

Indigenous Consultation and Accommodation of Immemorial Rights

Pre-existing Societies Initiative

Christian **A**boriginal **I**nfrastructure **D**evelopments

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Preface:

Much of the *Indigenous Consultation and Accommodation of Immemorial Rights: Pre-existing Societies Initiative* was written in language used in Canadian constitutional documents that identify First Nation, Inuit and Métis as Aboriginal peoples. As such, the use of the word Aboriginal may be offensive to some people. We apologize for this but given the rights discussions within this document, there was little choice. We have used the term Indigenous, where possible, in place of Aboriginal. In this document, the term Indigenous identifies all First Peoples in Canada.

The *Indigenous Consultation and Accommodation of Immemorial Rights: Pre-existing Societies Initiative* was first written in August 2015, but was not released. It was revised, submitted in September 2017 to the federal government and updated in May 2018. We did not feel the Government of Canada was ready to receive it in 2015.

It is impossible to discuss specifics about an initiative and maintain the generality of ‘Indigenous’ when so many distinct Indigenous Peoples are present in Canada. We switch from Indigenous to First Nations for the initiative for simplicity but even then, the discussion is an amalgamation of our experience with the Anishinaabe, Kaska Dena, Nishnawbe Aski and Tlingit Nations.

Submitted to:

The Honourable Carolyn Bennett, Minister of Crown-Indigenous Relations and Northern Affairs, on September 21, 2017.

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Indigenous Consultation and Accommodation of Immemorial Rights: Pre-existing Societies Initiative
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Initiative Abstract

I have heard so often from different Indigenous leaders that something needs to change. Unfortunately, as reflected in the following comments from two leaders in the north, time is running out:

- “We are becoming more and more like them. They are winning and it seems there is nothing we can do to stop it unless we become like them;” and,
- “We may as well sit at the table. We can’t stop them, so we should get what we can for our people.”

This rhetoric is hard to hear when we know colonialization is at its root.¹ How do we affect change? Indigenous Peoples have stood up to defend their rights with some degree of short term success. But, it seems litigation is simply a stop gap and collateral damage from the fight includes marginalized rights, community poverty, social inequity, growing unrest, and frozen regional economies. No one seems to have a viable path to reconcile with Indigenous rights and outside interests. However, there is a way.

The path to advance is through Immemorial rights. Immemorial rights are the rights upon which Indigenous culture is based. Unfortunately, historic wrongs have pushed aside Immemorial rights and scrambled their cultural (societal) expression.² Further, selective funding of colonial governance structures and community programs³ has left mostly non-native infrastructure in Indigenous communities; a fact that functionally thwarts re-establishing culture in societal infrastructure and defining Immemorial rights. To once again empower Immemorial rights, they must be pieced together, expressed in a modern context and brought into force (become built into society).

Immemorial rights and their culture are found in pre-existing societies (pre-contact). Despite Canada’s historic assimilation policies, there are enough fragments of pre-existing societies remaining to capture pre-contact culture and define its Immemorial rights. Once defined in a modern context, Immemorial rights will come into force as they are used to reconcile with outside jurisdictions to create modern infrastructure for Indigenous Peoples; including services and programs for land and resource management, governance, food, education, health, trade and commerce, justice, community, and more. Missing, incomplete or inappropriate infrastructure has created gaps in service delivery leaving First Nation communities disadvantaged and suffering the pressures of assimilation.

This initiative explains the failure of the *Constitution Act* (1982) to protect Indigenous rights and title. What that means and why Immemorial rights protect Indigenous Peoples and their rights are discussed briefly. A platform to define Immemorial rights and bring them into force through rebuilt culture-based infrastructure is outlined for land and resource management.

Where we are, as a country, and how we arrived here are not a testimony to integrity and honour. We do not wish to assault the Crown in Canada. However, there is no way to lay out the solutions without looking at the problem. To resolve Canada’s Indigenous rights issues, we have to correct the injustice of the past in a manner that respects Indigenous Peoples today.

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Initiative Background

A- Historical Perspective - *Terra Nullius* to Reconciliation

Canada was colonized by the British Crown with specific objectives to acquire resources and wealth.⁴ To own resources, the Crown had to extend its sovereignty over Canada. Sovereignty could not be extended outside of the Crown's territory in Britain unless by conquer, annexation (through gifting, treaty or marriage), or by discovery. The Crown declared Canada to be *Terra Nullius* (belonging to no one) through the Doctrine of Discovery^{5,6,7} (lands not occupied by subjects of a Christian state) allowing the extension of the Crown's sovereignty.⁸

70-80% of Canada's land mass was granted by the Crown to the Hudson Bay Company in 1670 and subsequently transferred into Canada by the 1870 Order.⁹ Land claimed by France was surrendered to the British Crown in 1763 under the Treaty of Paris¹⁰ and transferred to Canada with the existing British colony through the process of confederation under the British North American Act in 1867.¹¹ British Columbia, whose coast was originally claimed by the Spanish, joined confederation in 1871. All other lands (arctic) were transferred to Canada by the 1880 Order¹² except Newfoundland and Labrador. They joined the Dominion of Canada in 1949. For virtually all land and waterways in Canada, the Doctrine of Discovery was used for the Crown to assume sovereignty.

However, the land was not empty. It was occupied by nations of people, Indigenous Peoples, with defined territories, trading routes and societies. The Crown (in Canada) continued its colonization and acquisition of resources after confederation. Despite 151 years of concerted effort, Canada's assimilation policies failed to extinguish Indigenous Peoples (First Nation, Inuit and Métis).¹³ A vestige of nations present before contact still remain and have not forgotten Immemorial rights to their land, rights established by pre-contact occupation and use (pre-existing societies).

In 1982,¹⁴ Canada included Aboriginal rights and Treaty rights into the *Constitution Act* under section 35 creating a constitutional obligation¹⁵ to recognize and include these rights in the fabric of Canada. Unfortunately, the Crown did not change federal, provincial and territorial legislation or regulations to include Aboriginal or Treaty rights. Further, both Aboriginal and Treaty rights are defined and protected by Canada's court system while excluding Immemorial rights and Indigenous sovereignty. So, the Crown continues to advance its colonization and resource objectives.

Canada's Indigenous Peoples have progressively turned to the courts to force the Crown to recognize, respect and accommodate pre-existing (pre-contact) rights recognized by section 35. Over the last 35 years, a wealth of common law (court decisions) has emerged to define and enforce Aboriginal rights in Canada. Among the emerging rule of law is the duty of the Crown to meaningfully consult (consultation and accommodation) First Nations when rights guaranteed by section 35 are infringed upon.¹⁶ The goal of this meaningful consultation is the reconciliation of

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pre-existing Indigenous societies with the sovereignty of the Crown.^{17,18}

B- The Problem

Meaningful consultation to reconcile Indigenous societies with the Crown (including land and resource management) is a very good thing. However, the nuts and bolts of that process as defined by the court system is not. The problem is Canadian courts function to enforce the Crown's legislation, regulations and constitution, all of which still exclude Immemorial rights, Indigenous law and indigenous sovereignty. They are therefore biased and retain the Crown's colonial objectives by enforcing legislation, regulations and a constitution written to legitimize colonization. As such, meaningful consultation has become a "due process" and reconciliation an "interim goal" pending the Crown's inevitable use of its sovereignty to advance its colonization and resource objectives. This sovereignty "trump card" derives from the Doctrine of Discovery¹⁹.

