

WHAT CHANGES DID GRASSY NARROWS FIRST NATION MAKE TO FEDERALISM AND OTHER DOCTRINES?¹

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The Grassy Narrows case was a challenge, based on the promises made in Treaty 3, to Ontario's forest management scheme. The underlying concern was the impact of a logging licence on treaty hunting rights. The Supreme Court of Canada needed to consider treaty interpretation, the constitutional protection of treaty promises, and the constitutional law doctrine of interjurisdictional immunity, as well as the interactions among these concepts. In making its ruling, the Court established a new doctrine of constitutional evolution, which filled what was arguably a perplexing gap in the enforcement of treaty rights. The Court also narrowed, but, the author argues, did not abolish, the doctrine of interjurisdictional immunity in the Aboriginal law context. The author also argues that the Court did not change the principles of treaty interpretation, but did not apply them fully to the facts of the case. The author suggests that the doctrine of justified infringement in the context of treaty rights deserves another look, especially in the case of modern treaties.

L'affaire Grassy Narrows portait sur une contestation, fondée sur des promesses faites en vertu du Traité no 3, du régime d'aménagement forestier de l'Ontario. La préoccupation sous-jacente avait trait à l'incidence d'un permis d'exploitation forestière sur des droits de chasse issus du traité. La Cour suprême du Canada devait se pencher sur l'interprétation des dispositions du traité, la protection constitutionnelle accordée aux promesses contenues dans ce dernier, la doctrine de l'exclusivité des compétences en droit constitutionnel ainsi que sur les liens entre ces différentes notions. Dans le cadre de sa décision, la Cour a établi une nouvelle doctrine d'évolution constitutionnelle, qui vient combler un écart sans doute troublant dans l'exécution des droits issus de traités. La Cour a, par ailleurs, limité la portée de la doctrine de l'exclusivité des compétences dans le contexte du droit des Autochtones, mais selon l'auteur, elle ne l'a pas abolie. L'auteur soutient en outre que bien que la Cour n'ait pas modifié les principes d'interprétation des traités, elle ne les a pas appliqués parfaitement

¹ Earlier versions of portions of this paper were presented at conferences; HW Roger Townshend, "Keewatin Decision: Analysis and Likely Impact" (Aboriginal Law: Practice Primers and Contemporary Developments 2015 delivered at The Commons Institute, 24 February 2015) [unpublished]; HW Roger Townshend, "Keewatin Decision: The Implications and Interaction with Tsilhqot'in Nation" (Aboriginal Law Forum delivered at Insight Information, 3 November 2014) [unpublished]. I benefited from helpful comments on earlier versions of this paper by Senwung Luk, Kent McNeil, Kerry Wilkins, David Schulze, and two anonymous peer reviewers.

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aux faits de l'espèce. L'auteur constate que la doctrine de « l'atteinte justifiée » dans le contexte des droits issus de traités mérite un réexamen, surtout lorsqu'il s'agit de traités modernes.

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1. Introduction

The “old” Aboriginal law of the 19th century came into collision with the “new” Aboriginal law of the late 20th century in the decision of the Supreme Court of Canada called *Grassy Narrows First Nation v Ontario (Minister of Natural Resources)*,² referred to in the lower courts as *Keewatin*.³ The case involves the interaction between treaty interpretation, statutes, and the constitutional division of powers. The result affects the question of which government is responsible for fulfilling treaty promises. The “old” law had arguably left a perplexing gap such that the only government with the obligation to fulfil treaty promises (i.e. Canada) did not have the constitutional power to do so because fulfilling some of the promises involved provincial lands. *Grassy*

² 2014 SCC 48, [2014] 2 SCR 447 [*Grassy Narrows*].

³ *Keewatin v Ontario (Minister of Natural Resources)*, 2011 ONSC 4801, [2012] 1 CNLR 13 [*Keewatin Sup Ct cited to ONSC*]; *Keewatin v Ontario (Minister of Natural Resources)*, 2013 ONCA 158, 114 OR (3d) 401 [*Keewatin CA cited to ONCA*]. *Keewatin* is the name of one of the representative plaintiffs.

Narrows, by adopting a new doctrine of constitutional evolution, filled that gap, which had been haunting Aboriginal law for some time.

In addition, *Grassy Narrows* (together with *Tsilhqot'in Nation v British Columbia*) significantly narrowed the scope of the doctrine of interjurisdictional immunity.⁴ At first glance, these cases appear to have abolished the application of that doctrine in Aboriginal law. However, a full contextual analysis and subsequent jurisprudential development show that these cases did not extinguish the doctrine. Interjurisdictional immunity remains alive in Aboriginal law, although more constrained than it was prior to *Grassy Narrows* and *Tsilhqot'in Nation*. This article sets out the key facts and rulings in *Grassy Narrows* and explains how they relate to established doctrines of treaty interpretation. It then explains the new doctrine of constitutional evolution, along with its historical and legal significance. The article then explains the doctrine of justified infringement of an Aboriginal or treaty right and considers its interaction with the general constitutional law doctrine of interjurisdictional immunity. *Grassy Narrows* and *Tsilhqot'in Nation* appear to say that the doctrine of justified infringement replaces interjurisdictional immunity in the Aboriginal law context. However, it is argued that the Court did not, and could not, have meant such a categorical replacement. Finally, some suggestions are made for a second look at the doctrine of justified infringement in the context of treaty rights.

2. Background

The old Aboriginal law was created by cases in the 19th century in the context of federal-provincial disputes about jurisdiction and land ownership, with no Aboriginal parties coming before the courts.⁵ This old Aboriginal law was premised on (1) Aboriginal peoples having no land rights;⁶ (2) the written text of treaties being taken literally as what had been agreed;⁷ (3) treaties

⁴ *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44, [2014] 2 SCR 257 [*Tsilhqot'in Nation*].

⁵ For further discussion of the 19th century cases, see text accompanying notes 40–43.

⁶ Aboriginal title was not recognized even as a potentially legally enforceable concept until the decision of the Supreme Court of Canada in *Calder v British Columbia (AG)*, [1973] SCR 313, 34 DLR (3d) 145. The nature, content, and criteria for proof of Aboriginal title were not determined until *Delgamuukw v British Columbia*, [1997] 3 SCR 1010, 153 DLR (4th) 193 [*Delgamuukw*]. The first time a Canadian court finally declared that a specific tract of territory was subject to Aboriginal title was in 2014 in *Tsilhqot'in Nation*, *supra* note 4. See PG McHugh, *Aboriginal Title: The Modern Jurisprudence of Tribal Land Rights* (Oxford: Oxford University Press, 2011) at 2–5, 28, 68–69.

⁷ See James (Sa'ke'j) Youngblood Henderson, *Treaty Rights in the Constitution of Canada* (Toronto: Thomson Carswell, 2007) at 97. The breakthrough case, which ended the

having the effect of an absolute surrender of rights;⁸ and (4) there being no constitutional impediment to breaching treaty promises.⁹ These premises no longer hold. However, the old law also relied on the federalism provisions of the *Constitution Act, 1867*, which remain in force.¹⁰ Specifically, the old Aboriginal cases were concerned with the implications of Canada having jurisdiction over “Indians,¹¹ and Lands reserved for the Indians”,¹² while the provinces had the ownership of lands and resources “subject to any Trusts existing in respect thereof.”¹³ *Grassy Narrows* found a way of reconciling those federalism provisions with the new Aboriginal law.

The “new” basic principles of Aboriginal treaty interpretation are well established: (1) “a treaty represents an exchange of solemn promises between the Crown” and Aboriginal peoples;¹⁴ (2) “the honour of the Crown is always at stake” and no “sharp dealing[s]” will be sanctioned;¹⁵ (3) “ambiguities or doubtful expressions ... must be resolved in the favour of the [Aboriginal party]”;¹⁶ (4) evidence other than the written text of the treaty must be considered, even in the absence of “ambiguity on the face of the [written text]”;¹⁷ and (5) treaties were intended to reconcile the goals and interests of the parties to the treaty at the time and should be interpreted in a way consistent with those intentions.¹⁸

A different aspect of the old Aboriginal law was that, prior to the constitutional protection of treaty and Aboriginal rights in 1982, a technique

primacy of the written text, was *R v Taylor and Williams* (1981), 34 OR (2d) 360, 62 CCC (2d) 227 (CA), leave to appeal to SCC refused, [1981] 2 SCR xi (21 December 1981).

⁸ The Supreme Court of Canada so ruled as late as 1983 in *R v Smith*, [1983] 1 SCR 554, 147 DLR (3d) 237 [*Smith*], discussed below.

⁹ Such a constitutional impediment was not in place until the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Constitution Act, 1982*]. Prior to this, often Crown obligations to Aboriginal people were considered to be a “political trust”, and therefore unenforceable by courts, which was the case until 1982. See *R v Guerin*, 143 DLR (3d) 416, [1983] 2 WWR 686 (FCA), rev'd [1984] 2 SCR 335, 13 DLR (4th) 321 [*Guerin* cited to SCR]; Peter A Cumming & Neil H Mickenberg, eds, *Native Rights in Canada*, 2nd ed (Toronto: Indian-Eskimo Association of Canada, 1972) at 56–58.

¹⁰ *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5 [*Constitution Act, 1867*].

¹¹ I use words such as “Aboriginal” or “First Nation” in preference to “Indian” or “band”. However, when referring to precise statutory concepts or historic jurisprudence, sometimes the latter words are the only accurate ones.

¹² *Constitution Act, 1867*, *supra* note 10, s 91(24).

¹³ *Ibid.*, s 109.

¹⁴ *R v Badger*, [1996] 1 SCR 771 at para 41, 133 DLR (4th) 324 [*Badger*].

