it is likely that many powers will be concurrent.

concurrent, how would conflicts be resolved? The literature generally draws on the rules governing disputes between federal and provincial laws:

> Exclusive powers are those possessed only by the Aboriginal people; neither the federal Parliament nor the provincial (or territorial) Legislature would be able to exercise the same power. Concurrent powers are those possessed not only by the Aboriginal people, but also by either the federal Parliament or provincial (or territorial) Legislature. [134]

While ss. 91 and 92 list exclusive powers, there is overlap between the two lists, resulting in concurrent legislative powers[135] The rule of federal paramountcy applies to conflicts between federal and provincial laws, but the courts will only find a conflict if "one law expressly contradicts the other."[136] Under the Charlottetown Accord, aboriginal laws would have prevailed over inconsistent provincial and federal laws of general application, unless any such federal or provincial law was "essential to the preservation of peace, order, and good government in Canada."[137] Under the Yukon First Nation Self-Government Agreements, First Nations laws prevail over inconsistent Yukon laws, but the rules to settle conflicts between First Nation and federal laws are left to be decided in future agreements.[138]

In the context of internal, or self-regulation, McNeil argues that federal and provincial jurisdiction is precluded where aboriginal peoples have covered the field. He suggests that where there are no aboriginal laws addressing a matter, federal laws which pass the *Sparrow* justification test should continue to apply to aboriginal people and their rights.[139] Professor

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134 Hogg & Turpel, *ibid.* at 200.

135 *Ibid.* at 201. An example is environmental protection.

136 *Ibid.* at 202.

137 *Ibid.* at 203.

138 Clause 13.5. Under clause 13.5.3, a Yukon law of general application is not only inoperative in the event of an inconsistency: "Except as provided in 14.0, a Yukon Law of General Application shall be inoperative to the extent that it provides for any matter for which provision is made in a law enacted by the Teslin Tlingit Council. See Hogg & Turpel, *ibid.* at 204.

139 "Envisaging", *supra* note 36 at 134, and at 135-136 where he writes:

Ryder argues that the classical paradigm is appropriate in the context of legislation that affects "Indians and lands reserved for Indians". Federal laws may affect "Indians and lands reserved for Indians" if they are passed with the consent of the aboriginal people affected.[140] Ryder advocates a "covered the field" approach to paramountcy in the event that provincial laws affect "Indians and lands reserved for Indians."[141]

Professor Borrows would apply *Sparrow*'s priority doctrine to conflicts. Aboriginal laws would be paramount over conflicting federal or provincial laws in the absence of "exceptional circumstances."[142] Slattery's approach combines the division of powers and

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> In the context of the fishing rights which were in question in *Sparrow*, for example, if the Musqueam had shown that they had laws which adequately regulated the fishing activities of the members of their Nation, there would be no reason for the federal fishery regulations to apply to them. In those circumstances, an attempt by the federal government to try to justify the application of its own regulations would probably fail. The government might nonetheless attempt to show that, however, adequately the Musqueam were regulating their fishing, management of the resource as a whole required a comprehensive regulatory scheme, with priority given to Aboriginal users. But even if that were so, it would not necessarily mean that the *Sparrow* test of justification had been met so that the federal regulations would displace those of the Musqueam Nation. The *Sparrow* test, it should be recalled, can require consultation with Aboriginal people before regulatory measures are applied to them. It is therefore suggested that, in this situation, the federal government would be under an obligation to discuss its conservation plans with the Musqueam Nation, and try to arrive at a negotiated solution.

See also Royal Commission on Aboriginal Peoples, *supra* note 11 at 37.

Where federal jurisdiction is paramount, co-management may in be a requirement for justification. Kapashesit & Klippenstein *supra* note 83 at 961, argue that legislation passed to manage resources where a viable and effective aboriginal system is in place does not achieve the legislative objective as minimally as possible, and that s. 35(1) requires government to integrate ecological management systems into its environmental protection programs. Usher has also argued that "If future court challenges can show that the indigenous management system is on balance at least as effective as the state's, the case for self-government with respect to natural resources will have been greatly advanced." See Usher, *supra* note 124 at 21. This approach is a covered the field approach that incorporates responsibility and therefore the requirement that the management system be effective.

140 Ryder, *supra* note 17 at 363.

141 Ryder also argues that "the classical prohibition on federal inter-delegation should prevent the delegation of federal power in relation to "Indians" and "lands reserved" to the provinces, unless the consent of the three levels of government involved is obtained." Ryder, *ibid.* at 363.

142 "With or Without You", *supra* note 51 at 639. See also *Sparrow supra* note 31 at 1102, where the Court summarizes the argument put forth by counsel for Sparrow that conservation measures should only justify an infringement of aboriginal rights "where the aboriginal group concerned was unwilling to implement necessary conservation measures."

justification analyses:

> The matter can be summarized in four basic principles. *First*, the Aboriginal sphere of authority under section 35 is co-extensive with the Federal head of power recognized in section 91(24) of the *Constitution Act, 1867*. *Second*, within this sphere, Aboriginal governments and the Federal government have concurrent legislative powers. *Third*, in the case of conflict between Aboriginal laws and Federal legislation enacted under section 91, valid Aboriginal laws (including customary laws) will take precedence, except where the Federal laws can be justified under the section 35 standard laid down in the *Sparrow* case. *Fourth*, relative to Provincial laws, Aboriginal laws have basically the same status as Federal laws enacted under section 91(24), under the standard rules developed by the courts to police the Constitutional division of powers.[143]

The Royal Commission distinguishes between core matters over which aboriginal peoples may exercise jurisdiction without court sanction or agreements, and matters in the periphery of aboriginal jurisdiction, over which aboriginal peoples have potential rights.[144] The core includes "matters of vital concern to the life and welfare of the community that, at the same time, do not have a major impact on adjacent jurisdictions and do not rise to the level of overriding national or regional concern."[145]

Hogg and Turpel note that "intergovernmental cooperation and sharing of jurisdiction and

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143 "Question of Trust", *supra* note 30 at 282-283. Morse, *supra* note 70 at 1034, also argues that the division of powers analysis used to adjudicate jurisdiction disputes between the federal and provincial governments could be adapted for s. 35. McNeil argues that in the context of internal regulatory rights, it will be rare that government can justify an infringement:

> To the extent that Aboriginal and treaty rights are adequately regulated by Aboriginal laws, federal laws infringing those rights cannot apply to them. The conclusion flows from the *Sparrow* decision. As we have seen, before federal laws are allowed to infringe Aboriginal and treaty rights, the Supreme Court said a valid legislative objective must exist. Moreover, that objective has to be pursued in a manner which infringes those rights as little as possible. But if an Aboriginal people is already regulating its own rights in a way which is consistent with the legislative objective, there can be no need, and therefore, no justification, for the federal law to apply.

"Envisaging", *supra* note 36 at 134-35. See also Lambert J.A., dissenting in *Delgamuukw*, *supra* note 37 at 656.

144 Royal Commission on Aboriginal Peoples, *supra* note 11 at 38.

145 *Ibid.* at 38.

resources is the norm rather than the exception of Canadian federalism."[146] Questions concerning how in practice to change decision making structures and institutions to achieve the co-existence of Canadian and aboriginal laws are beyond the scope of this thesis, and arguably are political rather than legal questions.[147] The best approach may be to enter into agreements in order to implement resource management rights and set out a framework for sharing jurisdiction.[148] Unilateral exercise of aboriginal jurisdiction could lead to interminable disputes and litigation.[149] Similarly, legislation might be used to implement the right.[150]

The following section reviews the literature that addresses the role of the fiduciary relationship in s. 35(1), and in particular the second half of the justification analysis, which requires government to show that any infringement upholds the honour of the Crown.

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146 *Supra* note 19 at 202.

147 G. R. Hall, "The Quest for Native Self-Government: The Challenge of Territorial Sovereignty" (1992) U.T. Fac. L. Rev. 39 at 41. Some of the issues include the multitude of First Nations in Canada and the potential for competing aboriginal claims to jurisdiction. Other issues revolve around funding and capacity building. O.P. Dickason, "Rocky Road to Self-Government" in *Canada's First Nations: A History of Founding Peoples from Earliest Times* (2d ed.) (Toronto: Oxford University, 1997) 378 at 390-392. Hogg & Turpel, *supra* note 19 at 194, note that the Charlottetown Accord would have required aboriginal peoples to form "duly constituted legislated bodies." This requirement "would require the Aboriginal people in question to develop a constitution with provision for a law-making body and demonstrated support among the people for this institution." Hogg and Turpel suggest, *ibid.* at 207-210, that financing of First Nations governments will be necessary, and might be achieved through a combination of taxing powers and transfer payments. See also Royal Commission on Aboriginal Peoples, *supra* note 11 at 42-44.

There are some fundamental differences between the forms of First Nations and Canadian laws: see "With or Without You" *supra* note 51 at 646 - 652. Differences in the structure and decision making processes of aboriginal and non-Aboriginal cultures might pose difficulties as well: M. Boldt & J.A. Long, "Tribal Traditions and European-Western Political Ideologies: The Dilemma of Canada's Native Indians" in Boldt *et al.*, eds., *supra* note 2, 335. Professor Borrows, "With or Without You", *supra* note 51 at 639, notes, however, that "First Nations and non-Aboriginal legal sources are generally compatible when inappropriate terminology and categories of law are removed."

148 Some regard self-government agreements as not creating rights but as setting "mutually acceptable rules to govern the relationship between the three orders of government." Hogg & Turpel, *supra* note 19 at 211.

149 Hogg & Turpel, *ibid.* at 196 and 217.

150 That is not to say that the legislation creates the right or is necessary either to create it or to bind third parties, which is arguably necessary under current self-government agreements. See Hogg & Turpel, *ibid.* at 212.

5.11. The Fiduciary Duty in s. 35(1)

According to the Supreme Court of Canada, the fiduciary relationship between the Crown and aboriginal peoples is the guiding principle for the s. 35(1) analysis, and in particular is the standard against which the means used by government in achieving a valid legislative objective are scrutinized. However, Rotman suggests that the court has not constitutionalized the requirements of the fiduciary duty that have been imposed in the case law developed primarily in the context of reserve land surrenders.[151] He argues that the fiduciary duty operates primarily as an interpretive principle in the s. 35(1) analysis, and the Court has not scrutinized the Crown's actions with a view to determining whether fiduciary obligations were fulfilled with respect to the points in issue.[152]Rotman thus concludes that the fiduciary duty has been insignificant in the post-*Sparrow* decisions.[153]

According to Andrea Bowker, the *Sparrow* decision incorporated the fiduciary duty into its analysis in an attempt "to set out a framework by which to reconcile the seemingly intractable competing interests affected by the recognition of Aboriginal rights."[154] Aboriginal rights and government's legislative power will inevitably interfere with each other to some extent. Bowker suggests that the Court adopted the fiduciary duty as the principle governing the mutual limits which aboriginal rights and governmental power impose on each other.[155] This application of the fiduciary duty led the Court to develop the justification test.

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151 Rotman, *supra* note 62 at 44. After *Sparrow*, some commentators suggested that the Crown's fiduciary obligations were entrenched by s. 35(1), and that legislation violating principles of fiduciary relationships was unjustifiable. Leonard Rotman, *Parallel Paths: Fiduciary Doctrine and the Crown-Native Relationship in Canada* (Toronto: University of Toronto Press, 1996) at 256; "Envisaging", *supra* note 36 at 106 and 108.

152 Rotman, *supra* note 62 at 40-41.

153 Rotman, *supra* note 62 at 40.

154 Bowker, *supra* note 49at 2.

155 *Ibid.* at 10.

Bowker also notes that the Court extended the fiduciary obligation to government's legislative powers, thereby recognizing "that were it not for the assertion of Crown sovereignty, Aboriginal people themselves would exercise a similar power over their lives today."[156] She argues that the fiduciary duty imposed on the legislature must necessarily differ from the duties required in the surrender cases:

> When the Musqueam surrendered their land to the Crown for lease in *Guerin*, there was no reason for any broader public interest to inform the Crown's actions because it was simply acting in the place of the Band in dealing with the golf club. ...In *Sparrow*, however, ... the legislature cannot act with utmost loyalty because the public interest *is* implicated in the regulation of the fisheries. As such, the nature of the fiduciary duty discussed in *Sparrow* must be different from the duty breached in *Guerin*, even though the source is the same: the government's assumption, through the assertion of sovereignty, of rights that historically inhered in Aboriginal peoples themselves.[157]

As noted in Chapter 4, when the justification analysis has been triggered, government is purporting to act on behalf of competing aboriginal rights and non-aboriginal interests.[158] Bowker concludes that while the Crown cannot be expected to act solely on behalf of aboriginal peoples when it seeks to achieve a sufficiently important objectives for Canadians as a whole, the fiduciary duty operates to prevent government from acting as an adversary, and "it must make positive efforts to preserve Aboriginal rights, as opposed to simply having regard for them."[159]

Bowker suggests that the consultation requirement serves to discharge at least part of the Crown's obligations by giving some of the Crown's control over aboriginal interests back

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156 *Ibid.* at 15.

157 *Ibid.* at 13.

158 *Ibid.* at 13.

159 *Ibid.* at 14.

to aboriginal peoples:[160]

> By requiring the government to consult with the Aboriginal groups whose rights will be affected by a legislative measure, the Court is reducing the conflict of interest situation entailed by the government's position by enabling Aboriginal people to have a say in the protection of their rights under s. 35(1).[161]

Patrick Macklem has suggested that the consultation requirement in *Sparrow* could develop into a constitutional requirement for partnership in the formation of laws affecting aboriginal rights,[162] and Rotman has argued that the fiduciary duty may require government to return "legislative or governing powers to aboriginal peoples or [vacate] a jurisdictional area to allow for their exercise of inherent powers..."[163]

5.12. Conclusions

The literature surveyed in this chapter indicates that a return to first principles is key to the implementation of s. 35(1). The principles of contemporary cultural and physical survival are similar to principles of cultural and ecological sustainability. The current approach to aboriginal cultures and the s. 35(1) analysis may fall short of achieving these goals. The view that contemporary cultural and physical survival form the universal component of aboriginal rights is also compatible with the Court's finding that the underlying purposes of s. 35(1) are recognition of prior Aboriginal occupation and the reconciliation of that occupation with

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160 *Ibid.* at 15. Bowker argues that:

> The fiduciary obligation is rooted in the Crown's assertion of control over something that rightfully belongs to Aboriginal people. . . . in extending the fiduciary obligation to the government's legislative power, the Supreme Court recognized the fact that were it not for the assertion of Crown sovereignty, Aboriginal people themselves would exercise a similar power over their lives today.

