ABSTRACT

This thesis employs Jürgen Habermas’s discourse theory of law to argue that the doctrine of Canada’s duty to consult with indigenous communities is based on extra-legal communicative presumptions that fail to reflect the basic norm of communicative equality. It derives a set of communicative norms from discourse theory and demonstrates their dovetailing with discursive norms found within the intersocietal communicative practices associated with treaty-making in at least selected indigenous legal orders, such as in the establishment of the Great Peace of Montréal (1701). Finally, after providing a critical analysis of the duty to consult’s key discursive elements (historical narrative, justification, reconciliation, and the “honour of the Crown”), it argues for normative revisions of the duty to consult more appropriate to Canada's intersocietal legal order.

KEYWORDS: Aboriginal rights, Indigenous legal orders, Canada’s duty to consult, Habermas, Pragmatic and performative discourse, Inter-societal legitimacy, Discourse norms

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Abbreviations

(Habitmas’s works)

RDE  “Remarks on Discourse Ethics” (1994).

(Hart’s works)

CL  The Concept of Law (2012).

(Weber’s works)

ES1, 2  Economy and Society: an Outline of Interpretive Sociology vols. 1 and 2 (1978).
Introduction

Sec.35(1) of the *Canada Constitution Act, 1982* recognizes what it phrases as “aboriginal and treaty rights.” In the years following this constitutional recognition, however, Canada has so far failed to reconfigure its relations with First Nations and other indigenous communities.\(^1\) Instead, the courts have taken on the role of providing the fundamental determination of what sec. 35(1) might mean for the future of relations between settler state and indigenous parties in Canada. In an effort to cope with the gap between the 1982 recognition of these rights and existing state policies, the Supreme Court of Canada has gradually been developing the doctrine of the “duty to consult, and where indicated, accommodate”\(^2\) with holders of the rights recognized in sec. 35(1). As a result, the duty to consult has become the legal mainstay of indigenous participation in, and challenge to, state action affecting the future of indigenous interests of many sorts. Lower courts have engaged in an extensive process of refining this doctrine, through their consideration of literally hundreds of challenges to government actions. Over twenty of these cases have resulted in appeals reaching back to the Supreme Court of Canada, where various justices have added further clarification. The doctrine frequently appears to have wide-ranging implications, giving rise to questions of common law, administrative law, and constitutional law. Federal, provincial and First Nations governments, and individual departments and agencies, have developed protocols explaining the implications of the duty to consult on their operations. Corporations,

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1. For an in-depth look at this history from the first-hand perspective of the federal official who drafted much of the constitutional amendment language during that era, see Mary Dawson’s “From the Backroom to the Front Line: Making Constitutional History or Encounters with the Constitution: Patriation, Meech Lake, and Charlottetown” (2012) *McGill Law Journal* 57(4) 955. Also, political scientist Kirsten Matoy Carlson (Cherokee) examines the court’s emergence as a powerful shaper of national policy in the same time-frame. See her “Political Failure, Judicial Opportunity: The Supreme Court of Canada and Aboriginal and Treaty Rights” (2014) *American Review of Canadian Studies* 44(3) 334.

industry umbrella groups, NGOs, academic institutions, all have published clarifications of law and policy for interested parties. Public discourse from the pages of peer-reviewed journals to the on-line comments attached to news stories, or in the work of bloggers, tweeters and other social media users, has been the site of heated and wide-ranging debates about the doctrine and its implications for the future of Canada’s relations with indigenous communities, and for the fate of the country.

In what follows I address the duty to consult (never forgetting the “and where indicated, accommodate”) as it relates to the tasks of communication – which after all, comprises its most central features and purposes. I will argue that this communicative dimension of the duty to consult is crucial to making sense out of its basic meaning, and its implications for law in Canada. I argue that when considered as a set of communicative practices, the duty comes up short. To do this, I draw on the legal theory of the German philosopher Jürgen Habermas, while bearing in mind the words of Lamer C.J. that: “Aboriginal rights cannot, however, be defined on the basis of the philosophical precepts of the liberal enlightenment.”

I imagine that what such “philosophical precepts” might aim to offer would be derivatives from various ideas about human nature or society. However, I make no effort to define Aboriginal rights here, nor do I argue for a particular reading of human nature or society. Instead, I draw on Habermas’s approach to what he calls the “pragmatic” aspects of communication, because I think it is helpful in addressing the depths of disagreement and confusion regarding the duty to consult.

Scholars have discussed the duty to consult at great length. Much of their work addresses the scope of the duty to consult – the situations in which it applies, and the procedures necessary to

implement it consistently. Such scholarship targets the concerns of those who might need to conduct business, or policy formation and administrative oversight, and therefore need to understand the implications of the law for their endeavours.\(^4\) As well, scholars have assessed apparent gaps in the law, or the need for extending it to include circumstances not previously accounted for within the jurisprudence. Some have weighed its implications for administrative or constitutional law.\(^5\) Scholars of indigenous law have addressed its shortcomings as a means of achieving just resolutions to the longstanding conflicts between Canada and indigenous people. However, few scholars have sought to analyze it with an eye towards its functioning as communication; and none have addressed what I regard as the normative assumptions regarding communication that are entailed within the Supreme Court’s explication of the doctrine.

My turn to Habermas for assistance in this task does echo the work of scholars studying other fields of contest in which public discourse confronts administrative power. Habermas’s views on public sphere discourse have had deep and far-ranging effect, sparking an industry of debate within the human sciences, philosophy, political and legal theory, and other fields. Scholars focused on resource management or environmental assessment questions have employed Habermas to analyze the roadblocks evident in formal and informal consultations, or in the work


\(^5\) For an argument that processes of judicial review should be made consistent when required by the duty to consult, see Robin M. Junger and Nika Robinson “Administrative Law Remedies in the Aboriginal Law Context” (2012) *Canadian Journal of Administrative Law and Practice* 25(1) 55. They note, for instance, that although judicial review of administrative decisions will typically result in either letting the decision stand, or “quashing” it, judicial review concerned with Aboriginal rights most often results in mere temporary suspension of the decision, *ibid.* at 69.
of tribunals, courts and legislatures. Most of this work, however, focuses on bureaucratic implementation of communication protocols, rather than on the more upstream legal development of the regulations guiding bureaucrats. Some scholars have drawn on either Habermas’s work, or the field of “deliberative democracy” largely sparked by that work, in examining the impact of public sphere discourse on Canadian resource extraction and management. A much smaller number have employed him in considering resource development or environmental management issues focused around the interests of indigenous communities in Canada and the US. In earlier work, I also drew on Habermas to examine the dynamics of public discourse involving Western Shoshone and other activists opposed to a Carter-era US nuclear weapons basing program slated for deployment on traditional Shoshone lands in Nevada. However, scholars have not yet employed Habermas in providing a normative reading

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of Canada’s legal relations with indigenous peoples, nor in considering the duty to consult, as I do here.  

In what follows, I develop my normative argument based on the assumption that the duty to consult’s purpose, as Habermas would put it, is to “promote conditions of mutual understanding and social solidarity.” The courts have spoken of the duty’s goal being to serve the purposes of “reconciliation” between settler and indigenous communities in Canada. My argument amounts to the normative claim that as constituted by the jurisprudence, the duty to consult should reflect a much stronger understanding of the communicative practices entailed in the court’s development of the duty.

I proceed by first pulling out of the fundamental case law what I call the communicative practices grounding the duty. In Chapter 1, I address these practices within the Sparrow, Delgaamukw, and Haida Nation decisions, and turn briefly to consider communicative aspects of the duty that appear post-Haida Nation in the Supreme Court’s further consideration of the duty’s scope. In Chapter 2, I introduce relevant themes from Habermas’s work on the discourse theory of law, taking the time to exegete these themes in some detail for readers who might be unfamiliar with Habermas. Specifically, I outline his discursive view of law, and his view of discursive norms. I also contrast his discursive view of legal legitimacy with the more widely embraced views of legal validity inherited from Max Weber and H.L.A. Hart.

10 However, an exception to this is Fred Bennett’s dismissal of deliberative democratic approaches to the outstanding issues between Canada and indigenous communities. Bennett argues that since the Canadian public has little sustained interest in indigenous issues, a deliberative democratic approach would have little merit. Unfortunately, this leaves his argument reliant upon state organs for resolution of many problems. See, generally, his “Aboriginal Rights Deliberated” (2007) Critical Review of International Social and Political Philosophy 10(3) 339.
In Chapter 3, I consider some of the objections that might arise to my use of Habermas in even addressing the legal and political concerns of indigenous people, and offer some reworking of his assumptions that stand in the way of my use of discourse theory here. In Chapter 4, I attempt to show that a discourse theory approach to law can provide useful traction in considering the distinctive features of indigenous legal orders, at least as they relate to the formation of intersocietal legal legitimacy. As an example of this traction, I develop a discourse reading of a significant (though perhaps not widely known) colonial-era treaty, the 1701 “Great Peace of Montréal.” I regard the example of the Montréal process of treaty-making as providing a paradigmatic instance of the communicative conditions necessary for the formation of legal legitimacy in intersocietal contexts, such as those created across North America through the dynamics of interaction between settler and indigenous parties.

Finally, in Chapters 5 and 6 I apply my construction of an intersocietal reading of discourse theory to analyze the communicative practices supporting the duty to consult. I argue that each of these practices entails “extra-legal” presumptions. In *Rio Tinto*, McLachlin C.J. acknowledged that consultation “itself is not a question of law; it is a distinct and often complex constitutional process and, in certain circumstances, a right involving facts, law, policy, and compromise.” My aim is to demonstrate that we must also regard the duty to consult as not being in “itself a question of law.” Consequently, for the duty to consult to demonstrate what David Dyzenhaus terms, in a broadly Habermasian way, the “legitimacy of legality;” these extra-legal

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presumptions need to be significantly buttressed. Or, assuming that the court’s talk of “reconciliation” suggests at least an uncomfortable recognition of the continued force of colonial communicative practices that affect indigenous peoples’ legal standing in relation to the state, these presumptions need to be addressed, clarified, and critiqued, within an intersocietal legal context of communication.

I argue that the only way this can be achieved is by employing a process of discursive assessment; that is, by recognizing that pragmatic communication oriented towards mutual understanding requires acknowledging the condition of what I will call “communicative equality” between Canada and indigenous communities. In my conclusions, I develop the suggestion that communicative equality might be conceived along the lines of what Brian Slattery has called a “generic” Aboriginal right, or as part of what James Sa'ke'j Henderson has spoken of as “dialogical governance.” There I explain why I think this is superior to the current position of communicative subordination still found within the courts’ assessments of the duty to consult.

My usage of several terms in what follows may require clarification. I tend to use the term “state” when referring to the governing institutions of Canada, instead of the more common reference to “the Crown.” My reasons for choosing this will, I think, appear clearly in my discussion of the phrase “the honour of the Crown,” in Chapter 5. My usage is perhaps only idiosyncratic, and I note that indigenous legal scholars such as John Borrows and James Sa'ke'j

See his “The Legitimacy of Legality” (1996) *University of Toronto Law Journal* 46(1) 129. There he melds the approach to legitimacy found in the work of American legal theorist Lon Fuller with that of Habermas, as I will take up in Chapter 2. Dan Priel provides a helpful effort to distinguish between the concepts of legitimacy and legal validity in his “The Place of Legitimacy in Legal Theory” (2011) *McGill Law Journal* 57(1) 1.
Henderson typically employ the “the Crown” when referring to what in other jurisdictions would readily be simply “the state.”

I will most often use “indigenous” as a general term to indicate some point of similarity between a range of distinct peoples, much like “European” or “African” suggest ranges of similarity and difference in one context or another. It seems to me difficult to employ consistently a brief term that captures the political and legal stature of indigenous people’s collectivities. I do use the common term “First Nations” to indicate that stature, although at times I will use “indigenous communities.” Most awkwardly, when trying to indicate that the range of indigenous political and legal orders is not subsumed under the Canadian legal regime, or within Canadian federalism, I will refer to “First Nations and other indigenous communities.”

I frequently use the terms “settler” or “settler state” in order to refer to populations, interests, legal and political traditions, and institutions of law and governance. I assume that these terms carry some of the weight of the colonial trajectory into the Americas, but also hope they are less ideologically charged than other terms that might be employed.\textsuperscript{13}

I will use “Aboriginal” to refer specifically to a general set of characteristics belonging to indigenous people as these characteristics are raised within the context of Canadian law, since this is the term employed within the juridical/administrative context of their relations with the

\textsuperscript{13} They also reflect the practices of a growing body of interdisciplinary scholarship, some of which can strike the reader as also ideologically charged. See, for instance, Lorenzo Veracini Settler Colonialism: a Theoretical Overview (Hampshire UK: Palgrave McMillan, 2010), and Patrick Wolfe “Settler Colonialism and the Elimination of the Native” (2006) Journal of Genocide Research 8(4) 387. However, in Canada and the US, where “colonialist” seems understandably likely to raise the ire of courts, state officials, and the larger public, “settler” is more in keeping with the predominant self-image (even though it depends on a narrative, as these scholars point out, that requires the native’s “elimination”).
Canadian state. I capitalize “Aboriginal,” although state organs and courts frequently haven’t, because this usage seems preferable to indigenous people within Canada as they assert their legal and political distinctiveness in relation to Canada. That said, I think it would be better to treat “Aboriginal” as a level of political structure and identity, like “federal” or “provincial,” which don’t require capitalization in English. On the other hand, I don’t capitalize “indigenous,” as many do, simply on the ground that the term applies across a global range of communities and nations, and that a capital would suggest more of a geographically-specific application, as with “African” or “Asian.”

I use “Indian” in relation to indigenous people when speaking about the legal construction of personal or communal identity within the context of the federal Indian Act or laws developed under its authority, in relation to cases where the courts also employ the term, in relation to American law – where the term remains common, or in reference to the broader cultural constructs of “Indianness” in both Canada and the US.

Regarding plural forms of indigenous peoples’ collective names: unless the term in use already contains a plural, as in the final ending of “eg” in “Anishinaabeg,” I follow the suggestion of the Chicago Manual of Style, and indicate a people’s name, whether derived from their own language – for instance “Lakota,” or from another – for instance “Mohawk,” with a final “s” in order to make a workable English-language plural noun; that is, like “Germans” or “Russians,” and not like “French,” unless the name ends in an “s” or “x,” like “Sioux” or “Iroquois.” Also, my use of collective names lacks consistency. A reflection of my own ignorance more than anything else, I refer to some peoples by their own names. In referring to others, however, I use
names that although in common use, derive from earlier colonial encounters with people up river or back across a pass, and who gave Europeans their own name for the people down river, or on the far side of a pass -- but whose names for the people newly encountered by the Europeans was often only pejorative.
Chapter 1
Communicative Practices and the Doctrine of the Duty to Consult

In this chapter I examine those Supreme Court of Canada decisions that have shaped the duty to consult. I identify key communicative practices that the court has drawn upon in order to bring into focus how and why Canada has obligations to communicate with indigenous communities, and what sort of communication indigenous communities can expect this obligation to amount to. The court’s conception of each of these practices is weaker than it should be. In subsequent chapters I will lay out how the discourse theory of law, with its view of a communicative basis for legal legitimacy, suggests a more solid ground for understanding the practices identified here. In particular, in subsequent chapters I will show that a stronger understanding of communication is central to the intersocietal context of legal relations between Canada and indigenous nations. Finally, in Chapters 5 and 6 I will assess the communicative adequacy of the practices identified here, on the basis of norms of intersocietal legal discourse that I derive, in Chapter 4, from both Habermas and from discursive practices evident in the 1701 treaty at Montréal.

A) The emergence of the duty to consult as communicative practice

Over the course of the last two and a half decades, Canada’s Supreme Court has constructed the doctrine of the “duty to consult” in order to provide a means to determine the extent to which section 35(1) Aboriginal rights might constrain government decision-making on a variety of fronts. One consequence of this lengthy effort is that Aboriginal rights have in substance come to be identified primarily with the task of consultation. Such an approach to determining the meaning and scope of a right might at the outset seem peculiar. An individual’s right to vote as a
citizen of a given polity, for instance, is not something we would necessarily say receives its scope and content out of a process of communicative back-and-forth. Admittedly, the extension of that right to women and racial minorities could be regarded as coming about through such a process, but voting itself, as a right, we regard as having meaning derived from citizenship.

Nor would we customarily think that a right to obtain medical treatment in a country with a public health care system first and foremost means that a legal resident or citizen in need of treatment would expect to engage in a process of debate, performed on a case by case basis, to establish with potential care providers whether and how they might be willing to obligate themselves to such provision of care (though this might be necessary for specific sorts of treatments, or in response to particular sets of circumstances). Unlike most of the positive and negative rights that we refer to in modern democratic, constitutional polities, Aboriginal rights may seem to lack the veneer of age that makes rights appear to be features of human nature itself – even when they are newly created through the decisions of courts or legislatures, such as the right to an abortion, same-sex marriage, or the extension of the franchise in the 20th century. These newly created rights are themselves derivatives, or perhaps a sharpening, of already recognized rights.

In contrast, Aboriginal rights as recognized by Canada’s courts seem more like what historian Eric Hobsbawm identified some time ago as “invented traditions,” which he elaborated as sets “of practices, normally governed by overtly or tacitly accepted rules and of a ritual or symbolic nature, which seek to inculcate certain values and norms of behaviour by repetition, which automatically implies continuity with the past. In fact, where possible, they normally attempt to
establish continuity with a suitable historic past.” Hobsbawm highlighted three functions of invented traditions that bear on the Canadian effort to “recognize and affirm” Aboriginal rights in the *Constitution Act, 1982*, and on Canada’s resulting efforts to grapple with what recognition and affirmation means. For Hobsbawm, invented traditions are

a) those establishing or symbolizing social cohesion or the membership of groups, real or artificial communities, b) those establishing or legitimizing institutions, status or relations of authority, and c) those whose main purpose was socialization, the inculcation of beliefs, value systems and conventions of behaviour.

Canada’s courts have consistently framed the recognition of Aboriginal rights as part of a larger project of creating a certain kind of Canadian society, one capable of achieving reconciliation of former animosities, the overcoming of injustices, and the mutual accommodation of developmental paths, that is one grounded in Lamer C.J.’s admonition in *Delgamuukw*: “Let us face it[,] we are all here to stay.” Crucial to this imagination of Canada’s future is the image of a past in which communication took priority over violence and conflict. As many have noted, the articulation of this vision of the priority of communication over violence has itself often proceeded without the influence of indigenous voices.

Given that the duty to consult valorizes acts of communication over violence, making communication key to the legal substance of Aboriginal rights, and key to an imagined Canadian future, it seems worthwhile in this chapter to examine the presentation of communication, or

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what I will call communicative practices, enfolded within the doctrine of the duty to consult.\(^\text{18}\) I would define a communicative practice as an activity reflective of a set of implicit or explicit standards – though perhaps more the result of habit than of a rule-based approach to communicating. A practice of communication is not the same as Jürgen Habermas’s concept of “communicative action,” which I will explain in the following chapter. In his scheme, communicative action aims explicitly at producing social solidarity and common understanding. Communicative practices, on the other hand, may mask as much as they reveal, or pressure as much as they promote trust. That is, they can as readily be weapons as tools.\(^\text{19}\) Thus, a communicative practice can simply be undertaken for a range of communicative or strategic purposes. These purposes can be described or identified, as I attempt in what follows. In Chapters 5 and 6, I will scrutinize the practices supporting the duty to consult from the standpoint of Habermas’s theory of legal discourse.

\section*{B) Communicative practices in R. v Sparrow}

In 1990 the Supreme Court of Canada affirmed the B.C. Court of Appeal’s decision to set aside Ronald Sparrow’s 1984 conviction, in the process taking the first steps toward a clear articulation of the “duty to consult.” Sparrow had been convicted of using a drift net longer than 25 fathoms, a length specified in his Musqueam Band’s food fishing license. The band’s 1984 license had been issued under s. 12 of the \textit{British Columbia Fishery (General) Regulations},


\(^{19}\) Habermas, \textit{TCA1}, at 295.
SOR/84-248, a code authorized by the federal *Fisheries Act*, R.S.C. 1970, c. F-14. Although the Musqueam drift nets had been 75 fathoms throughout most of the 20th century, earlier in 1984 Canada’s Department of Fisheries had set out a new regulation on the length of Indian nets, while at the same time leaving unchanged the 200 fathom length used in non-Indian commercial fishing operations. Sparrow claimed in his defence that he had an Aboriginal right to use his 45 fathom drift net under the recently repatriated Constitution. His case spent several years in British Columbia courts before the Supreme Court took it up in 1988. In writing the court’s unanimous opinion overturning his conviction, Dickson, C.J. and La Forest, J. noted that the case had required the justices to “explore for the first time the scope of s. 35(1) of the *Constitution Act, 1982*, and to indicate its strength as a promise to the Aboriginal peoples of Canada.”

The justices clearly rejected the government’s own position that its regulatory regime over a common practice such as sustenance fishing had extinguished any question of it being an Aboriginal right. According to the justices, “[a]t bottom, the respondent's argument confuses regulation with extinguishment. That the right is controlled in great detail by the regulations does not mean that the right is thereby extinguished.” Instead, in accord with the 1973 *Calder* case, they said “The test of extinguishment to be adopted, in our opinion, is that the Sovereign's intention must be clear and plain if it is to extinguish an Aboriginal right.”

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20 From the Musqueam Indian Band’s website, at <http://www.musqueam.bc.ca/Sparrow.html#> accessed 12 April 2012.


At the same time, given the broad powers to regulate Aboriginal life derived from s. 91(24) of the British North America Act, 1867 and developed from 1876 on in the Indian Act (currently R.S.C., 1985, c. I-5), the justices were not envisioning Aboriginal rights as providing any impermeable limit to the government’s various regulatory aims concerning Aboriginals. Instead, they maintained that Aboriginal rights, whatever they might be, needed to be fleshed out in tandem with the legitimate regulatory power of government. Consequently, their argument identified three considerations necessary to construct a balance useful for any future conflicts over the meaning and scope of Aboriginal rights.

The first consideration is embedded in the justices’ statement about the process through which Aboriginal rights became incorporated in the Constitution. They referred to s. 35(1) as “the culmination of a long and difficult struggle in both the political forum and the courts for the constitutional recognition of Aboriginal rights.” Aboriginal rights are thus historical products. This acknowledgment of Aboriginal rights as historical products should not be read as simply celebratory, however. Accompanying it closely was an assessment of the future of Aboriginal rights as well. “Section 35(1), at the least, provides a solid constitutional base upon which subsequent negotiations can take place.”24 We might readily think that rights that are recognized entail the realization that rights must be defended. Such defence, however, is most likely possible only on the basis of rights being first secured, at least conceptually. The justices in Sparrow, however, seemed to be highlighting something else about Aboriginal rights. Rather than rights emerging from a historical process of political struggle, achieving some degree of clarity, but then facing subsequent threats as social conditions change; Aboriginal rights here seem

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24 Ibid. at 1105.
enmeshed in an ongoing process of communication: political forums, courts, and negotiations are keys to the presentation and explication of these rights. This is to say that they might never escape the sphere of argument, even though entrenched within the Constitution. Thus the justices seemed to be maintaining that Aboriginal rights are inherently contested.

The other two considerations advanced in Sparrow regarding Aboriginal rights also highlight how they are bound up with communicative acts. The second can be summarized as Aboriginal rights require the government to justify its policy and regulatory infringement of those rights, a requirement that they declared was "implicit" within the "constitutional scheme" created with s. 35(1). This implicit requirement emerges out of the justices’ efforts to chart how Aboriginal rights intersect with governmental power. They referred to the *sui generis* nature of Aboriginal rights, which Dickson C.J. had first elaborated in Guerin. While Dickson’s opinions in both Guerin and Simon did not approach the question of s. 35(1) Aboriginal rights, he and La Forest J. concluded in Sparrow that the *sui generis* nature of Aboriginal law should serve as a “general guiding principle for s. 35(1).”

In Guerin, the term *sui generis* referred to unique obligations Canada owes to Aboriginals, obligations that fit poorly within a common understanding of either private or public legal duties. A key example of this awkward fit would be the federal obligation to hold Aboriginal lands in

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25 Ibid. at 1110.
26 *Guerin v The Queen*, [1984] 2 SCR 335.
28 *Sparrow*, supra p. 15 n. 21, at 1108.
trust. Although the courts have typically regarded a fiduciary relationship as a private relationship, the justices acknowledged there that Canada’s duties regarding Aboriginal land are unique, and that a fiduciary understanding of the relationships between the Canada and Aboriginal communities was the best way of clearly conceiving their interaction.

The Crown’s obligation to the Indians with respect to that interest [Indian lands] is therefore not a public law duty. While it is not a private law duty in the strict sense either, it is nonetheless in the nature of a private law duty. Therefore, in this *sui generis* relationship, it is not improper to regard the Crown as a fiduciary.\(^{29}\)

Similarly, in *Simon* Dickson C.J. had framed treaty-making between Aboriginal communities and Canada as distinctive, claiming that “An Indian treaty is unique; it is an agreement *sui generis* which is neither created nor terminated according to the rules of international law.”\(^{30}\)

In *Sparrow*, then, the uniqueness of the state-Aboriginal relationship requires a similarly unique format for addressing questions of right. “The relationship between the Government and

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\(^{29}\) *Guerin* supra p. 17 n. 26, at 385.

\(^{30}\) *Simon*, supra p. 17 n. 27, at 404. Identifying Aboriginal rights as *sui generis* held, for a time, some degree of hope for Aboriginal communities and scholars interested in developing a strong view of such rights. However, within a few years of the *Sparrow* opinion, some were already elegiac in their analysis. Catherine Bell and Michael Asch, for instance, noted in 1997 (the year of the SCC *Delgamuukw* opinion) that:

The characterization of the legal nature of Aboriginal title as *sui generis* provided Canadian courts with the opportunity to explore beyond the confines of English property law to determine the scope and content of Aboriginal title and its relationship to the Crown’s interest. The recognition of the uniqueness of Aboriginal title was a clearly articulated, interpretive tool which could be invoked to distinguish previous precedent which did not fully appreciate the restraints imposed by the language and concepts of English and Canadian common law….However, with the exception of a few notable dissenting opinions, the concept of *sui generis* has simply been invoked in legal reasoning to deny classification of Aboriginal title as fee simple ownership with all the rights flowing there.

Aboriginals is trust-like, rather than adversarial, and contemporary recognition and affirmation of Aboriginal rights must be defined in light of this historic relationship.”

The format that Dickson C.J. and La Forest J. envisioned involved construction of a balancing mechanism, a step they acknowledged did not derive from any “explicit language in the provision that authorizes this Court or any court to assess the legitimacy of any government legislation that restricts Aboriginal rights.” The justices stressed in the same passage that: “Rights that are recognized and affirmed are not absolute.” They spoke of “reconciling” federal power and federal duty (though not really of reconciling Aboriginal rights and federal power, since federal duty, the fiduciary obligation, already seems to entail the recognition of Aboriginal interests). To accomplish this reconciliation, they derived a “demand” for the “justification of any government regulation that infringes upon or denies Aboriginal rights.” Numerous commentators in the years since Sparrow have pointed out the oddity of this task, which resembles the justification test developed out of s.1 – structurally, part of the Charter of Rights and Freedoms, and not really tied to s. 35 of Constitution Act, 1982 at all. The same point is acknowledged in Sparrow, “It is true that s. 35(1) is not subject to s. 1 of the Charter.”

Confusion on this point also stems from the incorporation within Badger of a related point in the 1988 Agawa decision.

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31 Sparrow, supra p. 15 n. 21, at 1108.

32 Ibid. at 1109.


34 Sparrow, supra p. 15 n. 21, at 1108.
This standard of scrutiny requires that the Crown demonstrate that the legislation in question advances important general public objectives in such a manner that it ought to prevail. Blair J.A. recognized the need for a balanced approach to limitations on treaty rights, stating:

. . . Indian treaty rights are like all other rights recognized by our legal system. The exercise of rights by an individual or group is limited by the rights of others. Rights do not exist in a vacuum and the exercise of any right involves a balancing with the interests and values involved in the rights of others. This is recognized in s. 1 of the *Canadian Charter of Rights and Freedoms* which provides that limitation of Charter rights must be justified as reasonable in a free and democratic society.\(^{35}\)

Thus, in their initial consideration of the task of justification, the justices in *Sparrow* gave evidence of a mixed set of goals: a potentially high bar – the Constitution’s call for government to accept limits on its policies; and a lower bar – the mere need of legislation or regulation to accord with a “valid objective.” Contributing to the potential high bar view of the decision, the justices also framed a “liberal interpretive standard” – from *Nowegijick*, and “honourable dealing” – from *Guerin*, as indicators of the sort of measure needed to successfully justify a regulation,\(^{36}\) which they referred to variously as a “justificatory process,” a “justificatory scheme,” or a “justificatory standard.”\(^{37}\)

At several points, the justices addressed the nature of the balance between contending forces they saw characterizing reference to Aboriginal rights. For instance, “Parliament and the provinces have sanctioned challenges to social and economic policy objectives embodied in legislation to the extent that Aboriginal rights are affected.”\(^{38}\) More pronounced, section 35 (1) “gives a


\(^{37}\) *Sparrow*, supra p. 15 n. 21, at 1109-1111.

\(^{38}\) *Ibid*. at 1110.
measure of control over government conduct and a strong check on legislative power.”\(^{39}\) At the same time, the justices did not say here that this measure of control or any particular strong check is something Aboriginal communities hold over against the government. For instance:

While it [section 35.1] does not promise immunity from government regulation in a society that, in the twentieth century, is increasingly more complex, interdependent and sophisticated, and where exhaustible resources need protection and management, it does hold the Crown to a substantive promise.\(^{40}\)

The essence of this substantive promise is simply that “government is required to bear the burden of justifying any legislation that has some negative effect” on Aboriginal rights, a point consistent with the view established in the BNA Act, and affirmed in \textit{St. Catherine’s Milling and Lumber}, that Indian rights, such as “title,” were a mere burden on “the Crown.”\(^{41}\)

To assess this burden, they offered an explication of the justificatory test. The first step undertaken in such a test here would be to determine whether a legislative act interferes “with an existing Aboriginal right,” with an affirmative answer indicating a “\textit{prima facie} infringement.”\(^{42}\) If so, the legislation or impugned governmental regulation would require justification. Like the initial question considered in \textit{Sparrow}, on the existence of an Aboriginal right (which I am bypassing in this discussion), this question of \textit{prima facie} infringement is one that Aboriginal individuals and communities would need to broach in a legal challenge to legislation.\(^ {43}\) The

\(^{39}\) \textit{Ibid.}

\(^{40}\) \textit{Ibid.}

\(^{41}\) \textit{St. Catherine’s Milling and Lumber Co. v The Queen} [(1888) 14 App. Cas. 46 (JCPC)], at 10. Spelling here as preferred by the Privy Council.

\(^{42}\) \textit{Sparrow, supra} p. 15 n. 21, at 1111.

\(^{43}\) \textit{Ibid.} at 1112.
justices maintained that determining infringement would depend on the answers to three further questions (which the justices framed in relation to the fishing right that gave rise to Sparrow): is a legislative limitation on an activity “unreasonable”? Does it “impose undue hardship”? Finally, does the legislation “deny to the holders of the right their preferred means of exercising that right”?\textsuperscript{44}

Establishing \textit{prima facie} interference would then require turning to the question of justification proper, which would determine the "legitimate regulation of a constitutional Aboriginal right." This analysis would consider the matter of a "valid legislative objective," both in terms of Parliament's authorizing intention and an administrative department's consequent development of particular regulations.\textsuperscript{45} The justices rejected the appellate court's conclusion that the "public interest" was a sufficient objective to justify regulation, since a public interest claim would be both so vague and so broad "as to be unworkable as a test" for limiting rights. At the same time, they held that an end of conservation would be “surely uncontroversial.”\textsuperscript{46} One might wonder, given the justices' rejection of a public interest objective without any explication other than "vague" and "broad," and their subsequent affirmation of a very open-ended conservation objective, whether this example of the threshold for justification is set very high at all.\textsuperscript{47}

\textsuperscript{44} \textit{Ibid.}

\textsuperscript{45} \textit{Ibid.} at 1113.

\textsuperscript{46} \textit{Ibid.}

\textsuperscript{47} For an extended treatment of this question, see André Goldenberg, “‘Surely Uncontroversial’ – the Problems and Politics of Environmental Conservation as a Justification for the Infringement of Aboriginal Rights in Canada” (2002) \textit{Journal of Law and Equality} 1(2) 278.
Admittedly, in Sparrow the justices held that a legitimate conservation objective of setting harvesting limits still entailed giving Aboriginal food fishing "priority over the interests of other user groups."48 At the same time, however, all that meant in the end, given the order for a new trial, was that British Columbia only needed to show that it had "no underlying unconstitutional objective such as shifting more of the resource to a user group that ranks below the Musqueam."49

In addition to establishing a valid legislative objective, the justices found a second principle for determining justification: “the honour of the Crown.”50 The honour of the Crown in Sparrow and other related food fishing cases meant that, as Dickson J. (as he then was) wrote in Jack: "With respect to whatever salmon are to be caught, then priority ought to be given to the Indian fishermen."51 At the same time, the reasoning which makes this allocation a higher priority does not really say much about how it derives from the honour of the Crown, a problem I will discuss at some length in Chapter 6. After acknowledging the burden which British Columbia would face in justifying regulations affecting Aboriginal peoples, the justices indicated that the broad range of circumstances which might provoke Aboriginal challenges to regulations could also require that other considerations be included in a justificatory test. Among these, was "whether the Aboriginal group in question has been consulted with respect to the conservation measures

48 Sparrow, supra p. 15 n. 21, at 1119.

49 Ibid. at 1121.

50 Ibid. at 1078.

51 Ibid. at 1116; Jack et al v The Queen [1980] SCR at 313.
being implemented.” Although they did not elaborate on this process, they indicated that "at the least" it would entail an expectation that the community "be informed.” Thus, the need for consultation mentioned only briefly towards the end of *Sparrow* stems from a characterization of Aboriginal rights that frames them as inhering in and becoming visible through what I regard as practices of communication.

With that proviso, I would highlight two communication practices present in *Sparrow* bearing on the formation of the duty to consult. The first is its narration of the history of the emergence of Aboriginal rights. Rather than assume that the narrative of Aboriginal rights is simply preliminary to the justices’ real concerns in *Sparrow*, I think the narrative is a crucial indicator of how the decision works. Robert Cover argued some time back for the recognition of law as narrative: “The codes that relate our normative system to our social constructions of reality and to our visions of what the world might be are narrative. The very imposition of a normative force upon a state of affairs, real or imagined, is the act of creating narrative.” If this is germane to many facets of the law, it is central to the law when it adopts narrative explicitly. The story of the emergence of Aboriginal rights conditions any narrative of the Canadian state, and stands as an achievement in its national biography. Such a narrative fulfills a variety of communicative purposes, for instance engendering social solidarity between groups or forming an identity for

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52 *Sparrow, supra* p. 15 n. 21, at 1119.


55 For a key text in the study of nationalism as cultural product, see in general Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (New York: Verso, 1991). For the notion of national biography, see *ibid.* at 204.
the nation within the international order. These tasks situate the narrative for readers in a domain of public knowledge about Canada and its aspirations to be a certain kind of society, even more basically than the narrative serves to recount a history of prior judicial approaches to a purely legal question.

The second communicative practice evident in *Sparrow* is its conclusion that state infringement on Aboriginal rights must be justified. Like narrative, justification has a more-than-legal core. It also requires an audience, a group of some sort that can give testimony about whether justification has succeeded. For instance, readers of *Paradise Lost*, Milton’s epic effort to justify the ways of God to man, are by their act of reading put into the position of judging. The reader is the one who must assess the success of Milton’s effort, which is to say that justification results from a dialogical effort. The court in *Sparrow* undertook a more monological approach, grounded in background constitutional considerations of the role of the Supreme Court post-repatriation, and consciously employing, as Brian Slattery noted in an article cited within the decision itself, standard British doctrine attributing paramountcy to Acts of Parliament. Nevertheless, the issue of justification as a communicative practice at the least requires an audience to consider its success. I will consider the issue of justification more fully in Chapter 5, building upon Habermas’s discourse view of legal legitimacy.

**C) Communicative practices in *Delgamuukw* and *Haida Nation***

How did the emerging requirement for consultation unfold within subsequent Supreme Court considerations of Aboriginal rights? Although *Delgamuukw* focused primarily on other issues,  

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there Lamer C.J. also took up the "nascent jurisprudence on justification" of infringements on Aboriginal rights, and set out his own effort there and in his earlier opinion in *Gladstone* as dependent upon the *Sparrow* discussion of justification. As had Dickson C.J., Lamer C.J. regarded the task of justification as necessary because of the fiduciary relationship between the Crown and Aboriginal communities. Lamer C.J., however, created a more elaborate role for consultation as an instrument in the process of reconciliation. In *Gladstone*, he had already noted that

> Aboriginal rights are a necessary part of the reconciliation of Aboriginal societies with the broader political community of which they are part; limits placed on those rights are, where the objectives furthered by those limits are of sufficient importance to the broader community as a whole, equally a necessary part of that reconciliation.

In contrast to *Sparrow*, however, where Dickson C.J. had spoken of reconciliation between federal power and federal duty, Lamer C.J. in *Gladstone* and in *Delgamuukw* framed reconciliation as a task to perform between Aboriginal communities and the larger society. In this scheme, legitimate government objectives also include "the pursuit of economic and regional fairness," and "the recognition of the historical reliance upon, and participation in, the fishery by non-Aboriginal groups."

The consequence of this difference most important here is its framing of communication. In charting out an inter-societal scope for the task of reconciliation, *Delgamuukw* placed the duty to consult within a larger communicative framework. Consultation achieves a clearer role as a

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58 *Gladstone*, *ibid.* at para. 73.

59 *Sparrow*, *supra* p. 15 n. 21, at 1077.

60 *Gladstone*, *supra* p. 26 n. 57, at 75; *Delgamuukw*, *supra* p. 13 n. 16, at para. 161.
means of harmonizing Canada's divergent forms of society. Even while expanding the horizon within which reconciliation must succeed, however, Lamer C.J. also appeared to tighten what might be achieved through a consultation process aimed at reconciliation and grounded in a fiduciary relationship. For instance, in regard to the question of harvesting limits animating the conservation concerns behind Ronald Sparrow's prosecution, Lamer C.J. concluded that fiduciary duty did not necessarily mean that Aboriginal fishing rights should receive a priority over non-Aboriginal fishing interests. He introduced a distinction, produced originally in *Gladstone*, between "internally-limited" rights (a harvesting limit determined by a community or individual need for food) and "externally-limited" (a harvesting limit only determined by the market for commercial fish) to show that priority did not always go to those with established Aboriginal rights.61

Nevertheless, Lamer C.J. first referred to a "duty to consult" derived from the Crown's fiduciary relationship with Aboriginal communities. He offered the following breakdown of a range of procedures which might relate to the variety of rights challenging government regulation and policy:

There is always a duty of consultation. Whether the Aboriginal group has been consulted is relevant to determining whether the infringement of Aboriginal title is justified, in the same way that the Crown’s failure to consult an Aboriginal group with respect to the terms by which reserve land is leased may breach its fiduciary duty at common law: *Guerin*. The nature and scope of the duty of consultation will vary with the circumstances. In occasional cases, when the breach is less serious or relatively minor, it will be no more than a duty to discuss important decisions that will be taken with respect to lands held pursuant to Aboriginal title. Of course, even in these rare cases when the minimum acceptable standard is consultation, this consultation must be in good faith, and with the intention of substantially addressing the concerns of the Aboriginal peoples whose lands are at issue. In most cases, it will be significantly deeper than mere consultation. Some cases may even require the full consent of an Aboriginal nation,

61 *Gladstone*, *supra* p. 26 n. 57, at para. 43.
particularly when provinces enact hunting and fishing regulations in relation to Aboriginal lands.\textsuperscript{62}

This breakdown of different levels of consultation undertakes more thoroughly than did \textit{Sparrow} to provide the duty to consult with some procedural specificity. It also grounds the duty by the same acknowledgement of the “fiduciary” relationship animating \textit{Sparrow}. However, the specificity it promotes through distinguishing different levels of consultation is still shrouded in ambiguity, some of which may well stem from the lack of substance given the “fiduciary” concept, glossed as involving “good faith” and the willingness to “substantially address” Aboriginal concerns. A reader is left with some confusion about the procedures being recommended as well as the weight of the norms the procedures might embody.

Ambiguity obscures other aspects of \textit{Delgamuukw} as well. For instance, consider the tension surrounding Lamer C.J.’s statement of the most serious form of consultation. “Some cases may even require the full consent of an Aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to Aboriginal lands.”\textsuperscript{63} How can “full consent” be especially important in relation to provincial regulations of the sort considered in \textit{Sparrow}, when as mentioned above, the chief justice also indicated that giving Aboriginal harvesting a priority over other interests was not really what the fiduciary relationship required? Or, even more baldly, how does his apparently strong acknowledgment of the need for “full consent” square with his conclusions about justification? Justification, as in \textit{Sparrow}, is a task undertaken out of a fiduciary duty, and specifically out of the goal of achieving “reconciliation of the prior

\textsuperscript{62} \textit{Delgamuukw}, supra p. 13 n. 16, at para. 168.

\textsuperscript{63} \textit{Ibid}. 
occupation of North America by aboriginal peoples with the assertion of Crown sovereignty.  

As the chief justice elaborated on the range of justifiable projects that could infringe upon the right of Aboriginal title, it is so far-reaching as to include most conceivable development projects:

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.

Notably, the passage is cited approvingly in its entirety, or gently edited, in the concurring opinions of La Forest J. and L’Heureux-Dubé J., and by McLachlin J.

