
Self-Government by Side Agreement?

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This article discusses the use of non-constitutionally entrenched agreements as part of a treaty package to reconcile Aboriginal interests, especially self-government. With the ratification of the Nisga'a Treaty in 2000, the Nisga'a received constitutional entrenchment of their right to self-government. Other First Nations, especially those involved in the British Columbia treaty process, also benefited insofar as they received a model for self-government centered on constitutional protection. The 2002 BC referendum on treaty principles introduced into the discussions a municipal style of self-government, however, and the overwhelming voter support that model received requires that it must be seriously considered. First Nations have matched the enthusiasm of BC voters with adamant rejection of the municipal model, and thus the self-government issue threatens to drag the negotiations down into deadlock.

The author examines whether self-government by way of non-constitutionally entrenched side agreements can provide a viable compromise. The author concludes that while side agreements can provide some constitutional protection, this protection must be explicitly written into the treaty. The danger posed to core Aboriginal interests by the reconciliation of self-government rights through a non-constitutionally entrenched agreement further requires that courts hold government parties to high standards of good faith during the negotiations.

Cet article discute l'utilisation des accords non constitutionnellement établis comme partie du règlement global tenant compte des intérêts des autochtones, particulièrement en matière d'autonomie gouvernementale. Avec la ratification du Traité Nisga'a en 2000, les membres de la nation Nisga'a ont obtenu l'établissement dans la constitution de leur droit à l'autonomie gouvernementale. Les autres Premières Nations, particulièrement celles participant au processus de conclusion de traités en Colombie-Britannique, en ont aussi bénéficié dans la mesure où elles se sont vu offertes un modèle d'autonomie gouvernementale fondé sur la protection constitutionnelle. Toutefois, le référendum de 2002 sur les principes a introduit un modèle d'autonomie gouvernementale inspiré du modèle municipal, et le support considérable qu'il a reçu des électeurs exige qu'il soit sérieusement considéré. Les Premières Nations ont répondu à l'enthousiasme électoral par un rejet catégorique du modèle municipal, créant ainsi un risque que les questions d'autonomie gouvernementale ne conduisent les négociations à l'impasse.

L'auteur se demande si accorder l'autonomie gouvernementale par le biais d'accords collatéraux non sanctionnés par la constitution pourrait être un compromis viable. L'auteur soutient que si de telles ententes offrent un certain niveau de protection constitutionnelle, cette protection doit néanmoins être explicitement accordée dans le texte du traité. De plus, le danger pour les intérêts autochtones de reconnaître le droit à l'autonomie gouvernementale par le biais d'accords collatéraux non sanctionnés par la constitution exige que les tribunaux tiennent les parties gouvernementales à un haut standard de bonne foi dans le déroulement des négociations.

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Introduction

In 1990, the Council for Yukon Indians and the Canadian and Yukon governments ratified the Yukon *Umbrella Final Agreement* (“UFA”).¹ The UFA specified the terms to be included in the eventual treaties signed by the First Nations involved in the treaty process. Under the UFA system, provision can be made for self-government, but not within the treaty itself. Rather, self-government is negotiated under a separate side agreement, which is not constitutionally protected. Under this system, the self-government powers of First Nations are apparently not shielded from unilateral repudiation by a legislature exercising its legislative sovereignty.

Recently, a similar model has been introduced to the bargaining table in the British Columbia treaty process. The referendum on treaty principles launched by the BC government in the summer of 2002 indicated, amid a storm of protest from First Nations, overwhelming support for a non-constitutional model of self-government. It seems self-government by side agreement will be a defining issue in the BC treaty negotiations for at least the next few years.

In this paper, I explore the perils and possibilities of using side agreements as a tool in the project of reconciling First Nation and state interests through negotiation. The motivation for the study is a belief that a greater variety of tools in this project may—if used in good faith—lead to deals that better reflect the real preferences of the parties. A central justification of negotiations as a means of reconciliation is the assertion that they maximize individually-defined goods, and crucial to that maximization is the existence of a variety of choices from which the appropriate good can be selected.

While the discussion is relevant to side agreements concerning any subject matter, the focus of the paper is on self-government because it most directly engages the threat that side agreements pose to Aboriginal sovereignty. In exploring these questions, I do not suggest that First Nations do not have existing constitutional rights to self-government that ought to be the subject of constitutionally protected treaties. Rather, my intention is to search for means by which the deep lack of mutuality implicit in side agreements might be mitigated, so that First Nations may have another viable option within the negotiation process. If side agreements can be rendered consistent with the nation-to-nation relationship, then they might be appropriate instruments for some First Nations in certain situations. Counterintuitively, this may especially be the case in the context of self-government, given the present BC government’s high level of resistance to the constitutional model. If the BC government is willing to pay dearly for a delegated model, side agreements may be a rational choice for some First Nations.

¹ *Infra* note 5.

My examination of side agreements is structured around the observation that they are contracts arising out of a treaty relationship. In Part I, I discuss the relationship of side agreements to modern treaty negotiation processes, and outline two opposing views on whether side agreements are appropriate in the context of self-government. In Part II, I examine the perils that the contractual relationship poses to Aboriginal sovereignty. The specific threat is the modification or cancellation of the side agreement through legislation, but the deeper threat is the subjection of First Nations' interests to the policy preferences of the majority. I examine two arguments that might be launched against legislative cancellations and demonstrate why arguments not grounded in a constitutional relationship ultimately fail. In Part III, I explore aspects of side agreements that incorporate the treaty relationship and the possibilities they yield for mitigating the threat to Aboriginal sovereignty posed by the contractual model. I find that side agreements can be shielded by a treaty, such that legislated interference with an agreement is valid only if the aggrieved First Nation is accommodated in specific ways. Nonetheless, I emphasize in Part IV that the value of side agreements lies in the expansion of choice for First Nations and urge that such choice is dependent upon the government parties being held to their duties to negotiate in good faith.

I. Negotiations Between Government and First Nations

The relationship between First Nations and the Canadian state has its roots in treaties. Between the early seventeenth century and 1921 almost five hundred such treaties were formed.² Some of these treaties contained mutual promises of peace and friendship. In others, the First Nation was required to "cede, release and surrender" land in exchange for money, goods, and recognized rights to smaller plots of land. Treaties of the latter kind opened Canada up to European settlement and agricultural development. Formed mainly after 1850, these treaties secured for the Crown unencumbered title throughout most of the country. In British Columbia, the Yukon, and the Northwest Territories, however, much of the land was left unsettled by the treaty process. In BC, only five treaties were formed covering a minority of the province.

After many decades of inactivity, governments and First Nations have begun to sign treaties once again. Beginning with a national process, the modern phenomenon of treaty making has increased in both size and political importance, such that there now also exists a specialized BC process. The national process, styled the

² Most of these treaties, of course, were not signed by Canada, but were concluded by colonial powers occupying parts of the territory now called Canada. See Canada, *Report of the Royal Commission on Aboriginal Peoples: Looking Forward, Looking Back*, vol. 1 (Ottawa: Canada Communication Group, 1996) at 29-244; James [Sákéj] Youngblood Henderson, "Empowering Treaty Federalism" (1994) 58 Sask. L. Rev. 241.

“Comprehensive Claims Process”, was initiated in 1974 as a direct result of the Supreme Court of Canada’s decision in *Calder v. A.G.B.C.*³ rendered the previous year. That decision marked the formal introduction of Aboriginal title as a concept with real substantive content in Canadian law. While the Court split evenly on the question of whether title continued to exist, the case cast previous assumptions about the status of lands across parts of Canada into doubt. That uncertainty was the underlying motivation for the establishment of the federal treaty process. The primary goal of the process is “to negotiate modern treaties which will provide a clear, certain and long-lasting definition of rights to lands and resources for all Canadians.”⁴ The national process has resulted in thirteen comprehensive treaties,⁵ involving First Nations in Quebec, the Yukon, the Northwest Territories, and British Columbia.

While the *Calder* decision gave substance to the concept of Aboriginal title, it also made clear that title was susceptible to extinguishment by legislation with a sufficiently “clear and plain” intention to do so and passed by a “competent legislative authority”, meaning Parliament. Other decisions of the Court stated a similar

³ [1973] S.C.R. 313, 34 D.L.R. (3d) 145 [*Calder* cited to S.C.R.].

⁴ See Indian and Northern Affairs Canada, *Comprehensive Claims Branch*, online: Comprehensive Claims Branch—Indian and Northern Affairs Canada <http://www.ainc-inac.gc.ca/ps/clm/ccb_e.html>.

⁵ See *James Bay and Northern Quebec and Complementary Agreements*, 11 November 1975 (Sainte-Foy, Que.: Les Publications du Québec, 1998), online: Indian and Northern Affairs Canada <http://www.ainc-inac.gc.ca/pr/agr/que/jbnq_e.html> [*James Bay Agreement*]; *The Northeastern Quebec Agreement*, 31 January 1978 (Ottawa: Indian and Northern Affairs Canada, 1984), online: <http://www.ainc-inac.gc.ca/pr/agr/que/neqa_e.pdf>; *The Western Arctic Claim: The Inuvialuit Final Agreement*, 5 June 1984 (Ottawa: Indian and Northern Affairs Canada, 1984), online: <http://www.ainc-inac.gc.ca/pr/agr/inu/wesar_e.html>; *Gwich'in Comprehensive Land Claim Agreement*, 22 April 1992 (Ottawa: Indian and Northern Affairs Canada, 1992), online: <http://www.ainc-inac.gc.ca/pr/agr/gwich/gwic_e.html>; *Nunavut Land Claims Agreement*, 25 May 1993 (Ottawa: Indian and Northern Affairs Canada, 1993), online: <http://www.ainc-inac.gc.ca/pr/agr/nunavut/index_e.html>; *Umbrella Final Agreement Between the Government of Canada, The Council for Yukon Indians and the Government of the Yukon*, 29 May 1993, online: <http://www.ainc-inac.gc.ca/pr/agr/umb/index_e.html> [*Umbrella Final Agreement*] (this agreement includes the agreements with the Vuntut Gwitchin First Nation (1993), the Champagne and Aishihik First Nations (1993), the Teslin Tlingit Council (1993), the First Nation of Na-cho Ny'a'k Dun (1993), the Little Salmon-Carmacks First Nation (1997), the Selkirk First Nation (1997), and the Tr'ondek H'wechin First Nation (1998)); *Sahtu Dene and Metis Comprehensive Land Claim Agreement*, 6 September 1993 (Ottawa: Public Works and Government Services Canada, 1993), online: <http://ainc-nac.gc.ca/pr/agr/sahtu/sahmet_e.html>; *Nisga'a Final Agreement*, 27 April 1999, online: <http://www.ainc-inac.gc.ca/pr/agr/nsga/index_e.html> [*Nisga'a Final Agreement*]. See also Indian and Northern Affairs Canada, *March 1996 Comprehensive Claims (Modern Treaties) in Canada*, online: <http://www.ainc-inac.gc.ca/pr/info/trty_e.html>; Council of Yukon First Nations, online: Council of Yukon First Nations <<http://www.cyfn.ca>> (background on the more recent final agreements).

vulnerability on the part of treaties.⁶ The introduction of section 35 into the constitution therefore marked a dramatic shift in the relationship between First Nations and the Canadian state.⁷ With respect to treaties, section 35 reformulated treaty federalism in two directions. First, subsection 35(1) recognized and affirmed the constitutional status of those historical treaties that had not been extinguished or surrendered, and so were still in existence at the passage of the *Constitution Act, 1982*. Those treaties can no longer be infringed without just cause.⁸ Thus, section 35 had a retrospective effect on Aboriginal-state relations. Added three years later in a subsequent constitutional conference, subsection 35(3) also opened the door to future constitutional negotiations. That subsection clarifies subsection 35(1), stating that the “treaty rights” it refers to “includ[e] rights that now exist by way of land claims agreements or may be so acquired.”⁹

Just as the *Calder* decision provoked the establishment of the federal treaty process, so the Supreme Court’s *Sparrow* decision¹⁰ spurred the initiation of a British Columbian treaty process. Prior to that decision, the BC government had persistently refused to deal with First Nations. As Governor Douglas refused to sign treaties despite overwhelming national pressure, the BC government of the 1970s and 1980s

⁶ *Simon v. The Queen*, [1985] 2 S.C.R. 387 at 406, 24 D.L.R. (4th) 390; *R. v. Sioui*, [1990] 1 S.C.R. 1025 at 1061, 70 D.L.R. (4th) 427; *Calder*, *supra* note 3 at 404; and *R. v. Badger*, [1996] 1 S.C.R. 771 at para. 41, 133 D.L.R. (4th) 324 [*Badger* cited to S.C.R.].

⁷ *Constitution Act, 1982*, s. 35, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

⁸ See *Badger*, *supra* note 6 at para. 85 where Cory J., for the majority, stated that “the recognized principles to be considered and applied in justification [of an infringement of a treaty] should generally be those set out in *Sparrow*.” The *Sparrow* test was articulated in *R. v. Sparrow*, [1990] 1 S.C.R. 1075, 70 D.L.R. (4th) 385 [*Sparrow* cited to S.C.R.]. Under the *Sparrow* test, those impugning a statute or regulation must prove that there has been prima facie infringement, after which the Crown bears the onus of proving that it was justified. In determining whether there has been prima facie infringement, the Court should consider these questions: “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 that right?” (*ibid.* at 1112). To prove that an infringement is justified the Crown must show, first, that it was enacted pursuant to a valid legislative objective, and second, that it is consistent with the Crown’s fiduciary relationship with Aboriginal peoples. The analysis of this latter question should be guided by such questions as: “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” (*ibid.* at 1119).

⁹ Section 35, subsections (1) and (3), state:

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

...

(3) For greater certainty, in subsection (1) “treaty rights” includes rights that now exist by way of land claims agreements or may be so acquired.

¹⁰ *Sparrow*, *supra* note 8.

did not participate with First Nations and the federal government in a claims process. In light of the Court's holding in *Sparrow* that subsection 35(1) "affords aboriginal peoples constitutional protection against provincial legislative power,"¹¹ the provincial government relented. The British Columbia Claims Task Force¹² was established the following year, and a province-wide claims process, supervised by the British Columbia Treaty Commission, commenced in 1993. There are currently fifty-five First Nations involved in the process organized around forty-five negotiation tables.¹³

While *obiter* comments in *Calder* stated that Aboriginal title would theoretically exist as long as it remained unsurrendered or unextinguished by Parliament, that decision did not conclude whether Aboriginal title continued to exist in British Columbia as a matter of fact. The *Sparrow* decision held that at least some fishing rights continue to exist and are constitutionally protected, but it failed to clarify whether title continues under section 35. It was not until the Court's decision in *Delgamuukw v. British Columbia*¹⁴ in 1997 that the debate was resolved. The Court's holding—that title continued to exist, that it is "a right to the land itself" rather than a "mere bundle of rights", and that it is now constitutionally protected—again dramatically reformulated the relationship between BC First Nations and the Canadian state.

The most significant effects of *Delgamuukw*, however, will not be subsequent cases where First Nations are successful in proving title. Rather, its most far-reaching implications will lie in the mere threat of such litigation, and the consequent increase in bargaining power for First Nations involved in treaty negotiations. In *Delgamuukw*, the Court explicitly preferred constitutional negotiations to litigation as the best means for achieving the purpose of section 35. That purpose was identified in the 1996 Supreme Court case of *R. v. Van der Peet* as "the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown."¹⁵ In *Delgamuukw*, the majority decision of the Court ended with a resounding endorsement of negotiations. While the Court ordered a new trial, it baldly urged the parties to settle through negotiations:

[T]his litigation has been both long and expensive, not only in economic but in human terms as well. By ordering a new trial, I do not necessarily encourage the parties to proceed to litigation and to settle their dispute through the courts. As was said in *Sparrow*, at p. 1105, s. 35(1) "provides a solid constitutional

¹¹ *Ibid.* at 1105.