161 *Ibid.* at 15. Rotman, in contrast, has argued that the consultation requirement is actually intended to assist the Crown carrying in acting in the bests interests of Aboriginal peoples, by requiring them to determine what those interests are Rotman, *supra* note 151 at 259.

162 Macklem, *supra* note 85 at 449.

163 Rotman, *supra* note 151 at 259.

Crown sovereignty. Contemporary survival places those purposes in context. As the courts will inevitably continue to be faced with disputes involving s. 35(1), they may return to first principles such as contemporary cultural survival, cultural sustainability and self-determination. I therefore adopt these principles as the basis for aboriginal rights in the next chapter.

Together, these principles support arguments for aboriginal rights to manage natural resources. Pentney, for example, argues that self-determination and self-preservation require aboriginal control over internal matters, and also some "power to make choices about how and when external influences, such as resource development, will affect an aboriginal society".[164] The final chapter of this thesis thus adopts a principled approach to s. 35(1) that draws on the sustainability literature as well as the literature discussed in this Chapter to answer the questions whether s. 35(1) includes rights to govern land and resource use and if so, what that might mean for federal and provincial authority to dispose of mineral and forest resources.

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[164] Pentney, *supra* note 44 at 260.

6. Conclusions

> Aboriginal and treaty hunting rights have been viewed as providing the barest of interest in the land. All they mean, it turns out, is that the Indian or Inuk who is hunting or fishing on unoccupied Crown land is not actually trespassing ... . The overseas oil company granted an exploration permit yesterday has greater standing before the law than the Indian whose ancestors used and occupied the land for 10 000 years.[1]

As discussed in Chapter 4, s. 35(1) of the *Constitution Act, 1982* recognizes and affirms existing aboriginal rights and s. 52(1) renders any law that is inconsistent with s. 35(1) of no force or effect to the extent of the inconsistency.

This thesis argues that s. 35(1) protects the resource use laws and decision making institutions of aboriginal peoples. This thesis argues that s. 35(1) recognizes and affirms the prior jurisdiction of aboriginal peoples over land and resource use. Reconciliation of prior aboriginal jurisdiction with the Crown's assertion of sovereignty may be achieved by giving effect to the terms of the confederal relationship between aboriginal peoples and Canada.[2]

The s. 35 analysis is difficult to apply outside the context in which it was formulated - the direct regulation of the exercise of aboriginal rights by federal and provincial governments. As discussed in Chapters 4 and 5, the principles underlying s. 35(1)should guide the development of the jurisprudence.

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1 P.J. Usher, "Property Rights: The Basis of Wildlife Management" in *National and Regional Interests in the North: Third National Workshop on People, Resources, and the Environment North of 60* Yellowknife, Northwest Territories, 1-3 June 1983 (Yellowknife: Canadian Arctic Resources Committee, 1983) 389 at 406.

2 Royal Commission on Aboriginal Peoples, *Partners in Confederation: Aboriginal Peoples, Self-Government, and the Constitution* (Ottawa: Royal Commission on Aboriginal Peoples, 1993) at 17.

In *Sparrow* the Supreme Court of Canada had to address the meaning and effect of s. 35(1) for the first time. As noted in Chapter 4, to ascertain the effect of s. 35(1), the Court inquired into the mischief which the provision sought to remedy. The nature of that mischief is captured in the following excerpt from the judgment: "...there can be no doubt that over the years the rights of the Indians were often honoured in the breach ... We cannot recount with much pride the treatment accorded to the native people of this country.'"[3] The Court summed up the intended effect of s. 35(1) by adopting the following quote from Professor Lyon: "Section 35 calls for a just settlement for aboriginal 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."[4] Viewed in its historical context, s. 35(1) was surely intended to trigger a change in relations between aboriginal peoples and the settler society's governments.[5]

In *Sparrow* the Court considered the government's ability to directly regulate the exercise of aboriginal fishing rights. The Court held that otherwise valid legislation can no longer[6] interfere with the exercise of aboriginal rights unless the government can justify the interference.[7] In its development of the s. 35(1) analysis, the Court has paid less attention to the mischief identified in *Sparrow*. Despite the Court's exploration of the background and need for s. 35(1) in *Sparrow*, Chief Justice Lamer, writing for the

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3 *Pasco* v. *Canadian National Railway Co.*, [1986] 1 C.N.L.R. 35 (B.C.S.C.), quoted in *R.* v. *Sparrow* [1990] 1 S.C.R. 1075 at 1103. See also *Sparrow, ibid.* at 1099; *R.* v. *Côté*, [1996] 3 S.C.R. 139; and *R.* v. *Adams*, [1996] 3 S.C.R. 101.

4 N. Lyon, "An Essay on Constitutional Interpretation" (1988) 26 Osgoode Hall L.J. 95 at 100, quoted in *Sparrow, ibid.* at 1106. See also *Sparrow* at 1108 where the Court held that "s. 35(1) is a solemn commitment that must be given meaningful content."

5 *Sparrow*, *supra* note 3 at 1106.

6 That is, as of April 17, 1982.

7 Indirect interferences, for example the issuance of a forest tenure to a third party where the third party's exercise of its rights under the tenure may interfere with the exercise of aboriginal rights, must also be justified. See for example *Halfway River First Nation* v. *British Columbia (Minister of Forests)*, [1997] 4 C.N.L.R. 45 (B.C.S.C.).

majority in *Van der Peet*, commented that the Court in *Sparrow* "did not have the opportunity to articulate the purposes behind s. 35(1) as they relate to the scope of the rights the provision is intended to protect."[8] In contrast to the approach taken in *Sparrow*, the majority in *Van der Peet* held that "the interests protected by s. 35(1) must be identified through an explanation of the basis for the legal doctrine of aboriginal rights, not through an explanation of why that legal doctrine now has constitutional status."[9] The *Sparrow* judgment suggested that we ought to consider the basis for the doctrine of aboriginal rights *and* the reason for giving those rights constitutional status in 1982.[10] The historical context and background of s. 35(1)'s enactment is essential to implementing s. 35(1) in a manner that will achieve the just settlement referred to in *Sparrow*.[11]

The *Van der Peet* judgment was in some respects a departure from *Sparrow*. The majority in *Van der Peet* identified two purposes underlying s. 35(1): the recognition of the prior occupation of Canada by aboriginal societies; and the reconciliation of that prior occupation with the Crown's assertion of sovereignty.[12] But settlers and aboriginal peoples have co-existed in Canada for hundreds of years, and so on their own these

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8 *R.* v. *Van der Peet*, [1996] 2 S.C.R. 507 at para. 22.

9 *Ibid.* at para. 29.

10 At the beginning of the judgment, *ibid.* at para. 3, Chief Justice Lamer himself wrote: "Until it is understood why aboriginal rights exist, *and are constitutionally protected*, no definition of those rights is possible." This approach is similar to that taken by the Supreme Court of Canada with respect to treaty rights in *Simon* v. *The Queen*, [1985] 2 S.C.R. 387 at 401:

> In my opinion, the treaty ... constitutes a positive source of protection against infringements on hunting rights. The fact that the right to hunt already existed at the time the treaty was entered into by virtue of the Mickmac's general aboriginal right to hunt does not negate or minimize the significance of the protection of hunting rights expressly included in the treaty.

The fact that rights protected under s. 35(1) existed before 1982 does not negate the significance of their express protection in the Constitution. The Court held in *Adams*, *supra* note 3 at para. 33, that aboriginal rights protected by s. 35(1) are not restricted to rights protected under the common law.

11 *Sparrow*, *supra* note 3 at 1106.

12 *Van der Peet*, *supra* note 8 at para. 31.

purposes do not provide an adequate framework within which to implement s. 35(1). When adjusting the s. 35(1) analysis in response to new disputes and fact situations, the Court refers to the dual purposes of s. 35(1), but not to the context within which the contemporary need to achieve those purposes has arisen.[13] The purposes identified in *Van der Peet* must be placed in the context of the history of the relationship between the settlers' governments and aboriginal peoples.

My view is that s. 35(1) calls upon Canadian governments to create space for aboriginal peoples to maintain their cultures and societies into the future. The adjustments to the s. 35(1) analysis suggested in this Chapter result from an attempt to bring the analysis in line with that object. The sustainability principles reviewed in Chapter 2 can be helpful in the implementation of s. 35(1), especially in natural resource contexts.

6.1. Sustainability Theory

As discussed in Chapter 2, sustainable resource use and management seeks to increase or maintain the welfare of the present generation while maintaining or increasing the welfare of future generations. Welfare includes physical, cultural, economic, social and political elements. These elements of welfare are often interrelated; they can be mutually reinforcing in some circumstances and in competition in others. Sustainable societies balance economic, ecological, social, political and cultural well being in order to maximize the overall well being of both present and future generations.[14]

Cultural sustainability is particularly useful in the context of 35(1). Culturally sustainable development is "development that meets the material needs of the present without compromising the ability of future generations to retain their cultural identity, social

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13 See for example *R.* v. *Gladstone*, [1996] 2 S.C.R. 723 at paras. 71-75.

14 Many sustainability theorists argue that the various attributes of wellbeing must be shared equitably among members of the society. See Chapter 2 *infra*.

relationships and values..."[15] This, I argue, is the essence of s. 35(1). While Canadian governments have power to make laws aimed at meeting the material needs of Canadians, such laws must not compromise the ability of present and future generations of aboriginal peoples to retain their cultures. The recognition and reconciliation contemplated by s. 35(1) should promote cultural sustainability for aboriginal peoples.

Some of the other principles of sustainability theory discussed in Chapter 2 can be useful in the s. 35(1) analysis as well. For example, the principle of keeping options open is central in sustainability theory.[16] In light of the historical mischief addressed by s. 35(1), the provision prohibits Parliament and the provincial legislatures from foreclosing the cultural options available to aboriginal peoples. Section 35 preserves aboriginal peoples' ability to choose to participate in their cultures. To the extent that cultural sustainability for aboriginal peoples depends upon ecological sustainability, the provision may require governments to make decisions that aim to maximize ecological options as well.

Elements of the Supreme Court of Canada's approach to s. 35(1) reflect a partial, though not explicit adoption, of some sustainability principles, including cultural sustainability. The current approach, however, falls short of embracing cultural sustainability. In this Chapter I will suggest that explicit and consistent application of sustainability principles in the s. 35(1) analysis could facilitate reconciliation, or a sustainable co-existence of aboriginal societies and the rest of Canadian society.[17] Section 35 recognizes the nation to nation relationship between the settler governments and aboriginal peoples and incorporates the terms of the constitutions governing their relationships.

The following section discusses the nature and scope of aboriginal rights.

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15 F. Berkes *et al.*, "Wildlife Harvesting and Sustainable Regional Native Economy in the Hudson and James Bay Lowland, Ontario" (1994) 47(4) Arctic 350 at 358.

16 See section 2.6 *supra*.

17 This thesis considered the *Van der Peet* analysis only. A similar approach could be taken to aboriginal title and treaty rights.

6.2. The Nature and Scope of Aboriginal Rights

The Court's approach to identifying aboriginal rights is, in theory, consistent with the view that cultural sustainability is at the heart of s. 35(1). According to the cases reviewed in Chapter 4, aboriginal rights protect the integral and defining features of aboriginal cultures and enable aboriginal peoples to preserve their relationships with their lands.[18] Aboriginal rights are group rights,[19] and the most basic group right is self-preservation.

Unlike the Court in *Sparrow*, which explored the historical and contemporary background relevant to s. 35(1), the majority in *Van der Peet* held that the appropriate point of departure when considering s. 35(1) is an explanation of the common law doctrine of aboriginal rights.[20] The Court explains the rationale underlying the common law doctrine as follows: "The doctrine of aboriginal rights exists ... because of one simple fact: when Europeans arrived in North America, aboriginal peoples were already here, living in communities on the land, and participating in distinctive cultures, as they had done for centuries."[21] Because the Court did not address the reason why, hundreds of years after contact, there was a need to give aboriginal rights constitutional protection, the Court's analysis cannot enable cultural survival. Had cultural sustainability been the point of departure in *Van der Peet*, the test for identifying aboriginal rights might be different.

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18 *Delgamuukw* v. *British Columbia* [1997] 3 S.C.R. 1010 at paras. 136 and 153; *Sparrow*, *supra* note 3 at 1099; *Adams*, *supra* note 3 at para. 33; *Côté*, *supra* note 3 at para. 52; and *Van der Peet*, *supra* note 8 at paras. 44-45.

19 *Sparrow*, *ibid.* at 1112.

20 *Van der Peet*, *supra* note 8 at para. 29. Contrast the approach taken *Sparrow*, *supra* note 3.

21 *Ibid.* at para. 30.

The current test holds that "in order to be an aboriginal right an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right."[22] As noted in the literature reviewed in Chapter 5, the test protects pre-contact activities and not contemporary cultures and societies.[23] Two main criticisms of the current approach are its focus on aboriginal peoples' pre-contact ancestors and its focus on narrowly identified activities.

In *Van der Peet*, the majority held that "it must not be forgotten that the rights [s.35(1)] recognizes and affirms are *aboriginal*."[24] Since s. 35(1) is concerned with the prior occupation of Canada, "the test for identifying the aboriginal rights ... must be directed at identifying the crucial elements of those pre-existing distinctive societies."[25] This approach does not permit aboriginal cultures to exist as contemporary cultures. Professor Borrows offers an approach more consistent with cultural sustainability. He argues that aboriginal rights should be identified by asking "what is central, significant and distinctive to the survival of these communities *today*"?[26]

The current test implies that aboriginal peoples ought to choose between participating in their cultures and participating in modern life. We do not impose that choice on other

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22 *Ibid.* at para. 46.