The Doctrine of Discovery and the Tsilhqot'in Decision

One of the most influential recent court decisions affecting Aboriginal rights is the Tsilhqot'in decision of the Supreme Court of Canada in 2014 on Aboriginal title.²⁰ The court decision granted Aboriginal title over land for the first time in Canadian history. Most Indigenous people and their advocates tout the Tsilhqot'in decision as a great victory for Aboriginal rights in Canada. In the written decision:

- The court recognized the Crown has a duty to consult Aboriginal people on both asserted and recognized (proven) aboriginal title;²¹ and,
- The court further confirmed that Aboriginal title flows from the fact Indigenous societies pre-date the Crown in Canada.²²

However, the court went on to write that the sovereignty of the Crown underlies (and therefore pre-dates) Aboriginal rights and title, a conclusion grounded in the Doctrine of Discovery. The court did concede that land was not *Terra Nullius* at first contact, but left the Doctrine of Discovery in force.²³ As a result, despite an award of Aboriginal title:

- 1) The Crown can still take up land for which Aboriginal title is recognized when it is in the public interest for, "the development of agriculture, forestry, mining, and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations to support those aims;"^{24,25}
- 2) The Crown (provincial, territorial and federal governments) can pass legislation and regulation that control the use of recognized Aboriginal title land and its resources;²⁶ and,
- 3) The Crown still has all interest vested in it for land and resources to which Aboriginal title has been asserted but not yet recognized.²⁷

So, land to which the Tsilhqot'in had their Aboriginal title recognized can still be unilaterally controlled and taken up by the Crown for its colonization and resource objectives – in a practical

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sense, nothing changed. The reason for this is the sovereignty trump card.

The Sovereignty Trump Card

Nothing has changed with the expression of Indigenous sovereignty through Immemorial rights to land and resources since confederation in 1867 due to the continued reliance of the Crown and its courts on the Doctrine of Discovery. The doctrine allowed the Crown to discriminate against Indigenous nations and create a racially-based exemption, or defect, in law. Notably, interests in the land (ownership and control) are first vested in the Crown and not the original Indigenous inhabitants. The Doctrine of Discovery bypassed Immemorial rights and pre-contact Indigenous sovereignty giving sovereignty (assumed sovereignty) to the Crown creating the sovereignty trump card. The Crown later, after confederation, officially recognized there were Indigenous claims to the land.²⁸ However, those claims and rights became subordinate to the Crown's underlying ownership and right to govern.²⁹ These claims are limited to land use and occupation plus rights that stem from occupation and use – Aboriginal title and section 35 Aboriginal rights.

Through the sovereignty trump card, provincial, territorial and federal governments in Canada have a mechanism to advance legislation, regulations and constitutional changes without the approval of Indigenous Peoples; including, land and resource developments even though Indigenous Peoples have recognized Aboriginal title and rights for the project site. The Crown's ability to override Immemorial rights and Indigenous sovereignty is grounded in the Doctrine of Discovery²⁹ and applies to all sovereign Immemorial rights.¹⁵

All Aboriginal rights under section 35, including the right to consultation, are based on the Doctrine of Discovery and therefore, not permanent. Section 35 can be removed from the constitution at any time, without Indigenous consent, following concurrent resolutions from the House of Commons, the Senate and two-thirds of provincial legislatures constituting more than fifty percent of Canada's population.³⁰ Further, Canada has legislation that defines who is eligible to be First Nation³¹ providing a mechanism to extinguish First Nation people through bloodline dilution.³²

In summary, the Doctrine of Discovery allows the Crown to disregard pre-contact Immemorial rights, grant post-contact rights, legislate/regulate mechanisms to define/extinguish Indigenous races and to create constitutional Aboriginal rights that can be both overridden and repealed, all to advance colonization and resource objectives. This is the root of conflict between Indigenous Peoples and the Crown. Creating a permanent place for sovereign Immemorial rights in Canadian legislation, regulations and the constitution will resolve that conflict. Only recognized Immemorial rights can guarantee Indigenous sovereignty and the right to self-determination over land, resources and peoples.

We will focus this initiative on the work that must be done to bring Immemorial rights to the Crown for reconciliation.

C- Moving Forward - Immemorial Rights and Pre-existing Societies

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We will switch to a discussion on working with First Nations for the Pre-existing Societies Initiative for simplicity, but the initiative can easily be adapted to Inuit and Métis peoples.

First Nation communities must bring their pre-existing culture to the table to ground their rights firmly on Immemorial rights. This is not an easy task since:

1. First Nation negotiating teams are generally a subset of the band office. The band office is a non-cultural government structure created and funded by federal legislation³³ that does not include Immemorial rights;
2. General knowledge of pre-existing societies has been scrambled to varying degrees by the effects of cultural genocide³⁴ resulting in the need for a significant investment of funds and human resources to collect and catalogue oral history and other information on pre-existing culture;
3. There is no legislation or regulation that directly requires the Crown to facilitate (with funds and human resources) in-community consultations on pre-existing culture; and,
4. Federal funding restrictions at the band office and a lack of alternate resource sources (funding and human resource capacity) generally prevent, or markedly limit, the community from funding its own collection and cataloguing of oral history and other information on pre-existing culture.

Given these conditions, the vast majority of First Nation communities in Canada cannot adequately define and present their pre-existing culture to assert Immemorial rights at a negotiating table. Instead, they rely on constitutional rights, rights grounded on the Doctrine of Discovery – rights that do not respect First Nation sovereignty to land, resources, and peoples. **The contrast between rights grounded on the Doctrine of Discovery versus Immemorial rights is the genesis of all conflict between the Crown and First Nations in Canada.**

Immemorial rights cannot be defined or brought into force (built into Canadian society) without bringing detailed knowledge of pre-existing societies into a modern context for reconciliation. It is this outline of pre-existing culture upon which First Nation communities must:

1. Assert constitutional rights;
2. Define and establish Immemorial rights;
3. Define and create culture-based infrastructure with services and roles to harmonize with the Crown; and,
4. Base future negotiations for agreements, treaties, land claims, wildlife management, land planning, resource utilization and more on Immemorial rights.

A detailed knowledge of pre-existing societies cannot be collected, catalogued and brought into a modern context without the Crown providing:

1. Funding; and,
2. Unbiased human resources.

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D- Support

Immemorial rights are grounded in the nature of First Nation culture that pre-dates first contact (pre-existing societies). First Nation rights in Canada should be grounded on Immemorial rights. Courts in Canada have recognized that:

- It is the pre-existing Aboriginal society that the Crown must reconcile with; and,
- That pre-existing culture should be interpreted in a modern context for reconciliation.³⁵

Unfortunately, the Crown does not consult culture and therefore negotiates with First Nations in a manner that excludes Immemorial rights from the very table where reconciliation should take place. As such, the outcome of consultation is invariably a contractual agreement based on Canadian law in which non-Immemorial rights granted by the Crown (Fiduciary rights, Treaty rights, Aboriginal rights, Aboriginal title, self-government and *etc.*) are cached as First Nation rights.

The following quotes are from a report to the United Nations Permanent Forum on Indigenous Issues (2014) concerning the Doctrine of Discovery:³⁶

“The UN General Assembly has indicated that the continuation of colonialism is “a crime which constitutes a violation of the Charter of the United Nations ... and the principles of international law”. Colonial-era doctrine cannot continue to oppress and impoverish generations of indigenous peoples and to deny them jurisdiction to exercise their indigenous laws and legal orders. ...

Canada's highest court has recognized the need for reconciliation of “pre-existing aboriginal sovereignty with assumed Crown sovereignty”. The Supreme Court has taken judicial notice of “such matters as colonialism displacement and residential schools”, which demonstrate how ‘assumed’ sovereign powers were abused throughout history. The root cause of such abuse leads back to the doctrine of discovery and other related fictitious constructs, which therefore must be addressed. ...

The doctrine of discovery was used as a tool to justify conferring upon States the ‘exclusive power to extinguish’ indigenous rights on an ongoing basis. The pre-existing inherent sovereignty of indigenous peoples was not justly considered. In different parts of the world, domestic courts have aided States not only by validating such destructive acts, but also by extinguishing indigenous rights through judicial rulings. ...