¹² See BC Treaty Negotiations Office, *The Report of the British Columbia Claims Task Force*, online: Treaty Negotiations Office <<http://www.gov.bc.ca/tno/rpts/bcctf/toc.htm>> [*Report of the BC Claims Task Force*].

¹³ See BC Treaty Commission, *Negotiation Update*, online: BC Treaty Commission <http://www.bctreaty.net/files_2/updates.html>.

¹⁴ [1997] 3 S.C.R. 1010, 153 D.L.R. (4th) 193 [*Delgamuukw* cited to S.C.R.].

¹⁵ [1996] 2 S.C.R. 507 at 539, 137 D.L.R. (4th) 289.

base upon which subsequent negotiations can take place". Those negotiations should also include other aboriginal nations which have a stake in the territory claimed. Moreover, the Crown is under a moral, if not a legal, duty to enter into and conduct those negotiations in good faith. Ultimately, it is through negotiated settlements, with good faith and give and take on all sides, reinforced by the judgments of this Court, that we will achieve what I stated in *Van der Peet, supra*, at para. 31, to be a basic purpose of s. 35(1)—“the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown”. Let us face it, we are all here to stay.¹⁶

Thus, political negotiations have usurped litigation as the judicially preferred means of achieving reconciliation.

A. The Treaty Processes

While modern treaty negotiations are largely political in nature, they are guided by a legal framework. As the Court indicated in *Delgamuukw*, once the Crown enters into negotiations it must conduct itself in good faith.¹⁷ Other courts have since reinforced this view of negotiations, acknowledging that while they are political, the courts do have a supervisory role. *Chemainus First Nation v. British Columbia Assets and Lands Corporation* reaffirmed the Crown’s duty once it entered negotiations to “genuinely negotiate ... without oblique motive.”¹⁸ In *Gitanyow First Nation v. Canada*, Williamson J. rejected the Crown’s contention that “the B.C. process is a political exercise, encouraged by the courts, and not amenable to judicial supervision or the ‘supplanting’ of the Treaty Commission by the courts.”¹⁹ Rather, Williamson J. favoured a view of the courts’ role as delineating the appropriate duties of the parties, arguing that “while the courts should be chary of interfering in the process itself, it is appropriate for the courts to assist in determining the duties of the parties involved in that process, in particular when the obligations of the Crown in dealing with Aboriginal peoples have been recognized only after judicial pronouncement.”²⁰

A legal framework also informs treaty negotiations in that First Nations come to the table bearing credible assertions of constitutionally protected rights. That is, the federal and provincial Crowns have more than merely humanitarian reasons for forming treaties. Those tracts of land throughout Canada, including most of BC, that were not the subject of the historical treaties have had their status rendered uncertain by the passage of section 35 and its subsequent judicial interpretation. The threat of many rounds of prolonged litigation in which First Nations might succeed in proving

¹⁶ *Delgamuukw, supra* note 14 at 1123-24.

¹⁷ *Ibid.*

¹⁸ [1999] 3 C.N.L.R. 8 at para. 26, [1999] B.C.J. No. 682 (QL) (B.C.S.C.) [*Chemainus*].

¹⁹ [1999] 3 C.N.L.R. 89 at para. 61, [1999] B.C.J. No. 659 (QL) (B.C.S.C.) [*Gitanyow* cited to C.N.L.R.]. These words are Williamson J.’s paraphrase of the Crown’s argument.

²⁰ *Ibid.* at para. 63.

title, coupled with the present loss of investment due to the uncertainty of the lands, combine to provide governments with a powerful incentive to settle. Section 35 and *Delgamuukw* have made First Nations with outstanding claims forces that must be reckoned with. As the Court stated in *Sparrow* and reconfirmed in *Delgamuukw*, section 35 “provides a solid constitutional base upon which subsequent negotiations can take place.”²¹

Central to the negotiations is the constitutional status of the resulting treaties. This constitutional status flows from a single provision of the treaty, usually in the “General Provisions” chapter, which declares that the agreement is “a treaty and a land claims agreement within the meanings of Sections 25 and 35 of the Constitution Act, 1982.”²² Rights contained within the treaty are then protected through a combination of subsections 35(1) and 35(3) from unilateral government infringement to the degree that the infringement is unjustified. While debate continues over the appropriate standard of justification to which government should be held, it is generally agreed that the standard should be at least as strenuous as that for Aboriginal rights.²³ That latter standard was outlined by the Court in *Sparrow* and has been affirmed and applied numerous times since, both to Aboriginal and treaty rights.²⁴

The *Sparrow* two-pronged justificatory test is very similar to the justificatory test applied under section 1 of the *Canadian Charter of Rights and Freedoms*.²⁵ The Crown must first demonstrate that its interference with the Aboriginal or treaty right is pursuant to a valid legislative objective, and second, that the manner in which that objective is attained is in keeping with the Crown’s fiduciary duty to Aboriginal people. In *Sparrow*, the Court noted three factors relevant to this latter analysis: “whether there has been as little infringement as possible in order to effect the desired

²¹ *Sparrow*, *supra* note 8 at 1105; *Delgamuukw*, *supra* note 14 at 1123.

²² See e.g. *Nisga’a Final Agreement*, *supra* note 5, c. 2, s. 1; *Umbrella Final Agreement*, *supra* note 5 (the Yukon final agreements state (at c. 2) that they “shall be land claims agreements within the meaning of section 35 of the Constitution Act, 1982”).

²³ See *Halfway River First Nation v. B.C. (Minister of Forests)* (2000), 178 D.L.R. (4th) 666 at para. 127, [1999] 4 C.N.L.R. 1 (B.C.C.A.) [*Halfway River*] for a recent application of the view that the *Sparrow* test applies to treaty rights. But see Leonard I. Rotman, “Defining Parameters: Aboriginal Rights, Treaty Rights, and the *Sparrow* Justificatory Test” (1997) 36 Alta. L. Rev. 149 (for the opposing view that the *Sparrow* test should not be applied to treaty rights given their consensual nature).

²⁴ On the application of the *Sparrow* test to treaty rights, see *R. v. Joseph*, [1990] 4 C.N.L.R. 59 at 67, 69, [1990] B.C.J. No. 1749 (QL) (B.C.S.C.); *R. v. Bombay*, [1993] 1 C.N.L.R. 92 at 94, [1993] O.J. No. 164 (QL) (Ont. C.A.); *R. v. Jones* (1993), 14 O.R. (3d) 421 at 431, [1993] 3 C.N.L.R. 182 (Ont. Prov. Div.); *R. v. Gladue*, [1994] 2 C.N.L.R. 101 at 103, [1993] A.J. No. 1063 (QL) (Alta. Q.B.); *R. v. Fox*, [1994] 3 C.N.L.R. 132 at 136, [1994] O.J. No. 667 (QL) (Ont. C.A.); and *Badger*, *supra* note 6 at para. 85.

²⁵ Part I of the *Constitution Act, 1982*, *supra* note 7.

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.”²⁶

Those who advocate the treaty process as a suitable means for First Nations to gain recognition of their rights emphasize the potential to build a new relationship with the state based on “mutual trust, respect, and understanding”.²⁷ Others assert that treaties respect Aboriginal sovereignty by embodying a “nation-to-nation” relationship.²⁸ However, while treaties recognize some rights of the First Nation and grant them constitutional protection, they also define and limit those rights in an attempt to eliminate uncertainty over jurisdiction and the status of lands and resources. Provisions that restrict the rights of the First Nation to those defined in the treaty are generally referred to as the “certainty” provisions.

Federal policy on certainty, developed for the Comprehensive Claims Process, originally adopted the “cede, release and surrender” requirement of the historical treaties. The *James Bay and Northern Quebec Agreement* contains this language.²⁹ Vehement opposition to this extinguishment policy has prompted changes to the federal approach. Recent alternatives include “modifying” Aboriginal title³⁰ or stating that the parties agree that the Aboriginal rights of the First Nation are limited to those defined in the treaty.³¹ Despite these new approaches, however, some BC First Nations

²⁶ *Sparrow*, *supra* note 8 at 1119.

²⁷ *Report of the BC Claims Task Force*, *supra* note 12, Recommendation 1.

²⁸ See Canada, *Report of the Royal Commission on Aboriginal Peoples: Restructuring the Relationship, Part One*, vol. 2 (Ottawa: Supply and Services Canada, 1996) at 18.

²⁹ *Supra* note 5. Section 2.1 states

In consideration of the rights and benefits herein set forth in favour of the James Bay Crees and the Inuit of Quebec, the James Bay Crees and the Inuit of Quebec hereby cede, release, surrender and convey all their Native claims, rights, titles and interests, whatever they may be, in and to land in the territory and in Quebec, and Quebec and Canada accept such surrender.

³⁰ See *e.g. Nisga'a Final Agreement*, *supra* note 5 at c. 2, s. 24:

Notwithstanding the common law, as a result of this Agreement and the settlement legislation, the aboriginal rights, including aboriginal title, of the Nisga'a Nation, as they existed anywhere in Canada before the effective date, including their attributes and geographic extent, are modified, and continue as modified, as set out in this Agreement.

³¹ See *e.g. Nisga'a Final Agreement*, *ibid.*, c. 2, s. 23. A new model developed for the Innu of Mamuitun simply relies on this kind of statement. This model is embodied in a memorandum of understanding called the “Common Approach”. Indian and Northern Affairs Canada, *Common Approach* at § 5.1, online: <http://www.ainc-inac.gc.ca/nr/prs/m-a2000/00147_e.PDF>:

In order to attain the desired degree of legal certainty, the treaty shall contain a clause to the effect that the title and rights defined and confirmed in the treaty constitute the rights of the Innu of Mamuitun on the territory of Quebec that are referred to in section

remain opposed to the treaty process on the basis that the rights limitation language constitutes a fundamental lack of mutuality between the parties. The Union of BC Indian Chiefs (“UBCIC”), which represents some of these First Nations, has denounced certainty as inherently assimilative:

Canada’s striv[ing] for certainty reflects a desire that Indigenous Peoples assimilate into Canada, that we sever our connection to the Land. Canada asks that we dig up the roots connecting us to the Land and replant them through treaties. This lack of understanding and fear about our connection to the Land is what Canada strives to address through certainty.³²

Whereas government stresses the need for finality on the question of Aboriginal rights and title, many First Nations urge that the aim of treaty negotiations should be a constitutional relationship that is capable of ongoing growth.

B. Side Agreements

While constitutionally protected treaties are generally regarded as the primary instrument for reconciliation within modern land claims processes, they are not the only instrument. Not all agreements between parties are included in the treaty so as to receive section 35 protection. There is another species of agreement—called side agreements—that are alluded to within the treaty, but that have their specific terms defined in another agreement that remains outside the treaty. Side agreements are a means of attaching a contractual relationship to an overall treaty relationship.

It is quite common for modern treaties to anticipate one or more side agreements. The *Nisga’a Final Agreement* (“Nisga’a Treaty”) contemplates four side agreements: an own source revenue agreement, a fiscal financing agreement, a taxation agreement, and a harvest agreement.³³ The agreement-in-principle, called the *Tlicho Agreement*, recently signed by the Dogrib Treaty 11 Council and the federal and NWT governments, anticipates two types of side agreement: intergovernmental services

35 of the *Constitution Act of 1982* and that these rights shall be exercised within the exclusive terms and conditions and land area set out in the treaty.

³² See Union of British Columbia Indian Chiefs, *Certainty: Canada’s Struggle to Extinguish Aboriginal Title*, at para. 3, online: Union of British Columbia Indian Chiefs <<http://www.ubcic.bc.ca/certainty.htm>>.

³³ See generally online: Nisga’a Lisims Government <<http://www.nisgaalisims.ca>>. The side agreements can be found on the Indian and Northern Affairs Canada Web site: Indian and Northern Affairs Canada, *Nisga’a Nation Own Source Revenue Agreement*, online: <http://www.ainc-inac.gc.ca/pr/agr/nsga/pdf/source_e.pdf>; Indian and Northern Affairs Canada, *Nisga’a Nation Fiscal Financing Agreement*, online: <http://www.ainc-inac.gc.ca/pr/agr/nsga/fis_e.html>; Indian and Northern Affairs Canada, *Nisga’a Nation Taxation Agreement*, online: <http://www.ainc-inac.gc.ca/pr/agr/nsga/pdf/tax_e.pdf> [*Taxation Agreement*]; Indian and Northern Affairs Canada, *Nisga’a Nation Harvest Agreement*, online: <http://www.ainc-inac.gc.ca/pr/agr/nsga/pdf/harvest_e.pdf> [*Harvest Agreement*].

agreements and financing agreements.³⁴ Lastly, in the Yukon process, which is conducted according to the Yukon UFA, self-government is to be concluded by way of side agreement.³⁵

There are three essential features of side agreements. First, they are alluded to within the treaty. Provisions within an appropriate chapter of the treaty lay out certain agreed-upon guidelines for the eventual side agreement and indicate whether any duty to negotiate such agreements exists, and if so, for whom. There is a range of possible levels of the duty to negotiate. The treaty might not place any duty on the parties to enter negotiations and may merely delineate the guidelines for the agreement in case both parties wish to enter into such a relationship.³⁶ Alternatively, the treaty might give one party the right to initiate negotiations, in which case the other party or parties have a corresponding duty to negotiate in good faith,³⁷ or the treaty might mandate that the parties conclude an agreement.³⁸

The second essential feature of side agreements is provisions within the treaty that locate the side agreement outside the treaty, and so deny it constitutional protection. Such provisions range in explicitness of language. The simpler provisions only exclude the side agreement from the treaty,³⁹ while the more complex ones specifically exclude the agreement from the application of sections 25 and 35.⁴⁰ These provisions may or may not be repeated in the side agreement. The last essential feature of a side agreement is, of course, the actual agreement itself. The agreement may refer to the treaty in its recitals or in the general provisions, or it may not refer to the treaty at all.

³⁴ Indian and Northern Affairs Canada, *Tlicho Agreement*, online: <http://www.ainc-inac.gc.ca/pr/agr/nwts/tliagr2_e.html>.

³⁵ See Council of Yukon First Nations, *supra* note 5.

³⁶ The language of such provisions is permissive, such as the parties “may enter into an agreement.” See *e.g.* *Tlicho Agreement*, *supra* note 34, s. 12.4.5 (allowing for an agreement between government and a renewable resources board created by the treaty).

³⁷ Such provisions might be worded this way: “Party X shall enter into negotiations with Party Y if it so requests with a view to concluding a Z agreement.” See *e.g.* *Umbrella Final Agreement*, *supra* note 5, s. 24.1.1 (apprehending the negotiation of self-government agreements).

³⁸ These provisions are phrased in the imperative and refer to all parties, such as: “the Parties will [or shall] enter into a Z Agreement.” Softer versions of this kind of provision might only talk of the parties entering into negotiations “with a view to concluding a Z agreement.” See *e.g.* *Nisga’a Final Agreement*, *supra* note 5, c. 8, s. 21 (for an example of strong language see the *Harvest Agreement*, *supra* note 33).

³⁹ See *Tlicho Agreement*, *supra* note 34 in which two side agreements are apprehended (c. 7). Sections dealing with the intergovernmental services agreements and the financing agreements have provisions stating that those agreements “shall not form part of the Agreement” (s. 7.10.8 and s. 7.11.10, respectively).

⁴⁰ An example can again be drawn from the *Harvest Agreement* in the *Nisga’a Final Agreement*. See *Nisga’a Final Agreement*, *supra* note 5, c. 8, s. 24 (“The Harvest Agreement is not intended to be a treaty or land claims agreement, and it is not intended to recognize or affirm aboriginal or treaty rights, within the meaning of sections 25 or 35 of the *Constitution Act, 1982*”).