¹⁵ *Ibid.*

¹⁶ *Ibid.*

¹⁷ *R v Marshall*, [1999] 3 SCR 456 at paras 10–12, 177 DLR (4th) 513 [*Marshall*].

¹⁸ *Ibid.* at para 14.

often used in the mid-20th century to defend Aboriginal and treaty rights was to argue that since Canada had jurisdiction over “Indians and lands reserved for the Indians,” provinces had no jurisdiction to regulate traditional Aboriginal harvesting practices. That is, interjurisdictional immunity applied. This aspect of the doctrine has also been affected by *Grassy Narrows* and *Tsilhqot’in Nation*.

3. Facts in Grassy Narrows

The trial in *Grassy Narrows* was divided into discrete phases. Only the first phase was reached and it was scoped to answer two questions about Aboriginal harvesting rights and their infringement: “(1) Does Ontario have the authority to ‘take up’ tracts of land within the Keewatin area so as to limit Treaty 3 harvesting rights? and (2) If the answer to the first question is no, does Ontario have the authority under the *Constitution Act, 1867* to justifiably infringe the appellants’ treaty rights?”¹⁹ Behind these abstract questions was a challenge to the validity of Ontario’s forest management system. The underlying concern was the impact of a logging licence on treaty hunting rights. To resolve the questions, the Court needed to consider the interaction of the interpretation of Treaty 3, a historic dispute about the boundary of the province of Ontario and its resolution, the federal-provincial division of powers, and the extent of constitutional protection of treaty promises.

The written text of Treaty 3 provides a guarantee of traditional harvesting rights throughout the treaty area, with an exception: “saving and excepting such tracts as may, from time to time, be required or *taken up* for settlement, mining, lumbering or other purposes *by Her said Government of the Dominion of Canada*, or by any of the subjects thereof duly authorized therefor by the said Government.”²⁰ However, after a lengthy analysis of the events leading up to Treaty 3; the goals, interests and knowledge of the parties to the treaty; and the treaty negotiations, the trial Court found that the Aboriginal parties had received a clear, oral promise of an unlimited and perpetual guarantee of harvesting rights, that this was a major consideration for them, and that they would not likely have signed the treaty without this assurance.²¹

These findings of fact were not challenged on appeal. Nonetheless, the implications of these facts were ignored by the parties and by all levels of court. The plaintiffs, rather than seeking to enforce the bargain about

¹⁹ *Grassy Narrows*, *supra* note 2 at para 19.

²⁰ *Ibid* at para 11 [emphasis added].

²¹ *Keewatin Sup Ct*, *supra* note 3 at paras 817, 822, 826, 830, 861, 864, 1293, 1296–302.

harvesting rights made at treaty, chose to rely on the wording of the written text and accepted that Canada (but not Ontario) was entitled to take up land and thus take it outside of the territory in which harvesting rights were guaranteed. The case proceeded, at all levels, with the key dispute being whether or not Ontario was entitled to take up land under the treaty.²²

This question of Ontario taking up land was affected by subsequent facts. At the time of Treaty 3, there was an ongoing dispute between Canada and Ontario about the correct location of the western boundary of Ontario and the proper interpretation of the constitutional division of powers in relation to Aboriginal treaties. It was this latter dispute that sparked the development of the old Aboriginal law. Those cases affirmed Ontario's ownership of lands and resources over most of the Treaty 3 area.²³

The resolution of the historic federal-provincial dispute included an 1891 statute that authorized an agreement between Canada and Ontario that provided that Treaty 3 harvesting rights did not apply on lands taken up by Ontario.²⁴ This statute and agreement dealt with approximately two-thirds of the Treaty 3 area. The remainder of the Treaty 3 territory, except for a portion of it now in Manitoba, was added to Ontario in 1912 by legislation that was silent about taking up lands, or about any impact on treaty harvesting rights.²⁵ It was in the territory added by this legislation that the dispute in the *Grassy Narrows* case arose.

4. Rulings in Grassy Narrows

The key ruling in *Grassy Narrows* is that treaty promises are promises of the Crown, not just of Canada. Both levels of government are bound to fulfill these promises within each of their jurisdictions. Similarly, both levels of government are entitled to the benefits of the treaty that apply to them.²⁶ Although the Supreme Court of Canada does not use the phrase, the Court of Appeal for Ontario called this doctrine "constitutional evolution" in deciding the case. More generally, the Court of Appeal stated:

²² *Ibid* at paras 13–14, 866, 1281.

²³ *St Catherine's Milling and Lumber Co v R* (1888), 14 AC 46, 2 CNLC 541 [*St Catherine's* cited to AC]; *Ontario Mining Co v Seybold*, [1903] AC 73, 3 CNLC 203 [*Seybold* cited to AC].

²⁴ *An Act for the settlement of certain questions between the Governments of Canada and Ontario respecting Indian Lands*, SC 1891, c 5, Schedule, s 1; *Act for the settlement of questions between the Governments of Canada and Ontario respecting Indian Lands*, SO 1891, c 3, Schedule, s 1.

²⁵ *Ontario Boundaries Extension Act*, SC 1912, c 40, s 2.

²⁶ *Grassy Narrows*, *supra* note 2 at para 35.

Throughout that process of constitutional evolution, the Crown and the relationship between the Crown and Canada's Aboriginal peoples remains a constant, central and defining feature. What has evolved is the allocation of legislative and administrative powers and responsibilities to different levels of government. In formal terms, what changes with constitutional evolution is the level of government on whose advice the Crown acts.²⁷

This result was significantly different from the approach of the trial Court. Rather than interpreting the treaty to give effect to the promise of unlimited harvesting rights (a result no party had requested), the trial Court ruled that the written clause in Treaty 3 was to be interpreted strictly and literally to require Canada to authorize any taking up of land by Ontario.²⁸

The trial Court was also of the view that the 1891 statute "amended" Treaty 3 in respect of the lands to which it applied, so that Ontario could take up those lands and thus make the Treaty harvesting rights inapplicable.²⁹ For the lands added to Ontario in 1912, however, the Court found no legislative intent to "amend" Treaty 3, and so applied the written text of Treaty 3 strictly.³⁰ The trial level result was that, for the lands added to Ontario in 1912, Ontario was not empowered by the treaty to unilaterally take up those lands and thereby limit treaty rights. To do this, Ontario would need Canada to cooperate. For this interpretation of Treaty 3, the trial Court relied on what it viewed Canada to have intended at Treaty 3—to interpose itself to be able to protect treaty harvesting rights should the boundary and jurisdictional issues in dispute at the time be resolved in Ontario's favour.

This reasoning and result was rejected by both the Ontario Court of Appeal and the Supreme Court of Canada.³¹ Central to the reasoning of the appeal decisions was that the treaty party was the Crown, not Canada, despite Canada having appointed and instructed the treaty commissioners. Because the treaty partner was the Crown, and it happened to develop that it was Ontario that became the administrator of Crown lands, it was Ontario that could exercise the taking up of lands on behalf of the Crown, and Ontario was bound to accept that the lands were subject to the harvesting rights guaranteed by treaty.³²

This appeal reasoning parallels the reasoning taken by the English Court of Appeal in 1982 when asked, in the midst of the constitutional patriation process, for a declaration that Aboriginal treaty obligations were still owed

²⁷ *Keewatin CA*, *supra* note 3 at para 136.

²⁸ *Keewatin Sup Ct*, *supra* note 3 at paras 1310, 1452.

²⁹ *Ibid* at paras 1402–03.

³⁰ *Ibid* at para 1414.

³¹ *Keewatin CA*, *supra* note 3 at para 135; *Grassy Narrows*, *supra* note 2 at para 35.

³² *Grassy Narrows*, *supra* note 2 at para 35.

by the Crown in right of the UK. In three separate sets of reasons, the Court ruled that Crown treaty obligations devolved to Canada or the provinces as the constitutional arrangements evolved towards self-government.³³

The *Grassy Narrows* appeals also clarified that the 1891 statute had not “amended” Treaty 3. It merely “confirmed” that Ontario, as owner of Crown lands, had stepped into Canada’s shoes by a process of constitutional evolution.³⁴

5. Treaty Interpretation

As noted above, at Treaty 3 negotiations in 1873, the Crown promised unlimited and perpetual harvesting rights. This promise should have been interpreted in light of the modern treaty interpretation principles set out in part two, above.

The promise that the trial court found had been given orally at the Treaty contradicts the part of the written text permitting the Crown to take up land so that harvesting rights would no longer apply. I suggest that the way to recognize the solemnity of the oral promise, to preserve the honour of the Crown, to properly consider evidence other than the written text of the treaty, and to reconcile the goals and interests of the parties to the Treaty is to essentially strike out the taking up clause from the written text of the treaty.³⁵ The result would be that the guarantee of harvesting rights would

³³ *R v Secretary of State for Foreign and Commonwealth Affairs Ex parte Indian Association of Alberta*, [1982] 2 All ER 118, [1981] 4 CNLR 86 (EWCA Civ). However, note that Bruce McIvor and Kate Gunn observe that this case affirmed the importance of the duties of the Crown devolving on Canada rather than the provinces. Bruce McIvor & Kate Gunn, “Stepping Into Canada’s Shoes: *Tsilhqot’in*, *Grassy Narrows* and the Division of Powers” (2016) 67:1 UNBLJ 146 at 159 [McIvor & Gunn].

³⁴ *Grassy Narrows*, *supra* note 2 at para 42. See also *Keewatin CA*, *supra* note 3 at paras 136–41.