The International Law Association (ILA) has concluded: “... indigenous peoples have the rights to reparation and redress for the wrongs suffered. This right amounts to a rule of customary international law to the extent that it is aimed at redressing a wrong resulting from a breach of a right that is itself part of customary international law. ...

The International Law Association has concluded that “States must comply with the

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obligation – according to customary and, where applicable, conventional international law – to recognize and fulfil the right of indigenous peoples to reparation and redress for the wrongs they suffered, in particular their lands taken or damaged without their free, prior and informed consent. Effective mechanisms for redress – established in conjunction with the peoples concerned – must be available and accessible in favour of indigenous peoples.” Any ongoing actions based in discovery are in violation of States' international obligations. Redress must include decolonization processes that effectively restore indigenous peoples' sovereignty and jurisdiction in contemporary contexts and achieve genuine reconciliation.”
[Emphasis Added]

In November 2015, the Right Honourable Justin Trudeau, Prime Minister of Canada, directed the Honourable Dr. Carolyn Bennett, Minister of Indigenous and Northern Affairs, to renew Canada's nation-to-nation relationship with First Nation, Inuit and Métis peoples based on recognition of rights, respect, co-operation and partnership; and, to implement the recommendations of the Truth and Reconciliation Commission, starting with the implementation of the UNDRIP.³⁷

The report of the Truth and Reconciliation Commission of Canada calls for the Government of Canada to:

1. Adopt and implement the *United Nations Declaration on the Rights of Indigenous Peoples*; **and,**
2. Renounce the concepts of *terra nullius* and the Doctrine of Discovery.³⁸

A number of aspects of Immemorial rights are recognized internationally by the United Nations within the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP).³⁹

The remainder of this Pre-existing Societies Initiative will be developed specifically towards First Nation land and resource management. However, work on any infrastructure can be developed using the same template.

Initiative Outline

Courts in Canada agree,⁴⁰ and the United Nations has noted,⁴¹ the Crown must reconcile pre-existing Aboriginal sovereignty with the assumed sovereignty of the Crown. Indigenous (Aboriginal) sovereignty is found in pre-existing societies as Immemorial rights expressed in pre-contact culture.

To accomplish this reconciliation, the Pre-existing Societies Initiative starts with consultations on pre-existing societies to acquire the modern expression of Immemorial rights. From there, modern culture-based community infrastructure is defined. These modern expressions of Immemorial rights and their infrastructure are harmonized (reconciled) with the Crown. After harmonization, new infrastructure and services can be built, or existing infrastructure and services can be restructured, to accommodate Immemorial rights and their modern infrastructure expressions. The

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process creates reconciled infrastructure and rights based on the recognition of Immemorial rights.

The intent behind the Pre-existing Societies Initiative is to provide a path to move from the place where the status quo prevails to where bilateral prosperity flows from respect and equal rights. The initiative builds the foundation for reconciliation and rebuilding.

A- Overview

The most pressing Immemorial right and infrastructure that must be reconciled involves land and resource management over traditional territories. With this infrastructure functioning for First Nations:

1. They can engage in traditional territory management while creating sustainable revenue streams to build other infrastructures and reverse poverty; and,
2. The dysfunction seen with land and resource development in Canada can be resolved.

First Nations have an international right to manage and develop traditional territories to the benefit of their citizens.⁴² Most First Nation communities would like to work toward an equitable and balanced stewardship of land and resources with the Crown. For this to be successful, First Nations need to pursue two courses of action. They must:

- Define Immemorial rights for land and resources; and,
- Assert Immemorial rights by building modern societal infrastructure founded on traditional culture; including, land stewardship infrastructures and roles.

First Nation communities cannot definitively establish traditional territory stewardship without defining their Immemorial rights.

The initiative is very simplistic in design. It entails choosing one First Nation community and working diligently with the community as a pilot for Immemorial rights. Although, the pilot could easily be done with a small group of communities – a small nation.

In an extreme oversimplification (see figure 1): Communities are consulted (consultation component) starting first with Elders to record knowledge of pre-existing societies from which an expression of pre-contact culture and Immemorial rights can be received. That expression is brought back to the community for input to receive modern expressions of Immemorial rights. After agreement on consultation outcomes, the Crown is engaged to reconcile (harmonization component) with the modern expression of Immemorial rights such that Immemorial rights can be recognize and respected. Finally, the rebuilding or restructuring of community infrastructures (transformation component) based on the inclusion of Immemorial rights is commenced to create services for land and resource management (in the current example).

Special care must be taken to respect and include culture and rights at every juncture of the initiative.

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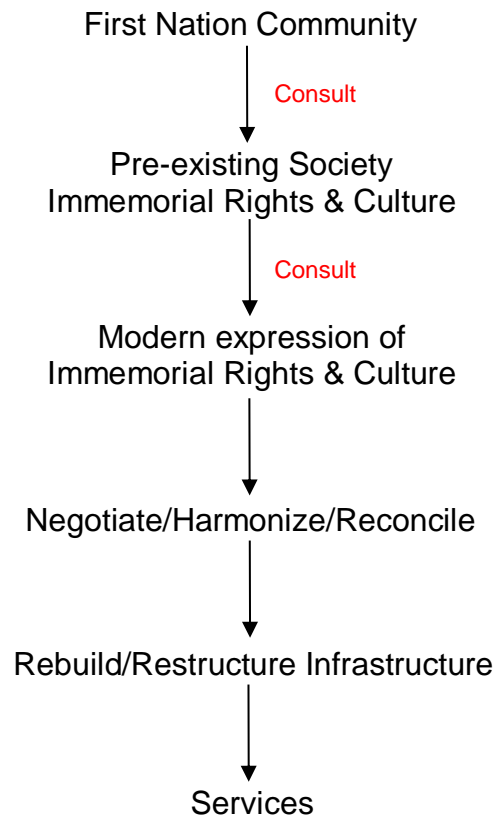
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B- Consultation Component

Methods and analyses that will be used for consultation of pre-existing societies have been described elsewhere.^{43,44,45,46,47,48,49}

All information recorded during consultation is relevant. Oral history, legends and traditions provide explanations and details of pre-existing societies. However, specific topics for which information is needed to harmonize with outside jurisdictions must be identified in advance to ensure the consultation will be adequate for downstream needs. This is accomplished by building needed-information-algorithms⁵⁰ for consultation teams prior to consultation. Algorithms are used to prepare the consultation teams with base and bridging questions for facilitators to ensure information needs are received during consultation.

Figure 1: An oversimplified outline of the Pre-existing Societies Initiative with consultation and enforcement of Immemorial rights through negotiation and the creation of infrastructure with services and community programs. Ultimately, all negotiations with outside jurisdictions should be based on Immemorial rights.



Consultation of the community on its pre-existing society has, in general, three basic parts:

1. Elder Consultation: The results from elder consultation provide the information from which Immemorial rights and pre-existing societal culture are gleaned. This information comes predominantly in the form of legends, stories and personal histories founded on rights and traditional law;

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2. Nation consultation: Rights and laws defined from the elder consultation are presented to the community, governance, councils and tribal organizations for input. Information from these consultations provides the definition needed to express rights and traditional law in a modern society; and,
3. Community ratification: Final definitions of the modern expression of Immemorial rights and pre-contact culture need to be approved by the elders and then endorsed by the community and governance.

Please note: Information obtained in this manner is considered a temporal interpretation of modernized Immemorial rights and culture. As such, definitions of Immemorial rights and culture-based infrastructure can be further defined as needs and situations change.