Other features are common, but are not found in every case. The terms of some side agreements state that the agreement binds the parties,⁴¹ or that the agreement may “be amended by written agreement of all the Parties.”⁴² Side agreements often incorporate dispute resolution procedures.⁴³ Some provide that the government parties will “recommend” to their respective legislatures that legislation be passed implementing the agreement. Obviously such legislation is necessary with respect to self-government agreements, but implementing legislation was also required in the Nisga’a harvest and taxation agreements.⁴⁴

One other feature of side agreements is important. For some side agreements, the treaty shields the agreement from unilateral government breach. The treaty provisions that apprehend the side agreement provide that any government interference with the agreement is only valid if the First Nation is accommodated. The only form of such accommodation that has so far been attached to existing side agreements is consultation.⁴⁵ In Part III of this essay, however, I argue that such forms of accommodation might include any of the elements of the *Sparrow* justification test. I point to these justificatory rights as means of transforming side agreements from mere contracts into more appropriate instruments of reconciliation.

For now, it is enough to observe that side agreements establish relationships that are at once both private and constitutional in nature. They are contracts that support, and are supported by, treaties. They are therefore a curious blend of legal regimes and can serve as a model for observing the interaction of private and public law. Yet side agreements possess more than academic relevance. In treaty processes in British Columbia and other areas of Canada where the status of land remains uncertain, side agreements are being used to define aspects of the relationship between First Nations and the state. That these agreements arise out of treaty processes is central to their relevance. As discussed above, many of the justifications for preferring treaty making over litigation as a mode of reconciliation centre on the potential for nation-to-nation relationships between the parties. The mutual respect implicit in the word “treaty” is seen as crucial. The constitutional protection accorded treaties recognizes that the sovereignty of Canada is inherently defined by the rights of Aboriginal peoples. In eschewing that constitutional protection, side agreements immediately appear to

⁴¹ See e.g. *Tlicho Agreement*, *supra* note 34, s. 7.10.9 (stating that an intergovernmental services agreement shall bind the parties).

⁴² See e.g. *Harvest Agreement*, *supra* note 33, s. 28; *Nisga’a Nation Own Source Revenue Agreement*, *supra* note 33, s. 47 (although slightly different wording is used).

⁴³ See e.g. *Harvest Agreement*, *ibid.*, s. 24; *Nisga’a Nation Own Source Revenue Agreement*, *ibid.*, ss. 35-38; *Taxation Agreement*, *supra* note 33, ss. 41-48.

⁴⁴ The Nisga’a Treaty calls for legislation implementing the *Harvest Agreement* (*ibid.*) in chapter 8, section 23. With regard to the *Taxation Agreement* (*ibid.*), the Treaty deals with the legislation in chapter 16, section 23, and the *Nisga’a Final Agreement* (*supra* note 5) calls for it in sections 39-40.

⁴⁵ The self-government agreements concluded under the Yukon UFA are currently the only existing side agreements that are shielded by the treaty in this way.

abandon the mutuality that is so central to reconciliation through negotiations. If government is not constitutionally restrained from interfering with the agreement, then the relationship remains stubbornly vertical, with First Nations yet again at the bottom.

Many side agreements do not merit these strong criticisms because they do not engage the cluster of interests that surround the sovereignty of First Nations. Rather, they deal with aspects of the First Nation-state relationship that are highly variable, and so require an instrument more easily amendable by the parties than the treaty itself. One such agreement, the *Nisga'a Own Source Revenue Agreement*, sets out how the Nisga'a will contribute to the cost of Nisga'a government. It is designed to guide a progressive reduction of BC and Canadian financing. In keeping with this graduated process, the agreement has an initial term of twelve years⁴⁶ and is to be renegotiated before the end of that term.⁴⁷ The *Nisga'a Own Source Revenue Agreement* demonstrates the valuable potential of side agreements to define relationships that are more dynamic than the treaty relationship. Insofar as these relationships acknowledge the need for continued, evolving dealings between the parties, they are somewhat akin to the vision of an ongoing relationship forwarded by some First Nations.

Other side agreements engage interests that touch upon the sovereignty of First Nations, and therefore merit close examination. The *Harvest Agreement* concluded pursuant to the Nisga'a Treaty subsumes the Nisga'a fishery under the conservation concerns of the federal government by giving the minister the right to set annual fish allocations.⁴⁸ Cases such as *R. v. Gladstone*⁴⁹ and *Sparrow* illustrate that for some First Nations the right to fish according to their own community rules is important. The Dogrib agreement-in-principle states that the primary objective of the intergovernmental services side agreement is "to provide for the management, administration and delivery of health, education, welfare, family and other social services and programs to persons other than Tlicho Citizens on Tlicho lands or in a Tlicho community and to Tlicho Citizens."⁵⁰ The delivery of social programs such as these is no side issue.

In the Yukon treaty process side agreements are used to address interests that go straight to the core of Aboriginal sovereignty. Under the UFA system, governance is defined and protected through side agreements. Thus, Yukon First Nations that conclude such agreements enjoy some governmental powers, but those powers are not constitutionally entrenched as treaty rights. So far, seven of eleven Yukon First

⁴⁶ *Nisga'a Nation Own Source Revenue Agreement*, *supra* note 33, s. 40.

⁴⁷ *Ibid.*, s. 43.

⁴⁸ The *Nisga'a Final Agreement*, however, does set certain minimum allocations, and gives a right to compensation if these levels are not met (*supra* note 5, c. 8, s. 22).

⁴⁹ [1996] 2 S.C.R. 723, 134 D.L.R. (4th) 648.

⁵⁰ *Tlicho Agreement*, *supra* note 34, s. 7.10.3.

Nations have signed self-government agreements.⁵¹ While the establishment of the Nisga'a Lisims Government gained international attention, the land area subject to their jurisdiction is minute in comparison to that at issue in the Yukon process.

The model of self-government by side agreement has relevance beyond the borders of the Yukon Territory. The BC Treaty Negotiations Referendum ("Treaty Referendum") held in the summer of 2002 demonstrated that there is very significant support in the province for a delegated model of self-government. The referendum proposed eight principles of treaty negotiations and asked the BC electorate whether the provincial government should take them to the bargaining table. The overwhelming support that all eight principles received was immediately interpreted by Premier Gordon Campbell as "a resounding vote of confidence in both the treaty-making process and the principles that my government will take to the table on the people's behalf."⁵² Principle 6, which held that "Aboriginal self-government should have the characteristics of local government, with powers delegated from Canada and British Columbia," received 87.25 per cent of the 615,977 valid votes.⁵³

The Treaty Referendum is but one manifestation of long-standing opposition in British Columbia to constitutionally protected self-government. For instance, as leader of the official opposition, Gordon Campbell launched a legal challenge to the Nisga'a Treaty.⁵⁴ While the challenge failed, another action is now being taken forward by different parties.⁵⁵ Opposition to constitutionalized self-government is also broadcasted through the media. Rafe Mair, a prominent BC radio commentator, has voiced sustained criticism of the direction of the treaty negotiations for years.⁵⁶ With

⁵¹ The First Nations that have signed self-government side agreements are the First Nation of Nacho Nyak Dun, the Champagne-Aishihik First Nation, the Vuntut Gwichin First Nation, the Teslin Tlingit Council, the Little Salmon-Carmacks First Nation, the Selkirk First Nation, and the Tr'ondek H'wechin First Nation. See Council of Yukon First Nations, *supra* note 5.

⁵² Premier Gordon Campbell, "Post Referendum Press Conference" (3 July 2002), online: Office of the Premier <http://www.gov.bc.ca/prem/down/premiers_speeches/post_referendum_speech_07_03.pdf>.

⁵³ Chief Electoral Officer, *Report of the Chief Electoral Officer on the Treaty Negotiations Referendum* (Victoria: Elections BC, 2002) at 6, online: Elections BC <<http://www.elections.bc.ca/referendum/refreportfinal.pdf>>.

⁵⁴ *Campbell v. British Columbia (A.G.)* (2000), 189 D.L.R. (4th) 333, [2000] 4 C.N.L.R. 1 (B.C.S.C.).

⁵⁵ See *House of Sga'nisim, Nisibilada v. Canada*, 2002 BCCA 362.

⁵⁶ A good summary of Mr. Mair's arguments are contained within his 15 February 1998 editorial for the *Vancouver Courier*:

Starting very soon, huge tracts of land in British Columbia will no longer be under the control of Victoria even though the land is presently owned by the Crown. ...

These tracts of land will be under the exclusive control of Indian Bands, often under hereditary leadership, which will determine what if any rights non natives have on

the election of Campbell's BC Liberals, the political price of constitutionalized self-government has increased for First Nations.

First Nations leaders have been no less vocal in forwarding their views. The Treaty Referendum met with sustained protest, including two legal challenges.⁵⁷ Principle 6, concerning self-government, received the most attention. The reaction of the First Nations Summit, the collective body representing First Nations involved in the BC process, was voiced by Herb George, one of its three commissioners. He argued, "[i]f the mandate says that we will only negotiate with you in terms of a municipal style of government, then we've got a problem." He reiterated that "if the inherent right [to self-government] is not on the table, then we're not at the table."⁵⁸

A model of self-government by side agreement lies at the point of impact between First Nations and Canada's competing claims to sovereignty. While many citizens are concerned about the possibility of the "Balkanization" of BC through the creation of dozens of constitutionally protected self-governing First Nations, a delegated model of self-government is viewed by many First Nations as a denigration of their nation-to-nation vision of the treaty process. Whereas treaties respect the inherent rights of First Nations by providing them with constitutional protection against state infringement, side agreements appear to relegate their interests once again to the status of mere policy issues. Thus, where important interests are at stake, side agreements can be viewed as a return to the pre-1982 era of Canada-First Nations relations.

In the following sections, I explore how side agreements can mediate these opposing views of the First Nation-state relationship. Side agreements are a mixture

these lands. If the proposed Nisga'a settlement is any guide, non band members will certainly not have political or property rights.

What will this amount to?

Well, the best examples I can think of where ownership of land and the rights of residents thereon depended upon race was in apartheid South Africa. They were called native homelands and were rightly condemned by decent people, including the Canadian Government and our courts, as racist. ...

Welcome to British Columbia, the land of 1600 native homelands, where all rights depend not only upon being of the correct race, but the right clan as well (Rafe Mair, "Vancouver Courier for February 15, 1998", online: Rafe Mair Online <<http://www.rafeonline.com/archive/courier/19980215.shtml>>).

⁵⁷ See *Hupacasath First Nation v. British Columbia*, 2002 BCSC 802; *Bob v. British Columbia*, [2002] 8 W.W.R. 621, 2002 BCSC 733. The UBCIC and Chief Judith Sayer of the Hupacasath First Nation led an "active boycott" strategy, including ballot burning. See Union of BC Indian Chiefs, "What to Do With Your Referendum Ballot", online: Union of BC Indian Chiefs <<http://www.ubcic.bc.ca/referendum.htm>>.

⁵⁸ CBC News Online, "B.C. Treaty Vote Results Favour Government" (4 July 2002), online: CBC News Online <<http://www.cbc.ca/stories/2002/07/03/treaty020703>>.

of both visions insofar as they are contracts embedded within a treaty relationship. The contractual aspects subsume Aboriginal interests under the legislative sovereignty of the state, while the treaty defines a relationship that is more horizontal. I look at the contractual elements first, and further elaborate on the threat they pose to Aboriginal sovereignty. Then, in Part III, I discuss how the treaty can shield the side agreement against this threat by constitutionally requiring accommodation of Aboriginal interests in the case of government or legislative breach.

II. Side Agreements as Contractual Relationship

Soon after the passage of the UK *Crown Proceedings Act of 1947*, statutory reform in every Canadian jurisdiction had abolished the requirement of receiving permission to sue the government in contract or in tort. These statutory reforms eliminated the “petition of right”, which required the government’s consent to be sued through the granting of a “royal fiat”.⁵⁹ The capacity of subjects to sue the government on substantially the same basis as they could sue another subject is now no longer contingent upon the Crown’s permission.⁶⁰ Crown liability in contract, however, is subject to the saving doctrine of executive necessity, which voids government contracts where a contract would “fetter its future executive action, which must necessarily be determined by the needs of the community when the question arises.”⁶¹ That doctrine has, however, largely become a dead letter, such that government contracts are routinely enforced without real consideration of it.⁶² Thus, the presumptive result of government breaking a side agreement with First Nations would be their liability for damages in an ordinary court. Those damages would normally be measured on an expectations standard, just as would a contract between two ordinary subjects. While some commentators have argued that government should only be held to a reliance standard of damages,⁶³ this is not the present state of the law.

Yet situations do arise when government considers that its contractual obligations too greatly constrain its policy-making functions. While the law of contract would hold government to the payment of damages, there is another avenue of escape

⁵⁹ See Peter W. Hogg & Patrick J. Monahan, *Liability of the Crown*, 3d ed. (Scarborough, Ont.: Carswell, 2000) at 4-11 (for a thorough discussion of the history of Crown proceedings).

⁶⁰ Before the statutory reforms, the Crown was held to the same liability as citizens. In *Journal Publishing v. The King*, [1930] Ex. C.R. 197, [1930] 4 D.L.R. 644 at 649, the Exchequer Court of Canada held that “in matters of contract the legal rights and liabilities of the Crown are substantially the same as those arising between subject and subject.”

⁶¹ This statement of the doctrine is taken from *The Amphitrite*, [1921] 3 K.B. 500 at 503, [1921] All E.R. 542.

⁶² Hogg & Monahan, *supra* note 59 at 229.

⁶³ See John Mitchell, *The Contracts of Public Authorities: A Comparative Study* (London: LSE, 1954); Gillian Hadfield, “Of Sovereignty and Contract: Damages for Breach of Contract by Government” (1999) 8 S. Cal. Interdisciplinary L.J. 467.

available. As Hogg and Monahan observe, “[t]he solution to this case is legislation.”⁶⁴ Parliament and the provincial legislatures have traditionally been regarded as competent to cancel a contract and deny the aggrieved party compensation. If it is a judicial decision that has set the cost of the contractual obligations too high, then that decision can be modified. Neither of the civil liberties documents are of any real aid to a plaintiff. The Charter does not protect property or contractual rights, and what limited protections the Bill of Rights offers can be denied by Parliament in an ordinary statute if that denial is sufficiently explicit. Thus, the legislative branch can extract an executive that is in over its head. As the executive necessity doctrine has withered as a means of securing the supremacy of the public will, legislation is the last bulwark. Hogg and Monahan characterize this unfettered legislative discretion as “the ultimate safeguard of public policy.”⁶⁵

The competence of the legislative branch to override the liability of the Crown flows from the basic doctrine of parliamentary supremacy. That doctrine contains the basic assertions that the executive cannot bind the legislative branch, and that legislatures are competent to pass or repeal any law that lies within its constitutionally granted jurisdiction.⁶⁶ As one court famously put it, “The prohibition, ‘Thou shalt not steal’ has no legal force upon the sovereign body.”⁶⁷ The power to cancel a contract is, however, somewhat constrained by the rules of interpretation used by courts. Recently, the Supreme Court reiterated this position, holding that “clear and explicit statutory language would be required to extinguish existing rights previously conferred on [a] party.”⁶⁸ But if the language is sufficiently explicit, it is open to Parliament to modify and even cancel contractual rights. The most significant deterrents against legislative cancellations are imposed not by the courts, but by would-be contractors and the public. It is commonsensical that were government to routinely repudiate its contractual obligations, it would soon be unable to find anyone to contract with. Thus, legislative cancellation or modification might preserve the governmental budget, but it seriously damages the government’s reputation. Furthermore, the repudiation of contractual rights by legislation can in many circumstances appear to the public so unjust to the aggrieved party that the abstract justification of public policy does not suffice. Thus, basic principles of good business and political appearances constrain the government from regularly shirking its contractual bargains.