One way to characterize this conjoining of opposites: a utilitarian calculus of benefit to the larger society, and a deontological-sounding reference to Aboriginal rights, would be to say that in Delgamuukw ambiguity itself threatens to become a communicative practice. Although for law ambiguity requires weeding out, in other communicative forms it serves important functions that cannot necessarily be overcome. Decades ago the noted literary critic William Empson characterized the varieties of ambiguity relied upon in poetry. In the process, he demonstrated that in one form, the embrace of inherent contradictions, ambiguity serves to “show a fundamental division in the writer’s mind.” By “fundamental,” he meant personal and psychological divisions in aspiration, the sense of obligation, or ultimate commitments

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64 Ibid. at para. 165.
65 Ibid.
66 Ibid. at para. 14.
68 Empson, Seven Types of Ambiguity (Edinburgh: T and A Constable, 1961 [1930]) at 192.
(discussing theologically minded poetry of 17th century England). Part of what makes this form of ambiguity unresolvable, for Empson, is the context in which it occurs.

An ambiguity . . . is not satisfying in itself, nor is it, considered as a device on its own, a thing to be attempted; it must in each case arise from, and be justified by, the peculiar requirements of the situation. On the other hand, it is a thing which the more interesting and valuable situations are more likely to justify.\textsuperscript{69}

Although law is not poetry, law requires an equally imaginative effort, though a collective imaginary effort, in creating a shared, public order out of the potential chaos of historical experience. As scholars such as Benedict Anderson, Robert Cover and Charles Taylor all acknowledge in their different ways, law serves an inherently unwieldy task. It provides certainty, but only does so within a given historical and political context; and in which the range of individual and collective choices that appear as unquestionably rational are actually only the choices available within a certain “social imaginary.”\textsuperscript{70} The social imaginary runs so deep that its self-evidence is rarely questionable, or even identifiable. Accordingly, if this is fair, then my linking Lamer C.J.’s conflicting visions to what may be unresolvable from within a certain set of

\textsuperscript{69} Ibid. at 235.

convictions about Canada’s foundations as a legal order – grounded in and sustaining the future of a settler colonial project – may be less disrespectful than it sounds.\(^{71}\)

Subsequent to \textit{Delgamuukw}, the most influential case concerning the duty to consult is \textit{Haida Nation}, which, as of this writing, has been cited 278 times.\(^{72}\) In \textit{Haida Nation}, the court considered questions arising out of Weyerhauser Company Limited’s efforts to obtain a Tree Farm License, transferred from MacMillan Bloedel Ltd. by the B.C. Minister of Natural Resources in 1999. The Haida Nation challenged this transfer affecting land to which they claimed unceded Aboriginal title, contending that they had not consented to its transfer.\(^{73}\) Given the unresolved question of their title, the government maintained it had no duty to consult with them about the transfer of the license, since \textit{Sparrow} had tied the duty to consult to questions of recognized Aboriginal rights. As McLachlin C.J. framed the key question: “is the government required to consult with them [the Haida] about decisions to harvest the forests and to accommodate their concerns about what if any forest in Block 6 should be harvested before they have proven their title to land and their Aboriginal rights?”\(^{74}\) McLachlin C.J. rejected the government’s position that it had no such obligations to those without clearly established rights.\(^{75}\) In the process of holding that British Columbia did possess a duty to consult even

\(^{71}\) See, among many now, Lorenzo Veracini, \textit{supra} p. 8 n. 13.

\(^{72}\) \textit{Haida Nation, supra} p. 1 n. 2.

\(^{73}\) \textit{Ibid.} at paras. 4 and 6.

\(^{74}\) \textit{Ibid.} at para. 6.

\(^{75}\) In addition she considered two secondary questions, which I do not address here. The first was whether the province also had a duty to consult with the Haida nation, which she affirmed. The second was whether, as the Haida Nation had argued, Weyerhauser also had a duty to consult – which she denied.
regarding unestablished claims to Aboriginal rights, she developed what some have maintained is a sturdier version of the duty than had emerged from Delgamuukw.\textsuperscript{76}

As McLachlin C.J. conceived it in \textit{Haida Nation}, the duty to consult arises out of the “honour of the Crown.” Dickson C.J. and Lamer C.J. had both already established this; but in Lamer’s approach in particular, the honour of the Crown and the social goal of reconciling Aboriginal and non-aboriginal Canadians seems to take a back seat to the expansion of non-aboriginal interests in the land.\textsuperscript{77} A simple content analysis indicates that McLachlin C.J. used the term “honour” far more extensively than did either Dickson C.J. or Lamer C.J. An appropriate question then is in what ways does her opinion develop the communicative understanding of consultation beyond that in \textit{Sparrow} and \textit{Delgamuukw}?

In both of those opinions, the court employed the honour of the Crown as a grounding principle for the need to consult, and both highlighted the Crown’s fiduciary relationship with Aboriginal communities to give specificity to the notion of honour. In \textit{Sparrow}, for instance, the justices explicated every use of the term “honour” by following it with a statement of fiduciary duty. As the justices put it: “That is, the honour of the Crown is at stake in dealings with aboriginal peoples. The special trust relationship and the responsibility of the government vis-à-vis

\textsuperscript{76} For instance, Darlene Johnston in “Lo, How \textit{Sparrow} Has Fallen: A Retrospective of the Supreme Court of Canada’s Section 35 Jurisprudence” in Julia Bass \textit{et al} (eds.), \textit{Access to Justice for a New Century: The Way Forward} (Toronto: Law Society of Upper Canada, 2005) at 197. See also, Lisa Dufraimont “From Regulation to Recolonization: Justifiable Infringement of Aboriginal Rights at the Supreme Court of Canada” (2000) \textit{University of Toronto Faculty of Law Review} 58(1) 1.

\textsuperscript{77} \textit{Delgamuukw}, supra p. 13 n. 16, at para. 165.
aboriginals must be the first consideration in determining” the justification of legislation.\textsuperscript{78} In *Haida Nation*, however, McLachlin C.J. stressed that the issue before her concerned the Haida Nation’s claimed but still not established aboriginal right of title to the area of T.F.L. 39. This meant that the concept of fiduciary duty was of no help in determining the implications of the honour of the Crown here. In *Weywakum*, Binnie J. had already expressed frustration with the fact that “Canadian courts have experienced a flood of ‘fiduciary duty’ claims by Indian bands across a whole spectrum of possible complaints.”\textsuperscript{79} There he regarded the appellants as having crossed a rhetorical line.

But there are limits. The appellants seemed at times to invoke the “fiduciary duty” as a source of plenary Crown liability covering all aspects of the Crown-Indian band relationship. This overshoots the mark. The fiduciary duty imposed on the Crown does not exist at large but in relation to specific Indian interests.\textsuperscript{80}

Consequently, in *Haida Nation* she framed the inappropriateness of a fiduciary obligation to the question before her.

Here, Aboriginal rights and title have been asserted but have not been defined or proven. The Aboriginal interest in question is insufficiently specific for the honour of the Crown to mandate that the Crown act in the Aboriginal group’s best interest, as a fiduciary, in exercising discretionary control over the subject of the right or title.\textsuperscript{81}

However, as discussed above, while the Crown’s fiduciary obligations and its duty to consult and accommodate share roots in the principle that the Crown’s honour is engaged in its relationship with Aboriginal peoples, the duty to consult is distinct from the fiduciary duty that is owed in relation to particular cognizable Aboriginal interests.\textsuperscript{82}

\textsuperscript{78} *Sparrow, supra* p. 15 n. 21, at 1079.

\textsuperscript{79} *Wewaykum Indian Band v Canada* [2002] 4 SCR 245, at para. 82.

\textsuperscript{80} *Ibid.* at para. 81.

\textsuperscript{81} *Haida Nation, supra* p. 1 n. 2, at para. 18.

\textsuperscript{82} *Ibid.* at para. 54.
What does the separation of a duty to consult from the fiduciary obligation indicate about the nature of the duty to consult, or its framing as a process, and what does it say about the meaning of “the honour of the Crown”? Such a framing, she noted early on, was the goal of her writing in *Haida Nation*:

> Our task is the modest one of establishing a general framework for the duty to consult and accommodate, where indicated, before Aboriginal title or rights claims have been decided. As this framework is applied, courts, in the age-old tradition of the common law, will be called on to fill in the details of the duty to consult and accommodate.  

The general framework possesses three features, each of which she explicitly grounded in the notion of the honour of the Crown. 1) The first feature, the spur to consult, the source of the duty, is the “honour of the Crown.” She did seem to aim here for a stronger reading of honour than Canada had argued for, in which obligations did not exist pre-treaty.

2) The second feature of her framework is the caveat that consultation does not predetermine an outcome. It “must be meaningful.” Nevertheless, “There is no duty to reach agreement.” The “honour of the Crown” seems to underlie this in two ways, stemming from how the Chief Justice phrased the lack of a determinate end. One version appears in relation to the degree of accommodation that might emerge from a consultation process. “Good faith consultation may in turn lead to an obligation to accommodate Haida concerns in the harvesting of timber, although what accommodation if any may be required cannot at this time be ascertained.” This is to say

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that an end of accommodation may emerge from consultation, and that such accommodation would be an obligation, even if what it involved was not known in advance.

Another way of articulating the outcome of consultation appears further on in the opinion.

The accommodation that may result from pre-proof consultation is just this – seeking compromise in an attempt to harmonize conflicting interests and move further down the path of reconciliation. A commitment to the process does not require a duty to agree. But it does require good faith efforts to understand each other’s concerns and move to address them.87

The difference between the two is that the second statement does not say, as the first did, that accommodation may involve an obligation to something unknown at the time of undertaking the obligation (which is rather like promising to do someone a favor before knowing what the favor involves). The first statement about obligation could easily accord with a strong sense, or even chivalrous sense, of honour. The second statement, instead, is more of a hedging of bets. An obligation to accommodate, but by accommodate mean “compromise,” would yield a softer obligation. This is because, for all the apparent synonymous functioning of “accommodate” and “compromise,” the focus of the terms shifts from an achievement to an abandonment. A quick look at the Oxford English Dictionary demonstrates that “accommodation” involves doing something for someone (providing, fitting, adjusting, satisfying, facilitating—all of which are meanings that the chief justice leaves out in her own reference to the pocket OED.)88

Compromise, in contrast, concerns loss (risking, endangering, exposing, imperiling). The one would forge an obligation to provide, the other an obligation to abandon.

87 Ibid. at para. 49.

88 Ibid.
Consider how McLachlin C.J. answered the question stemming from Canada’s side of the *Haida Nation* issue: “Is the Crown, under the aegis of its asserted sovereignty, entitled to use the resources at issue as it chooses, pending proof and resolution of the Aboriginal claim? Or must it adjust its conduct to reflect the as yet unresolved rights claimed by the Aboriginal claimants?”89 As she put it:

The answer, once again, lies in the honour of the Crown. The Crown, acting honourably, cannot cavalierly run roughshod over Aboriginal interests where claims affecting these interests are being seriously pursued in the process of treaty negotiation and proof. It must respect these potential, but yet unproven, interests. The Crown is not rendered impotent. It may continue to manage the resource in question pending claims resolution. But, depending on the circumstances, discussed more fully below, the honour of the Crown may require it to consult with and reasonably accommodate Aboriginal interests pending resolution of the claim. To unilaterally exploit a claimed resource during the process of proving and resolving the Aboriginal claim to that resource, may be to deprive the Aboriginal claimants of some or all of the benefit of the resource. That is not honourable.90

From this, the end of consultation grounded in the “honour of the Crown” seems to indicate a vigorous notion of the Canada’s obligation. At the same time, the strength of such a potential obligation softens even as it appears in juxtaposition to the potency of “the Crown.” Hence the unilateral exploitation of a “claimed resource” is only potentially questionable. It “may” “deprive the Aboriginal claimants,” which yields a softened moral force in the judgment that such exploitation is “not honourable.” The chief justice did not say that exploitation of a claimed resource prior to resolution of a claim is not honourable. Instead, honour here would have to be determined by an empirical assessment of the infringement to any benefits from the resource that the claimants might be receiving. Generally, an empirical measurement of a moral obligation is bound to yield a soft version of the obligation.


90 *Ibid.* at para. 27.
McLachlin C.J.’s soft view of the “honour of the Crown” seems already indicated in Weywakum, where Binnie J. was concerned with the problem of the fiduciary relationship. There he referred to the Crown’s multiple hats.

When exercising ordinary government powers in matters involving disputes between Indians and non-Indians, the Crown was (and is) obliged to have regard to the interest of all affected parties, not just the Indian interest. The Crown can be no ordinary fiduciary; it wears many hats and represents many interests, some of which cannot help but be conflicting.  

This same understanding of the Crown as representing many conflicting interests, and therefore wearing “many hats,” may also account for her concurrence with Lamer C.J. in Delgamuuk, mentioned above, on the extent of justifiable infringements. However, if the Crown wears many hats, some of them conflicting, and Aboriginal rights are only one of those interests, it is hard to see how the honour of the Crown entails any particular obligation to Aboriginal people. One could as easily say that the honour of the Crown undergirds all the hats it wears.

3) The third aspect of her framework related to the honour of the Crown is the timing of a consultation process. In rejection of the government’s argument about the impracticality of consulting prior to gaining clarity on the issue of title, she concluded that legal authority does not support making consultation subsequent to the “final determination of the scope and content of the right.” More elaborately, she also framed this question of timing as a matter of honour:

The jurisprudence of this Court supports the view that the duty to consult and accommodate is part of a process of fair dealing and reconciliation that begins with the

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91 Wewaykum, supra p. 33 n. 79, at para. 96.
92 Haida Nation, supra p. 1 n. 2, at para. 31.
assertion of sovereignty and continues beyond formal claims resolution. Reconciliation is not a final legal remedy in the usual sense. Rather, it is a process flowing from rights guaranteed by s. 35(1) of the Constitution Act, 1982. This process of reconciliation flows from the Crown’s duty of honourable dealing toward Aboriginal peoples, which arises in turn from the Crown’s assertion of sovereignty over Aboriginal people, and de facto control of land and resources that were formerly in the control of that people.93

Here the chief justice moved beyond her practical concern: that consultation might only occur after the damage to resources covered by potential Aboriginal rights had been done. She connected in an interesting way the temporal question of when the duty to consult arises, with a longer question, more tied to the narrative concern in Sparrow, which I discussed above. The duty to consult, and the task of reconciliation, are both situated in a “flow.” The flow she referred to seems to be more than the flow of logical entailment. Rather, she was speaking of a temporal flow. The duty and the process of reconciliation are tied to a historical process, one that “begins with the assertion of sovereignty and continues.” This process is evidently coterminous with that of Canadian history itself. With its intertwining of two forms of “process:” that of consultation, and that of reconciliation; its two sources of “flow:” rights and duty; and its two genetic assertions of Crown “sovereignty,” it makes a complicated picture – combining metaphor, moral-sounding principles, Realpolitik and a condensed historical overview.

Skeptical commentators have accused the court of “conjuring” in giving shape to the honour of the Crown, language that may have been triggered by McLachlin C.J.’s own assurance that her effort in Haida Nation was “not a mere incantation, but rather a core precept that finds its application in concrete practices.”94 Mariana Valverde draws on Ernst Kantorowicz’s study of

93 Ibid. at para. 32.

94 Ibid. at para. 16. John Borrows, prior to Haida Nation, had already used the term “alchemy” to characterize the construction of sovereignty in Delgamuukw, a term stronger in import than my own weak
medieval political theology to show that the ideas of Crown, honour and sovereignty operative in Canadian law still possess their metaphysical stature. Passages in *Haida Nation* affirming the honour of the Crown may seem to give credence to these suspicions. Nevertheless, I argue (more in hopes of sharpening these suspicions than in opposition to them), that the difficulties here stem from the workings of the honour of the Crown as a communicative practice. In *Haida Nation* the Crown’s honour is the supporting reason for nearly every declaration made, every suggestion developed, every distinction drawn between one case and another. And yet, its meaning is never clarified, except in circular references to itself, and a history of precedents that do no more to explain the concept. As a communication practice, I think it could be more charitably classified than as an “incantation,” which really requires the reader to know something about the worldview of the one offering the incantation. More simply, I think we can just conclude that the Chief Justice presumed that its meaning and functions were obvious.

Thus, despite her efforts to give shape to the “honour of the Crown” by linking it to the task of communication, McLachlin C.J. provided no serious explanation of what honour might mean as a legally significant concept, nor how the “concrete practices” where it applies are made distinct by attributing them to honour. For instance, she declared that honourable negotiations, such as treaty negotiations, “serve to reconcile pre-existing Aboriginal sovereignty with assumed Crown sovereignty.” As a communicative practice, one might think that an honour-based negotiation

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96 *Haida Nation*, *supra* p. 1 n. 2, at para. 20.
serving to reconcile such separate notions as “pre-existing Aboriginal sovereignty” and “assumed Crown sovereignty,” would have to make an open theme out of the object of negotiation: “sovereignty.” That this is not what the chief justice was actually advocating underscores the presumed rather than simply “assumed” form of sovereignty, and which is therefore in no need of demonstration. A few passages later, she referred to the “reality” of Crown sovereignty. That sovereignty can transform from being merely assumed to being real without some other intervention than the claims of honour may, as Borrows thinks, be alchemical.97 It also seems to simply involve the communicative practice of presumed obviousness, in which subjects apparently open for discussion are not open for discussion. I will address this further in Chapter 6.

**D) Communicative practices in post-Haida Nation jurisprudence**

In the years since *Haida Nation*, lower courts have considered numerous further challenges arising out of McLachlin C.J.’s articulation of the duty to consult. CanLII lists, as of this writing, over 550 cases referring to the duty in one form or another. As well, provinces and a range of federal departments have elaborated protocols attempting to spell out consultation policies for government employees, and guidelines for business practices.98 Statutes, such as Ontario’s *Far North Act, 2010*, or the recent revision of its *Mining Act*, now require governments, and in some situations third parties, to engage in consultation with indigenous communities facing impacts from development policies. The *Far North Act*, for instance, invites First Nations to contribute to

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97 Borrows, *supra* p. 38 n. 94.

the formation of “community based land use plans” in order to participate in decision-making processes.\(^9\) The *Mining Amendment Act, 2009*, at 140(1)(c), specifies that:

Aboriginal consultation has been conducted in accordance with the regulations, which may provide that the Director, in considering whether he or she is satisfied that appropriate consultation has been carried out, may take into account any arrangements that have been made with Aboriginal communities potentially affected by the advanced exploration.\(^10\)

The Supreme Court has also considered the duty to consult on several further occasions, refining the doctrine primarily by assessing the range of its application. The court has found that the duty applies to government actions infringing both historic and modern treaty rights. In the case of modern treaty conflicts of interpretation, the means of any required consultation might be more reflective of administrative reviews concerned with procedural justice. In *Little Salmon/Carmacks*, the first case dealing with consultation regarding modern treaty rights, recognized in the Yukon Final Agreement, however, Binnie J. rejected what he characterized as Yukon’s “tight-lipped approach” to consultation.\(^10\) The territory had maintained that no duty to consult existed outside the specific terms of the Yukon Final Agreement, which it claimed amounted to a “complete code.”\(^10\) Binnie J. found instead, that while the duty to consult grounded in the honour of the Crown (and not simply within the YFA itself) did apply to the

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102 *Little Salmon/Carmacks*, *ibid*. at para. 4.
approval process, the standard of consultation was low. Additionally, in *Rio Tinto* the court found that the duty is forward looking; it does not apply to historic infringements, or speculative impacts on rights. McLachlin C.J. also found that the duty to consult did not easily govern the work of tribunals or commissions, such as the BC Utilities Commission – which the Carrier Sekani challenge had targeted for not undertaking consultation regarding the renewal of Rio Tinto/Alcan’s energy purchase agreement on the Nechako River. She noted that

> Consultation itself is not a question of law; it is a distinct and often complex constitutional process and, in certain circumstances, a right involving facts, law, policy, and compromise. The tribunal seeking to engage in consultation itself must therefore possess remedial powers necessary to do what it is asked to do in connection with the consultation.

These remedial powers could only stem from the legislation creating a particular tribunal in the first place. She found no evidence of these remedial powers in the legislative history authorizing the utilities commission, and therefore held that it could not be expected to have undertaken the consultation process pleaded by the Carrier Sekani council.

In *Moses*, another modern treaty case – dealing with the James Bay and Northern Quebec Agreement (1975) – the court again held that the duty to consult applied to modern treaty interpretation, although the intense disagreement between Binnie J. and LeBel J. focused more on division of powers issues, as in *St. Catharines Milling and Lumber* (discussed in Chapters 5

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104 *Rio Tinto*, supra p. 6 n. 11.

and 6 – largely ignoring the Cree argument for participation in decision-making grounded in the duty to consult jurisprudence.106

Though shaping the scope of the duty to consult, none of these more recent cases expand upon the communicative practices that McLachlin C.J. had previously employed in *Haida Nation*. However, in the court’s 2014 decision on the long-running Tsilhqot’in Nation title case, McLachlin C.J. did reconfigure her treatment of the communicative practices entailed by the duty to consult.107 There, in a landmark ruling declaring for the first time in Canadian history that a particular people does clearly possess title to at least a portion – five percent – of their traditional lands (for which the province had granted Carrier Lumber Ltd. a commercial timber license in 1983),108 the court seemed to be offering a strong affirmation of the existence of such a fundamental Aboriginal right. McLachlin C.J. also seemed to view her efforts there as providing indigenous communities with some teeth in future conflicts over lands development. As she put it in an aside:

> I add this. Governments and individuals proposing to use or exploit land, whether before or after a declaration of Aboriginal title, can avoid a charge of infringement or failure to adequately consult by obtaining the consent of the interested Aboriginal group.109

However, what the Tsilhqot’in right of Aboriginal title amounts to is actually quite circumscribed by the communicative practices which the chief justice deployed in elaborating on the duty to consult. Throughout *Tsilhqot’in Nation* the theme of “consent” appears in relation to

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107 *Tsilhqot’in Nation v British Columbia*, 2014 SCC 44.


Tsilhqot’in Aboriginal title. In each instance, however, the likelihood of justifying settler society development projects through a procedure of consultation and a consideration of justificatory reasons looms larger than the likelihood that failure to achieve consent might quash a project. For instance, in explaining the range of remedies that could be available to cope with breach of Aboriginal title, McLachlin C.J. concludes:

Finally, once title is established, the Crown cannot proceed with development of title land not consented to by the title-holding group unless it has discharged its duty to consult and the development is justified pursuant to s. 35 of the Constitution Act, 1982.¹¹⁰

Thus the lack of consent is only a preliminary to a process of justification, which the decision focuses on developing upon the foundation of Sparrow.

In Sparrow and Delgamuukw, the nascent duty to consult appeared as one component of the justification of government infringement on s. 35(1) rights. Dickson C.J. conceived the task of justification to be a necessary step in the process of reconciliation, as I noted above, between federal power and federal duty. As he put the task of justification:

In other words, federal power must be reconciled with federal duty and the best way to achieve that reconciliation is to demand the justification of any government regulation that infringes upon or denies aboriginal rights.¹¹¹

He considered consultation itself almost as an afterthought.

Within the analysis of justification, there are further questions to be addressed, depending on the circumstances of the inquiry. These include the questions of whether there has been as little infringement as possible in order to effect the desired result; whether, in a situation of expropriation, fair compensation is available; and, whether the aboriginal group in question has been consulted with respect to the conservation measures being implemented.¹¹²

¹¹⁰ Ibid. at para. 91.

¹¹¹ Sparrow, supra p. 15 n. 21, at 1109.

¹¹² Ibid. at 1119.
As I noted above, in *Delgamuukw* Lamer C.J. expanded on the task of reconciliation – envisioning it as a task to be undertaken between indigenous and settler communities. He referred to his earlier framing of this reconciliation in *Gladstone*:

Aboriginal rights are a necessary part of the reconciliation of aboriginal societies with the broader political community of which they are part; limits placed on those rights are, where the objectives furthered by those limits are of sufficient importance to the broader community as a whole, equally a necessary part of that reconciliation.\(^{113}\)

For Lamer, to reconcile indigenous and settler communities required finding a suitable way of defining what Aboriginal rights actually were. He quoted his earlier statement in *Van der Peet*:

The definition of an aboriginal right must, if it is to truly reconcile the prior occupation of Canadian territory with the assertion of Crown sovereignty over that territory, take into account the aboriginal perspective, yet do so in terms which are cognizable to the non-aboriginal legal system.\(^{114}\)

Including the “aboriginal perspective” was necessary, because the court has consistently regarded Aboriginal rights as communicative achievements, as I have tried to show. In her elaboration of the practice of consultation in *Haida Nation*, however, McLachlin C.J. did not mention “the aboriginal perspective” at all, though she continued to highlight the importance of communicative practices in order to establish the core of the duty to consult. Nor did she mention it in either of the two additional post-*Haida Nation* decisions she authored.\(^{115}\) She could have expanded on this in those arenas, since it would have explained how consultation and justification fit into the court’s enshrining of reconciliation into a national task. It would also

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\(^{113}\) *Delgamuukw*, *supra* p. 13 n. 16, at para. 161; *Gladstone*, *supra* p. 26 n. 57, at para. 73.

\(^{114}\) *Delgamuukw* *supra* p. 13 n. 16, at para. 81; *Van der Peet*, *supra* p. 2 n. 3, at para. 49.

\(^{115}\) Those decisions are *Rio Tinto* and *R. v Kapp* (2008 SCC 41). The only SCC expression of interest in “the aboriginal perspective” in the post-*Haida Nation* jurisprudence comes in Bastarache J.’s concurrence in result only in *Kapp, ibid.* at 110. There, in his argument for employing section 25 of the *Charter* in the case, he maintained that “where there is uncertainty, every effort should be made to give priority to the aboriginal perspective.”
have made the language of reconciliation more understandable.\footnote{116} In *Tsilhqot’in Nation*, nevertheless, she did acknowledge at one point (only) her agreement “with the Court of Appeal that the compelling and substantial objective of the government must be considered from the Aboriginal perspective as well as from the perspective of the broader public.”\footnote{117}

In spite of this admission, or perhaps in keeping with the jurisprudence’s general care to ensure that “the perspective of the broader public” receive its due, *Tsilhqot’in Nation* presents the duty to consult and the task of justifying infringements on established Aboriginal title as less tied to the communicative practice of invoking the honour of the Crown, which is barely mentioned in McLachlin C.J.’s decision. Nor is there any statement of how the court ought to engage in considering “the Aboriginal perspective,” which might be thought of as a substantial enough question for the court to approach. Instead, the decision finds more significance in the *Sparrow* casting of reconciliation as a matter between government power and duty:

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*.\footnote{118}

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\footnote{116}{The court’s reflections on reconciliation remain beyond my scope here, although for an argument that SCC statements on reconciliation are evidence of a “new paradigm” emerging, one reflecting an abandonment of the older understanding of sovereignty, see Felix Hoehn *Reconciling Sovereignties: Aboriginal Nations and Canada* (Saskatoon: Native Law Centre, 2012). Also, for more equivocal views of reconciliation language from two indigenous legal theorists (from among many), see Dale Turner “On the Idea of Reconciliation in Contemporary Aboriginal Politics” in Jennifer Henderson and Pauline Wakeham (eds.) *Reconciling Canada: Critical Perspectives on the Culture of Redress* (Toronto: University of Toronto Press, 2013), at 100-114; and James Sákéj Henderson “Incomprehensible Canada,” *ibid.* at 115-26.}

\footnote{117}{*Tsilhqot’in Nation, supra* p. 43 n. 107, at para. 81.}

\footnote{118}{*Ibid.* at para. 77.}
What stands out strikingly in the decision is the language of proportionality, and of the public good. The duty to consult is made a procedural preliminary to the substantive goals of development desired by the larger public. The language of proportionality suggests that the task of justifying can be approached in a simple utilitarian manner. Although the chief justice took steps to indicate that the non-indigenous public’s developmental goals have to be considered in light of fiduciary duties (for rights proven, that is), she also noted with Delgamuukw that fiduciary duties “do not demand that aboriginal rights always be given priority.”119 She laid out the task of justification in terms that could have been cast in a communicative manner, and shaped to engage the “Aboriginal perspective,” but seemed instead to point back to the Sparrow court’s narrower casting of the issue of justification:

[T]he Crown’s fiduciary duty infuses an obligation of proportionality into the justification process. Implicit in the Crown’s fiduciary duty to the Aboriginal group is the requirement that the incursion is necessary to achieve the government’s goal (rational connection); that the government go no further than necessary to achieve it (minimal impairment); and that the benefits that may be expected to flow from that goal are not outweighed by adverse effects on the Aboriginal interest (proportionality of impact).120

A communicative cast to this obligation would have made it easier to see how proportionality and “Aboriginal perspective” could cohere together, and how to comprehend a process that can “protect Aboriginal and treaty rights while also allowing the reconciliation of Aboriginal interests with those of the broader society.”121

To recap, my contention here is that the duty to consult entails a range of communicative practices, which I have illustrated through this discussion of the crucial cases in which the

119 Delgamuukw, supra p. 13 n. 16, at para. 162.

120 Tsilhqot’in Nation, supra p. 43 n. 107, at para. 87. At the same time, she found this almost mathematical focus on proportion and weight to be at the heart of both Delgamuukw and Haida Nation.

121 Ibid. at para. 139.
doctrine has developed. I have tried to show that these practices are slippery, perhaps counter-intuitive, and in need of further reflection if the doctrine is really to serve as the foundation for ongoing relations between indigenous and settler communities in Canada. Notions such as the honour of the Crown, tasks such as justification, have an inherently communicative core, and yet as it stands, the court’s efforts to develop the doctrine do not sufficiently address how this communicative core applies to Canada’s legal relations with First Nations and other Aboriginal communities.
Chapter 2

An Overview of Jürgen Habermas on Law, Discourse and Legitimacy

A. Introduction

In this chapter I provide an overview of the themes in Habermas’s work that I will apply in my analysis of the duty to consult. I attend to these themes in some detail chiefly because I think the level of contention regarding Habermas’s discourse theory means that readers can often have a distinct impression of the value, or the disvalue, of his work even without having much exposure to it. As well, given the depths of disagreement surrounding his positions on law, communication, and other features of his theory, a reader would need to know how I make sense out of his dense web of prose in order to evaluate my claims in what follows about the duty to consult.

Further, given that it might easily seem presumptuous on my part to employ Habermas in discussing legal issues affecting indigenous peoples, I think it is necessary to attend to his own intellectual context. I don’t think a close reading of his work can sustain the conclusion that he is simply a ‘universal’ intellectual, assuming his ability to speak for all because of the solidity of his theoretical grasp of immutable truths. Instead, I think that the specific legal/political context that has shaped much of his work over several decades is crucial to interpreting his normative project, that of providing a critical understanding
of the legitimacy of legal order.¹ That context is dramatically different from those of First
Nations members, and member of other indigenous communities, as they struggle with
the continued implications for their lives of the Canadian state, its legal regime, and a
settler public consensus that views them as marginal to the past, present and future of
Canada.

However, Habermas’s attempt to forge a strong communicative basis for legal legitimacy
in post-National Socialist Germany, also seems to me to be relevant to the legal
challenges facing indigenous communities as they confront the Canadian state by means
of the duty to consult. In both contexts, the relationship between legal legitimacy and
communication has been profoundly influenced by legal traditions that have minimized
the communicative roles of marginalized collectivities: cultural/ethnic groups in
Germany, and small-scale nations with traditional capabilities of legal and political self-
determination in Canada. Turning to Habermas’s views on law, communication and

¹ For the centrality of law in his social theory, and particularly his interest in finding a way past
the positivist-natural law debates that figured in post-war Germany, see Matthew G. Specter
_Habermas: an Intellectual Biography_ (New York: Cambridge University Press, 2010) at 10. As
well, see his autobiographical discussions in _Autonomy and Solidarity: Interviews with Jürgen
Habermas_ (London: Verso, 1985, hereinafter AS) at 77-78, and in _Between Naturalism and
framing of the post-war German context, in which the “45er” generation grew up in a public
world dominated by American educational programs, focused on instilling democratic values
through learning the art of public discussion, a program with foundations in the work of John
Dewey and other American pragmatists (and who would become so crucial to Habermas’s views
on communication), see Nina Verheyen, _Diskussionslust: Eine Kulturgeschichte des “besseren
Arguments” in West Deutschland_ (Göttingen: Vandenhoeck und Ruprecht, 2010). See also Dirk
Moses _German Intellectuals and the Nazi Past_ (Cambridge: Cambridge University Press, 2007)
for Habermas’s active and controversial role in addressing public memory regarding the Nazi
years. Charles Turner, in “Jürgen Habermas: European or German?” _European Journal of
Political Theory_ 3(3) 293, addresses the posture of universalism found in German intellectual
traditions. My discussion of legal legitimacy later in this chapter will turn to this historical
context, which also figures in the approach to legitimacy undertaken in the work of English
theorist H.L.A. Hart.
legitimacy seems useful to me in analyzing the duty to consult because the duty is grounded in communicative practices that raise troublesome questions about legal legitimacy of the intersocietal context in which Canada and indigenous nations interact with each other. In Chapter 3 I will address some of the likely questions readers might have about my use of Habermas in what follows. Here, I will simply offer my reading of the themes relevant to this project.

**B. Habermas’s key assumptions regarding communication and law**

A tangible picture of the concerns animating Habermas is most evident in *The Structural Transformation of the Public Sphere*. In that early work, Habermas shows how a democratic perspective emerged in the post-Reformation era, through such means as the critical discussion of norms in Europe’s salons and coffee houses, unfettered by the rules of Court or the prying eyes and ears of the Church. On his account, democratic institutions have gained both their effectiveness and their legitimacy out of this historical lineage of non-coercive, truth-seeking and solidarity-promoting communication. By the same token, they have become dysfunctional to the extent that forums, channels or opportunities for such critical, truth-seeking communication have shriveled under the influence of strategic forms of power. His subsequent publications have largely aimed to demonstrate or defend the utility of this sort of view, that is, one focused on what he has called “communicative action” or “discourse theory,” and to chart how it makes possible

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an alignment of other key empirical and normative intellectual projects, such as social
theory’s charting of the emergence of modernity.³

Charting the functioning, and the consequent implications of, the human ability to
communicate is for Habermas both an empirical and a normative effort, and has required
his immersion in such fields as linguistics, developmental psychology, anthropology,
sociology and law--to mention a few of his conversation partners--as well as in
philosophy. For Habermas, communication is the engine of social evolution, the source
of valuation and the spur of critical reflection. However, where linguistics or analytic
philosophy primarily invest themselves in the grammatical and semantic functioning of
sentences as sufficient to understand the heart of language-based communication,
Habermas has elaborated upon the speech-acts theories of J.L Austin and John Searle to
give priority to the relation-forming function of communication, that is “action oriented
to reaching understanding.”⁴ As he put it in the mid-1970s: “The goal of coming to an
understanding is to bring about agreement that terminates in the intersubjective mutuality
of reciprocal understanding, shared knowledge, mutual trust and accord with one
another.”⁵ Communicative action oriented towards factual truth and normative rightness
accounts for all human phenomena worth preserving in a world now “post-metaphysical,”
and severed from the authoritative hold of tradition stemming from Court and Church.

³ See, generally, Communication and the Evolution of Society (Boston: Beacon, 1975, hereinafter

⁴ CES, at 1.

⁵ CES, at 3.
The concept of communicative action is also key to charting and critiquing all that is not worth preserving. Without it, he holds, one cannot sustain a critique of anything.\(^6\)

Habermas distinguishes communicative action from “strategic action,” which might certainly employ language, but arises not concerned to establish un-coerced mutual understanding, rather to calculate and achieve the increasing hold or value of forces such as money or administrative power. This form of action he sees as the modern outcome of the sort of rationalization of society that Max Weber analyzed, his “iron cage.”\(^7\) In the 1980s Habermas characterized the struggles between communicative and strategic action as occurring between the “lifeworld”—a phrase borrowed most directly from Austrian philosopher Alfred Schutz, and the “system.”\(^8\) The lifeworld refers to all that is interactive, representing the domains of family, tradition and culture, the varied processes of learning; thus the everyday background knowledge that holds both smaller and larger scale societies together. In short, the lifeworld is all that might be assembled internally and pre-theoretically by an individual, or expressed in terms of values and symbols by a community.


\(^8\) See, generally, TCA2.
The system, by contrast, is only visible from an external point of view. In modern societies the two have come apart, or as he says, following American social theorist Talcott Parsons, been “differentiated.” Thus:

modern societies attain a level of system differentiation at which increasingly autonomous organizations are connected with one another via delinguistified media of communication: these steering mechanisms—for example, money—steer a social intercourse that has been largely disconnected from norms and values, above all in those subsystems of purposive-rational economic and administrative action that, on Weber’s diagnosis, have become independent of their moral-political foundations.9

By disconnected, Habermas is referring to the separation of modern steering media from the kinds of control that various pre-modern forms of society held over economic activity, for instance as described in Karl Polanyi’s The Great Transformation.10 A ready example of this might be seen in the way that capitalism entails the interest power of money, which appears to be a natural force, and no longer the traditionally understood vice of usury. Or, in a North American context, it might be seen in the myriad conflicts between indigenous communities and the agents of Anglo civilization who sought to re-orient traditional sustenance and trade patterns.11

Habermas has also revised Weber’s diagnosis of the potential future looming over Europe and other areas of the globe, envisioning the spread of a destructive process that he termed “the colonization of the lifeworld.”

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9 TCA2, at 187.


11 Anthony Wallace’s The Death and Rebirth of the Seneca (New York: Random House, 1969) and R. David Edmunds’ The Shawnee Prophet (Lincoln: University of Nebraska, 1983) might both be read as examples of these common 18th and 19th century conflicts between system and lifeworld.
The lifeworld is assimilated to juridified, formally organized domains of action and cut off from the influx of an intact cultural tradition. In the deformations of everyday practice, symptoms of rigidification combine with symptoms of desolation. The former, the one-sided rationalization of everyday communication, goes back to the growing autonomy of the media-steered subsystems, which not only get objectified into a norm-free reality beyond the horizon of the lifeworld, but whose imperatives also penetrate into the core domains of the lifeworld. The latter, the dying out of vital traditions, goes back to a differentiation of science, morality and art, which means not only an increasing autonomy of sectors dealt with by experts, but also a splitting off from traditions; having lost their credibility, these traditions continue along on the basis of everyday hermeneutics as a kind of second nature that has lost its force.12

The cornerstone of Habermas’s analysis of communicative action is what he has referred to as

the “ideal speech situation.”13 Critics have fastened on to this term, and Habermas has offered several revisions over the years to what he maintains the concept indicates about the pragmatic nature of communication. Much of this back and forth has involved the implications of Habermas’s use of terms such as “ideal,” “transcendental” and “a priori” to characterize the ideal speech situation. He seems more recently to have let the term go, or at least to have softened its expression in response to its jarring impact on his critics, though he still refers to an effective but “weak” transcendence which remains necessary to its conception.14

In recent work he has stressed that the sort of necessity inherent within these pragmatic assumptions is not really Kantian in its pedigree. Rather, he traces the lineage to the influence of Ludwig Wittgenstein. This necessity

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12 TCA2, at 327.
13 TCAI, at 25.
14 BNR, at 83.
does not have the transcendental meaning of universal, necessary and noumenal conditions of possible experience, but has the grammatical meaning of an “unavoidability” stemming from the conceptual connections of a system of learned—but for us inescapable—rule-governed behavior. After the pragmatic deflation of the Kantian approach, “transcendental analysis” means the search for the presumptively universal, but only de facto inescapable conditions that must be met if certain fundamental practices or achievements are to be possible. All practices for which we cannot imagine functional equivalents in our sociocultural forms of life are “fundamental” in this sense.\(^\text{15}\)

While such caveats might not satisfy his critics, I think they go a long way toward indicating that much of the hostility to his argument is misplaced, as I will address more fully below. An additional qualification that might reconcile at least some of his opponents is the fact that in his work on law, he also began to characterize the ideal speech situation more carefully, referring to it as an “anticipation,” a “thought experiment” or a “methodological fiction.”\(^\text{16}\) Nevertheless, in spite of these revisions to its status, the concept itself does remain the driving force behind his “discourse theory” of law and democracy.

Sketched in brief, with the “ideal speech situation” Habermas has held that entailed in any act of communication oriented towards expressing a speaker’s perspective on some state of affairs, are certain necessary, though not necessarily explicit, pragmatic assumptions about the ability to communicate in the first place. Chief among these assumptions is simply our belief that in our own use of language (as competent natural languages speakers) to make claims about the world, we are capable of articulating the truth related to some state of affairs. When challenged about our ability to do so, or our

\(^{15}\) *Ibid.* at 27.

\(^{16}\) *BFN*, at 323.
success in doing so, we see ourselves as also capable of providing reasons justifying our original claim. This challenge and response, leading to some form of argumentation centered on making a theme of discussion out of our challenged claim, is what Habermas means by “discourse.”¹⁷ That is, “discourse” is the communicative activity arising out of a challenge to one’s statements, in so far as they are grounded in what he refers to as basic “validity claims.” These validity claims can appeal to either empirical (or propositional) truth, normative rightness, or personal sincerity. The third form of validity claim is one that Habermas has been most flexible in articulating. It ranges in focus within his work from sincerity, “truthfulness,” or “personal authenticity,”¹⁸ such as might be associated with statements of emotional or subjective disposition, to statements about aesthetic perceptions, or the “well-formedness of symbolic expressions,” and therefore reflective of cultural practices as well as personal beliefs.¹⁹ It also seems as stated the least apt, since its domain encompasses a much greater range of speech acts than either the propositional truth or normative claims. Thus it may simply be a catch-all for various other categories of speech, one that others with greater interest in it than Habermas himself has shown could find more stable ways of characterizing. The distinctions

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¹⁷ TCA1, at 19.

¹⁸ TCA1, at 308. In his earliest efforts to address validity claims, for instance in his 1971 Princeton lectures, he distinguishes four claims, including with the others mentioned above that of semantic “intelligibility.” He eventually let this one go, however, since its focus on the correct construction of sentences is different than the focus of the other claims on perceptions of states of affairs in the world. See his “From a Constitutive to a Communicative Theory of Society” in On the Pragmatics of Social Interaction: Preliminary Studies in the Theory of Communicative Action (Cambridge: MIT Press, 2001) at 63.