³⁵ I am not aware of a court using the terminology “striking out” to describe what it is doing when interpreting a treaty. However, in *Marshall*, *supra* note 17, the Supreme Court of Canada was interpreting a treaty that included a clause saying “And I [the Aboriginal signatory] do further engage that we will not traffick, barter or Exchange any Commodities in any manner but with such persons or the managers of such Truck houses as shall be appointed or Established by His Majesty’s Governor at Lunenburg or Elsewhere in Nova Scotia or Accadia” [emphasis in original] (at para 5). The interpretation the court gave was “that the surviving substance of the treaty is not the literal promise of a truckhouse, but a treaty right to continue to obtain necessities through hunting and fishing by trading the products of those traditional activities” (at para 56). The Supreme Court altered the written text in order to give effect to the actual agreement reached at the treaty, which meant transforming a negative restriction into a positive entitlement for the Aboriginal party. I suggest striking out the taking up clause in Treaty 3 would be no more radical an approach than that taken in *Marshall*.

be unqualified.³⁶ No other alternative would be consistent with what the trial Court found had been promised.

It is unfortunate, given the trial court's finding regarding the oral promise, that all levels of court proceeded to apply the written treaty provision permitting taking up land. However, in fairness to the courts, none of the parties to *Grassy Narrows* asked that the clause be struck out.

Nonetheless, nothing in *Grassy Narrows* changes the established principles of treaty interpretation. The courts simply did not apply the principles to the facts on what the actual Treaty agreement was. This suggests that it is still open to a Treaty 3 First Nation to seek to have the taking up clause struck out of the treaty completely.

It is a helpful clarification that the Court of Appeal ruled that the 1891 statute had not "amended" the treaty.³⁷ Allowing a unilateral amendment of this sort would not be consistent with the nature of treaties as an agreement between two or more parties. This approach also has the beneficial effect of interpreting Treaty 3 consistently across its geographic scope, rather than having a different result for the geographic area added to Ontario in 1912.

6. Constitutional Evolution

The most significant ruling of *Grassy Narrows* is that it adopted a constitutional evolution doctrine that results in the inseparability of treaties' benefits and burdens.³⁸ This clarifies that treaty rights cannot fall into a black hole because of jurisdictional arguments; though this might sound logical or even obvious, it is a new development that appears to overrule previous case law.³⁹

³⁶ Robert Dül also considers how the principle of meeting-of-the-minds should apply in the Treaty 3 context in light of *Grassy Narrows*. However, he argues that the Aboriginal parties were mistaken about the identity of their treaty partner (i.e. they thought they were dealing with Canada, not the Crown at large), and that therefore Treaty 3 is void at common law on a contract law analysis. Robert Dül, "Grassy Narrows X: An Alternative Argument" (2015) 73:2 UT Fac L Rev 32 (Lexis).

³⁷ *Grassy Narrows*, *supra* note 2 at para 21.

³⁸ See above, text accompanying notes 26–27, 31–34.

³⁹ Kent McNeil makes the intriguing point that what I am calling a "new development" is actually a reversion to a much earlier theory of Crown indivisibility, which had been rejected by modern case law, and which McNeil sees as making little sense. Kent McNeil, "The Obsolete Theory of Crown Unity in Canada and Its Relevance to Indigenous Claims" (2015) 20:1 Rev Const Stud 1 [McNeil, "Obsolete Theory"]. Robert Dül, *supra* note 36, suggests that this theory of constitutional evolution, which he does not question, results in Treaty 3 being void at common law because the Aboriginal parties were mistaken [i.e. in hindsight, given *Grassy Narrows*, *supra* note 2] about who their treaty partner was—they thought they were bargaining with Canada, and as a result of *Grassy Narrows*, they ended up

No court had previously ruled that the benefits and burdens of treaties are inseparable, although even the 19th century Aboriginal cases made suggestions to that effect.⁴⁰ What the old line of cases had established was that (1) Canada had the jurisdiction to make Aboriginal treaties;⁴¹ (2) upon a treaty or other agreement “surrendering” land, the land immediately became unburdened by the Aboriginal interest and was fully and beneficially owned by the relevant province;⁴² (3) if those treaties required dealing with lands (e.g. to create reserves), Canada could not do that, and so the province had to be involved;⁴³ and (4) having received the benefit of a treaty (i.e. the unburdened beneficial interest in the land), a province came under “at least an honourable engagement” to fulfill the terms of the treaty.⁴⁴ What had not been decided was whether provinces had merely an honourable engagement or a legally enforceable obligation to Aboriginal parties to cooperate in order to fulfil treaty promises. This left the door open to an argument that treaty rights somehow vanished into a jurisdictional black hole—with the only government capable of fulfilling some treaty promises having no obligation to do so because it was not a party to the treaty (e.g., Ontario in the case of providing land for reserves under Treaty 3). *Grassy Narrows* convincingly fills that hole: provinces get the benefit of land ownership through section 109 of the *Constitution Act, 1867*, but that ownership is subject to Aboriginal title and treaty rights.

The *Grassy Narrows* ruling is significant, as it appears, for example, to overrule key aspects of the 1983 decision of the Supreme Court of Canada in *R v Smith*.⁴⁵ At issue in that case was an 1895 surrender of Indian reserve lands, which included a condition that money from the sale of such lands be credited to the First Nation. The operative words of the document are:

being treaty partners with Ontario (at paras 6–9, 22–23, 34). Dül suggests that this amounted to a misrepresentation by the Crown negotiator at Treaty 3 (at paras 26, 30–34, 48–49). On this latter point, it seems that Dül has not accounted for the shifting constitutional theories about the nature of the Crown that have been in play since 1873 (and are outlined in McNeil, “Obsolete Theory”), and I remain unconvinced that Alexander Morris, the Crown negotiator at Treaty 3, should be imputed with knowing these theories.

⁴⁰ As noted above, the ruling parallels the ruling made about the treaty obligations of the Crown in right of the UK, see text accompanying note 32.

⁴¹ *St Catherine’s*, *supra* note 23 at 60. That is, where there is a province with full provincial jurisdiction. The prairie provinces, for example, did not have control over Crown lands until the Natural Resource Transfer Agreements that came into force in 1930, see *Constitution Act, 1930* (UK), 20 & 21 Geo V, c 26, reprinted in RSC 1985, Appendix II, No 26 [*Constitution Act, 1930*]. So this and the following propositions only became true in respect of the prairie provinces in 1930, and the Natural Resource Transfer Agreements also modified the operation of these propositions.

⁴² *St Catherine’s*, *supra* note 23 at 58–60.

⁴³ *Seybold*, *supra* note 23 at 82.

⁴⁴ *Ibid.*

⁴⁵ *Smith*, *supra* note 8.

The Indians owning the . . . Red Bank Reserves ... Do hereby release, remise, surrender, quit claim and yield up unto Our Sovereign Lady the Queen ... TO HAVE AND TO HOLD the same ... in trust to sell the same ... AND upon the further condition that all moneys received from the sale thereof, shall, after deducting the usual proportion for expenses of management, be placed to our credit and the interest thereon paid to us and our descendants as to the Department of Indian Affairs may seem right.⁴⁶

The Supreme Court interpreted this release of the land through the lens of rather old law regarding the interpretation of real estate conveyances, together with the constitutional division of powers, to unencumber unconditionally the land title of the province, with a legally independent “request ... for a financial credit equal to the proceeds of sale.”⁴⁷ In my view, this pulls apart the transfer of the land interest that the First Nation gave up from the promise of compensation for it and converts the promised compensation into a mere “request”. The promises to the First Nation thus fell into a jurisdictional black hole. I suggest that this disregards the solemnity of the promise, stains the honour of the Crown, and fails to reconcile, or even consider, the intentions of the parties. Applying the new doctrine of constitutional evolution would allow the benefits and burdens of the surrender to remain linked to each other by imposing a legal duty on the province to pay the proceeds of the land sales to the First Nation. This would avoid the need to interpret the land surrender in a way so inconsistent with modern treaty interpretation principles.

Other examples of jurisdictional black holes can be found in the facts of the *Grassy Narrows* case itself, which recounts a history of Ontario failing to cooperate in order to create Treaty 3 reserves.⁴⁸ Ontario also systematically refused to honour treaty harvesting rights until the early 1970s, instead prosecuting Aboriginal people for exercising their rights.⁴⁹ The old way of thinking that Aboriginal people’s rights somehow vanished or fell into a crack between federal and provincial jurisdiction has haunted the practice of Aboriginal law for many years. *Grassy Narrows*, with its doctrine of constitutional evolution, appears finally to have put that way of thinking to rest. Perhaps now an action for redress of these historic wrongs could be possible.

Nonetheless, one may need to be cautious about overextending the concept of constitutional evolution. It is a welcome result for First Nations

⁴⁶ *Ibid* at 556–57 [emphasis in original].

⁴⁷ *Ibid* at 564, 570.

⁴⁸ *Keewatin Sup Ct, supra* note 3 at paras 1102–13.

⁴⁹ See James Morrison, “The Robinson Treaties of 1850: A Case Study,” CD-ROM: *For Seven Generations: An Information Legacy of the Royal Commission on Aboriginal Peoples* (Ottawa: Libraxis, 1997).

that provinces are bound to treaties, but it should not be taken as removing Canada's responsibility entirely. There are situations, due to the federal-provincial division of powers, where both Canada and a province must act together in order to fulfil certain kinds of treaty promises. For example, in order to set aside a reserve, a standard treaty term for "land surrender" treaties,⁵⁰ a province must make the land available,⁵¹ and Canada must formally set the land apart as an Indian reserve. Of course, the relevant First Nation must agree as well.

7. Justified Infringement

Treaty and Aboriginal rights, although recognized and affirmed by section 35 of the *Constitution Act, 1982*, are not absolute and may be infringed if it can be justified.⁵² We will see how *Grassy Narrows* applied and developed this doctrine in the context of a treaty with a taking up clause.