Despite these restraints, however, legislatures occasionally enact such legislation. This is especially true of the provinces. Provincial governments have enacted

⁶⁴ Hogg & Monahan, *supra* note 59 at 229.

⁶⁵ *Ibid.*

⁶⁶ See *Reference Re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525, 83 D.L.R. (4th) 297 [CAP Reference cited to S.C.R.].

⁶⁷ See *Florence Mining Co. v. Cobalt Lake Mining Co.* (1909), 18 O.L.R. 275 at 279 (C.A.).

⁶⁸ *Wells v. Newfoundland*, [1999] 3 S.C.R. 199 at para. 41, 177 D.L.R. (4th) 73.

legislation cancelling contractual rights,⁶⁹ rewriting contracts,⁷⁰ and modifying collective agreements with public sector unions.⁷¹ On the other hand, instances in which Parliament has enacted such legislation are few. Regulations enacted pursuant to the *War Measures Act* expropriated property from Japanese Canadians during the Second World War.⁷² As well, in 1991, Parliament passed legislation that capped the growth of its transfer payments to the provinces of Alberta, British Columbia, and Ontario under the *Canada Assistance Plan*.⁷³

More recently, the House of Commons passed Bill C-22 in June of 1994, which would have cancelled a series of contracts and denied the aggrieved parties compensation and even a cause of action.⁷⁴ The contracts, which had been signed by the federal Conservative government in the course of an election campaign, together privatized Terminals 1 and 2 of Toronto's Pearson International Airport. The bill, however, caused a political firestorm at the time and it was eventually defeated in the Senate.⁷⁵ Had the bill been enacted, it would have been the last of perhaps only three instances in the past century in which Parliament cancelled or significantly modified specific contracts.⁷⁶

While the provinces have been more willing to take the political risks associated with legislative repudiation, it might reasonably be questioned whether contract cancellation poses a serious threat to side agreements formed by First Nations and

⁶⁹ As in *Ottawa Valley Power Co. v. Hydro-Electric Power Commission* (1936), [1937] O.R. 265 (Ont. CA); and *Reference Re Upper Churchill Water Rights Reversion Act 1980 (Newfoundland)*, [1984] 1 S.C.R. 297, 8 D.L.R. (4th) 1.

⁷⁰ As in *Ladore v. Bennett*, [1939] A.C. 468, [1939] 3 All E.R. 98 (P.C.); and *Bacon v. Saskatchewan Crop Insurance Corp.*, [1999] 11 W.W.R. 51, 180 Sask. R. 20 (Sask. C.A.) [*Bacon*].

⁷¹ For recent examples, see *Education Services Collective Agreement Act*, S.B.C. 2002, c. 1; *Public Education Flexibility and Choice Act*, 2001, S.B.C. 2002, c. 2; and Bill 29, *Health and Social Services Delivery Improvement Act*, 2d Sess., 37th Leg., B.C., 2001, all introduced by the current BC government.

⁷² See e.g. P.C. 1942-1665, C. Gaz. 1942, 13628 (11 March 1942).

⁷³ The legislation was challenged by the provinces and upheld by a unanimous Supreme Court in *CAP Reference*, *supra* note 66.

⁷⁴ Bill C-22, *An Act respecting certain agreements concerning the redevelopment and operation of Terminals 1 and 2 at Lester B. Pearson International Airport*, 1st Sess., 35th Parl., 1994 (as passed by the House of Commons 16 June 1994).

⁷⁵ See Patrick J. Monahan, "Is the Pearson Airport Legislation Unconstitutional?: The Rule of Law as a Limit on Contract Repudiation by Government" (1995) 33 *Osgoode Hall L.J.* 411 at 414-15 (for a presentation of the bill's history).

⁷⁶ Of course, many other pieces of legislation have had the effect of expropriating property or annulling contractual rights. The leading Canadian case in this context is *Manitoba Fisheries v. The Queen* ((1977), [1978] 1 F.C. 485, 88 D.L.R. (3d) 462 (C.A.)), which dealt with the federal *Freshwater Fish Marketing Act* (R.S.C. 1985, c. F-13). The plaintiffs argued that the Act had the effect of expropriating their company's goodwill and that they were entitled to fair compensation. The Supreme Court of Canada agreed.

government. This skepticism makes sense given the enormous political fallout that would likely follow such a move. But if we examine side agreements in terms of their role in the project of reconciliation of First Nations with the Canadian state, then the mere fact that government can repudiate them is significant. If side agreements deliver important First Nations' interests to the supremacy of majoritarian authority, then insofar as those interests are concerned, First Nations will be in the same subordinate relationship that the constitutional amendments of 1982 were intended to fix. This is the deeper threat posed by side agreements, and it is very likely the trigger behind many First Nations people's strong animosity toward the BC Liberals' referendum and its Principle 6.

This deep threat posed by side agreements to Aboriginal sovereignty would be mitigated, however, if some ground can be found that restrains the exercise of legislative supremacy such that the bargain struck could not be unilaterally cancelled. If the obligations were bilateral, then side agreements would not vitiate the mutual respect upon which reconciliation depends. This would also have the beneficial result of making available to the parties another tool to use in negotiations. In the following sections, I explore two arguments for constraining the legislative sovereignty of the state.

A. The Rule of Law

One approach to counter the validity of legislative cancellations is to challenge the doctrine of legislative supremacy upon which they depend. This approach argues that the *Constitution Act, 1982* subjected legislative supremacy to the rule of law through the entrenchment of section 52⁷⁷ and the inclusion of the principle of the rule of law in the preamble to the Charter.⁷⁸ Therefore, legislative supremacy arguably no longer includes the capacity to legislatively repudiate contractual rights.

The submissions of various legal experts called by the Senate Committee looking into Bill C-22 provide most of the positions surrounding this issue. The traditional view of the rule of law is well represented by Joel Bakan and David Schneiderman.⁷⁹ Based on section 52's reference to "provisions" of the constitution, they argue that only constitutional provisions, not principles, can be a basis for holding legislation of no force or effect to the extent of the inconsistency. Since the rule of law is not set out

⁷⁷ *Supra* note 7. Subsection 52(1) states:

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.

⁷⁸ *Supra* note 25. The Preamble reads:

Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law.

⁷⁹ Joel Bakan & David Schneiderman, "Submission to the Standing Senate Committee on Legal and Constitutional Affairs Concerning Bill C-22" [unpublished, on file with author].

in a specific provision, but is merely a principle drawn from section 52 and the preamble, it cannot be used by itself to strike down legislation.⁸⁰ Bakan and Schneiderman concede that the rule of law has been used to require state officials to comply with legislation,⁸¹ to aid interpretation of constitutional provisions,⁸² and to inform constitutional remedies,⁸³ but it has never been used on its own to restrain legislative sovereignty.⁸⁴ Furthermore, they argue that to do so would be contradictory. The rule of law requires that legal decisions be based on comprehensible norms, and the use of the rule of law as a basis for vitiating legislation would engender decisions that would be inherently vague and arbitrary.⁸⁵

A number of other experts called by the committee took the contrary view. The Canadian Bar Association (“CBA”) submitted that the bill infringed the rule of law,⁸⁶ as did Professor Ken Norman.⁸⁷ Professor Patrick Monahan also testified that Bill C-22 was invalid, but only on the grounds that it infringed the Bill of Rights.⁸⁸ He has since written an article in which he argues that Bill C-22 would have been invalid due to inconsistency with the rule of law.⁸⁹

The argument forwarded by these experts is based on the shift in supremacy from the legislatures to the constitution that was heralded by the entrenchment of section 52. In his later article, Monahan points to the Supreme Court’s subsequent expansion on the principle of the rule of law as evidence that “all constitutional powers,

⁸⁰ *Ibid.* at paras. 2 and 3.

⁸¹ See *Roncarelli v. Duplessis*, [1959] S.C.R. 121 at 142, 16 D.L.R. (2d) 689 [*Roncarelli* cited to S.C.R.]; *Amx Potash v. Government of Saskatchewan*, [1977] 2 S.C.R. 576, 71 D.L.R. (3d) 1; and *British Columbia Power Corp. v. British Columbia Electric Co.*, [1962] S.C.R. 642, 34 D.L.R. (2d) 196. Cases cited by Bakan & Schneiderman, *ibid.*

⁸² *B.C.G.E.U. v. British Columbia (A.G.)*, [1988] 2 S.C.R. 214, 53 D.L.R. (4th) 1. Case cited by Bakan & Schneiderman, *ibid.*

⁸³ *Reference Re Manitoba Language Rights (Man.)*, [1985] 1 S.C.R. 721, 19 D.L.R. (4th) 1 [*Manitoba Language Reference* cited to S.C.R.]. Case cited by Bakan & Schneiderman, *ibid.*

⁸⁴ Bakan & Schneiderman, *ibid.* at para. 5.

⁸⁵ *Ibid.* at paras. 7-8. They cite Dale Gibson’s testimony before the Senate Committee as part of their argument: Senate of Canada, Standing Senate Committee on Legal and Constitutional Affairs, “Eighth Report of the Committee (Report on Bill C-22)” in *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs*, No. 11 (5 July 1994) at 68.

⁸⁶ See CBA, Constitutional and Human Rights Section, “Submission on Bill C-22” (November 1994) [unpublished, on file with author] at 3 [“CBA Submissions”]. The CBA Submissions, however, do not explicitly indicate whether they regard an “infringement” of the rule of law to be a valid ground for striking down legislation. I assume that they do.

⁸⁷ Extracts from his submissions were published as a *Globe and Mail* commentary piece: Ken Norman, “The Pearson Act Offends the Rule of Law” *The Globe and Mail* (8 December 1994) A27.

⁸⁸ See Monahan, *supra* note 75 at 415. Other experts also made submissions on the Bill of Rights. As the Bill is not constitutionally entrenched and can be overridden by Parliament, I do not consider these arguments.

⁸⁹ *Ibid.*

including the powers of Parliament itself, are subject to the requirements of the rule of law.”⁹⁰ The clearest support Monahan finds is the *Manitoba Language Reference*, in which the Court referred to the rule of law as temporarily delaying the invalidation of all of Manitoba’s legislation for failing to meet the requirements of section 23 of the *Manitoba Act, 1870*.⁹¹ After noting that while it “is not set out in a specific provision, the principle of the rule of law is clearly a principle of our Constitution,”⁹² the Court appeared to hold that mere principles could be used to invalidate legislation. It quoted this passage from the *Patriation Reference*:

However, on occasions, this Court has had to consider issues for which the *B.N.A. Act* offered no answer. In each case, this Court has denied the assertion of any power which would offend against the basic principles of the Constitution.⁹³

Monahan asserts that “any power” must include legislative powers as well as those exercised by the Crown.⁹⁴

From the basis that the rule of law can restrain legislative sovereignty of its own force, both Monahan and the CBA then argued that the rule of law contains at least three subordinate principles that Bill C-22 infringed. First, the rule of law depends on access to the courts. Second, the courts have long recognized that legislation authorizing expropriation without compensation is “fundamentally unjust”,⁹⁵ and so the courts developed the principle of statutory construction that interprets such legislation narrowly. Last, both experts submitted that the rule of law is infringed by undue reliance on ministerial discretion.⁹⁶

The thesis that the rule of law constrains the exercise of legislative as well as executive power is tempting insofar as it resonates with the increasing emphasis on “underlying principles of the Constitution” that has marked post-1982 constitutional jurisprudence. In many ways, the CBA and Monahan anticipated later developments in the case law. The most compelling statements on these principles arose in Supreme Court decisions written in the late 1990s, especially the *Secession Reference*,⁹⁷ where the Court discussed four principles underpinning the constitution, of which the rule of law is one. At one point, the Court seems to equate these principles with constitutional provisions in terms of their capacity to restrain governmental power. The Court holds, “Underlying constitutional principles may in certain circumstances give rise to

⁹⁰ *Ibid.* at 421.

⁹¹ S.C. 1870, c. 3, reprinted in R.S.C. 1985, App. II, No. 8.

⁹² *Manitoba Language Reference*, *supra* note 83 at 751. Cited in Monahan, *supra* note 75 at 422.

⁹³ *Reference Re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753 at 841, 125 D.L.R. (3d) 1, Martland & Ritchie JJ. [*Patriation Reference* cited to S.C.R.]. Cited in Monahan, *ibid.*

⁹⁴ Monahan, *ibid.*

⁹⁵ CBA Submissions, *supra* note 86 at 10.

⁹⁶ See CBA Submissions, *ibid.* at 10-11; Monahan, *supra* note 75 at 429-31.

⁹⁷ *Reference Re Secession of Quebec*, [1998] 2 S.C.R. 217, 161 D.L.R. (4th) 385 [*Secession Reference* cited to S.C.R.].

substantive legal obligations ... which constitute substantive limitations upon government action.”⁹⁸ If “government action” includes the exercise of legislative sovereignty, then the Court’s statement would seem to support the CBA and Monahan’s thesis. Furthermore, in *Babcock v. Canada*, the Court recently re-emphasized that “the unwritten constitutional principles are capable of limiting government actions,”⁹⁹ although it also held that they “must be balanced against the principle of Parliamentary sovereignty.”¹⁰⁰

Subsequent decisions of lower courts, however, have not interpreted the comments in the *Secession Reference* this way. In fact, as Sujit Choudhry has observed, “Canadian courts seem unwilling to engage in the imaginative approach to constitutional interpretation.”¹⁰¹ The case law demonstrates that challenges to legislation based on unwritten constitutional norms have been almost uniformly unsuccessful. Whether relying on the principle of the rule of law,¹⁰² minority rights,¹⁰³ democracy,¹⁰⁴ or the separation of powers,¹⁰⁵ such challenges have not succeeded in invalidating legislation.¹⁰⁶ In fact, one court writing in May 2002 observed that, “[a]lthough the rule of law was the basis for restricting arbitrary and unlawful actions

⁹⁸ *Ibid.* at 249. See also *Patriation Reference*, *supra* note 93 at 845.

⁹⁹ *Babcock v. Canada (A.G.)*, [2002] 3 S.C.R. 3 at 29, 214 D.L.R. (4th) 193.

¹⁰⁰ *Ibid.*

¹⁰¹ Sujit Choudhry, “Unwritten Constitutionalism in Canada: Where Do Things Stand?” (2001) 35 *Can. Bus. L.J.* 113 at 120.

¹⁰² See *Singh v. Canada (A.G.)*, [1999] 4 F.C. 583, 170 F.T.R. 215 (F.C.T.D.), *aff’d* (2000) 183 D.L.R. (4th) 458, 20 *Admin. L.R.* (3d) 168 (F.C.C.A.), leave to appeal to S.C.C. refused, [2000] 1 S.C.R. xxii [*Singh* cited to D.L.R.]; *JTI-MacDonald Corp. v. B.C. (A.G.)* (2000), 184 D.L.R. (4th) 335, [2000] 6 W.W.R. 227 (B.C.S.C.); *Bacon*, *supra* note 70; *Hogan v. Newfoundland (A.G.)* (1999), 173 Nfld. & P.E.I.R. 148, 59 C.R.R. (2d) 318 (Nfld. S.C.(T.D.)), *aff’d* (2000), 183 D.L.R. (4th) 225, 72 C.R.R. (2d) 1 (Nfld. S.C.(C.A.)) [*Hogan*]; *Public Service Alliance of Canada v. Canada* (2000), 192 F.T.R. 23, [2000] F.C.J. No. 754 (F.C.T.D.) (QL) (defendant succeeded on an application to strike a claim for failure to disclose a cause of action with regard to the plaintiff’s claims that legislation offended the rule of law, but was unsuccessful in other respects).