23 J.J. Borrows & L.I. Rotman, "The *Sui Generis* Nature of Aboriginal Rights: Does It Make a Difference?" (1997) 36 Alta. L. Rev. 9; L.I. Rotman, "Creating a Still-Life Out of Dynamic Objects: Rights Reductionism at the Supreme Court of Canada" (1997), 36 Alta L. Rev. 1 at 2; J. Borrows, "The Trickster: Integral to a Distinctive Culture" (1997) 8 Constitutional Forum 27 (hereinafter "Trickster"); J. Borrows, "Fish and Chips: Aboriginal Commercial Fishing and Gambling Rights in the Supreme Court of Canada" (1996) 56 C.R. (4th) 230 (hereinafter "Fish and Chips"); and R.L. Barsh & J.Y. Henderson, "The Supreme Court's Van der Peet Trilogy: Naive Imperialism and Ropes of Sand" (1997) 42 McGill L.J. 993.

24 *Van der Peet, supra* note 8 at para. 17 (emphasis added). Chief Justice Lamer similarly wrote, at para. 20, that: "aboriginal rights ... are rights held by aboriginal people because they are aboriginal."

25 *Van der Peet, ibid.* at para. 44.

26 "Trickster", *supra* note 23 at 28-29 (emphasis added).

cultures,[27] and as some of the literature canvassed in Chapter 3 shows, change and continuity are consistent, and both are prerequisites for contemporary cultural survival. Aboriginal peoples had to adapt in response to contact with Europeans and must continue to adapt to the challenges posed by co-existence with non-aboriginal Canadians.

Another obstacle to the achievement of cultural sustainability and self-determination in the analysis is the focus on narrowly defined activities. The *Van der Peet* test focuses on the "nature of the action which the applicant is claiming was done pursuant to an aboriginal right."[28] The Court separates out the elements of practices, customs and traditions and protects only those activities that can be shown to be independently integral.[29] The current approach equates the activity engaged in with the right being asserted. An activity which is evidence of an aboriginal right or an example of the exercise of a right may lose its cultural significance in the absence of protection of the broader right. Protection of individual activities does not protect the culture.[30] This compartmentalized approach to aboriginal rights is contrary to aboriginal philosophies and worldviews.[31]

The only way to achieve cultural sustainability is to give effect to the institutions of aboriginal societies and to allow aboriginal peoples to determine and shape their own

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27 See the *International Covenant on Civil and Political Rights*, U.N.T.S. No. 14668, vol. 999 (1976), p. 171, Article 27: "In those States in which ethnic, religious or linguistic minorities exits, persons belonging to such minorities shall not be denied the right, in community with other members of their group, to enjoy their own culture, and to profess and practise their own religion, or to use their own language." See *Lovelace* v. *Canada* (1981), 36 U.N. GOAR Supp. (No. 40) Annex XVIII; U.N. Doc. A/36/40.

28 *Van der Peet supra* note 8 at para. 54.

29 The inquiry into what is integral is apparently objective, rather than being ascertained from the perspective of the aboriginal peoples claiming the rights.

30 For example, language rights should not be limited to activities such as speaking and writing that must each be separately proven.

31 Barsh & Henderson, *supra* note 23 at 1000-1001; "Fish and Chips", *supra* note 23 at 236; and A. Bowker, "*Sparrow's* Promise: Aboriginal Rights in the B.C. Court of Appeal" (1995), 53 U.T. Fac. L. Rev. 1 at 27-29 argue that *Sparrow* suggests that s. 35 as protects cultures, while *Van der Peet* the Court developed a test that only protects activities.

futures. Instead of inquiring into activities, aboriginal rights could be defined with reference to the laws of aboriginal societies. In *Van der Peet*, the Court purported to adopt the doctrine of continuity as expressed by the High Court of Australia decision in *Mabo*:

> "Traditional laws" and "traditional customs" are those things passed down, and arising, from the pre-existing culture and customs of aboriginal peoples. ... To base aboriginal title in traditional laws and customs, as was done in *Mabo*, is, therefore, to base that title in the pre-existing societies of aboriginal peoples. This is the same basis as that asserted here for aboriginal rights.[32]

While the doctrine of continuity holds that aboriginal laws continued to exist after contact and sovereignty until actually altered by legislation, the *Van der Peet* decision relies on the doctrine to limit rights to pre-contact activities. The decision did not consider the extent to which aboriginal laws and related institutions are themselves protected under s. 35(1).

As noted in Chapter 4, the decisions suggest a reluctance to recognize aboriginal laws. Thus, for example, the Court referred to the aboriginal "perspective" and the non-aboriginal "legal system" in *Van der Peet*, and held that both must be given equal weight in defining aboriginal rights.[33] In the end aboriginal rights must conform to the non-aboriginal legal system, because the aboriginal legal system is subordinated to the rank of a perspective that must be taken into account. The current approach arguably transforms claims based on aboriginal laws and customs into narrower claims acceptable to the non-aboriginal system but no longer cognizable to the aboriginal legal systems in which they find their origin. In *Nikal* the Court held that there was a right to regulate the internal exercise of fishing rights, but that such a right did not amount to freedom to not comply with Department of Fisheries and Oceans directions. The Court held that the right did not

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32 *Van der Peet, supra* note 8 at para. 40.

33 *Ibid.* at para. 49. This approach is inconsistent with cultural sustainability, which cannot be achieved by outsiders determining what specific activities require protection and how.

accord freedom to live without laws.[34] Implicit in the Court's reasoning is the assumption that aboriginal peoples are lawless.

The *Pamajewon* decision allows for the possibility of self-government rights, but can be interpreted as restricting self-government powers to the internal regulation of the exercise of rights.[35] The decision applies *Van der Peet*'s restrictive approach to claims of rights to self-govern. While the appellants claimed "a broad right to manage the use of their reserve lands,"[36] the Court held that the correct characterization of their claim was "that they are claiming the right to participate in, and to regulate, high stakes gambling activities on the reservation."[37] The Court asked whether the activity was engaged in and regulated by the First Nation prior to contact and whether it was integral to the pre-contact culture. This inquiry is irrelevant to the question whether the right claimed contributes to contemporary cultural survival.

The following section considers whether s. 35(1) protects aboriginal rights to manage land and resource use.

6.2.1. Aboriginal Rights to Manage Land and Resource Use

The physical survival of all future generations depends upon ecological sustainability. Some of the literature discussed in Chapter 2 highlights the fact that for aboriginal peoples, ecological sustainability may be a prerequisite to their cultural survival as well.[38]

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34 *R.* v. *Nikal*, [1996] 1 S.C.R. 1013 at para. 82.

35 *R.* v. *Jones and Pamajewon*, [1996] 2 S.C.R. 821.

36 *Ibid.* at para. 27.

37 *Ibid.* at para. 26.

38 The effects on physical and cultural survival may not always be the same. For example, the cultural effect of a clearcut within a hunting territory may be more immediate and certain than its ecological effect on the health of the ecosystem.

In many aboriginal cultures, natural resource use and relationships with lands and resources are intertwined with cultural identity, social relationships and values.[39]

Does s. 35(1) protect resource management rights? As argued by several of the writers referred to in Chapters 3 and 5, cultural sustainability cannot be achieved absent some measure of aboriginal control over land and resource use that extends beyond self-regulation of the exercise of rights. Aboriginal peoples must be able to restrict access by outsiders and protect their cultures and the ecosystems which support their cultures from external threats.[40] Such rights are the contemporary form of the kinds of management systems studied by the researchers referred to in Chapter 3.

Section 35 cannot protect aboriginal cultures if it protects harvesting activities but not the larger context and institutions within which aboriginal peoples participate in those activities and institutions.[41] Resource use rights focused narrowly on specific activities will be ineffective without aboriginal jurisdiction to protect lands and resources. That jurisdiction, while it may not have been exercised to regulate hard rock mining prior to contact, has always been "meaningfully related or linked" to harvesting activities.[42] The laws and legal systems of aboriginal peoples are essential to the resilience and integrity of aboriginal societies, as are the worldviews embodied within these laws. Just as loss of a species is irreversible, loss of an element of an aboriginal culture may also be irreversible.

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39 See M. Gadgil, F. Berkes & C. Folke, "Indigenous Knowledge for Biodiversity Conservation" (1993) 22 Ambio 151 at 155; F. Berkes, "Co-management: Bridging the Two Solitudes" (1994) 22(2/3) Northern Perspectives 18 at 19; Ontario Round Table on Environment and Economy, *Report of the Native People's Circle on Environment and Development* (Queen's Printer for Ontario, 1992) at 25.

40 R. Kapashesit & M. Klippenstein, "Aboriginal Group Rights and Environmental Protection" (1991) 36 McGill L.J. 925 at 955-958; W. Pentney, "The Rights of the Aboriginal Peoples of Canada in the Constitution Act, 1982 Part II - Section 35: The Substantive Guarantee" (1988) 22 U.B.C. L. Rev. 207 at 260; and P. Macklem, "First Nations Self-Government and the Borders of the Canadian Legal Imagination" (1991) 36 McGill L.J. 382 at 451.

41 See *Saanichton Marina Ltd.* v. *Claxton* (1989), 36 B.C.L.R. (2d) 79 (B.C.C.A.) where the Court held that the treaty right to fish included habitat protection. See also *R.* v. *Sundown*, [1999] S.C.J. No. 13 (QL); and *Simon*, *supra* note 10.

42 *Sundown*, *ibid.* at para. 30.

Rights to manage lands and resources are also consistent with the recognition of the prior occupation of Canada by organized aboriginal societies and the principle of continuity implied in that recognition.[43] The majority judgment in *Delgamuukw* acknowledged that prior occupation includes "pre-existing systems of aboriginal law."[44] To the extent that s. 35(1) embodies principles of justice, as suggested *Sparrow,*[45] the provision may require government to return to aboriginal peoples powers it has taken away from them.[46] As an intersocietal body of law, aboriginal rights should include aboriginal laws and legal institutions. To the extent that s. 35(1) embodies the doctrine of continuity, aboriginal laws relating to land and resource use which were not explicitly extinguished prior to 1982 survive and are protected in their contemporary form.

Rights to manage forest and mineral use and development are consistent with self-determination as well. As some of the authors referred to in Chapter 5 argue, aboriginal peoples' ability to choose their own paths is crucial to their ability to continue as societies. To the extent that s. 35(1) incorporates self-determination, it requires that future options for aboriginal peoples not be foreclosed. Aboriginal peoples' ability to choose to participate in management and even use of resources depends on their ability to protect resources and habitats, and their ability to participate fully in their own land and resource use systems.

The above arguments for aboriginal rights to govern land and resource use are based on first principles. Can resource management rights be established in accordance with the

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43 J. Borrows, "With or Without You: First Nations Law (in Canada) (1996) 41 McGill L.J. 629 at 640 ("With or Without You"); and "Fish and Chips", *supra* note 23 at 238.

44 *Supra* note 18 at para. 126. See also "With or Without You", *ibid.* at 640 and 646.

45 See *Sparrow*, *supra* note 3; *Côté*, *supra* note 3; and *Adams*, *supra* note 3.

46 Report of the Royal Commission on Aboriginal Peoples, *Volume 1: Looking Forward, Looking Back* (Ottawa: Minister of Supply and Services, 1996) at 6.

Van der Peet test?[47] The studies canvassed in section 3.1 illustrate that rules and institutions governing land and resource use are, and have always been integral and defining features of distinctive aboriginal cultures.[48] They are therefore practices, customs and traditions integral to distinctive aboriginal cultures.

As noted above, however, the Court endeavours to precisely define the nature of aboriginal rights. The Court will narrow down claims to broad self-government rights under s. 35(1). For example, a right manage the use of reserve lands is too broad.[49] Each aspect or exercise of self-government must be proven individually, and the Court asks whether the regulated activity, and not just the right to regulate, is an aboriginal right.[50] A right to regulate gambling could therefore not be proven absent proof of a right to gamble. Can a right to regulate mineral exploration and development be proven absent proof of a right to explore and develop minerals or proof of pre-contact use of minerals?

A pre-occupation with specific activities may preclude management rights from the outset. The focus is properly on the management system as a whole and what is required today to ensure its continued effectiveness. Resource management or land stewardship systems such as those referred to in Chapter 3 are integral elements of distinctive cultures. To be effective and fulfill their roles in contemporary society, these management systems must extend to land use decisions and forest and mineral dispositions.

A distinction must be drawn between a right and an example of its exercise. The court carves up rights much the way we carve up land, resources and governmental jurisdiction.

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47 *Van der Peet*, *supra* note 8 at para. 46. See Chapter 4 *infra*.

48 See M. Asch & P. Macklem, "Aboriginal Rights and Canadian Sovereignty: An Essay on *R.* v. *Sparrow*" (1991) 29 Alta. L. Rev. 498; B. Ryder, "The Demise and Rise of the Classical Paradigm in Canadian Federalism: Promoting Autonomy for the Provinces and First Nations" (1991) 36 McGill L.J. 308; and "With or Without You", *supra* note 43.

49 *Pamajewon*, *supra* note 35 at para. 27.

Regulation of forestry and regulation of mining can be examples of the exercise of the same broader right. Aboriginal laws must play a role equal to that played by the common law in the definition of aboriginal rights. Aboriginal cultures and laws, like ecosystems, do not conform to arbitrary boundaries and divisions.[51] Several of the scholars referred to in Chapter 5 suggest that cultures and laws, not activities, are the proper subject of protection under s. 35.[52] If laws governing land and resource use are integral to aboriginal cultures they should be protected under s. 35(1).

Aboriginal rights to manage land and resource use could be defined as rights to act as stewards of their territories. In the communities discussed in Chapter 3, the role of stewards is to take care of the land in order to ensure that the land continues to support the culture into the future. Aboriginal peoples should accordingly be regarded as having jurisdiction over the lands and resources they rely upon for physical and cultural survival today.

While large scale mineral and forestry dispositions might be characterized as "non-aboriginal" and in relation to non-aboriginal activities, their regulation should not be denied to aboriginal peoples on that basis. Rather than ask, for example, whether in pre-contact times hard rock mining and its regulation were integral to the distinctive aboriginal culture, the proper inquiry is whether the society in question had rules or institutions governing land and resource use. The *Delgamuukw* decision suggests that

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50 *Pamajewon, supra* note 35 at para. 28.