Grassy Narrows establishes that Ontario may take up land under Treaty 3, and that when it does so, the harvesting rights of the Aboriginal parties do not apply to the land taken up. However, the right to take up is not unconditional. A First Nation must be consulted and accommodated when taking up might impact their rights, even if the impact stops short of an infringement.⁵³ There is a large and growing body of jurisprudence on Aboriginal consultation and accommodation, which I will not discuss here, but note that this is a serious and substantive restraint on Crown action that cannot be treated as merely a set of procedures to check off.⁵⁴ Rather,

[a province] must then deal with the Ojibway in good faith, and with the intention of substantially addressing their concerns (*Mikisew*, at para. 55; *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 (S.C.C.), at para. 168). The adverse impact of the Crown's project (and the extent of the duty to consult and accommodate) is a matter of degree, but consultation cannot exclude accommodation at the outset.⁵⁵

⁵⁰ That is, treaties that purported to surrender large tracts of land. Such treaties usually also set aside reserves. "Peace and friendship" treaties did not have such terms at all. It is often in question whether the surrender of large tracts of land had received free and informed consent from the Aboriginal parties.

⁵¹ There are places and times where there is no province having such jurisdiction, see the text accompanying note 41.

⁵² *R v Sparrow*, [1990] 1 SCR 1075, 70 DLR (4th) 385 [*Sparrow* cited to SCR].

⁵³ *Grassy Narrows*, *supra* note 2 at paras 50–51.

⁵⁴ The leading case for consultation and accommodation in the context of taking up land under a treaty is *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 SCR 388.

⁵⁵ *Grassy Narrows*, *supra* note 2 at para 52.

Beyond consultation and accommodation, however, “if the taking up leaves the Ojibway with no meaningful right to hunt, fish or trap in relation to the territories over which they traditionally hunted, fished, and trapped, a potential action for treaty infringement will arise.”⁵⁶

In such a case, the infringement might be legally permitted if it passes a rigorous test for justification. In such cases, Canadian law may permit the federal government or a provincial government to impose a decision even if it will result in an infringement of a treaty or Aboriginal right. *Tsilhqot'in Nation*, which was a case regarding an Aboriginal title claim, recently reformulated the test for a justified infringement. In order to impose its decisions in the face of a *prima facie* infringement of a treaty or Aboriginal right, the Crown has to show that it (1) procedurally consulted and accommodated the Aboriginal community, (2) imposed its decision based on a “compelling and substantial objective”, and (3) imposed its decision in a way consistent with its fiduciary obligations.⁵⁷

The first branch of this test is outlined above. Under the second branch of this test, the Crown has to prove that its objective in imposing its decisions against the wishes of the Aboriginal title holder are “compelling and substantial”. It is clear that this must be considered from the perspective of both the Aboriginal community and the non-Aboriginal public.⁵⁸

Under the third branch of this test, the Crown then has to prove that its imposition on the Aboriginal community is consistent with its fiduciary obligations. It is significant that the Supreme Court of Canada has re-invigorated the word “fiduciary” in reference to the relation between the Crown and Aboriginal peoples. This implies a strict standard of loyalty and giving priority to the Aboriginal interest. This was the language of the breakthrough case *R v Guerin* in 1984, which put an end to the “political trust” theory by ruling that a promise to a First Nation at the time of a land surrender was indeed enforceable by a court, characterizing it as a fiduciary duty.⁵⁹ This was also the language used in the leading case of *R v Sparrow* in 1990, where the Supreme Court set out the doctrine of justified infringement, using fiduciary duty as the rationale and standard for justification of a rights infringement.⁶⁰ In *Sparrow*, this meant Aboriginal fishing had complete priority over non-Aboriginal fishing. In 1996, while still using the concept of fiduciary duty, the Supreme Court softened this concept of harvesting

⁵⁶ *Ibid.*

⁵⁷ *Tsilhqot'in Nation*, *supra* note 4 at para 77.

⁵⁸ *Ibid* at para 81.

⁵⁹ *Supra* note 9 at 351.

⁶⁰ *Supra* note 52 at 1108.

priority when the Aboriginal right is not “internally limited.”⁶¹ Instead, ideas of balancing and accommodation came into play. These ideas seem inconsistent with the classic fiduciary principle that requires utmost good faith and a heightened degree of loyalty.⁶² In 2004, the Supreme Court of Canada introduced an overall concept in *Haida Nation v British Columbia (Minister of Forests)* called “honour of the Crown” to Crown-Aboriginal relations, which only sometimes gives rise to a fiduciary duty, and other times gives rise to a “duty to consult and accommodate,” which is a lower threshold.⁶³

Some “balancing” of Aboriginal and non-Aboriginal interests is probably unavoidable for a Canadian court, even factoring in the special duties the Crown owes to Aboriginal people. Nonetheless, it is perhaps revealing that in *Tsilhqot’in Nation*, the Supreme Court of Canada is again using the concept of fiduciary duty freely, and has clearly signalled that justifying an infringement of Aboriginal title is a high hurdle, as “[g]ranting rights to third parties to harvest timber on Tsilhqot’in land is a serious infringement that will not lightly be justified.”⁶⁴

Under this third branch of fiduciary obligation, as a preliminary matter, the Crown has to show that the infringement would not “substantially deprive future generations of the benefit” of the right.⁶⁵ For example, a complete and unilateral extinguishment of Aboriginal rights or title is not legally permitted, and cannot be justified under any circumstances.

Further, in order to show that the Crown’s fiduciary obligation has been fulfilled, the Crown’s actions must be “proportionate.”⁶⁶ To do so, the Crown has to show that: (1) the infringement of Aboriginal title is *necessary* to achieve the Crown’s goals (rational connection), (2) the infringement goes *no further than necessary* to achieve the Crown’s goals (minimal impairment), and (3) the benefits expected from the infringement are not outweighed by adverse effects on the Aboriginal interest (proportionality of impact).⁶⁷

The Supreme Court of Canada has set out the test for justifying an infringement in a way that is very similar to the test for justifying a *Charter* right limitation under section 1 of the *Charter*. First, the “compelling and substantial objective” of the justification test for section 35 of the

⁶¹ *R v Gladstone*, [1996] 2 SCR 723 at paras 54–66, 137 DLR (4th) 648 (case concerning Aboriginal commercial fishing rights).

⁶² See e.g. Leonard I Rotman, *Fiduciary Law* (Toronto: Carswell, 2005) at 305–06.

⁶³ 2004 SCC 73 at para 18–25, [2004] SCR 511.

⁶⁴ *Tsilhqot’in Nation*, *supra* note 4 at para 127.

⁶⁵ *Ibid* at para 86.

⁶⁶ *Ibid* at paras 17, 79, 87.

⁶⁷ *Ibid* at para 87 [emphasis added].

Constitution Act, 1982 mirrors the section 1 justification requirement of “sufficient importance to warrant overriding a constitutionally protected right or freedom.”⁶⁸ Second, in articulating the three elements of proportionality required by the fiduciary duty, the Court explicitly named the three proportionality elements of the section 1 justification test: rational connection, minimal impairment, and proportionality of impact.⁶⁹ The tests were similar in substance before *Tsilhqot’in Nation*, but now they track each other structurally and linguistically as well. The Court also explicitly compared the purposes and operation of section 35 and the *Charter*.⁷⁰ Perhaps the Court is signalling that it may be appropriate to look to section 1 *Charter* jurisprudence when considering a possible justified infringement of a section 35 right.

8. Interjurisdictional Immunity

A key issue in both *Tsilhqot’in Nation* and *Grassy Narrows* was whether a province, as opposed to Canada, could infringe a treaty right (in the case of *Grassy Narrows*) or Aboriginal title (in the case of *Tsilhqot’in Nation*) if it passed the justification test. In both cases, the Supreme Court of Canada decided that this could be legally permissible. This issue has to do with the interaction of the doctrines of justified infringement and interjurisdictional immunity.

A) History of Interjurisdictional Immunity

The federal and provincial governments each have exclusive jurisdiction over the matters that are assigned to them in the Canadian Constitution. Canadian courts have long rejected an enclave theory of jurisdiction⁷¹ in favour of a double aspect approach, so that often either or both federal and provincial legislatures may pass laws about certain matters.⁷² However, there remains a doctrine called “interjurisdictional immunity”, according to which there is a core of exclusive jurisdiction for each government, immune to legislation of the other level of government, even if the government

⁶⁸ *R v Oakes*, [1986] 1 SCR 103 at 138, 26 DLR (4th) 200 [Oakes], citing *R v Big M Drug Mart Ltd*, [1985] 1 SCR 295 at 352, 18 DLR (4th) 321.

⁶⁹ For the basic section 1 *Charter* justification test, see *ibid* at 136–37.

⁷⁰ *Tsilhqot’in Nation*, *supra* note 4 at para 142.

⁷¹ See e.g. *Cardinal v Alberta (AG)* (1973), [1974] SCR 695, 40 DLR (3d) 553 (rejecting the idea that Indian reserves are federal enclaves on which no provincial laws applied).

⁷² See Peter W Hogg, *Constitutional Law of Canada*, 5th ed (Toronto: Carswell, 2007) (loose-leaf updated 2016 release 1), ch 15 at 12–14 [Hogg, *Constitutional Law*]. Leading cases are *Hodge v R* (1883), 9 App Cas 117, 9 CRAC 13 (PC); *Multiple Access Ltd v McCutcheon*, [1982] 2 SCR 161, 138 DLR (3d) 1.

having exclusive jurisdiction has left the “[matter] wholly unregulated.”⁷³ We will see that one of the areas where this doctrine has been applied has been in relation to treaty and Aboriginal rights.