¹⁰³ See *Hogan*, *ibid.*; *Moncton (City) v. Charlebois* (2001), 242 N.B.R. (2d) 259 at 303, 25 M.P.L.R. (3d) 171 (N.B.C.A.) (plaintiff succeeded in striking down the city’s bylaw, but the court refused to use the principle of minority protection as its basis:

As I understand the effect of the statements made by the Supreme Court concerning the use of these principles, I think that the argument that this unwritten and underlying principle can also be used independently of any constitutional text, as a basis of an application for judicial review to strike down government action is not very convincing. I believe that the “powerful normative force” referred to by the Supreme Court concerns the interpretation of constitutional texts and not the creation of rights outside of the constitutional texts).

¹⁰⁴ See *Brown v. Alberta* (1999), 177 D.L.R. (4th) 349, [1999] 12 W.W.R. 330 (Alta. C.A.).

¹⁰⁵ See *Singh*, *supra* note 102.

¹⁰⁶ See Choudhry, *supra* note 101 (for a good examination of the case law involving unwritten constitutional norms as of 2001. This article refers to many of the aforementioned cases).

by public officials in *Roncarelli* ... there have been no cases where the doctrine was successfully extended to strike down legislation.”¹⁰⁷

*Lalonde*¹⁰⁸ might be thought to contradict this observation. In that case the principle of minority rights was used to review the Ontario Health Services Restructuring Commission’s decision to shut down certain programs of the only French-language hospital in Ontario. However, the Ontario Court of Appeal did not use that constitutional principle in the manner discussed here. While the Court affirmed the Divisional Court’s quashing of the Commission’s decision based on the principle of minority rights alone, the Court specifically left the question of whether unwritten constitutional principles can be used to strike down legislation to another day.¹⁰⁹

The Ontario Court of Appeal’s reluctance to strike down legislation on the basis of an unwritten constitutional principle alone seems similar to that shown by most lower courts. It is just too difficult to apply unwritten principles to specific facts and thereby reach a specific outcome. A principle of the rule of law that floats above positive articulations of its content can so readily be asserted to mean anything that ultimately it means nothing. Courts have been alive to this problem. As the Federal Court of Appeal observed in *Singh*, “[a]dvocates tend to read into the principle of the rule of law anything which supports their particular view of what the law should be.”¹¹⁰ Furthermore, the more the rule of law is detached from specific enunciations of its content in statutes and constitutional provisions, the more it becomes self-contradictory. While recent cases demonstrate that, at least among counsel if not among the judiciary, there is debate as to what the rule of law really means, there is little disagreement that it must at least mean that laws not be vague. The *Secession Reference* is itself clear on this point: “At its most basic level, the rule of law vouchsafes to the citizens and residents of the country a stable, predictable and ordered society in which to conduct their affairs.”¹¹¹ As Bakan and Schneiderman stated in their submissions to the Senate Committee on the Bill C-22 issue, “[t]he principle of rule of law, as a vague, general and ‘unstated principle that lurk[s] in the

¹⁰⁷ *Matthew v. Canada*, [2003] 1 C.T.C. 2045 at 2201, (2002) 99 C.R.R. (2d) 189 (T.C.C.). The court was referring to *Roncarelli*, *supra* note 81.

¹⁰⁸ *Lalonde v. Ontario (Commission de restructuration des services de santé)* (2001), 56 O.R. 505, 208 D.L.R. (4th) 577 (Ont. C.A.) [cited to O.R.].

¹⁰⁹ *Ibid.* at para. 126, where Weiler and Sharpe J.J.A. held for the Court that “it is not necessary for us to answer the more general question—whether the fundamental constitutional principle of respect for and protection of minorities gives rise to a specific constitutional right capable of impugning the validity of an act of the legislature or sufficient to require the province to act in some specific manner.”

¹¹⁰ *Singh*, *supra* note 102 at 478.

¹¹¹ *Secession Reference*, *supra* note 97 at 257.

text of the Constitution' is thus disqualified, by its own terms, from being a *rule of law*."¹¹²

Arguments against the validity of legislative cancellations of side agreements that depend solely upon unwritten principles of the constitution are therefore unlikely to succeed in the lower courts. Rather, these courts will probably continue to confine the principles to the narrow purpose of interpreting written provisions. And since the constitution contains no protections for property or contractual rights, the likelihood that the rule of law will be used to invalidate legislated repudiations of side agreements is very slim indeed.

For the case of side agreements, this means that the principle of the rule of law will not likely protect First Nations against the government unilaterally cancelling or modifying the agreement. Unwritten principles are probably too vague to be applied to the complex realities of Crown-First Nation negotiations. Thus, in the absence of some other restraint on the capacity of government to take unilateral action, First Nations will have to bargain for such protection. A restraint may, however, be found in the fiduciary duty doctrine, which is considered in the next section.

B. The Fiduciary Duty

While side agreements may be binding on the parties, government can escape from its contractual obligations by exercising its legislative supremacy. This avenue is not open to the First Nations party. Thus the government party has considerable discretion over the interests of the contracting First Nation.

The exercise of discretion is often regulated by fiduciary doctrine. The fiduciary relationship has been extended to the state-First Nation relationship, based upon the *sui generis* nature of Aboriginal title and the powers and responsibilities historically assumed by the Crown.¹¹³ The existence of a fiduciary duty obligates the fiduciary to act in the best interests of the principal, but the intensity of the duty varies according to the discretion held by the fiduciary.¹¹⁴ Various courts have found that the government's relationship with Aboriginal peoples requires a "high standard of honourable dealing"¹¹⁵ and "no appearance of 'sharp dealing.'"¹¹⁶ While the fiduciary

¹¹² Bakan & Schneiderman, *supra* note 79 at 5 [footnote omitted]. There has even been recent case law on whether the rule of law can be used by itself to strike down legislation on the ground of vagueness: *Johnson v. B.C. (Securities Commission)* (1999), 67 B.C.L.R. (3d) 145 at 159, 64 C.R.R. (2d) 275 (B.C.S.C.) (Allan J. found that the legislation could not be struck down. The Court of Appeal varied on other grounds). See *Johnson v. B.C. (Securities Commission)* (2001), 206 D.L.R. (4th) 711, [2001] 10 W.W.R. 635 (B.C.C.A.).

¹¹³ See *Sparrow*, *supra* note 8.

¹¹⁴ See *Canadian Aero Service Limited v. O'Malley*, [1974] S.C.R. 592, 40 D.L.R. (3d) 371.

¹¹⁵ *Sparrow*, *supra* note 8 at 1109.

¹¹⁶ *R. v. Taylor* (1981), 34 O.R. (2d) 360 at 367, 62 C.C.C. (2d) 227 (Ont. C.A.).

relationship between the Crown and Aboriginal peoples was originally conceived by the Supreme Court in *R. v. Guerin*¹¹⁷ as a creature of the common law, the *Sparrow* case recognized it as "a general guiding principle" for section 35. Thus, the fiduciary relationship between government and First Nations now not only implicates the executive branch, it also constrains the exercise of legislative sovereignty such that infringements of certain Aboriginal interests must be justified.

At first glance, then, the general parameters of fiduciary law seem to have the potential to restrain the unilateral repudiation of side agreements by government. Yet the fiduciary duty suffers from the same weakness as the rule of law argument; without a constitutional grounding, the contract is subject to the sovereignty of Parliament. Such vulnerability to legislative supremacy potentially undermines a lawsuit against the executive for breach of fiduciary duty.

There are two problems regarding an action against the Crown for breach of fiduciary duty. First, a fiduciary relationship does not always imply a fiduciary duty. Rather, fiduciary duties depend on a specific discretion entrusted to the fiduciary.¹¹⁸ With side agreements, what is the specific discretion that grounds the Crown's duty? The obvious possibility is the capacity for the Crown to introduce a bill into Parliament that would cancel or modify the agreement. It might be said that this discretion, arising after the surrender of the First Nation's rights to the side agreement, is relevantly similar to the post-surrender duty that was owed by the Crown to the Musquem Band in *Guerin*. The fiduciary relationship would require that the Crown exercise that discretion in the best interests of the First Nation, which obviously would not be served by the introduction of the bill.

But it is not at all clear that a side agreement arising out of good faith negotiations is a situation analogous to that of *Guerin*, because there is no right sufficient to ground the duty. *Guerin* involved an express undertaking by government under the *Indian Act* that precluded First Nations from alienating their reserve land to anyone but the Crown. The Court found that the First Nation's interest in reserve land was legally identical to an interest in Aboriginal title.¹¹⁹ It is this element that is missing with regard to side agreements. Assuming that the negotiations are not coercive,¹²⁰ then all that the parties have done in forming the side agreement is to deal with those matters it concerns in a non-constitutional manner. That is, the parties have agreed

¹¹⁷ [1984] 2 S.C.R. 335, 13 D.L.R. (4th) 321 [*Guerin* cited to S.C.R.].

¹¹⁸ *Ibid.* at 384 (Dickson J. (as he then was) stated: "where by statute, agreement, or perhaps by unilateral undertaking, one party has an obligation to act for the benefit of another, and that obligation carries with it a discretionary power, the party thus empowered becomes a fiduciary").

¹¹⁹ See *ibid.* at 379 (Dickson J. stated: "It does not matter, in my opinion, that the present case is concerned with the interest of an Indian Band in a reserve rather than with unrecognized aboriginal title in traditional tribal lands. The Indian interest in the land is the same in both cases" [footnote omitted]).

¹²⁰ The effect of coercion in the negotiations will be discussed below. See *infra*, Part IV.

that for the purposes of the side agreement the interests are merely contractual. Since the rule of law does not constrain legislative supremacy, contracts with government are inherently defined by the possibility of legislative cancellation. When a minister introduces such a bill, she is not exercising the discretion of a fiduciary, because it is simply not contrary to the relationship agreed to by the parties.

Second, even if the courts did find that the situations were parallel, the Crown would quite likely be shielded yet again by the doctrine of legislative sovereignty. In the *Canada Assistance Plan Reference*,¹²¹ the provinces argued that the doctrine of legitimate expectations constrained the government from introducing a bill that would have the effect of undermining those expectations. The Court rejected this argument, stating that “[a] restraint on the executive in the introduction of legislation is a fetter on the sovereignty of Parliament itself.”¹²² Thus, the government’s exercise of discretion intersects with the exercise of legislative sovereignty, and so to succeed the beneficiary of the fiduciary duty must be capable of constraining that sovereignty. A fiduciary duty based only on a contractual relationship, however, cannot in the present state of the law constrain legislative sovereignty.¹²³ While *Sparrow* extends the doctrine of fiduciary duties so that duties are placed on the legislative branch as well, it is clear that it does so in the context of existing section 35 rights. In *Sparrow* the specific right at issue related to fishing for food. It was the presence of this right that allowed for the extension of the fiduciary duty to Parliament. It is section 35, not the common law of fiduciary duties, that “demand[s] the justification of any government regulation that infringes upon or denies aboriginal rights.”¹²⁴

The side agreement as contract, then, is vulnerable to legislative cancellation. Even if the government is not shielded against suit for breach of fiduciary duty when introducing a cancellation bill, it is open to Parliament to protect the government in the legislation. If the common law of fiduciary duties does not constrain legislative sovereignty, Parliament can deny a cause of action in the courts for breach of that duty, just as it can for breach of contract. Thus the doctrine of parliamentary supremacy again provides a way out of contractual obligations voluntarily undertaken by the Crown.

This argument, however, is premised upon the absence of a constitutionally protected right upon which the fiduciary duty can be founded. Since the side agreement is not a treaty, it is clear that any such right will not be found within the agreement. There is another possibility, which has been forwarded by Peter Hogg and

¹²¹ *CAP Reference*, *supra* note 66.

¹²² *Ibid.* at 560. See Peter W. Hogg, *Constitutional Law of Canada*, vol. 1, 4th ed. (Scarborough, Ont.: Carswell, 1997) at s. 12.3(a) (for a good discussion of the implications of this case).

¹²³ In fact, if it could, the “discretion” upon which the fiduciary duty is based in this hypothetical argument would not exist.

¹²⁴ *Sparrow*, *supra* note 8 at 1109.

Mary Ellen Turpel;¹²⁵ using the Yukon self-government agreements as examples, they argue that such side agreements simply give “form and structure” to the inherent right of self-government.¹²⁶ Underpinning the self-government agreement and any later uses of governance powers is an Aboriginal right, which continues to exist and enjoy constitutional protection in the absence of any consensual extinguishment. Any unilateral government modification or cancellation of the agreement would therefore be in breach of the First Nation’s section 35 right and so should be struck down by the courts.

This view has immediate appeal, in that it avoids the vertical relationship that side agreements threaten to establish. Unfortunately, however, it is contrary to the general thrust of the jurisprudence. This disconnect is understandable, given that Hogg and Turpel were writing in 1994 before the occurrence of two significant events: the federal government’s recognition of the inherent right to self-government in the 1995 *Federal Policy Guide*¹²⁷ and the 1997 *Delgamuukw* decision. Furthermore, at the time of their writing the failed Charlottetown Accord was still fairly recent. They were therefore writing in a period in which the hopes of First Nations and their sympathizers were tied to the affirmation of inherent rights by the courts (if not through constitutional processes), rather than their definition by negotiators. But the approach to reconciliation has now shifted. The 1995 *Federal Policy Guide* demonstrated that governments can be open to the recognition of inherent rights without direct compulsion from the courts. Perhaps in response, the Supreme Court showed through its *Delgamuukw* decision that it regards the definition of the constitutional rights of First Nations as largely lying in the hands of negotiators. When the Court observed that “it is through negotiated settlements ... that we will achieve [reconciliation],”¹²⁸ it was signalling that it views the consensual intentions of the parties, as evidenced by written documents, as constituting the primary basis of their relationship.

Therefore, a more realistic view of side agreements is that, in the absence of explicit language, any existing Aboriginal right on the same matter is simply left untouched by the side agreement and remains an outstanding issue. The right has not been extinguished, but neither has it been given structure and form; it simply remains unaddressed by the parties. This view is more in keeping with the present trend

¹²⁵ Peter W. Hogg & Mary Ellen Turpel, “Implementing Aboriginal Self-Government: Constitutional and Jurisdictional Issues” in Canada, Royal Commission on Aboriginal Peoples, *Aboriginal Self-Government: Legal and Constitutional Issues* (Ottawa: Supply and Services Canada, 1995) 375.

¹²⁶ *Ibid.* at 412-13.

¹²⁷ Indian Affairs and Northern Development, *Federal Policy Guide, Aboriginal Self-Government: The Government of Canada’s Approach to the Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government* (Ottawa: Public Works and Government Services Canada, 1994) [*Federal Policy Guide*].

¹²⁸ *Delgamuukw*, *supra* note 14 at 1123.

toward negotiated settlements. First, by sticking to the plain meaning of the text, it is more respectful of the intentions of the parties, and gives due regard to certainty as the goal of all the parties. Second, this view supports the general bargain model of negotiations by avoiding giving First Nations something for nothing.

The view that side agreements are not propped up by existing Aboriginal rights also better preserves the potential for a variety of possible arrangements between the parties, and is therefore more able to address the divergent situations of different First Nations because it does not collapse Aboriginal and treaty rights into one another. The exact nature of the legal distinction between Aboriginal and treaty rights has always been unclear, and incorporation of the distinction into section 35 did nothing to clarify the matter. Nonetheless, the current direction of negotiations in various treaty processes shows that the distinction can yield some real advantages. In the BC process the principals have agreed through a tripartite working group that an incremental approach to treaty making is more likely to be successful than the previous comprehensive and unitary model. In their final report, the working group described the incremental approach as “a process for building treaties by negotiating over time a series of arrangements or agreements linked to treaties that can be implemented before a final treaty.”¹²⁹ The working group found that such an approach can yield process efficiencies, produce tangible results more quickly, and help improve the relationships between the parties. Preserving the distinction between Aboriginal and treaty rights would better support this approach by allowing the parties to test certain arrangements before cementing them in a treaty. The incremental approach would be made much more difficult if each interim measure were regarded as giving “structure and form” to any related existing Aboriginal rights.