51 Sustainability theory promotes integrated decision making and an ecosystem-based view of the natural world. As noted in Chapter 2, the independent management of various resources within the same ecosystem is an unsustainable form of resource management.

52 Justice Lamer himself stated in *Van der Peet, supra* note 8 at para. 40, that the nature and incidents of aboriginal rights are ascertained through examination of the laws of aboriginal peoples. See also *Mabo* v. *Queensland [No. 2]* (1992), 175 C.L.R. 1 (H.C.).

aboriginal jurisdiction may be limited so that aboriginal peoples may not exercise it in a manner that is irreconcilable with the nature of the group's attachment to the land.[53]

Specific activities such as rotational harvesting of wildlife or controlling hunters' access to territories are properly recognized as the exercise or evidence of broader stewardship rights. Where aboriginal peoples exercised such authority prior to contact, and where such practices continue today[54] they should be recognized as part of the distinctiveness of aboriginal cultures and protected accordingly. To define the scope of the right today we should ask what kind of stewardship or resource management roles are needed to ensure contemporary cultural survival. For example, the regulation of access to traditional lands for hard rock mineral exploration and development can be viewed as the exercise of a broader right to regulate access to and use of habitat.

The extension of aboriginal resource management to settler populations and situations and conflicts which did not exist prior to contact is a necessary evolution of aboriginal management systems. First Nations should not be required to show the impossible - that prior to contact aboriginal laws and legal institutions addressed incompatible uses of lands and resources by settlers.

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53 *Delgamuukw*, *supra* note 18 at para. 128, held that aboriginal peoples may not use aboriginal title lands in a manner that is "irreconcilable with the nature of the occupation of that land and the relationship that the particular group has had with the land which together have given rise to aboriginal title in the first place." Lamer C.J.C. is presumably referring to the nature of the pre-sovereignty attachment of the group to the land. The limitation imposes sustainability requirements on aboriginal peoples' use of lands. The Court's imposition of this limit suggests that the Court recognizes that aboriginal peoples had rules relating to these matters. If aboriginal peoples cannot make unsustainable decisions now, that is because the land and resource use systems of aboriginal peoples' ancestors were designed to ensure that the land sustained aboriginal peoples and cultures into the future. The effect of the limitation is that a purported exercise of decision making authority over aboriginal title lands is *ultra vires* if it is inconsistent with the continuity of the relationship of an aboriginal community to its land over time. The limitation should arguably operate to restrict government action as well.

54 Or where Aboriginal peoples now wish to reassert their jurisdiction. Continuity of the practice tradition or custom from pre-contact until the present, according to *Van der Peet*, does not require an unbroken chain.

The rules themselves may have changed since pre-contact times. In the same way the Court distinguishes between "traditional" practices of bartering and modern "commercial sales", so it might emphasize that in "aboriginal" times, authority was exercised internally, or enforced by suggestion only. Protection of the contemporary form and content of aboriginal management systems would be more consistent both with cultural sustainability and with the Court's rejection of a "frozen rights" approach to aboriginal rights.[55]

Cultural sustainability requires resilience; aboriginal cultures cannot survive if they do not adapt to change. As discussed in Chapter 3, mixed economies are evidence of the continuity and persistence of aboriginal cultures and relationships with lands and resources.[56] They are strategies that enable cultural sustainability. Management systems must evolve to account for changes within aboriginal societies and also in response to outside influences. While aboriginal peoples did not regulate the activities of Europeans

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[55] See *Sparrow*, *supra* note 3 at 1093; and *Sundown*, *supra* note 41 at para. 29. See also J. W. Zion, Searching for Indian Common Law" in B.W. Morse & G.R. Woodman, eds., *Indigenous Law and the State* (Dordecht, Holland: Foris, 1988) 121 at 125; and F. Berkes, "The Role of Self-Regulation in Living Resources Management in the North" in M.M.R. Freeman, ed., *Proceedings: First International Symposium on Renewable Resources and the Economy of the North (Banff, Alberta, May 1981)* (Ottawa: Association of Canadian Universities for Northern Studies, 1981) 166 at 170-172.

[56] The literature reviewed in Chapter 3 shows that in the mixed economies of the north, the traditional or subsistence sector remains culturally important. T. Fenge & W.E. Rees, eds., *Hinterland or Homeland? Land-use Planning in Northern Canada* (Ottawa: Canadian Arctic Resources Committee, 1987) at 8; J.A. McDonald, "The Marginalization of the Tsimshian Cultural Ecology: The Seasonal Cycle" in B.A. Cox, ed., *Native People Native Lands: Canadian Indians, Inuit and Metis* (Ottawa: Carleton University, 1988) 199 at 214-215; F. Berkes et al., *supra* note 15 at 351 and 359; H. Fast & F. Berkes, *Native Land Use, Traditional Knowledge and the Subsistence Economy in the Hudson Bay Bioregion* Technical Paper Prepared for the Hudson Bay Program (Canadian Arctic Resources Committee & the Municipality of Sanikiluaq, 1994) at 1; P.J. Usher, *Assessing the Impact of Industry in the Beaufort Sea Region, A Report to the Beaufort Sea Alliance* (Ottawa, December 1982) at 17; F. Berkes *et al.*, "The Persistence of Aboriginal Land Use: Fish and Wildlife Harvest Areas in the Hudson and James Bay Lowland, Ontario" (1995) 48 Arctic 81 at 81-82; H.A. Feit, "The Future of Hunters Within Nation-States: Anthropology and the James Bay Cree" in E. Leacock & R. Lee, eds., *Politics and History in Band Societies* (Cambridge: Cambridge University, 1982) 373 at 389-395 and 403; and P. George, F. Berkes & R.J. Preston, "Aboriginal Harvesting in the Moose River Basin: A Historical and Contemporary Analysis" (1995) 32 Canadian Review of Sociology and Anthropology 69 at 71-73.

prior to contact, and did not regulate industrial activities prior to industrialization, the extension of authority beyond internal regulation and beyond non-commercial wildlife harvesting activities should be acknowledged as a continuity of authority from pre-contact times. If laws can form or define rights, they must be able to do so from a contemporary perspective. Pre-contact laws may have limited relevance or effectiveness in contemporary Canada.

Similarly, as discussed in Chapter 4, the difference in form or enforcement of aboriginal laws and legal systems should not preclude their protection.[57] For example, the absence of written or codified laws or formal enforcement and punishment for failure to observe laws should not preclude the recognition of laws governing land and resource use.[58] Regulation in a more modern form enforceable against all who wish to use or access the land in question, could be recognized as a continuation of traditional systems. The courts should also reject suggestions that aboriginal management systems are really religions or beliefs which are distinguishable from management systems which can be imposed on those who do not share the same beliefs.

As discussed in Chapter 3, examples of resource depletion by aboriginal peoples or of breakdowns in aboriginal management systems should not be relied upon to deny the existence of management systems or rights to continue those systems.[59] First Nations

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57 See Chapter 3.

58 See W. Moss, "Inuit Perspsectives on Treaty rights and Governance Issues" in Royal Commission on Aboriginal Peoples, *Aboriginal Self-Government: Legal and Constitutional Issues (Papers Prepared as part o the Research Program of the Royal Commission on Aboriginal Peoples* (Ottawa: Supply and Services, 1995) 55 at 60; K. McNeil, "Envisaging Constitutional Space for Aboriginal Governments" (1993) 19 Queen's L.J. 95 at 124-125; M. Asch, "Errors in Delgamuukw: An Anthropological Perspective" in in F. Cassidy, ed., *Aboriginal Title in British Columbia: Delgamuukw v. the Queen: Proceedings of a Conference held Sept. 10 & 11, 1991* (Lantzvill, B.C.: Oolicahn Books, 1992) at 224-225; J. Richstone, "The Inuit and Customary Law: Constitutional Perspectives" in Morse & Woodman, eds., *supra* note 55, 239 at 248; and Royal Commission on Aboriginal Peoples, *supra* note 2 at 24-25. It may be, nonetheless, that First Nations' laws will have to be codified in some manner in order to make the laws known to non-aboriginal land and resource users.

59 See Usher, *supra* note 1 at 394; and Berkes, *supra* note 55 at 170.

should be able to adapt their management systems and techniques in response to failures and successes, just as the settler society can and should.[60] Aboriginal peoples must be allowed to develop their understandings of natural systems and the effect of human activities on those systems, and adapt their practices accordingly. Where wildlife populations have decreased, it is inappropriate to focus on aboriginal overharvesting and population growth, while ignoring the effects of other harvesters and the habitat destruction and fragmentation resulting from the exploitation of non-wildlife resources.[61] In *Van der Peet* the majority held that an aboriginal community does not have to establish an unbroken chain of carrying out the activity from the time of contact to the present.[62] In particular, the requirement of continuity should be relaxed where disruption in the exercise of authority over land and resources is attributable to the refusal of colonizers to recognize these rights.[63]

The fact that all organized societies must to some extent regulate land and resource use should not preclude aboriginal rights to regulate land and resource use. As noted by Professor McNeil, the right is no less distinctive, simply because it relates to something in which all societies engage.[64]

Alternatively, resource management might be protected as necessarily incidental to either harvesting or internal management rights. From the perspectives of aboriginal peoples, codes of conduct, beliefs and stewardship or management systems are inseparable from

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60 D.J. Buege, "The Ecologically Noble Savage Revisited" (1996) 18 Environmental Ethics 71 at 83, argues that "Expecting ecological nobility from these peoples is unfair to them; native peoples must violate the stereotype simply to survive."

61 Berkes, *supra* note 55 at 171, notes that "commercialization of a subsistence hunt is probably one of the better documented mechanisms by which resources come to be overharvested."

62 *Van der Peet, supra* note 8 at para. 65; and *Delgamuukw supra* note 18 at para. 153.

63 The studies in Chapter 3 reveal deliberate management by aboriginal peoples. In many cases where such management does not continue, that is because of the intrusion of incompatible settler systems.

64 *Van der peet, supra* note 8 at para. 56; and K. McNeil, "Aboriginal Title and Aboriginal Rights: What's the Connection?" (1998) 36 Alta. L. Rev. 117 at 124.

harvesting practices.[65] Aboriginal peoples have always regulated the use of wildlife and lands as an essential aspect of harvesting resources. To pass on resource harvesting practices to future generations, aboriginal peoples must be able to pass on their cumulative knowledge, beliefs, ethics and management systems, not just the skills involved in specific harvesting activities.[66] As discussed in Chapter 5, Professor Borrows argues that "the Aboriginal right to hunt is made effective by associated First Nations laws and customs. Under the principles set forth in *Simon*, therefore, the existence and protection of First Nations laws are implied in the exercise of other specific Aboriginal rights."[67]

For aboriginal rights to hunt to remain effective today the extension of First Nations laws to forest and mineral dispositions may be necessary. Internal regulation and laws aimed at ensuring continued harvests may be rendered ineffective without the incidental right to protect lands and resources from outsiders.[68] Based on the principles underlying the *Simon* and *Côté* decisions, to the extent that jurisdiction over the use of lands and resources by outsiders is necessary to preserve harvesting rights, that jurisdiction may be protected along with the right to harvest regardless of proof of pre-contact management. If habitat protection is necessary to ensure the continuity of harvesting practices, then it should be protected as an incidental right.[69] Control over forestry and mining may be necessary to ensure that rights to harvest trees, fish or wildlife are effective.[70]

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65 For example, the decision makers are harvesters.

66 See *Côté*, *supra* note 3.

67 "With or Without You" *supra* note 43 at 642-3.

68 On incidental rights, see *Sundown*, *supra* note 41.

69 In *Saanichton*, *supra* note 41 at 58, a treaty right to fish included the incidental right to habitat: "...the protection afforded to the Indians by the treaty provides them with a basis for objecting to the development of the proposed marina and that their objection should be sustained." See also "With or Without You" *supra* note 43 at 642-43; and "Fish and Chips", *supra* note 23 at 243.

70 See *Saanicton*, *ibid.*

The following section addresses the identification of the subject matter of aboriginal jurisdiction.

6.2.2. Jurisdiction over What?

Hogg and Turpel offer a useful approach to identifying the scope of aboriginal jurisdiction. As noted in Chapter 5, they adopt a modified version of the Charlottetown Accord's contextual statement and suggest that aboriginal peoples should have authority:

> (a) to safeguard and develop their languages, cultures, economies, identities, institutions and traditions; and
> (b) to develop, maintain and strengthen their relationship with their lands, waters and environment
> so as to determine and control their development as peoples according to their own values and priorities and ensure the integrity of their societies...[71]

This approach to the subject matter of aboriginal authority reflects the principles of self-determination and cultural sustainability. It is also consistent with the "integral to a distinctive culture test" of *Van der Peet* to the extent that aboriginal peoples have or have had laws and institutions relating to these matters. Aboriginal jurisdiction over forestry and mining is necessary to "develop, maintain and strengthen their relationship with their lands, waters and environment" and "determine and control their development as peoples according to their own values and priorities." Self-regulation will often be insufficient to achieve these goals. Jurisdiction must be territorially based and enforceable against anyone seeking to carry out an activity on, or gain an interest in, culturally significant lands and resources.

As noted above, aboriginal jurisdiction might not include jurisdiction to authorize activities or dispositions that are irreconcilable with the nature of aboriginal peoples' (pre-contact) relationships with the land. The right might be characterized as a right to protect the lands subject to aboriginal jurisdiction. For example, while a First Nation

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[71] P.W. Hogg & M.E. Turpel, "Implementing Aboriginal Self-Government: Constitutional and Jurisdictional Issues" (1995) 74 Cdn. Bar Rev. 187 at 195.

may have a right under s. 35(1) to prevent a forest disposition it may not have jurisdiction to dispose of forest resources if the disposition is inconsistent with the First Nation's relationship with the forested lands.[72]

In sum, I have argued in this section that aboriginal peoples have authority over access to and use of lands and resources where such access and use potentially affects aboriginal peoples' cultures or relationships with their lands and waters. Section 35(1) protects aboriginal rights to control use of and access to resources and habitat. Aboriginal jurisdiction over forest and mineral dispositions can be established on the basis of first principles, in accordance with the integral to a distinctive culture test as a contemporary form of aboriginal resource management, or as a right which is reasonably incidental to either internal management systems or harvesting rights. Aboriginal peoples asserting such jurisdiction would have to provide evidence of pre-contact regulation of resource use. I have argued that aboriginal peoples should not be required to show that they engaged in hard rock mining or industrial forestry, or regulated such activities, prior to contact.