In principle, interjurisdictional immunity applies equally to federal and provincial legislation,⁷⁴ but in practice has only been applied to render provincial law inapplicable to certain kinds of federally regulated activities, and not vice versa.⁷⁵ For convenience, I will describe interjurisdictional immunity as it applies to immunize federal jurisdiction from provincial laws. In the early 20th century this doctrine was applied if the provincial law would “sterilize” a federally-regulated undertaking.⁷⁶ In the 1960s, the test was broadened so that it became whether or not the provincial law would “[affect] a vital part” of a federally-regulated undertaking.⁷⁷ Then in the 1980s the test was narrowed again, culminating in 2007 with a new test of “impairing a vital part,” said to be an intermediate between “sterilizing” and “affecting.”⁷⁸ Interjurisdictional immunity continues to be applied in various contexts, sometimes quite robustly,⁷⁹ although the trend seems to be to view it as a narrow doctrine.⁸⁰

⁷³ Kerry Wilkins, “R v Morris: A Shot in the Dark and Its Repercussions” (2008) 7:1 *Indigenous LJ* 1 at 12 [Wilkins, “Shot”].

⁷⁴ *Canada (AG) v PHS Community Services Society*, 2011 SCC 44 at para 65, [2011] 3 SCR 134.

⁷⁵ Hogg, *Constitutional Law*, *supra* note 72, ch 15 at 38.6–38.8.

⁷⁶ *Ibid*, ch 15 at 30; see e.g. *Toronto (City of) v Bell Telephone Co of Canada*, [1905] AC 52, 13 CRAC 361 (PC); *Ontario (AG) v Winner*, [1954] AC 541, [1954] 4 DLR 657 (PC); *Campbell-Bennett Ltd v Comstock Midwestern Ltd*, [1954] SCR 207, [1954] 3 DLR 481.

⁷⁷ *Quebec (Commission du Salaire Minimum) v Bell Telephone Co of Canada Ltd*, [1966] SCR 767 at 774, 59 DLR (2d) 145.

⁷⁸ Hogg, *Constitutional Law*, *supra* note 72, ch 15 at 30–34; *Canadian Western Bank v Alberta*, 2007 SCC 22, [2007] 2 SCR 3 [*Canadian Western Bank*].

⁷⁹ See e.g. *Quebec (AG) v Canadian Owners and Pilots Association*, 2010 SCC 39, [2010] 2 SCR 536 [COPA]. In COPA, a provincial statute aimed at preserving agricultural land by requiring express authorization for non-agricultural uses was found inapplicable if the land was to be used as an aerodrome, on the basis of interjurisdictional immunity. As the two dissenting opinions point out, this application is robust since it was made in the absence of evidence that it would otherwise be hard to find a suitable space for an aerodrome (at paras 79–93). It is hard to reconcile the COPA case with *British Columbia (AG) v Lafarge Canada Inc*, 2007 SCC 23, [2007] 2 SCR 86, which has been criticized as going too far in narrowing interjurisdictional immunity, and overcompensating by a broad application of paramountcy to avoid an inconvenient result. See Hogg, *Constitutional Law*, *supra* note 72, ch 15 at 36–38, 16 at 4–8. Perhaps COPA was a response to such criticism.

⁸⁰ *Canadian Western Bank*, *supra* note 78 (“interjurisdictional immunity is of limited application and should in general be reserved for situations already covered by precedent” at para 77; “the Court does not favour an intensive reliance on the doctrine, nor should we accept the invitation of the appellants to turn it into a doctrine of first recourse in a division of powers dispute” at para 47).

One of the contexts in which interjurisdictional immunity has been applied regularly has been in relation to provincial laws affecting Aboriginal people. This approach has deep roots in Canadian law, stemming from the Crown having interposed itself between settlers and Aboriginal peoples, for the protection of the latter, since the time of the Royal Proclamation of 1763.⁸¹ At Confederation, a key rationale for assigning Canada jurisdiction over “Indians and Lands Reserved for the Indians”⁸² was to protect Aboriginal people from exercises of provincial jurisdiction that would impair their rights.⁸³ A high point of this approach is the decision of *R v Sutherland*, where the Supreme Court found, based on federal-provincial division-of-powers reasoning, that it was beyond the jurisdiction of the Manitoba legislature to define what lands Aboriginal people had the right of access to for the purpose of hunting.⁸⁴ Some subsequent cases created conflicting jurisprudence on the extent of the application of interjurisdictional immunity where provincial legislation infringed Aboriginal rights.⁸⁵

However, in 2006, the Supreme Court of Canada reinvigorated the doctrine with a robust application in *R v Morris*, in which a hunting charge was challenged on the basis that the provisions of the British Columbia *Wildlife Act* that prohibited hunting at night and hunting with a light were constitutionally inapplicable to Aboriginal people, because of the federal-provincial division-of-powers.⁸⁶ Both the majority and the dissent ruled that provincial law would not apply of its own force to Aboriginal people if the effect of the law created a *prima facie* infringement of an Aboriginal or treaty right; the reasoning was that (1) the federal government has jurisdiction over “Indians, and Lands reserved for the Indians”; (2) this has been interpreted to mean a province may not affect “Indianness”, single out “Indians” for special treatment, or affect an Indian land interest; (3) a *prima facie* infringement of an Aboriginal or treaty right impairs “Indianness”; and (4) the doctrine of interjurisdictional immunity therefore renders such provincial laws inapplicable of their own force.⁸⁷

The matter did not end there because section 88 of the *Indian Act* incorporates, by reference, provincial legislation that affects the “core of

⁸¹ *Guerin*, *supra* note 9 at 383. See also *McIvor & Gunn*, *supra* note 33 at 147.

⁸² *Constitution Act, 1867*, *supra* note 10, s 91(24).

⁸³ *McIvor & Gunn*, *supra* note 33 at 148, 159–60. See also John Borrows, “The Durability of *Terra Nullius*: *Tsilhqot’in Nation v British Columbia*” (2015) 48:3 UBC L Rev 701.

⁸⁴ [1980] 2 SCR 451 at 455, 113 DLR (3d) 374.

⁸⁵ *McIvor & Gunn*, *supra* note 33 at 152.

⁸⁶ 2006 SCC 59 at paras 15, 41–43, [2006] 2 SCR 915 [*Morris*].

⁸⁷ *Ibid* at paras 41–43, 82, 88–90, 99.

Indianness,” making it apply with federal force.⁸⁸ However, section 88 makes an exception for certain provincial laws:

*Subject to the terms of any treaty and any other Act of Parliament, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that those laws are inconsistent with this Act or the First Nations Fiscal Management Act, or with any order, rule, regulation or law of a band made under those Acts, and except to the extent that those provincial laws make provision for any matter for which provision is made by or under those Acts.*⁸⁹

So, for example, if provincial legislation *prima facie* infringed a treaty right, it would not be applicable of its own force and would not be invigorated by section 88 of the *Indian Act*. Such legislation would not apply to First Nations members and there could be no justification of such an infringement; this was the ruling in *Morris*.⁹⁰ On the other hand, provincial legislation infringing an Aboriginal right would be invigorated with federal force by section 88 of the *Indian Act*, and would apply to First Nation members if it passed the justified infringement test.

Since section 88 only makes provincial legislation applicable to “Indians” and not to “Indian lands”, one would think, following *Morris*, that provincial legislation affecting Aboriginal title would be inapplicable of its own force and not be invigorated by section 88 of the *Indian Act*.⁹¹

B) Interjurisdictional Immunity Rulings in Tsilhqot’in Nation and Grassy Narrows

The question of provincial legislation affecting Aboriginal title came to the fore in *Tsilhqot’in Nation*, where the Supreme Court of Canada significantly changed the interjurisdictional immunity doctrine. We will see that in light of *Tsilhqot’in Nation* and *Grassy Narrows*, provinces may now legislate in ways that affect Aboriginal title, Aboriginal rights, or treaty rights. If this happens, and any infringements of title or rights pass the justification test, the legislation will have force in relation to such title or rights. If not, the legislation will not apply.

⁸⁸ *Indian Act*, RSC 1985, c I-5, s 88.

⁸⁹ *Ibid* [emphasis added].

⁹⁰ *Morris*, *supra* note 86 at paras 54 (Deschamps & Abella JJ), 91, 97, 99 (McLachlin CJ & Fish J, dissenting). *Morris* was a 4-3 split decision, but both majority and dissent agreed that provincial legislation that *prima facie* infringed a treaty right would not apply of its own force, and would not be invigorated by section 88. The dissent parted from the majority on a treaty interpretation issue.

⁹¹ See Kerry Wilkins, “Of Provinces and Section 35 Rights” (1999) 22 Dal LJ 185.

According to *Tsilhqot'in Nation*, provinces can legislate about subjects within their power in a way that affects Aboriginal title or rights (e.g. at issue in *Tsilhqot'in Nation* was forestry). If the legislation does infringe on Aboriginal title or rights, the provinces would be required to justify those infringements. The Court stated that the matter is now to be tested under the “justified infringement” analysis for section 35 of the *Constitution Act, 1982*, rather than the “interjurisdictional immunity” analysis related to section 91(24) of the *Constitution Act, 1867*. The latter test could, in some cases, have prevented any possibility of justifying an infringement.