Maintaining the presumption of distinction between Aboriginal and treaty rights also allows First Nations possibilities for avoiding the kind of certainty provisions that have been decried by groups such as the UBCIC.¹³⁰ Such provisions generally transform inherent Aboriginal rights into text-based treaty rights. Although they are labelled “certainty” provisions, they entail a very substantial risk for First Nations. *Campbell* represents the sole existing legal challenge to a treaty signed in the section 35 era. Although the Nisga’a Treaty survived that test, another case is in the works.¹³¹ Thus, the legal effect of certainty provisions remains a largely unknown factor. The fear is that these provisions will extinguish inherent Aboriginal rights, and yet be unenforceable in the courts. This uncertainty was very probably the main motivation

¹²⁹ British Columbia Treaty Commission, “*Improving the Treaty Process*”: *Report of the Tripartite Working Group* (25 February 2002) at 3, online: BC Treaty Commission <http://www.bctreaty.net/files_2/pdf_documents/tripartite_working_group_report.pdf>. The Principals endorsed the report on 15 March 2002 (see BC Treaty Commission Chief Commissioner Miles Richardson’s letter that precedes the report).

¹³⁰ See *supra* note 32 and accompanying text.

¹³¹ See *supra* note 55 and accompanying text.

behind sections 19 to 21 of chapter 2 of the Nisga'a Treaty, through which the parties agree that unconstitutional provisions are severable and will be renegotiated; that they will not challenge the agreement in court; and that if the agreement is somehow struck down it will remain binding on the parties.

At present there are two arrangements through which First Nations have mitigated the perils of certainty mentioned above. One approach was taken in the Nisga'a Treaty itself, and will apparently be used by the Innu of Quebec. Under this approach, the treaty "modifies" the Aboriginal rights (in the language of the Nisga'a Treaty),¹³² or simply states that the rights and title set out in the treaty "constitute" the section 35 rights of that First Nation (this is the language of the Innu Common Approach).¹³³ Under both of these approaches, Aboriginal rights continue, but only within the terms of the treaty. If the treaty rights fail, the Aboriginal rights remain.

The other approach is that taken by the Yukon self-government agreements. Under this arrangement, existing Aboriginal rights to self-government are not surrendered. The treaty itself contains certainty language, but leaves room for self-government rights. The treaty surrenders all existing rights not affirmed in the treaty to land outside the settlement land; but within the settlement area, Aboriginal rights continue as long as they are not "inconsistent or in conflict with any provision of a Settlement Agreement."¹³⁴ Furthermore, section 2.2.4 states that, subject to section 2.5.1.2 of the UFA and other more minor provisions, "Settlement Agreements shall not affect the ability of aboriginal people of the Yukon to exercise, or benefit from, any existing or future constitutional rights for aboriginal people that may be applicable to them." Provisions to similar effect are included within the chapter of the UFA dealing with self-government, and within the self-government agreements themselves.¹³⁵

¹³² See *supra* note 30 and accompanying text.

¹³³ See *supra* note 31 and accompanying text.

¹³⁴ See *Umbrella Final Agreement*, *supra* note 5, s. 2.5.1.2:

Yukon First Nation and all persons eligible to be Yukon Indian People it represents, as of the Effective Date of that Yukon First Nation's Final Agreement, cede, release and surrender to Her Majesty the Queen in Right of Canada all their aboriginal claims, rights, titles and interests in and to Category A and Category B Settlement Land and waters therein, to the extent that those claims, rights, titles and interests are inconsistent or in conflict with any provision of a Settlement Agreement.

¹³⁵ In the self-government agreements, section 3.3 duplicates the rider quoted above. Within the self-government chapter of the UFA, the wording, however, is slightly different. See *Umbrella Final Agreement*, *supra* note 5, s. 24.12.2 (nothing in the chapter shall preclude the First Nation from acquiring constitutional protection for self-government "as provided in future constitutional amendments"). I think this wording can be attributed to the fact that the drafters were writing prior to the failure of the Charlottetown Accord. See also Hogg & Turpel, *supra* note 125.

Given these developments in the jurisprudence and in current treaty negotiations, it is unlikely and undesirable that a court would find that unextinguished Aboriginal rights are somehow implicated in a side agreement such that they can ground a fiduciary duty. The trend is in the other direction. Under the bargain model of negotiations certainty and choice are paramount values. Adopting the “structure and form” thesis at this point would upset the already slow pace of the negotiations and hamper our best efforts at reconciliation.

Yet, without the “structure and form” thesis, side agreements are vulnerable to legislative cancellation. Neither the fiduciary duty doctrine nor the constitutional principle of the rule of law can protect First Nations who sign side agreements against shifts in government policy. Thus, without more protection, side agreements are not an appropriate tool for dealing with important First Nation interests, and parties engaged in treaty negotiations will not have another possible course toward reconciliation available to them.

Side agreements, however, are not merely contracts. As stated in the beginning of this paper, side agreements are contracts that are contemplated by a treaty. They can be viewed in two parts: the actual agreement, which contains the contractual relationship, and the treaty provisions that contemplate the negotiation of the contract. These treaty provisions provide the side agreement with some grounding in the constitutional relationship established by the treaty. Might this grounding provide the motivation and the means to constrain unilateral government repudiation and so preserve the mutuality between the parties? The next section addresses this question.

III. Side Agreements and the Treaty Relationship

The previous part of this article examined the side agreement as a simple contract. In other words, it looked at that agreement in isolation from the treaty. But side agreements are integrated into a treaty relationship, and there are provisions within the treaty itself that create some space for the side agreement. For the sake of convenience, I will call these “framework provisions” because they delineate the basic shape of the side agreement and so serve a purpose similar to that of framework agreements with regard to treaties. Framework provisions have two forms. Some provisions simply spell out the parameters of the side agreement that is to be concluded between the parties. With regard to the *Harvest Agreement*, for example, section 22, chapter 8, of the *Nisga'a Final Agreement* states the following:

The Harvest Agreement will:

- a. Include Nisga'a fish allocations equivalent to:
 - i) 13% of each year's adjusted total allowable catch for Nass sockeye salmon, and
 - ii) 15% of each year's adjusted total allowable catch for Nass pink salmon;

...

- d. include a dispute resolution process and a requirement for fair compensation if the Harvest Agreement is breached by terminating or reducing the Nisga'a fish allocations pursuant to subparagraph (a).¹³⁶

These provisions merely define some of the content of the eventual agreement. Since treaty provisions also state that the side agreement is not intended to be a land claims agreement, these definition provisions in the treaty do not of themselves accord any constitutional protection.

Other treaty provisions, however, do not deal with the content of the eventual agreement but rather concern its relationship to the treaty. Two types of provision are common here, both of which have already been mentioned. First, the treaty generally states that the side agreement shall not be a land claims agreement. Second, is a provision that places duties or rights to negotiate on the parties. As discussed above, these provisions come in a variety of forms, from requiring the conclusion of an agreement to granting one party the option of entering negotiations. These "duty to negotiate" clauses are then informed by the content provisions. If a party were to refuse to negotiate on the basis of the terms laid out in the content provisions, this would very likely amount to a breach of the duty to negotiate in good faith.

These two types of provisions do not relate to the nature of the contractual relationship between the parties created by the side agreement. Rather, they concern how that agreement will fit into the broader relationship between the parties. That being the case, these provisions are part of the treaty relationship itself and so are protected from unjustified unilateral government cancellation. Where the framework provisions spell out specific duties, such as the duty to negotiate in good faith, those duties are entrenched within the treaty relationship, creating constitutionally protected rights in the other party.

The treaty, therefore, can regulate the relationship between the parties on a constitutional basis between the ratification of the treaty and the conclusion of the side agreement.¹³⁷ But what about after the conclusion of the agreement? Do treaty provisions ever accord the side agreement any protection against legislative cancellation?

The short answer appears to be yes. For example, the final agreements formed under the Yukon UFA model all have provisions that relate to the formulation, passage, and amendment of the legislation required to implement the self-government agreements. Section 24.9.1 states that the parties will negotiate guidelines for the

¹³⁶ *Nisga'a Final Agreement*, *supra* note 5.

¹³⁷ It is a term of many treaties that contemplate side agreements, however, that the treaty will not be entered into until the side agreement is concluded. Thus this special relationship does not always arise. Nonetheless, if the content terms are formulated prior to ratification, the duty to negotiate in good faith would still apply. See *infra*, Part IV.

drafting of the implementing legislation. Sections 24.9.2 and 24.9.3 require the Yukon and Canada to recommend that legislation to the legislature and Parliament, respectively. The crucial provisions, however, are contained in the first two sections of 24.10. They are the following:

- 24.10.1 Government shall consult with affected Yukon First Nations before recommending to Parliament or the Yukon Legislative Assembly, as the case may be, Legislation to amend or repeal Legislation enacted to give effect to [self-government agreements].
- 24.10.2 The manner of consultation in 24.10.1 shall be set out in each self-government agreement.¹³⁸

Legislation passed by both the Yukon and Canada is necessary to implement the Yukon self-government agreements. The framework provisions in the treaty require not only that the governments consult with the First Nation during the initial drafting of this legislation, but also that government consult with the affected First Nation if the government wishes to repeal that legislation or to pass legislation that would otherwise interfere with it. These provisions therefore address the problem at issue: legislative modifications or cancellations of side agreements. They mandate that any legislation concerning the side agreement may be passed only after government has consulted the First Nation. Furthermore, these provisions are not contractual. Rather, they are embedded within the treaty relationship and are therefore constitutionally protected. The effect is that these framework provisions shield the side agreement from government repudiation without consultation.

If we regard these provisions as attempting to restore some measure of mutuality between government and the First Nation, then two aspects of these provisions are interesting. First, these restorative provisions of the Yukon treaties explicitly implicate the legislative branches of Canada and the Yukon. Thus, although the fact that the government parties are merely to recommend the legislation alludes to a separation between the executive and legislative branches, once that legislation is passed, government is treated as a union of the two. Thus, the constitutional protection attached to the side agreements is directed at the source of the non-mutuality implicit in the contractual relationship: the disconnect between the executive and legislative branches.

More important, however, is the form of the protected right to consultation. Consultation has been the subject of much jurisprudence in the last five years. Its appearance as the protected right in the Yukon self-government context raises two points about the potential of side agreements. First, it demonstrates that side agreements have the potential to reconfigure Aboriginal rights, so that the right is not directly defined by an Aboriginal interest, but rather is defined by good conduct on the part of government. Second, this requires a re-imagination of the *Sparrow* test for

¹³⁸ *Umbrella Final Agreement*, *supra* note 5.

informing the content of justification requirements. The next two sections discuss these issues.

A. Justification as Right

Consultation was brought into the law surrounding government-First Nation relations as part of the *Sparrow* test for the justification of infringements of Aboriginal rights. As discussed above,¹³⁹ under the *Sparrow* the Crown must meet a two-pronged test. First, it must prove that it interfered with the protected right pursuant to a valid objective. Second, the Crown must satisfy the court that the manner of its interference is consistent with its fiduciary relationship to Aboriginal peoples. The Court has listed three factors relevant to this latter analysis: whether the interference was as small as possible, whether compensation was offered, and whether the First Nation was consulted.¹⁴⁰

In including within the treaty itself requirements of consultation over amendments to the legislation implementing self-government, the Yukon treaties entrench as a right what has before been merely a means of justifying infringements of rights. That is, the requirements of justification—narrow tailoring, compensation, and consultation—have so far generally been conceptualized as being grounded in a substantive section 35 right. They are the correlatives of an Aboriginal or treaty right. The framework provisions of the Yukon treaties that require consultation, however, detach that justification requirement from any substantive right. The Crown is therefore required to justify in the absence of any Aboriginal right grounded in pre-contact or pre-sovereignty society. The Yukon treaties thus define a new species of right—what might be called “justificatory” rights.

While justificatory rights collapse the usual right versus justification dichotomy, there is no reason why they are not legally sound. Treaty rights, after all, are not simply defined by land continuously occupied prior to the Canadian sovereignty or by cultural practices existent before and since contact with Europeans. Rather, the peril and promise of treaties is that they deal explicitly with the present reality of a relationship between First Nations and the state. Many rights that routinely appear in modern treaties are nonsensical in the absence of this relationship. Examples include rights of public access to settlement lands for certain purposes,¹⁴¹ roads and rights of way,¹⁴² rights concerning capital transfers and taxation,¹⁴³ and relationships between

¹³⁹ See cases listed, *supra* note 24 and accompanying text.

¹⁴⁰ See *Sparrow*, *supra* note 8 at 1119.

¹⁴¹ See e.g. *Nisga'a Final Agreement*, *supra* note 5, c. 6; *Umbrella Final Agreement*, *supra* note 5, c. 6.

¹⁴² See e.g. *Nisga'a Final Agreement*, *ibid.*, c. 7; *Umbrella Final Agreement*, *ibid.*, c. 6.

¹⁴³ See e.g. *Nisga'a Final Agreement*, *ibid.*, c. 14, 16; *Umbrella Final Agreement*, *ibid.*, c. 19-21.

local and regional governments.¹⁴⁴ These treaty rights help define the relationship between the First Nation and the state. Consultation serves a similar purpose.

Furthermore, recent jurisprudence demonstrates that courts have become increasingly open to the accommodation of Aboriginal interests in the absence of rights proved in court or defined in treaties. In recognition of the expense of proving rights through litigation, courts have held that the Crown's duty of consultation is triggered even if Aboriginal rights or title have not been proved. In *Taku River Tlingit First Nation v. Tulsequah Chief Mine Project*,¹⁴⁵ BC argued that

the constitutional or fiduciary obligation to consult with First Nations, as distinct from any administrative law duty of procedural fairness, only arises after there has been a determination that the First Nation has existing aboriginal or treaty rights under s. 35 of the *Constitution Act, 1982*, and that those rights may be infringed by Crown sanctioned activities.¹⁴⁶

The majority of the BC Court of Appeal dismissed this view, holding that to do otherwise would have “the effect of robbing s. 35(1) of much of its constitutional significance”¹⁴⁷ and “effectively end any prospect of meaningful negotiation or settlement of aboriginal land claims.”¹⁴⁸ In *Haida Nation v. British Columbia (Minister of Forests)*,¹⁴⁹ Lambert J.A., writing for the Court, affirmed the approach taken in *Taku River*,¹⁵⁰ finding that it would be contrary to the fiduciary relationship to interpret subsection 35(1) “as if it required that before an aboriginal right could be recognized and affirmed, it first had to be made the subject matter of legal proceedings.”¹⁵¹ The Court consequently found that the Crown had a duty to consult with the Haida Nation before any *prima facie* infringement of its title and rights was made.¹⁵²

While the Court in *Haida I* grounded the duty to consult on the existence of a “good *prima facie* case” for Haida title,¹⁵³ in the supplementary reasons in *Haida II* the Court found that another source of the duty of consultation arises out of the “opportunity to put up a defence of justification to any claim against it for violation of

¹⁴⁴ See e.g. *Nisga'a Final Agreement*, *ibid.*, c. 18.

¹⁴⁵ (2001), 211 D.L.R. (4th) 89, [2002] 4 W.W.R. 19 (B.C.C.A.) [cited to D.L.R.].

¹⁴⁶ *Ibid.* at 137 (Southin J.A. (dissenting) quoting from para. 71 of the Attorney General's factum).

¹⁴⁷ *Ibid.* at 165.

¹⁴⁸ *Ibid.*

¹⁴⁹ [2002] 2 C.N.L.R. 121, [2002] 6 W.W.R. 243 (B.C.C.A.) [*Haida I* cited to C.N.L.R.]. There was a later set of reasons flowing from this case that clarified the original reasons. See *Haida Nation v. British Columbia (Minister of Forests)* (2002), 216 D.L.R. (4th) 1, [2002] 10 W.W.R. 587 (B.C.C.A.), leave to appeal to S.C.C. granted, [2002] S.C.C. A No. 417 (QL) [*Haida II* cited to D.L.R.].