¹⁹ TCA1, at 42.
between these claims might also be said to reflect Habermas’s debt to Kant’s revision of the traditional Platonic, characterization of the good, the beautiful, and the true.\textsuperscript{20}

As he expressed at one point the attendant assumptions necessary to hold in order to argue about the truth of some claim:

Anyone who seriously engages in argumentation must presuppose that the context of discussion guarantees in principle freedom of access, equal rights to participate, truthfulness on the part of participants, absence of coercion in adopting positions, and so on. If the participants genuinely want to convince one another, they must make the pragmatic assumption that they allow their “yes” and “no” responses to be influenced solely by the force of the better argument.\textsuperscript{21}

Pragmatic, real-world illustrations of this expectation or anticipation of norms for truthful communication are not difficult to come by. For instance, when a teen-ager (or most of the rest of us, for that matter) is challenged regarding a poor moral choice, she is likely to invoke a context-transcending justification for the choice, even if it is only ‘anyone faced with the same choice would have made the same decision.’ This claim relies on the expectation that her challenger will recognize application of a principle of fairness. If she confronts her challenger with a set of facts that she hopes would make her choice seem more legitimate, she would be assuming that her challenger respects facts as such—and that she herself would respect facts as such, even if they were countervailing. Such mundane examples illustrate the specific “anticipatory” role of the ideal of discourse as Habermas has laid it out. What is at work in a speech situation is the speaker’s anticipation that any group of impartial listeners would find themselves in agreement with the speaker’s characterization of the matter at hand. As a pragmatic anticipation,

\textsuperscript{20} See his discussion of Kant in \textit{MCCA}, at 2-3.

\textsuperscript{21} “Remarks on Discourse Ethics,” in \textit{Justification and Application: Remarks on Discourse Ethics} (Massachusetts Institute of Technology Press, 1994) 19, at 31. Hereinafter RDE.
then, Habermas’s use of “transcendental” does not need to be seen as the problematic invocation of the “ideal” that his critics have argued it is.

The attendant assumptions to discourse: free access to information, equal ability to speak, acceptance of the integrity of other speakers (in their own intention to speak truthfully), the “absence of coercion,” and the accompanying willingness to engage in “yes” or “no” dialogue, are all efforts to flesh out what Habermas has consistently called the “discourse principle.” The discourse principle, or “D”, summarizes the breadth of his analysis of communicative pragmatics. Its most common formulation is “Just those action norms are valid to which all possibly affected persons could agree as participants in rational discourses,”22 or with the substitution of “practical discourses” for “rational discourses.”23 In earlier work he regarded this principle as sufficient to account for moral obligation as well, but eventually developed from it a separate principle, “U,” to account for the universal perspective he believes morality requires. This states that: “All affected can accept the consequences and the side effects [a norm’s] general observance can be anticipated to have for the satisfaction of everyone’s interests”.24 Although both principles share the focus on an ideal consensus derived through rational argumentation, they differ in their operation. U operates at “a specific form of argumentation which is internally constituted,” since it influences the thinking of all individuals. D operates at the level of “externally institutionalized” argumentation, which is to say that it “steers the

\[\text{22} \quad BFN, \text{ at 107.}\]

\[\text{23} \quad \text{DEN, at 66.}\]

\[\text{24} \quad \text{Ibid. at 65, emphasis in original.}\]
production of the legal medium itself.” D is therefore identical to the principle of democracy, grounded in specific action-contexts, and focused on the production of legal norms.  

Given the amount of criticism Habermas has sustained for developing these assumptions, what is remarkable, for my purposes in addressing Canada’s duty to consult, is the provisional “and so on” with which his detailing of necessary discourse assumptions ends. It is clear from his elaboration of the discourse principle in various works that the specific content of these attendant assumptions is of lesser interest to him than the direction in which they point. For instance, he acknowledges Robert Alexy’s “suggested” articulation of what these necessary assumptions might be. He lays these out as: 1) everyone capable of speaking and acting can participate in discourse, 2) everyone can question any assertion, introduce any assertion, or express their needs and desires, 3) no one can be coerced into violating 1) or 2). Habermas does not attempt to hone Alexy’s account of these assumptions any further, though they differ somewhat from his own earliest efforts to specify them. Rather, he tries to show how they reflect a necessary posture for one who aims to communicate truthfully. In Chapter 4, I will argue that this provisional quality of the necessary assumptions of discourse makes clear how Habermas’s perspective might dovetail with norms of discourse embraced within indigenous approaches to intersocietal legal discourse.

25 BFN, at 110-11.

26 DEN at 89.

27 Ibid. at 91.
Much of the criticism targeting Habermas’s account of the ideal speech situation, as Habermas has repeatedly noted, seems to mistake its basic purpose within his social theory. Many critics, for instance, have objected that it is simply too idealistic. Empirically-minded researchers have sought to show that as a model of communicative action, it does not describe much about the behavior of people actually engaged in communication, and seems to require people to function as communicative heroes. Some have found its generality to be vacuous. Others have assailed it from post-modern, post-structuralist or anti-foundationalist perspectives, as I will note below. Some of those within the field of deliberative democracy who have been most influenced by Habermas’s larger project, have also argued that his account fails to capture how argument may actually function as a mechanism for democratic practice. Others have similarly argued that the ideal speech situation fails because of Habermas’s basic assumption of a social theoretical distinction between communicative and strategic action, as detailed above. For some, committed to Kantian or Platonic versions of transcendental philosophy, it seems a poor imitation of more classical approaches.

And yet, given its status as an ideal, most of these dismissals of it seem little more than category mistakes, in effect holding it to standards alien to the purpose or properties of

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28 For a fairly egregious example of this approach, see Byron Rienstra and Derek Hook “Weakening Habermas: the Undoing of Communicative Rationality” (2006) *Politikon* 33(3) 313, which relies primarily upon formulations of Habermas’s views derived from the conclusions of his critics. For a more sophisticated expression of the mutually-beneficial dependencies of empirical and theoretical/normative approaches, see Dennis F. Thompson “Deliberative Democratic Theory and Empirical Political Science” (2008) *Annual Review of Political Science* 11, 497.
ideals as such. Habermas himself has emphasized that it is a regulative and not a constitutive ideal. Its purpose is to expose the “underside of communicative social relations—an underside that, even to the participants themselves, remains largely hidden in the shadows of the idealizing presuppositions of communicative action.” He acknowledges that the suspicions of his critics may stem from his terminology, which “tempts one to improperly hypostatize the system of validity claims on which speech is based.” Instead, he maintains that while the necessary assumptions of the ideal speech situation enable those communicating about something within the world to “go beyond local justifications and to transcend the provinciality of their spatiotemporal contexts,” this does not transform such would-be truthful communicative practitioners: “they are not themselves transported into the beyond of an ideal realm of noumenal beings.”

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29 At the same time, however, his usage is not always consistent. Here he seems to be saying that these assumptions are constitutive and not regulative:
- Presuppositions of communication do not have regulative force even when they point beyond actually existing conditions in an idealizing fashion. Rather, as anticipatory suppositions they are constitutive of a practice that without them could not function and would degenerate at the very least into a surreptitious form of strategic action.
- Presuppositions of rationality do not impose obligations to act rationally; they make possible the practice that participants understand as argumentation (RDE, at 31).

This apparent discrepancy in his usage is resolvable by distinguishing the different levels at which they operate within practical discourse (and by noting that his immediate sources for the terms, Rawls and Searle, also employ them somewhat fluidly). Habermas’s usage resembles Searle’s. The pragmatic rules of discourse “constitute” the possibility of engaging in rational discourse, by providing “weakly” (his term) “regulative” norms to assess the success of communicative action. Thus truthfulness is constitutive in general of our expectations of discourse aimed at establishing mutual understanding, yet also regulative when we are disappointed by an act that violates our expectations, for instance, by discovering that someone is lying to us. Rawls’s usage is similar: constitutive rules govern practices in general, regulative rules enable us to justify particular actions within a practice. For Rawls’s use, see his “Two Concepts of Rules” (1955) The Philosophical Review 64(1) 3. For Searle’s, see Speech Acts: an Essay in the Philosophy of Language (Cambridge: Cambridge University Press, 1969) at 51-52.

30 BFN, at 326.

31 Ibid. at 323.

32 Ibid.
thoroughly situated in particular historical, cultural, social contexts, though they “are not simply at the mercy of their lifeworld.” What they gain, even if only intuitively, is the ability to suspect those communicative efforts that appear to fall short of the standard made explicit in the discourse principle. They also gain the presumption that their partners in communication can be expected to share their assumptions that communication oriented towards reaching an understanding is also oriented towards the truth.

Habermas elaborates on the real world use of D:

Whenever we want to convince one another of something, we always already intuitively rely on a practice in which we presume that we sufficiently approximate the ideal conditions of a speech situation specially immunized against repression and inequality. In this speech situation, persons for and against a problematic validity claim thematize the claim and, relieved of the pressures of action and experience, adopt a hypothetical attitude in order to test with reasons, and reasons alone, whether the proponent’s claim stands up. The essential intuition we connect with this practice of argumentation is characterized by the intention of winning the assent of a universal audience to a problematic proposition in a noncoercive but regulated contest for the better arguments based on the best information and reasons. It is easy to see why the discourse principle requires this kind of practice for the justifications of norms and value decisions: whether norms and values could find the rationally motivated assent of all those affected can be judged only from the intersubjectively enlarged perspective of the first-person plural. This perspective integrates the perspectives of each participant’s worldview and self-understanding in a manner that is neither coercive nor distorting. The practice of argumentations recommends itself for such a universalized ideal role taking practiced in common.

33 BFN, at 324. Communicative actors being of, but not at the mercy of their lifeworlds, is a admittedly a vague expression of their historical situatedness. It leads Habermas’s critics to assume he secretly thinks some actors can attain an absolute transcendence. It leads more friendly readers, including myself here, to imagine that this transcendence of context does not need to be very far at all in order to count as regulative in Habermas’s sense, even if only it is only postulated or imagined as a condition of better rather than worse communication.

34 Ibid. at 228.
In Chapter 3, I will consider possible objections to this characterization of our communicative intuitions that stem, or could stem, from the perspectives of indigenous theorists concerned with the duty to consult. For now, it seems sufficient to note that Habermas’s characterization of our intuitions regarding argument rests upon our confidence that we can sufficiently access, and convey to others, a significant degree of truth regarding various states of affairs in the world.

Although his theory of communicative action, or discourse, leads many to assume he is either naïve in his vision of consensus, or prone to restricting the sorts of communicative acts that might count as legitimate discourse, there is no reason to read him in such a way. Habermas’s view of public sphere discourse, legal and political, highlights its necessary contentiousness – making it relevant to McLachlin C.J.’s *Haida Nation* admonition that the duty to consult does not need to yield agreement, as I will elaborate on in Chapters 5 and 6. This contentiousness is evident in his emphasis on law as a form of public sphere discourse. Discourse theory seeks the “institutionalization of the corresponding procedures and conditions of communication,” as well as to maintain “the interplay of institutionalized deliberative processes with informally developed public opinions.”  

Habermas indicates the centrality of civic engagement in the concluding sections of *BFN*.

In the proceduralist paradigm, the vacancies left by the private-market participant and the client of welfare bureaucracies are filled by enfranchised citizens who participate in political discourses in order to address violated interests and, by

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35 *BFN*, at 298.
articulating new needs, to collaborate in shaping standards for treating like cases alike and different cases differently. To the extent that legal programs are in need of further specification by the courts—because decisions in the gray area between legislation and adjudication tend to devolve on the judiciary, all provisos notwithstanding—juristic discourses of application must be visibly supplemented by elements taken from discourses of justification.  

In fact, Habermas makes quite clear that the roles played by this “energized citizenry” are not subsidiary to those of seemingly autonomous political and legal institutions. Rather, such a citizenry is the central force, embodying what he calls “communicative power,” which can shift the orientation of modern constitutional states toward “lifeworld” restoring developments. To that end, he has long pointed to the salutary democratic influence of civil rights groups, peace and anti-colonial activists, national liberation movements, feminist advocates, and grass-roots environmental movements; all of whom have employed within the public sphere a range of practices, including legislative advocacy, legal challenges to administrative decisions, and campaigns of civil disobedience.  

As he frames the centrality of public opinion formation to democratic political practice and the possibility of a legitimate legal order:

In the proceduralist paradigm, the public sphere is not conceived simply as the back room of the parliamentary complex, but as the impulse-generating periphery that surrounds the political center; in cultivating normative reasons, it affects all parts of the political system without intending to conquer it. Passing through the channels of general elections and various forms of participation, public opinions are converted into a communicative power that authorizes the legislature and legitimates regulatory agencies, while a publicly mobilized critique of judicial decisions imposes more-intense justificatory obligations on a judiciary engaged in further developing the law [my emphasis].

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36 Ibid. at 439.

37 BFN, at 381-82. See also AS, at 180-81.

38 Ibid, at 442.
Habermas’s continuing view of the role of these public communicative practices on the development of law entails what he regards as a worthwhile “permanent risk of dissensus.” This risk of dissensus will be crucial to assess in my addressing the courts’ conceptualization of the duty to consult from the standpoint of discourse.

C. A discourse view of the legitimacy of legality

For Habermas, the truth-invoking argumentative function of the discourse principle serves as more than just an add-on to the philosophy of language, which he sees having overlooked the social-solidarity function of communication in its concentration on the semantics of assertions, as I noted above. The discourse principle also provides him with the core of an explanation for social interaction, and for his analysis of law and democracy in BFN. I will focus in chapter 4 and on the conditions for legal legitimacy that arise out of North American intersocietal communicative contexts, such as emerged in paradigmatic settings of treaty formation. Given the distance between these discourse-based views and those more commonly held by courts and legal theory, I will distinguish Habermas’s approach here from those of Max Weber and H.L.A. Hart.

39 Ibid, at 462. Strikingly, many of Habermas’s critics portray his interest in public communication as inordinately focused on the production of consensus. Such a critic might easily suspect that my use of him in this project is thus fated to yield an outcome for Canada’s First Nations that could only further diminish their expectations of the duty to consult. For a useful reading of what I would call the dissensus stream in Habermas’s legal theory, and an argument against the interpretation of Habermas as building a theoretical “consensus machine,” see Stephen K. White and Evan Robert Farr “‘No-Saying’ in Habermas” (2012) Political Theory 40(1) 32, which focuses on the importance of civil disobedience in Habermas’s view of democratic practice.
Habermas has long maintained that the accounts of law’s legitimacy descended from Max Weber and H.L.A. Hart are at best incomplete. Both of them, from Habermas’s perspective, succumb to a fatal temptation in their respective accounts of modern law. In these accounts, as he puts it: “the voluntarism of pure enactment stirs the imagination of legal positivism.” This stirring, he contends, has thoroughly distorted our understanding of the role of law as a medium of social integration in modern society, in effect turning law into one of the "delinguistified steering media," which, as I noted above, means that it has become a force operating on a par with, and largely in service of, other forces (markets and bureaucracies), rather than restraining the corrosive impacts of those forces on democratic social orders.

Habermas certainly has much in common with both Weber and Hart. From Weber, Habermas has taken his long-term narrative focus on the rationalization of the Occident, which has provided the spur for Habermas to draw a different conclusion about the fate of that rationality from the one that Weber (and Habermas’s teachers Max Horkheimer and Theodor Adorno) drew in their portraits of iron cages and the triumph of instrumental reason. From Weber also, Habermas has inherited his commitment to keeping action theory at the heart of his social and legal theory—meaning that while he attempts to incorporate the systems perspectives of theorists such as Niklas Luhmann and Talcott

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40 BFN, at 38.

41 Critics of Habermas might easily point to what must sound like the above sentence’s chimeric expression of the historical relation between law and democracy, and note that such a construction exemplifies the overarching difficulty they find in Habermas’s effort to advance a normative project (the critical theory of society) on the basis of empirical historical-sociological accounts.
Parsons, he regards these approaches (or the somewhat related approaches of French post-structuralists such as Michel Foucault) as making impossible a full consideration of law as an intentional creation, or a product of what he often refers to as “political will formation.” Ultimately, it is this Weberian focus on social action (though now reframed as communicative action) that is such crucial fodder for the development of his view of legal validity. However, Weber chose to address the legitimacy of law from within the limiting assumptions about rationality that steered his account of the modernization of Occidental social institutions.

\[C(1)\]. A discourse view of Weber’s account of legal validity

Weber held that modern law rests on two sources of validity: its result from voluntary agreements between parties, which forms the basis of private, or contractual law;\(^{42}\) and from its “imposition by an authority which is believed to be legitimate and therefore meets with compliance.”\(^{43}\) Despite his overarching sociological interest in “belief,” and in the complex range of subjective motivations for social action in general, for instance as these shape his treatment of world religions; within his sociology of law, Weber dismissed the significance of the sources of “belief” in authority, or at least chose not to give them center-place in his depiction of the form of rational legal authority. Thus, while belief could have a “profound influence on action in the absence of any external guarantee,” at least within “primitive” social orders, he did not think it was central to the


\(^{43}\) *ES1*, at 36.
sociologist of law’s focus in examining the institutions of formalized legal action. “[I]t is by no means necessary that all conventionally or legally guaranteed forms of order should claim the authority of ethical norms. Legal rules, more often than conventional ones, may have been established entirely on grounds of expediency.”

The evident tension here between Weber’s neo-Kantian interest in questions of motivation and value, and his interest in characterizing the objective features of formal legal institutions, especially bureaucratic administration, has much to do with his most basic assumptions about rationality. Fundamental to the Weberian project of tracing out the emergence of Occidental rationalism is the distinction between \( \textit{zweckrationalität} \) and \( \textit{wertrationalität} \), that is between forms of rationality functioning in terms of means-end calculations, or procedural rationality; and those functioning in terms of commitments to absolute values. Whether he depicted this history dispassionately or with the melancholy of the \textit{Protestant Ethic}, Weber consistently saw \( \textit{zweckrationalität} \) as the only form available for measuring truth or success within the modern Occidental social order.

Value-rational action may thus have various different relations to the instrumentally rational action. From the latter point of view, however, value-rationality is always irrational. Indeed, the more the value to which action is oriented is elevated to the status of an absolute value, the more “irrational” in this sense the corresponding action is.

\[44 \text{Ibid.} \]

\[45 \text{Ibid. at 26.} \]
Thus legality can only be thematized as an expression of *zweckrationalität*.

Consequently, the presence of “positive enactment which is believed to be legal” is the ground for measuring the legitimacy of the modernized “social order.”

Weber focused his study of legitimacy on the means by which law provided more stable expectations of social order than were possible under either regimes of expediency or custom. In the end, he held that law’s provision of order, *legale Herrschaft*, or legalized domination, stems from the “guarantee” of social order provided through the state’s “coercive apparatus” — that is, its monopoly on violence, and administered in a consistent way through bureaucratic organizations, in which “coercion [physical or psychological] will be applied by a *staff* of people in order to bring about compliance or avenge violation.” The “juridical formalism” of modern law “enables the legal system to operate like a technically rational machine.” Its principle characteristics: its systematic range of provisions, generalized form, and consistent application, appear seamlessly woven together with key characteristics of bureaucratic administration: uniform application of abstract regulations, technical basis of knowledge, and

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50 *Ibid.* at 34, emphasis in original.
51 *ES2*, at 811.
“formalistic impersonality.” Legitimacy, “today,” he notes, derives from “the belief in legality, the compliance with enactments that are formally correct and which have been made in the accustomed manner.” As Weber characterized his historical account of legitimacy in one influential formulation:

With the triumph of formalist legal rationalism, the legal type of domination appeared in the Occident at the side of the transmitted types of domination [meaning from traditional sources]. Bureaucratic rule was not and is not the only variety of legal authority, but it is the purest....[I]n legal authority, submission does not rest upon the belief and devotion to charismatically gifted persons, like prophets and heroes, or upon piety toward a personal lord or master who is defined by an ordered tradition, or upon piety toward the possible incumbents of office fiefs and office prebends who are legitimized in their own right through privilege and conferment. Rather, submission under legal authority is based on an impersonal nod to the generally defined and functional ‘duty of office.’ The official duty—like the corresponding right to exercise authority: the ‘jurisdictional competency’—is fixed by rationally established norms, by enactments, decrees and regulations, in such a manner that the legitimacy of the authority becomes the legality of the general rule, which is purposely thought out, enacted and announced with formal correctness.

For Habermas, Weber was only able to reach this depiction of modern, formal law by ignoring the communicative core of the rationality of law. One might note, for instance, his dismissal of the significance of “belief” about the law cited above. In addition, one might also note, that even on Weber’s grounds of limited “ethnological” (as he put it) exposure, he characterizes “primitive” law as established by voluntary agreement, hence, by what Habermas would call a communicative process of consent formation. However, Weber frames this form of law as lower on the rationality scale than that of modern,

53 ES1, at 223-26, ES2, 958.

54 ES1, at 37, emphasis in original.

formalized legal institutions—since voluntary agreement would inevitably produce a less secure social order.\(^{56}\) Significantly, although Habermas shares in Weber’s socio-evolutionary view of the emergence of Occidental rationalism, he does not draw the same conclusion regarding the “primitive” nature of consensus formation. In addition, for Weber the consent possibility evident within “primitive” legal communities also stood in tension with the more basic form of legal legitimacy provided by “charismatic authority.” “Revelation of law” received from charismatic figures, he notes, while “opposing the stability of tradition,” is also “the parent of all legal ‘enactment.’”\(^{57}\)

What troubles Habermas most in Weber’s formulation of legitimacy, is that it represents Weber’s choice to make normative this constrained view of rationality. Over the years Habermas has frequently used the term “positivism” loosely to indicate this constrained view. Although his usage of the term may give some pause, what seems most significant here is that he is concerned to highlight the gap he sees between Weber’s achievement and his self-imposed theoretical limitations.\(^{58}\) On the one hand, Weber’s “approach still holds out the best prospect of explaining the social pathologies that appeared in the wake

\(^{56}\) ES1, at 37.

\(^{57}\) ES2, at 761. The German expresses this origin more strongly: “die Mutter aller ‘Satzung’ von Recht.” WG, at 446.

\(^{58}\) “Positivism” sometimes serves as a catch-all term of opprobrium in Habermas’s writing, in part because he has addressed several of its different forms—which remain not necessarily related. However, even “legal positivism” has a range of expressions and proponents, not all of them compatible. As I use it here, “legal positivism” reflects “the simple contention,” as Hart puts it, “that it is no sense a necessary truth that laws reproduce or satisfy certain demands of morality, though in fact they have often done so.” Or, “there is no important necessary or conceptual connection between law and morality.” In The Concept of Law 3rd ed. (Oxford UK: Oxford University Press, 2012 [1961], hereinafter CL) at 186, 259.
of capitalist modernization.” On the other hand, his theoretical “bottleneck” was that he “equated the capitalist pattern of modernization with societal rationalization generally.” Consequently, “he was unable consistently to bring the legitimation problems generated by a positivistically hollowed out legal domination under the pattern of rationalization of modern societies, because he remained himself tied to legal-positivistic views.” By viewing all credible expressions of rationality through the lens of “instrumental” or “purposive-rational” action, Weber consigns the rationality of moral judgment to the same subjective sphere in which he placed religion, art and other forms of cultural expression.

Weber traces the origins of modern law to two analytically separate tendencies within Occidental cultures: 1) emerging “post-traditional structures of moral consciousness,” such as the Protestant Reformation, which he saw as grounded in *wertrationalität*, or substantive value-rationality, and 2) the accompanying economic and political institutionalization of market and state, grounded in *zweckrationalität*, or purposive or instrumental rationality. As Habermas portrays it, Weber’s crucial error in his treatment of law was to dismiss the first tendency as only a holdover from a pre-modern world, thus limiting the rationality of law to the rationality of strategic, instrumental action. He notes that Weber succeeds in his historical account of law’s development

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59 TCA2, at 303.

60 Ibid.

61 TCA2, at 304.

62 ES1, at 24.
“only at the cost of an empiricist reinterpretation of the legitimation problematic and a conceptual separation of the political system from forms of moral-practical rationality – he trims back political will-formation to processes of acquiring and competing for power.”

Thus, although Weber had the conceptual means and historical evidence available to have concluded differently, he concluded that law’s legitimacy was only a question of “legality” or “enactment.”

C(2). A discourse view of Hart’s union of rules approach to law’s legitimacy

Given the amount of effort Habermas has put into his absorption of, and interaction with, Anglo-Saxon currents in philosophy of language, socio-political theory, and other intellectual enterprises, it is surprising that he has not focused more on the work of Oxford legal theorists. This limited interaction may account for his loose usage of “positivism,” and his providing a reading of H.L.A. Hart that seems to place Hart more within the orbit of John Austin and Jeremy Bentham than Hart would have been glad to acknowledge, and to accept Ronald Dworkin’s reduction of Hart’s “positivism” to the issue of “pedigree.” Nevertheless, in his own approach to the legitimacy of law, he does make an effort to distinguish his approach from that of Hart.

63 TCA2, at 254.

64 See Hart’s response to Dworkin in CL, at 247.

65 Habermas’s far greater attention to Weber might strike the Anglo reader as parochial. But that reader would have to acknowledge that the scope of Weber’s overall project is far greater than Hart’s. It has also provided the material inspiration for the reach of Habermas’s own project, serving as a constant point of reference through several decades of his work. Interestingly, Weber also seems to have also been an influence on Hart, although he evidently pretended that this was not so, even though he claimed his work was an “essay in descriptive sociology” (CL at vi). Nicola Lacey discusses the implications of Hart having an annotated copy of Weber’s ES in “Analytical Jurisprudence versus Descriptive Sociology Revisited” (2006) Texas Law Review
Weber’s view of law’s legitimacy seems to cohere easily with what Hart refers to as the “command theory,” that is, the “sovereign’s coercive orders,” advanced by earlier generations of positivists, a theory Hart sought to discredit and replace with his own. In its stead, Hart argues that for modern “municipal” legal regimes at least, the basis of legitimacy lies in the means of identifying law. The “union of primary and secondary rules” that Hart proposes as the “most illuminatingly” adequate account for the identification of law remains, fifty years after its promotion and accompanying level of scholarly debate, as thorny a concept as Habermas’s “ideal speech situation.”

84(4) 945, at 951. Lacey concludes that, although Hart was unable to pursue it himself, his approach “opened up a set of possibilities” for more successful sociological or historical interaction on the part of legal theory. See also, her biography of Hart, A Life of H.L.A. Hart: the Nightmare and the Noble Dream (Oxford: Oxford University Press, 2004).

66 CL, at 79.

67 Ibid. at 94. This long-running debate, which arose out of Hart’s exchange with Lon Fuller in 1958, is well-beyond my scope here, except to emphasize that while Habermas’s response to Hart acknowledges Fuller, it does so in fairly cryptic terms. As with Hart’s dependence on Weber, Habermas seems at best minimally familiar with Fuller’s work, referring in both LM and BFN only to the same secondary source. See LM, at 234, and BFN, at 220. A few scholars have addressed the relationships, or better, the mutual implications, of the work of Hart, Fuller, Weber and Habermas. For the initial 1958 exchange see Hart, “Positivism and the Separation of Law and Morals” (1958) Harvard Law Review 71(4) 593 (hereinafter PSLM), and Fuller, “Positivism and Fidelity to Law: A Reply to Professor Hart” (1958) Harvard Law Review 71(4) 630. For a recent consideration of Fuller emphasizing Hart’s conceptually necessary dependence upon Weber, see James C. Ketchen “Revisiting Fuller’s Critique of Hart: Managerial Control and the Pathology of Legal Systems: The Hart-Weber Nexus” (2003) The University of Toronto Law Journal 53(1) 1. Both Eric W. Orts and David have addressed the connections between Hart and Habermas by way of Weber and Fuller. In “The Legitimacy of Legality,” supra p. 7 n. 12, Dyzenhaus offers a perceptive pragmatist reading of Habermas’s emergence from the historical context of German legal theory. He concludes, ibid. at 177, that Habermas’s approach to the legitimacy problem in BFN -- even with its evident debt to pragmatism -- is still too-dependent upon Weber’s sketch of rationality, with its stark contrast between universal reason and irrational decisions. Orts, in “Positive Law and Systemic Legitimacy: a Comment on Hart and Habermas” (1993) Ratio Juris 6(3) 245, argues that Habermas’s concern for “systemic legitimacy,” buttressed with what Orts, at 252, calls “critical legality,” can replace Hart’s limited notion of “critical morality” as the central issues to consider in discussions of legal legitimacy. The arguments of these scholars will figure
Hart maintains that the distinction between two forms of rule is a matter of historical development. Early social orders: “primitive” or “pre-legal,” undoubtedly had rules regulating conduct – although he is even less interested than Habermas seems to be in focusing his attention on what such societies may have been (or continue to be) like. These “primary rules,” at some unspecified historical moment, eventually became supplemented by a “secondary” sort of rule, “the rule of recognition,” which serves to legitimate authority. As he summarizes the distinction:

Under rules of the one type, which may well be considered the basic or primary type, human beings are required to do or abstain from certain actions, whether they wish to or not. Rules of the other type are in a sense parasitic upon or secondary to the first; for they provide that human beings may by doing or saying certain things introduce new rules of the primary type, extinguish or modify old ones, or in various ways determine their incidence or control their operations. Rules of the first type impose duties; rules of the second type confer powers.68

Hart also distinguishes between “external” and “internal” views of law, the one available to the observer, the other to its practitioner or subject, and argues that his own approach to law is uniquely able to take account of this internal point of view.

What the external point of view, which limits itself to the observable regularities of behaviours, cannot reproduce is the way in which the rules function as rules in the lives of those who normally are the majority of society . . . for them the violation of a rule is not merely a basis for the prediction that a hostile reaction will follow, but a reason for hostility.69

He thinks that his theoretical forebears were overly-interested in the external aspects of law, and were committed to the erroneous idea “that somewhere in every legal system, in my analysis below of the courts’ validation of the duty to consult with Aboriginal communities.

68 Ibid. at 81.
69 Ibid. at 90.
even though it lurks behind legal forms, there must be a sovereign legislative power which is legally unlimited.” As indicated above, he would seem to necessarily consign Weber to the camp of those committing this error, while maintaining that his identification of the internal aspect of law makes possible the absolute identification of the “concept” of law. However, in the end, his conceptualization of this “internal” aspect does little to get beyond Weber’s own identification, and then dismissal, of “belief” as a rational ground for legitimacy. That is, he never really addresses the nature of the “reason” that he highlights as the distinguishing mark between the internal point of view and the external.

Thus, Hart maintains that in a municipal legal regime all would be able to accept the distinction between the two sorts of rules, and recognize the validity of primary rules enacted in accordance with the secondary rule. However, Hart exhibits little interest in what might readily, and Habermas would say ‘necessarily,’ stem from framing law as identifiable by its “internal” aspect. That is, law seems unanchored in political practice, or in what Habermas would call “communicative practice.” We might sharpen this by saying that for Hart the generative conditions of law—the formation of rules regarded as legitimate—are extraneous to what law actually is; as though the terms “formation” and “regarded” are not crucial to determining the meaning of “rules” and “legitimate.”

For Hart, the conferral of power, made possible by a rule rather than a weapon, is the measure of legal validity. He identifies “as a matter of history,” that the rule of recognition became visible first in “the mere reduction to writing of hitherto unwritten
rules,” which provided a means of referring “to the writing inscription as authoritative, i.e. as the proper way of disposing of doubts as to the existence of the rule.” In this “simple operation of identifying a given rule as possessing the required feature of being an item on an authoritative list of rules we have the germ of the idea of legal validity.” Hart considers the idea of “legal validity,” -- despite his identification of the “internal” aspect of law -- consistently from the standpoint of the external observer. As soon as he does this, however, he winds up reinstating the “command theory” that he has tried to displace, since he seems uninterested in exploring the complexities of any “internal” perspectives. Within Hart’s clarification of the essence of the category of law appear repeated demonstrations that it is either only adequately seen from an external perspective, or only embodied internally by those in command of a legal regime. The “ultimate rule of recognition may be regarded from two points of view: one is expressed in the external statement of fact that the rule exists in the actual practice of the system; the other is expressed in the internal statements of validity made by those who use it in identifying the law.” Thus, he sees legal validity as adequately addressed by the notion of parliamentary supremacy:

Finally, when the validity of the statute has been queried and assessed by reference to the rule that what the Queen in Parliament enacts is law, we are brought to a stop in inquiries concerning validity: for we have reached a rule which, like the intermediate statutory order and statute, provides criteria for the assessment of the validity of other rules; but it is also unlike them in that there is no rule providing criteria for the assessment of its own legal validity.”

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70 Ibid. at 94-95, emphasis in original.
71 Ibid.
72 Ibid. at 112.
73 Ibid. at 107.
Further, he blithely summarizes the scope of his fundamental concern by concluding that in the modern municipal system, “only officials might accept and use the system’s criteria of legal validity. The society in which this was so might be deplorably sheeplike; the sheep might end in the slaughter-house. But there is little reason for thinking that it could not exist or for denying it the title of a legal system.” In the end then, despite his insistence on having uncovered an internal aspect to the question of legal validity, he is still enamored, as was Weber before him, with what Habermas phrased above as “the voluntarism of pure enactment.”

As he does with Weber, Habermas admittedly also shares important assumptions with Hart. Most crucially here, Habermas consistently takes pains to avoid collapsing law into morality. For instance, he holds that positive law represents a historic achievement, or at least functions as a coping mechanism for citizens of complex institutional orders, since “without revoking the principle of unhindered communication, [positive law] removes tasks of social integration from actors who are already overburdened in their efforts to reach understanding.” This means that positive law compensates for the “weaknesses” of “an autonomous morality,” by “relieving legal subjects of the effort that is demanded from moral persons when they have to resolve their conflicts on their

74 Ibid. at 117.

75 Orts, supra p. 75 n. 67, at 246, holds that Habermas could be regard as a positivist in this respect.

76 BFN, at 38.
Like Hart, though far more explicitly, Habermas has also drawn on resources within the philosophy of language, using them to shape his argument for communicative action. And, assuming Lacey is correct, they are both in debt to Weber’s narrative of the emergence of what Habermas called, and Hart would agree with, “post-metaphysical” legal formalism as a fundamental feature of modern Occidental rationalism.

However, despite these similarities in orientation, Habermas does not think Hart is capable of handling the question of law’s legitimation. “Tying the validity of law to its genesis allows only an asymmetrical solution to the rationality problem.” Or, similarly: “the rationality problem is resolved in a way that gives priority to a narrowly conceived institutional history purged of any suprapositive validity basis.” This means that “legitimation through the legality of the lawmaking procedure privileges the pedigree—namely, the correct process of enactment—over the rational justification of the norm’s content.” By the “rationality problem,” Habermas is referring in general to Weber’s depiction of the conflict between instrumental-purposive and absolute values. As concerns the legitimacy of law, this conflict deepens the fissure between Geltung and Gültigkeit, between what is valid as a matter of fact and valid as a matter of rational legitimacy. Habermas asks: “how can the application of a contingently emergent [that

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77 LM, at 246.

78 BFN, at 202.

79 Ibid.

80 Habermas maintains that in some social-historical contexts (although without providing much in the way of historical or ethnological illustration) the normative force of law derives from its factual content, which would mean that those living in such contexts would have no way of articulating the two forms of validity distinguished in German as Geltung and Gültigkeit. In
is, via the process of enactment] law be carried out with both internal consistency and rational external justification, so as to guarantee simultaneously the certainty of law and its rightness?\textsuperscript{81} Hart, like, Weber before him, has rationalized the legitimacy of law only by severing these two ends, consigning the second to extra-legal, and for Weber -- if not explicitly for Hart, to the irrational realm of moral-ethical reflection.

For Habermas, by contrast, the questions of validity of enactment and procedure that occupy judges assessing a case cannot be isolated from the larger pragmatic questions of Gültigkeit. Thus, “the claim to legitimacy requires decisions that are not only consistent with the treatment of similar cases in the past and in accord with the legal system. They are also supposed to be rationally grounded in the matter at issue so that all participants

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English, these terms could translate as “customary norm” (Geltung) and “reasonably considered norm” (Gültigkeit), and which I refer to as “pragmatic rational legitimacy” (in order to distinguish it from what appears as “rational legitimacy” in English translations of Weber). As Habermas accounts for the difference:

The validity (Gültigkeit) claimed for statements and norms (as well as for first-person reports of experience) conceptually transcends space and time, whereas the actual claim is, in each case, raised here and now, in a specific context in which its acceptance or rejection has immediate consequences. The validity we claim for our utterances and for practices of justification differs from the social validity or acceptance (soziale Geltung) of actually established standards and expectations whose stability is based merely on settled custom or the threat of sanctions (BFN, at 20).

For an overview of the confusing usage of these terms in German, see Christoph Lumer "Geltung, Gültigkeit," in Hans Jörg Sandkühler (ed.) Enzyklopädie Philosophie v 1. (Hamburg DE: Meiner 1999) at 450-55. Lumer notes that the distinction between factual and rational validity became prominent in German philosophical and legal discourse of the mid-19th century. Weber, however, approaches the question of “legitimacy” in law simply as a matter of Geltung or gelten. See ES, at 26. A point I have not yet encountered in the literature, but which a certain form of Habermas critic might be expected to highlight, is how such a historically-situated semantic distinction could give rise to the universal sorts of claims that critics find so objectionable in his work. The work of Nina Verheyen on the culture of public discussion emerging in post-war West Germany, supra p. 50 n. 1, also underscores the importance of historical context in the development of Habermas’s project.

\textsuperscript{81} BFN, at 199, emphasis in original.
can accept them as rational decisions.”  

Beyond those matters that indicate a case’s degree of “accord with the legal system,” meaning those questions of standing, jurisdiction, precedent that go to providing a judge’s ruling with legal certainty; is a more basic matter. Hart objected to this idea of law entailing a more basic matter, for instance, in his argument against the efforts of post-war German courts to wrestle with the continued relevance of National Socialist law, judicial practices and jurisprudence. In his criticism of German expressions of interest in natural law, primarily in the postwar work of Gustav Radbruch, he framed positivism as providing a braver, more intellectually consistent way of coping with the continued impact of evil laws:

For if we adopt Radbruch’s view, and with him and the German courts make our protest against evil law in the form of an assertion that certain rules cannot be law because of their moral iniquity, we confuse one of the most powerful, because it is the simplest, forms of moral criticism. If with the Utilitarians we speak plainly, we say that laws may be law but too evil to be obeyed. This is a moral condemnation which everyone can understand and it makes an immediate and obvious claim to moral attention. If, on the other hand, we formulate our objection as an assertion that these evil things are not law, here is an assertion which many people do not believe, and if they are disposed to consider it at all, it would seem to raise a whole host of philosophical issues before it can be accepted.  

In order to make his case for the superior ability of positivism to describe the nature of law within his own legal context, however, he seriously misread Radbruch – as well as the history of German legal positivism and the nature of the Third Reich’s legal system.  

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82 Ibid.  

83 PSLM, at 619.  

84 Hart argued that Radbruch’s post-war views were a rejection of positivism, and claimed that the post-war climate of legal opinion in Germany was devoted to rooting out positivism, as having contributed to the lethality of NS law. He contended that this rejection had unleashed a wave of natural law “hysteria” in the Federal Republic’s courts, his sole example being a 1949 Bamberg appeals court’s upholding of a court’s judgment against a wife who had denounced her husband to the NS authorities, leading to his execution for comments critical of the regime.
Indeed, Hart seems to construe Radbruch’s “conversion,” and subsequent display of “extraordinary naïveté” simply as a foil in order to extend the separation of law and morality thesis he derives from Austin and Bentham.85

(PSLM, at 619). In point of fact, however, the postwar courts were not inclined to overturn decisions from the NS courts, as Ingo Müller notes in Hitler’s Justice: the Courts of the Third Reich (Cambridge MA: Harvard University Press, 1991, at 292). Nor did “positivism” play a direct role in NS jurisprudence. According to both Carl Schmitt and Ernst Forsthoff, leading NS philosophers of law, the coming of the Reich marked the end of positivism in Germany (ibid. at 219-20). Or, consider the opening statement for the NS defendants (among whom was the Reich Acting Minister of Justice, Franz Schlegelberger), in U.S.A. v Alstötter et al, the 1947 “Justice Case” or “Jurists’ Trial.” In his statement, defense counsel Egon Kubushok pointed out how “positivism” represented an older current within German law, as did discussion of its limitations – meaning that NS law, such as sec. 2 of the penal code, prohibiting Aryan—non-Aryan sexual relations, represented a modification of this positivist inheritance, leaning towards the “right of the Reich President to issue emergency decrees,” in Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10, Nuremberg, October 1946-April 1949, v 3, (Washington, D.C.: USGPO, 1951, at 108-09). Even under the Weimar constitution, the provision of such basic rights as equality before the law was voided, “if necessary to restore public safety and order,” which the NS regime made permanent with the February, 1933 suspension of all rights (ibid. at 986). The “new world philosophy” of NS and its jurisprudence, as the defendant Curt Rothenberger (Gaufführer of the National Socialist Lawyers League and State Secretary of the Reich Ministry of Justice) put it, entailed an “antagonism toward law,” which was “justified because the present moment absolutely demands a rigid restriction of the power of law. He who is striding gigantically toward a new world order cannot move in the limitation of an orderly administration of justice” (ibid. at 1022, emphasis in original). The Nürnberg court quoted Reich Minister of Justice Otto Thierack’s 1943 explanation of the principle animating NS jurists: “The inner law of the guardian of justice is national socialism; the written law is only to be an aid to the interpretation of National Socialist ideas” (ibid. at 1023). Müller goes so far as to call the idea that NS justices were positivist a post-war myth, developed to assist in their defense and their extremely successful re-incorporation into the legal profession (Müller, ibid. at 222).