The reasoning of the Supreme Court in coming to this result was that Aboriginal rights were held against governments, but had nothing to do with the division of powers between Canada and the provinces. Further, the Court was concerned about practical difficulties such as inconsistent tests for limits on provincial powers, and jurisdictional patchworks and gaps. The Court also mentioned the preference for using the double aspect doctrine rather than an enclave theory as being more consistent with co-operative federalism, as expressed in the cases about interjurisdictional immunity in contexts outside Aboriginal law.⁹²

Tsilhqot'in Nation also pointed out that, generally speaking, legislation that protects the environment would not infringe on Aboriginal or Treaty rights, even in a *prima facie* sense.⁹³ However, government action that assigns Aboriginal property rights to somebody else, such as the granting of timber licences on Aboriginal title land, would be considered a serious infringement of Aboriginal rights and would not be easily justified.⁹⁴

The federal government can also make laws about forestry on Aboriginal title lands under its power over “Lands Reserved for the Indians.”⁹⁵ Both sets of laws could be valid because the matter has a “double aspect,” involving both the federal and provincial powers.⁹⁶ Federal law would prevail if it conflicted with provincial law under the doctrine of federal paramountcy.⁹⁷ However, both federal and provincial laws would be invalid or inapplicable if they infringed on a section 35 Aboriginal or Treaty right without justification.⁹⁸ *Grassy Narrows* applied the same approach to treaty rights, so it is possible that provincial legislation that infringed a treaty right could apply to First Nations and their members if it passed the justified infringement test.⁹⁹

⁹² *Tsilhqot'in Nation*, *supra* note 4 at paras 141–49.

⁹³ *Ibid* at para 105.

⁹⁴ *Ibid* at paras 124, 127.

⁹⁵ *Ibid* at paras 102–03.

⁹⁶ *Ibid* at para 129.

⁹⁷ *Ibid* at para 130.

⁹⁸ *Ibid* at para 144.

⁹⁹ *Grassy Narrows*, *supra* note 2 at para 53.

C) Analysis of Current State of Interjurisdictional Immunity

One might be tempted to conclude that the division of powers analysis has been completely replaced in Aboriginal law by a justified infringement analysis under section 35.¹⁰⁰ Despite the breadth of the wording in *Tsilhqot'in Nation* and *Grassy Narrows*, I will argue that a now-narrowed doctrine of interjurisdictional immunity continues to apply in relation to provincial impacts on Aboriginal peoples' rights.

There is undoubtedly a preference by the Supreme Court of Canada to deal with constitutional limitations on the power of provinces in relation to Aboriginal rights through section 35 rather than through the division of powers: "What role then is left for the application of the doctrine of interjurisdictional immunity and the idea that Aboriginal rights are at the core of the federal power over 'Indians' under s. 91(24) of the *Constitution Act, 1867*? The answer is none."¹⁰¹ However, I suggest that the matter is more ambiguous. The Court did not, and could not, amend the division of powers in sections 91 and 92 of the *Constitution Act, 1867*. Provinces may not, for example, legislate in a way that is, in pith and substance, about "Indians" or "Indian lands".

Nor did the Court abolish the doctrine of interjurisdictional immunity, either generally or in relation to Aboriginal matters.¹⁰² In the subsequent case *Rogers Communications Inc v Châteauguay (City of)*, the Supreme Court of Canada pointedly noted that principles of co-operative federalism could not override nor modify the division of powers, and that the doctrine of interjurisdictional immunity remained in force, although as a relatively narrow doctrine.¹⁰³

Tsilhqot'in Nation and *Grassy Narrows* undoubtedly narrowed the interjurisdictional immunity doctrine, which is consistent with its recent treatment of interjurisdictional immunity in other contexts, as discussed

¹⁰⁰ Kerry Wilkins argues that the only doctrinally sound way for provinces to be able to infringe treaty or Aboriginal rights would be if the doctrine of interjurisdictional immunity died. Although *Tsilhqot'in Nation* and *Grassy Narrows* seem to have attempted to kill this doctrine for this very purpose, we will see that the doctrine "has refused to die" in Wilkins' words from 2011, which are still true. Kerry Wilkins, "Constitutional Cases 2010: Dancing in the Dark: Of Provinces and Section 35 Rights After 2010" (2011) 54:1 SCLR 529 [Wilkins, "Dancing"].

¹⁰¹ *Tsilhqot'in Nation*, *supra* note 4 at paras 140, 151.

¹⁰² McIvor and Gunn accept that *Tsilhqot'in Nation* and *Grassy Narrows* did seem to abolish the doctrine of interjurisdictional immunity in relation to Aboriginal matters, but argue it was an unwarranted and unjustified departure from established case law (McIvor & Gunn, *supra* note 33 at 158–65).

¹⁰³ 2016 SCC 23 at paras 39, 57–74, 118–22, [2016] 1 SCR 467 [*Rogers Communications*].

above. However, I am not convinced that the Court intended to abolish completely the concept that a “core of Indianness” would be immune to provincial jurisdiction. This was clarified in the subsequent Aboriginal case, *Daniels v Canada (Minister of Indian Affairs and Northern Development)*, where the Supreme Court of Canada noted that federal jurisdiction over Métis and non-status Indians “does not bar valid provincial schemes *that do not impair the core of the ‘Indian’ power*,” referring to the interjurisdictional immunity test.¹⁰⁴ There is no suggestion in *Tsilhqot’in Nation* or *Grassy Narrows* that some of the traditional contents of the “core of Indianness”, other than section 35 rights, no longer remain “core”, such as Indian status, relationships with Indian families and reserve communities, band membership rights, and rights to possession of reserve land.¹⁰⁵

Further, the Supreme Court of Canada seems to have stopped short of overruling *Morris* entirely. In discussing *Morris*, *Tsilhqot’in Nation* stated: “*To the extent that Morris stands for the proposition that provincial governments are categorically barred from regulating the exercise of Aboriginal rights, it should no longer be followed.*”¹⁰⁶

What the Supreme Court did not say was that the result in *Morris* itself was incorrect. In fact, in *Tsilhqot’in Nation*, its reasons only mentioned effects on “Aboriginal rights” or “Aboriginal title” as being insufficient to trigger interjurisdictional immunity. It did not use the phrase “treaty and Aboriginal rights” in this section, despite having used that phrase frequently until it reached the point of answering the questions about interjurisdictional immunity that it set out for itself.¹⁰⁷ Indeed, until *Grassy Narrows*, I would have thought that it was arguable that treaty rights interacted differently with interjurisdictional immunity than did Aboriginal rights. However, *Grassy Narrows* clearly applied the same reasoning to treaty rights in a way that considered the matter already decided by *Tsilhqot’in Nation*.¹⁰⁸ Indeed, the reasons given for narrowing interjurisdictional immunity in *Tsilhqot’in Nation* seem to apply equally to treaty rights as to Aboriginal rights. *Tsilhqot’in Nation* had noted that: (1) interjurisdictional immunity was intended to deal with conflicts between federal and provincial powers,

¹⁰⁴ 2016 SCC 12 at para 51, [2016] 1 SCR 99 [*Daniels*] [emphasis added].

¹⁰⁵ See some of the traditional contents of the core named in Jack Woodward, *Native Law* (Toronto: Carswell, 1994) (loose-leaf updated 2017, revision 3), ch 3 at para 243. Woodward expresses the contrary view that in light of *Grassy Narrows*, interjurisdictional immunity does not apply to such a “core of Indianness” (*ibid*).

¹⁰⁶ *Tsilhqot’in Nation*, *supra* note 4 at para 150 [emphasis added]; the headnote in *Tsilhqot’in Nation* (written by the Court) lists *Morris*, *supra* note 86, as “distinguished,” not “overruled.”

¹⁰⁷ *Tsilhqot’in Nation*, *supra* note 4 (compare the usage of the phrases before and after para 140).

¹⁰⁸ *Grassy Narrows*, *supra* note 2 at para 53.

not between Aboriginal title holders and provinces; (2) the application of the interjurisdictional immunity doctrine in this context could lead to competing tests for assessing the constitutionality of provincial legislation, or to legislative vacuums; and (3) it was at odds with the present approach to co-operative federalism.¹⁰⁹

However, *Morris* has not been overruled completely. Until or unless this happens, it is arguable that in cases sufficiently close to the facts of *Morris*, interjurisdictional immunity can prevent infringements of treaty rights by a province, regardless of whether or not such infringements could pass a justification test. Perhaps a distinction could be made between provincial legislation that directly regulates a treaty right (e.g. *Morris*) and provincial legislation that indirectly affects Aboriginal title (e.g. *Tsilhqot'in Nation*) or a treaty right (e.g. *Grassy Narrows*). For example, the hunting regulation at issue in *Morris* on its face directly regulated treaty hunting rights. This regulation in *Morris* can be contrasted to forestry legislation at issue in *Tsilhqot'in Nation* that affected the land subject to Aboriginal title by authorizing timber cutting, or that, in *Grassy Narrows*, affected treaty hunting rights by authorizing timbering activities that would affect the animals hunted. These are indirect effects on the practical ability to enjoy Aboriginal title or treaty rights, but neither piece of legislation directly regulates Aboriginal title or treaty rights.¹¹⁰ This view of the proper doctrinal analysis for the application of provincial legislation is illustrated below in Figure 2, to be contrasted with the analysis applied prior to *Tsilhqot'in Nation* and *Grassy Narrows*, set out in Figure 1. All of the differences are located in the second box from the top, labelled “Apply of own Force?”

Such a distinction between direct regulation of a treaty right and indirect effects on a treaty right would seem to be supported by *Sechelt Indian Band v British Columbia (Manufactured Home Park Tenancy Act, Dispute Resolution Officer)*, where the lands in question were “lands reserved for the Indians” in the meaning of section 91(24) of the *Constitution Act, 1867* by virtue of the *Sechelt Indian Band Self-Government Act*.¹¹¹ The British Columbia Court of Appeal refused to apply provincial rent control legislation on such lands for reasons of interjurisdictional immunity (or paramouncy, in the

¹⁰⁹ *Tsilhqot'in Nation*, *supra* note 4 at paras 144–49.

¹¹⁰ Kent McNeil suggests a different, but not unrelated, way of qualifying the Court's apparent rejection of the doctrine of interjurisdictional immunity in the context of section 35 rights. He suggests a distinction between permitting regulation of a treaty or Aboriginal right and forbidding what amounts to a legislative expropriation of such rights. Kent McNeil, “Aboriginal Title and the Provinces after *Tsilhqot'in Nation*” (2015) 71:1 SCLR 67 at 79–85 [McNeil, “Aboriginal Title”].