C- Harmonization Component

Internationally, Immemorial rights, in part, are referred to as inherent Indigenous rights. The United Nations recognizes Immemorial rights to traditional land and its resources in article 26 of the UNDRIP.⁵¹ In this regard, the Pre-existing Societies Initiative agrees in principle with land and resource reconciliation goals outlined in articles 5, 18, 19, 20, 23, 26, 27, 32 and 34 of the UNDRIP.⁵²

Despite our blunt presentation of Immemorial versus Aboriginal rights in Canada, the initiative does not advocate a legal challenge to the Crown's sovereignty or the Doctrine of Discovery. It is genuinely believed that reconciliation of Immemorial rights with the Crown is possible and that Immemorial rights will find expression in the practical building of harmonized First Nation infrastructure, invalidating the Doctrine of Discovery and amending offending legislation.

The harmonization component uses legal services, professionals, and First Nation leaders for counsel for what is needed to harmonize/reconcile Immemorial rights and infrastructure to outside jurisdictions and legal systems. These services ensure information needed for downstream harmonization will be included in the consultation algorithm. Legal services must also be sought to ensure the definition of Immemorial rights obtained during consultation can harmonize with those of national and international legal systems.

D- Transformation Component

Historically, Canada withheld societal infrastructure from First Nation communities while destroying pre-existing culture-based infrastructure.⁵³ This withholding created service delivery gaps in First Nation communities. What infrastructure that does exist generally excludes First Nation sovereignty and Immemorial rights. Canada needs to redress First Nations by helping to rebuild First Nation community infrastructures. Missing culture-based infrastructures include, in whole or in part, land and resource management, governance, food, education, health, trade and commerce, justice, veterinary, community, and more.

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The Pre-existing Societies Initiative agrees in principle with First Nation institutional (infrastructure) goals outlined in articles 8, 20, 23 & 34 of the UNDRIP.⁵⁴

Key to the rebuilding of First Nation infrastructure is advancement on Immemorial rights with the modern context of pre-contact societies as the template. This ensures both Immemorial and international rights are realized within finished infrastructures.

Details needed to negotiate and build a land and resource infrastructure would include:

1. Details of consultation-derived Immemorial rights and culture;
2. Physical community characteristics;
3. Geographic region;
4. Nature of the land and its resources; and,
5. The nature of each outside jurisdiction the land and resource infrastructure would need to harmonize with.

E- Community Selection

Detailed consultations on pre-existing societies, the harmonization of Immemorial rights with outside jurisdictions and the building of a culture-based land and resource management infrastructure will all be precedent setting. The most prudent approach then, is to start with one carefully selected community. However, most First Nation communities exist in a broader, multi-community nation. In that regard, the consultation of a small nation (2-10 communities) is also prudent.

Special care should be taken to gain informed community consent and to support the community and its leaders during the entire planning and delivery of the Pre-existing Societies Initiative.

The choice of community is important for the consultation, citizen support of leaders and for the community's capacity to build its land and resource infrastructure. There are a number of considerations when choosing a community that can be identified before commencing the initiative. In general, they include, but are not limited to, the:

1. Nature of the land and its resources:
2. Nature of legal hurdles to harmonize to other jurisdictions:
3. Nature of the community:
 - a. Treaties and land claims:
 - b. Geography:
 - i. Traditional territory:
 - Well demarcated and reasonably established.
 - Coastal, mountainous, plains, arctic, or *etc.*

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- ii. Isolation:
 - Other First Nation communities affected by the enforcement of the Immemorial right;
 - A more recent time of first contact during colonization in regard to “recent memory” for pre-existing society knowledge; and,
 - Limited road access in regard to cultural dilution.
- c. Other considerations:
 - Community size, human resource capacity, governance stability, pervasiveness of culture (overt remnants), strength of claim through Immemorial rights, established culture-based organizations (i.e. elder council), and overall cohesiveness and functioning of the community.
4. Crown jurisdiction:
 - Different provinces and territories have overtly different policies towards First Nations and their rights.
5. Resource development activity:
 - A high-profile resource project occurring in the traditional territory can either provide impudence to engage in the consultation or focus pressure from external groups, influencing the collection of consultation data.

Most First Nation consultation work in Canada has focussed solely on land claims or tangible traditional knowledge for project mitigation and impact assessment. In that regard, there is no completed consultation process available from which to glean a modern expression of Immemorial rights and pre-existing culture. However, favourable consideration could be given during selection to a community or small nation that is actively engaged in documenting its culture.

Scope

The Pre-existing Societies Initiative can be seen as having consultation and transformation (rebuilding) components coupled to a harmonization component needed to reconcile to other jurisdictions. The broad overview of the initiative can be broken down into short, medium and long-term bench marks for the consultation, harmonization and transformation components:

1. Short term:
 - a. Consultation:
 - Consultation and discussion with First Nations and germane professionals on the initiative, including; identifying a community, protocols and needed outcomes from elder and nation consultations on pre-contact societies; and,
 - Prepare consultation team and define the pilot project framework for elder and nation consultations of pre-contact societies and its modern context.

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- b. Harmonization:
 - Consultation and discussion with First Nations and germane professionals on needed outcomes and information from consultations on strategies to harmonize Immemorial rights and infrastructure with other jurisdictions and legal systems.
 - c. Transformation:
 - Consultation and discussion with First Nations and germane professionals on needed consultation outcomes and information for services, programs and a rights-based process for agreements for land claims, traditional stewardship and required infrastructure.
2. Medium Term:
- a. Consultation:
 - Elders consultation on pre-contact practices and societies – defining Immemorial rights, traditional law, and traditional roles;
 - Nation consultation on the modern expression of pre-contact practices and societies – defining needed modern regulations, services, roles and programs;
 - Define land and resource management culture-based infrastructure on Immemorial rights with its modernized pre-contact societal rights, laws, regulations, services, roles and programs; and,
 - Community ratification of definitions for the modern expression of Immemorial rights and pre-contact culture by the elders and then endorsement by governance.
 - b. Harmonization:
 - Prepare harmonization team and harmonizing Immemorial rights for land and resource management with outside jurisdictions and legal systems.
 - c. Transformation:
 - Prepare transformation team and harmonizing current infrastructure for land and resource management with Immemorial rights-based infrastructure needs;
 - Define culture-based roles for harmonized land and resource management infrastructure; and,
 - Define and plan infrastructure assets, service and programs for harmonized land and resource management services.
3. Long Term:
- a. Consultation:
 - Engage community with information forums that receive input until infrastructure is on-line; and,
 - Maintain close working relationship with consultation team until infrastructure is on-line.
 - b. Harmonization:
 - Maintain close working relationship with harmonization team until infrastructure is on-line.

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c. Transformation:

- Create and deliver training programs for First Nation roles in new services and programs; and,
 - Restructure or build infrastructure assets and services.
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Goals

The underlying goal of the Pre-existing Societies Initiative is to have First Nation Immemorial rights recognized and to facilitate the rebuilding of culture-based infrastructure in Canada's First Nation communities. In the example initiative on land and resource management, the goals are to create a land and resource stewardship infrastructure that reconciles First Nation Immemorial rights with the rights of the Crown in Canada (see below, E- Initiative Goals).

A- First Nation Goals

Underlying goals for First Nations are self-determination and management of traditional territories.

In respect of this proposal, First Nation goals include to:

1. Assert available constitutional rights;
2. Define and establish Immemorial rights;
3. Define and create culture-based infrastructure with services and roles that harmonizes with Crown jurisdictions; and,
4. Base future negotiations for agreements, treaties, land claims, wildlife management, land planning, resource utilization and *etc.* on Immemorial rights.

The Pre-existing Societies Initiative's goals facilitate these First Nation goals by enabling the rebuilding of modern, harmonized, culture-based community infrastructures on Immemorial Indigenous rights.

B- Crown Goals

Historically, the Crown's goals were centred on colonization and assimilation. However, the Right Honourable Justin Trudeau, current Prime Minister of Canada, has clearly redefined those goals:

“No relationship is more important to me and to Canada than the one with Indigenous Peoples. It is time for a renewed, nation-to-nation relationship with Indigenous Peoples, based on recognition of rights, respect, co-operation, and partnership.”³⁸

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The Pre-existing Societies Initiative's goals are in agreement with the Crown's goals.