The following section considers the question of extinguishment.

6.3. Extinguishment

It was noted in Chapter 4 that s. 35(1) does not revive rights extinguished prior to 1982.[73] According to *Delgamuukw*, any extinguishment of aboriginal rights post-Confederation had to be effected by the federal government. The literature in Chapter 3 reveals that in many instances where aboriginal peoples used to, but no longer, engage in resource

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[72] Aboriginal jurisdiction to protect lands can limit the ability of a province or the federal government to dispose of resources in the same way that federal jurisdiction over fisheries and navigable waters can limit provincial resource dispositions. See G.V. La Forest, *Natural Resources and Public Property under the Canadian Constitution* (Toronto: University of Toronto, 1969) at 147-148.

[73] See *Van der Peet*, *supra* note 8 at para. 28, where Chief Justice Lamer writes: "Subsequent to s. 35(1) aboriginal rights cannot be extinguished..."

management, the intrusion of incompatible settler systems has precluded aboriginal peoples from effectively participating in their own systems. Even where such management systems were federal, however, there is no clear and plain legislative intent to extinguish aboriginal rights to manage the use of lands and resources. The *Forests Act* and CMRs simply ignore aboriginal jurisdiction. Aboriginal rights under s. 35(1) are not limited to rights recognized by the common law or colonizers.[74]

Two issues relevant to extinguishment were identified in Chapters 4 and 5. The first is whether aboriginal legal systems could survive the Crown's assertion of sovereignty and the second is whether such systems could survive confederation and the purportedly exhaustive distribution of powers between the federal and provincial governments.

6.3.1. Aboriginal Laws and the Assertion of Sovereignty

My conclusion is that aboriginal jurisdiction survived the Crown's assertion of sovereignty over the colonies now included in Canada. Prior to the assertion of sovereignty, Canada was inhabited by indigenous peoples with laws of their own, and according to the doctrine of continuity, indigenous laws continue until actually altered by a positive constitutional act of the Crown or Parliament. The basic principles of the common law are consistent with the recognition of aboriginal authority over land and resource use.[75] The decision of the British Columbia Court of Appeal in *Delgamuukw* is inconsistent with the doctrine of continuity. There is no justification for the position that

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74 *Delgamuukw*, *supra* note 18 at paras. 133 and 136; and *Côté*, *supra* note 3 at para. 52.

75 See B. Slattery, "Understanding Aboriginal Rights" (1987) 66 Canadian Bar Review 727 at 738, notes that:

> When the Crown gained sovereignty over an American territory, colonial law dictated that the local customs of the native peoples would presumptively continue in force and be recognizable in the courts, except insofar as they were unconscionable or incompatible with the Crown's assertion of sovereignty.

England's common law automatically applied throughout the colonies, to all inhabitants, and to the exclusion of the operation of indigenous laws.

According to *Sparrow*, while legislative power is vested in the Crown in parliament, s. 35(1) does give the courts authority to question sovereign claims made the Crown. The vesting of legislative power in the Crown did not necessarily divest aboriginal peoples of their rights to exercise jurisdiction over land and resource use.

After the Crown asserted sovereignty over the colonies now forming Canada it respected aboriginal peoples' rights to remain autonomous and decide whether to dispose of lands by entering into treaty relationships.[76] The relationship between aboriginal peoples and the Crown was confederal. Aboriginal rights should be understood in accordance with the terms under which aboriginal peoples entered into confederal relationships with the Crown, whether by way of treaty or otherwise.[77]

The following section considers the effect of confederation and the supposed exhaustive division of powers between these two orders of government.

6.3.2. Aboriginal Laws and the Exhaustive Division of Powers in the *Constitution Act, 1867*

The case law is unsettled on the question whether the distribution of legislative powers under the *Constitution Act, 1867*, extinguished aboriginal jurisdiction over land and resource use. I conclude that no blanket extinguishment was effected by the federal and provincial governments' entry into confederation. The *Constitution Act, 1867* simply did not speak to the question of aboriginal jurisdiction. As noted by several writers referred

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[76] Royal Commission on Aboriginal Peoples, *supra* note 2 at 11-13.

[77] *Ibid.* at 17-19.

to in Chapter 5, the failure to address aboriginal jurisdiction could not have extinguished such jurisdiction.

It is well established that non-recognition of a right does not extinguish the right.[78] The division of powers, and the doctrine of exhaustiveness, were developed without regard for aboriginal peoples and laws, and the division of powers does not reveal a clear and plain legislative intent to extinguish aboriginal rights.[79] The division of powers in ss. 91-95 set out the parameters of the relationship between the federal and provincial governments. The rules relating to relations with aboriginal governments have always been found in other constitutional documents such as the *Royal Proclamation of 1763*, and now, s. 35(1). Sections 91-95 must be read in a manner consistent with those other constitutional provisions. Section 91(24) must be read together with s. 35(1), which represents the conditions upon which aboriginal peoples agreed to share the land with the settlers. Section 35 is remedial and thus Ryder argues that while there may have been no space in which aboriginal laws and governments could operate prior to 1982, s. 35 now protects "Aboriginal governmental traditions and practices."[80] Canada's federal structure is actually, as Ryder notes, consistent with the continuity of aboriginal authority.[81] Section 91(24) did not extinguish aboriginal jurisdiction over "Indians and lands reserved for the Indians". The provision provides that only the federal government has jurisdiction to obtain from aboriginal peoples their interests in lands and resources. After 1982, it can no longer extinguish aboriginal rights, and it may not infringe upon aboriginal rights unless it does so in accordance with the justification test.

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78 *Ibid.* at 33; *Sparrow*, *supra* note 3 at 1097; and *Gladstone*, *supra* note 13 at para. 36

79 Ryder, *supra* note 48 at 316, 362-363; Hogg & Turpel, *supra* note 71 at 192; and Royal Commission on Aboriginal Peoples, *supra* note 2 at 32 and 46.

80 B. Ryder, "Aboriginal Rights and *Delgamuukw* v. *The Queen*" (1994) 5 Constitutional Forum 43 at 46.

81 Ryder, *ibid.* at 362-363.

While aboriginal peoples cannot claim complete autonomy under s. 35(1), this does not mean government has complete jurisdiction to overrule aboriginal authority.[82] While Parliament may have legislative authority over federal Crown lands, its authority is burdened by any pre-existing aboriginal authority, just as the Crown's radical title is burdened by aboriginal title until the aboriginal title is surrendered to the Crown or lawfully extinguished by Parliament. Just as the indigenous inhabitants of Canada could not have become trespassers in their own territories upon acquisition of sovereignty by the Crown, nor could they have become lawless or without government and authority by the simple "discovery" or "settlement" of Canada, or the establishment of the federation. Absent a surrender or lawful extinguishment of aboriginal authority, such authority persists.

Though Crown sovereignty carries with it the right to make laws in relation to the territory over which the Crown has acquired sovereignty, that right is not necessarily exclusive. Prior to 1982, the Crown could get in the aboriginal interest either by agreement or through legislation which extinguished the rights via a clear and plain legislative intent. After 1982, aboriginal jurisdiction cannot be extinguished and cannot be unjustifiably interfered with. A pluralistic approach is consistent with the intersocietal nature of aboriginal rights law. As intersocietal law, the law of aboriginal rights should bridge its two legal sources and allow both to continue.

As discussed in Chapter 4, the Royal Commission on Aboriginal Peoples argued that the confederal relationship between the Crown and aboriginal peoples continues, and that the compact theory dictates that, like the provinces, aboriginal peoples kept whatever powers they did not cede.[83] While s. 91(24) gives the federal government exclusive legislative authority over "Indians and lands reserved for the Indians", this power can be read as

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[82] This view is supported by Lamer C.J.C.' s judgment in *Delgamuukw, supra* note 18 where he states that consent will be required in some instances in order to justify an interference with title.

[83] Royal Commission on Aboriginal Peoples, *supra* note 2 at 22-23, citing in support s. 129 of the *Constitution Act, 1867*, which provides that all laws continue unless the Act provides otherwise.

concurrent as between the federal government and aboriginal peoples, and exclusive as between the federal and provincial governments.[84]

Aboriginal rights are not limited to those established under the common law. *Attorney General Ontario* v. *Attorney General Canada*, which held that all governmental powers were exhaustively distributed between the federal and provincial governments under the ss. 91 and 93, was decided in 1912 need not be followed.[85] The remedial nature of s. 35(1) may require us to reject old and unjust case law.[86]

While the division of powers may not preclude the existence of aboriginal rights to govern land and resource use, such rights must operate within Canada's federal structure.[87] Reconciliation requires the coexistence of aboriginal and Canadian laws and legal systems. A just reconciliation will allow aboriginal peoples to secure their own contemporary cultural and physical survival. The remainder of this thesis thus discusses the interaction between aboriginal and federal and provincial laws, and the rules which might apply to conflicts between aboriginal laws or legal systems protected by s. 35(1) and federal and provincial laws.

If jurisdiction over land and resource use and dispositions is an existing aboriginal right protected by s. 35, it may not be unjustifiably infringed by either federal or provincial legislation, and it arguably cannot be interfered with or impaired by provincial legislation at all. According to the analysis introduced in *Sparrow*, once an existing aboriginal right is established, the s. 35 analysis proceeds to a consideration of whether the right has been infringed.

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84 *Ibid.* at 33.

85 *Attorney General of Ontario* v. *Attorney General of Canada*, [1912] A.C. 571 (P.C.).

86 See *Mabo*, *supra* note 52.

87 B. Slattery, "The Organic Constitution: Aboriginal Peoples and the Evolution of Canada" (1996) 34 Osgoode Hall L.J. 101 at 110; M. Walters, "British Imperial Constitutional Law and

6.4. Infringement

As discussed in Chapter 4, a *prima facie* infringement exists where there is an interference with the exercise of an aboriginal right. The burden on aboriginal peoples to establish an infringement is not heavy. The purpose of this stage in the analysis is to restrict claims to those which have some merit, and to exclude frivolous or vexatious claims. Wherever a federal or provincial law is in conflict with aboriginal laws or decision making processes, there is a *prima facie* infringement of the aboriginal right.

Sustainability principles can be useful in the determination of whether there has been a *prima facie* infringement. The Court has adopted a cumulative effects approach to *prima facie* infringement in cases such as *Gladstone*. The *Gladstone* approach suggests, for example, that the courts can scrutinize forest management as a whole rather than just the issuance of a cutting permit. The courts could further incorporate a cumulative effects approach by considering the effects of various activities on the exercise of rights. In a dispute over forestry, the courts could consider relevant cumulative effects on the land in question of forestry, mining and any other relevant activities or legislation.

If cultural sustainability is the ultimate goal of s. 35(1), then any interference with the exercise of an aboriginal right that compromises or affects the ability of present or future generations to retain their cultural identity, social relationships and values in the future is a *prima facie* infringement.[88] Sustainability theory suggests that our decisions should ensure that future generations have choices at least as broad as ours, and therefore legislation which has the effect of narrowing the cultural choices of future generations of aboriginal peoples is a *prima facie* infringement.

Aboriginal Rights: A Comment on *Delgamuukw v. British Columbia*" (1992) 17 Queen's L.J. 350 at 412; and Borrows & Rotman, *supra* note 23 at 13; Moss, *supra* note 58 at 65.

[88] Berkes et al., *supra* note 15 at 358.

As discussed in Chapter 2, we often cannot predict the results of our activities. The precautionary principle instructs us to choose not to act in circumstances of uncertainty when our actions could have harmful consequences. The precautionary principle could inform the *prima facie* infringement test, so that if the effects of legislation or decisions on ecosystems or aboriginal cultures are uncertain but potentially harmful, a *prima facie* infringement is established.

The same principles that govern federal/provincial division of powers conflicts could be referred to in determining whether there is an infringement. For example, where both laws can operate there would be no *prima facie* infringement, but where there is a conflict between the laws such that following one law results in breaking the other, there is a *prima facie* infringement. The *Van der Peet* analysis would probably require aboriginal litigants to show that they are exercising a right that is allegedly being interfered with.[89]

Based on my conclusion that s. 35(1) protects aboriginal rights to manage land and resource use, the application of legislation such as the *Forests Act* and the *Canada Mining Regulations* to lands with respect to which aboriginal peoples have such rights is a *prima facie* infringement, as is a disposition made under such legislation. Neither regime reflects the existence of prior aboriginal management systems or jurisdiction over land and natural resource use.

Large scale forestry and mineral dispositions preclude aboriginal management systems from achieving their objectives. Under the *Forests Act* the primary purpose of forested lands is timber production. Timber production may conflict with aboriginal uses of

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[89] *Van der Peet* suggests that to demonstrate a *prima facie* infringement an aboriginal claimant must show an interference with the exercise of "*present* practices, customs and traditions." *Supra* note 8 at para. 63 (emphasis added). See also *Sundown*, *supra* note 41at para. 30; and *Côté*, *supra* note 3 at para. 69.

forested lands, and with the goals of aboriginal management systems.[90] To the extent that aboriginal peoples are prevented from protecting their lands and resources or their uses of them, the legislation interferes with aboriginal jurisdiction. Aboriginal peoples are precluded from deciding when and where forest tenures should be disposed of, from setting cutting volumes, and from imposing conditions such as selective harvesting or other practices as preconditions to dispositions.

The CMRs authorize the staking of claims on lands that may be subject to pre-existing aboriginal jurisdiction. The potential for aboriginal jurisdiction is ignored by the free entry scheme. Staking activities themselves may be incompatible with aboriginal peoples' use of lands and the CMRs deny aboriginal peoples the ability to decide where and when mineral exploration and development should occur. Aboriginal management systems may not be based on the assumption that lands should be explored for minerals and that all accessible mineral deposits should be developed. Once a claim is recorded its holder may remove $100,000 worth of minerals per year and *must* perform representation work to keep the claim,[91] regardless of the use of the lands by aboriginal peoples. A claim holder is entitled to a lease. Even where the *Territorial Land Use Regulations* or the *Northwest Territories Waters Act* are triggered, they are not concerned with ensuring that aboriginal rights are protected or that aboriginal jurisdiction is respected.