85 PSLM, at 616-17. For a better account of the concerns animating in 1946, and before, see Stanley L. Paulson “On the Background and Significance of Gustav Radbruch’s Post-War Papers” (2006) Oxford Journal of Legal Studies 26(1) 17. Paulson explains both the historical and theoretical confusions surrounding Weimar-era versions of legal positivism, and demonstrates how Radbruch was not the convert from positivism to natural law that Hart painted him to be. Although he certainly contributed to some of the confusion surrounding the separation of law and morality debate, his fundamental concerns reflected more what Orts (supra p. 75 n. 67, at 251) calls “critical legality,” than they do the natural law moral tradition. Orts also points out that even Fuller, in his 1958 exchange with Hart, is inclined to view the injustice of NS law as basically a moral issue (ibid. at 255). Still, Radbruch’s focus on the question of legality is something of a precursor of Habermas. For instance, in addition to the provision of legal certainty, he was also committed to the idea that law as an institution is made to serve justice, and continuously held that “positive law, secured by legislation and power, takes precedence even when its content is unjust and fails to benefit the people, unless the conflict between statute and justice reaches such
Even though Habermas shares with Hart the suspicion that natural law’s substantive values are inadequate for the legal orders of a “post-metaphysical” age, he, like Lon Fuller before him, thinks that Hart’s concept of legitimacy, that legitimate law is what is “valid given the system’s criteria of validity,” fatally misconstrues the relation of law and morality.\(^8^6\)

As an alternative to the approaches of Weber and Hart, Habermas employs the discourse principle, D, to show how this relation between law and morality might be more adequately, and practically, expressed when addressing questions of the law’s legitimacy. Both law and morality are forms of communicative action. Both are then oriented around D, meaning that their respective abilities to steer human action are subject to D. This does

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86 CL, at 110.
not mean that law is necessarily also subject to specific moral commitments. For Habermas, law’s provisions are specific to particular, historically-situated institutional orders, while morality’s provisions remain general to humans across not only institutional boundaries, but social boundaries as well.\textsuperscript{87} Both remain, however, subject to the justification required by D, which creates the only rationally adequate path to assessing the legitimacy of either a legal provision or a moral command. As he tries to indicate this more congruent relationship, in opposition to Hart:

Moral argumentation penetrates into the core of positive law, which does not mean that morality completely merges with law. Morality that is not only complementary to but at the same time ingrained in law is of a procedural nature; it has rid itself of all specific normative contents and has been sublimated into a procedure for the justification of possible normative contents. Thus a procedural law and a proceduralized morality can mutually check one another.\textsuperscript{88}

Hart holds that it “cannot seriously be disputed that the development of law, at all times and places, has in fact been profoundly influenced” by conventional and reflective versions of morality. Nevertheless, this historical relationship has no bearing on the question of legal validity, as though “the criteria of legal validity of particular laws used in a legal system must include, tacitly if not explicitly, a reference to morality or justice.”\textsuperscript{89} Habermas, however, thinks Hart glosses over a key element in the question of validation as it involves the task of arguments of justification. Legal discourse “however bound to existing law, cannot operate within a closed universe of unambiguously fixed legal rules…The moral principles of natural law have become positive law in modern constitutional states. From the viewpoint of a logic of argumentation, the modes of

\begin{footnotesize}
\textsuperscript{87} BFN, at 451-52.

\textsuperscript{88} LM, at 247.

\textsuperscript{89} CL, at 184.
\end{footnotesize}
justification institutionalized in legal processes and proceedings remain open to moral discourses.”

For Weber and Hart, certainty is the achievement, and a Hobbesian fear of subjective conscience-based anarchy the attending threat, of the modern legal system. Habermas, however, points to the way in which legal certainty itself requires justification by D. “[L]egal certainty, which is based on the knowledge of unambiguously conditioned behavioral expectations, is itself a principle which must be weighed against other principles” in consideration of a case. But, as a principle advanced within rational discourse, it cannot be so weighed simply within the confines of “professionally and judicially institutionalized monopolies on interpretation and permit only internal revision according to their own standards.” Thus, on the basis of D, Habermas argues that the question of legitimacy cannot be addressed from within the closed catalog of procedures maintained by the culture of legal experts. Instead, grounded in acts of communication, it always opens to the wider social community of the “public sphere.” This means that law’s legitimacy is a function of democracy. Habermas’s discourse theory of law certainly also focuses on the creation of procedures. However, he consistently frames the construction of procedures as a process open under D to all users. “The proceduralist understanding of law [that is, his own rather than the positivist’s] thus privileges the communicative presuppositions and procedural conditions of democratic opinion- and

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90 LM, at 230.
91 BFN, at 220.
92 Ibid. at 222.
will-formation as the sole source of legitimation.” He envisions that the “additional burden of legitimation” which might realistically accompany any effort to make such a legitimizing task functional could be met by “the institutionalization of a legal public sphere that goes beyond the existing culture of experts and is sufficiently sensitive to make important court decisions the focus of public controversy.”

I have highlighted Habermas’s critique of legitimacy in the work of Weber and Hart because I believe it goes to the heart of difficulties Canada’s courts have had in addressing the communicative nature of intersocietal law, still inchoate within the court’s doctrine of the duty to consult. If legitimacy can be thought of as deriving from real-world dialogical processes between legal actors in a public sphere, then how the courts have conceived of the communicative basis of state legal relations with indigenous parties has significant normative implications. I will address these implications in Chapters 5 and 6. In the meantime, having given some explication to Habermas’s perspectives, in the next chapter I will address potential tensions and shortcomings that might arise from attempting to reach a useful understanding of Canada’s duty to consult with Aboriginal communities on the basis of discourse theory.

93 Ibid. at 450.

94 Ibid. at 440.
A disjuncture seems obvious between the concerns that animate Habermas’s critical theory of law and society, and those that might inform a normative investigation of Canada’s duty to consult with indigenous communities. From what I laid out above, his own historical context and his philosophical commitments both seem likely to contribute to a critical reader’s sense of this disjuncture. Such a reader might easily remain suspicious that Habermas’s approach is simply unhelpful – or perhaps even pernicious, in addressing the duty to consult. Indeed, Canadian political philosopher James Tully has offered a pointed caution to anyone considering the respective merits of Habermas or Michel Foucault, saying that “the stakes are extremely high, and anyone with a general interest in freedom and autonomy will choose Foucault’s approach over that of Habermas.”

Tully’s assumption that Foucault is the better guide, however, seems to entail a dismissal of law as a constructive social form. Thus, it may not itself be all that useful in

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1 Public Philosophy in a New Key, vol. 1: Democracy and Civic Freedom (Cambridge UK: Cambridge University Press, 2008) at 118. As he puts his objections to discourse theory: “It would constrain us to assess our moral and political norms in a deontological or juridical manner and to subordinate other ways of thinking and acting politically,” ibid. at 56. However, his own development of principles to guide relations between Canada and indigenous peoples seems to cohere with those that I think stem from discourse theory. He concludes, for instance, that: “The relationship will be proven to be valid if these principles come to be accepted in the course of further critical discussion by all Aboriginal and non-Aboriginal people affected by them,” ibid. at 229. As well, he sketches the forms of dialogue and negotiation appropriate to his practices of recognition, envisioning: “an intercultural dialogue in which mutual understanding and un-coerced agreements by contextually appropriate forms of negotiation and reciprocal questioning on how they should cooperate and review their relations of cooperation over time,” ibid. at 239.

2 I do not want to enter into long-running theory wars between proponents of the one and proponents of the other. I will simply say that I think Foucault’s view of law’s power, in Discipline and Punish: the Birth of the Prison (New York: Vintage, 1975), approaches law from what Hart might have called an “external” perspective. Thus, Tully’s frequent use of the Foucauldian terms “juridical” and “governmentality” are calculated to focus a reader’s attention on the power-laden force of law, Weber’s Gewalt. Although all of this is necessary to making sense out of law, it does not easily leave open the
considering the normative basis of intersocietal legal legitimacy necessary for the duty to consult
to serve the process of “reconciliation” called for by the courts.

In order to sharpen the edge of what I nevertheless believe is a powerful analytic tool, in this
chapter I will address the concerns of his critics most relevant to my subsequent discussion of the

possibility of conceiving of law in the more “internal” way that Hart, perhaps, but Habermas, surely,
would say is necessary for us self-determining beings to will as a rational form of normative social order.

When Tully turns to the normative questions at the heart of Canadian “Aboriginal” law, it seems to me
that he is most comfortable drawing upon Foucault’s ethics, with its focus on “new forms of subjectivity.”

As did Foucault in the 1980s, Tully portrays Habermas as a “universal” intellectual viewing
society from above, a “utopian,” someone convinced he is able to access critical principles beyond the
influence of history, supra p. 85 n. 1, at 121. Following Foucault, he claims that Habermas is
insufficiently critical in failing to examine his own presuppositions regarding his idea of a stable modern
personality, or “subject,” ibid. at 95; that Habermas is unreasonable to simplify the pragmatics of
communication into universal forms, ibid. at 109; that Habermas can’t examine historically the “juridical
subject” ibid. at 113, and that Habermas is utopian in believing that power is inherently bad, and therefore
missing from genuine acts of communication, ibid. at 120. Jean-Francois Lyotard also cast Habermas’s
project in a similar light, concluding as early as 1979 that consensus was not the primary goal of
communication, and that this awareness “destroys a belief that still underlies Habermas’s research,
namely that humanity is a collective (universal) subject seek[ing] its common emancipation through the
regularization of the ‘moves’ permitted in all language games and that the legitimacy of any statement
resides in its contributing to that emancipation,” in his The Postmodern Condition: a Report on
Knowledge (Minneapolis: University of Minnesota Press, 1984) at 66. Recently the Foucault/Habermas
debate has been renewed among political and legal theorists. See, for instance, Jacopo Martire “Habermas
Contra Foucault: Law, Power and the Forgotten Subject” (2012) Law Critique 25(2) 123. A useful effort
to find some common concern and points of departure between Foucault and Habermas, is Amy Allen’s
“Discourse, Power, And Subjectivation: the Foucault/Habermas Debate Reconsidered” (2009)
Philosophical Forum 40(1) 1.

Scholars in several fields have usefully employed Foucault to detail the workings of both colonial
administration and indigenous forms of resistance on North American reserves and reservations. See, for
instance, Thomas Biolsi, Organizing the Lakota: the Political Economy of the New Deal on the Pine
Ridge and Rosebud Reservations (Tucson: University of Arizona Press, 1992), Cole Harris, Making
Native Space: Colonialism, Resistance, and Reserves in British Columbia (Vancouver: University of
Communities in Western Canada, 1877-1927 (Edmonton: Athabasca University Press, 2009). As well,
both indigenous and non-indigenous scholars have applied Foucault to their interpretations of law as
social power affecting indigenous people. See, for instance, Robert A. Williams, Jr. The American Indian
in Western Legal Thought: the Discourses of Conquest (New York: Oxford University Press, 1990), and
Seán Patrick Eudaily The Present Politics of the Past: Indigenous Legal Activism and Resistance to
(Neo)Liberal Governmentality (New York: Routledge, 2004). For an example of Foucault’s thought
applied to a recent case involving an inter-tribally significant sacred site in Arizona, see Jessica M.
Service” Seattle University Law Review 33(2) 463.
duty to consult. In the first section, I take up an issue that does stand in the way of my immediate employment of Habermas: his own occasional references to indigenous communities and worldviews within the body of his social and legal theory, which I clarify by trying to bridge the gap apparent between what he refers to as “the system of rights” and the place of Aboriginal and treaty rights in Canadian law. In the second section, I will attempt to find common ground between the discourse approach to law and the approaches to dialogue and legal pluralism evident within the work of several indigenous scholars who have expressed their suspicion of projects such as Habermas’s.

A. Limitations to Habermas’s conceptualization of the legal standing of indigenous communities

To begin with what may simply be obvious, the range of interests, and the various literatures Habermas has absorbed in developing his discourse theory are daunting. Nevertheless, in his aiming to account for the rise of the modern social order, to save the democratic heritage of Enlightenment rationalism, and to provide a critical basis for a normative approach to democracy and legality, Habermas has paid scant attention to the histories of contact and conflict between European and North American modernizers and this continent’s indigenous societies. Consideration of these histories could certainly have an impact on the sorts of conclusions Habermas has voiced on occasion regarding the legal standing of indigenous communities, and might affect his conclusions regarding the position of subaltern and minority groups in other settings besides North America. In a 1985 interview, for instance, he framed a horizon of concern to his social and political vision:

I am no transcendental philosopher. I would not speak of ‘communicative rationalization’ if, in the last two hundred years of European and American history, in the last forty years of the national liberation movements, and despite all the catastrophes, a piece of ‘existing reason,’ as Hegel would have put it, were not
nevertheless also recognizable—in the bourgeois emancipation movements, no less than in the workers’ movement, today in feminism, in cultural revolts, in ecological and pacifist forms of resistance, and so forth.\(^3\)

His faith in the historical sprouting of “existing reason” in the form of North American liberal institutions and liberal political values, with no word at all offered regarding the coeval history of conflicts with North American indigenous nations,\(^4\) is sufficient to indicate this lack of interest, perhaps especially since in the same place he refers to the struggles against colonialism marking the post-war era on other continents. At the same time, his acknowledgment of those post-colonial struggles of “national liberation” also suggests that he could conceivably still encompass the legal and political struggles of indigenous peoples in North America and elsewhere within the framework of his observations and reflections, since these movements were in part reflective

\(^3\) AS, at 180-81.

\(^4\) "Nation" is admittedly an awkward term to employ consistently, and my own usage here remains rather loose. Red Cliff Ojibwe historian Michael Witgen notes its unsubtle application to indigenous peoples' own political institutions. He maintains that its original use among New France's colonial administrators and intellectuals aided in their task of attempting to unify for their own purposes the varied structures and groupings of Great Lakes indigenous communities. See his An Infinity of Nations: How the Native New World Shaped Early North America (Philadelphia: University of Pennsylvania Press, 2012) at 107. I do use it in what follows, however, thinking that its tilt towards an oversimplification of historic indigenous political collectives also balances out an equally strong tendency to minimize the legal standing of those collectives in relation to the Canadian state, and a tendency which US chief justice John Marshall countered in his own explanation for employing “nation,” as a group capable of making treaties, in relation to North American tribes. See Worcester v Georgia, 31 U.S. (6 Pet.) 515 (1832), at 650. As well, (and with an obligatory nod towards the work of Benedict Anderson) I acknowledge that its rhetorical suggestion of collective political identity, generally grounded in blood and language, connotes a uniformity that obscures the local as well as the broader – clan and league – based allegiances and decision-making forums that have often functioned within indigenous political orders confronting settler state challenges. For recent debate on the diminished usefulness of an indigenous "nationalist" perspective, see Joseph Bauerkemper and Heidi Kiwetinepinesiik Stark "The Trans/National Terrain of Anishinaabe Law and Diplomacy" (2012) The Journal of Transnational American Studies 4(1) 1. For an influential expression of a nationalist perspective, see the work of Crow Creek Sioux literary scholar Elizabeth Cook-Lynn, in particular, her "Who Stole Native American Studies?" (1997) Wicazo Sa Review 12(1) 9. See also Anderson supra p. 24 n. 55.
of, or at least bound up with, indigenous peoples’ political aspirations in Asia, Africa, and the Americas.\textsuperscript{5}

The minor attention Habermas has actually given to indigenous societies in the course of his discussions of social evolution also demonstrates his lack of any developing interest in or awareness of indigenous perspectives on such questions as their legal standing in relation to settler states, or the substance of their own traditions of legal thought and practice. His limited discussions of indigenous peoples amount only to skewed, generalized and ahistorical reconstructions grounded in social theory classics, such as Emile Durkheim’s \textit{Elementary Forms of the Religious Life} (1912). In \textit{TCA2}, for instance, he examines the social evolutionary link between the sacred and the moral order that Emile Durkheim developed out of his reading of early ethnological reports concerning Australian Aboriginal religious life, absorbed by his social theoretical aim, and lacking any curiosity about the integrity of Durkheim’s ethnographic or

\textsuperscript{5} Granted, the category “indigenous” is also subject to considerable debate and stretch, which I won’t take the space to explicate here beyond noting anthropologist James Clifford’s effort to steer discussion away from earlier academic debates regarding insider/outside, authentic/inauthentic. See his “Indigenous Articulations” (2001) \textit{The Contemporary Pacific} 13(2) 467. For examinations of this issue in terms of the contests between states and indigenous groups attempting to gain greater standing within international law, see Jeff J. Corntassel “Who Is Indigenous? ‘Peoplehood’ and Ethnonationalist Approaches to Rearticulating Indigenous Identity” (2003) \textit{Nationalism and Ethnic Politics} 9(1) 75, and Francesca Merlan “Indigeneity: Global and Local” (2009) \textit{Current Anthropology} 50(3) 303. For an overview of international law related to colonialism and its impact on indigenous peoples, see Antony Anghie \textit{Imperialism, Sovereignty and the Making of International Law} (Cambridge: Cambridge University Press, 2007). The term “peoples” is also subject to considerable dispute within international bodies such as the UN and the International Labour Organization. For the development of indigenous peoples’ engagement with international law and its institutions, see S. James Anaya \textit{Indigenous Peoples in International Law} (New York: Oxford University Press, 1996). For the challenges to state sovereignty associated with the term “peoples” see \textit{ibid.} at 48-49. My point here is only that Habermas, never an orthodox Marxist, was able even in the early 1980s to see continuity between widely diverse political movements, some of which contained the seeds of the global-scale indigenous peoples’ movements expanding during the same time period as the postwar “national liberation” movements. My point is not to say that post-colonial regimes are themselves reflective, or supportive, of indigenous peoples’ aims at self-determination.
historical sources. Similarly, in his evolutionary account of law’s communicative core in *BFN*, he objects to the common depiction of “kinship societies” as lacking any form of political/legal functioning, a claim crucial to state of nature arguments in the vein of Thomas Hobbes, though again without expressing any interest in the particulars undergirding his confident assertion of an “overabundance of anthropological material.”

Perhaps his most troubling statement related to indigenous peoples, however, arises in the course of his post-*BFN* efforts to address the legal basis of multiculturalism. In a 2005 essay on liberalism, and while drawing solely on the work of Canadian political theorist Will Kymlicka to provide himself with information and context, Habermas offers the following statement concerned with the rights of indigenous peoples in North America:

> [T]here are tribal societies and forms of life and also cultic practices that do not fit with the political framework of an egalitarian and individualist

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6 See *TCA2* at 43ff. For a critique of Habermas’s reference to indigenous societies as a generalized touchstone within the confines of an evolutionary approach to social theory, and an argument for turning instead to Foucault to assist in the articulation of indigenous theories of resistance to continued colonial pressures, see Jan Lüdert “Habermas Revisited: Indigenous Lifeworlds Today” (2010) *Indigenous Policy Journal* 21(4). WilsonWeb, 27 April 2012. For a critique of the “neo-primitivist” assumptions contained in Habermas’s evolutionary approach to communication, see Victor Li *The Neo-Primitivist Turn: Critical Reflections on Altery, Culture, and Modernity* (Toronto: University of Toronto Press, 2006). Li attempts to show that Habermas’s entire view of communication rests upon a mythical construction of “pre-modern” primitive societies, thus committing in reverse the errors of those western figures who revered a golden age of noble savages. Unfortunately for the clarity of his position, Li winds up concluding that the mythical vision of primitivism contained within the theory of modernity is so pervasive in its influence that no work of theory, including his own, can escape it. My aim, not being theoretical, is only to extract enough of Habermas’s view of discourse to be able to employ it practically. I will have to leave open the question of how one might interpret Habermas severed from his own “post-metaphysical” attempt to ground his normative theory of law and discourse by appealing to the social science construction of social evolution. I note, however, that many scholars have argued that a more pragmatist option exists for Habermas, whether or not he might accept it. If pushed, I would ally myself with this same attempt to resolve the question. See David 12, *supra* p. 7 n. 12, and Amy Allen, “The Unforced Force of the Better Argument: Reason and Power in Habermas’ Political Theory” *Constellations* 2012 19(3) 353.

7 *BFN*, at 138-39.
legal order. That is apparent in the attempts by the United States, Canada and
Australia to correct the historical injustice to indigenous peoples who were
subjugated, compulsorily integrated and discriminated against for centuries.
These groups use the concession of far-reaching autonomy to maintain or to
restore particular forms of traditional authority and collective property, even
though in individual cases these conflict with the egalitarian principle and
individualistic reference of “equal rights for all.” According to the modern
understanding of law, there really cannot be a “state within the state.” If a so-called
“illiberal” group is nevertheless allowed to assume its own legal order within a liberal
state, that results in irresolvable contradictions. When tribal communities, whose
ancestors were forcibly integrated into the state of the conquerors, are, for moral reasons,
compensated with extensive rights to self-administration, the obligations of individual
members of the tribe can conflict with rights that they are entitled to as citizens of the
larger political community.  

Philosophy 13(1) 1, at 23-24, emphasis in original. His efforts here follow the tack he laid out in
Inclusion of the Other: Studies in Political Theory (Cambridge MA: MIT Press, 1998), he tries to
approach the legal and political claims of cultural identity movements as he did in BFN. There he sought
to find a third way to discuss political rights and the creation of law, steering between classic divides of
liberalism and communitarianism. Similarly, in his work on cultural identity, he seeks to provide more
acknowledgment for collective sources of identity than he finds typical of liberals, but less than is typical
of communitarians, who he thinks more inclined to award substantive group rights that conflict with the
inherent self-legislating power of democratic citizens. They are right in acknowledging that personal
identity is the result of an “intersubjective” process, but wrong to think this requires rights not serving
primarily to shield individuals from group coercion, ibid. at 208. For a critique of the work of Kymlicka
and Charles Taylor, who also influences Habermas’s thinking on the politics of culture, as that applies to
“Aboriginal rights” in Canada, see Caroline Dick “Culture and the Courts’ Revisited: Group-
Rights Scholarship and the Evolution of s.35.1” (2009) Canadian Journal of Political Science 42(4) 957. In an
effort somewhat similar to the one I am advancing here, William Rabinder James argues that Habermas’s
view of public discourse is an aid to the notion of tribal sovereignty. He distinguishes Kymlicka’s liberal
sense of autonomy as a private exercise from Habermas’s, which he says is public. At the same time,
however, in considering US cases such as Santa Clara Pueblo v Martinez (98 US 1670 [1978]), he
continues to frame indigenous standing as cultural. See his “Tribal Sovereignty and the Intercultural
Public Sphere” (1999) Philosophy and Social Criticism 25(5) 57, at 65. Also, for an anthropologist’s
critique of “culture” as it appears within Canada’s Aboriginal jurisprudence, see Michael Asch “The
Judicial Conceptualization of Culture after Delgamuukw and Van der Peet (1999-2000) Review of
Constitutional Studies 5, 119. See also Ronald Niezen "Culture and the Judiciary: The Meaning of the
Culture Concept as a Source of Aboriginal Rights in Canada" (2003) Canadian Journal of Law and
Society 18(2) 1. For critiques of the culture tests developed by the Supreme Court, see Russel Lawrence
Barsh and James Youngblood Henderson "The Supreme Court's Van der Peet Trilogy: Naive Imperialism
and Ropes of Sand" (1997) McGill Law Journal 42(4) 993; and John Borrows "The Trickster: Integral to
a Distinctive Culture" (1997) Constitutional Forum 8(2) 27.
In this passage Habermas employs assumptions regarding the relation of subaltern or minority groups and dominant political/legal institutions that, if warranted, would make impossible many of the arguments that indigenous communities have advanced in Canada’s courts, and perhaps even some of the reflection on Aboriginal and treaty rights carried out by the courts themselves since 1982. Admittedly, as Gordon Christie demonstrates, the courts dealing with “Aboriginal rights” largely project, and seek to protect, the same web of liberal assumptions about law and political order that Habermas sees as threatened by “illiberal” groups. What makes Habermas’s analysis less than germane when stretched to apply to the situations of indigenous communities in Canada, however, is that it overlooks both what Christie speaks of as “Aboriginal difference,” and the key component of the historical forms of relationship constructed between indigenous and settler peoples. For instance, in characterising the basis of compensation for “forcible” integration “into the state of the conquerors” as being performed for “moral reasons,” he overlooks the historical development of treaty relations between settler states and indigenous communities. A significant consequence of this oversight is that it lets stand a line of thought evident in influential 20th century U.S. cases, such as Tee Hit Ton (also cited in Calder and several other Canadian cases), where Supreme Court Justice Reed employed the idea that legal rights and moral sentiments in Indian cases are unrelated. An earlier expression of this strongly

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10 Ibid. at 91.

positivist view was the U.S. Supreme Court’s conclusion in *Santa Fe Pacific* that extinguishment of title raises “political, not justiciable, issues.” In *Northwestern Bands of Shoshone Indians*, another American title case, Justice Jackson was able to employ this same division to hold together the majority and the dissent, noting that:

> We agree with Mr. Justice Reed that no legal rights are today to be recognized in the Shoshones by reason of this treaty. We agree with Mr. Justice Douglas and Mr. Justice Murphy as to their moral deserts. We do not mean to leave the impression that the two have any relation to each other.

This basically Hartian tenet, as I discussed in the previous chapter, is a key element in the view of legal legitimacy that Habermas seeks to replace with his discourse theory. Confronted with such positivist reasoning in Indian and Aboriginal law cases, and informed of the longstanding nature of the treaty relationship, I believe Habermas would have to agree that the weight of his diagnosis of the Canadian situation should be questioned.

An entry point to this problem can be taken from his use of the word “illiberal” to characterize North American “tribal societies.” It may well be that by doing so Habermas has in mind the thick web of practices, values and institutions that historically distinguished indigenous societies

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12 United States *v* Santa Fe Pacific R. Co., 314 U.S. 339 (1941), at 347. The lineage of this tendency extends back to Chief Justice John Marshall’s 1823 diffident expression in *Johnson v M’Intosh*:

> We will not enter into the controversy, whether agriculturists, merchants, and manufacturers, have a right, on abstract principles, to expel hunters from the territory they possess, or to contract their limits. Conquest gives a title which the Courts of the conqueror cannot deny, whatever the private and speculative opinions of individuals may be, respecting the original justice of the claim which has been successfully asserted (21 U.S, 8 Wheat., 543 [1823], at 588).

13 Northwestern Bands of Shoshone Indians *v* United States 324 U.S. 335 (1945), at 358.

14 Choosing to dismiss the need for such questioning would also leave him open to the critiques of philosophical liberalism coming from indigenous scholars such as Gordon Christie, supra p. 95 n. 9, and Dale Turner, who have both argued effectively that contemporary liberalism imposes the same constraints on indigenous survival as did its 19th century forebear. See Turner’s *This Is Not a Peace Pipe: towards a Critical Indigenous Philosophy* (Toronto: University of Toronto Press, 2006).
in general from those brought to the Americas by European settlers. In such patterned areas of
social life as kinship relations, property-holding, economic distribution, and gender-roles, as well
as in domains of knowledge and understandings of the sacred, strong differences between
indigenous and the emergent settler societies contributed to lasting tension and conflict.
Certainly, if by “illiber al” one means a social order not inclined to regard the individual cash-
labour nexus of the emergent market economy as normative, nor bourgeois patterns of gender
roles and family life, or privatized acknowledgment of the sacred, then the term “illiber al” might
well apply.\textsuperscript{15}

However, Habermas says nothing that would indicate he has these or related features of North
American society in mind. Thus, the term as he employs it can only mischaracterize other
equally important aspects of indigenous societies in North America, most especially basic
features of political decision-making and legal norm-creation and observance.\textsuperscript{16} The most likely
source for this mischaracterization is that Habermas sees indigenous North Americans as
fulfilling the same position within Canadian and US life as do minority and immigrant groups
within European societies. “Illiber al” is a term he uses often in tandem with “fundamentalist” in
speaking of immigration to Europe, or as an inhibitor of an emergent possibility of
“constitutional patriotism” providing solidarity across Europe’s various borders. Or, he uses
“illiber al” to characterize those he thinks may lack the stamina for democracy – meaning

\textsuperscript{15} For an instructive analysis of the operation of liberal legal and administrative presumptions affecting
one Western Shoshone family over the course of the 20\textsuperscript{th} century, and illustrating many larger conflicts,
see Allison Dussias “Squaw Drudges, Farm Wives, and the Dann Sisters' Last Stand: American Indian
Women's Resistance to Domestication and the Denial of their Property Rights” (1999) \textit{North Carolina
Law Review} 77(2) 637.

\textsuperscript{16} Christie, \textit{supra} p. 95 n. 9.
especially his fellow citizens socialized in the GDR, prior to the burdensome process of reunification following the collapse of the Soviet Union and its satellite states. Without pursuing any further his discussions of multiculturalism within contemporary Europe, we can conclude that he is clearly mistaken in regarding immigrant Muslim communities in contemporary Germany or France, or former citizens of the GDR, as sharing any commonalities in relation to their legal or political standing with indigenous North Americans.

Consequently, the position he advocates on multiculturalism in this passage from 2005 is of little value in thinking through the legal standing of indigenous North American communities. His repeated arguments against strong collective, cultural, rights are grounded in the idea that cultural practices and traditional chains of authority, in our liberal and “post-metaphysical” age, are forces that individuals are free to take up or reject on the basis of their yes/no responses to challenged validity-claims. While this may be applicable to some North American situations, it is indistinguishable in its effect, as regards Aboriginal legal and political standing, from such assimilation-minded policy directives as the Trudeau administration’s 1969 “White Paper.”  

17 For an overview of the history of assimilation, see J.R. Miller, *Skyscrapers Hide the Heavens: a History of Indian-White Relations in Canada* 3rd ed. (Toronto: University of Toronto Press, 2000). For the text of the White Paper, see “Statement of the Government of Canada on Indian Policy, 1969” (Ottawa: Queen’s Printer, 1969), available at <http://www.aadnc-aandc.gc.ca/eng/1100100010189/1100100010191>. The White Paper expressed a liberal view of assimilation as the preferable remedy to historical injustices, grounding this process in the choice of indigenous individuals to cast-off the legal and cultural weights which constrained their ability to live productive, self-determined lives. Thus it highlighted the value of culture and “identity,” while portraying these as essentially non-legal categories.

This Government believes in equality. It believes that all men and women have equal rights. It is determined that all shall be treated fairly and that no one shall be shut out of Canadian life, and especially that no one shall be shut out because of his race. This belief is the basis for the Government's determination to open the doors of opportunity to all Canadians, to remove the barriers which impede the development of people, of regions and of the country. Only a policy based on this belief can enable the Indian people to realize their needs and aspirations.

The Indian people are entitled to such a policy. They are entitled to an equality which preserves and enriches Indian identity and distinction; an equality which stresses Indian participation in its creation and which manifests itself in all aspects of Indian life (*ibid.* at 6).
Thus, on this issue, I think Habermas is clearly wrong, though I trace this to his being poorly informed rather than to possessing underlying theoretical commitments that would necessarily militate against my use of his discourse theory. He clearly holds the common misconception that North American indigenous "communities" are basically ethnic or cultural entities, and that their position within or in relation to the larger society is not fundamentally legal or political in nature. However, as a thinker who has exhibited frequent ability to reconsider and modify his own positions in response to interactions with his critics, I also believe Habermas is capable of setting aside his assimilationist understanding of North American indigenous communities.\footnote{Although this remains the subject of debate, consider how some feminist theorists have indicated that the features they found most troubling within Habermas’s theory of communicative action have been modified in his subsequent work. For an earlier response, see, for instance, Nancy Fraser “What’s Critical about Critical Theory? The Case of Habermas and Gender” (1985) \textit{New German Critique} 35 (Spring/Summer) 97. For a more recent appraisal, see Pauline Johnson “Distorted Communications: Feminism’s Dispute with Habermas” (2001) \textit{Philosophy and Social Criticism} 27(1) 39. For a less positive view of his ability to change perspective, see Amy R. Allen “Systematically Distorted Subjectivity? Habermas and the Critique of Power” (2007) \textit{Philosophy and Social Criticism} 33(5) 641.}

The point at which his theory can be adjusted to include a more robust recognition of indigenous communities’ legal standing, and their government to government relationships with the larger North American political orders (points which, after all, are more matters of fact rather than theory), appears when we consider what he presents as the “system of rights,” his term for the essence of a democratic legal order. On Habermas’s account legally protected political rights are communicative achievements; they emerge within a political order through the mutual acknowledgment and consent of those affected -- that is the upshot of D. Constitutional provisions, statutes, and regulations embodying such rights, are all valid – as in rationally legitimate – because of this communicative core. On one reading of the emergence of Aboriginal

For a recent critique of the White Paper and its lingering effects, see Turner \textit{supra} p. 96 n. 14.
rights within Canada’s constitutional order, those engaged in rights-acknowledging discourse are individuals. This would mean that Canada’s affirmation and recognition of Aboriginal and treaty rights in sec. 35 (1) of the Constitution Act, 1982 is at most an effort to secure for Aboriginal individuals some form of redress for the history of colonial oppression. This reading is in accord with those majority sentiments that dismiss the significance of Aboriginal rights as “special rights” in conflict with Canada’s democratic, liberal heritage. Accordingly, this reading would place members of Canada’s Aboriginal communities within the same constitutional framework that offers protection to all citizens.

Habermas, however, given his commitment to the discourse principle, would have to admit that this reading ignores the particular communicative basis of the linkage between the Canadian state and Aboriginal communities. The primary form of this connection historically has been the creation of treaties between the state and self-determining indigenous nations. Assessed from the standpoint of D, Canada’s treaty-making has been, and arguably remains, a deeply flawed endeavour. If, as D holds, “Just those action norms are valid to which all possibly affected persons could agree as participants in rational discourses,” it would be hard to contend for the pragmatic rational legitimacy of the treaty-formation process. And yet, the treaty relation between indigenous nations and the Canadian state does contain a kernel of legitimacy, far more so than does the Indian Act or legislation such as the resource transfer agreements contained in

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19 This is the well-known position of Tom Flanagan, First Nations? Second Thoughts (Montreal: McGill-Queen’s University Press, 2000).

20 For a historical overview, see J.R. Miller Compact, Contract and Covenant: Aboriginal Treaty-Making in Canada (Toronto: University of Toronto Press, 2009).

21 BFN, at 107.
the *Constitution Act 1930*, all of which are lacking in any communicative dimension. That kernel of legitimacy, though stunted through a legacy of broken promises and the state’s unilateral and self-serving interpretation of the nature of these agreements, is observable within indigenous communities still; in their histories of treaty veneration, in their communicative practices of kinship and alliance formation, and in their high regard for upholding their own promises to share the land – despite the subsequent history of injustices.

Habermas could easily find in the long tradition of treaty-making sufficient material to cause him to revise his view that the politics of culture and the legal securing of individual rights are sufficient to satisfy a discourse reading of the liberal state’s accommodation to the “historical injustices” affecting Canada’s indigenous communities. Although Canada’s courts have interpreted treaties as *sui generis* agreements, different in form and function from those made by Westphalian states, Habermas would have to acknowledge that – as elders have traditionally said, and as scholars have been documenting for some time now – treaties in Canada are primarily communicative, norm-creating events. Thus, the “system of rights” to which they have given rise is akin to the system of rights that Habermas has argued for within the space of

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the European Union’s debate about a constitutional order. Within that order, even on what some
observers regard as Habermas’s rather constrained vision of democratic constitution-building,
the only system of rights bearing any potential legitimacy has to be one that all affected by are
capable of consenting to, through whatever respective structures of representation and
procedures of debate carry rational legitimacy within the various EU member communities. This
vision of a politically federated Europe bears sufficient resemblance to the “treaty federalism”
advocated some time ago by James Sákéj Henderson, to indicate that from a discourse
perspective Canada’s web of Aboriginal rights and treaty relations with First Nations and other
indigenous communities are poorly described and theorized post-1982 primarily through the
resort to common law.23

23 Russel Barsh and Sákéj Henderson first applied the idea of treaty federalism to tribal/First Nations
relations with the US and Canadian states in The Road: Indian Tribes and Political Liberty (Berkeley:
Saskatchewan Law Review 58(2) 241. For more recent efforts to advance his argument that Aboriginal
treaties are actually documents affecting the nature of the constitutional order (rather than the more
common assumption that they are only products of otherwise legitimated constitutional power), see John
Queen's Law Journal 26(1) 143. For an effort to apply the concept of treaty federalism to contemporary
issues of joint-governance, taking account of the difficult electoral issues that would arise from
conceiving Canada as a three-tier federation (including deep suspicion of Canada’s electoral politics from
within indigenous communities, see Michael A. Murphy’s “Representing Indigenous Self-Determination”
Aboriginal-Government Land Claims” (2002) Publius 32(3) 89, Graham White argues that while land
claims in the north have created complex bureaucratic mechanisms for administration of lands and
resources, it is unclear that these treaty-derived institutions are capable of incorporating Inuit values or
traditional knowledge, although, as he says “it is hard to escape the judgment that traditional ways will, at
best, only be able to modify (rather than transform) the enormously powerful institutional values
embedded in the EuroCanadian administrative model,” ibid. at 113. Thomas Hueglin argues that Canada
shares with the EU important characteristics of “treaty federalism,” despite some obvious differences in
terms of Canada’s constitutional structure; although he nowhere mentions in his discussion the indigenous
presence in Canada. See his “Treaty Federalism as a Model of Policy Making: Comparing Canada and the
European Union” (2013) Canadian Public Administration 56(2) 185. For instance, the key parallel he
finds between the federalisms of the EU and Canada entails a significant communicative dimension. As
he puts it, in both settings “the institutional and procedural environment in which policy formation is
likely to take place” depends upon “power sharing, intergovernmental contracting, council governance
and equalization commitments” ibid. at 192. However, a recent study of US tribes coping with federalist
**B. Indigenous dialogues, Habermasian discourses, and the legitimation of law**

I maintain that discourse theory can function in the present context much better than it would appear to on the basis of James Tully’s argument that anyone with “a general interest in freedom and autonomy” or respect for indigenous communities and their worldviews should reject a Habermasian approach out of hand. Nevertheless, I do think it is still necessary to question whether what can easily be seen as a lack of fit between discourse theory and the range of indigenous perspectives and concerns regarding communicative practices and legal standing would prohibit its utility here. Numerous indigenous scholars from North America and elsewhere have argued that western approaches to communicative practice inevitably weaken the possibility of indigenous peoples’ participation in any kind of intercultural communication event. Maori scholar Linda Tuhiwai Smith and colleagues, for instance, adopt positions derived from Foucault and various post-colonial writers, arguing that the universal presumptions found in Western Enlightenment notions of rationality, justice and humanity are not necessarily transferrable to other contexts and times in their totality without an engagement with issues of social justice that arise from the ideological, intellectual and imperial domination of Western thought and theory.24

As she frames it in an earlier work, the “modernist project” (which, as noted above, Habermas seeks to defend with his communicative view of law and society) is intimately tied in its

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conception of scientific rationality to the hierarchical classification schemes that incorporated, oppressively, indigenous peoples into western systems of knowledge and colonial administration.\textsuperscript{25} Dale Turner and Audra Simpson, in their discussion of indigenous leadership tasks within the context of modern First Nations governance, also speak to the difficulty of creating decent conditions for dialogue across linguistic and intellectual fences. They acknowledge that translation of traditional indigenous legal and political concepts into English is risky even when undertaken by members of indigenous communities (though they also regard it as necessary):

\begin{quote}
[T]o translate Indigenous ways of knowing the world into English may read as an attempt to change Indigenous cultures, the interior spaces of our communities and our knowledges where sacredness and tradition reside, into cultures that unproblematically accept the discourses of rights, sovereignty, and nationhood as the only authoritative sources of Indigenous political claims. We realize these languages may be read as a sort of violence upon those interior spaces of our being, but we want to argue instead that they are used to simply protect, through the language of the dominant culture – in a way that they understand – what we regard as ours.\textsuperscript{26}
\end{quote}

In their strongest formulations of the distance between such respective “epistemologies,” as grounded in the structures of different language families, some indigenous scholars have held that western and indigenous habits of thought are almost ‘incommensurable.’ Some of these statements may well be little more than rhetorical generalities functioning within the academic politics of post- or anti-colonial humanities and social science. For instance, referring to the work of the controversial linguist Benjamin Lee Whorf and his view of “linguistic indeterminacy,”

\begin{quote}
\textsuperscript{25} See her Decolonizing Methodologies: Research and Indigenous Peoples, 2\textsuperscript{nd} ed. (London: Zed, 2012) at 62-63.
\end{quote}

\begin{quote}
\textsuperscript{26} See their “Indigenous Leadership in a Flat World” (West Vancouver: National Centre for First Nations Governance, 2008) at 14. Margaret Kovachs, who speaks of indigenous as well as “tribal” epistemologies, also sees indigenous academic researchers being able to (though perhaps under challenging conditions) function both within these frameworks and within the parameters of modernist western approaches to knowledge. See her Indigenous Methodologies: Characteristics, Conversations and Contexts (Toronto: University of Toronto Press, 2009).
\end{quote}
Marie Battiste and James Sákéj Henderson have drawn sharp distinctions between the “noun-based” Indo-European languages employed by those who developed the “Eurocentric worldview” and the “verb-based” languages of North American indigenous peoples.27 As well, they have doubted the possibility of “benign” translation between such languages.28 While in some form these statements reflect notable positions within linguistics, philosophy of language, anthropology and other fields, the bald implications that Battiste and Henderson draw at points

27 Protecting Indigenous Knowledge and Heritage: a Global Challenge (Saskatoon: Purich, 2000) at 73-74. See also Anne Waters “Language Matters: Nondiscrete Nonbinary Dualism” in American Indian Thought: Philosophical Essays (Oxford: Blackwell, 2004) at 97. In addition, Grace Li Xiu Woo, drawing on the well-known work of Thomas Kuhn, and the post-Whorfian linguist George Lakoff’s studies of embodied metaphors (as in the idea of a “high” court), argues that conflicting views of s. 35(1) rights in Canada are a product of conflicting linguistic systems. See her Ghost Dancing with Colonialism: Decolonization and Indigenous Rights at the Supreme Court of Canada (Vancouver: University of British Columbia Press, 2011) at 41-42. For Whorf’s influential formulation of the linguistic foundations of an indigenous North American worldview (derived from his analysis of the lack of any means within Hopi grammar to express ideas about the course of time), see his “An American Indian Model of the Universe” (1950) International Journal of American Linguistics 16(2) 67. The debates that Whorf sparked run too far afield to sketch here, other than to note the periodic changes in consensus on the part of linguists regarding the merits of his work. Ekkehart Malotki demonstrated that Whorf misrepresented Hopi grammar in Hopi Time: a Linguistic Analysis of the Temporal Concepts in the Hopi Language (Berlin: Mouton, 1983). More recently, Malotki’s universalist assumptions have also sparked considerable debate among linguists, anthropologists and cognitive scientists. Some of these more recent versions of indeterminacy focus as well on the political and legal implications that might be drawn from language structure. Anthropologist David Dinwoodie, for instance, employs Habermas’s concept of the public sphere to demonstrate the impact of the “voice” achieved by the use of the Tsilhqot’in language in a 1989 public declaration from the Xeni Gwet’ín, or Nemiah Valley Indian Band, regarding logging on their traditional lands. See “Authorizing Voices: Going Public in an Indigenous Language” (1998) Cultural Anthropology 13(2) 193. As well, Elizabeth Povinelli frames the hope for translatability as being bound up with what she speaks of as “late liberalism.” In “Radical Worlds: the Anthropology of Incommensurability and Inconceivability” (2001) Annual Review of Anthropology 30, 319, she provides an overview of the recurrent discussions among anthropologists and philosophers of Whorfian incommensurability or indeterminacy, focused particularly on the marginalized groups reflecting what she refers to as “radical alterity,” that is, ethnic, indigenous, religious and sexual minorities. Although also employing the language of incommensurability to chart the distance between fundamental Canadian and Anishinaabe legal concepts, Wapshkaa Ma’iingan (Aaron Mills) emphasizes that this gap “is contingent; that it need not be there and that at least in some ways, the respective jurisdictions could function together.” See his “Aki, Anishinaabek, kaye tahsh Crown” (2010) Indigenous Law Journal 9(1) 107, at 148.