¹¹¹ *Sechelt Indian Band v British Columbia (Manufactured Home Park Tenancy Act, Dispute Resolution Officer)*, 2013 BCCA 262, 45 BCLR (5th) 263, leave to appeal to SCC refused, 35503 (23 October 2014); *Sechelt Indian Band Self-Government Act*, SC 1986, c 27.

alternative). While this decision was prior to the Supreme Court's decisions in *Tsilhqot'in Nation* and *Grassy Narrows*, it denied leave to appeal *Sechelt* after the decisions in *Tsilhqot'in Nation* and *Grassy Narrows*. While this does not necessarily mean that the Supreme Court agreed with the decision in *Sechelt*, it does mean that the *Sechelt* approach remains open.¹¹²

D) An Ongoing Limit on the Impact of Provincial Legislation

As an application of the suggested exception that a province may not directly regulate (or extinguish) a treaty or Aboriginal right, I would suggest, for example, that provincial legislation cannot directly extinguish Aboriginal land interests for division-of-powers reasons in addition to section 35 reasons.¹¹³ This means, for example, that provincial limitations legislation may not, of its own force, apply to Aboriginal land interests.

To think that interjurisdictional immunity has ceased to apply in an Aboriginal context, and that provincial legislation could extinguish an Aboriginal land interest, would amount to saying that a court has effectively repealed section 91(24). Taking it a step further, provincial limitations legislation cannot apply of its own force to Aboriginal title, since limitations legislation usually extinguishes any land rights in question at the expiry of the limitation period.¹¹⁴ If a province cannot use its powers to extinguish Aboriginal title, it would not have the power to do so after a specified waiting period that it prescribes.¹¹⁵ Indeed, in *Wewaykum Indian Band v Canada*,

¹¹² See *McCaleb v Rose*, 2017 BCCA 318, 2017 CarswellBC 2489 (WL Can), which ruled *Sechelt* was still good law after *Tsilhqot'in Nation*. However, the distinction it made was that the ruling in *Tsilhqot'in Nation* about interjurisdictional immunity was made in the context of Aboriginal title, and did not apply in relation to lands reserved for Indians under section 91(24).

¹¹³ To be sufficiently clear and plain to extinguish a treaty or Aboriginal right, it would become *ultra vires* provincial powers. *Delgamuukw*, *supra* note 6 at para 180. See also McNeil, "Aboriginal Title", *supra* note 110, which gives an alternate route to coming to the same conclusion.

¹¹⁴ See *Canadian Pacific Ltd v Paul*, [1988] 2 SCR 654 at 673, 53 DLR (4th) 487 [Canadian Pacific]; *Chippewas of Sarnia Band v Canada (AG)* (2000), 51 OR (3d) 641 at paras 239–41, 195 DLR (4th) 135 (CA). Even absent an explicit extinguishment provision, barring a remedy arguably amounts to an extinguishment of Aboriginal title. *Chippewas of Sarnia Band v Canada (AG)* (1999), 101 OTC 1, at paras 457–64, 534, 40 RPR (3d) 49 (Sup Ct), *rev'd* other grounds (2000), 51 OR (3d) 641, 195 DLR (4th) 135 (CA). But see the debate about whether limitations periods are "procedural" or "substantive", and whether or not barring a remedy amounts to extinguishing a right, most recently canvassed in *Samson Indian Nation and Band v Canada*, 2015 FC 836 at paras 129 ff, 2015 CarswellNat 2688 (WL Can), *aff'd* *Ermineskin Indian Band v Canada*, 487 NR 306, 2016 FCA 223, leave to appeal to SCC refused, 37277 & 37280 (9 March 2017).

¹¹⁵ This is the key reasoning, in the context of concluding that a *Charter* remedy could not be barred by limitations legislation, in *Prete v Ontario* (1993), 16 OR (3d) 161 at 167–68,

the Supreme Court of Canada was emphatic that provincial limitations legislation did not apply of its own force to an Indian land interest, but did apply with federal force through the incorporation by reference of provincial limitations periods in the *Federal Court Act*.¹¹⁶

The significance of this issue is magnified given the operation of a provincial statute (e.g., a limitations statute) purporting to extinguish a treaty right before 1982. The thrust of the Supreme Court's preference for avoiding the doctrine of interjurisdictional immunity was that disputes about the constitutional limits of provincial powers in relation to Aboriginal rights would be better considered with reference to the affirmation of treaty rights in section 35 of the *Constitution Act, 1982*. But section 35 was not in force until 1982. If the constitutional limits of provincial powers in relation to Aboriginal rights are to be resolved for disputes pre-dating 1982, this likely requires a doctrine like interjurisdictional immunity.

Nonetheless, *Peter Ballantyne Cree Nation v Canada* (AG) applied provincial limitations legislation to a claim against the federal Crown about Indian reserve land.¹¹⁷ *Peter Ballantyne* considered interjurisdictional immunity and decided that *Tsilhqot'in Nation* and *Grassy Narrows* had precluded any possible interjurisdictional immunity argument. The Saskatchewan Court of Appeal, therefore, applied the Saskatchewan *Public Officers Protection Act* directly to a claim about Indian reserve land, not via a federal incorporation by reference.¹¹⁸ The Court so ruled without considering the nuances of the issues discussed above, nor the most recent Supreme Court of Canada cases mentioning interjurisdictional immunity, such as *Rogers Communications* and *Daniels*.¹¹⁹

110 DLR (4th) 94 (CA) [*Prete*], leave to appeal to SCC refused, [1994] 1 SCR x. Subsequent developments about the effect of limitations periods on constitutional rights make it unclear if *Prete* is still good law. See Peter W Hogg & Patrick J Monahan, *Liability of the Crown*, 3rd ed (Toronto: Carswell, 2000) at 75, n 63.

¹¹⁶ 2002 SCC 79 at paras 114–15, [2002] 4 SCR 245; *Federal Court Act*, RSC 1985, c F-7. See also *Canadian Pacific*, *supra* note 114; *Blueberry River Indian Band v Canada* (Department of Indian Affairs and Northern Development), [1995] 4 SCR 344 at para 107, 130 DLR (4th) 193. It is not completely clear whether *Tsilhqot'in Nation* and *Grassy Narrows* have affected this conclusion about provincial limitations periods. Curiously, *Canada* (AG) v *Lameman*, 2008 SCC 14, [2008] 1 SCR 372, makes no reference to the point and could be read as applying the provincial limitations legislation of its own force, although it relies pointedly on *Wewaykum*.

¹¹⁷ 2016 SKCA 124, 485 Sask R 162 [cited to SKCA].

¹¹⁸ *Ibid* at paras 143, 179–81; *Public Officers' Protection Act*, RSS 1978, c P-40.

¹¹⁹ *Rogers Communications*, *supra* note 103; *Daniels*, *supra* note 104.

9. Justified Infringement as Applied to Treaty Rights

It is now well established in Canadian law that a *prima facie* infringement of a treaty right may be legally allowed if it passes a justification test. However, we will see that this doctrine has been introduced in an incremental manner, which did not provide an opportunity for the consideration that both treaties and the justified infringement doctrine are modes of reconciling Aboriginal rights and Crown sovereignty.¹²⁰ In this context, “reconciling” involves a certain protection of Aboriginal rights within the framework of Canadian law and considerable limits on Aboriginal rights, as “[i]n the establishment of these relations, the rights of the original inhabitants were, in no instance, entirely disregarded, but were necessarily, to a considerable extent, impaired.”¹²¹

Is it appropriate, having made such a reconciliation in a treaty, to allow the Crown to unilaterally diminish Aboriginal peoples’ rights even further through the justified infringement doctrine? The expanded scope given to the doctrine of justified infringement by *Grassy Narrows* in relation to treaty rights has heightened this concern.

This aspect of taking “two bites of the (reconciliation) apple” has never been addressed directly because of how the doctrine of justified infringement developed.¹²² The doctrine of justified infringement originated in *Sparrow*, which was about whether a federal regulation restricting the length of fishing nets infringed Aboriginal fishing rights.¹²³ In that case, the Supreme Court of Canada considered section 35 of the *Constitution Act, 1982* for the first time, laid out an analytic structure for Aboriginal rights and their infringement, set out the doctrine of justified infringement, and ordered a new trial in light of insufficient evidence to apply the newly established doctrines.¹²⁴ The Supreme Court was speaking of Aboriginal rights, which, as defined by Canadian law, are rooted in ancestral practices of Aboriginal communities at the time of European contact, and by definition cannot have included any reconciliation with non-Aboriginal society.¹²⁵ Thus, the

¹²⁰ See e.g. *R v Van der Peet*, [1996] 2 SCR 507 at para 36, 137 DLR (4th) 289 [*Van der Peet*]; *Marshall*, *supra* note 17 at para 3.

¹²¹ *M’Intosh* (1823), 21 US 543 at 574, 5 L Ed 681, cited in *Van der Peet*, *supra* note 120 at para 36, as similar to the reconciliation incorporated in section 35 of the *Constitution Act, 1982*, *supra* note 10.

¹²² Cf Wilkins, “Dancing”, *supra* note 100 at 529–30, n 4.

¹²³ *Sparrow*, *supra* note 52 at 1083.

¹²⁴ *Ibid* at 1111–20.

¹²⁵ To be an Aboriginal right, an activity must have continuity with a pre-contact activity that was integral to the distinctive culture of the Aboriginal people. The Supreme Court set this out clearly in *R v Van der Peet*, *supra* note 120, which was not decided until six years after *Sparrow*, *supra* note 52 (those elements can be found in *Sparrow* at 1094).

Supreme Court needed to situate reconciliation, and chose the doctrine of justified infringement for this purpose.