¹⁵⁰ *Haida I*, *ibid.* at 132.

¹⁵¹ *Ibid.* at 134.

¹⁵² The Court also found that Weyerhaeuser owed a constitutional duty to consult. The basis for Weyerhaeuser's duty is the main subject of *Haida II*. See *Haida II*, *supra* note 149.

¹⁵³ See *Haida I*, *supra* note 149 at 138.

aboriginal title or aboriginal rights.”¹⁵⁴ Thus, these cases demonstrate an increasingly common conception of consultation as a right asserted by a First Nation against the Crown. The consultation requirement in the Yukon treaties simply goes one step further by formally defining it as a treaty right.

There is no reason, however, why consultation should be the only justificatory right. Indeed, any of the elements of the *Sparrow* justification test could be entrenched in the treaty, as long as it was clear from the wording that the right was to exist outside of the content of the side agreement. Along with consultation, the Court in *Sparrow* listed narrow tailoring and compensation as factors within the second stage of the justification test. These factors could be used to shield the side agreement instead of, or along with, consultation. Moreover, factors from the first stage could also serve as justificatory rights. That is, a treaty might require that any legislative repudiation or modification of the side agreement have a valid objective, be reasonable, and/or not impose undue hardship. Such requirements would limit the scope of the threat of legislative repudiation of the side agreement by shielding the side agreement from some of the more egregious forms of breach. Thus, justificatory rights serve to restore some of the mutuality between the parties by subjecting any legislative repudiation to the threat of judicial review.

B. The Variable Content of Justificatory Rights

The entrenchment of justificatory rights in the treaty provisions dealing with the side agreement does not, however, end the analysis because the content of those rights must be determined. There are two means by which this might be done.

One possibility is to define the content consensually, by either spelling out the content within the treaty provisions or by explicitly deferring to the side agreement to provide the definition. As seen earlier, the Yukon UFA treaties take this latter approach. Section 24.10.2 states that “[t]he manner of consultation ... shall be set out in each self-government agreement.” This section therefore allows the side agreement itself to inform the content of the protected justificatory right. However, the Yukon self-government agreements do not actually seize this possibility; each agreement simply states that “Government shall Consult with the [First Nation] during the drafting of any amendment to Self-Government Legislation which affects the [First Nation].”¹⁵⁵ The side agreements, therefore, do not actually provide any greater definition of the content of the consultation right. Yet, even if the side agreement did attempt to define the rights more clearly, it is most unlikely that it would provide enough clarity to avoid judicial interpretation. Thus, whether or not the parties attempt

¹⁵⁴ *Haida II*, *supra* note 149 at 37-38.

¹⁵⁵ See e.g. *Selkirk First Nation Self-Government Agreement*, 21 July 1997, s. 5.2, online: Indian and Northern Affairs Canada <http://www.ainc-inac.gc.ca/pr/agr/selkirk/ssgfa_e.pdf>.

to spell out the content of the justificatory rights, ultimately courts will have to look outside the text of the framework provisions to discover their real content.

It is clear from the Supreme Court's treatment of the elements of the *Sparrow* justification test that they are variable in content. In *Delgamuukw*, the Court described a "sliding scale"¹⁵⁶ approach to the Crown's duty of consultation:

The nature and scope of the duty of consultation will vary with the circumstances. In occasional cases, when the breach is less serious or relatively minor, it will be no more than a duty to discuss important decisions that will be taken with respect to lands held pursuant to aboriginal title. Of course, even in these rare cases when the minimum acceptable standard is consultation, this consultation must be in good faith, and with the intention of substantially addressing the concerns of the aboriginal peoples whose lands are at issue. In most cases, it will be significantly deeper than mere consultation. Some cases may even require the full consent of an aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to aboriginal lands.¹⁵⁷

The Court therefore calibrated the scope of the duty of consultation to the severity of the breach. In discussing the content of compensation, the Court added another ground: "[t]he amount of compensation payable will vary with the nature of the particular aboriginal title affected."¹⁵⁸

From *Delgamuukw*, then, it appears that the content of justificatory rights falls along a spectrum. While that case only discussed consultation and compensation, there is no reason why the other justificatory rights should not be treated in the same way. *Delgamuukw* also suggests that two factors will determine where a particular case falls along the spectrum: the nature of the interest affected and the severity of the breach. Lawrence and Macklem note that the *R. v. Marshall* decision added a third factor: "whether or not the Minister is required to act in response to unforeseen or urgent circumstances."¹⁵⁹ While these two commentators lament that "[l]ower courts have studiously ignored the significance of the sliding scale of consultation proposed in *Delgamuukw*,"¹⁶⁰ subsequent decisions seem to indicate that the lower courts are now beginning to adopt that framework of analysis.¹⁶¹

¹⁵⁶ Sonia Lawrence & Patrick Macklem, "From Consultation to Reconciliation: Aboriginal Rights and the Crown's Duty to Consult" (2000) 79 Can. Bar Rev. 252 at 263.

¹⁵⁷ *Delgamuukw*, *supra* note 14 at 1113.

¹⁵⁸ *Ibid.* at 1114.

¹⁵⁹ [1999] 3 S.C.R. 533 at 564, 179 D.L.R. (4th) 193.

¹⁶⁰ Lawrence & Macklem, *supra* note 156 at 263.

¹⁶¹ See *Nunavik Inuit v. Canada (Minister of Canadian Heritage)* (1998), 164 D.L.R. (4th) 463 at 493, [1998] 4 C.N.L.R. 68 (F.C.T.D.) ("[t]he nature and scope of the duty will vary with the circumstances"); *Liidlii Kue First Nation v. Canada (A.G.)* (2001), 187 F.T.R. 161 at 178, [2000] 4 C.N.C.R. 123 (F.C.T.D.) (Reed J. held that "[a]nother factor relevant to the nature and scope of the

This sliding scale analysis can be applied to justificatory rights, but the analysis must be alive to the special context that side agreements provide. The first factor—the nature of the interest affected—requires particular attention. The *Sparrow* test was originally designed to apply to Aboriginal rights. Even if the *Halfway River* case is followed and the test is applied to treaty rights directly,¹⁶² justificatory rights are different in that they are detached from other section 35 interests. That is, there appears to be no other interest affected by the breach that could inform the content of the justificatory right itself.

The answer to what is the nature of the interest affected lies in the interdependence between treaties and side agreements. Since any justificatory rights that are attached to side agreements find their source in the relationship between the agreement and the treaty, any inquiry into the nature of the interest must return to that relationship. What differentiates side agreements from ordinary contracts is that they support treaty rights. Thus, in the context of side agreements, justificatory rights do have bases in other section 35 interests, because they point back to treaty rights. This suggests a three-stage analysis. First, the treaty right or rights to which the side agreement is related must be identified. Second, the nature of that interest must be judged along the lines of the *Sparrow* test. Third, the court must consider the degree to which the side agreement supports the identified treaty right or rights. The “interest affected” in the context of justificatory rights attached to side agreements is the cluster of these three factors.

How might this analysis play out for the Yukon self-government agreements? The analysis is a difficult one in the absence of any clear judicial statements of the relationship between self-government and other Aboriginal rights, yet a few tentative suggestions can nonetheless be made. First, the right that self-government agreements would be found to support is likely the right to land granted under chapter 4 of the treaties. Chapter 13 or 14 of the self-government agreements state that the legislative powers of the First Nation extend to (1) the treaty benefits that are to be controlled by the First Nation, (2) social and cultural matters, and (3) the administration of land rights.¹⁶³ The clearest connection to the treaty lies through the third head—the land grants—since they constitute the core of the treaty. That the self-government agreements support Aboriginal land rights is also consistent with comments of the Court in *Delgamuukw*. In discussing the content of Aboriginal title, the Court found that it is held communally: “Aboriginal title cannot be held by individual aboriginal persons; it is a collective right to land held by all members of an aboriginal nation.

required consultation will be the nature of the prospective infringement”); *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)* (2001), 214 F.T.R. 48 at 77-79, [2002] 1 C.N.L.R. 169 (F.C.T.D.) (where arguments as to variable content were canvassed); *Haida II*, *supra* note 149 at 31-32 (affirmed that analysis from *Mikisew*).

¹⁶² See sources listed, *supra* note 23 and accompanying text.

¹⁶³ See e.g. *Selkirk First Nation Self-Government Agreement*, *supra* note 155, c. 14, ss. 14.1-14.3 (where these heads of jurisdiction are set out).

Decisions with respect to that land are also made by that community."¹⁶⁴ It is likely, then, that a court would find that the treaty rights supported by the Yukon self-government agreements are those that relate to land.

The second stage of the analysis is to determine the nature of the treaty right that is supported by the side agreement. The importance of the land rights in the Yukon treaties is not controversial. They form the backbone of the treaties. Of the twenty-eight chapters in the Yukon treaties, at least fifteen clearly concern land-based interests.¹⁶⁵ The treaty rights supported by the self-government agreements are of the highest importance.

The last stage of the analysis of the interest affected is the relationship between the side agreement and the treaty rights it supports. Again, the lack of judicial guidance makes this analysis more difficult, yet the relationship can be said to be close for two reasons. First, self-government relates to the communal nature of Aboriginal land rights, as identified by the Court in *Delgamuukw*. Communal interests must be managed, and self-government provides the means. Second, most of the legislative powers delineated in the self-government agreements explicitly relate to the regulation of the settlement land itself. Self-government supports the enjoyment of settlement land.

The nature of the interest affected by a breach of the duty to consult with regard to Yukon self-government is therefore a very significant one. It is intertwined with the First Nation's enjoyment of its lands and so lies close to the core of aboriginality. This interest informs the content of the duty to consult.

Having identified the nature of the interest affected, the other stages of the *Sparrow* test should operate in the same way. That is, the court should first examine the severity of the impact on this interest, and then the court should find whether any mitigating circumstances—such as an emergency—existed that might somewhat justify the intrusion. Outside of any specific factual context with regard to these latter two factors, it is difficult to assess what this analysis would mean if Parliament were to unilaterally amend the Yukon self-government implementing legislation. Would it result in the amending legislation being declared invalid, or would government simply be required to pay damages?

There are at least two reasons to expect that courts could be persuaded to rule the legislation invalid. First, while the case law shows that judges respect the principle of legislative supremacy, the case law also demonstrates judicial disdain for legislative

¹⁶⁴ *Delgamuukw*, *supra* note 14 at 1082-83 [emphasis added].

¹⁶⁵ See *Umbrella Final Agreement*, *supra* note 5, c. 4-18 (Reserves and Land Set Aside; Tenure and Management of Settlement Land; Access; Expropriation; Surface Rights Board; Settlement Land Amount; Special Management Areas; Land Use Planning; Development Assessment; Heritage; Water Management; Definition of Boundaries and Measurement of Areas of Settlement Land; Fish and Wildlife; Forest Resources; Non-Renewable Resources).

cancellations, as Monahan correctly argued in his article.¹⁶⁶ Interpretive principles requiring that the language of any such legislative cancellation be clear and explicit is evidence of that disdain. Specific cases yield further evidence. One recent case—*Carrier Lumber v. British Columbia*¹⁶⁷—concerned a logging company's contract with the BC government. The government cancelled the contract and attempted to legislatively shield itself from liability.¹⁶⁸ The reasons for judgment show the lengths to which some judges will go to provide grievors with equity. While the government argued that it was shielded by legislative denials of liability, the judge held that “[t]he answer to the application of these statutory provisions is found in the fact that the defendant in this case fundamentally breached the agreement with Carrier outside the term of any application of the provisions of either *Forest Amendment Act*.”¹⁶⁹ If the courts can find a constitutional toehold, then they will be very tempted to side with the grievors against legislative cancellations. Furthermore, the nature of side agreements themselves provide more than a mere toehold. Side agreements implicate the complex history of relations between First Nations and the Canadian state. In an era where the courts are increasingly urging a nation-to-nation relationship, side agreements harken back to the more overt colonialism that marked relations before the introduction of section 35. As side agreements arise out of the treaty processes, and the constitutional elements are located in the treaties, they implicitly call up the statements of the Supreme Court on the importance of treaty negotiations to the purpose of section 35. In sum, side agreements provide a context in which the iniquity of a legislative cancellation is brought into sharp relief.

Side agreements can and do contain some constitutional protections for First Nation interests. These protections mitigate the perils of the contractual model by constitutionalizing requirements of accommodation. Given judicial disdain for legislative cancellations and the importance of the negotiations between the parties, it is very probable that the courts would assign great weight to these protections, amounting in some cases to declaring the legislation invalid.

Nonetheless, the negotiation of side agreements poses a risk for First Nations. While the gradations of justificatory rights allow the parties to choose from a variety of options, they also give rise to the danger that government will insist that the

¹⁶⁶ See the discussion in Part II(A), above.

¹⁶⁷ (1999), 47 B.L.R. (2d) 50, 30 C.E.L.R. (N.S.) 219 (B.C.S.C.) [*Carrier Lumber* cited to B.L.R.].

¹⁶⁸ Subsection 25(3) of the *Forest Amendment Act (No. 1)*, 1987, S.B.C. 1987, c. 40, stated:

No compensation or damages are payable by the government and no proceedings shall be commenced or maintained to claim compensation or damages from the government or to obtain a declaration that compensation or damages are payable by the government.

A second act, the *Forest Amendment Act (No. 2)*, 1987, S.B.C. 1987, c. 54, had a similar section (s. 19).

¹⁶⁹ *Carrier Lumber*, *supra* note 167 at 170.

agreement receive minimal protection. This danger can be mitigated, however, through a more robust and well-defined duty to negotiate in good faith.

IV. Side Agreements and the Duty to Negotiate in Good Faith

The trend in the jurisprudence and in negotiations is toward the primacy of written definitions of the First Nation-state relationship. This trend is not an accident, but rather is provoked by the recognition of certain present realities: negotiation is cheaper than litigation, negotiation can delineate more sophisticated relationships between the parties, and it can better address present poverty and other social ills that might not be recognized as the subject of Aboriginal rights. Furthermore, negotiation is preferable just on the basis that it gives the parties—especially First Nations—more scope to choose their own cultural, political, and economic destinies.

Yet the move away from inherent rights to those consensually defined through negotiations entails a very significant risk for First Nations. The inequalities of bargaining power between First Nations and the government parties are very large and very real. It must always be remembered that judicial compulsion underlies the federal and provincial governments' willingness to deal with First Nations. Although treaty processes are increasingly regarded as mainly political in nature, their purpose is to reconcile legal interests. It is these legal interests that drive the negotiations forward. As Patrick Macklem has observed, "the relative bargaining power of the parties is a function of the distribution of property rights accomplished by legal choice."¹⁷⁰ The treaty processes are a mixture of both political and legal forces, and it is only through an appropriate balance of the two that true reconciliation is possible. It has been argued that this balance between the legal and the political has shifted, such that the ultimate nature of the rights is increasingly within the political realm. But if the delicate balance that underpins the negotiations is to be maintained, some other role for legal interests must be found. That role is to maintain watch over the process by which the agreements are reached.

As argued above, the fiduciary duty doctrine is incapable of preventing a unilateral government modification of a side agreement that lacks justificatory rights, because the judicial preference for negotiated settlements would respect the parties' consensual definition of the agreement as non-constitutional.¹⁷¹ But that is so only after the agreement has been concluded. During the negotiations process First Nations hold interests that could likely be the subject of constitutional protection through legal means, that is adjudication, alone. The existence of these interests constitutes the primary motivation for the negotiations and should inform the manner in which the negotiations are conducted. Given that the reconciliation of these interests through

¹⁷⁰ Patrick Macklem, *Indigenous Difference and the Constitution of Canada* (Toronto: University of Toronto Press, 2001) at 96.