28 For Battiste and Henderson’s statements regarding language and the “illusion” of translatability, see supra p. 104 n. 27, at 80-81.
seem to me little more than polemical. As they put it: “A noun-based system that is not based on the sensory natural world but on artificially created ideas proceeds from mastery to enslavement.” 29 In a similar vein, Mohawk legal scholar Patricia Monture-Argus urged indigenous scholars to pay careful attention to the way that language (that is English) presupposes a framework of meaning that is at the least hierarchical and gendered. I also experience it as colonial. No definition can be taken for granted as inclusive. The re-examination of the way language sanctions particular worldviews and understandings is central [to the task of addressing indigenous legal standing in Canada]. 30

Although such statements may be polemical, these authors’ shared assumption that language affects worldview has also usefully encouraged a number of indigenous and other scholars to focus on the breadth of what Val Napoleon calls “indigenous legal orders” maintained across North America. 31 These legal orders are often framed as reflecting their particular oral lineage. 32

29 Supra p. 104 n. 27, at 73. For Battiste and Henderson’s statements regarding language and what they refer to as “cognitive imperialism” see, ibid. at 74.

30 See her Journeying Forward: Dreaming First Nations’ Independence (Halifax: Fernwood, 1999) at 43.

31 Indigenous legal orders have been the focus of at least some scholars since E.A. Hoebel and Karl Llewellyn’s The Cheyenne Way: Conflict and Case Law in Primitive Jurisprudence (Norman: University of Oklahoma Press, 1941). This attention was quite limited however, despite the advocacy work of early 20th century pan-Indian groups, and the post-World War Two public prominence of crucial Indian law cases, such as Calder in Canada, or the US court battles over title and the rulings of the Indian Claims Commission – pursued by such tribes as the Oneidas, the Sioux and the Western Shoshones. The length of these battles, some dating back to the 1920s and earlier, testifies to the long-standing frustrations that members of indigenous communities have typically felt regarding the courts. For detail on the legal views and aims of lesser known pan-Indian organizations, see Steven J. Crum “Almost Invisible: The Brotherhood of North American Indians (1911) and the League of North American Indians (1935)” (2006) Wicazo Sa Review 21(1) 43; but see also Hazel Hertzberg The Search for an American Indian Identity: Modern Pan-Indian Movements (Syracuse: Syracuse University Press, 1971), and Wilcomb E. Washburn’s Red Man’s Land/White Man’s Law: a Study of the Past and Present Status of the American Indian (New York: Scribners, 1971), for general histories of the early development of Indian claims against the government. For the impact of Calder on the incorporation of sec. 35(1) within the Canada Constitution Act, 1982, see Hamar Foster, Heather Raven and Jeremy Webber Let Right Be Done: Aboriginal Title, the Calder Case, and the Future of Indigenous Rights (Vancouver: University of British Columbia Press, 2007). A specifically indigenous literature concerned with both traditional legal understandings and with providing intellectual perspectives on contemporary legal questions really only emerged in the wake of the Red Power/civil rights era, which sparked the work of numerous indigenous authors, such as the acerbic Lakota scholar Vine Deloria, Jr., and in Canada, that of Cree political leader

32 The oral basis of indigenous legal orders raises a number of issues that theorists of legal pluralism, such as William Twining, have sought to address across an international spectrum. Twining notes that much of the academic discussion of legal pluralism rests with demonstration of the fact of legal diversity, and avoids, so far, the tasks of addressing the normative dimensions of plural legal discourses, such as one might explore from a Habermasian perspective. See his “Normative and Legal Pluralism: a Global Perspective” (2010) Duke Journal of Comparative and International Law 20(3) 473. Borrows (2010) supra p. 107 n. 31, has contemplated the implications of a pluralism recognizing indigenous legal orders in Canada. The courts, sparked by the Supreme Court’s 1997 ruling in Delgamuukw, have limited their consideration of oral legal orders largely to the specifics of admitting oral traditions as evidence at trial. For discussion of the limitations to what seems like the court’s acknowledgement of a crucial feature of indigenous traditions, see, among many, Val Napoleon “Delgamuukw: a Legal Straightjacket for Oral Histories?” (2005) Canadian Journal of Law and Society 20(2) 123; John Borrows “Listening for a Change: the Courts and Oral Tradition” (2001) Osgoode Hall Law Journal 39(1) 1; and Bruce Granville Miller Oral History on Trial: Recognizing Aboriginal Narratives in the Courts (Vancouver: University of British Columbia Press, 2011). For a leading, though controversial, government witness’s statement of what he regards as the inferior ability of oral tradition to function as evidence within the strictures of court procedures, see Alexander von Gernet “What My Elders Taught Me: Oral Traditions as Evidence in Aboriginal Trials” in Owen Lippert (ed.) Beyond the Nass Valley (Vancouver: Fraser Institute, 2000) 174. For a critique of the positivist view of knowledge animating von Gernet’s dismissal of oral history in the courts, see Robin Jarvis Brownlie “Disciplining Orality: Alexander von Gernet and the Crown’s Invalidation of Aboriginal Oral History in Canadian Litigation” (forthcoming in Native Studies Review, but online at http://gsdl.ubc.ca/collect/firstna1/index/assoc/HASHc8d1.dir/doc.pdf, accessed 24 January 2014). See also historian Arthur Ray’s account of his experience serving as an expert witness for the Delgamuukw plaintiffs, and others, in Telling It to the Judge: Taking Native History to Court (Montreal: McGill-Queen’s University Press, 2011). Ray notes the influence of von Gernet’s view of the
Their distinctiveness from the European common and civil law traditions, however, is even broader than the term “oral” expresses. Like the legal orders of medieval Europe, of ancient societies such as Greece, Rome and Israel, or of a range of tribally based societies located across Africa and Asia; North American indigenous legal orders have relied upon a wide-range of media to express their specific understandings of obligation. As Bernard Hibbitts argued some time ago, apart from the world of post-Protestant Reformation Europe, much of what people have done to communicate and to effect their understandings of legal obligation has employed the full range of senses other than the visual, and its derivative product – the written word.  

Hibbitts argues that law is best regarded not in its “black letter” form, but as primarily a matter of “performance,” that is, as depending on spoken words, gestures, touches, sounds, and even
smells. To give only one example out of what Hibbitts indicates might easily be thousands across time and space, in ancient Greece nomos meant both “law” and “tune;” and Aristotle, or one of his peripatetic followers at least, suspected that this was because the laws were originally sung. Or, for an illustrative North American performance from the southwest, consider the report of American fur trapper James O. Pattie, who made a treaty in 1825 with several unnamed Apache caciques, while working for a Spanish mine owner northeast of Santa Fe. The caciques agreed not to harm the Spaniards, apparently fooled by Pattie into thinking that Americans actually owned the mine. Nevertheless, the caciques concluded the treaty, which had been first elaborated with speeches of peace and smoking of the pipe, with a practice unfamiliar to Pattie. He notes:

They then dug a hole in the ground in the centre of the circle, and each one spat in it. They then filled it up with earth, danced round it, and stuck their arrows in the little mound. They then gathered a large pile of stones over it, and painted themselves red. Such are their ceremonies of making peace. All the forms of the ceremony were familiar to us, except the pile of stones, and spitting in the hole they had dug, which are not practised by the Indians on the American frontiers. We asked them the meaning of the spitting. They said that they did it in token of spitting out all their spite and revenge, and burying their anger under the ground.

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34 See his “‘Coming To Our Senses’: Communication and Legal Expression in Performance Cultures” (1992) Emory Law Journal 41(2) 873, which sketches a typology of law as performance based on senses of touch, taste, smell, and hearing.

35 For the example of Aristotle, see Hibbits ibid. at 247. See also Aristotle’s Problemata, E.S. Forster, ed. (London: Oxford University Press, 1927) at XIX.920.28.

36 A Taino term for leader employed by the Spanish across the Southwest.

In North America, indigenous parties to legal disputes, or conversely, to solemn agreements, have long relied on performances employing a wide range of ceremonial acts, formal recitations and narratives, and revered physical objects; as well as invoking norms derived from their relationships with plants, animals and natural features of the landscape. While such performances have generally been difficult for post-Guttenberg westerners to respect, on Hibbitts’ account of law as performance, indigenous North American legal traditions would also appear to have much in common with legal practice across a wide range of historical and social contexts. Nevertheless, examples run throughout Canadian and US history of settler impatience with the physicality of indigenous diplomatic protocols, of the courts’ skeptical reactions to the

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39 Justice McEachern, for instance, whose efforts to take account of the Gitxsan and Witsuwit’en oral traditions for the British Columbia Supreme Court proved inadequate for the Supreme Court, expressed at several points his conviction that in considering the testimony of Gitxsan witness Mary Johnson, he found it impossible to reconcile irrational and rational beliefs. “The Medeek [the storied figure of the grizzly bear] or supernatural portion of these adaawk is a matter of belief, or faith, rather than rational inference” see Delgamuukw (1991), supra p. 95 n. 11, at 173.
relevance of indigenous narrative performances, and the discounting of ceremonial assurance of the truth of agreements.\textsuperscript{40} These dismissals of indigenous performances may stem from a variety of motivational and intellectual sources, but they also seem likely to reflect differing fundamental assumptions about law as produced, encountered and conveyed through written texts, and law as encountered, produced or conveyed through other media.\textsuperscript{41}

Proponents of indigenous legal standing grounded in the wide-ranging particulars of traditional languages, practices or worldviews could thus understandably greet with suspicion my rendition of the Habermasian discourse theory. Making the evaluation of Habermasian norms for discourse even more complex, other indigenous scholars have focused on how colonial power in Canada has produced a “private sphere” equally as destructive of indigenous “lifeworlds” (Habermas’s term) as the more prominent “public” sphere of diplomacy and federal regulation of lands, resources and self-governance. Athabascan scholar Dian Million, for instance, has demonstrated the significant gendered impacts of this domestic colonial power on discourse before the courts, such as in consigning to the legal margins the role of “affective” testimony in relation to the sordid abuse practiced at Canada’s residential schools, or in dealing with violence against indigenous women. As she notes: “The intimacy of the ‘domestic’ location that is Canadian

\textsuperscript{40} William Denny, English governor of Pennsylvania, and active in the 1758 treaty councils at Easton, illustrates this tendency as well as anyone. While relying upon Condolence-derived treaty protocols in his remarks at Easton to Six Nations, Delaware and other participants, he framed, in more private correspondence, these same protocols as merely “trifling Ceremony.” See Merrell supra p. 110 n. 38, at 264-65. For Denny’s more public form of discourse during the treaty negotiations, see Kalter supra p. 110 n. 38, at 298-301.

\textsuperscript{41} This is not to say that settler legality has not had its own significant basis in performance. See, for instance, Michael Witgen’s study of French colonial performance, in "The Rituals of Possession: Native Identity and the Invention of Empire in Seventeenth-Century Western North America" (2007) Ethnohistory 54(4) 639. For an examination of the performative legal practices employed by all European colonial powers in the northern and southern hemispheres, see Patricia Seed Ceremonies of Possession in Europe's Conquest of the New World, 1492-1640 (New York: Cambridge University Press, 1995).
colonization in Indian lives renders any conversation about ‘it’ subjective and emotionally engaged.”42 The affective depths of those traumas may well prevent the rationalistic model of a public sphere at the heart of discourse theory from being of assistance in any conceivable overcoming.

Thus, any communicative process – or even the practices animating a given communicative process – held under the strictures of D might seem bound to erase the significance of many forms of indigenous participation. Although speaking of the Indian subcontinent, the Bengali historian Dipesh Chakrabarty has framed the questionable advantage of subaltern dialogue with proponents of “the hyper-rationalism characteristic of colonial modernity” in ways that coincide with the concerns of indigenous North American suspicions.43 Such a dialogue, he notes, “by its very structure, is not democratic.”

For a dialogue can be genuinely open only on one condition: that no party puts itself in a position where it can unilaterally decide the final outcomes of the conversation. This never happens between the ‘modern’ and the ‘non-modern.’ Because, however non-coercive the conversation between the Kantian subject (i.e. the transcendent academic observer, the knowing, judging and willing subject of modernity) and the subaltern who enters into a historical dialogue with the former from a non-Enlightenment position, this dialogue takes place within a field of


possibilities that is already structured from the very beginning in favour of certain outcomes.  

In the same vein, Métis legal scholar D’Arcy Vermette, referring to the Supreme Court’s ruling in *R. v Van der Peet*, notes how the Canadian courts employ a variety of practices to transform indigenous contributions to court proceedings, or the very bringing of claims, in order to maintain what he argues is colonial control over indigenous parties:

Claims also need to be drafted in a way that the court will understand. Again, it is Aboriginal people making the accommodation and not the courts. To illustrate how this works we can look at how the Court characterized Dorothy Van Peet’s claim. The Court stated: “She is claiming, in other words, that the practices, custom and traditions of the Sto:lo include as an integral part the exchange of fish for money or other goods.” The key to this statement is found in the expression “in other words,” which indicates that the claimant’s Aboriginal voice has been confiscated and turned into a legal voice – the voice of the colonizer. However, the Court goes too far in its characterization of her claim according to and in support of the “integral” test laid out by the Court. It is inappropriate for the Court to put words in her mouth. It is a reflection of the inflexible nature of the colonial courts.

The concern that Vermette and other indigenous scholars express quite frequently is that under colonial conditions, any discourse situation involving indigenous parties and the state will likely be freighted with incapacitating difficulties in achieving a resolution to conflicts or providing a hearing of grievances that an indigenous party could accept as what Habermas refers to as “rationally legitimate.” However, although pursuing these concerns is crucial to the continued

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45 *Supra* p. 13 n.17.

46 Among efforts to address this conflict, which we could sum as being between state-sanctioned legal procedure and indigenous expectations of legitimacy under the conditions of colonialism, and which reflect the tension that Habermas portrays between the end of law as certainty and the end of law as justice, as I noted above, see Gordon Christie’s “Indigenous Authority, Canadian Law, and Pipeline Proposals” (2013) *Journal of Environmental Law and Practice* 25, 189. As well, see his “A Colonial Reading of Recent Jurisprudence: Sparrow, Delgamuukw and Haida Nation” (2005) *Windsor Yearbook of Access to Justice* 23, 17. For an assessment of Canadian law as still operating on colonial assumptions and employing colonial methods, see Mary Eberts “Still Colonizing after all these Years” (2013) *University of New Brunswick Law Journal* 64, 123. Other analyses of the continued impact of colonial constraints on indigenous self-determination in Canada include Darlene Johnston “Aboriginal Traditions
development of indigenous legal theory, and to addressing questions of Canadian law’s ability to respond fairly to indigenous parties’ legal concerns, I think they do not actually indicate that Habermas’s discourse theory is necessarily tarred with the burdens of conveying an underhanded legitimation of colonialism.

To provide some context for this conclusion, consider an example of troubled communication that Canadian historian Sheldon Krasowski derives from eyewitness accounts to the making of Treaty Six. Krasowski points out that one of the few true failures in mutual understanding connected with the 1876 negotiations at Forts Carlton and Pitt concerned “the significance of the Treaty Six pipe ceremonies.” As he frames it,

Alexander Morris held that ‘the pipe ceremony meant that [the commissioners] had accepted the friendship of the Cree nation.’ However, the Indigenous understanding of the pipe ceremony evoked the presence of the Creator and ensured that the truth was spoken during the negotiations. Though the commissioners did not appear to fully understand the significance of the pipe ceremony, they knew it was important and vital to the success of the treaty.”47

47 See his “Mediating the Numbered Treaties: Eyewitness Accounts of Treaties between the Crown and Indigenous Peoples, 1871-1876” (University of Regina Ph.D. dissertation, 2011), at 272, and 238. For Morris’s own view of the significance of the pipestem ceremony at Fort Carlton, see his The Treaties of Canada with the Indians of Manitoba and the Northwest Territories (Toronto: Coles, 1971 [1880]) at 183. For Plains Cree elder Jim Kâ-Nipitêhtêw’s view of the pipestem ceremony as assuring the truth of Canada’s Treaty Six promises, see Freda Ahenakew (ed.) ana kâ-pimwêwêhahk okakêskihihkêmowina: the Counselling Speeches of Jim Kâ-Nipitêhtêw (Winnipeg: University of Manitoba Press, 2007) at 107-11. According to Kâ-Nipitêhtêw, the ceremony, which involved Morris grasping the pipestem and repeating his promises, was fundamentally a means of assuring the truthfulness of the promise-maker. As Kâ-Nipitêhtêw recounted its purpose in 1987 to a group at the Saskatchewan Indian Cultural College:

He, my late father, used to say this: ‘Well, a certain old man had foretold it, rising from his seat; then he had foretold it: ‘The people must have something to rely upon as testimony, and we who
Consider in addition another form of misunderstanding occurring during the Treaty Six negotiations. Krasowski also recounts how Morris’s official recording of a speech delivered by pro-treaty Métis commissioner James McKay omitted an exchange between McKay and The Badger, a Cree chief unenthusiastic about the proposed treaty. On the basis of the eyewitness report of interpreter Peter Erasmus, hired by the Cree chiefs to assist them, however, McKay evidently responded with some hostility regarding comments from The Badger about treaty terms. According to Krasowski:

McKay admonished the chiefs for their demands and stated ‘In my experience you always want more than you were promised in the first place and you are never satisfied with what is given to you.’ McKay’s speech was followed by a distinct murmur of disapproval and The Badger immediately rose to his feet and stated, ‘I did not say that I wanted to be fed every day. You, I know, understand our language and yet you twist my words to suit your own meaning. What I did say was that when we settle on the ground to work the land, that is when we will need help and that is the only way that a poor Indian can get along.’

Krasowski’s accounts of these incidents highlight two forms of failure to reach an understanding. The failure to understand the significance of the Treaty Six pipe ceremony may well go to the conflict in worldviews that Battiste and Henderson emphasize. Even in such a conflict, however, someone less committed to the strong conflict of world views position might argue that Morris’s

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are Crees do have something to rely upon as testimony; that which is called the pipestem, that is all upon which we can rely as testimony. When he, our brother the White-Man, made these promises to us, he did promise that no human walking upon two legs on the surface of the earth would ever be able to break the promises he made to us, *ibid.* at 109.

Morris’s own words, as Kâ-Nîpitêhtêw recounted them, don’t seem to allow for the possibility that he misunderstood the significance of his action:

[Cree treaty chief:]’Indeed, do you speak the truth in that you will forever look after me to this extent?’ he had said to that one, ‘If you speak the truth, hold then this pipestem, do you speak the truth, yes or no?’

‘Yes!’ [Morris] said, and when they had made him hold the pipestem, then he had taken this pipestem, ‘Indeed, no human walking on two legs will ever be able to break what I am hereby promising you,’ *ibid.* at 111.

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apparently simplistic conclusion that the ceremony was important regardless of its meaning to the Crees who employed it was sufficient to produce Canada’s good faith participation in the treaty. In either case, what I draw from this example is that it demonstrates what Habermas would call the semantic level at which the participants likely assessed the ceremony as a communicative performance. The second example, McKay’s alleged twisting of The Badger’s words, although it also clearly employed what Habermas considers a “strategic” use of communication – since “twisting” is not animated by a desire to reach mutual understanding – shares with the ceremony the level at which the participants likely assessed it as well.

As I discussed in the previous chapter, Habermas’s concern with the discourse theory of law derives from the distinction between a semantic and a pragmatic approach to communication. These approaches to language use remain distinct analytically, although, as with McKay’s use of The Bear’s words, they can overlap in practice. The direct concern of a semantic focus is the weighing of the truth and meaning of linguistic expressions. Struggles over the validity or meaning of worldviews, often found in failures to communicate across cultural divides, are largely focused around semantic questions of language and communication. Struggles over the meaning or translatability of words like “property” or “resources,” or Justice McEachern’s difficulty with Mary Johnson’s testimony regarding the Medeek in Delgamuukw, for instance, entail efforts to find equivalences – or at least resemblances, and to form distinctions between varying concepts across the language gaps that Battiste and Henderson highlight, and to chart the philosophical, legal and political implications of these equivalences and distinctions. Even if we reversed the direction of the effort to find equivalences, accepting that indigenous legal categories and practices should be considered part of the normative whole of Canada’s legal
framework – which would make the problem as much one of finding indigenous language equivalents for English concepts as it is about finding English equivalents for ‘exotic’ indigenous concepts; the struggle to find the appropriate equivalences would still be a semantic struggle.⁴⁹

On the other hand, a pragmatic concern with communicative acts focuses on conditions necessary for producing a mutual understanding, or establishing and maintaining social relationships. Thus law, morality and ethics, for Habermas, are all ultimately pragmatic enterprises. Though they have important differences, as I noted in the previous chapter, Habermas regards them each as bearing a degree of legitimacy derived from the extent to which all parties involved in discourse seeking mutual understanding would ideally consent to the norms necessary to evaluate contributions to the discourse.⁵⁰ Thus, in addition to, or even preceding, the possible resolution of pressing semantic questions across colonial divides, between parties of conflicting interests or worldviews, or in courtrooms and other legal/political venues; is a separate, and on Habermas’s account, ultimately pragmatic concern. This means that

⁴⁹ See Borrows (2010) supra p. 107 n. 31, for a pluralist argument that the range of indigenous legal orders functioning in Canada should be regarded as part of the country’s constitutional fabric. My understanding of legal pluralism also stems from William Twining supra p. 107 n. 32.

⁵⁰ Although consent remains a troublesome concept within political theory, I think understanding it within a Habermasian framework, as well as perhaps within a broad range of indigenous legal frameworks, is not as tied to the liberal pitfalls of original or tacit consent that Jeremy Webber identifies in his “The Meanings of Consent,” his introductory essay to his and Colin M. MacLeod’s Between Consenting Peoples: Political Community and the Meaning of Consent (Vancouver: University of British Columbia Press, 2010) at 13-15. In that same volume, for instance, Val Napoleon speaks of the importance to Gitksan legal order of a “dialogic construction of consent,” that is a “process of discussion, disagreement, affirmation and reconciliation, performed at intervals whenever important actions or decisions were required.” See her “Living Together: Gitksan Legal Reasoning as a Foundation for Consent” ibid. at 46. Also in that volume, Janna Promislow finds in her study of Hudson Bay Company and Hayes River Cree interactions at York Factory that consent was the product of a “working intersocietal space in which normative expectations that were shared at the level of practice were not always shared at the level of meaning,” a distinction I think is still congruent with the one Habermas makes between semantic and pragmatic aims of discourse. See her “‘Thou Wilt Not Die of Hunger . . . for I Bring Thee Merchandise’: Intersocietal Normativity and the Exchange of Food at York Factory, 1682-1763” ibid. at 104.
in certain settings the criteria for evaluating discursive statements are themselves the product of the mutual effort of the parties to make themselves understood. I think Habermas’s critics are wrong to hold that Habermas’s view of the conditions of discourse are somehow predetermined by the specifics of a particular point of view (in this case the western, colonial point of view). Therefore, I maintain that it makes more sense to concur with Habermas when he says that substantive convictions regarding rationality need not be encased within or found lurking behind the discourse principle. His own statement that “[c]oncepts such as truth, rationality, and justification play the same role in every language community, even if they are interpreted differently and applied in accordance with different criteria,” indicates a confidence – perhaps misplaced, but one I will rely upon – that attempts to find common pragmatic ground across conflicts of worldview are not inherently fated to let the colonial rationalist’s faith in the superiority of western traditions of thought in by the back door.\(^1\) Instead, discourse theory entails the requirement of securing a “symmetrical relation” for any “intercultural” communication, and holds that “assimilation” or “conversion” of the parties must remain inappropriate outcomes. As a discursive ideal, this “symmetrical relation” does not, as I think it seems to for his critics, valorize the contemporary approach to dialogue with indigenous parties regarding Aboriginal and treaty rights often practiced in Canada, in which the state limits the range of discussion to future-oriented issues,\(^2\) as I will demonstrate in the next chapter.

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\(^1\) RDE at 105.

Chapter 4
Intersocietal Legal Norms of Discourse

A. Performative legality in the region of the middle ground

Considered simply at the pragmatic level, I think a strong correlation is evident between Habermas’s rendition of the norms of discourse and those embodied within at least certain forms of indigenous discursive practices. It remains well beyond my capability to trace these in any detail across the wide historic and cultural range of discursive practices operating within North American indigenous legal orders, but also, I think, unnecessary in this context. Instead, here I merely want to highlight a congruence of norms operating within one form of “intersocietal” discursive practice (to use Promislow’s term) germane to the discourse required by Canada’s duty to consult:¹ protocols for treaty formation commonly employed within the region Richard White referred to with his historical trope of the “middle ground.”²

¹ Supra p. 117 n. 50.

² Richard White The Middle Ground: Indians, Empires and Republics in the Great Lakes Region, 1650-1815 (Cambridge: Cambridge University Press, 1991). It may well be that a large range of communicative practices particular to various indigenous communities, or even shared more broadly between communities, do not fit easily (which is not to say should not be employed) within the sort of public “middle ground” arena between indigenous and settler societies, where the duty to consult holds sway. For instance, Patricia Covarrubias, in “(Un)Biased in Western Theory: Generative Silence in American Indian Communication” (2007) Communication Monographs 74(2) 265, notes the importance of what she calls “generative silence,” that is silence as a productive rather than destructive personal and communal practice, among her students’ largely Coast Salish families. The generative capacities of silence employed within courts, tribunals, hearings and other gatherings focused on processes of consultation might stretch the imaginative sympathies of a non-indigenous review panel or judge. Nevertheless, as I employ discourse theory, I don’t think Habermas has indicated that traditional communicative practices that might fit less well into a “middle ground” scenario need to be regarded as inappropriate to a public sphere discourse setting. The strongest strictures on what sorts of practices or claims might be admissible in public sphere discourse, that is, as needing to rest on “public reason,” have come more from John Rawls. On Rawls’s account, participants in political conversation or negotiation, or at court, would themselves need to carry an intellectual sieve, sifting out their tradition- or metaphysical-
Having already turned to the context of treaty-making to illustrate both performative dimensions of indigenous legal orders, and the problem of failures in understanding indigenous legal performance across cultural divides, here I want to draw more explicitly on historical accounts of “middle ground” treaty formation, in order to demonstrate how common norms of discourse operated within settings where law as indigenous performance intersected with law as settler written decree. From a discourse perspective, these intersocietal norms, employed in the practices of treaty-making between French and English colonial authorities and representatives of a wide range of indigenous nations in the Great Lakes region, are paradigmatic. Far more so than does the post-Confederation web of Canadian legislation and case law dealing with Aboriginal issues, the norms employed across the middle ground demonstrate real-world approximations of Habermas’s discourse principle. However, tensions remain between leading characterizations of those norms.

For White, and for James Tully following him, social, political and environmental conditions within the Great Lakes region (at least up until the end of the War of 1812) provided the possibility of fragile, almost accidentally achieved agreements negotiated between First Nations and settler forces. In White’s well-known formulation, the middle ground is the site of fortuitous misunderstandings.

bound convictions before broaching them in public. For a comparison of Rawls and Habermas on this point, see Todd Hendricks Rawls and Habermas: Reason, Pluralism and the Claims of Political Philosophy (Stanford: Stanford University Press, 2010) at 40. Matthew Tomm argues that Rawls’s notion of public reason has at best an ambivalent impact on indigenous parties engaged with Canada’s legal institutions, as his discussion of the Kitchenuhmaykoosib Inninuwug First Nation’s challenges to Platinex Inc.’s exploratory drilling at Big Trout Lake illustrates. See his “Public Reason and the Disempowerment of Aboriginal People in Canada” (2013) Canadian Journal of Law and Society 28(3) 293, as well as Justice Smith’s reasons for judgment in Platinex Inc. v Kitchenuhmaykoosib Inninuwug First Nation, 2006 CanLII 26171 (ON SC).
On the middle ground diverse peoples adjust their differences through what amounts to a process of creative, and often expedient, misunderstandings. People try to persuade others who are different from themselves by appealing to what they perceive to be the values and practices of those others. They often misinterpret and distort both the values and the practices of those they deal with, but from these misunderstandings arise new meanings and through them new practices – the shared meanings and practices of the middle ground.3

As noted above, historic treaty-making in the northeast, and likely in other areas of the continent as well, involved various performative, largely ceremonial, means of establishing obligations. For White, these performances were bits of bricolage, assembled on the fly between Algonquians and the French (then later the English), out of the “shattered pieces” of indigenous social life left over from the “Iroquois hammer striking Algonquian glass,” that is, in the aftermath of the long-running war between the Haudenosaunee confederacy and a number of other Algonquian and Iroquoian nations in the seventeenth century.4 As White puts it: “Particularly in diplomatic councils, the middle ground was a realm of constant invention, which was just as constantly presented as convention. Under the new conventions, new purposes arose, and so the cycle continued.”5

White’s focus on invention out of failed understandings, as a historian of the accidental and the discontinuous, readily harmonizes with that of Tully’s own view of political and legal practice as strategic embodiments of power. However, it also tends to obscure points of continuity that have operated within the same diplomatic, intersocietal sphere. Historian Heidi Bohaker and Anishinaabe legal scholar and historian Darlene Johnston (Chippewas of Nawash) have each

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3 White supra p. 119 n. 2, at x.

4 Ibid. at 2.

5 Ibid. at 52.
faulted White’s characterization of indigenous participation within this zone of treaty and alliance formation. In particular, Bohaker rejects White’s reduction of indigenous treaty parties to mere “shards” of their former communal and individual selves, and the strongly constructivist view of their communicative practices. According to Johnston and Bohaker, Great Lakes Anishinaabe communities were never reduced to the status of refugees, at least not to the collective and permanent extent that White takes for granted: alienated from homelands, lacking the connection of relations, divorced from spiritual and intellectual resources. Thus, their participation in a range of diplomatic efforts continued to draw on well-defined performances of their personal, social and legal/political identity as members of functioning clans, or odoodemag in Anishinaabemowin. Consequently, in this chapter, although I continue to employ White’s term as a spatial metaphor significant for analyzing intersocietal legal discourse, I mean to sidestep his own construal of it. Instead, I take more direct inspiration from Johnston and

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6 Heidi Bohaker “Nindoodemag: The Significance of Algonquian Kinship Networks in the Eastern Great Lakes Region, 1600-1701” (2006) The William and Mary Quarterly 63(1) 23. See also Darlene Johnston “Litigating Identity: the Challenge of Aboriginality” (University of Toronto L.L.M. thesis, 2003) at 33-38. Johnston also faults White for what she refers to as “pan-Algonquianism,” in effect lumping all opponents of the Haudenosaunee confederacy into the one French category of "Algonquian," ibid. at 41. A consequence of this, though not the one she emphasizes, is the erasure of culturally embedded discursive norms, such as I want to highlight here.

7 Third person plural, based on the stem, ode, and cognate of de, “heart.” In Anishinaabemowin (not that I am a speaker), “dependent” nouns, indicating necessary relationships, are used with affixes denoting person, number and animacy. See the Ojibwe People's Dictionary, ojibwe.lib.umn.edu/main-entry/odoodeman-nad, accessed 4 April, 2014. Bohaker uses the first person singular in her writing, which, as she notes, creates the odd English usage of “their ‘my clan,’” but is consistent with “linguistic conventions.” See her “Nindoodemag: Anishinaabeg Identities in the Eastern Great Lakes Region, 1600 to 1900” (University of Toronto Ph.D. dissertation, 2006) at 6, n. 5. The Ojibway scholar Basil Johnston recounts the etymology of the term, noting that the “evidence is strong that the term ‘dodeam’ comes from the same root as do ‘dodum’ and ‘dodosh.’ ‘Dodum’ means to do or fulfill, while ‘Dodosh’ literally means breast, that from which milk, or food, or sustenance is drawn. ‘Dodaem’ may mean ‘that from which I draw my purpose, meaning, and being,’” in Ojibway Heritage (Lincoln NE: University of Nebraska Press, 1990) at 61.
Bohaker, and contend that the long functioning of oodemag demonstrates important discursive norms widely observed within the treaty-making protocols of Great Lakes indigenous nations.  

Writing in the early 1850s, the historian William Whipple Warren (son of an American father and a White Crane clan mother), quoted his Anishinaabe informants and relatives stating that they regarded the clan system as dating “back to when the Earth was new.” French trapper and explorer Nicholas Perrot had emphasized this same view of the temporal continuity of oodemag, as well as their embodiment of what we might think of as sacred power, in recounting what he heard from Great Lakes Anishinaabeg in 1665:

“After the creation of the earth, all the other animals withdrew into the places which each kind found most suitable for obtaining therein their pasture or their prey. When the first ones died, the Great Hare caused the birth of men from their corpses, as also from those of the fishes which were found along the shores of the rivers which he had formed in creating the land. … You will hear them say that their villages each bear the name of the animal which has given its people their being – as that of the crane, or the bear, or of other animals. They imagine that they were created by other divinities than those which we recognize.”

Johnston, in making her argument for the continued legal relevance of doodem identity, provides a translation of the comments of French cleric Abbé Thavenet, in his unpublished Algonquian grammar:

“It is to be supposed that uniting as a nation, each family preserved its Manitou, the animal which lives in the country from which it came, being the most beautiful or the

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8 Susan Sleeper-Smith, in her overview of a series of considerations of White’s concept, notes that the term “has become so appealing that many scholars are guilty of turning every time and place of cultural encounter into a middle ground, transforming the phrase into an elusive metaphor for various forms of compromise,” in “Introduction” (2006) The William and Mary Quarterly 63(1) 3, at 4.

9 In his History of the Ojibway Nation (St. Paul MN: Minnesota Historical Society, 1885) at 41. Available online at http://hdl.handle.net/2027/nnc1.0038846144.

best friend of man, or the most feared, or the most common; the animal which it ordinarily hunted and from which it got its usual nourishment &c.; that this animal became the distinctive mark of each family, and that each family transmitted it to its posterity for being the perpetual symbol of each tribe. One must therefore – when speaking of a tribe – designate it by the animal which is the symbol. 11

The American anthropologist A. Irving Hallowell employed the term “other-than-human persons” to stand for the range of powerful beings influencing the Anishinaabe world, such as those Abbé Thavenet described. 12 The term remains in wide scholarly use today. As Bohaker, and the Anishinaabe historians Stark, Johnston and Witgen, have all detailed, the fundamental form of political identity among Anishinaabeg up into the late 19th century was that derived from odoodemag relations with other-than-human persons. These relations structured life at the village level, though they also extended across Anishinaabe territories, creating kinship ties among villages sharing the same other-than-human ancestors, and extending these ties to others, whether strangers or former enemies. Drawing on Max Weber’s discussion of charisma in her study of Anishinaabe leadership in 19th century western Great Lakes communities, Anishinaabe historian Cary Miller demonstrates the interrelationship of religious, legal and familial authority at the village level. She notes that ogimaag, leaders, while often possessing an inherited source of legitimacy, typically augmented this by also manifesting charismatic connections with odoodemag progenitors: other-than-human manidoog. Thus gift exchange, the extension of real

11 Abbe Jean-Baptiste Thavenet "Grammaire Algonquin" (1819) unpublished manuscript, quoted in Johnston supra p. 122 n. 6, at 54-55.

and fictive kinship ties, and the sharing of resources, were all seen as obligatory requirements for social relations grounded in odoodemag.\textsuperscript{13}

To invoke the continuity across generations provided by odoodemag relations, Anishinaabeg deployed pictographs of their clan progenitors in a variety of settings across the Great Lakes region, doing so for a variety of purposes. Of often great antiquity, the doodem symbols remain visible on the landscape today, deployed across the Laurentian Plateau. As well, these pictures were often deployed on their bodies, on material possessions, and at burial sites.\textsuperscript{14} Here, however, I only want to highlight what several scholars imply about the discursive function of these pictures as embodied specifically on treaty texts. Bohaker’s study of over one hundred treaty texts from the 18\textsuperscript{th} and 19\textsuperscript{th} centuries, treaties convened with French, English, US and

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\textsuperscript{13} \textit{Ogimaag: Anishinaabeg Leadership, 1760-1845} (Lincoln: University of Nebraska Press, 2010). As she puts it:

The gifts exchanged between human beings and manidoog were mirrored in the social lives of Anishinaabeg people. Gifting was the cornerstone of kinship, and kinship organized society. Gifting even served as a means to incorporate newcomers into the community. If an individual, family, or community could not establish some form of real or fictive kinship, then social interaction could not take place, much less trade, and the outsider would be treated as potentially hostile to the individual or community (\textit{ibid.} at 32).

Miller traces the combinations of charismatic and inherited authority, undergirding what she describes as the three overlapping forms of religious, military and civil (my term) leadership effective within the various doodemag. Whatever their leadership role, she notes, all ogimaag relied on performative means of establishing connections to manidoog, through tobacco, feasts, songs, dances and Midewiwin ceremonial, see \textit{ibid.} at 114-15.

\textsuperscript{14} Ontario archaeologist Jon Nelson relates his conversations with Lac La Croix First Nation elders regarding the need to protect sacred doodem pictographs in \textit{Quetico: Near to Nature’s Heart} (Toronto: Dundurn, 2009) at 82. Anthropologist John L. Creese elaborates the complex set of relations with other-than-human beings inscribed across the landscape of the Canadian shield, in “Algonquian Rock Art and the Landscape of Power” (2011) \textit{Journal of Social Archaeology} 11(1) 3. The Online Cree dictionary notes that these totemic figures, known as pawakanak in Northern Cree, are encountered in dreams, and bestow spiritual power on individuals and communities. See <http://www.creedictionary.com/search/index.php?q=pawakan&scope=1&cwr=7225> accessed 16 April 2014. See Bohaker \textit{supra} p. 122 n. 7, at 137, for Champlain’s observations of the care Anishinaabe individuals took in personal adornment evoking doodem identities. See Johnston \textit{supra} p. 122 n. 6, at 94-101 for the prevalence of doodem symbols at burial sites.
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Canadian authorities – as well as on a variety of petitions to the US and Canadian governments – demonstrates the widespread practice of ogimaag employing pictographs of odoodemag identity in order to establish legally binding representations of community consent.

Johnston and Bohaker both focus primarily on establishing that doodem identities were historically central to the treaty relationships forged between Anishinaabe and colonial/settler state parties. Both of these authors, as well as Miller, hint at, though they don't really explore, what strikes me as a performative dimension operative in the doodem pictographs. Bohaker refers to them as "iconic," though without really explaining her use of the term. However, she is most interested in demonstrating that they functioned historically as a form of identity-conferring writing: symbols bearing information, exchanged with others, "a rich, highly developed and complex Great Lakes public communication system."15 Johnston demonstrates this identity-conferral in referring to the practice of Credit River chief, Methodist minister, and her great-great grandfather, Peter Kegedonce Jones, who signed treaties with a pictograph of his Otter doodem, rather than his Christian name.16 For Johnston, the employment of such a pictograph also links a visual symbol with a community's history, embodying a narrative history that is more significant than the individuals who made such pictures. As she notes: "Aboriginal people understand their stories have a power independent of the teller, as do the marks, independent of their maker."17 This would seem to underscore Bohaker's use of "iconic," though it also remains undeveloped.

15 For "iconic," see supra p. 122 n. 6, at 7. For "public communication," see ibid. at 146. See also, her “Reading Anishinaabe Identities: Meaning and Metaphor in Nindoodem Pictographs” (2010) Ethnohistory 57(1) 11.