C- Rights Goals

Human rights-based organizations generally have a core goal to protect and defend human rights. They often focus their goals on a specific set of rights or a disadvantaged group. There are a number of human rights organizations that attempt to defend and protect the rights of First Nations in Canada;⁵⁵ including those working to resolve rights violations surrounding Missing and Murdered Indigenous Women in Canada.⁵⁶ Unfortunately, in a practical sense, there cannot be an end to Indigenous rights violations until Immemorial rights define First Nation rights and their relationship with the Crown.

The Pre-existing Societies Initiative provides the starting point to permanently end Indigenous rights violations in Canada by enabling the expression of Immemorial rights in modern infrastructure. The initiative is a deliberate step-by-step process to re-establish First Nation Immemorial rights and build culture-based infrastructure.

D- Environmental Goals

The underlying environmental goal for most First Nations and outside environmental organizations is the protection and sustainable management of land, water, air and wildlife for the benefit of future generations.⁵⁷ The Pre-existing Societies Initiative's goals will empower First Nation land stewardship through the expression of Immemorial rights in land and resource management infrastructure that is harmonized to outside jurisdictions.

E- Initiative Goals

We have already introduced the basic goals of the initiative. In a more practical sense, the basic goal of the consultation component of this initiative is to discover, identify and define pre-contact societies as expressed in a modern context for Immemorial rights and culture. The consultation component creates the foundation for the reconciliation of Immemorial rights with the Crown and for their inclusion into First Nation-inclusive infrastructure that has been harmonized to outside jurisdictions. In that, the initiative empowers goals to:

1) Consult Immemorial Rights:

- Provide framework definitions of Indigenous rights to land and resource management to be recognized in Canadian infrastructure.

2) Harmonize Immemorial rights:

- Remove barriers to Immemorial rights in Canada; and,
- Include Immemorial rights-based infrastructure into non-Indigenous infrastructure to create harmonized Canadian infrastructure for land and

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resources that enables both Indigenous and non-Indigenous rights.

- 3) Create Needed Services and programs:
 - Define and create rights-based cultural roles in service and programs for a sustainable economy in land and resource management; and,
 - Define and create rights-based infrastructure needed to close service and income gaps in Indigenous communities.
- 4) Create a Recognized Rights-based Process for Agreements:
 - Include Immemorial rights and Indigenous law into bilateral and contribution agreements.

F- CAID Goals

Christian Aboriginal Infrastructure Developments (CAID) has the rebuilding of Canada's relationship with First Nations as its central goal. Of paramount importance to that goal, is the consultation and accommodation of First Nation Immemorial rights to rebuild culture-based infrastructures that harmonize with outside jurisdictions.

In the Pre-existing Societies Initiative, CAID's goals also include:

- 1) Healing: - Create culture and healing programs founded on pre-contact culture and community roles in a modern context;
- 2) Rebuilding: - Build lost or stolen community infrastructures using modernized pre-existing societal culture; and,
- 3) Empowering: - Physical building of assets and training staff for roles in culture-based infrastructure services.

Objectives

Basic objectives for the Pre-existing Societies Initiative can be grouped into seven functional units to meet the initiative's goals. They include:

- 1) Phase 1:
 - a) Introduce initiative to stakeholders and adjust model framework as needed;
 - b) Build human resource teams for professional, core and community needs;
 - c) Develop criteria for the pilot community selection and engage with preliminary discussions; and,
 - d) Create preliminary elder and nation consultation protocols on pre-existing societies.
- 2) Phase 2:

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- a) Consultation and discussion on consultation needs with community and professional teams;
 - b) Create final protocols and algorithms for elder and nation consultation on pre-existing societies;
 - c) Consultation and discussion with community and professional teams on strategies to harmonize Immemorial rights and land/resource management infrastructure; and,
 - d) Create preliminary protocols to harmonize Immemorial rights and land/resource management infrastructure.
- 3) Phase 3:
- a) Consult elders on pre-contact practices and societies;
 - b) Consult the rest of the nation on present day expressions of pre-contact practices and societies; and,
 - c) Plan for a searchable digital data base on consultation results.
- 4) Phase 4:
- a) Maintain engagement with communities and leaders;
 - b) Refine results for Immemorial rights;
 - c) Elder ratification of gleaned information for rights, culture and framework definitions
 - d) Refine modern expressions of pre-existing society;
 - e) Community ratification and governance endorsement of defined Indigenous infrastructure framework; and,
 - f) Define pre-existing and modern frameworks (rights, laws, regulations, services, roles and programs) for community and nation infrastructures.
- 5) Phase 5:
- a) Maintain engagement with communities and leaders;
 - b) Create a temporal expression of Immemorial rights on traditional territory stewardship (land and resource management) to harmonize with the Crown and other legal systems;
 - c) Create a temporal expression of culture-based traditional territory stewardship infrastructure to harmonize with other jurisdictions; and,
 - d) Create a community-friendly, culture-focussed, digital organization of consultation and rights results.
- 6) Phase 6:
- a) Maintain engagement with communities and leaders;
 - b) Plan physical infrastructure asset needs for roles in culture-based infrastructure;
 - c) Create cultural and healing programs for land and resource-based management.
 - d) Create training programs for culture-based land and resource management infrastructure; and,
 - e) Create final protocols for harmonizing Immemorial rights and land/resource management infrastructure to outside jurisdictions and legal systems.

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- 7) Phase 7:
 - a) Maintain engagement with communities and leaders;
 - b) Deliver cultural and healing programs for land and resource-based management;
 - c) Build or restructure physical infrastructure assets for roles in culture-based infrastructure;
 - d) Deliver training programs for culture-based land and resource management infrastructure; and,
 - e) Bring harmonization protocols into force.
-

Conclusion

For the most part:

- Individual Canadian citizens and small businesses have very little understanding of First Nation issues and no disposable income to finance change;
- Larger Canadian corporations have funds to effect change but they choose to walk a fine line between profits, the interests of their investors and amicable working relationships with elected governments and regulatory bodies;
- Rights and environmental groups have engaged with First Nations to some extent on shared goals but are not interested in tackling the broader issue of Immemorial rights;
- Elected officials, by nature of the system, grease the squeak that maintains them in office; and,
- Government bureaucracy, by nature of the system, is powered by the status quo.

If nothing changes, the status quo in Canada will continue colonization and every Canadian will benefit from it except Indigenous Peoples. Internationally, continued colonization and its cultural genocide have been declared crimes. So, it is not a question of “if” Indigenous Immemorial rights should be recognized and “if” Canada will deal fairly with Indigenous Peoples, it is a question of “when.”

Removing the Doctrine of Discovery by rebuilding First Nation infrastructure on Immemorial rights will take time, but if we do not start, nothing will change. We do not need to wait for the war to be won before we see change. As rebuilding moves forward, Immemorial rights will be progressively empowered in land and resource management, cultural and healing programs, other community infrastructures and in the assertion of the right to self-determination.