¹⁷¹ See *supra* note 113 and accompanying text.

negotiation requires Crown participation, legal standards must ensure that the Crown does not use the negotiations as a means of coercing First Nations into surrendering their rights.

It is the fiduciary duty that regulates the negotiations process, taking the form, as was hinted at in *Delgamuukw*, of a duty on the part of the Crown to negotiate in good faith once it enters negotiations.¹⁷² It is essential that the Crown be held to this duty. As Justice Williamson stated in *Gitanyow*,

the longstanding fiduciary relationship between Aboriginal peoples and the Crown, involving as it does the honour of the Crown, and recognized and affirmed as it is in s. 35(1) of the *Constitution Act, 1982*, cannot be displaced simply because the Crown and First Nations enter into negotiations concerning Aboriginal title and/or rights.¹⁷³

This duty is placed not only on the federal government but on the provincial Crown as well, as demonstrated by both *Chemainus* and *Gitanyow*. Once negotiations have begun, both government parties must conduct themselves according to fiduciary standards.

The duty to negotiate in good faith is notoriously difficult to define. The line between responsive negotiations and “sharp dealing” is lazy at best and depends upon the factual context. But the analysis can benefit from the parallel between the duty of good faith negotiating and the Crown’s fiduciary duty regarding surrenders of Aboriginal title or reserve land. In addition to the post-surrender duty that was at issue in *Guerin*, the Court also found in *Blueberry River*¹⁷⁴ that the Crown has a pre-surrender duty to fully inform the First Nation of all its options with the objective of allowing the First Nation to make a good deal. Both duties arise because the Crown assumed discretion in the *Indian Act* for dealing with surrenders to fulfill the objective from the Royal Proclamation of 1763 of preventing “great Frauds and Abuses” committed by settlers against Aboriginal peoples.¹⁷⁵ Thus, the purpose of the discretion informs the nature of the duty governing that discretion. In the context of treaty negotiations, the Crown’s fiduciary duty must relate to the purpose of the negotiations process: the reconciliation of the pre-existence of Aboriginal societies with the sovereignty of the Crown. That is, although the Crowns, and especially the provincial Crown, may look to the interests of third parties or the sovereignty of the state, they must also have due regard to the interests of First Nations arising out of their existence as societies prior to the establishment of the state. The Crown parties

¹⁷² *Delgamuukw*, *supra* note 14 at 1123.

¹⁷³ *Gitanyow*, *supra* note 19 at para. 40.

¹⁷⁴ *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 S.C.R. 344 at 370, 130 D.L.R. (4th) 193.

¹⁷⁵ George R., Proclamation, 7 October 1763 (3 Geo. III), reprinted in R.S.C. 1985, App. II, No. 1 at 6. See *Guerin*, *supra* note 117.

must actively seek to provide meaningful protection for these interests and must be open to the wishes of the First Nation regarding the manner of protection.

This general standard—that the Crown must have regard to the interests of the First Nation—can be seen as arising out of two fundamental propositions regarding treaties: that treaties are aimed at reconciling rights that are legally entitled to constitutional protection, and that negotiation is preferred over litigation as the means of that reconciliation because it allows the parties greater choice in defining their relationships. Each of these propositions has its corollary, which provide standards for the Crown's duty to negotiate in good faith. The first proposition dictates that the Crown cannot insist on dealing with important First Nation interests through side agreements that lack treaty shielding provisions. The second prevents the Crown from refusing to consider, fully and conscientiously, dealing with core First Nation interests through full treaty provisions. Each of these propositions will be considered in turn.

A. Justificatory Rights as the Minimum Measure of Protection

If the negotiations process was created to reconcile interests that could receive recognition through litigation, then to be in good faith, the Crown must enter negotiations with the expectation that core interests of the First Nation will be afforded some constitutional protection. The minimum level of such protection should be the justificatory rights discussed above. Insisting that a core interest of the First Nation receives no constitutional protection at all should be deemed a breach of the Crown's duty to negotiate in good faith.

This standard of good faith conduct should not apply, however, to all interests the First Nation regards as important because that would too greatly constrain the give and take that the bargain model requires. Rather, the standard should only apply to those interests for which the First Nation could obtain constitutional protection through means other than negotiation. Those interests relate, of course, to any existing Aboriginal rights the First Nation can credibly assert. That is, the First Nation must be able to point to something akin to a good prima facie case, consistent with Lambert J.A.'s standard from *Haida I*. Neither should such interests automatically require full constitutional protection within the treaty. That would too stringently limit the future relationship between First Nations and the state to past practices, and would hamper the parties' capacities to address present realities.

It might be questioned why Aboriginal rights give rise to this standard if they remain unsundered and available for legal recognition by the courts. That is, why must First Nations have this protection if they can go to court and prove their rights? When the Court advocated negotiations in *Delgamuukw*, it also hinted at the answer to this question: "this litigation has been both long and expensive, not only in economic but in human terms as well." It is this obvious fact that requires a high standard of conduct on the part of the Crown parties. The Aboriginal rights doctrine is

of little benefit if First Nations cannot obtain recognition of such rights, and negotiation as a process for obtaining such recognition is of little use if the Crown parties can use that process to minimize First Nations' rights.

Jim Aldridge, who represented the Nisga'a Tribal Council in its negotiations from 1980 to 2000, has explained that the difficulty in proving Aboriginal rights in court was the motivation behind constitutionalizing self-government in the Treaty:

If First Nations seek to establish a range of self-government powers through litigation, such as those set out in the Nisga'a Treaty, they will be faced with proving—and the Crown with defending—those claims, First Nation by First Nation, authority by authority, territory by territory and establishing the proper relationship of laws in each case. I suggest that this approach is quite properly rejected in favour of negotiation, under which the parties can agree to the appropriate law-making authority for a modern treaty without being faced with the burdens attendant upon the litigation process.¹⁷⁶

As Aldridge also observed, the difficulty of this process is increased by the Supreme Court's insistence in *Pamajewon* that Aboriginal rights should not be framed with "excessive generality", but rather should be examined "in light of the specific circumstances of each case and, in particular, in light of the specific history and culture of the aboriginal group claiming the right."¹⁷⁷ This standard combines with the *Van der Peet* requirements of continuity, cultural distinctiveness, and a practice that is integral to that culture to place a burden on the First Nation claimant that is prohibitively onerous. It is this gap between the potential for legal recognition of Aboriginal rights and the First Nation's real possibilities for actually obtaining such recognition that gives rise to the minimum standard of justificatory rights protection. The duty is triggered once the Crown has entered negotiations and caused the First Nation to commit to negotiations as its means of reconciling its rights.

During the negotiations, First Nations are entitled to expect that the Crown will start bargaining at least from the baseline position that core interests will receive protection through justificatory rights. It is a right that a First Nation should be able to enforce in court by way of a declaration if either of the Crowns persistently demands an arrangement less favourable to the First Nation. The right is extinguished, however, as soon as the First Nation signs an agreement, assuming the absence of coercion that vitiates the First Nation's consent. This is the consequence of a model of reconciliation that assigns substantive questions to the political realm, while providing legal supervision only for procedural issues. First Nations are free to trade in protection for some rights for better protection for others or for some other compensation, but they are also entitled to the presumption that interests that could be

¹⁷⁶ See Jim Aldridge, "Self-Government: The Nisga'a Nation Approach" in BC Treaty Commission, ed., *Speaking Truth to Power III: Self-Government: Options and Opportunities* (14 March 2002) 43, online: BC Treaty Commission <http://www.bctreaty.net/files_2/pdf_documents/truth_3_book.pdf>.

¹⁷⁷ *R. v. Pamajewon*, [1996] 2 S.C.R. 821 at 834, 130 D.L.R. (4th) 204.

Aboriginal rights will be respected and constitutionally protected at least through justificatory rights.

B. The Requirement of Flexibility

Willingness to protect core First Nation interests through justificatory rights should be regarded as a mandatory minimum for the Crown parties to be negotiating in good faith, but that standard is not the full extent of their duty. If the duty ended there, one of the chief benefits of the negotiation process might be lost. That benefit is the expansion of real choice for the parties in defining their relationship.

Attaching to side agreements some constitutional protection for various forms of accommodation—such as consultation or compensation—mitigates to some degree the lack of mutuality generally implied by a contractual model of government-First Nations relations. By including such protections, side agreements might be more attractive to First Nations as an instrument of reconciliation. A First Nation might rationally choose not to expend bargaining capital on full entrenchment of certain rights in preference for other benefits. This strategy might work particularly well in the context of self-government, where, for example, the BC government has demonstrated a strong antipathy to an inherent right model and might be willing to pay dearly for acceptance of a delegated model.

But however much a side agreement is supported by justificatory rights, it is not a treaty. Side agreements do not embody to the same degree the nation-to-nation relationship upon which most First Nations peoples—and others like myself—would like to see the negotiations proceed. The inclusion of justificatory rights still falls short. The problem is that, without more, side agreements might allow the government parties to insist on them as the instrument of reconciliation in certain contexts. Obviously, the recent referendum in BC raises this possibility for self-government.

In order to preserve the benefit of expanded choices that negotiations offer, Crown parties must be open to arrangements beyond their own preference. They must be responsive and conscientious in considering proposals from the First Nation. Persistently demanding, in the face of First Nation objections, that core interests only receive the minimum standard of protection—justificatory rights—should be regarded as a breach of the duty.

The need for Crown flexibility during negotiations is reflected in and required by the statutory instruments supporting the BC treaty process. The process was established following the recommendation of the BC Claims Task Force, which was composed of representatives of the Canada and BC governments and the First Nations Summit. Its basic structure was outlined in the *British Columbia Treaty Commission Agreement*¹⁷⁸

¹⁷⁸ BC Treaty Commission, *British Columbia Treaty Commission Agreement*, online: BC Treaty Commission, <http://www.bctreaty.net/files_2/bctcagreement.html>.

and implemented through the federal *British Columbia Treaty Commission Act*¹⁷⁹ and the provincial *Treaty Commission Act*.¹⁸⁰ Both acts refer to the agreement, and the agreement states in section 13.1 that the BC Treaty Commission may refer to the task force report¹⁸¹ “to provide the context for this Agreement and as an aid to its interpretation.” Clearly, the report was considered, at least by the government parties, to articulate foundational principles of the process.

The task force report contains nineteen recommendations, two of which are particularly relevant here. These recommendations stress the necessity of flexibility in negotiations on the part of the parties. Recommendation 1 suggests that “[t]he First Nations, Canada, and British Columbia [should] establish a new relationship based on mutual trust, respect, and understanding—through political negotiations.” Openness and flexibility are cited as hallmarks of this relationship. In its discussion of this first recommendation, the task force states that “[i]t is important that the items for negotiation not be arbitrarily limited by any of the parties.”¹⁸² Recommendation 2 further emphasizes the need for responsiveness: “Each of the parties [should] be at liberty to introduce any issue at the negotiation table which it views as significant to the new relationship.”¹⁸³ The report indicates that a consequence of this principle is that “[t]here should be no unilateral restriction by any party on the scope of negotiations.”¹⁸⁴

These principles from the report should inform the content of the duty to negotiate in good faith. Government parties should not be allowed to dictate the terms of the agreements by refusing to discuss First Nation proposals. Canada and BC must be responsive to concerns raised by the Aboriginal party and must not be tied to one position in the face of significant opposition to it.

This requirement has clear relevance to the post-referendum treaty process in BC. When introducing the referendum principles, Gordon Campbell and Geoff Plant, the Minister responsible for treaty negotiations, emphasized repeatedly that the referendum would be binding on the province under the provisions of the *Referendum Act*.¹⁸⁵ Many commentators questioned what this could mean in the climate of give and take implicit within negotiations. Minister Plant’s post-referendum instructions to provincial negotiators make the question no clearer. At one point he directs that “[p]rovincial negotiators have the authority to negotiate and make commitments on

¹⁷⁹ R.S.C. 1995, c. 45.

¹⁸⁰ R.S.B.C. 1996, c. 461.

¹⁸¹ *Report of the BC Claims Task Force*, *supra* note 12, Recommendation 1.

¹⁸² *Ibid.* at c. 1, para. 34.

¹⁸³ *Ibid.*, Recommendation 2.

¹⁸⁴ *Ibid.* at c. 2, para. 1.

¹⁸⁵ R.S.B.C. 1996, c. 400. Section 4 of the Act states:

If more than 50% of the validly cast ballots vote the same way on a question stated, that result is binding on the government that initiated the referendum.

topics that are consistent with the referendum principles and for which current policies exist,” while at another he urges that “[i]t is important that provincial negotiators demonstrate flexibility and creativity in developing agreements that can be supported by all negotiating parties.”¹⁸⁶ The legitimacy of the BC treaty process will depend much upon which of these two statements has greater influence in the next few years.

Conclusion

The modern treaty processes raise questions of enormous complexity and importance, and it is increasingly obvious that these roads to reconciliation will be arduous and long. The mood has shifted since the early years after the entrenchment of section 35. While the courts have urged the parties into negotiation and compromise, the treaty processes have not yet progressed as speedily as was envisioned. The BC process has fallen from the high optimism of the 1991 task force report into the acrimony of the referendum. In British Columbia, at least, there is a growing sense of gridlock that threatens to derail the whole process.

One necessary element of any solution to the stalemate is a greater variety of tools for the parties to use in redefining their relationship. In Quebec, the Innu of Mamuitun and the federal and provincial governments have developed a new model for securing certainty. The principals of the BC process are also searching for more options. At least in part provoked by the launch of the referendum campaign, the principals last year conducted a major review of the negotiations. That review culminated in an agreed willingness to look beyond comprehensive treaties to an incremental approach to treaty-making.

Side agreements have long been a fixture of the treaty processes. But they have generally been regarded as merely contractual in nature and so have not often been used to reconcile core First Nation interests. The Yukon side agreements, however, reveal these instruments’ greater potential. By shielding the side agreement with justificatory rights within the treaty, the First Nation can enjoy a measure of constitutional protection for rights that are not themselves constitutional. And whereas the Yukon side agreements are shielded through a right to consultation, any of the elements of the *Sparrow* justification test might be used, by themselves or in combination, to ensure that the First Nation’s interests are not arbitrarily overridden by shifts in government policy. Side agreements do not have to be merely contractual, but can receive some protection from the treaty. This potential for side agreements to

¹⁸⁶ See letter from Geoff Plant, Attorney General and Minister Responsible for Treaty Negotiations to Philip Steenkamp, Deputy Minister, Treaty Negotiations Office (31 July 2002), online: Government of British Columbia Treaty Negotiations Office <http://www.gov.bc.ca/aboriginal_dir/forum/Formn_2002/factsheets/negotiations.pdf>.

straddle the line between private and public might provide the crucial compromise for parties locked in stalemate.

Side agreements may in this way be very well suited to the present state of treaty negotiations, marked as they are by the need for more compromise and pragmatism. But it is critical that realism not eclipse consciousness of what the negotiations are all about. The treaty processes were founded to provide the “just settlement for aboriginal peoples” that is so long overdue. Since this purpose was heralded in *Sparrow*¹⁸⁷ the courts have increasingly handed the reconciliation project over to the political realm, but this overarching goal remains. Side agreements could be introduced by the Crown parties into the negotiations in a manner contrary to this purpose. The courts must not let them do so. While the parties should be allowed to formulate their new relationship without judicial prescription of its terms, the courts must be willing to hold the Crown parties to high fiduciary standards during the negotiations themselves. The federal and provincial governments must meet First Nations in good faith, motivated by the desire that each First Nation secure a just place within the Canadian social and constitutional order.

¹⁸⁷ See *Sparrow*, *supra* note 8 at 1105, where the Court quoted a classic statement from Noel Lyon, “An Essay on Constitutional Interpretation” (1988) 26 Osgoode Hall L.J. 95 at 100.