16 Johnston supra p. 122 n. 6, at 62.

17 Ibid. at 108.
From a discourse perspective, I think the employment of doodem pictures on middle ground
treaty texts suggests an even-stronger framing of their function within legally significant acts of
treaty-making than Johnston, Bohaker, or Miller, provide. The Anishinaabe literary scholar
Niigonwedem James Sinclair comes much closer, in his discussion of doodem markings as
*bagijiganan*: offerings, or gifts.\(^{18}\) As he indicates (and as I quote at some length), doodem
markings established the treaties as broad, Anishinaabe-defined relationships:

> Signing using Nindoodemag meant that Anishinaabeg were not just “agreeing” to a set of
legal arrangements over territory (and sometimes even that is questionable, considering
certain barriers of language and political interests), but were also introducing Europeans
to Anishinaabeg ways and introducing newcomers to the world they were entering – one
full of relationships and agreements in the interests of sharing and reciprocity. Markings
of Nindoodemag were not only statements of power and collectivity but narratives given
to Europeans from dynamic, innovative, and political communities intended to teach
them about the relationships they were joining. The issue, as it stands in many
scholarly characterizations of treaty exchanges, is that it is often thought that it
was Europeans who were “modernizing” Indians when it is equally possible that it
was the other way around. Considering these exchanges as two-way venues where
communication, discourse, and ideas were traded illustrates more what these
arrangements actually were: the joining together of peoples and their languages. This
does not mean power and subjectivities were not at work, for they undoubtedly were. It
is that often the Indian side of these arrangements are thought to be without voice – or in
a whisper – when this approach ignores the obvious evidence at hand.\(^{19}\)

In terms of the tasks of discourse, I think we can follow Sinclair in concluding that Anishinaabeg
placing doodem symbols within treaty texts did more than simply mark their consent or
submission to terms asserted in French or English. The symbols functioned performatively for
those who placed them. As he notes, "In essence, an Anishinaabeg carrying a doodem is

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\(^{18}\) "Nindoodemag Bagijiganan: a History of Anishinaabeg Narrative" (University of British Columbia,

\(^{20}\) *Ibid.* at 81, emphasis in original.
effectively that doodem.” They created promissory obligations, established possibilities of relationships, and gave access to a world containing opportunities for what Habermas would call processes of “mutual learning,” and that Sinclair speaks of as invitations to share in Anishinaabe "offering.” As such, it may well be that their deepest functions would only have been most-easily deciphered from within the framework of an Anishinaabe worldview, or, as Sinclair shows with respect to Nicholas Perrot – and who was present at the 1671 treaty ceremony at Sault Ste. Marie – someone long-familiar with that worldview. The literature is also stocked with examples of settler state officials deciding not to bother with the learning necessary to gain such familiarity. Bohaker, for instance, quotes Indian Department official, J.W. Keating, complaining to his superiors in 1843: “I had commenced by causing each Indian to make his totem b but the amazing time each took would have taken two or three days from their numbers & so they merely touched the pen as white people unable to write,” and thus finding a legal equivalence in

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20 Ibid. at 81, emphasis in original.

21 This opportunity for mutual learning was also often rejected in the name of settler party “civilizing” aims. As Bohaker documents, the British and Americans in particular were most eager to replace collective doodem symbols with the use of individual Christian names or X-marks, supra p. 122 n. 6, at 206-07. The French also were inclined to challenge the Anishinaabe symbolizations of animal-human bonds as defining of New World nexus of social-legal-environmental relationship possibilities. For a consideration of intersocietal, contested views of doodem-significant animals, see Benjamin Breen "The Elks Are Our Horses: Animals and Domestication in the New France Borderlands" ( 2013) Journal of Early American History 3(2) 181, at 189, where he notes that:

The goal of la francisiation was thus to transform both American landscapes and the humans and animals who inhabited them into not only societal, but also ecological and environmental analogs of France. Indians were to find fixed habitations, to cease to 'keep things in common', and to adopt Old World patterns of resource management, animal husbandry and agriculture. One of the first steps toward achieving these goals was the abandonment of long-held [Anishinaabe] attitudes towards animals and the embrace of European models of animal possession. Mississauga Anishinaabe scholar Leane Simpson discusses her elders’ understanding of clan-based treaty-relationships as conducted not only with human communities, but with animal “nations” as well. See her "Looking after Gdoor-naaganaa" supra p. 110 n. 38.

22 Sinclair supra p. 127 n. 18, at 71.
such different forms of inscription sufficient to erase the specific performance basis of the doodem symbols.  

I draw from this too-brief historical survey several conclusions. Like many other aspects of indigenous legal orders, Anishinaabe participation in treaty-making was performance-based, in continuity with long-standing doodem practices of legal significance: the framing of communal identities, the extension of kinship-networks, the making of alliances, and the forging of promissory agreements. These performative, worldview-centered practices, as Johnston, Bohaker, Stark and Witggen demonstrate, were initially regarded favourably enough by settler parties (that is, enough for them to undertake treaty negotiations), even when their full significance was not understood. However, over the course of the 19th century (a point I have not elaborated on) they came under increasing pressure from settler-state forces, who viewed them as legally inadequate to their own aims of “governmentality,” 24 of incorporating indigenous peoples within the range of settler-state administrative bodies and domestic law.

This accounting of the history dovetails readily enough with the critical assumptions that figures such as Tully share with Henderson and Battiste, and with other indigenous authors who demonstrate the legally-significant gulf between indigenous and Euro-centered worldviews, and question Canada’s ability to engage fairly with indigenous nations in healing lingering impacts

23 Bohaker supra p. 122 n. 6, at 205.

24 Michael Asch offers a brief reading of Foucault’s concept in relation to indigenous/settler state relations within Canada, in “Governmentality, State Culture and Indigenous Rights” (2007) Anthropologica 49(2) 281. Michael Coyle’s work has long offered an insightful analysis of the working of power within the common law, although without relying on the Foucauldian language favoured by Tully and others. See, for instance, his “Negotiating Indigenous Peoples' Exit from Colonialism: the Case for an Integrative Approach” (2014) Canadian Journal of Law and Jurisprudence 27(1) 283.
of its colonial legacy. As these authors point out, Canada’s frequent dismissal of the legal significance of indigenous performance-based practices has continued into the present era.

B. Norms of Discourse in the Great Peace of Montréal

What I believe is distinctive about Habermas’s discourse theory, is that it offers a way to get beyond these power-charged gaps between worldviews, by highlighting the different levels of discursive functioning operating within practical environments, such as within the intersocietal domain of treaty-making found in North America. One treaty text that seems to be especially instructive from a discourse theory perspective is that recording the 1701 agreement sometimes known as “La Grande Paix de Montréal.” The treaty largely ended the century-long warfare between the French, their many allies, and the Haudenosaunee league, and also ensured Haudenosaunee neutrality with respect to conflicts between the French and the English. Historian Gilles Havard notes how the text represents a "syncretic product of French-Native diplomacy" blending both French and indigenous traditions of alliance formation. It contains a written French text, recording a speech delivered by Louis-Hector de Callière, Quebec’s governor general, as well as his signature and that of French witnesses. The text also includes 36 pictographs, primarily doodem-based, of those indigenous nations concurring with the peace; and in a separate, concluding section, spoken responses to Callière’s speech from 18 of the indigenous representatives. Thus, in spite of the document’s construction in French, as well as


The actual number of distinct groups joining the treaty through these inscriptions remains disputed. The text in the Broadhead collection, ibid. at 725, refers to 38 “nations.” Bohaker reads the inscriptions as clearly indicating 20 separate doodemag political entities, supra. p. 122 n. 6, at 84; while Havard claims
its clear recording of Callière’s effort to constrain the agreement in ways that would achieve French dominance, the text remains deeply reflective of indigenous protocols.27 Considering the text at a performative level, and bearing in mind Sinclair’s fuller rendition of how doodem symbols have functioned in general within Anishinaabe communities, it seems fair to say that what makes the 1701 treaty binding for the indigenous parties is the crucial role of the doodem inscriptions. They extend bonds of fictive kinship to the French, and one might even think from Anishinaabeg to the Haudenosaunee as well. They invite former enemies to share in a common world.

This performative establishment of legitimacy, however, raises a crucial question about the relation between the doodem inscriptions and the subsequent speeches from the various indigenous leaders. If the French-language transcriptions of the speeches record sufficiently the gist of the leaders’ statements, what discursive purposes did they serve? Perhaps the French understood the speeches to comprise the substantive core of the agreement, and the inscriptions to serve as marks of authority. Bohaker maintains that the doodem inscriptions are similar to the European use of wax or lead seals, which also conveyed authoritative identity, and, she notes, may have been familiar to indigenous leaders who had observed French practices, or likewise been viewed as such by the French.28 If so, then it is likely that the various parties each pointed

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27 In terms of colonists’ frequent rhetorical efforts to establish their dominance over indigenous communities, scholars often note that the language of extended kinship employed in these intersocietal alliances entailed significant gaps between French and indigenous views of the father figure and his inherent authority. See, for instance Havard, *ibid.* at 30, and White *supra* p. 119 n. 2, at 142-43.

to the wrong indicator of what the other parties had aimed to convey with their agreement, a point that would underscore White’s ironic characterization of the middle ground as a zone of misunderstanding.

Or, perhaps they were seen by either the French or their indigenous treaty partners as translations of the “offerings” conveyed in the doodem inscriptions. While this could perhaps be inferred on the part of the French, I doubt it is fair to the indigenous participants. Given what Bohaker and Sinclair, and the other Anishinaabe historians I mention above, have indicated about the culturally deep-seated assumptions regarding doodem inscriptions prevalent among Anishinaabeg generally, it seems unlikely that the indigenous Montreal treaty participants would have agreed with the claim that the significance of the inscriptions were adequately conveyed in the various translated remarks. These remarks are notably thinner in content than that conveyed by the inscriptions, especially on Sinclair's reading of them. The remarks are largely confined to expressions of gratitude or loyalty to Callière, expressions of consent to the peace, mention of prisoners brought in exchange, and offerings of wampum “colliers” and calumets.

If the remarks were not simply redundant to the formation of the peace, then I think they need to be viewed as functioning not at the performative, but rather at the pragmatic level of discourse.\(^29\)

Assuming the actual establishment of the peace through the performance nature of the inscriptions (not to mention the entire process – typical of indigenous treaty-making protocols – of feasting, gifting, speech-making and private conferences held over the two weeks proceeding),

the remarks themselves must have served additional pragmatic purposes. They establish degrees of loyalty. They clarify terms of promise fulfillment. They enumerate the specifics of promise fulfillment. They critique the integrity of others, and identify their failures to fulfill obligations. In doing so, they also appear to reflect at least three pragmatic discursive expectations held on the parts of the various ogimaag who spoke, and – given their representative roles as orators – likely by their communities as well.\(^3\)

First, the remarks presumably rest on an implied expectation that agreements of this sort might be formed across linguistic or cultural fault lines – that the contents of pragmatic agreements could be translated sufficiently for the various parties gathered at Montréal to rely upon them. Thus, although contemporary indigenist and cultural theorists, such as those I referred to above, might want to highlight as incommensurable the gap limiting translation across cultures and worldviews, this particular episode of North American treaty history suggests that settler and indigenous parties shared a significant discursive expectation regarding the potential for achieving intersocietal pragmatic agreements. I am not able here to provide a broader range of

\(^3\) Miller, in her study of Anishinaabe leadership within the Great Lakes region, notes that "[s]trong oratory was an important leadership skill in a consensus-based society that relied on verbal persuasion and interpreted eloquence as credibility," *supra* p. 125 n. 13, at 87. At the same time, she demonstrates how affective eloquence and charismatic influence were qualities bound by active forms of community consent. Thus leaders could only aim to persuade when they were regarded as credible to begin with. This dialogic structure of persuasion and consensus, she notes, accounts for both the large number of participants attending treaty conferences (at Montréal upwards of 1,000 Anishinaabeg were present) and the lengthy processes of consideration undertaken in search of consensus, *ibid.* at 103. She also refers to Basil Johnston’s characterization of this dialogical structure. As he puts it: "One of the prerogatives of a leader was to speak, but when speaking he did not purport or even presume to speak on behalf of his people without first seeking their guidance and their opinions upon the matters to be discussed. By deferring to custom and the will of the people the spokesman was seeking permission." See Johnston *supra* p. 122 n. 7, at 79.
examples of this expectation, but believe it to have been widely-spread across North America. This expectation has functioned despite the many obvious failures in practice, and despite the gaps in worldviews that have hindered colonial and settler state parties from typically recognizing, as Sinclair put it above, the obligations they have incurred from accepting the “offerings” extended, often performatively, from indigenous communities.

Second, is the pragmatic expectation that giving consent and making promises of loyalty are verbally confirmable (that is, can be considered separately from, or in addition, to the performative acts of the doodem inscriptions). Thus, the majority of the remarks contain statements of consent such as that of the ogimaa of the Kiskakons, who said to Calliére: “I willingly subscribe to everything you have done.” Others offer pledges of loyalty, such as that of the Potawatomi Onanguisset: “I am always ready to obey even to the death,” or who, in also speaking for the Sauks, said “I am of one body with you, my father.”

Third, although featured less prominently within the treaty text than the statements of consensus and pledges of loyalty, the remarks also contain statements critical of the Haudenosaunee failure to bring their captives with them to exchange in Montréal. By the end of the seventeenth century, taking large numbers of captives had become a crucial feature of warfare in the Great Lakes

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31 The expanding investigations of specific legal orders, and of the histories of treaty-making, that indigenous scholars have been conducting in recent years will serve to confirm or refute my characterization of these discursive expectations as a general feature of intersocietal jurisgenesis in North America.

32 Havard, supra p. 130 n. 26, at 211.

33 Ibid. at 213.

34 Ibid. at 212.
region, conducted under the additional pressures of epidemics and fur trade competition. Havard refers to the estimate of Pierre François Xavier de Charlevoix, the Jesuit historian of New France, who concluded that by the 1660s two thirds of the Haudenosaunee population had originally been taken as captives.\textsuperscript{35} Accordingly, Calliére’s aim of achieving peace through the return of captives posed additional problems, especially for Haudenosaunee communities worn down by the region’s long-running conflicts. Although those French-allied parties with captives largely brought them to Montréal, the Haudenosaunee demurred.

The remarks thus include statements from ogimaag criticizing the Haudenosaunee, as well as their responses justifying the failure to comply. Recorded in the text as the first of the indigenous leaders to speak, the unspecified Haudenosaunee representative (this would have been one of the three pro-French Seneca spokesmen: Tekanoet, Aouenano or Tonatakout) acknowledged the discrepancy between the agreement to return prisoners, and their failure to comply. “[W]e assure you, by these four collars [wampum belts], that we will comply with everything you have arranged; we are presenting you with two prisoners here with us, and we shall return the others that we have.”\textsuperscript{36} However, their failure to bring indigenous captives in any number nearly thwarted the agreement, and many of the French allies expressed their outrage. Kondiaronk, the influential Wendat leader, spoke early in the conference:

\begin{quote}
We obeyed you [referring to Calliére’s call for a prisoner exchange]. . . . Let us see at the same time see if the Iroquois obey you, and how many they have brought back of our nephews who were taken since the beginning of the war . . . If they have done so, it is a
\end{quote}

\textsuperscript{35} \textit{Ibid.} at 49.

\textsuperscript{36} \textit{Ibid.} at 119 and 212. Havard notes that tensions between three principal factions within the league: the pro-French, the pro-English, and those favouring neutrality towards the colonial powers, were only partially resolved at the time of the treaty conference in Montréal, \textit{ibid.} at 91-93.
mark of their sincerity; if they have not done so, they are dishonest. I know, however, that they have not brought any . . . they have deceived us.”

While the remarks within the treaty text do not go nearly as far in condemning the Haudenosaunee as did those of Kondiaronk, the suspicion of Haudenosaunee intentions and disappointment at their failure remains. Most directly spoken are the remarks of the “Salteur” Crane doodem ogimaa, Ouabangué:

You sent us a collar three years ago to invite us to make peace with you. We sent you one in return. We also give you this one to tell you that we have laboured for that goal. We ask no more than that it be lasting. Do also for your part what needs to be done for the peace.

The other comments are more indirect, such as the words of Outoutagan, ogimaa of the Michilimakinac Odawas: “I ask you my father with this collar that the Iroquois release to me my flesh that is in their country.” This request, and others that simply mention the various speakers’ offerings of wampum and calumets to the Haudenosaunee delegation, may all employ the discursive practice of indirect shaming in order to highlight the Haudenosaunee failure and to urge their compliance. Even in such a form, however, they would still proceed from a necessary discursive expectation that actions can be subjected to scrutiny, and indicate a confidence that pragmatic discourse can serve the critical function of distinguishing across language and cultural gaps between promissory obligations upheld and obligations neglected.

If this is a fair depiction of the discursive expectations held on the parts of indigenous treaty-makers at Montréal, that is, expectations of pragmatically worthwhile translatability, of the

\[37\text{ Ibid. at 150.}\]
\[38\text{ Ibid. at 214.}\]
\[39\text{ Ibid. at 212.}\]
possibility of giving consent and making promises, and of providing critical responses to failures to uphold obligations, how do they compare with those expectations elaborated in Habermas’s discourse theory? As I noted above, Tully thinks Habermas’s version of discourse norms is likely to weigh more in favour of settler state parties. As Habermas himself casts these norms:

Anyone who seriously engages in argumentation must presuppose that the context of discussion guarantees in principle freedom of access, equal rights to participate, truthfulness on the part of participants, absence of coercion in adopting positions, and so on. If the participants genuinely want to convince one another, they must make the pragmatic assumption that they allow their “yes” and “no” responses to be influenced solely by the force of the better argument. 

I see no necessary reason why the norms from the 1701 Montréal treaty should be thought to conflict with, or even worse – to wind up being sabotaged by, Habermas’s own characterization of the norms of pragmatic discourse.

Instead, I think they can be adjusted to fit closely enough to make discourse theory useful in the context of assessing indigenous interactions with settler state legal regimes. Habermas’s norm of “equality” in access and rights to participate in discourse seems to have no clear parallel among those I have derived from the ogimaag remarks, and therefore might be the most obviously troublesome to reconcile. However, the intuition supporting the equality norm is that of personal autonomy. Given the treaty basis for relations between indigenous and settler parties in the colonial era, the equality norm can be seen to express a fundamental intuition of all indigenous parties to treaties: that they were autonomous communities, equal in ‘sovereignty’ (admittedly, another slippery term) to the settler powers. This was apparent in Montréal, in spite of Callière’s efforts to assert French dominance. Treaty-making protocols typically emphasized this equality

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40 RDE, at 31.
of discourse between the representatives of the various parties, as Mark Walters, John Borrows and Sákéj Henderson have all emphasized in their histories of colonial era jurisprudence.41

One might respond to this by casting Habermas’s norm as an expression of liberal, individualist equality, which if employed as regulative within a discursive situation involving indigenous parties would have the effect of delegitimizing the very structures of traditional authority that operated collectively in the historical treaty-making context.42 I think, however, that this important concern can also obscure two points. First, the norm of equality of discourse readily coheres with common discursive practices operative within indigenous communities, in which all individuals concerned are typically free to speak, or be represented, creating the conditions of what Miller (referring to Great Lakes Anishinaabeg) calls "consensus-based society."43 Second, the liberal presumption that troubles Christie and Turner miscasts the scenario of consultation by presuming the state-level legitimacy of whatever administrative body might be conducting

41Walters argues that despite the colonial mentality, a better line of treaty interpretation, reflecting the British acknowledgement of indigenous sovereignty, was reflected in Sir William Johnson’s 1764 Two Row Wampum agreement at Niagara. As he notes:

Sir John Johnson seemed to share his father’s views of the treaty relationship. For example, when he was criticized in 1824 for not ordering the Kahnawake Mohawk chiefs to meet with their Indian Department agent, he stated: On this subject I think it necessary to remind you, that the Indians have been always considered by His Majesty's Government as Allies, and not as Vassels; and under all the circumstances of the case, I could not feel myself Justified in Commanding the Chiefs to attend upon W. Doucet, when it is evidently his duty to attend upon them.


42 See Christie supra p. 95 n. 9, and Turner supra p. 96 n. 14.

43 Supra p. 125 n. 13, at 103. The complicated question of whether consensus describes either discursive practices or ideals within indigenous legal orders is more than I can address here. I note that Mohawk anthropologist Audra Simpson favours terms such as “refusal” or dissensus to characterize crucial functions of public discourse within Mohawk circles, as well as with settler state forces, and dismisses ethnographic tendencies to valorize tradition and consensus as forces shaping Iroquoian ‘culture.’ See her “On Ethnographic Refusal: Indigeneity, ‘Voice’ and Colonial Citizenship” (2007) Junctures 9(1) 67.
hearings, reviews, or tribunals. It also undervalues the participation of indigenous parties as amounting to only special interests or collections of individuals, and hence, disregards the representative legitimacy of all parties. Given the adjustments to Habermas's position that I recommended above, which incorporate the necessary collective standing of treaty parties into the model of an 'ideal' discourse situation, we could see the equality norm as being a key embodiment of appropriate treaty protocol.

The other norms are more easily reconcilable. What I have characterized as the Montréal norm of pragmatic translatability, in which party A’s conviction can be sufficiently transferred across a linguistic or cultural gap to become understandable to party B, obviously shares in the expectation of truthfulness. Without that expectation, there would be no reason to assume that a translated conviction, aim or need could reflect the conviction, aim or need actually held by party A. Further, the expectation of non-coercion shares with the Montréal expectation of consent-giving and promise-making the necessary assumption that parties are freely able to form conclusions and make agreements reflecting their basic understandings.

Finally, both the norm of responding solely to the better argument and the norm of being able to critically assess the holding of promises require the assumption that pragmatic discourse is capable of being sufficiently rational to make assessments of the worth of arguments and the consistency of words and actions. This assumption of a common rational potential to the conduct of pragmatic intersocietal discourse received voice in Montréal in the words of the Kahnawake representative, L'Aigle, who said in response to Calliére’s proposals:

All your views are so just and so reasonable, that one would have to not be a man to refuse to submit to them. You must therefore believe that neither the diversity of the
many languages they speak, nor their particular interests and resentments, will by any means be an obstacle to the proper understanding in which you order them to live together in the future.\textsuperscript{44}

L’Aigle’s regard for a common ability to engage in rational reflection occurs widely throughout the speeches of indigenous speakers in treaty conferences during the period, though it remains beyond my scope to survey the philosophical commitments evident within this oratorical tradition. A critic operating out of a post-colonial or post-modernist perspective might dismiss such statements as an ironic reflection of Enlightenment era “noble savage” discourse.\textsuperscript{45} I would only note that the same appeal to common rationality appears among contemporary indigenous legal and political theorists. Seneca scholar John Mohawk, for instance, describes Haudenosaunee legal order as grounded in just such assumptions. As he portrays the tradition:

\begin{quote}
[T]he Peacemaker was required to convince a very skeptical audience that all human beings really did possess the potential for rational thought, that when encouraged to use rational thought they would inevitably seek peace and the belief in the principles would inevitably lead to the organized enactment of the vision.

The test of this thinking is found in the converse of the argument. If you do not believe in the rational nature of the human being, you cannot believe that you can negotiate with him. If you do not believe that rational people ultimately desire peace, you cannot negotiate confidently with him toward goals you and he share. If you cannot negotiate with him, you are powerless to create peace. If you cannot argue around those beliefs, the principles cannot move from the minds of men into the actions of society.\textsuperscript{46}
\end{quote}

\textsuperscript{44} Havard supra p. 130 n. 26, at 144.

\textsuperscript{45} In their study of the pitfalls of the BC treaty process, sociologists Andrew Woolford and R.S. Ratner characterize in Habermasian terms what they refer to as “Aboriginal rationalism.” Although noting the congruence between discourse theory and the position adopted by several BC First Nations’ negotiating parties, they conclude that the apparent congruence was merely strategic, and was later abandoned in favour of legal challenges and protest actions. Given the prominence of both legal action and protest within Habermas’s own understanding of public sphere discourse, however, their dismissal of the theory’s relevance to the stances of indigenous BC treaty parties may well be premature. See their “A Measured Sovereignty: the Politics of Nation-Making in British Columbia” (2004) The Canadian Journal of Native Studies 24(2) 283 at 296.

\textsuperscript{46} Mohawk, “Origins of Iroquois Political Thought” in Joseph Brucha (ed.) New Voices from the Longhouse: an Anthology of Contemporary Iroquois Writing (Greenfield Center NY: Greenfield Review, 1989), at 221. Other proponents of disengagement with the sec. 35(1) legal regime in Canada include the late Patricia Monture-Argus. Monture-Argus, also referencing John Mohawk, makes an argument for
Even Gerald Taiaiake Alfred's contemporary call for militant ethnic nationalism, and a resurgence of his Mohawk warrior tradition in rejection of a potential intersocietal legal order in Canada, draws on sufficiently similar assumptions about discourse and communication to indicate a parallel (though admittedly unacknowledged) set of concerns with Habermas. Alfred portrays his warriors as engaged in verbal struggles over the legitimacy of continued colonial rule, noting that “[l]egitimation (acceptance and support for colonial institutions) is the fundamental battlefield.” The colonial state’s alternative to violence is a structure of authority so pervasive it sinks into the inner lives of the subjugated. Thus when indigenous people accept the legitimacy of colonial rule, they are succumbing to the designs of colonial forces. As I discussed in the previous chapter, the question of legitimacy is also central to Habermas’s discourse theory. It would be a weak reading of that theory not to note that even despite their apparent differences on the usefulness of law (differences that I don’t think would really hold up, though I won’t pursue them here), that both Habermas and Alfred conceive legitimacy as something established through communicative action, that is, through critical public discourse; that they both highlight the role of creative non-violence or civil disobedience as communicative communication across the lines of colonial society that entail expectations about discourse that would correspond to those within Habermas’s work. “When the world is looked at in a holistic way, everyone’s opinion carries with it a similar weight. The way voice is legitimated in Aboriginal society is vastly different from that of the societies that settled here [Canada].” See her Journeying Forward, supra p. 106 n. 30, at 42.

47 Alfred depicts his indigenous warrior figure as fulfilling a primarily communicative role. To do this, he draws explicitly on the work of Hannah Arendt, who is also a key influence on Habermas’s view of communicative action, and the source for his concept of “communicative power” – which is what creates the possibility of establishing pragmatic legal legitimacy. For Alfred’s discussion of Arendt’s view of legitimacy, see his Wasáse: Indigenous Pathways of Action and Freedom (Peterborough ON: Broadview, 2005) at 203. For Habermas’s view of Arendt, see his “Hannah Arendt's Communications Concept of Power” (1977) Social Research 44(1) 3.

48 Alfred supra p. 141 n. 47, at 56.

49 Ibid.
efforts; and that they both conceive communicative power as an effort to deploy claims about truth in the public sphere.

Another point of similarity is in the norm of unfettered honesty that Habermas says must function as a marker of genuine communication aiming to establish the truth of some state of affairs in the world. It is hard to imagine Alfred holding that such a norm should be dismissed as a residue of colonial traditions. He appears to invoke this same norm when he says that warriors must communicate the truth, and that the test of whether the truth is spoken is whether the speaking took courage. Like Habermas, he regards language-use oriented to the truth as a critical force, a danger to the vested interests of colonialism’s beneficiaries, because such words and ideas are “convincing in their logic and so grounded in social, cultural and political reality that there is imminent possibility of their affecting and shaping the actions of people:”

Words can, in fact, be powerful shocks to the system and are capable of causing people to rethink their identity and their place within colonialism. But if they are to be powerful enough to cause crises in the contradictory consciousness of the colonized individual, the words must be dangerous and must push people outside the bounds of their comfort zone and beyond acceptability. The test of whether one's words are contentious in this sense is this question: How much guts does it take to say what you are thinking and to be who you are?50

While advocating his disruptive “strategy of contention,” he also draws a clear line between the symbolic, communicative action he proposes as the tool for warriors, and violence:

What I am acknowledging is that peace and harmony are only possible if we take the possibility of contention to its limit. That limit is reached by developing a renewed sense of pride in bold and serious disruptions of the status quo. Reaching that limit is only possible if we discipline ourselves to reject the promotion of offensive violence as the means of advancing our struggle; if we commit to using words, symbols and direct non-violent action as the offensive weapons of our fight on a battlefield that is the critical juncture of contention and conflict; if we push disruptive direct action tactics right up to the point that they will become a means of violent attack

50 Ibid. at 57.
upon our adversaries … we should have faith in the power of our ideas and in our ability to communicate our ideas without resorting to the mute force of violence to bring our message to people. We should seek to contend, to inform our agitating direct actions with ideas, and to use the effects of this contention to defeat colonialism by convincing people of the need to abandon the cycle of subjugation and conflict and join us in a relationship of respect and sharing.  

Alfred’s mixture of communication terms with obviously power-laden terms – using words “as offensive weapons” on a “battlefield,” and his drawing inspiration from Ghandi’s non-violent, truth-laden, strategic campaign against British colonialism, is instructive when set next to Habermas’s own acknowledgement of power and language-use: “the unforced force of the better argument.” Though Alfred here sounds consistent with Foucauldian political visions, one might ask how these powerful words and symbols are supposed to be effective in confronting Canada’s legal/political order, and its citizen beneficiaries. Not through violence, which he renounces, and not through preaching to the converted, since he frames this strategic discourse as able to convince “people [that is, non-indigenous people] of the need to abandon the cycle of subjugation and conflict and join us in a relationship of respect and sharing.” The “power of our ideas,” if with Arendt the ideas are not expressions of violence; must be an analogy for their truth. It seems sufficient to me to note that this assumption of an ability to communicate truth regarding the legacy of colonialism across a Canadian social divide fraught with fear, suspicion

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51 Ibid. at 77.

52 See Allen supra p. 93 n. 6.

53 In German, as in English, the concept of “power” is deeply ambiguous. Though German employs Macht for power and Gewalt for violence (or force), Habermas notes that Arendt reserves Weber’s definition of power, as the ability to impose unimpeded a will on others, for violence itself. See her complaint against English-language ambiguities regarding power, force, violence and authority in On Violence (San Diego: Harcourt Brace, 1970), at 43-46. For Habermas’s reading of the Weber/Arendt disagreement, see supra p. 141 n. 47, at 3. For a discussion of the problems descending from English translations of Weber’s concept of power, see Isidor Walliman, et al “Misreading Weber: the Concept of ‘Macht’” (1980) Sociology 14(2) 261.
and outbursts of violence, is on a close par with Habermas’s own view of truth as an anticipatory ideal for the conduct of public discourse focused on assuring the legitimacy of legality.

A final point in comparing norms of discourse might arise even if one does detect important differences between Habermasian assumptions and those contained within the discursive practices of indigenous communities. I am not claiming that such practices could be best understood as entailing Habermasian norms, that is, within historical or social contexts that might be termed 'pre-contact' or 'traditional.' Instead, I am only concluding that the expectations, norms or conditions of ideal discourse as glossed here would be ones that indigenous parties engaged in intersocietal, legally-significant dialogue situations, such as treaty-formation and consultation, would likely regard as capable of insuring just and reasonable outcomes, and therefore, norms worthy of respect.

What discourse theory helps us see is that intersocietal public discourse as developed between settler and indigenous parties in North America often functions at two levels. Thus, it includes within the range of legally significant discourse communication that is performative in nature, and can encourage us to acknowledge that rational legitimacy arises out of such performances. Included within this range of the performative would also be discourse that is affective rather than linear and propositional. Habermas’s critics on the left have generally argued that he dismisses the significance of these aspects of communication. I am arguing, as have others, that it is more the case that he has avoided rather than dismissed these aspects, and that discourse theory grounded in legitimacy through consent must give a strong affirmation to the potential legal significance carried in such forms of communication. However, it seems precipitous to
limit the legal significance of indigenous communicative acts to their performative basis, when it seems clear that the modes of oratory, and the models of treaty negotiation, historically practiced in North America took great care to engage in pragmatic uses of discourse as well.

The intersocietal context of legal discourse requires attention to pragmatic concerns. This is not a sleight of hand colonial trick. Any performance in any context can require supplementation through a turn to the pragmatic. To do more than clap or hoot in response to a powerful musical performance requires those of us listening to speak, to compare impressions, to inquire into what seemed murky, and to defend our impressions when they are challenged. In the same way, indigenous and settler parties were compelled to turn to the pragmatic when the performance-based legitimacy of their assumptions regarding legal obligations required clarification, or were challenged, in situations involving other parties not sharing those performance practices. This is not to say that the performances were insignificant, or irrelevant to a rational establishment of legal obligation.

The reason these performances are intersocietally significant as legal discourse, and not simply within a given community, is that their function as what Sinclair called bagijiganan, “offerings” is the inevitable discursive basis of legal legitimacy. The reason to accept another group’s performance-based discourse is because it raises the jointly resolvable question of what sort of relationship are we going to produce here, and how do we find agreement on what will make that relationship binding? These questions will likely entail pragmatic reflection, though not of the sort considered rational by Justice McEachern in Delgamuukw (1991). Instead, as Habermas argues, pragmatic discourse is grounded in the continually necessary, and legally significant,
question of how we ought to address the task of establishing and maintaining social solidarity. As I want to show in the next section, this is the question that Canada’s courts have said is at the heart of the duty to consult.

To recap, I have argued in the last two chapters that although Habermas’s discourse theory is subject to limitations regarding his own efforts to reference indigenous peoples’ political and legal stances within modern liberal constitutional orders, these limitations are not inherent roadblocks to the use of his theory. I have tried to show that critiques of his work do not yield reasons to avoid him. I have also tried to show that an effort to acknowledge the distinctiveness of indigenous legal orders, characterized to a great extent (though certainly not exclusively) by their oral and performance base, still must recognize the need for pragmatic discourse in attempting to employ these orders within an intersocietal context. The treaty-making processes long practiced in North America, and likely in many more contexts than I am able to draw upon here, demonstrate the strong tendency of indigenous negotiators and representatives to refer to just the sorts of assumptions regarding legally significant discourse that Habermas has identified as necessary to employ in developing a just, pragmatically legitimate legal order. That such a legal order in North America must be an intersocietal legal order in order to justly deal with the longstanding claims of indigenous communities, is a conclusion that I believe Habermas would have to concur with. Accordingly, in the following chapters, I will examine Canada’s doctrine of the duty to consult and where necessary accommodate Aboriginal and treaty rights from the perspective of his theory.
In Chapter 1, I laid out the ways in which the Supreme Court of Canada has constructed its doctrine of the duty to consult on the basis of a number of communicative practices. I suggested there that the strong reliance upon acts of communication to establish the nature of Aboriginal and treaty rights affirmed and recognized by the *Constitution Act, 1982* was peculiar.¹ In Chapter 2 I outlined the themes in Jürgen Habermas’s discourse theory of law relevant to this discussion of the duty to consult. In Chapters 3 and 4 I then argued that limitations to discourse theory, and its perceived distance from what we might regard as some of the distinctive features of North American indigenous legal orders, should not be thought of as derailing it from usefully addressing law’s creative role in addressing relations between indigenous and settler communities in Canada.

In this chapter and the next I want to lay out how I see discourse theory enabling a better view for regarding the duty to consult than we find generally deployed within Canada’s courtrooms and decision-making bodies, as well as across the complex whole of its public sphere. I would not conclude that the communicative preoccupation in envisioning Aboriginal rights and the duty to consult itself is mistaken, especially in light of the political failure on various fronts during the

¹ Although I won’t pursue this here, it might also be that this is part of the reason the courts have described them as *sui generis.*
1990s to provide them with a firmer shape. However, what I hope to demonstrate from the perspective of discourse theory is that a better understanding of this communicative preoccupation is possible; better in both a normative sense, and in the implications it would offer for improving the destructive situation facing indigenous and settler communities struggling over law in Canada.

In my reading of SCC decisions in Chapter 1, I emphasized how the court has made use of various communicative practices in constructing the doctrine of the duty to consult. The court’s explanations of these practices constitute an intellectual scaffold, providing the duty to consult as a legal doctrine with what the court has regarded as its necessary and sufficient support. Key practices include: narrating the emergence of Aboriginal rights as a progressive story of Canada, framing the state as capable of offering satisfactory justifications for its infringements (including those of third parties) on Aboriginal and treaty rights, urging a national engagement with the task of reconciliation, and invoking a standard of the honour of the Crown. From the standpoint of discourse theory, while these practices may well be necessary in giving shape to the duty to consult, they are not sufficient as a form of communicative action – at least, as they remain framed within the courts’ opinions. I argue that their insufficiency as supports for the duty to consult stems from their weak construal of what is legally relevant about these particular acts of communication. They are all communicative practices that we might employ generally, and the courts have offered no gloss to their distinctive legal use.

Each of these practices might readily be seen to entail at least two pragmatic assumptions, that is, assumptions about the communicative task the practice performs. When we offer a justification
of government decisions, say to renew a timber-cutting permit, to plot a winter road, or to tighten restrictions on fishing along a stretch of a given river, we assume that providing a rational justification of the renewal or restriction is actually possible. We must also assume that those who learn of the justification will find it rationally acceptable. Communication “oriented” towards mutual understanding, as Habermas puts it, requires us to make such assumptions. However, it might be that we really assume something else. Contrary to the first assumption, we might not believe that a rationally convincing justification is actually possible. Contrary to the second, we might doubt that those we communicate with regarding our justification can be rationally expected to find it credible. On Habermas’s account, the extent to which such an effort to justify a policy change or a new regulation actually stems from these two additional assumptions, would indicate that our communicative effort is less a form of “communicative action” than a form of “strategic action.” Granted, as his critics have pointed out, the absolute separation of communicative from strategic action may well be impossible to achieve within the real world, and in Chapter 2 I argued that these elements of discourse theory need to be regarded merely as ideal-types in the Weberian sense.

As articulated in SCC decisions since 1990, the duty to consult still remains clouded with practical, political and legal difficulties. Practically, for First Nations, the federal government, and the provinces, the financial burdens associated with challenges to state and corporate action under the duty to consult are considerable. This is especially true for First Nations, which frequently lack the financial and administrative resources to respond adequately to consultation challenges.² Politically, the seemingly perpetual position of First Nations seeking to defend

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² Kaitlin Ritchie highlights three funding problems First Nations face in participating in consultation efforts: 1) Only four Canadian provinces currently have programs making funding available. 2)
treaty and Aboriginal rights through legal challenges to generally applicable regulations, to development projects threatening off-reserve traditional lands, to changes in federal and provincial policies affecting First Nations; are all generally met with suspicion and hostility from the Canadian public at large.\(^3\) Legally, despite more than twenty years of development, the duty to consult doctrine still carries ambiguities and implications that yield more occasion for conflict and challenge than it does clarity and security for protection of First Nations’ treaty and Aboriginal rights.\(^4\) From a discourse perspective, then, at a minimum the doctrine is difficult to

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Agreements providing funding from corporations interested in development affecting First Nations remain voluntary. 3) Funds available under environmental assessment or other regulatory processes are only available to First Nations when the proposed action triggers the need for a broader assessment or review in accord with the mandate of departments or agencies, such as the Canadian Environmental Assessment Agency. See her “Issues Associated with the Implementation of the Duty to Consult and Accommodate Aboriginal Peoples: Threatening the Goals of Reconciliation and Meaningful Consultation” (2013) University of British Columbia Law Review 46(2) 397, at 426-27.

\(^3\) To assess this by only one anecdotal measure, consider the webpage comments generally attached to any coverage of First Nations issues in the press. As Tiredofbeingovertaxed wrote following a July 2014 Globe and Mail story on continued BC First Nations’ challenges to the Northern Gateway pipeline construction, “Let the endless extortion commence! Thanks supreme court, I can't wait to pay more for everything so the parasites can continue doing nothing.” Available at <http://www.theglobeandmail.com/news/british-columbia/first-nations-challenge-northern-gateway-pipeline-in-new-court-action/article19608617/comments> accessed 15 October 2014. Or, as Vancouverite Kenneth McGechen wrote in response to a December 2014 Vancouver Sun story about the federally unrecognized Hwlitsum First Nation’s land claim: “Stop this nonsense. This is almost becoming laughable. BC you are screwed. The government should grow some balls now or the lazy useless tax avoiding Indians will take them too!” <http://www.vancouversun.com/life/land+claim+seeks+massive+territory+South+Coast+including+Stanley+Park/10431709/story.html> accessed 3 December 2014.

\(^4\) For instance, Janna Promislow highlights the growing tendency to relieve administrative tribunals and municipalities of obligations to consult, which she argues has the effect of making consultation less protective of First Nations interests than the “fundamental justice” available to all Canadians under sec. 7 of the Charter. As she reads the impact of post-Haida Nations jurisprudence:

"Through critical points of departure from established administrative law principles, courts and tribunals have narrowed tribunal jurisdiction in relation to the duty to consult relative to tribunal jurisdiction over other constitutional matters. This narrowing permits governments and legislatures to avoid the changes in administrative decision-making anticipated by Haida Nation and arguably required to implement the duty to consult in a manner that is capable of promoting reconciliation.

In her casting of the impact of post-Haida Nation refinements of the duty to consult: “a decision maker's obligation to consult has potentially less legal content than a decision maker's obligation to decide in accordance with the requirements of procedural fairness, which in administrative law is treated as a
place along an ideal continuum of strategic/communicative action. If the duty to consult is to amount to something more than strategic action, that is, if it is to provide a wider sense of legal legitimacy, one that can genuinely contribute to ameliorating the long-damaged, essentially colonial relationship between Canada and First Nations and other indigenous communities, then clarifying how the practices entailed in the duty to consult approach the standard of Habermas’s discourse principle – “D” – would be worthwhile. Contrary to the views of his critics, who often see him imposing, Kant-like, universal standards of legitimacy so refined that only the angels might hope to pass their muster, I think that the discourse theory of law can be practically useful. In particular, it can indicate how an appropriate standard of legal legitimacy could be found or established either embedded within Canada’s institutions, or in concurrence with norms of discourse held by both courts and indigenous communities. Habermas’s discourse conception of legal legitimacy offers us a way to regard the duty to consult as a potential step towards a legal order that indigenous parties could find worth subscribing to, despite the evidence that Canada’s law has historically focused on cementing colonial power over indigenous communities and individuals. In what follows, then, I will address each leg of the duty to consult’s scaffold.

To refresh, discourse theory distills into the principle that: “Just those action norms are valid to which all possibly affected persons could agree as participants in rational [or practical] discourses.” Additional clarifications, the contributions of others more than Habermas himself, have stressed that D entails such pragmatic requirements as communicative conditions of equality, yes/no responses to challenges, commitments to truthfulness. As I emphasized above,

question of law.” See her "Irreconcilable? The Duty to Consult and Administrative Decision Makers" (2013) Constitutional Forum 22(10) 63, at 64.

5 BFN, at 107; DEN, at 66.
these additional pragmatic requirements have never been framed as the sum and extent of D, meaning, I think, that the principle is flexible enough to be capable of functioning in tandem with pragmatic requirements that may be employed within other, non-western worldviews, as I demonstrated in relation to historical Anishinaabe communicative practices related to treaty-making described in Chapter 4.

One might object that this is to hold the law to an extra-legal standard. However, as I indicated above in comparing Habermas and H.L.A. Hart on the legitimacy of legality, Habermas is as resistant as is Hart to holding law subject to morality. D, he stresses, is not a moral principle. Rather, it is what he also calls the “democratic principle,” that is, a communicatively construed Rechstaat or “rule of law.” Additionally, this objection fails to account for the fact that the common law duty to consult itself is not really articulated as a purely legal concept (conceived in Hartian or Weberian terms), as I will show. As well, it would fail to consider the crucial ‘extra-legal’ foundations of Canadian constitutional law, as the SCC affirmed in the Quebec Secession Reference.