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“Expedicion for Hudsons Bay in the North west part of America for the discovery of a new Passage into the South Sea and for the finding some Trade for Furrs Mineralls and other considerable Commodities and by such their undertaking have already made such discoveries as doe encourage them to proceed further in pursuance of their said designe by means whereof there may probably arise very great advantage to us and our Kingdome” [emphasis added]
- ⁵ (2014) United Nations Economic and Social Council, Permanent Forum on Indigenous Issues; Thirteenth Session: A Study on the impacts of the Doctrine of Discovery on Indigenous Peoples, Including Mechanisms, Processes and Instruments of Redress, with Reference to the Declaration, and Particularly to Articles 26-28, 32 and 40. E/C.19/2014/3
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- ⁸ (1670) The Royal Charter for Incorporating The Hudson's Bay Company, A.D. 1670.
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“And whereas the said undertakers for their further encouragement in the said designe have humbly besought us to Incorporate them and grant unto them and their successors the sole Trade and Commerce of all those Seas Streights Bayes Rivers Lakes Creekes and Soundes in whatsoever Latitude they shall bee that lye within the the entrance of the Streights commonly called Hudsons Streights together with all the Landes Countryes and Territoryes upon the Coastes and Confynes of the Seas Streights Bayes Lakes Rivers Creekes and Soundes aforesaid which are not now actually possessed by any of our Subjectes or by the Subjectes of any other Christian Prince or State” [emphasis added]
- ⁹ (1870) Rupert's Land and North-Western Territory Order.
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- ¹⁴ (1982) Constitution Act. <http://caid.ca/ConstAct010208.pdf>
35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
- (2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.
- (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.
- (4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.
- 35.1 The government of Canada and the provincial governments are committed to the principle that, before any amendment is made to Class 24 of section 91 of the "*Constitution Act, 1867*", to section 25 of this Act or to this Part,
- (a) a constitutional conference that includes in its agenda an item relating to the proposed amendment, composed of the Prime Minister of Canada and the first ministers of the provinces, will be convened by the Prime Minister of Canada; and
- (b) the Prime Minister of Canada will invite representatives of the aboriginal peoples of Canada to participate in the discussions on that item.
- ¹⁵ *R. v. Sparrow*, [1990] 1 S.C.R. 1075, pp. 1113-1119. <http://caid.ca/Sparrow020908.pdf>
- ¹⁶ *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511, at para. 24 & 25. <http://caid.ca/HaidaDec010208.pdf>
- Para. 24. "The Court's seminal decision in *Delgamuukw*, *supra*, at para. 168, in the context of a claim for title to land and resources, confirmed and expanded on the duty to consult, ... These words apply as much to unresolved claims as to intrusions on settled claims."
- Para. 25. "Put simply, Canada's Aboriginal peoples were here when Europeans came, and were never conquered. ... The potential rights embedded in these claims are protected by s. 35 of the *Constitution Act, 1982*. ... While this process continues, the honour of the Crown may require it to consult and, where indicated, accommodate Aboriginal interests."
- ¹⁷ *Dene Tha' First Nation v. British Columbia (Minister of Environment)*, [2006] F.C. 1354, 2008 FCA 20, at para. 81. <http://caid.ca/DeneThaDec2006.pdf>

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Para. 81. ... “In sum, where an Aboriginal group has no fiduciary protection, the honor of the Crown fills in to insure the Crown fulfills the section 35 goal of reconciliation of “the pre-existence of aboriginal societies with the sovereignty of the Crown.”

¹⁸ *R. v. Vanderpeet*, [1996] 2 S.C.R. 507 at para. 31. <http://caid.ca/VanDec1996.pdf>

Para. 31. “More specifically, what s. 35(1) does is provide the constitutional framework through which the fact that aboriginals lived on the land in distinctive societies, with their own practices, traditions and cultures, is acknowledged and reconciled with the sovereignty of the Crown.” ... “aboriginal rights recognized and affirmed by s. 35(1) must be directed towards the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown.”

¹⁹ (2010) United Nations Permanent Forum on Indigenous Issues, Ninth Session: Preliminary Study of the Impact on Indigenous Peoples of the International Legal Construct Known as the Doctrine of Discovery. Submitted by the Special Rapporteur. E/C.19/2010/13 at para. 9 & 15. <http://caid.ca/UNECS19Feb2010.pdf>

Para. 9. “The papal bull *Romanus Pontifex*, issued in 1455, serves as a starting point to understand the Doctrine of Discovery, specifically, the historic efforts by Christian monarchies and States of Europe in the fifteenth and later centuries to assume and exert rights of conquest and dominance over non-Christian indigenous peoples in order to take over and profit from their lands and territories. The overall purpose of these efforts was to accumulate wealth by engaging in unlimited resource extraction, particularly mining, within the traditional territories of indigenous nations and peoples. The text of *Romanus Pontifex* is illustrative of the doctrine or right of discovery. Centuries of destruction and ethnocide resulted from the application of the Doctrine of Discovery and framework of dominance to indigenous peoples and to their lands, territories and resources.” [emphasis added]

Para. 15. “Pope Nicholas authorized King Alfonso to assume and take control over non-Christian lands because the Holy See “had formerly ... [for example, in the bull *Dum diversas* of 1452] granted among other things free and ample faculty to the aforesaid King Alfonso — to invade, search out, capture, vanquish, and subdue all Saracens and pagans whatsoever, and other enemies of Christ wheresoever placed, and the kingdoms, dukedoms, principalities, dominions, possessions, and all movable and immovable goods whatsoever held and possessed by them and to reduce their persons to perpetual slavery, and to apply and appropriate to himself and his successors the kingdoms, dukedoms, counties, principalities, dominions, possessions, and goods, and [the right] to convert them [those things] to his and their use and profit ...”. This “faculty” granted by the Holy See to King Alfonso to “apply and appropriate to himself” the kingdoms, dukedoms, principalities, dominions, possessions, and all movable and immovable goods, is a papal licence for the forced taking of all indigenous lands and territories in the regions located, and to engage in unlimited resource extraction for the monarch’s “use and profit”. In this context, the secular meaning of “convert” is “to appropriate dishonestly or illegally” that which belongs to another”.¹⁶ To make the forced appropriation seem “lawful” and “right”, Pope Nicholas declared that because the Apostolic See had previously issued the “faculty”

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to engage in such work, and because the king had thereby “secured the said faculty”, “the said King Alfonso ... justly and lawfully has acquired and possessed, and doth possess, these islands, lands, harbours, and seas, and they do of right belong to ... the said King Alfonso and his successors...”

²⁰ *Tsilhqot'in Nation v. British Columbia*, [2014] SCC 44. <http://caid.ca/TsiDec2014.pdf>

²¹ *Tsilhqot'in Nation v. British Columbia*, [2014] SCC 44, at para. 80.
<http://caid.ca/TsiDec2014.pdf>

Para. 80. “Where Aboriginal title is unproven, the Crown owes a procedural duty imposed by the honour of the Crown to consult and, if appropriate, accommodate the unproven Aboriginal interest. By contrast, where title has been established, the Crown must not only comply with its procedural duties, but must also ensure that the proposed government action is substantively consistent with the requirements of s. 35 of the *Constitution Act*, 1982.” ...

²² *Tsilhqot'in Nation v. British Columbia*, [2014] SCC 44, at para. 12, 14 & 69.
<http://caid.ca/TsiDec2014.pdf>

Para. 12. ... “However, this title was burdened by the “pre-existing legal right” of Aboriginal people based on their use and occupation of the land prior to European arrival (pp. 379-82). Dickson J. characterized this Aboriginal interest in the land as “an independent legal interest” (at p. 385), which gives rise to a *sui generis* fiduciary duty on the part of the Crown.”

Para. 14. ... “This Court confirmed the *sui generis* nature of the rights and obligations to which the Crown’s relationship with Aboriginal peoples gives rise, and stated that what makes Aboriginal title unique is that it arises from possession *before* the assertion of British sovereignty, as distinguished from other estates such as fee simple that arise *afterward*.” ...

Para. 69. ... “At the time of assertion of European sovereignty, the Crown acquired radical or underlying title to all the land in the province. This Crown title, however, was burdened by the pre-existing legal rights of Aboriginal people who occupied and used the land prior to European arrival.” ...