In *Nikal* the Court held that there was no infringement of the right to regulate the exercise of harvesting rights. The defendant did not have a right to follow Wet'suwet'en discretion in exercising fishing rights.[92] The Court's understanding of the Wet'suwet'en claim that members should be free to follow the band's direction was that the defendant sought absolute freedom in exercising his fishing rights. The Court interpreted this as a claim to

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90 According to s. 28(4) of the *Forests Act* licensees and permit holders are "entitled, except as against the Crown, to compensation from any person [or, presumably, any First Nation] who deprives him of his right to cut and recover any timber."

91 Representation work includes stripping, drilling, sinking shafts, constructing roads and airstrips.

92 *Nikal, supra* note 34 at para 91.

freedom to live without any laws.[93] This thesis is concerned with the rights of aboriginal peoples to live with their own laws.

Applying the analysis established in *Adams* and *Côté*, the *Forests Act* and CMRs, respectively, include an unstructured discretion to issue rights to lands and resources[94] or a lack of discretion to refuse to issue rights.[95] The legislation does not seek to accommodate aboriginal management rights. While *Adams* and *Côté* considered the direct regulation of the exercise of aboriginal rights and held that an infringement results where the ability to exercise a right is dependent on the exercise of a discretion to authorize the exercise of the right, the reasoning extends beyond these circumstances. An infringement occurs where legislation includes an unstructured discretion to grant to third parties rights that may interfere with aboriginal rights. Legislation giving no discretion in the exercise of a power to authorize activities that may interfere with the exercise of aboriginal rights also infringes those rights. The effect is the same as in *Adams* and *Côté*. The legislation creates an administrative regime that may have significant consequences for exercise of aboriginal rights and there is no attempt to accommodate aboriginal rights, in this case aboriginal rights to manage land and resource use.

Neither the *Forests Act*[96] nor the *CMRs* attempts to accommodate aboriginal management systems or structure the exercise of authority to ensure that land and resource use complies with aboriginal peoples' laws or decisions concerning land and resource use. Neither legislation requires aboriginal involvement in decision making or rule making. The *Forests Act* and CMRs potentially infringe existing aboriginal rights to manage resource use. The next step in the analysis depends upon whether provincial or

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93 *Ibid.* at para 92.

94 See for example the *Forests Act*, s. 16(1). See also the unstructured discretion to protect aboriginal rights by way of withdrawal powers in s. 11(1) of the CMRs and s. 23 of the *Territorial Lands Act*, R.S.C. 1985, c. T-7.

95 CMRs, s. 24.

96 See for example, the *Forests Act*, s. 16(1).

federal legislation interferes with aboriginal jurisdiction. The following section considers the division of powers between the federal and provincial governments.

6.5. Division of Powers Analysis

Justification may not be an option for a province that interferes with the exercise of an aboriginal resource management right.[97] As discussed in Chapter 4, a valid provincial law of general application cannot impair (or affect) matters at the core of the federal head of power "Indians and lands reserved for Indians" in other than an incidental way. Thus, provincial laws cannot affect "Indians in their Indianness" "Indians *qua* Indians" or the "status and capacity of Indians." Aboriginal rights are included in "Indianness" and the "status and capacity of Indians".[98]

The "lands reserved" head of power encompasses rights in relation to land, which the Court in *Delgammuukw* suggests includes all site specific rights.[99] Jurisdiction over resource and land use must be a right in relation to land.[100] Under s. 88 of the *Indian Act* provincial laws of general application are applicable to and in respect of Indians. While the point is unsettled in the case law, the failure to include the lands reserved head of power in s. 88 implies that it is not covered by s. 88. Provincial laws of general

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97 See N. D. Bankes, "*Delgamuukw*, Division of Powers and Provincial Land and Resource Law: Some Implications for Provincial Resource Rights" (1998), 32 U.B.C. L. Rev. 317.

98 *Delgamuukw*, *supra* note 18 at para. 181; *R.* v. *Alphonse*, [1993] 5 W.W.R. 401 (B.C.C.A.) at 418-419; *Dick* v. *The Queen*, [1985] 2 S.C.R. 309 at 321; and *Four B Manufacturing Ltd.* v. *United Garment Workers of America*, [1980] 1 S.C.R. 1031.

99 *Delgamuukw*, *ibid.* at paras. 138 and 176.

100 Bankes, *supra* note 97, concludes as follows with respect to the matters that fall within the core jurisdiction of the federal government under the subject "lands reserved":

> What matters are included within the core or primary jurisdiction of the subject "lands reserved"? The case law suggests that this includes the disposition, administration, use, possession and control of lands reserved. *Delgamuukw* confirms that the subject must also include the right to make laws with respect to whatever beneficial interest is held by the federal Crown prior to surrender (by contrast with the radical title held by the provincial Crown) as well as any title or land-based rights protected by s. 35 of the *Constitution Act, 1982*.

application probably cannot affect, in other than an incidental way, matters at the core of lands reserved.[101] It was noted in Chapters 4 and 5 that the case law is inconsistent with respect to whether the threshold for the inapplicability of provincial laws is that they affect or impair a matter included in the core of federal jurisdiction.[102] Which threshold applies need not be determined for present purposes, because the *Forests Act* impairs any existing aboriginal jurisdiction over the lands covered by making decisions regarding the use of forests and by disposing of exclusive interests in forest resources.[103] There is no need to further consider the justification analysis.[104]

As Professor Bankes has noted, while s. 35 only protects aboriginal rights from what the Court finds to be unjustifiable infringements, a finding that a provincial law impairs aboriginal rights in relation to lands may lead automatically to the conclusion the provincial law is inapplicable to that extent.[105] Provincial mineral or forest legislation disposing of and controlling the use of, lands which are subject to aboriginal jurisdiction, relates to or impairs core matters of the subject "lands reserved". The provincial legislation must be read down so as not to apply in such situations.

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101 See *Stoney Creek Indian Band* v. *British Columbia*, [1999] 1 C.N.L.R. 192 (B.C.S.C.); *Four B*, *supra* note 98; and *Delgamuukw supra* note 18 at para 17. Recall as well that s. 88 must be interpreted liberally in favour of aboriginal peoples.

102 See also Bankes, *supra* note 97.

103 See the discussion of *prima facie* infringement above. For a similar argument with respect to aboriginal title, see Bankes, *ibid.* at 333.

104 Similarly, under s. 109 of the *Constitution Act, 1867*, the province's interest in lands excludes aboriginal title and any interest other than that of a province. Neither level of government can dispose of interests in land that it does not own: *A.-G. Canada* v. *A.G.- Ontario*, [1897] A.C. 199 at 210-211 (P.C.). Power to legislate, such as the provincial power to legislate with respect to management and sale of public lands under s. 92(5), only applies to provincial public lands. Note that the federal government's legislative jurisdiction under s. 91(24) gives it the ability to extinguish the aboriginal interest (before 1982). The federal government can acquire the aboriginal interest by exercising legislative authority, but the beneficial interest acquired goes to the provinces: *St. Catherines Milling* v. *R.*, (1888), 14 App. Cas. 46 at 55 (P.C.).

105 Bankes, *supra* note 97 at 350, suggests that a provincial law does not apply to lands reserved if it "*relate[s]* (in other than an incidental way) to matters included within the core or primary jurisdiction of the subject "lands reserved".

Professor Lyon suggests that division of powers questions should be informed by sustainability principles.[106] A government only acts within its authority if it acts in accordance with the responsibilities attached to that authority. The studies of aboriginal management systems in Chapter 3 suggest that aboriginal systems are for the most part ecologically sustainable. They are decentralized, and decisions are informed by extensive knowledge gained from current use and inheritance. Decisions are integrated and the aim is to take care of the land generally. The decision makers, or stewards, are hunters who have demonstrated the knowledge and capability to ensure that sustainable decisions are made. Authority in aboriginal management systems is equated with responsibility, and management is based on the concept of stewardship. Aboriginal peoples have more incentives to sustainably use the land and resources than do outsiders who leave the area once finished extracting resources. Aboriginal management systems, when free from outside intrusions, represent sustainable local management systems.

On the other hand, the legislation and literature reviewed in Chapter 3 suggest that current federal and provincial resource management, at least in the context of forestry and mining, is unsustainable. Forest management is timber management aimed at securing sustained commercial timber yields, not sustainable ecosystems. Non-timber values are subordinated and are protected, if at all, at the operational level of planning. There is a lack of integrated or ecosystem management, and of land use planning aimed at sustaining ecosystems. Forest management under the *Forests Act* amounts in large part to self-regulation by forestry companies who are restricted to managing for sustained timber supply.

The free-entry mineral regime contained in the CMRs is based on the assumption that prospecting for mineral resources and staking of claims should be allowed on all lands in the Northwest Territories. To prevent lands from being staked and mined, government must withdraw the lands or put them into a use falling within the exceptions in s. 11(1)

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[106] N. Lyon, "Canadian Law Meets the Seventh Generation" (1993) 19 Queen's L. J. 350.

before someone stakes a claim. The free-entry system manages for one land value only. It is not concerned with ecosystem resilience or integrity, or with maximizing the options of future generations. Decisions are made mostly by industry, and the management system excludes from the decision making process those who pay the costs of development.

Under both the *Forests Act* and the *CMR*s, lands and waters are not managed as habitat. Forests are managed as timber factories and lands containing minerals are managed solely for mineral production. Under both systems the options for future generations of aboriginal peoples are not preserved. Not only are aboriginal peoples prevented from continuing to participate in resource use and management practices that are integral to the continuity of their cultures, they have no control over decisions that can jeopardize the ability of First Nations to perpetuate their cultures.

As noted in Chapter 4, Lyon suggests that division of powers questions can be answered by asking which level of government is in the best position to fulfil the trust or responsibility connected with land and resource management. Aboriginal peoples with viable management systems are in an optimal position to manage land and resource use. The studies discussed in Chapter 3 show that aboriginal management systems are more consistent with the principles of sustainable resource use and management discussed in Chapter 2 than the forest and mineral regimes discussed. The most appropriate approach to conflicts between aboriginal and government jurisdiction over land and resource use would be based on the approach taken by several of the authors referred to in Chapter 5, including the following approach offered by Slattery:

> The matter can be summarized in four basic principles. *First*, the Aboriginal sphere of authority under section 35 is co-extensive with the Federal head of power recognized in section 91(24) of the *Constitution Act, 1867*. *Second*, within this sphere, Aboriginal governments and the Federal government have concurrent legislative powers. *Third*, in the case of conflict between Aboriginal laws and Federal legislation enacted under section 91, valid Aboriginal laws (including customary laws) will take precedence, except where the Federal laws can be justified under the

> section 35 standard laid down in the *Sparrow* case. *Fourth*, relative to Provincial laws, Aboriginal laws have basically the same status as Federal laws enacted under section 91(24), under the standard rules developed by the courts to police the Constitutional division of powers.[107]

While s. 91(24) may be a full answer to the question of the constitutionality of provincial resource disposition legislation insofar as it is applied on lands where rights to manage land and resource use exist, federal legislation that interferes with the exercise of Aboriginal rights must be challenged under s. 35. Further, the Court has indicated that s. 35(1) may apply to provincial infringements of land-based rights.[108] The remainder of this chapter applies the s. 35 analysis to the question of forest and mineral disposition legislation and Aboriginal rights to regulate land and resource use.

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[107] B. Slattery, First Nations and the Constitution: A Question of Trust (1991) 71 Cdn. Bar Rev. 261 at 282- 283; see also B.W. Morse, "Permafrost Rights: Aboriginal Self-Government and the Supreme Court in *R.* v. *Pamajewon*" (1997) 42 McGill L.J. 1011 at 1034; and "With or Without You", *supra* note 43 at 639.

McNeil, *supra* note 58 at 134-135, notes that in the context of internal regulatory rights, it will be rare that government can justify an infringement:

> To the extent that Aboriginal and treaty rights are adequately regulated by Aboriginal laws, federal laws infringing those rights cannot apply to them. The conclusion flows from the *Sparrow* decision. As we have seen, before federal laws are allowed to infringe Aboriginal and treaty rights, the Supreme Court said a valid legislative objective must exist. Moreover, that objective has to be pursued in a manner which infringes those rights as little as possible. But if an Aboriginal people is already regulating its own rights in a way which is consistent with the legislative objective, there can be no need, and therefore, no justification, for the federal law to apply.

See also Lambert J.A., dissenting in *Delgamuukw* v. *British Columbia* (1993), 104 D.L.R. (4th) 470 at 656 (B.C.C.A.).

[108] *R.* v. *Badger*, [1996] 1 S.C.R. at 771; and *Delgamuukw*, *supra* note 18.

6.6. Justification Analysis

The justification analysis is meant to impose a high standard of conduct on government.[109] An infringement can only be justified if the interference upholds the honour of the Crown in light of the fiduciary relationship.

6.6.1. Valid Legislative Objective

As discussed in Chapter 4, to meet the justification standard, the government first must demonstrate that the interference is in pursuit of a valid legislative objective. In *Sparrow*, conservation was a sufficiently compelling and substantial objective to justify interference with aboriginal rights to fish. Conservation goals are compatible with the exercise of fishing rights,[110] and the limitation on the exercise of harvesting rights effected by conservation measures does not jeopardize long term cultural sustainability.

However, compatibility with the continued exercise of aboriginal rights did not prove to be a requirement for a valid legislative objective when the Court considered commercial fishing rights and aboriginal title. As discussed in Chapter 4, in *Gladstone*, the majority held that it may be appropriate to give more weight to the reconciliation objective than to the recognition objective in the context of the justification analysis.[111] In the wake of *Gladstone* and *Delgamuukw*, interferences with the exercise of aboriginal rights can in principle be justified on the basis of any objective of compelling and substantial importance to the broader Canadian community:

> Because . . . distinctive aboriginal 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

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109 *Sparrow, supra* note 3 at 1109.

110 Though in the short term conservation goals may restrict the exercise of fishing rights, if the conservation measures are successful the long term ability to exercise fishing rights will be preserved and perhaps enhanced.

111 *Gladstone, supra* note 13 at para. 72.