The doctrine of justified infringement was first applied to a treaty right by the Supreme Court in *R v Badger*, which questioned whether provincial hunting regulations applied to First Nation members hunting in Treaty 8 territory.¹²⁶ However, the treaty right in question had been modified by the Alberta *Natural Resources Transfer Agreement*, which had been given constitutional force and was broadly worded.¹²⁷ Therefore, no question of interjurisdictional immunity could have applied, because of the statute's constitutional force.

In *R v Marshall*, the issue was whether federal fishing regulations infringed a treaty right.¹²⁸ The Crown had not attempted to argue that the infringement was justified, so Donald Marshall was acquitted. The Supreme Court of Canada, however, stated that the justified infringement doctrine would apply to such treaty rights. Indeed, the Supreme Court stated that the justified infringement doctrine would apply in principle to both federal and provincial legislation, although the law in question was federal.¹²⁹ Thus, again, no question of interjurisdictional immunity could have been raised.

Morris applied interjurisdictional immunity to prevent the application of the doctrine of justified infringement in the case of provincial legislation infringing a treaty right, and the Supreme Court distinguished the comments in *Marshall* as applying only to commercial harvesting rights, and not to food, social, or ceremonial harvesting rights.¹³⁰

When the Supreme Court narrowed the doctrine of interjurisdictional immunity in *Tsilhqot'in Nation*, and then ruled that this narrowed doctrine did not apply in *Grassy Narrows*, so as to permit the possibility of the province justifying infringements of treaty rights, there was no consideration of whether it was appropriate to further "reconcile" what was already a reconciliation by treaty. In principle, this concern would seem to apply to all treaties. Perhaps the courts might later revisit whether or not treaty rights can be subject to justified infringements in relation to the concerns expressed above.

However, we can still inquire about other limits to the proper scope of the application of the justified infringement doctrine to treaty rights. The

¹²⁶ *Supra* note 14.

¹²⁷ *Ibid*; *Constitution Act, 1930*, *supra* note 41.

¹²⁸ *Supra* note 17.

¹²⁹ *Ibid* at paras 7, 58; *R v Marshall (No 2)*, [1999] 3 SCR 533 at para 24, 179 DLR (4th) 193.

¹³⁰ *Morris*, *supra* note 86 at para 46.

treaty in question in *Marshall* was written in 1760.¹³¹ There is a world of difference between treaties of the 18th century and those of the late 20th and early 21st centuries. The early treaties were brief, with highly general terms, were often ambiguous, and were usually entered into after a short discussion between the parties.¹³² In contrast, starting with the James Bay and Northern Quebec Agreement in 1975, modern treaties are entered into after lengthy negotiations, can be hundreds of pages in length, and are highly detailed and precise.¹³³ While such modern treaties must still be interpreted in accordance with the honour of the Crown,¹³⁴ courts should strive to respect the “handiwork” of the parties who took such pains to order their affairs precisely.¹³⁵

These features of modern treaties have implications for the application of the doctrine of justified infringement to rights held under such treaties. Aboriginal groups spend years (or decades) negotiating treaties that run to hundreds of pages in length in order to make the treaty rights as precise as possible, and so as not to interfere unduly with the rights and interests of non-Aboriginal people. After Aboriginal groups agreed to such compromises, should the Crown then be allowed to say that it can infringe such treaty rights if this is “justifiable”? I suggest it would reduce the likelihood of ratification of modern treaties if Aboriginal groups were advised that they had negotiated a set of rights after many years and many compromises, but the enforceability of the treaty provisions remained uncertain.¹³⁶

If in future a province seeks to justify an infringement of a modern treaty, I suggest that a court should revisit whether this is appropriate at all, in light of the above considerations. In the alternative, perhaps a very high threshold for the criterion of a “compelling and substantial objective” could be applied. How could something be a “compelling and substantial objective” sufficient to allow an infringement of a treaty right if the Crown could have raised this in the lengthy treaty negotiations instead of later doing it unilaterally?

¹³¹ *Supra* note 17.

¹³² *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53 at paras 9, 12, 52, 54, [2010] 3 SCR 103.

¹³³ *Ibid.*

¹³⁴ *Ibid* at para 12.

¹³⁵ *Ibid* at para 54.

¹³⁶ *Cf* Wilkins, “Shot”, *supra* note 73 (“[f]or the federal Crown, such an outcome [that treaty provisions would not be shielded from provincial incursions by interjurisdictional immunity] would compromise its capacity to ensure the integrity of the negotiated arrangements it was offering in exchange for domestication of those pre-existing rights” at 17).

However, in *Corp Makivik c Québec (Procureure générale)*, the Quebec Court of Appeal applied a justified infringement test to a breach of the James Bay and Northern Quebec Agreement (first signed in 1975).¹³⁷ Although the Court found the breach was not justified, it did apply the *Tsilhqot'in Nation* justified infringement test, although apparently without the parties arguing the question of justified infringement and without any explicit comment about whether or how the test should apply in the context of a modern treaty.¹³⁸

10. Conclusion

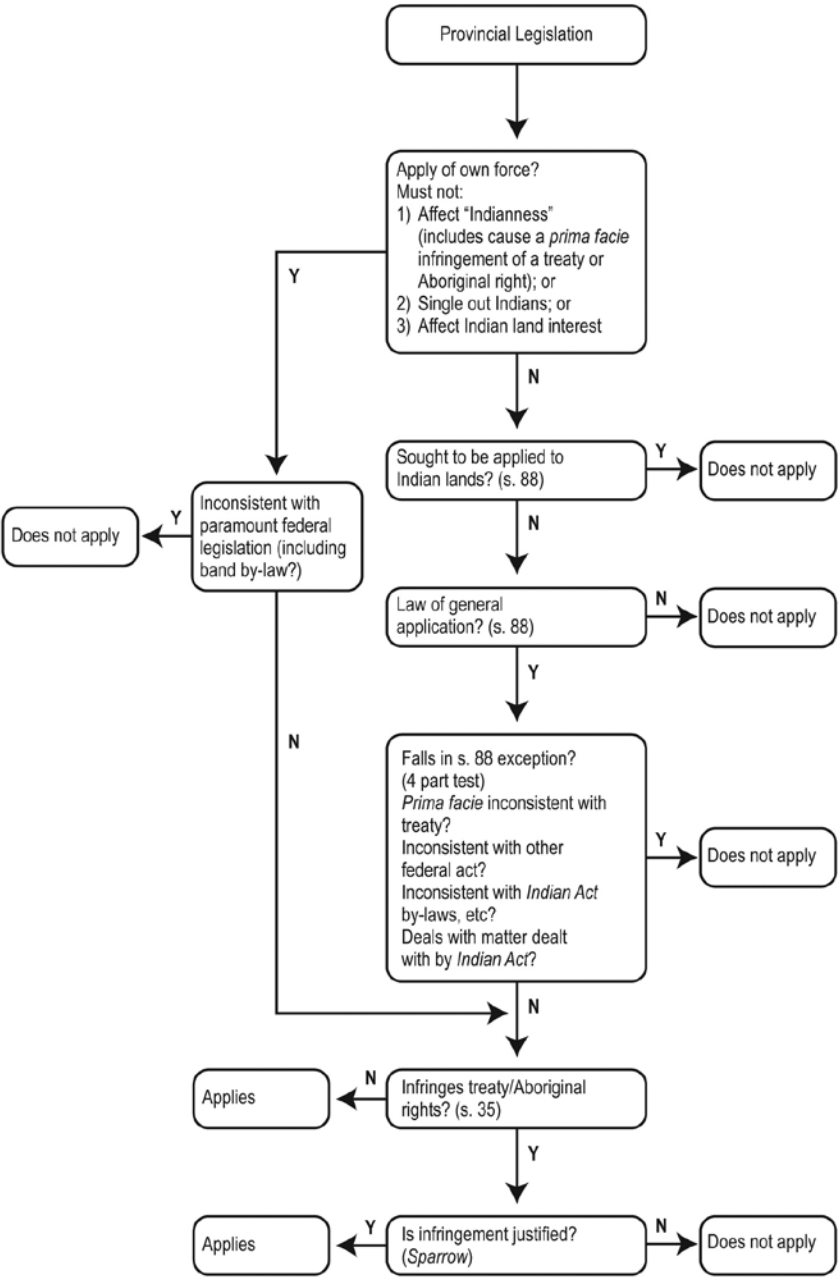
Grassy Narrows established a doctrine of constitutional evolution so that the Crown is viewed as the treaty partner of First Nations, and whichever manifestation of the Crown has the relevant powers will enjoy the related benefits and bear the related obligations of a treaty. This filled what was arguably a gap into which treaty rights could vanish. *Grassy Narrows* did not change the principles of treaty interpretation, but does seem to have neglected to apply them in light of the factual findings of the Court. It appears still open to a Treaty 3 First Nation to seek vindication of what it was promised at treaty—an unlimited and perpetual guarantee of harvesting rights.

Grassy Narrows and *Tsilhqot'in Nation* narrowed, but did not abolish, the scope of the operation of the doctrine of interjurisdictional immunity in the context of Aboriginal law. There remain circumstances where provinces may not legislate to directly regulate treaty or Aboriginal rights, whether or not the test for a “justified infringement” of a treaty right is met. The application of the doctrine of justified infringement to treaty rights has some troubling implications that do not appear to have been considered, especially in circumstances involving modern treaties.

¹³⁷ 2014 QCCA 1455, [2015] 1 CNLR 215.

¹³⁸ *Ibid* at paras 96–99.

**Figure 1: Test for Application of Provincial Legislation
(pre *Tsilhqot'in* and *Keewatin*)**



**Figure 2: Test for Application of Provincial Legislation
(post *Tsilhqot'in* and *Keewatin*)**