²³ *Tsilhqot'in Nation v. British Columbia*, [2014] SCC 44, at para. 69.
<http://caid.ca/TsiDec2014.pdf>

Para. 69. ... “The doctrine of *terra nullius* (that no one owned the land prior to European assertion of sovereignty) never applied in Canada, as confirmed by the *Royal Proclamation (1763)*, R.S.C. 1985, App. II, No. 1. The Aboriginal interest in land that burdens the Crown’s underlying title is an independent legal interest, which gives rise to a fiduciary duty on the part of the Crown.”

²⁴ *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, at para. 165.
<http://caid.ca/DelDec1997.pdf>

Para. 165. “The general principles governing justification laid down in *Sparrow*, and embellished by *Gladstone*, operate with respect to infringements of aboriginal title.

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In the wake of *Gladstone*, the range of legislative objectives that can justify the infringement of aboriginal title is fairly broad. ... In my opinion, the development of agriculture, forestry, mining, and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations to support those aims, are the kinds of objectives that are consistent with this purpose and, in principle, can justify the infringement of aboriginal title.” ...

²⁵ *Tsilhqot'in Nation v. British Columbia*, [2014] SCC 44, at para. 71, 77 & 88.

<http://caid.ca/TsiDec2014.pdf>

Para. 71. “What remains, then, of the Crown’s radical or underlying title to lands held under Aboriginal title? The authorities suggest two related elements — a fiduciary duty owed by the Crown to Aboriginal people when dealing with Aboriginal lands, and the right to encroach on Aboriginal title if the government can justify this in the broader public interest under s. 35 of the *Constitution Act, 1982*. The Court in *Delgamuukw* referred to this as a process of reconciling Aboriginal interests with the broader public interests under s. 35 of the *Constitution Act, 1982*.”

Para. 77. “To justify overriding the Aboriginal title-holding group’s wishes on the basis of the broader public good, the government must show: (1) that it discharged its procedural duty to consult and accommodate, (2) that its actions were backed by a compelling and substantial objective; and (3) that the governmental action is consistent with the Crown’s fiduciary obligation to the group: *Sparrow*.”

Para. 88. “In summary, Aboriginal title confers on the group that holds it the exclusive right to decide how the land is used and the right to benefit from those uses, subject to one carve-out — that the uses must be consistent with the group nature of the interest and the enjoyment of the land by future generations. Government incursions not consented to by the title-holding group must be undertaken in accordance with the Crown’s procedural duty to consult and must also be justified on the basis of a compelling and substantial public interest, and must be consistent with the Crown’s fiduciary duty to the Aboriginal group.”

²⁶ *Tsilhqot'in Nation v. British Columbia*, [2014] SCC 44, at para. 115, 116 & 150.

<http://caid.ca/TsiDec2014.pdf>

Para. 115. “I conclude that the legislature intended the *Forest Act* to apply to lands under claims for Aboriginal title, *up to the time title is confirmed by agreement or court order*. To hold otherwise would be to accept that the legislature intended the forests on such lands to be wholly unregulated,” ...

Para. 116. ... “The timber on it no longer falls within the definition of “Crown timber” and the *Forest Act* no longer applies. I add the obvious — it remains open to the legislature to amend the Act to cover lands held under Aboriginal title, provided it observes applicable constitutional restraints.”

Para. 150. ... “I find that, consistent with the statements in *Sparrow* and *Delgamuukw*, provincial regulation of general application will apply to exercises of Aboriginal rights, including Aboriginal title land, subject to the s. 35 infringement and justification framework. This carefully calibrated test attempts to reconcile general

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legislation with Aboriginal rights in a sensitive way as required by s. 35 of the *Constitution Act, 1982* and is fairer and more practical from a policy perspective than the blanket inapplicability imposed by the doctrine of interjurisdictional immunity.”

²⁷ *Tsilhqot'in Nation v. British Columbia*, [2014] SCC 44, at para. 114.

<http://caid.ca/TsiDec2014.pdf>

Para. 114. ... “the British Columbia legislature proceeded on the basis that lands under claim remain “Crown land” under the *Forest Act*, at least until Aboriginal title is recognized by a court or an agreement. ... Looked at in this very particular historical context, it seems clear that the legislature must have intended the words “vested in the Crown” to cover at least lands to which Aboriginal title had not yet been confirmed.”

²⁸ *Guerin v. R.*, [1984] 2 S.C.R. 335, pp. 379-382. <http://caid.ca/GueDec1984.pdf>

²⁹ *Calder v. Attorney General of British Columbia*, [1973] S.C.R. 313.

<http://caid.ca/CalDec1973.pdf>

³⁰ (1982) McNeil, Kent. The Constitutional Rights of the Aboriginal Peoples of Canada.

Supreme Court Law Review Vol. 4, p. 255-265. <http://caid.ca/ConRigAboPeo1982.pdf>

“The inadequacy of the provision for consultation with the aboriginal peoples highlights the major weakness of the constitutional entrenchment of their rights. Although now protected against infringement by Parliament or by as provincial legislature acting unilaterally, they can still be taken away at any time by a constitutional amendment authorized by resolutions of the Senate, the House of Commons, and the legislatures of two-thirds of the provinces having a combined population of at least fifty percent of the population of all the provinces. The consent of the aboriginal peoples is not required, and after the initial constitutional conference provided for in section 37 they would not even have to be consulted. Given the power the other participants have over their rights, the weakness of the bargaining position of the aboriginal peoples at the conference is obvious. Ultimately, therefore, the fate of their rights will depend on the level of public awareness of the legal and historical bases of those rights, and the degree to which the people of Canada expect their elected representatives to deal justly and fairly with the aboriginal peoples.” [emphasis added]

³¹ (1985) Indian Act 1985, S. 4-12. <http://caid.ca/IndAct010208.pdf>

³² (1985) Indian Act 1985, S. 6(1)(f), 6(2) & 7(1)(b). <http://caid.ca/IndAct010208.pdf>

Personal note: These sections of the *Indian Act* grant Aboriginal status and rights based on a person being “full-blood,” s.6(1)(f); “half-blood,” 6(2); and, “quarter blood,” 7(1)(b). Full- and half-blooded people are granted full status and rights whereas quarter bloods are granted rights but no status. Thus, the Crown defines that only people with ½ blood or more are Aboriginal. These statutes provide a mechanism to extinguish Aboriginal people as a race in Canada while creating a new “Aboriginal” ethnic minority without claims to traditional lands and resources.

³³ (1985) Indian Act 1985, S. 74-86. <http://caid.ca/IndAct010208.pdf>

³⁴ (2015) Truth and Reconciliation Commission of Canada. *Canada’s Residential Schools: The Final Report of the Truth and Reconciliation Commission of Canada Chapter 5 The Legacy*. Montreal: McGill-Queens University Press.

http://nctr.ca/assets/reports/Final%20Reports/Volume_5_Legacy_English_Web.pdf

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³⁵ *Tsilhqot'in Nation v. British Columbia*, [2014] SCC 44, at para. 32.

<http://caid.ca/TsiDec2014.pdf>

Para. 32. ... “This said, the court must be careful not to lose or distort the Aboriginal perspective by forcing ancestral practices into the square boxes of common law concepts, thus frustrating the goal of faithfully translating pre-sovereignty Aboriginal interests into equivalent modern legal rights.” ...