> objectives of compelling and substantial importance to that community as a whole (taking into account the fact that aboriginal societies are a part of that community), some limitation of those rights will be justifiable.[112]

In the right circumstances, objectives such as the pursuit of economic and regional fairness and development of mining and forestry can justify an interference with an aboriginal right.[113] According to the Court, the reconciliation of aboriginal societies with the rest of Canada may depend on the successful attainment of these goals.[114]

The circumstances in which objectives such as development of forestry and mining will be valid are uncertain.[115] *Gladstone* suggests that the evidence would have to establish that *in the circumstances* the objectives are in the interest of and sufficiently important to the broader community *and* that the reconciliation of aboriginal societies with Canadian society depends on successful attainment of the objective.[116]

In the context of resource management rights, the analysis under the federal peace order and good government ("p.o.g.g.") may be helpful.[117] The p.o.g.g. cases hold that some legislative matters, while local or provincial in origin, can acquire national dimensions or become matters of national concern, thus bringing the matter within the federal Parliament's residuary p.o.g.g. power. The matter must from its inherent nature be the

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112 *Gladstone, ibid.* at para. 73.

113 *Delgamuukw, supra* note 18 at para. 165.

114 *Gladstone, supra* note 13 at para. 75.

115 An objective which is valid in one set of circumstances may not be valid in another. See *Adams, supra* note 3 at para. 58, where the Court held that there was no evidence that the sports fishing which the scheme in question sought to promote had a meaningful economic dimension. Similarly, forestry and mining *per se* cannot without evidence specific to the circumstances be compelling and substantial for the purpose of s. 35. K. McNeil "How Can Infringements of the Constitutional Rights of Aboriginal Peoples be Justified?" (1997) 8 Constit. Forum 33 at 36 argues that public interest objectives amount to "judicially-authorized perpetuation of past injustices" and he suggests that this is not the way to achieve reconciliation.

116 *Gladstone, supra* note 13 at para 75 (emphasis added).

concern of the country as a whole. It is not sufficient that the subject matter be simply important to all Canadians, because if that were the case provincial powers could be seriously diminished. Uniformity of law throughout the country on the subject matter must be essential and not merely desirable: "...the most important element of national concern is a need for one national law which cannot realistically be satisfied by cooperative provincial action because the failure of one province to cooperate would carry with it adverse consequences for the residents of other provinces."[118] Moreover, the matter must "have a singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern and a scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of legislative power under the Constitution."[119]

A similar test could be applied where government and aboriginal jurisdiction conflict. The federal government can rely on the Crown's sovereignty over Canada or on its underlying legislative power, where the objective it pursues is sufficiently important, has reasonable and ascertainable limits with respect to the impact on aboriginal jurisdiction and cannot be achieved by provinces and First Nations acting cooperatively. As some of the authors referred to in Chapter 5 suggest, where local First Nations management systems are effective, there is no justification for government interference.

The rationale underlying the p.o.g.g. cases is that while the federal government must be able to fulfill its responsibilities to Canadians as a whole, it cannot encroach so far into provincial jurisdiction so as to impair provincial autonomy. These same principles

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117 See *A.-G. Ont.* v. *A.-G. Can. (Local Prohibition)*, [1896] A.C. 348 (P.C.); *A.-G. Ont.* v. *Canada Temperance Federation*, [1946] A.C. 193 (P.C.); and *R.* v. *Crown Zellerbach*, [1988] 1 S.C.R. 401.

118 P.W. Hogg, *Constitutional Law of Canada (1997 Student Edition)* (Toronto: Carswell, 1997) at 416.

119 *Crown Zellerbach, supra* note 117 at 432 and 438; *Re Anti-Inflation Act*, [1976] 2 S.C.R. 373 at 457-458. The subject matter must have "ascertainable and reasonable limits, in so far as its impact on provincial jurisdiction is concerned."

should apply to interferences with aboriginal jurisdiction under s. 35(1). To justify an infringement of aboriginal jurisdiction under s. 35, the objective should be sufficiently compelling and substantial and in the interests of Canadians as a whole. There should be a need for a national law (or provincial law, if my conclusion with respect to the division of powers is wrong), which cannot realistically be satisfied by cooperative effort.[120] The scale of impact on aboriginal jurisdiction should be "reconcilable with the fundamental distribution of legislative power under the Constitution [including s. 35(1)]."[121]

Sustainability criteria could also assist in determining whether an objective such as development of forestry or mining is valid in the circumstances.[122] Lyon's approach to legislative authority, which incorporates responsibility and sustainability requirements into the division of powers analysis, is consistent with the Court's approach to aboriginal title in *Delgamuukw*.[123] In that case the Court held that while aboriginal peoples have the right to decide what uses are to be made of aboriginal title lands, there is an inherent limit to that right. Aboriginal peoples cannot put their lands to a use that is incompatible with "the continuity of the relationship of an aboriginal community to its land over time."[124] Aboriginal decision making is not just a power but also a responsibility.[125] A law should be valid only if it is consistent with government's responsibilities to the broader community, which includes aboriginal peoples.[126]

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120 The failure of one First Nation to cooperate would carry with it adverse consequences for the residents of other First Nations and provinces. See Hogg, *supra* note 118 at 416.

121 *Crown Zellerbach*, *supra* note 117 at 432; and *Re Anti-Inflation Act*, *supra* note 119 at 457-458.

122 This conclusion is based on my assumption in Chapter 2 that present generations owe obligations to future generations.

123 *R.* v. *Hare and Debassige* (1985), 20 C.C.C. (3d) 1 (Ont. C.A.); *Sparrow*, *supra* note 3; and *Nikal*, *supra* note 34, also suggest a link between government authority and responsibility.

124 *Delgamuukw*, *supra* note 18 at para 126.

125 There may similarly be an inherent limit to aboriginal jurisdiction over land and resource use such that it must be exercised in order to ensure continuity of aboriginal peoples' relationships with their lands. The studies reviewed in Chapter 3 suggest that this has always been the purpose of aboriginal management systems.

126 See *Sparrow*, *supra* note 3 at 1113, where the Court suggested that *proper* management and conservation is a valid legislative objective.

While the Court has insisted on narrowly and precisely defining aboriginal claims, it has not yet required the same of government claims. Because the justification test amounts to government paramountcy over aboriginal authority, a generous approach to valid legislative objectives is contrary to the remedial nature of s. 35. Narrowly defined rights too easily seem insignificant when weighed against broad and vague government objectives such as development of mining and forestry.

Government objectives should be characterized precisely and accurately, and then scrutinized to determine whether in the circumstances they are compelling and substantial objectives that are for the benefit of the broader community. [127] The objective of Alberta's *Forest Act*, for example, is to secure a perpetual timber supply to the commercial forest industry. This objective is arguably not in the interest of Canadians as a whole, or of any community other than the forest industry.[128] A forest management regime whose objective is ecosystem integrity and preserving the ability of forests to continue to provide timber and non-timber products and services, may be founded on a valid legislative objective.

The *CMR*s embody the assumption that all lands containing minerals should be explored and mined. The free-entry regime encourages unsustainable land use and gives priority to mineral extraction over all other land uses, even though mineral extraction often has negative consequences for surrounding lands and resources and for neighbouring aboriginal peoples. Dispositions occur without regard to competing interests in lands containing minerals, or to the impacts of mineral exploration and development on the health, integrity and resilience of ecosystems and aboriginal cultures. Achievement of the

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[127] The current approach attempts to reconcile very narrowly defined, activity-specific rights with very broad, vague public and government interests. The danger to this approach is that narrowly defined rights (as opposed to cultural survival) may not seem very important when compared to large goals such the economic health of a province.

[128] See *Sparrow*, *supra* note 18, where shifting more of a resource to users ranking below the Musqueam was held to be an invalid objective.

objective narrows the present and future options of all Canadians. The free entry regime is not in the interest of the broader community, and therefore is not necessary for the achievement of reconciliation and not aimed at fulfilling a valid objective.

Unsustainable management of forests and mineral lands is not in the interest of Canadians or any segment therefor, though it may be in the short term economic interest of a few members of Canadian society.[129] The *Forests Act* and the *CMR*s cannot be justified as being in pursuit of objectives sufficiently compelling and substantial to justify infringing constitutionally protected aboriginal rights, particularly where the right in question is a right to manage the lands and resources in order to ensure cultural survival.[130]

In the absence of a valid legislative objective there is no need to consider the second half of the justification test. Assuming however that the *Forests Act* and the *CMR*s infringe aboriginal rights in pursuit of valid legislative objectives, the means used to achieve the objectives must be scrutinized.

6.6.2. Upholding the Honour of the Crown

In the second half of the justification analysis, the courts consider whether the means used to achieve the valid objective uphold the honour of the Crown. As discussed in Chapter 4, the relevant considerations include whether the government has given the right the appropriate degree of priority, whether the government has chosen means that will infringe the right as minimally as possible, and whether the aboriginal rights holders have been given an appropriate role in the decision making process.

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129 In this context, it is also significant that sustaining aboriginal cultures may contribute to ecological sustainability.

130 The relationship between ecological, economic, social and cultural sustainability could inform the analysis as well. For example, while there will often be conflicts in the short term between the settler society's economic goals and aboriginal peoples' cultural goals, sustainable decision making is informed by long term consequences, and recognizes that long term economic health is dependent upon ecological health.

Sustainability principles could inform this stage of the analysis as well.[131] If the means used to achieve an objective threaten cultural survival or the ability of aboriginal peoples to maintain their cultures, the honour of the Crown is not being upheld, and the fiduciary duty is not being fulfilled.[132] A cumulative effects approach is appropriate at this stage in the justification analysis. For example, issuing a forest tenure covering the last remaining area in which a First Nation can exercise aboriginal rights that are crucial to the continuity of the First Nation's culture, and with respect to which the First Nation has made a decision prohibiting logging or the manner and extent of logging permitted under the tenure, may not be justifiable.

6.6.2.1. Priority

As discussed in Chapter 4, the nature of the priority which must be accorded to an aboriginal right depends on the nature of the right. Priority is usually articulated in terms of allocation, or priority in taking a share of a resource. The prior jurisdiction of aboriginal peoples is not reflected in the *Forests Act* or the CMRs.

Neither the *Forest Act* nor the *CMR*s accords any priority to aboriginal management or aboriginal peoples' use of resources. The *Forests Act* gives priority to timber production, and the *CMR*s give priority to mineral production. Other values are protected either at the operational stage, or, in the case of the *CMR*s, if lands are withdrawn prior to the staking of claims. While land and water use legislation, and environmental protection legislation, may impose some restrictions on development, they will not stop developments that are

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131 While there might be overlap with the valid objective analysis, I think it is nonetheless useful to look at sustainability principles when scrutinizing government's choice of means to achieve its objective.

132 Aboriginal rights cannot be extinguished after 1982: *Van der Peet*, *supra* note 8 at para. 28. This approach is similar to the proportionate effect test applicable to infringements of Charter rights. *R.* v. *Oakes*, [1986] 1 S.C.R. 103 at 139. This part of the *Oakes* test requires "a proportionality

unacceptable to aboriginal peoples with jurisdiction over the lands or resources in question. The miner or forester's decision trumps aboriginal peoples' decisions respecting whether the lands in questions should be logged or mined.

6.6.2.2. Minimal Impairment

An infringement of an aboriginal right will normally only be justified if government has infringed the right only to the extent necessary to achieve the valid objective. For example, assuming forest development is a valid objective, a government must show that the infringement was necessary to achieve the objective, which implies that the infringement must actually contribute to achievement of the objective.[133] Any interference with the exercise of jurisdiction by a First Nation must be necessary. The extent of the interference must be minimized. If cooperative management in which aboriginal peoples retain jurisdiction is feasible, legislation leaving no space within which aboriginal management systems can operate is not justified. To the extent that government can achieve its objectives in a manner which leaves control with aboriginal societies who have jurisdiction, it must do so.

If the infringement is necessary, the nature of the activity authorized, or the means of decision making, must then be scrutinized to ensure that interference with aboriginal rights is minimized. Consider forest development in wildlife habitat for example. Sustainability principles may be useful in the minimal impairment analysis. For example, if an objective of forestry development is achieved through unsustainable forestry practices or methods, the impairment is not minimal. To the extent that government

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between the *effects* of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of 'sufficient importance'".

[133] Examples of resource depletion by aboriginal peoples or of breakdowns in aboriginal management systems should not justify an infringement on the basis of necessity. To demonstrate necessity the government should have to show that the aboriginal management is unsustainable and precludes achievement of the valid legislative objective, and, that the government system is sustainable and capable of achieving the objective.

management in pursuit of a valid objective allows aboriginal cultures to flourish and aboriginal management systems to continue, it may be justifiable. If government management is necessary and aimed at goals consistent with aboriginal management goals, it may be justified.

The *Forests Act* and the CMRs make no attempt to incorporate aboriginal management systems. Enforcement of aboriginal laws and management systems could amount to a contravention of the legislation. There is no effort to minimize interferences with aboriginal jurisdiction.

The following section considers the consultation requirement, which is intertwined with the minimal impairment requirement when the right in question is aboriginal jurisdiction over land and resource use.

6.6.2.3. Consultation

The fiduciary duty does not impose on government a duty of utmost loyalty in the context of the justification analysis. Utmost loyalty requires the fiduciary to always act in the best interests of the beneficiary. A fiduciary who infringes a beneficiary's right in pursuit of an objective that is important to the broader society is not acting in the best interests of the beneficiary. The justification analysis balances fiduciary obligations with obligations of government to advance the interests of all Canadians, whether such interests are constitutionally protected or not. Government is attempting to represent parties with competing interests, and it cannot act with utmost loyalty to aboriginal peoples.[134] The justification analysis recognizes the inevitability of divided loyalties and conflicts.[135]

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134 Bowker, *supra* note 31 at 13.

135 *Ibid.* at 2.

As discussed in Chapter 5, Bowker argues that consultation can be a tool to minimize government's conflict of interest. Consultation allows aboriginal peoples to provide informed input and advise government. The assumption is that the government will then make an informed decision that is consistent with its fiduciary obligations. Bowker argues that extension of the fiduciary obligation to government's legislative powers amounts to recognition "that were it not for the assertion of Crown sovereignty, Aboriginal people themselves would exercise similar power over their lives today."[136] She suggests that consultation is an opportunity to return to aboriginal peoples some of the control and power that the government exercises on their behalf.