A) Narrating the history of Aboriginal rights in Canada

As I described in Chapter 1, the court in the earlier cases portrayed the duty to consult as a product of Canada’s historical development, particularly in Sparrow. There Dickson C.J. provided a narrative of Aboriginal rights, running from the Royal Proclamation of 1763 to up to the years just prior to his own writing. Whether in law or literature, narratives are crucial means of communication, and work, as James Boyd White has emphasized, by providing control of a

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6 BFN, at 110-11.
vast range of other possibilities of description, meaning, inference. But if narrative is a form of control, how did the court in Sparrow come by its specific control of the developmental narrative of Aboriginal rights in Canada? In fiction, we can readily grant an author control of her narrative; but when the narrative concerns a country’s history – which above all lacks the unifying figure of an author – the question of alternate accounts is difficult to dismiss. Admittedly, narrative is a function of discourse that Habermas does not really address. However, the question of narrative as control dovetails with his basic concerns, such as the relation between communication and legal legitimacy, in ways that still make discourse theory helpful in highlighting difficulties within the doctrine of the duty to consult.

Although Dickson C.J. recounted particulars of Canada’s legal history, his narrative also embraced at key points a more general, public, frame of reference. His concern with “the meaning of the constitutional recognition and affirmation of the existing aboriginal right to fish for food and social and ceremonial purposes” does not yield a narrative simply delineating the conflicting judicial interpretations of the Royal Proclamation, as occupied the courts in such historic cases as St. Catharines Milling and Lumber (1887, 1888), Ontario v the Dominion (1909), Calder (1973), or R. v White and Bob (1966), as I will discuss below. In those cases, and in many others, the courts sought to establish the legal implications of the Royal Proclamation as directly deducible from the text of the Proclamation: whether that meant, for instance, that Indians either had or did not have rights in the soil – and whether or not any such rights were

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7 See his The Legal Imagination, supra p. 30 n. 70, at 249. Drawing on the work of Robert Cover, Gordon Christie suggests that narratives “police meaning, working to keep unified a community capable of diverse forms of thought and action.” See his “Indigeneity and Sovereignty in Canada’s Far North: the Arctic and Inuit Sovereignty” (2011) The South Atlantic Quarterly 110(2) 329, at 338.

8 Sparrow, supra p. 15 n. 21, at 1101.
themselves the product of the Proclamation, or whether the Proclamation had the force of statute, or whether or not it applied to British Columbia. Despite the conflicting interpretations that have resulted, such cases relayed an arc of the national narrative that has emphasized consistency between the Proclamation and the historical development of the country. That is, they have demonstrated that “Crown” sovereignty has cohered with the presence of Aboriginal rights, whether the courts have seen these as deriving from “the goodwill of the Sovereign,” or as existing from “time immemorial.”

In the Supreme Court’s consideration of *St. Catharines Milling and Lumber*, for instance, Taschereau J. concurred with the majority that sovereignty entailed a weak form of Aboriginal rights effective within the historical development of Canada. His conception of what I called the arc of historical narrative appears in his use of several temporal terms to indicate the scope of sovereignty (“for the present,” “thereafter,” “at any time,” “when he would think,” “forever”):

“The words "for the present," in this and the next clause, are equivalent to a reservation by the king of his right, thereafter or at any time, to grant these lands when he would think it proper to do so. He reserves for the present for the use of the Indians all the lands in Canada outside of the limits of the Province of Quebec as then constituted. Is that, in law, granting to these Indians a full title to the soil, a title to these lands? Did the sovereign thereby divest himself of the ownership of this territory? I cannot adopt that conclusion, nor can I see anything in that proclamation that gives to the Indians forever

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9 That it did not, was Judson J.’s view in *Calder, supra* p. 95 n. 11, at 323.

10 This was likewise his view, *ibid.* at 328, and reflected the influence of *Saint Catharines Milling and Lumber v the Queen* (1887) 13 SCR 577.

11 The Statute of Westminster (1275) set this common law term to the accession of Richard I (3 September 1189) in order to limit claims to land rights, or seisin. See Michael Asch *On Being Here to Stay: Treaties and Aboriginal Rights in Canada* (Toronto: University of Toronto Press, 2014) at 42-43 for a brief engagement with political scientist Tom Flanagan over the implications of the term in Canada. See also, *Van der Peet, supra* p. 2 n. 3, at 35-37, where Lamer C.J. provided an extensive discussion of time immemorial, or what he came to refer to as the “pre-contact period” (*ibid.* at 60), as providing the source of sec. 35(1) rights. He derived this temporal view from US Chief Justice John Marshal’s opinions, *Johnson v M’Intosh, supra* p. 96 n. 12, and *Worcester, supra* p. 91 n. 4
the right in law to the possession of any lands as against the crown [sic]. Their occupancy under that document has been one by sufferance only. Their possession has been, in law, possession of the crown.¹²

That Aboriginal rights fit weakly within this historical arc may also be indicated by the use of the present perfect tense: “has been,” which conveys no forward temporal trajectory.

In upholding the SCC’s view that Ontario rather than the federal government held title to the lands at dispute in that case, the Judicial Committee of the Privy Council also affirmed a weak reading of Aboriginal rights consistent with sovereignty, and effective historically, or at least “for the present.” As Lord Watson put it:

Whilst there have been changes in the administrative authority, there has been no change since the year 1763 in the character of the interest which its Indian inhabitants had in the lands surrendered by the treaty. Their possession, such as it was, can only be ascribed to the general provisions made by the royal proclamation in favour of all Indian tribes then living under the sovereignty and protection of the British Crown. It was suggested, in the course of the argument for the Dominion, that inasmuch as the proclamation recites that the territories thereby reserved for Indians had never been "ceded to or purchased by" the Crown, the entire property of the land remained with them. That inference is, however, at variance with the terms of the instrument, which show that the tenure of the Indians was a personal and usufructuary right, dependent upon the good will of the sovereign. The lands reserved are expressly stated to be "parts of Our dominions and territories;" and it is declared to be the will and pleasure of the sovereign that, "for the present," they shall be reserved for the use of the Indians, as their hunting grounds, under his protection and dominion.¹³

Similarly, in 1909 the Supreme Court observed in the “Indian Annuities Case:”

A line of policy begotten of prudence, humanity and justice adopted by the British Crown to be observed in all future dealings with the Indians in respect of such rights as they might suppose themselves to possess was outlined in the Royal Proclamation of 1763 erecting, after the Treaty of Paris in that year, amongst others, a separate government for Quebec, ceded by that treaty to the British Crown.


That policy adhered to thenceforward, by those responsible for the honour of the Crown led to many treaties whereby Indians agreed to surrender such rights as they were supposed to have in areas respectively specified in such treaties.\(^{14}\)

These fruitful co-generators of imperial policy: “begotten of prudence, humanity and justice,” produced what Strong J. had earlier, with perhaps a touch of realpolitik, portrayed as “a well known fact of Canadian history which cannot be controverted.”\(^{15}\)

Even when the courts began to cast Aboriginal rights in a stronger vein, they still stressed the continuity between those rights and sovereignty. Concurring with the majority opinion in \(R. v\ White and Bob\), Norris J.A. summarized the impact of the Royal Proclamation on Canada’s historical recognition of Aboriginal rights:

For the British, the Proclamation of 1763 dealt with a new situation arising from the war with the French, in North America, which Indians to a greater or less degree took an active part on both sides, and incidentally from the Treaty of Paris of 1763 which concluded that war. The problem which then faced the British was the management of a continent by a power, the interests of which had theretofore been confined to the sea coast. As exploration advanced, the natives of the interior and the western reaches must be pacified, trade promoted, sovereignty exercised and justice administered, even if only in a general way, until such time as British settlement could be established. It was a situation which was to face the Imperial power in varying degree and in various parts of

In that same narrative, Norris J.A. quoted from the work of the noted western Canadian historian, A.S. Morton:

\(^{14}\)Province of Ontario v Dominion of Canada [1909] 42 SCR 1, at 103-04.

\(^{15}\)As he considered the “more liberal treatment accorded to the Indians” by British policy derived from the Royal Proclamation:

To ascribe it to moral grounds, to motives of humane consideration for the aborigines, would be to attribute it to feelings which perhaps had little weight in the age in which it took its rise. Its true origin was, I take it, experience of the great impolicy of the opposite mode of dealing with the Indians which had been practised by some of the Provincial Governments of the older colonies and which had led to frequent frontier wars, involving great sacrifices of life and property and requiring an expenditure of money which had proved most burdensome to the colonies.

See his dissent, though not on this point, in the Canadian SCC decision in Saint Catharines Milling, supra p. 154 n. 10, at 609-10.
The promise which won over the warlike Five Nations was that they would enjoy their territory undisturbed, and that no lands were to be taken from them but by formal purchase by His Majesty the King. Thus they would be protected from the dreaded encroachment of colonists. To us who have experienced the peaceful working out of such a policy, from the purchases by the Hudson Bay Company of the rights to build their forts down to the long succession of Indian treaties which preceded the settlement of the North-West, this policy appears as doing no more than justice to the Indians, quite apart from the treaties which promised it to them - no mere scraps of paper, surely. So far from precluding the manifest destiny of the White Race on this continent, it really provided for an orderly and peaceful expansion.\textsuperscript{16}

Although framing the development of Aboriginal rights in terms of providing for “orderly and peaceful expansion” and the “manifest destiny of the White Race,” Norris J.A. also indicated that the earlier narrative of congruence between sovereignty and Aboriginal rights was at least more complicated than it appears within the work of turn-of- the-century jurists such as Chancellor Boyd or Lord Watson. For instance, he noted that his own historical narrative stood in opposition to the contentions of the state in the question of the summary convictions of Clifford White and David Bob for hunting deer without a permit.

It is well that what is now attempted by the enforcement of the game laws against the Indians in this case be understood. This is not a case merely of making the law applicable to native Indians as well as to white persons so that there may be equality of treatment under the law, but of depriving Indians of rights vested in them from time immemorial, which white persons have not had, \textit{viz.}, the right to hunt out of season on unoccupied land for food for themselves and their families.\textsuperscript{17}

In view of the argument before us, it is necessary to point out that on numerous occasions in modern days, rights under what were entered into with Indians as solemn engagements, although completed with what would now be considered informality, have been whittled away on the excuse that they do not comply with present day formal requirements and with rules of interpretation applicable to transactions between people who must be taken in the light of advanced civilization to be of equal status. Reliance on

\textsuperscript{16} \textit{Ibid.} at 637, quoting from Morton’s \textit{History of the Canadian West to 1870-71} (1939).

\textsuperscript{17} \textit{Ibid.} at 648.
instances where this has been done is merely to compound injustice without real justification at law.\textsuperscript{18}

The quote above also demonstrates that his narrative is complicated, at least at this one point, by a depiction of conflicts between Canada’s rule of law and Aboriginal rights. In these “modern days,” rights are “whittled away” by “formal requirements,” amounting to the perpetuation of “injustice” without “justification.”

The SCC decision in \textit{Calder}, which built on \textit{White and Bob}, also conveyed the historical arc, though without really sharpening it in the potentially critical direction that Norris J.A. had suggested there. Instead, like the earlier cases, it also squarely framed the congruence between sovereignty and Aboriginal rights by means of the \textit{Royal Proclamation} (which the Nisga’a claim had in part relied upon).\textsuperscript{19} As Hall J. put it:

Its force as a statute is analogous to the status of Magna Carta which has always been considered to be the law throughout the Empire. It was a law which followed the flag as England assumed jurisdiction over newly-discovered or acquired lands or territories. It follows, therefore, that the Colonial Laws Validity Act applied to make the Proclamation the law of British Columbia. That it was regarded as being the law of England is clear from the fact that when it was deemed advisable to amend it the amendment was effected by an Act of Parliament, namely, the Quebec Act of 1774. In respect of this Proclamation, it can be said that when other exploring nations were showing a ruthless disregard of native rights England adopted a remarkably enlightened attitude towards the Indians of North America. The Proclamation must be regarded as a fundamental document upon which any just determination of original rights rests.\textsuperscript{20}

The split decision in \textit{Calder} regarded the application of the \textit{Royal Proclamation} to British Columbia, and hence to the question of title for the Nisga’a before the court. Neither side,

\textsuperscript{18} \textit{Ibid}. at 649.

\textsuperscript{19} \textit{Calder, supra} p. 95 n. 11, at 318.

\textsuperscript{20} \textit{Ibid}. at 395.
however, found reason to question or qualify the narrative of Aboriginal rights as already embraced in Canada’s history, or as coherent with the idea of British sovereignty.

In *Sparrow*, by contrast, Dickson C.J.’s narrative of the historical “background of s. 35(1)” is not simply more complicated than the one Norris J.A. provided in *R. v White and Bob*; it also conveys the suggestion that the congruent relation between sovereignty and Aboriginal rights does not really hold in Canadian history. *Sparrow* thus could have potentially threatened to subvert the historical arc. As the chief justice summarized the policy of the colonial period:

> It is worth recalling that while British policy towards the native population was based on respect for their right to occupy their traditional lands, a proposition to which the Royal Proclamation of 1763 bears witness, there was from the outset never any doubt that sovereignty and legislative power, and indeed the underlying title, to such lands vested in the Crown. . . . And there can be no doubt that over the years the rights of the Indians were often honoured in the breach.

His dual emphasis on the lack of “doubt” – no doubt about sovereignty, and no doubt about frequent breaches of Indian rights – places this narrative within a different context from those in which references to British policy and the *Royal Proclamation of 1763* had previously appeared.

Here, the focus is not on providing an initial source to outline the force of a consistently functioning legal concept. The potential for doubt that Dickson C.J. dismissed is not the doubt of legal experts who may disagree with the reading of a case. Instead, the dismissing of doubt refers to the apparent solidity of more common knowledge. The recognition that “Indian rights were often honoured in the breach” is a simple historical statement, reflecting content known, or knowable, to Canadians in general and not simply to their legal experts. Its fatalism bears similarity to Justice Reed’s nod in the US case *Tee Hit Ton*: “every schoolboy knows” the basic

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21 *Sparrow*, *supra* p. 15 n. 21, at 1102.

facts of US-Indian history. If we assume that the uses of “doubt” in both of these sentences is consistent, then it seems likely that the usage in relation to “sovereignty” and “title” evident within Dickson C.J.’s reference to the *Royal Proclamation of 1763* also appeals to the understanding held among a more public audience. That is, *Sparrow* positions the assessment of the legal status of Aboriginal people and their rights in Canada within the range of public discourse. Thus, while the narrative in *Sparrow* indicates that it is engaged in describing a consensus about that which cannot be doubted; it is not simply making claims of propositional truth here. Instead, the narrative is also an action guide, a spur for consent as much as a statement about what is consented to; and consequently, capable of being evaluated at the level of pragmatic discourse.

Pragmatically, the narrative opens to the achievement of a consensus of rational Canadians on two evidently conflicting points. The first is the solidity of state “sovereignty,” which is the underlying fact, the *Grundnorm*, of Canada’s history. The second is the character of Canadian history. Real world conflicts, amounting to honouring Indian rights “in the breach,” might be thought to shake the solidity of sovereignty in Canada, or to define that sovereignty in a darker manner than it presents itself within the *Royal Proclamation of 1763* (that of the benevolent, Christian monarch concerned for his “loving subjects”). It suggests that the public’s range of common knowledge regarding what is “in the breach” could amount to a chastened understanding of what I called the ‘national imaginary,’ above. It also runs counter to the

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23 As Justice Reed put it there: “Every American schoolboy knows that the savage tribes of this continent were deprived of their ancestral ranges by force and that, even when the Indians ceded millions of acres by treaty in return for blankets, food and trinkets, it was not a sale but the conquerors' will that deprived them of their land.” See *Tee-Hit-Ton supra* p. 95 n. 11, at 289-90. It also registers with Strong J.’s regard of facts “which cannot be controverted” about Canadian history, above.
narrative provided since *Saint Catharines Milling*. The earlier narratives of law’s embrace of Indians all indicated continuity between the foundation of law in sovereignty, and the implementation of law in practice. Dickson C.J.’s narrative, however, grounded in his two certainties that cannot be harmonized on their face, indicates a deep-seated point of tension in Canada, at the very least, between law as provider of order and law as provider of justice.

Our history has shown, unfortunately all too well, that Canada’s aboriginal peoples are justified in worrying about government objectives that may be superficially neutral but which constitute de facto threats to the existence of aboriginal rights and interests.24 Thus, the consensus that Canada’s sovereignty has extended through time actually amounts to a history of injustice. There would be no other way to harmonize the two contending certainties than through recognition (on the part of the public as well as its legal experts) that Canada’s historical relationship with indigenous peoples is fundamentally dark.

How did Dickson C.J. cope with this recognition? From a discourse perspective, the narrative that Dickson C.J. developed in *Sparrow* does two things. In reaching for a public audience, the narrative necessarily opens to a public range of response. That is, it raises the practical necessity of a new consensus, the achievement of mutual understanding, about what is incapable of being doubted: the conflict between sovereignty and breaches of Indian rights. At the same time, however, it also indicates the difficulty in establishing any such consensus: since the government’s consistent approach to issues of Aboriginal rights has been to frame them as merely political. As the chief justice noted: “By the late 1960s, aboriginal claims were not even recognized by the federal government as having any legal status.”25 Similarly, he noted the


state’s persistent refusal to recognize the legal substance of Aboriginal claims in all the main policy developments within that era: the “White Paper” (1973), the James Bay Northern Quebec Agreement (1975), and the creation of a “comprehensive claims” mechanism (1981), a tendency he also found extending into government arguments in Guerin (1984).\textsuperscript{26}

The pragmatic question of how to grapple with public recognition of such a history could have provided the courts with an opportunity to call for, and to ensure a worthwhile process for, the sorts of soul-searching national reflection, and measures of redress, undertaken in post-apartheid South Africa or post-WWII federal Germany during the same period as Sparrow was being considered. Dickson C.J, however, avoided the potential traumas of such reconsiderations, and turned the narrative itself in a redemptive, or what I called above a more ‘progressive,’ direction. Thus, he reined in the narrative with the conclusion that sec. 35(1):

\begin{quote}
represents the culmination of a long and difficult struggle in both the political forum and the courts for the constitutional recognition of aboriginal rights. The strong representations of native associations and other groups concerned with the welfare of Canada's aboriginal peoples made the adoption of s. 35(1) possible.\textsuperscript{27}
\end{quote}

He then capped the conclusion with a quote from legal scholar J. Noel Lyon on the impact of sec. 53(1): “It renounces the old rules of the game under which the Crown established courts of law and denied those courts the authority to question sovereign claims made by the Crown.”\textsuperscript{28}

What stands out here from a discourse perspective is the disparity between the two tendencies in the narrative. First, although having developed the potentially threatening theme that sovereignty

\textsuperscript{26} \textit{Ibid.} at 1103-05.

\textsuperscript{27} \textit{Ibid.} at 1105.

\textsuperscript{28} \textit{Ibid.} at 1106.
and Aboriginal rights stand in conflict throughout Canadian history, Dickson C.J. did not use this assessment of legality to question any of the underlying assumptions within the Canadian legal order regarding Aboriginal peoples. Instead, he drew sec. 35(1) as a redemptive achievement, invoking a quote from a legal scholar to mark its significance – though he could have framed this significance himself. Second, although highlighting the public role of “native associations” in lobbying for sec. 35(1)’s inclusion in the Constitution Act of 1982, and acknowledging the importance of the “aboriginal perspective” regarding the nature of the fishing right defended by Ronald Sparrow, he did not rely upon anything like an “aboriginal perspective” in framing his narrative.29

Thus, although in principle Dickson C.J. upheld Sparrow’s claim of infringed rights against the DNR drift net regulation revision, authorized under sec. 12 of the B.C. Fisheries Regulations, from a discourse perspective his ruling raises many suspicions. Not the least of these is that this first leg of the emerging duty to consult’s scaffolding was already weakened by its approach to discourse itself. Instead of Dickson C.J. conceiving of Aboriginal rights as opening an occasion for mutual understanding – an aim that would have easily followed from his casting of the tension between sovereignty and Aboriginal rights, and his casting this as an issue of public discourse regarding whether the particular legal status of indigenous communities in relation to

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29 A critic might say that I am making a Whiggish argument here. However, at the time of his writing Sparrow, a fairly wide range of scholarship concerning Aboriginal perspectives on legal standing was available in Canada, the US, and other common law regimes, some of which I mentioned in chapter 4. As well, during those same decades, the intellectual thrust of many of the “native associations” that he acknowledged certainly included claims not only of grievances to be represented within the courts, but of challenges to the very basis of sovereignty insisted upon by the Canadian state. For a history of the jurisprudence, scholarship and (to some extent) advocacy reflecting the impact of these perspectives in the post-WWII era, see Paul McHugh Aboriginal Title: the Modern Jurisprudence of Aboriginal Land Rights (New York: Oxford University Press, 2011).
the Canadian state is best expressed in the affirmation of rights within the constitution, he crafted a doctrine that gave controversial powers of judicial review to the courts. The ‘game change’ that he let Prof. Lyon indicate, within the text of Sparrow itself, has much less to do with any shift in thinking about the legal standing of indigenous people in Canada, and much more to do with clarifying, or extending, the power of the court itself.

Consequently, the chief justice cast the real import of sec. 35(1) – and correspondingly wound up maintaining the control of his narrative – by foregrounding the court’s role: through sec. 35(1) the court gains the ability to resolve the historic tension between sovereignty and Aboriginal legal standing. As he put it:

There is no explicit language in the provision that authorizes this Court or any court to assess the legitimacy of any government legislation that restricts aboriginal rights. Yet, we find that the words "recognition and affirmation" incorporate the fiduciary relationship referred to earlier and so import some restraint on the exercise of sovereign power. Rights that are recognized and affirmed are not absolute. Federal legislative powers continue, including, of course, the right to legislate with respect to Indians pursuant to s. 91(24) of the Constitution Act, 1867. These powers must, however, now be read together with s. 35(1). In other words, federal power must be reconciled with federal duty and the best way to achieve that reconciliation is to demand the justification of any government regulation that infringes upon or denies aboriginal rights.

The reconciliation required here (between power and duty) apparently resolves the tension in the narrative between sovereignty and rights “honoured in the breach.” However, it does this in a way that leaves sovereignty unalloyed – and makes the future breaching of Indian rights subject to a case by case process of consideration. He spoke of that process as one of “justification,” and envisioned the task of consultation itself as simply one component of this process. He did not

30 As I discussed in Chapter 2, for Habermas, outside of a narrow range of questions that he regards as “juristic discourses of application,” and which bear most directly on the nature of the Basic Law in Germany, he regards legal questions as inherently tied to public discourse, see BFN at 439.

31 Sparrow, supra p. 15 n. 21, at 1109.
describe the act of consultation in detail; although the considerations he included within the process of justification: providing a “clear and plain” expression of sovereign intentions to infringe a right, and articulating a “valid objective” to regulation of rights, indicate that any consultation undertaken as a result of the Sparrow decision would conceivably raise troublesome issues from within targeted indigenous communities.

For instance, from a discourse perspective, and reflecting Habermas’s view of the establishment of legal legitimacy as “rational legitimacy” – meaning that legal decisions are “supposed to be rationally grounded in the matter at issue so that all participants can accept them as rational decisions” – the threshold of justification here seems low, and the conception of consultation weak, or at least undeveloped. This suggests that as far as its first leg of scaffolding goes, Dickson C.J. broached the duty to consult in a way that would ensure its result more in securing the Canadian state’s potential for communication as “strategic action” rather than as action oriented towards genuine mutual understanding and social solidarity with Aboriginal parties (whatever those might actually entail in the real world).

I have described the chief justice’s narrative as “progressive” here, because it yields an improved state of affairs that seems to respond to a new situation: the “game change” of sec. (35)1, and the upsetting of the traditional claims of the coherence of state sovereignty and Aboriginal standing. At the same time, it does this in a way that maintains continuity with the past, while providing a

32 Ibid. at 1099.
33 Ibid. at 1110.
34 BFN, at 199.
future controlled by elites in possession of increased technical knowledge, and ambivalent about the impact of democratic approaches to matters of law and policy. His narrative might have moved in a different direction. For instance, it might have reconsidered the *Royal Proclamation*, along the lines that John Borrows has indicated in his own narrative reconstruction of the Proclamation’s place within Canadian law, as requiring a much fuller attention to questions of rational legitimacy than Dickson C.J. provided in his reference to the “aboriginal perspective.”

To have done that, however, would have reduced the possibility of controlling the narrative, and opened Canadian law towards what Habermas calls the “permanent risk of dissensus.” The chief justice did say that sec. 35(1) meant that by “giving aboriginal rights constitutional status and priority, Parliament and the provinces have sanctioned challenges to social and economic policy objectives embodied in legislation to the extent that aboriginal rights are affected.”

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35 Although the term may resonate more in consideration of American history than Canadian, where its fate seems bound up with a particular political party, it seems to me useful here; although I employ it only loosely. In American historiography, the “Progressive Era” (roughly 1880-1920) is characterized by the extension of rationalized approaches to harnessing destructive or destabilizing social forces. Law, in particular, during this era, became a means of exerting social control over a range of unruly groups (farmers, industrial labour, women, racial minorities, immigrants) and regions (the south, the west). For American Indians, the Progressive Era provided ambivalent means of responding to post-Civil War efforts to control their continued presence on recently nationalized soil. Early efforts to use law to advance Indian interests, and law to control their political self-organization (by means of New Deal tribal constitutions for example), seem like worthwhile examples of what Habermas means by the ambivalence of “juridification,” as I discussed in chapter 2. For an overview of Progressivism as an assemblage of elite efforts to employ law, science and administration on one important front, see Samuel P. Hays *The Gospel of Efficiency: the Progressive Conservation Movement: 1890-1920* (Cambridge MA: Harvard University Press, 1959). For a variety of American Indian responses to the era’s promises and threats, see William E. Hoxie, *Talking back to Civilization: Indian Voices from the Progressive Era* (Boston: Bedford/St. Martins, 2001) and Tom Horn *The Great Confusion in Indian Affairs: Native Americans and Whites in the Progressive Era* (Austin: University of Texas, 2005).


37 *Sparrow, supra* p. 15 n. 21, at 1110. The *Platinex* and *Keewatin/Grassy Narrows* decisions, which I mentioned in chapter 4, indicate that the courts are not easily inclined to embrace the sorts of dissensus that Habermas has in mind.
time, however, the courts have been keenly interested in reining in the implications of those challenges. Building upon *Sparrow*, the SCC confronted the question of rational legitimacy again with a short-reined consideration of the task of justification, which I turn to below.

**B. The task of justification in Sparrow, Delgamuukw and beyond**

The court’s second leg of the duty to consult’s intellectual scaffolding is the practice of justification, regarded as necessary on the basis of sec. 35(1), in order to clarify the legitimacy of infringements upon Aboriginal rights. Beginning in *Sparrow*, and with refinements added in *Gladstone, Delgamuukw, and Haida Nation*, the court has developed a test for justifying infringements, in the process moving the duty to consult into the centre of the task of justification.

The test developed in *Sparrow* requires the preliminary determination of whether a right has been “extinguished.” Dickson C.J. explained that the traditional reliance upon an observable inconsistency between a right and a regulation or piece of legislation was inadequate, and insisted instead upon the “clear and plain intention” reading of legislative purpose, rather than “valid enactment.” After having determined that a right has not been extinguished, and that

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38 As an example of this thinking, grounded in the idea of ‘parliamentary supremacy,’ Dickson C.J. quoted from a 1980 case: “Once a statute has been validly enacted, it must be given effect. If its necessary effect is to abridge or entirely abrogate a common law right, then that is the effect that the courts must give it. That is as true of an aboriginal title as of any other common law right.” *Ibid.* at 1098. That case was *Baker Lake (Hamlet) v Minister of Indian Affairs and Northern Development*, [1980] FC 518 (TD).

39 It might be tempting to conclude that this shift marked a move away from the positivist perspective of Weber and Hart that I discussed in Chapter 2. However, Habermas would likely find the difference only marginal in terms of addressing the legitimacy of an infringement.
“prima facie interference” has affected the practice of the right, the chief justice said that courts would then need to assess the question of justification, recognizing that “the contours of a justificatory standard must be defined in the specific factual context of each case.” To do this would nevertheless generally require addressing two questions: first, whether the infringement reflected a valid legislative objective, meaning objectives more precisely articulated than “public interest,” and reflecting “compelling and substantial” aims, such as conservation, or public safety. Second, is the question of whether the infringement is in keeping with the “special trust relationship and the responsibility of the government vis-a-vis aboriginals.”

Consultation itself is only one tool to ensure that the process of justification can be accomplished, and Dickson C.J. regarded it as playing its most direct role at the stage of determining prima facie infringement. As explained here, it could conceivably be a means by which a department or a court could find out about the “aboriginal perspective” on a given right, although the chief justice does not mention it in his brief reference to this perspective. It would also enable a government body to inform a community about its aims. As the chief justice framed this in relation to the impact of the drift net length regulations on Musqueam rights:

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40 As he framed it in reference to the infringement of Ronald Sparrow’s Musqueam Band fishing rights: To determine whether the fishing rights have been interfered with such as to constitute a prima facie infringement of s. 35(1), certain questions must be asked. First, is the limitation unreasonable? Second, does the regulation impose undue hardship? Third, does the regulation deny to the holders of the right their preferred means of exercising that right? (Sparrow, supra p. 15 n. 21, at 1112).

41 Ibid. at 1111.

42 Ibid. at 1113.

43 Ibid. at 1114.

44 Ibid. at 1112.
The aboriginal peoples, with their history of conservation-consciousness and interdependence with natural resources, would surely be expected, at the least, to be informed regarding the determination of an appropriate scheme for the regulation of the fisheries.\textsuperscript{45}

Thus, as depicted in its initial consideration, consultation regarding infringement of Aboriginal and treaty rights emerged in only a sketchy formulation: “at the very least,” a single component of a larger requirement that the state justify those aims affecting indigenous communities. The task of justification, however, received further consideration from Lamer C.J. in \textit{Gladstone}\textsuperscript{46} and \textit{Delgamuukw}.\textsuperscript{47}

Lamer C.J. extended the task of justification from the \textit{Sparrow} domain of conservation regulations affecting “subsistence” treaty rights (“food and social and ceremonial purposes”)\textsuperscript{48} to infringements on commercial fishing rights (\textit{Gladstone}) and the larger question of “Aboriginal title” (\textit{Delgamuukw}). He viewed his work in the latter two cases as building consistently upon the approach to justification laid out in \textit{Sparrow}; and the two chief justices did share some common understanding regarding the task of justification as a communicative practice, as I will elaborate below. However, Lamer C.J. also added qualifications to the justification task, in particular, explaining what I will call its “social weighting” in a way that transforms the task as Dickson C.J. first broached it. For Dickson C.J., the larger implication of sec. 35(1), as I noted above, meant that it demonstrates the Canadian state’s determination to

\textsuperscript{45} \textit{Ibid.} at 1119.

\textsuperscript{46} \textit{Gladstone}, supra p. 26 n. 57.

\textsuperscript{47} \textit{Delgamuukw}, supra p. 13 n. 16.

\textsuperscript{48} \textit{Sparrow}, supra p. 15 n. 21, at 1101.
sanction “challenges to social and economic policy objectives embodied in legislation.” 49 The priority allocation to Musqueam fishers derived from consideration of his justification test “may place a heavy burden on the Crown.” 50 For Lamer C.J., on the other hand, the implication seems more the opposite. Despite his frequent reference to the communicative practice of reconciliation (which I will consider in the next chapter) and despite his significant attention to issues of “aboriginal perspective,” his statements on the justification process are primarily concerned with reining in the potential impact of sec. 35(1). Given – as I argued in the previous section – that Dickson C.J.’s own efforts in Sparrow amount to a reining in, Lamer C.J.’s efforts seem even more oriented towards lightening Canada’s “burden.”

Dickson C.J., for instance, maintained that Aboriginal rights “recognized and affirmed” are nevertheless “not absolute,” and that although sec. 1 of the Charter did not apply to sec. 35(1):

“Legislation that affects the exercise of aboriginal rights will nonetheless be valid, if it meets the test for justifying an interference with a right recognized and affirmed under s. 35(1).” 51 However, in Sparrow Dickson C.J. did not even mention “the Oakes test” that is, his own prior work in elaborating the limiting force of sec. 1 on Charter rights. 52 Lamer C.J., by contrast, in Gladstone and Delgamuukw devoted considerable energy to expanding the scope of justified infringements on Aboriginal and treaty rights. He did this by drawing explicitly upon the Oakes decision to characterize justified infringements as based on the same principles as the rights

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49 Ibid. at 1110.
50 Ibid. at 1119.
51 Ibid. at 1109.
infringed upon. As he put it: “the purposes underlying the rights must inform not only the
definition of the rights but also the identification of those limits on the rights which are
justifiable.” 53 As he melded the concept of justifiable infringement from *Sparrow* and *Oakes*, this
meant

that the objectives which can be said to be compelling and substantial will be those
directed at either the recognition of the prior occupation of North America by
aboriginal peoples or -- and at the level of justification it is this purpose which may
well be most relevant -- at the reconciliation of aboriginal prior occupation with the
assertion of the sovereignty of the Crown. 54

The use of “directed at” and “purpose” in this passage suggests that “compelling and substantial”
reasons for infringing rights are themselves to be thought of as animated by, intentionally shaped
by, the same legal aspiration as has recognized Aboriginal and treaty rights. What might strike
the reader as odd here, is that Lamer C.J. wound up equating the limit on a right with the
meaning of the right itself, as though compelling efforts to infringe are animated by the same
intention as would be found in upholding or practicing the right. Thus, he was able to conclude
*Gladstone* (though calling for a new trial due to insufficient evidence) in far-ranging general
terms, that

objectives such as the pursuit of economic and regional fairness, and the recognition of
the historical reliance upon, and participation in, the fishery by non-aboriginal groups, are
the type of objectives which can (at least in the right circumstances) satisfy this
standard. 55

Although tied to the singular concern of the case’s commercial fishing claim, *Gladstone*
transformed the task of justification from that laid out in *Sparrow*. In *Sparrow*, Canada appears
in the view of Dickson C.J. ready to shoulder as a general principle that a “heavy burden” could

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55 *Ibid.* at paras. 75 and 78.
easily attend its recognition of Aboriginal and treaty rights. In *Gladstone*, this burden seems much less likely to occur, in effect shifting the social weighting being contemplated. Lamer C.J.’s fullest statement of his view of these justifiable objectives only emerged in *Delgamuukw*.

There, in discussing the task of justification, he laid out in clear and broad terms the sorts of compelling and substantial aims that could infringe upon Aboriginal title, but could accordingly also affect other rights. As he put it (and as I quote again from Chapter 1 for convenience):

> The general principles governing justification laid down in *Sparrow*, and embellished by *Gladstone*, operate with respect to infringements of aboriginal title. 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. Whether a measure or government act can be explained by reference to one of those objectives, however, is ultimately a question of fact that will have to be examined on a case-by-case basis.\(^5\)

I assume the chief justice’s listing of a “fairly broad” range of development efforts indicates that basically no form of development or resource extraction lies outside the range of being justifiable as a possible substantial and compelling infringement on Aboriginal and treaty rights.

If so, from a discourse perspective, the practice of justification tied to the duty to consult raises several troublesome issues, and, I believe, can’t really amount to, as he put it, a process by which “a measure or government act can be explained by reference to one of those objectives,” even if augmented by a “case-by-case” consideration of facts. What exactly, then, does the court envision as justification? As I indicated in Chapter 1 regarding justification as a communicative practice, at the minimum, for justification to function in a pragmatic mode, it would have to

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\(^5\) *Delgamuukw*, supra p. 13 n. 16, at para. 165.
entail a *reception* of a justificatory effort. Within logic, mathematics, or natural science, that is, inherently deductive forms of expression, justification as proof-making is incidental to the act of reception. In pragmatic discourse, however, justification remains an inherently multi-party endeavour, being otherwise meaningless. In Habermas’s terms, it would involve one party’s advancement of, and another party’s consideration of, a set of validity claims. The only way to conceive of pragmatic justification without such a reception, is to regard the justificatory process as a kind of legal pronouncement, or what Habermas calls a “discourse of application.” However, *Sparrow*, as I noted above, dismisses as insufficient regard for the nature of Aboriginal and treaty rights, the courts’ longstanding practice of equating pronouncements of duly constituted authority with the relevant measure of validity.

In place of abandoning a ‘positivist’ approach, or what Weber called “formalist legal rationalism,” to legitimating policy and regulation, however, the court has inadequately addressed the discursive character of justification. Drawing upon *Sparrow*’s admission that sec. 35(1) “does not promise immunity from government regulation in a society that, in the twentieth century, is increasingly more complex, interdependent and sophisticated exist within a complex society” Lamer C.J. substituted a clearly utilitarian moral calculus. Although he framed this in terms of “reconciliation” – which I address in the following chapter – as a statement of “general” principle regarding the task of justification, on his account holders of Aboriginal and treaty rights are, in the end, required to take their position as merely some among the many. As he put it in *Gladstone*:

*Because, however, distinctive aboriginal societies exist within, and are a part of, a broader social, political and economic community, over which the Crown is sovereign,*

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57 As I discussed in Chapter 2.
there are circumstances in which, in order to pursue objectives of compelling and substantial importance to that community as a whole (taking into account the fact that aboriginal societies are a part of that community), some limitation of those rights will be justifiable.\(^{58}\)

From a discourse perspective, we can leave aside for the moment the *petitio principii* involved in framing the idea of a “community as a whole,” as well as the moral consideration that Lamer C.J. raises as a form of justification.\(^{59}\) The initial question to address is how this approach to justification could be defended simply as a validity claim belonging to pragmatic discourse.

If the court is envisioning communication around the process of justification as oriented by the aim of providing for mutual understanding, that is, if it is a process of communicative action, then on what basis can the court say that “distinctive aboriginal societies” are required to take their place within “the broader” community? If pragmatic statements achieve their validity because those to whom they are addressed also consider them worth consenting to, then any such statement would be recognizably legitimate only if those “distinctive aboriginal societies” concurred that their place in the social order entails the presumed acknowledgment of this role. The other possible reasons to hold in favour of their acceptance of such a role are either that they have been forced to by some act of domination, or that they are – whether by nature or history – dependent upon the “community as a whole.” Since both of these assumptions seem clearly a

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58 *Gladstone, supra* p. 26 n. 57, at para. 73.

59 In her dissent in *Van der Peet*, McLachlin J., as she was at the time, noted critically that Lamer C.J.’s construction of justification on the basis of what I have called social weighting. As she put it:

> The Chief Justice’s test, however, would appear to permit the constitutional aboriginal fishing right to be conveyed by regulation, law or executive act to non-native fishers who have historically fished in the area in the interests of community harmony and reconciliation of aboriginal and non-aboriginal interests (*Van der Peet, supra* p. 2 n. 3, at para. 307).
part of the colonial legacy, which the court often claims to reject, they cannot really be the basis for a validity claim offered by the court as an approach to the justification of infringements.

Another option for making sense out of the court’s configuration of the social weighting called for in Gladstone and Delgamuukw is to regard it not as oriented towards mutual understanding, but as a piece of strategic action. Habermas’s characterization of the expanding autonomy of systems of money and power noted in Chapter 2 certainly resonates with Lamer C.J.’s list of justifiable developments. Habermas’s casting of the tension between system and lifeworld can easily (though not perfectly) resonate as a characterization of legal conflicts between First Nations and Canada. As he puts it:

The point is to protect areas of life that are functionally dependent on social integration through values, norms and consensus formation, to preserve them from falling prey to the systemic imperatives of economic and administrative subsystems growing with dynamics of their own, and to defend them from being converted over, through the steering medium of law, to a principle of sociation that is, for them, dysfunctional.

I think scholars such as James Tully and Taiaiake Alfred (whose views I addressed in Chapters 3 and 4) would concur with Habermas’s earlier rendition of such a congruence between law and “systemic imperatives.” However, consistently applying such a view of the discourse of justification developed around the duty to consult would also entail a cynical admission regarding the dark spread of Habermas’s “juridification,” or what Tully, following Foucault, calls the “juridical.” That is, it would enervate the possibility of legal discourse serving as anything more than power’s handmaid.

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60 For example, there is Dickson C.J.’s assessment that the common tendency to devalue the seriousness of treaties “reflects the biases and prejudices of another era in our history. Such language is no longer acceptable in Canadian law and indeed is inconsistent with a growing sensitivity to native rights in Canada.” See Simon v the Queen, supra p. 17 n. 27, at para. 21.

61 TCA2, at 373.
Consequently, the available options to regarding justification as communicative action seem equally unattractive. Instead, I think the court’s emphasis on justification needs to be understood as a clear expression of the will to achieve mutual understanding. However, it can only function in such a way when pragmatic discourses between Canada and First Nations and other Aboriginal communities operate under broader norms of discourse. I identified such norms above as figuring within discourse theory (Chapter 2) and within the legal and diplomatic communicative practices of indigenous communities – assuming that my example of discursive Anishinaabe doodem practices (Chapter 4) rings sufficiently true for other indigenous legal orders.

Norms relevant to the justification process would include Habermas’s norm that one must be able to make a "yes/no" response without coercion, or what I characterized above as the Anishinaabe “equality” norm operating during the 1701 treaty-making at Montréal. Employing such norms, the recipients of efforts to justify a policy or a regulation would have to be able to respond within a framework oriented towards mutual understanding. Otherwise, such recipients of state justificatory efforts could only respond out of coercion, at the minimum – out of a sense of forced choice, or out of an awareness of not being co-creators of the legal arrangements within which they live. As I laid out in Chapter 2, for discourse theory, the very foundation of legal legitimacy arises out of the effort to reach mutual understanding. This is not the hypothetical version of consent associated with the social contract tradition. Rather, it is the necessary potential engagement with law-making available to anyone living within a particular legal framework. Justification within the scope of the duty to consult therefore can only be a process
of argumentative persuasion – in which uncoerced agreements are possible to obtain, as are disagreements.