³⁶ (2014) United Nations Economic and Social Council, Permanent Forum on Indigenous Issues; Thirteenth Session: A Study on the impacts of the Doctrine of Discovery on Indigenous Peoples, Including Mechanisms, Processes and Instruments of Redress, with Reference to the Declaration, and Particularly to Articles 26-28, 32 and 40, at para. 6, 13, 15, 19 & 22. E/C.19/2014/3 <http://caid.ca/UNESRPFII.C19.2014.pdf>

³⁷ (2015) Right Honourable Justin Trudeau, Prime Minister of Canada, Open Policy Mandate Letter to the Honourable Dr. Carolyn Bennett, Minister of Indigenous and Northern Affairs. November 17, 2015. <http://pm.gc.ca/eng/minister-indigenous-and-northern-affairs-mandate-letter>

³⁸ (2015) Truth and Reconciliation Commission of Canada: Calls to Action, at para 45. i & ii. http://www.trc.ca/websites/trcinstitution/File/2015/Findings/Calls_to_Action_English2.pdf

45. “We call upon the Government of Canada, on behalf of all Canadians, to jointly develop with Aboriginal peoples a Royal Proclamation of Reconciliation to be issued by the Crown. The proclamation would build on the Royal Proclamation of 1763 and the Treaty of Niagara of 1764, and reaffirm the nation-to-nation relationship between Aboriginal peoples and the Crown. The proclamation would include, but not be limited to, the following commitments:

- i. Repudiate concepts used to justify European sovereignty over Indigenous lands and peoples such as the Doctrine of Discovery and *terra nullius*.
- ii. Adopt and implement the *United Nations Declaration on the Rights of Indigenous Peoples* as the framework for reconciliation.”

³⁹ (2007) United Nations General Assembly, Sixty-First Session: United Nations Declaration on the Rights of Indigenous Peoples. A/RES/61/295 <http://caid.ca/UNIndDec010208.pdf>

⁴⁰ *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511, at para. 20. <http://caid.ca/HaidaDec010208.pdf>

Para. 20. “Where treaties remain to be concluded, the honour of the Crown requires negotiations leading to a just settlement of Aboriginal claims: *R. v. Sparrow*, [1990] 1 S.C.R. 1075, at pp. 1105-6. Treaties serve to reconcile pre-existing Aboriginal sovereignty with assumed Crown sovereignty, and to define Aboriginal rights guaranteed by s. 35 of the *Constitution Act, 1982*. ... This, in turn, implies a duty to consult and, if appropriate, accommodate.”

⁴¹ (2014) United Nations Economic and Social Council, Permanent Forum on Indigenous Issues; Thirteenth Session: A Study on the impacts of the Doctrine of Discovery on Indigenous Peoples, Including Mechanisms, Processes and Instruments of Redress, with Reference to the Declaration, and Particularly to Articles 26-28, 32 and 40, at para. 13. E/C.19/2014/3

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<http://caid.ca/UNESRPFII.C19.2014.pdf>

Para. 13. “Canada's highest court has recognized the need for reconciliation of “pre-existing aboriginal sovereignty with assumed Crown sovereignty”. The Supreme Court has taken judicial notice of “such matters as colonialism displacement and residential schools”, which demonstrate how ‘assumed’ sovereign powers were abused throughout history. The root cause of such abuse leads back to the doctrine of discovery and other related fictitious constructs, which therefore must be addressed.”

- ⁴² (2004) United Nations Economic and Social Council, Commission on Human Rights, Prevention of Discrimination and Protection of Indigenous Peoples, Indigenous Peoples’ Permanent Sovereignty over Natural resources: Final Report of the Special Rapporteur, Erica-Irene A. Daes. E/CN.4/Sub.2/2004/30 <http://caid.ca/UNIndPermSovNatRes2004.pdf>
- ⁴³ (2010) Herbert, R.G., Report II Expansion of Research and Preparation: Ross River Dena Council – Yukon Government Dog Management Pilot Program. <http://caid.ca/CAIDYKDogResPreII2010.pdf>
- ⁴⁴ (2009) Herbert, R.G., Meaningful Consultation in Canada: The Alternative to Forced Aboriginal Assimilation. <http://caid.ca/MeaCon092409.pdf>
- ⁴⁵ (2009) Herbert, R.G., Working Papers on Meaningful Aboriginal Consultation in Canada: Overview. <http://caid.ca/MeaConOve101609.pdf>
- ⁴⁶ (2010) Herbert, R.G., Working Papers on Meaningful Aboriginal Consultation in Canada: Step 1 – Nation Consultation. <http://caid.ca/MeaConOne102309.pdf>
- ⁴⁷ (2008) Herbert, R.G., A Model for the Reconciliation of Canada with its Indigenous Peoples: Restoration of Missing Infrastructure Phase 1: Pilot Program Development by Dr. R.G. Herbert. <http://caid.ca/ModelInf091608.pdf>
- ⁴⁸ (2008) Herbert, R.G., A Model to Establish a New Framework for Aboriginal Economic Development in Canada. <http://caid.ca/Model031108.pdf>
- ⁴⁹ (2008) Herbert, R.G., Re-establishing Indigenous Culture and Prosperity. <http://caid.ca/Indigenous011608.pdf>
- ⁵⁰ (2010) Herbert, R.G., Report II Expansion of Research and Preparation: Ross River Dena Council – Yukon Government Dog Management Pilot Program, p 25 and 73. <http://caid.ca/CAIDYKDogResPreII2010.pdf>
- ⁵¹ (2007) United Nations General Assembly, Sixty-First Session: United Nations Declaration on the Rights of Indigenous Peoples, article 26. A/RES/61/295 <http://caid.ca/UNIndDec010208.pdf>

“Article 26

1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.
2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.
3. States shall give legal recognition and protection to these lands, territories and resources.

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Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.”

- ⁵² (2007) United Nations General Assembly, Sixty-First Session: United Nations Declaration on the Rights of Indigenous Peoples, articles 5, 18 - 20, 23, 26, 27, 32 & 34. A/RES/61/295 <http://caid.ca/UNIndDec010208.pdf>

“Article 5

Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.

Article 18

Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.

Article 19

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

Article 20

1. Indigenous peoples have the right to maintain and develop their political, economic and social systems or institutions, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities.

Article 23

Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous peoples have the right to be actively involved in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions.

Article 26

1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.
2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.
3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.”

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Article 27

States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.

Article 32

1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.
2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.

Article 34

Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards.”

⁵³ (1996) Report of the Royal Commission on Aboriginal Peoples. Volume 1: Looking Forward, Looking Back. Part One: The Relationship in Historical Perspective. Chapter 6, Stage Three: Displacement and Assimilation; 8. Extending Measures of Control and Assimilation. Canada Communication Group — Publishing, Ottawa, Ontario K1A 0S9.

<http://caid.ca/RRCAP1.6.pdf>

⁵⁴ (2007) United Nations General Assembly, Sixty-First Session: United Nations Declaration on the Rights of Indigenous Peoples, articles 8, 20, 23 & 34. A/RES/61/295

<http://caid.ca/UNIndDec010208.pdf>

“Article 8

1. Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture.
2. States shall provide effective mechanisms for prevention of, and redress for:
 - a. Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities;
 - b. Any action which has the aim or effect of dispossessing them of their lands, territories or resources;
 - c. Any form of forced population transfer which has the aim or effect of violating or undermining any of their rights;
 - d. Any form of forced assimilation or integration;
 - e. Any form of propaganda designed to promote or incite racial or ethnic discrimination directed against them.

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Article 20

1. Indigenous peoples have the right to maintain and develop their political, economic and social systems or institutions, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities.
2. Indigenous peoples deprived of their means of subsistence and development are entitled to just and fair redress.

Article 23

Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous peoples have the right to be actively involved in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions.

Article 34

Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards.”

⁵⁵ (2011) Amnesty International, Getting Back on the “Rights” Track; A Human Rights Agenda for Canada. <http://caid.ca/AmnIntHRACan2011.pdf>

⁵⁶ (2013) Human Rights Watch, Those Who Take Us Away: Abusive Policing and Failures in Protection of Indigenous Women and Girls in Northern British Columbia, Canada. <http://caid.ca/HRWRepThoWhoTakAwa2013.pdf>

⁵⁷ (2015) Acting on Climate Change: Solutions from Canadian Scholars. UNESCO–McGill Chair for Dialogues on Sustainability and the Trottier Institute for Science and Public Policy, Sustainable Canada Dialogues. <http://caid.ca/ActOnCliCha2015.pdf>