Bowker's analysis and conclusions are consistent with the Court's approach to consultation. The nature of the consultation role to which aboriginal peoples are entitled depends on the nature of the right and the severity of the potential infringement. More severe infringements, and rights with decision making components, appear to require consultation towards the "consent" end of the spectrum. Mere consultation should never suffice to justify an infringement on a decision-making right.[137] Rotman argues that the fiduciary duty may require government to return legislative or governing powers to aboriginal peoples.[138]

Principles of sustainability also support the return of power to aboriginal peoples. Equity and justice in the distribution of the costs and benefits of development requires that those who benefit from developments should pay its costs, and that those who will bear the potential costs should be given an opportunity to participate in decisions. When

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136 *Ibid.* at 15.

137 There are parallels between Berkes' levels of co-management, discussed in Chapter 3, and the scale of consultation indicated in *Delgamuukw*, *supra* note 18 at para. 168, which ranges from "mere consultation" or discussion, to obtaining consent. The lowest level of consultation is "discussion" as consultation, thus apparently excluding the two lowest levels of participation in the ladder. See Berkes, *supra* note 39 at 19.

138 L.I. Rotman, *Parallel Paths: Fiduciary Doctrine and the Crown-Native Relationship in Canada* (Toronto: University of Toronto, 1996) at 259.

considered along with the Crown's fiduciary duty and the requirement to consult, principles of equity and justice with respect to the distribution of the costs and benefits of development suggest that aboriginal peoples must be involved in decisions that may impose disproportionate costs on aboriginal peoples.

Aboriginal peoples often pay a disproportionate price for development. Mining and forestry laws currently fail to internalize the costs inflicted upon aboriginal peoples and cultures. Property rights in resources, particularly where tenures are long-term theoretically provide incentives to harvest sustainably. As noted in Chapter 3, the *Forests Act*, for example, gives property in timber to forest companies. Forest companies are motivated to ensure a sustainable supply of commercially valuable timber; they have no reason to give consideration to other plant life, wildlife or habitat. As was discussed in Chapter 3, the legislation provides that the purpose of FMAs, for example, is to manage the land for sustained timber yield. Costs are externalized to aboriginal communities on whose land developments occur, or whose lands developments affect.[139] This situation forms the basis of many arguments in favour of co-management.[140]

To what extent if any could co-management arrangements suffice to fulfill the requirements of s. 35(1)? As discussed in Chapter 3, current comanagement arrangements do not integrate decision making. They operate within the already existing legislative framework. Aboriginal input is, for example, often restricted to wildlife management, which is separated from habitat management. Aboriginal world views and objectives with respect to land use are subordinated to the status of stakeholder interests.[141] They must compete with public interests, and it is only the settlers' governments who are charged with weighing these interests and making decisions in the

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139 See W. Cragg & M. Schwartz, "Sustainability and Historical Injustice: Lessons from the Moose River Basin" (1996) 31:1 J. Cdn. Studies 60 at 66.

140 See also Gadgil *et al.*, *supra* note 39 at 155: "Controlling the access of others makes it possible for the local group to appropriate any benefits of the conservation effort."

141 Lyon, *supra* note 106 at 352.

public interest.[142] Reconciliation between aboriginal peoples and Canadians as a whole cannot be achieved without an attempt to reconcile or accommodate these divergent world views. Power and responsibility under most co-management arrangements remains with government and aboriginal peoples have advisory roles only.[143] The government may or may not choose to follow the recommendations of First Nations. The role played by aboriginal peoples is not that of decision-maker. Aboriginal management systems themselves are not incorporated or perpetuated.[144] Co-management amounts to a slightly modified and decentralized continuation of the state system.[145] Any power given to First Nations under current arrangements is almost invariably delegated and therefore based on the assumption that jurisdiction over the decisions subject to cooperative management resides solely with government.[146]

> It is the genuine fear of losing a shared fundamental set of values, and thus a vital base of cultural identity, over issues which other groups see basically in terms of economy, resource management and conservation, but not of identity, that gives northern resource questions aspects of intractability and sometimes desperation.[147]

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142 P. J. Usher "Devolution of Power in the Northwest Territories: Implications for Wildlife" in *Native People and Renewable Resource Management: The 1986 Symposium of the Alberta Society of Professional Biologists* (Alberta Native Affairs/Indian and Northern Affairs Canada, 1986) 69 at 76.

143 See the Gwaii Haanas Agreement for an alternative, but unique, approach, in which both the Haida Nation and the governments involved agreed to disagree on the question of title and authority. The parties agreed to cooperatively protect Gwaii Haanas regardless of the disagreement on authority and title.

144 P.J. Usher, "Indigenous Management Systems and the Conservation of Wildlife in the Canadian North" (1987) 14(1) Alternatives 3 at 8.

145 *Ibid.*

146 While aboriginal people are understood to be capable of carrying out management and scientific practices, and while it is also generally recognized that the aboriginal harvesters obtain valuable information which could be valuable to the state system, as Usher argues, "It is not yet generally acknowledged, however, that Native harvesters' culture and experience provide them the tools to integrate and organize those data into an effective management strategy." Usher, *ibid.* at 9.

147 E.F. Roots, "Comments on the Realities and Conflicts of Ecosystems, Economic Systems and Cultural Expression in the Northern Environment" in Freeman, ed., *supra* note 55, 1 at 5.

As noted in Chapter 3, aboriginal and non-aboriginal people will often envision different futures for disputed lands and resources,[148] and in light of s. 35 the aboriginal vision of the future should not be subordinated to the settler government's vision.[149] The policy underlying the *Forests Act* and the *CMR*s is that forestry and mining, respectively, are the highest and best uses of land. In contrast to co-management, which would operate within those assumptions, aboriginal jurisdiction over land use would give a voice to competing and legitimate views of the highest and best use of lands:

> The Indian people of the region must be allowed to articulate their own needs and to help evaluate the impact of other uses on the resources of the region. Their agreement should be obtained before the resources which they are now managing and utilizing are affected by plans to develop the non-wildlife resources of the region.[150]

Co-management may be sufficient to justify an infringement where there is a valid legislative objective and an infringement of aboriginal jurisdiction is necessary. Co-management may be the least intrusive means of achieving the objective in such circumstances.

Co-management arrangements are often limited in terms of the management functions covered. As noted in Chapter 3, Pinkerton has identified the following seven functions: data gathering and analysis; logistical harvesting decisions; harvest allocation; protection of habitat and water quality; enforcement; enhancement and long-term planning; and broad policy decision making.[151] Co-management rarely if ever addresses the broader policy decisions. If the basis and fundamental principles of resource management do not

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148 For example, while many aboriginal peoples, particularly in northern Canada, place importance on the continued ability to harvest renewable resources, government legislation and resource management policy favours the development of non-renewable resources, even where such development has a detrimental impact on renewables.

149 B.A. Cox, "Changing Perceptions of Industrial Development in the North" in B.A. Cox, ed., *supra* note 56, 223 at 223.

150 H.A. Feit, "Waswanipi Cree Management of Land and Wildlife: Cree Ethno-Ecology Revisited" in B.A. Cox, ed., *ibid.*, 75 at 82.

151 See Chapter 3.

represent aboriginal values, aboriginal involvement in allocations or enforcement will be ineffectual in ensuring cultural sustainability.

The fact that the systems themselves are integral features of aboriginal societies further suggests that the systems ought to be preserved where possible. It should rarely be justifiable to exclude the aboriginal system entirely, and thus shared jurisdiction is more appropriate than consultation or participation in co-management bodies with advisory roles. The management systems themselves should be bridged,[152] because s. 35(1) seeks to bridge aboriginal and non-aboriginal cultures and legal systems. Finally, as Freeman has noted, self-determination is essential to cultural survival: "It seems reasonable to conclude that to the extent which a society is able to influence the 'rules of the game', so they will correspondingly enhance their likelihood of remaining adaptive."[153] If cultural sustainability is the ultimate goal of s. 35(1), aboriginal peoples must influence the "rules of the game".

Current conceptions of co-management, while they are useful to the extent that they highlight the benefits of aboriginal participation in resource management, do not go far enough to comply with s. 35, except in situations where government can establish that the infringement is justified in the circumstances as necessary and the least intrusive means of achieving a valid legislative objective.

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152 P.J. Usher, "Indigenous Management", *supra* note 144 at 9.

153 M.M.R. Freeman, "Effects of Petroleum Activities on the Ecology of Arctic Man" in F.R. Engelhardt, ed., *Petroleum Effects in the Arctic Environment* (London: Elsevier Applied Science, 1985) 245 at 247

6.7. Conclusion

This thesis has discussed a possible approach to implementing s. 35(1) in the context of resource management. I have argued that aboriginal rights include jurisdiction over natural resource use. The Brundtland Report noted that many indigenous lifestyles "are threatened with virtual extinction by insensitive development over which they have no control."[154] For aboriginal societies who continue to carry on subsistence activities, cultural sustainability is dependent upon ecological sustainability. The literature discussed in Chapter 3 suggests that jurisdiction over the use of forest and mineral resources could enable aboriginal peoples to sustain their cultures and pass them on to future generations.

I have argued that s. 35 embodies the doctrine of continuity. Aboriginal peoples retain jurisdiction over land and resources unless such jurisdiction was extinguished by federal legislation evincing a clear and plain intent to effect such extinguishment. Section 35 is part of Canada's federal structure. It embodies the terms according to which aboriginal peoples allowed settlers to occupy their territories. Aboriginal peoples did not give up their lands and resources. They agreed to share them with the newcomers. Aboriginal and government jurisdiction and responsibilities place limits on each other, similar to the mutual limits imposed by federal and provincial jurisdiction.

Section 35(1) recognizes and affirms aboriginal jurisdiction over activities on and uses of lands and resources. Federal and provincial governments must accordingly share jurisdiction over natural resources and lands with aboriginal peoples who can demonstrate an existing right to participate in and enforce aboriginal resource management systems. While a cooperative approach to the regulation of land and resource use is desirable, this thesis has discussed the legal position of the federal and

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[154] World Commission on Environment and Development, *Our Common Future* (Oxford: Oxford University, 1987) at 71; see also s. 2.9.1 above.

provincial governments and aboriginal peoples if aboriginal peoples were to unilaterally exercise their aboriginal rights. For example, a First Nation might pass a law or enforce an existing law prohibiting mineral development or exploration that has been authorized by federal or provincial legislation. If aboriginal and provincial jurisdiction conflict, aboriginal jurisdiction should prevail. Where the federal government seeks to exercise authority over lands and resources in a manner which conflicts with aboriginal jurisdiction, the federal government should only be permitted to impose its management scheme where it can justify the infringement. There may be situations where governmental regulation is necessary, for example, where "management of the resource as a whole required a comprehensive regulatory scheme ..."[155] I suggest that co-management should be a prerequisite for justification. First however, the federal government should demonstrate that it is necessary for it to exercise jurisdiction in the circumstances in order to achieve a valid objective.

Federal authority is not justified if it unnecessarily excludes aboriginal authority. Even where aboriginal authority is justifiably overridden by federal legislation, the federal government should at a minimum, attempt to arrive at a negotiated solution. Co-management in which aboriginal peoples serve advisory roles within government's resource management framework should be the lowest acceptable level of consultation to justify an infringement of aboriginal jurisdiction.

Decision making structures that attempt to allow the two systems to work cooperatively should be developed. Where a decision cannot be reached cooperatively the federal government must comply with the principles of necessity, minimal impairment, and priority to justify its infringement.

Legislation such as the *Forests Act* and the CMRs, fail to accommodate aboriginal management systems. They render any existing aboriginal management systems

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[155] McNeil, *supra* note 58 at 135-136.

ineffective to the extent that these aboriginal systems seek to achieve goals other than timber harvesting and mineral production. Both regimes completely deny the possible existence of aboriginal jurisdiction and both purport to allow activities and dispositions which jeopardize the viability of aboriginal cultures and societies. There is no attempt to incorporate aboriginal management systems, no requirement to co-manage resources, and no requirement to even consult.

To the extent that s. 35 embodies cultural sustainability, and to the extent that ecological sustainability is a prerequisite for aboriginal cultural survival, the s. 35 analysis should allow us to evaluate the sustainability of government legislation and management of resources. Unsustainable resource management should not be paramount over aboriginal jurisdiction. Principles of cultural and ecological sustainability should guide the resolution of conflicts where cooperation is impossible. The unsustainable nature of the management regimes embodied in the *Forests Act* and the CMRs suggests that these schemes are not justifiable infringements of aboriginal jurisdiction.

The question of how to implement shared jurisdiction in practice is not within the scope of this thesis. Situations of competing aboriginal jurisdictions may arise, but the resolution of such conflicts is beyond the scope of this thesis.[156]

A cooperative approach to shared jurisdiction over natural resources could benefit not only aboriginal peoples but all of Canada. Local decisions are more likely to be informed and integrated, and aboriginal peoples have more at stake and are therefore motivated to avoid irreversible consequences. An integration of state and indigenous systems "can result in the best features of both systems being brought to bear on the modern problems of conservation that neither can solve alone."[157] An integrated and cooperative approach

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156 This thesis also does not address the issue of remedies for unjustifiable infringements of aboriginal management rights.

157 Usher, *supra* note 142 at 78.

to resource management would maximize knowledge and facilitate the reconciliation envisioned by the Supreme Court of Canada. It is a culturally sustainable solution which allows aboriginal management systems and cultural values to continue. Shared jurisdiction can maintain Canada's cultural and ecological diversity and sustainability, and preserve the physical and cultural options of future generations.[158] Most importantly, shared jurisdiction can allow the sustained co-existence of aboriginal and non-aboriginal peoples in Canada.

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[158] See F. Berkes, "Environmental Philosphy of the Chisasibi Cree People of James Bay" in M.M.R. Freeman & L.N. Carbyn, eds., *Traditional Knowledge and Renewable Resource Management in Northern Regions* (Edmonton: Boreal Institute for Northern Studies), 7 at 7-8 19-20, where he argues that aboriginal cultures provide us with alternative environmental philosophies and ways of relating to the natural world. Preserving aboriginal cultures contributes to Canada's cultural diversity, and this in turn maximizes our ability to adapt, as does biological and genetic diversity.

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