Canada’s courts have shied away from acknowledging this necessary potential for Habermas’s “dissensus” within any communication oriented towards mutual understanding. The closest step towards a discourse perspective so far, is the one taken by McLachlin C.J., who offered an aside in the 2014 *Tsilhqot’in Nation* title case advising parties interested in indigenous lands to “avoid a charge of infringement or failure to adequately consult” by obtaining consent.62 But this is merely a cost-benefit weighing of legal strategies, not a statement of her reading of the force of the law. As well, she undercut the value of this advice as a statement of First Nations’ positions within consultation dialogues oriented towards mutual understanding by holding that their consent is not necessary to obtain as long as justification (determined by the courts) can be.

Thus:

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*.63

This antinomy between consent and justification contained within *Tsilhqot’in Nation* indicates quite clearly that, despite its decades of reflection on Aboriginal and treaty rights since *Sparrow*, the court retains either a strategic view of justification, or else a poorly-framed understanding of justification as a communicative practice.

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62 *Tsilhqot’in Nation, supra* p. 43 n. 107, at para. 97.

In *Sparrow* itself an embryonic version of the communicative dimension of justification was evident. For instance, there Dickson C.J. contrasted the courts’ earlier view of justification as determination of valid enactment with his proposed replacement of “compelling and substantial” aims, such as conservation.

While the "presumption" of validity is now outdated in view of the constitutional status of the aboriginal rights at stake, it is clear that the value of conservation purposes for government legislation and action has long been recognized. Further, the conservation and management of our resources is consistent with aboriginal beliefs and practices, and, indeed, with the enhancement of aboriginal rights.64

In this statement a communicative core is evident, though it remains undeveloped. The conservation aim of the regulation is asserted to be compatible with “aboriginal beliefs and practices,” and the “enhancement” of rights. Presumably, this would only be knowable on the basis of contributions to the development of the state’s conservation aims from indigenous parties. As general reflections occupied with more than Ronald Sparrow’s specific drift net length, the statements would work best if accompanied by demonstrations of the asserted compatibility. As it stands, the reader is left having to insert external sources illustrating just what indigenous conservation aims Dickson C.J. had in mind. This elision forecloses the possibility of disagreement from indigenous parties who may well object to the design and operation of the state’s conservation apparatus. From a discourse perspective, concerned especially with the development of legal legitimacy, what might be especially troubling here (and in countless other cases where indigenous individuals face prosecution for summary offenses, chiefly violations of fish and game regulations) is that a genuinely communicative effort to reach mutual understanding regarding the shape of conservation regulations remains

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64 *Sparrow, supra* p. 15 n. 21, at 1114.
completely off the radar for Canada’s courts, legislative and administrative bodies. Thus, even in *Sparrow* the task of justification in which the duty to consult is enmeshed employs an artificially constrained view of discourse focused on obtaining mutual understanding.

In recent years a potentially more adequate view of justification (from a discourse perspective, at least) has emerged in the well-known, and in Canada the oft-dismissed, principle of “free, prior, and informed consent” (FPIC) included in the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP), and in other instruments reflective of emerging norms in international law. A number of First Nations have inserted FPIC clauses in their own protocols regarding consultation, or into their economic development policy statements. The treaty group NAN, the Nishnawbe Aski Nation, for instance, has determined that: “Proposed private

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65 This point may be simply unnecessary to mention. The gulf between such a discourse theory vision of a rationally legitimate approach to resource management in Canada and the current regime is rarely bridgeable. The power imbalances between administrators, enforcement personnel, the courts, and those individuals arrested for violation of hunting and fishing regulations, appear frequently in the very tone of lower court decisions. See, for example, the numerous duty to consult cases in Alberta, which has maintained an aggressive effort to control indigenous access to and use of natural resources: *R. v Lefthand*, 2007 ABCA 206. Alberta has conducted undercover, or sting, operations in its efforts to control indigenous breaches of game laws: *R. v Janvier*, 2005 ABPC 194.


> 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.

Ambiguities in UNDRIP regarding the meaning of “consent” stem from Article 32’s relationship to Article 3 – acknowledging “self-determination” and to Article 18, which states that:

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. “Participation” would soften the implications of “consent,” which is how states and corporate bodies have elected to read the declaration, while “self-determination” would strengthen it. Mauro Barelli accounts for this range of meaning by pointing out the gaps between initial draft versions of UNDRIP, composed by indigenous representatives, and the final version, reflective of input from various states. See his “Free, Prior and Informed Consent in the Aftermath of the UN Declaration on the Rights of Indigenous Peoples: Developments and Challenges Ahead” (2012) *International Journal of Human Rights* 16(1)1, at 10-11.
development or Canadian government policy that affects any part of the NAN territory cannot proceed without the FPIC of the affected NAN First Nation or First Nations.”

Although not drawing on UNDRIP, in 2007 the Hul’qumi’num Treaty Group petitioned the Inter-American Commission on Human Rights against Canada for (among several charges) its failure to consult regarding sale of traditional lands, drawing on similar concepts contained within the Organization of American States’ *American Declaration of the Rights and Duties of Man*, to which Canada has subscribed. Increasingly, corporations, umbrella groups such as the Boreal Leadership Council, and financial institutions ranging from Canada’s TD Bank to the World Bank Group’s International Finance Corporation, have also begun including statements of their intent to comply with FPIC in pursuit of development opportunities that could affect Aboriginal or treaty rights – although their interpretations of "consent" frequently vary among themselves and from those of First Nations. At the same time, other First Nations governing bodies have

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69 As one example of an industry-related social responsibility group’s acknowledgment of FPIC, consider the Boreal Leadership Council's position that corporations need a "pro-active" adoption of FPIC. Their report includes the provision to "Respect decisions by Aboriginal groups (including non-consent) rather than falling back on government rules that fall short of consent." See their "Free, Prior, and Informed Consent in Canada” (Ottawa: Boreal Leadership Council, 2012) at 16. Available at <http://www.borealcanada.ca/lead-council-e.php> accessed 28 September 2014. Much of the reflection on FPIC within corporate investment circles is sensitive to developing bottom-line implications, as recognized by
made no reference to FPIC – although the *Cree Nation Mining Policy* reflects the simultaneous desire to support mining development and to do so from within a framework reflective of Cree values and interests.  

On at least a few occasions, the courts have briefly considered submissions drawing upon UNDRIP’s FPIC clause, though consistently finding it vague or inapplicable to Canada. For instance, in the most recent ruling, the B.C. Supreme Court held that UNDRIP:


The guiding principle of this policy states that:

> The Cree Government will support and promote the development of mineral resources within the territory of Eeyou Istchee that provides long term social and economic benefits for the Cree and that addresses sustainable development in compliance with the environmental and social protection regime of the JBNQA and that is compatible with the Cree way of life and protection of Cree rights in the Cree Territory.  
has not been endorsed as having legal effect by either the Federal Government or the
Courts. Canada is a signatory to the UNDRIP, but has not ratified the document. The
Federal Government, in announcing its signing of the Declaration, stated that the
Declaration is aspirational only and is legally a non-binding document that does not
reflect customary international law nor change Canada’s domestic laws. 71

Canada has recently confirmed its political position on the unsuitability of FPIC as a legal
principle. In September 2014, its ambassador to the UN explained Canada's refusal to concur
with a second statement from the UN General Assembly on indigenous peoples' rights:

Agreeing to paragraph 3 [reaffirming FPIC] of the Outcome Document would
commit Canada to work to integrate FPIC in its processes with respect to implementing
legislative or administrative measures affecting Aboriginal peoples. This would run
counter to Canada’s constitution, and if implemented, would risk fettering Parliamentary
supremacy.

Canada does not interpret FPIC as providing indigenous peoples with a veto.
Domestically, Canada consults with Aboriginal communities and organizations on
matters that may impact their interests or rights. This is important for good governance,
sound policy development and decision-making. Canada has strong consultation
processes in place, and our courts have reinforced the need for such processes as a matter
of law. Agreeing to paragraph 20 would negate this important aspect of Canadian law and
policy. 72

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The first case addressing FPIC was Mississaugas of Scugog Island First Nation v National Automobile,
Aerospace, Transportation and General Workers Union of Canada (CAW-Canada), Local 444, 2007
ONCA 814 (CanLII), decided in the same year as the UN General Assembly passed UNDRIP, without (at
the time) Canada's concurrence. There the court noted that:

While international law often is of assistance in the interpretation of domestic legal and
constitutional norms, the general language
of the Draft Declaration does not, in my
view, provide any meaningful assistance to the resolution of the specific issue of Canadian
constitutional law presented here (ibid. at 46).

In Hupacasath First Nation v Canada (Foreign Affairs), 2013 FC 900 (CanLII), at 51, the court found
that appellants had failed to submit evidence that UNDRIP was relevant to Canadian law.

72 Paragraph 3 of the “Outcome Document” reaffirms the General Assembly members’ commitments to:
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, in accordance with
the applicable principles of the Declaration.

Paragraph 20 reads:

We recognize commitments made by States, with regard to the United Nations Declaration on the
Rights of Indigenous Peoples, to 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.

See UN General Assembly “Outcome document of the high-level plenary meeting of the General
Assembly known as the World Conference on Indigenous Peoples” A/69/L.1 (15 September 2014).
At the same time, Canada’s courts may well be moving closer to endorsing the view that international standards of indigenous rights amount to customary law. LaBel J. for instance, found in *Hape* that international norms not in conflict with Canadian domestic law are incorporated domestically without the necessity of legislative approval:

> In my view, following the common law tradition, it appears that the doctrine of adoption operates in Canada such that prohibitive rules of customary international law should be incorporated into domestic law in the absence of conflicting legislation. The automatic incorporation of such rules is justified on the basis that international custom, as the law of nations, is also the law of Canada unless, in a valid exercise of its sovereignty, Canada declares that its law is to the contrary. 73

As regards consent being an appropriate measure of justification and successful consultation, Canada does not at present have legislation that would on its face actually prevent the adoption of a strong FPIC prohibition on development or regulation without indigenous consent. Instead, policy is grounded, I believe, and as it appears in the UN ambassador’s statement, on slippery-slope fears of what a consent requirement would do to economic development.

From a discourse perspective, what FPIC places before the courts, and before any other body engaged in consultation with First Nations or other indigenous communities aiming to develop mutual understanding, is the pragmatic necessity for such bodies to thematize why they would regard consent as unnecessary to obtain in advance of a development project or the

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implementation of a regulation. That is, it forces those bodies to articulate a reason, a Habermasian “validity claim,” for why they hold the superior position of being able to dismiss lack of consent from a First Nation or other indigenous community. This is intrinsic to the communicative task of legal justification, which seeks to present decisions as “rationally grounded in the matter at issue so that all participants can accept them as rational decisions.” In Canada, one might object, my hypothetical depiction of the courts forced to articulate such underlying reasons is clearly an extra-legal intellectual hurdle that these duly authorised bodies are in no need of considering. Admittedly, my conception of the responsibility of the courts as well as the state to make such articulations is dependent upon the discourse theory argument that the public sphere “surrounds” the courts. Nevertheless, both the courts and the Canadian state have often indicated that the only reason they are able to provide for denying consent, in a discursive situation intended to bring mutual understanding, is “the assertion of the sovereignty of the Crown,” or, as the UN ambassador’s statement above indicates it, "Parliamentary supremacy." That same statement buttresses the ambassador’s reference to parliamentary supremacy by noting the Tsilhqot’in Nation decision (though without mentioning it specifically) that in Canadian law "the Crown may justify the infringement of an Aboriginal or Treaty right if it meets a stringent test to reconcile Aboriginal rights with a broader public interest."

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74 BFN, at 199. As part of his concept of “dialogical governance,” James Sákéj Henderson also frames the relationship between the court and the public sphere as multi-valent. As he puts it:

The Court has emphasized the generation of a latent alliance between judicial decisions concerning the realization of constitutional rights that connects with Aboriginal peoples' grassroots movements and mobilization to constitutional dispute settlement as an interactive source of dynamic governance (supra p. 132 n. 29, at 62).

75 BFN. at 442.

76 Gladstone, supra p. 26 n. 57, at para. 72.
A lack of consent, however, remains an inherent possibility in any set of pragmatic communicative acts oriented towards mutual understanding, unless the party that might refuse consent concurs that it actually has no such ability to refuse. The question is not whether a legislature has granted an indigenous community such a power. Rather, it is whether a party has chosen to exclude itself from possessing this most basic feature of rationality.\(^7\) To hold otherwise is to also hold that the rights "recognized and affirmed" in sec. 35(1) are actually the product of a legislative act – a conclusion that the courts (though often not the state) have resisted. This position is rightly rejected, because it would entail holding that throughout

\(^7\) That such a possibility is inherent within rational human nature is a basic feature of philosophical liberalism. Both Hobbes and Locke tied consent to the rational drive for self-preservation. As Locke put it in his discussion of “prerogative”:

> And therefore, though the people cannot be judge, so as to have, by the constitution of that society, any superior power, to determine and give effective sentence in the case; yet they have, by a law antecedent and paramount to all positive laws of men, reserved that ultimate determination to themselves which belongs to all mankind, where there lies no appeal on earth, viz. to judge, whether they have just cause to make their appeal to heaven. And this judgment they cannot part with, it being out of a man's power so to submit himself to another, as to give him a liberty to destroy him; God and nature never allowing a man so to abandon himself, as to neglect his own preservation: and since he cannot take away his own life, neither can he give another power to take it.

See his *Two Treatises of Government* (London: Whitemore, Fenn and Brown, 1821) chp. 14, sec. 108. Available at https://archive.org/details/twotreatisesofg00lockuoft, accessed 29 September 2014. To deny consent, then, is to deny rational nature. And while exactly this presumption is part of traditional notions of Indian wardship in the US and Canada, such notions should not continue to function within law.

The SCC’s approach to the dismissal of previously enshrined legal doctrines concerning indigenous peoples, however, is itself part of the problem. The court frames its rejections of the ideological underpinnings of traditional doctrines in the gentle tones of one observing a shift in the weather rather than in an explicit rejection of the hold of evil ideas. Thus, in *Simon*, Dickson C.J. rejected the colonial assumptions of savagery and civilization employed in *R. v Syliboy*, [1929] 1 DLR 307, in terms that make the passage of time itself the active force in the dismissal of contemptible assumptions:

> It should be noted that the language used by Patterson J. illustrated in this passage, reflects the biases and prejudices of another era in our history. Such language is no longer acceptable in Canadian law and indeed is inconsistent with a growing sensitivity to native rights in Canada (*Simon*, supra p. 17 n. 27, at 399).

More recently, although the court had submissions from interveners in the *Tsilhqot’in Nation* case focused on the “doctrine of discovery” – the historical source for settler state notions of title, McLachlin C.J. only stated that 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” (*supra* p. 43 n. 107, at para. 69) reducing to an anachronism the interveners’ concern with the ongoing influence of that most powerful doctrine.
Canada's history its "Crown" has provided a kind of initial legal garb to those indigenous parties with whom it sought to form a relationship, as though they were previously legally naked; instead of accepting that they were already clothed in legal garb of their own making. Justification, if it is an instance of establishing the rational legitimacy of a regulation or piece of legislation, and in the specifically "intersocietal" context necessary for rational legitimacy between Canada and First Nations and other Aboriginal communities, can only occur upon the mutual consent of the parties affected.\footnote{78}

When Canada's government denies that indigenous communities possess a “veto,” and when its courts defer to this political viewpoint, the issue lurking underneath is the long festering matter of "sovereignty."\footnote{79} Although the justification leg of the duty to consult scaffolding leads necessarily to consideration of sovereignty, the court has most consistently referred to it in relation to the third leg, that of "reconciliation,” which I will address below. Unfortunately, this seems from a discourse perspective rather like having to change the subject before successfully concluding a pragmatic resolution, and at a minimum indicates that the court should not continue to avoid giving full consideration to the continued role the of the doctrine of Crown sovereignty.

\footnote{78} Admittedly, Lamer C.J. came close to acknowledging this in Van der Peet, referring there to both Mark Walters and Brian Slattery “suggesting” that the appropriate understanding of law in Canada was an “intersocietal” one (\textit{supra} p. 2 n. 3, at para. 42).

\footnote{79} That is, assuming for argument’s sake that “veto” has a clear meaning in practice, which it may well not have, but which I won’t pursue further here. Part of the slipperiness of “veto” is apparent in Delgamuukw, where Lamer C.J. does say that consultation may “require the full consent of an aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to aboriginal lands” (\textit{supra} p. 13 n. 16, at para. 168). This acknowledgment of full consent related to infringements on hunting and fishing rights, in a case regarding infringement on title, is less than a direct endorsement of full consent.
in Canada’s relations with indigenous people, a point that indigenous parties and legal theorists have been advocating for some time.\textsuperscript{80}

\textsuperscript{80} One recent example is Henderson’s model of “dialogical governance.” Habermas’s own vision of the not-yet realized political (rather than economic) form of the European Union, contended for in \textit{The Crisis of the European Union: a Response} (Cambridge: Polity Press, 2012), bears some resemblance to Henderson’s argument for a dynamic constitutional form of democratic governance inclusive of indigenous voices. As Henderson casts the discursive basis of this form of governance:

\begin{quote}
Dialogical relationship operates jointly to resolve common jurisdictional challenges on a consensual foundation rather than relying on rivalry, coercive legislation, and policy-making dominated by majorities in federal and provincial governments. The underlying constitutional principle of the dialogical relationship between the Crown and First Nations is based on the fact that they are constitutionally protected with a distinct constitutional voice…. The Crown and First Nations must seek a just convergence of Aboriginal and treaty rights under the principle of constitutional democracy and federalism (\textit{supra} p. 132 n. 29, at 57).
\end{quote}
A. The theme of reconciliation in the duty to consult

Although the third leg of the duty to consult scaffold, “reconciliation,” may seem to be as much a task as is justification, I refer to it as a theme. Justification suggests, for the courts, particular procedures, tests, and sorts of arguments. With reconciliation, finding particular measures comparable with, for instance, the cost-benefit analyses implied within Delgamuukw’s vision of generally justifiable projects, is virtually impossible. And if, even though Sparrow rejected it, justification might still be glossed as satisfied by demonstrating that a regulation or piece of legislation is a “valid enactment,” there are no equivalent textual or formal demonstrations to indicate that reconciliation has occurred.

As a term, “reconciliation” is prone to considerable ambiguity. Legal historian Mark Walters, however, has argued that reconciliation does possess a legal meaning, one developed by the courts in the years since 1982, largely through the same cases that have determined the duty to consult.¹ At the same time, however, he claims to see three common but separate meanings of reconciliation: resignation, relationship and consistency, each operating within sec. 35(1) jurisprudence, as well as within such state-sponsored efforts to respond to indigenous frustrations.

as the Royal Commission on Aboriginal Peoples and the Truth and Reconciliation Commission of Canada. Several authors have charted the conflicting approaches to reconciliation that have animated treaty-making strategies, pursuit of claims, and development of public rhetoric, on the parts of Canada, the provinces, and a variety of First Nations. The term then as employed within legal discourse, remains deeply contested.

A survey of the most influential statements from the SCC regarding reconciliation shows little effort to probe the meaning and appropriate usage of the term itself. As I noted above, Dickson C.J. in Sparrow initially used “reconcile” to frame the relationship between “federal power and federal duty,” envisioning then a judicial task of finding consistency. I draw two conclusions from this usage. The first is that this particular cast of the term is quite derivative. The OED, for instance, lists the use of “reconcile” as “make consistent” (either of theories and facts, or collections of numbers) as the tenth and eleventh, out of twelve different streams of use. The second conclusion, is that in this usage one might presume that there seems little call for Habermas’s discursive approach to law, since an effort to achieve this form of reconciliation would require no multi-party communication oriented towards mutual understanding.

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2 It remains well beyond my scope here to examine the relationship between the Supreme Court of Canada’s use of the term and its employment within the mandates of the RCAP, or the TRC – which was established after the primary formulations of reconciliation within the case law that produced the doctrine of the duty to consult. See the 2006 “Mandate for the Truth and Reconciliation Commission,” available at <http://www.trc.ca/websites/trcinstitution/File/pdfs/SCHEDULE_N_EN.pdf> accessed 30 September 2014. For an critical reading of the process of reconciliation in Canada, see Jennifer Henderson and Pauline Wakeham “Colonial Reckoning, National Reconciliation?: Aboriginal Peoples and the Culture of Redress in Canada” (2009) ESC: English Studies in Canada 35(1).

3 See, for instance, Rachel Ariss and John Cutfeet supra p. 41 n. 100; Carole Blackburn “Producing Legitimacy: Reconciliation and the Negotiation of Aboriginal Rights in Canada” (2007) The Journal of the Royal Anthropological Institute (13)3 621; and Egan, supra p. 118 n. 52.
In its main expression within the SCC texts, the term underwent a startling transformation in the Aboriginal rights decisions of Chief Justice Lamer. In his statements on the duty to consult in Delgamuukw, he brought into play the transformed vision of reconciliation that he laid out most extensively in Van der Peet, and then augmented in Gladstone. As he first cast it, the purpose of sec. 35(1) was “directed towards the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown.” Further on, he framed this purpose as “reconciling pre-existing aboriginal societies with the assertion of Crown sovereignty over Canada.” A brief search of CanLII reveals that this formulation of reconciliation (pre-existence of aboriginal societies with the assertion of Crown sovereignty) has been quite influential – being quoted or closely paraphrased in over half of the 392 cases that refer to “aboriginal rights” and “sovereignty” in the same sentence. It might seem that we could detect a gradual move away from this sort of construction, since in Tsilhqot’in Nation McLachlin C.J. came to speak simply of “reconciling Aboriginal interests with the broader public interests,” “the broader interests of society as a whole,” or “the interests of all Canadians.” However, in the last instance she did this while explicitly equating her own with the formulation of Lamer C.J. Also, in 2013, she applied the original Lamer formulation in Metis Nation. Another variation, although much more infrequently employed in other decisions (only 19 times – although this may be more tied to its

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4 Van der Peet, supra p. 2 n. 3, at para. 31.

5 Ibid. at para. 57.

6 Tsilhqot’in Nation, supra p. 43 n. 107, at para. 71.

7 Ibid. at para. 82.

8 Ibid. at para. 125.

specific context), is her statement in *Haida Nation* that “[t]reaties serve to reconcile pre-existing Aboriginal sovereignty with assumed Crown sovereignty.”10 Another usage in *Haida Nation* contrasts “the prior Aboriginal occupation of the land with the reality of Crown sovereignty.”11 In *Mikisew* Binnie J. provided still another usage that might have led away from that of Lamer C.J.. He claimed there to be concerned with: “the reconciliation of aboriginal peoples and non-aboriginal peoples and their respective claims, interests and ambitions.”12 This usage, which seems stripped of several key *Van der Peet* assumptions, CanLII indicates has only been drawn on 18 times in subsequent decisions.

What is intriguing about Lamer C.J.s’ framing of reconciliation is that for all its apparent congruence with the sort of pragmatic orientation to discourse that Habermas says is central to the legitimacy of law, it actually avoids grappling with just the discursive conditions which would make reconciliation rationally legitimate. Three points illustrate this. The first arises in his statement that reconciliation concerns “pre-existing aboriginal occupation” on the one hand and “asserted Crown sovereignty” on the other. While this may seem like a potentially useful pairing to hold in juxtaposition, it is more like equating apples and oranges. Throughout Lamer C.J.’s depiction of reconciliation in *Van der Peet*, and subsequently, he juxtaposed a sociological category with a political category. Thus “pre-existing aboriginal occupation” refers to “distinctive” groups “with their own practices, customs and traditions.”13 Lamer’s focus on

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13 *Van der Peet*, supra p. 2 n. 3, at para. 44.
indigenous societies as sociological entities, rather than as autonomous political entities
grounded in independent legal orders, is in keeping with the courts’ traditional casting of the
relationship between the two different sorts of legal orders. This is apparent in *St. Catharines
Milling and Lumber*, and extends backwards into the foundations of liberal political thought in
the work of theorists such as Hobbes, if not further.\(^{14}\) That it remains substantially unquestioned,
places a troublesome validity claim at the heart of Canada’s position in its discourse with First
Nations, who have consistently framed their own discourse with settler parties as stemming from
their continued position as autonomous legal/political entities.

This miscasting of the dialogical situation between a sociological and a political entity leads to
the second problematic assumption in Lamer C.J.’s conception of reconciliation. To see
indigenous societies in sociological terms leads easily to the trope of parts and wholes, in which
Canada has continually cast its discourse with indigenous nations. Alexander Morris, for
instance, in conference at Fort Carlton for what became Treaty 6, framed his opposition to Cree
demands by saying that the Crees were merely some of the Queen’s many children. As he
wrestled with the contending implications of his portrait of the Queen as a benevolent and
generous figure, and the constraints of parliamentary budgets: “I cannot undertake the
responsibility of promising provision for the poor, blind and lame. In all parts of the Queen’s
dominions we have them; the poor whites have as much reason to be helped as the poor Indian;

\(^{14}\) As he expressed a common 17\(^{th}\) century European impression of New World inhabitants in his “state of
nature” argument: “For the savage people of America, except the government of small families, the
concord whereof depends on natural lust, have not government at all” in *Leviathan: Or the Matter, Forme
and Power of a Commonwealth Ecclesiasticall and Civil* Oakeshott edition (New York: Collier
they must be left to the charity and kind hearts of the people.”  

Not only did he situate the Crees as parts of the larger whole of settler society, Morris also portrayed them as in competition for the Queen’s bounty with other indigenous communities: “you have to think only of yourselves, we have to think of all the Indians and of the way in which we can procure the money to purchase all the things the Indians require.”  

In the same way Lamer in *Gladstone* conceived of reconciliation requiring the adjustment of the part (aboriginal) with the “community as a whole” (Canada at large).  

As I noted above, this same view extends into McLachlin’s C.J.’s thinking in *Tsilhqot’in Nation*. In this conception, which the court following Lamer C.J. has been most inclined to view in terms of the force of large-scale, and inevitable, economic, technological and demographic transformations; the imaginable consultation paradigm is always one of adaptation – minimally destructive one hopes – but nevertheless, adaptation to the forces that have always already structured the larger whole, and which it merely seeks to extend. Reconciliation then means adaptation to the inevitable, as Walters notes.

The third problematic assumption in the court’s consideration of reconciliation leads from the second. If reconciliation is a process of adjustment between parts and wholes, where does the legitimacy of the part’s adjustment to the whole come from? In the language of reconciliation, such an adjustment can only be thought of as a reflection of the power of the larger whole. However, the term’s usage in this way is only really thinkable in one semantic context, one

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17 *Gladstone*, supra p. 26 n. 57, at para. 73.

18 Walters, *supra* p. 188 n. 1, at 179.
unfortunately never acknowledged by the court, even though it is, as the OED indicates, the most basic stream of usage in English. Reconciliation is, at bottom, a theological term, the product of the Christian tradition’s conception of a means to restore an alienated relationship between God and humanity, or in the Apostle Paul’s writings, the whole of creation with the Creator. In this tradition, the relation between parts and whole, or between lesser and greater power, may well make sense.\(^{19}\) If the creation reflects the design of the Creator, then as the product of the Creator it could be expected to respond with the kinds of adjustments that reconciliation seems to require of First Nations in Canada. And, in that tradition, the creation’s acknowledgement of the Creator is a communicative act that is both pragmatic and performative: it requires repentance, a human act of will and promise-making. However, the Creator’s part in reconciliation is an offer of grace and benevolence, not one of necessity. Within a pragmatic legal context, oriented towards mutual understanding – which any meaningful act or process of reconciliation must be – reconciliation must be seen as a relationship between legal equals.

Another implication of this theological core to the term reconciliation may well be at the heart of the inadequately discursive cast of Lamer C.J.’s original formulation. As he put it, reconciliation concerned the “assertion of Crown sovereignty.” The idea that sovereignty can be asserted is discursively troublesome (that is, how it could be readily responded to without coercion), apart from imagining a creative power similar to that held within biblical tradition, which envisions God creating the world with a word, and in the Christian account, conceives of the world’s

\(^{19}\) As Paul put it in one influential text:

For in him all the fulness of God was pleased to dwell, and through him to reconcile to himself all things, whether on earth or in heaven, making peace by the blood of his cross. And you, who once were estranged and hostile in mind, doing evil deeds, he has now reconciled in his body of flesh by his death, in order to present you holy and blameless and irreproachable before him (Colossians 1:20-21).
redeemer himself being a word. Apart from having that sort of pedigree, how a state could imagine its relations with other parties to have been successfully structured by a one-sided assertion is impossible to entertain, other than as a kind of flawed validity claim.\(^{20}\)

Certainly, indigenous parties in Canada have long rejected this formulation. Pragmatically, their rejections are sufficient to make questionable the assertion, which could only have credible meaning through an act of consent. Instead of what we might call this assertional sovereignty, Henderson has also argued that indigenous nations have consistently held to what he refers to as “dialogical sovereignty,” in his description of Mikmaq legal order.\(^{21}\) We can see this pragmatic stance evident in statements such as those of Wabanaki and Mikmaq representatives at the 1725 Boston conference that led to ratification of the Wabanaki Compact. Henderson quotes two responses to the English assertion of Crown sovereignty. From the Wabanki representative: “when you hae ask’d me if I acknowledg’d Him for king i answer’d yes butt att the same time have made you take not ice that I did not understand to acknowledge Him for my king butt only that I own’d that he was king his kingdom as the king of France is king of His.” As well, the Mikmaq representatives responded that they would: “"pay all the respect & Duty to the King of

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\(^{20}\) One could interpret the court’s use of “assertion” as a kind of implicit critique of the claim to sovereignty, as though the court were consistently distinguishing between \textit{de jure} and \textit{de facto}. McLachlin C.J. does employ this distinction at one point in \textit{Haida Nation}, saying:

This process of reconciliation flows from the Crown’s duty of honourable dealing toward Aboriginal peoples, which arises in turn from the Crown’s assertion of sovereignty over an Aboriginal people and \textit{de facto} control of land and resources that were formerly in the control of that people (\textit{supra} p.1 n. 2, at para. 32).

However, the Lamer usage suggests nothing of such an implicit critique. This move would be more recognizable had the courts taken this practice up more broadly, or had they referred to a “presumed” sovereignty. Further, if the case law concerned with reconciliation and consultation did reflect an implicit critique of Crown sovereignty, I am inclined to think this would have encouraged the justices to provide a more direct examination of the concept by now.

\(^{21}\) See his “First Nations Legal Inheritances” \textit{supra} p. 138 n. 41, at 12.
Great Britain as we did to ye King of France, but we reckon our selves a free People and are not bound.”

Finally, the theme of reconciliation employed by the court (and echoed in numerous lower court decisions, in provincial and federal policy statements, and adopted into the public discourse of First Nations, advocacy groups of various stripes, and the public faces of corporations and industry umbrella groups) raises a discursive claim that is inherently historical. To reconcile must mean to bring something together again: re-concile. As I said above, its usage as merely bringing together (without a previous state of alienation) is derivative, and is evident in McLachlin C.J.’s statement in *Haida Nation*: “Balance and compromise are inherent in the notion of reconciliation.” Still, the courts cannot credibly maintain that the duty to consult serves to bring together again, to form compromises on varying interests, in the necessarily historical sense the term requires. Canada’s history is not one in which formerly amicable parties were somehow alienated from each other. To employ the term in a pragmatic validity claim that could withstand scrutiny, the courts and Canada would have to point to an earlier amicable state, and be able to provide an explanation for an ensuing period of alienation that indigenous nations who have participated in this alienation could concur with. Instead, as the progressive narrative of Canada indicates, and which I argued above constitutes the first support for the duty to consult, the court has tried to frame Canada’s history as a move from darkness to light, from injustice to justice. If one instead responds that the historical treaty relationship demonstrates just

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23 See *Haida Nation*, *supra* p. 1 n. 2, at para. 50. Her point there was clearly made in light of a derivative sense of reconciliation. In its theological, or even its personally intimate cast, balance and compromise are far from central to the gist of the term. Neither the Mosaic covenant nor the crucifixion of Jesus involve compromise, nor is it necessarily central to moments of personal reconciliation which typically, somewhat like the theological casts, employ themes of atonement and forgiveness.
such a shift from amicability to alienation, then the progressive narrative undergirding the duty
to consult would fail. As well, one would not be able to make such a response by referring to the
treaties as Canada or its courts have understood them. The post-Simon dismissal of *R. v Syliboy*
is not the demonstration of this. Rather, *Syliboy* and *St. Catharines Milling* demonstrate that the
treaty relationship was, for both Canada and the courts, seen within the colonial gaze that
accompanied the assertions of sovereignty.

The only way to hold to a discursively useful meaning of “reconciliation” as it might support the
duty to consult, is to approach it from the perspectives of those indigenous nations that signed
treaties in good faith, made uncountable but costly adjustments to their lives, institutions, and
economies, and shared their worlds generously, though not in acts of subjection to superior
power or legitimate authority. But this would mean, as Borrows, Henderson and many others
have argued for some time now, abandoning the very notion of sovereignty that reconciliation
tries to protect. It would require a fundamental consideration of the “intersocietal” basis of
Canada’s law, and not merely the brief and indirect acknowledgment that Dickson C.J. provided
in *Van der Peet*.24 It would also require accepting that historical and contemporary treaty
relationships have to be regarded as founded on legal equality in order to attain rational
legitimacy.

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24 *Van der Peet*, supra p. 2 n. 3, at para. 50. There, acknowledging the influence of Mark Walters, he
mentioned an approach to defining an aboriginal right that “takes into account the aboriginal perspective
while at the same time taking into account the perspective of the common law. True reconciliation will,
equally, place weight on each.” The chief justice was, however, only referring to the definition of a
particular right in the context of making a claim before a court. He was not advocating a more full-
fledged consideration of an intersocietal approach to Canada’s legal relations with indigenous nations.
D. The “honour of the Crown” as discursive ideal

In *Haida Nation* McLachlin C.J. referred to the “historical roots of the principle of the honour of the Crown” which suggested to her that “it must be understood generously in order to reflect the underlying realities from which it stems.”\(^{25}\) Nowhere in her opinion, however, is there any more specific reference to what those historical roots might be.\(^{26}\) Given its central role in steering the consultation process developed to ensure the protection of Aboriginal and treaty rights, and to achieve the national goal of reconciliation, the lack of attention to documenting the historical function and usage of the term “honour of the Crown” seems at best incomplete. If the court had simply chosen to begin employing the term as a common expression, that would raise one sort of question about its suitability in a legal setting. However, to allude to a history and then not document it raises other questions about the discursive aims in its employment. Given its central role in supporting the duty to consult, these discursive aims are worth clarifying.

Scholarship on the “honour of the Crown” is not extensive; but reference to it within recent case law is. As well, reference to it within administrative protocols, policy statements from various government departments, and the promotional literature of large numbers of corporate resource developers, or law firms advising such clients, is certainly extensive. It also appears in the position papers of First Nations governance groups, NGOs concerned with Aboriginal rights or environmental issues, and in documents produced by individual First Nations. Perhaps this widespread usage (that is, especially since *Haida Nation* in 2004) means that the “honour of the Crown” is readily transparent, and in no need of critical scrutiny by the justices who have

\(^{25}\) *Haida Nation*, supra p. 1 n. 2, at para. 17.

\(^{26}\) Mariana Valverde, *supra* p. 39 n. 95, at 969, has also commented on this absence, though without pursuing it as I do here.
employed it, or by the scholars who interpret their work.\textsuperscript{27} Ontario’s 2006 draft guidelines on consultation, for instance, note that: “The Crown’s duty to consult has its source in the honour of the Crown and the constitutional protection accorded Aboriginal rights and treaty rights under section 35 of the \textit{Constitution Act, 1982}.” That document quotes from McLachlin C.J.’s \textit{Taku River} opinion (although without including her judgment that the province of British Columbia held an “impoverished vision of the honour of the Crown” found earlier in the same paragraph):

In all its dealings with Aboriginal peoples, the Crown must act honourably, in accordance with its historical and future relationship with the Aboriginal peoples in question. The Crown’s honour cannot be interpreted narrowly or technically, but must be given full effect in order to promote the process of reconciliation mandated by s. 35(1).\textsuperscript{28}

Given the contemporary significance of the “honour of the Crown” as an ideal standard for the court to employ in assessing government conduct related to Aboriginal and treaty rights, the first issue to clarify is what the term’s history of use indicates about its basic meaning, and the range of its employment.

A rough scan of the 1,174 SCC decisions on CanLII employing the root term “honour” indicates that in over 90\% of those decisions, dating back to the court’s initial term in 1876, “honour” itself was used only in reference to someone holding a court office: “the Honourable.”\textsuperscript{29} Only

\textsuperscript{27} For instance, although the updated federal guidelines on consultation paraphrase at several points the usage of “honour” in \textit{Haida Nation}, the list of definitions supplied in annex A of that document does not include “honour.” See \textit{Aboriginal Consultation and Accommodation: Updated Guidelines for Federal Officials to Fulfill the Duty to Consult} (Ottawa: DIAND, 2011) at 61. Available at <http://www.aandc-aadnc.gc.ca/eng/1100100014649> accessed 15 October 2014.


\textsuperscript{29} The same sort of scan applied to the whole of Canada’s jurisprudence available on CanLII emphasizes this pattern of usage even more dramatically. Out of the 193,875 decisions employing “honour” in some
fifteen decisions employed it as a personable attribute: a “man of honour,” or, somewhat differently in one decision – the “honour of a woman.”\textsuperscript{30} In thirty to forty cases it was tied to a financial or contractual agreement: “honouring a cheque” or a contract. In only 34 cases has “honour of the Crown,” or in one variant from 1915 – “the honour and dignity of the Crown” – itself appeared.\textsuperscript{31} Prior to \textit{Sparrow}, which introduced it into more general usage in Aboriginal rights cases (that is, in 28 of the 34 SCC cases employing the term), it occurred in only a handful of SCC opinions concerned with Indians.

An SCC decision from 1895 marks the first use of “honour of the Crown” in relation to Indians. Appearing before the SCC, Ontario’s counsel, S.H. Blake, argued that the Indian parties to the Robinson-Huron Treaty of 1850 were said to:

\begin{quote}
 retain---and it is specified in the treaty as all that they do retain---the right to fish and shoot on all the other lands until the Government chooses to sell them; but the moment it gives them away, or sells them, or leases them, that ends it. They take a certain sum of money down, and they take the promise of the Government, which embraces the honour of the Crown, which embraces all, it may be, that might come from the lands, which embraces all the revenues of the Government. They take that promise and set absolutely free all these lands; and if these lands are not set absolutely free from any trust and from any interest, then the whole object of the treaty is utterly and entirely defeated.\textsuperscript{32}
\end{quote}

The honour embraced here is not framed as bearing on whether or not the “object of the treaty” is “defeated.” The concern is rather simply that the acquisition of the lands might be put at risk if a

\textsuperscript{30} This last occurred in an appeal from a manslaughter case, \textit{The King v Hughes}, [1942] SCR 517, at 523.

\textsuperscript{31} \textit{R. v Bonanza Creek Gold Mining Co.}, [1915] 50 SCR 534.

\textsuperscript{32} \textit{The Province of Ontario v the Dominion of Canada and the Province of Quebec; In Re Indian Claims} (1895), 25 SCR 434, at 13. Available at http://gsdl.ubcic.bc.ca/collect/firstna1/archives/HASH01ce/9e4969b7.dir/doc.pdf, accessed 28 September 2014.
trust was thought to have been established. That case concerned whether the provinces of Ontario and Quebec or the federal government bore the financial responsibility for increasing the annuities owed Huron-Robinson treaty partners due to profits generated from the development of treaty lands. “Honour of the Crown” also appeared in Gwynne J.’s dissenting opinion. Both parties, then, expressed an understanding of the issue as tied to the “honour of the Crown.” In Gwynne J.’s opinion, honour is cast less glibly than it appears in the words of Ontario’s counsel:

…the British sovereigns, ever since the acquisition of Canada, have been pleased to adopt the rule or practice of entering into agreements with the Indian nations or tribes in their province of Canada, for the cession or surrender by them of what such sovereigns have been pleased to designate the Indian title, by instruments similar to these now under consideration to which they have been pleased to give the designation of "treaties" with the Indians in possession of and claiming title to the lands expressed to be surrendered by the instruments, and further that the terms and conditions expressed in those instruments as to be performed by or on behalf of the Crown, have always been regarded as involving a trust graciously assumed by the Crown to the fulfilment of which with the Indians the faith and honour of the Crown is pledged, and which trust has always been most faithfully fulfilled as a treaty obligation of the Crown.33

The issue of whether or not the treaty constituted a “trust” did not turn on the meaning of the “honour of the Crown.” For both parties, honour is a quality expressed through the “pleasure” of the Crown, a descriptive characteristic, not a critical standard external to the pleasure – the will, or prerogative – of state power.34

33 Ibid. at 27.

34 In Ross River Dena Council v the Attorney General of Canada, supra p. 95 n. 11, the Yukon Supreme Court dismissed an appeal from the Ross River Dena First Nation, concluding that the plaintiff’s argument that the “honour of the Crown” obligated Canada to undertake post-Confederation treaties with western tribes, and to fulfill promises for compensation contained in the 1870 Rupert’s Land and Northwestern Territory Order (U.K.), 23 June 1870 (R.S.C. 1985, II/9), reflected a non-justiciable understanding of both “promise” and “honour of the Crown.” Drawing on testimony of legal historian Paul McHugh, the court concluded that neither term, historically, could be enforced against the royal prerogative, ibid. at 150. The relevant promise for compensation regarding the surrender came from an 1867 speech from the Dominion to the Queen, maintaining in part that:

And furthermore that, upon the transference of the territories in question to the Canadian Government, the claims of the Indian tribes to compensation for lands required for purposes of settlement will be considered and settled in conformity with the equitable
This same gloss on honour – that it is readily embodied in government action, more a description than a standard – is evident in *Ontario v the Dominion* (1909). As I noted above in regard to this decision’s narrative of British policy derived from the *Royal Proclamation*, the JCPC said the policy led “those responsible for the honour of the Crown” to establish “many treaties whereby Indians agreed to surrender such rights as they were supposed to have in areas respectively specified in such treaties.”  

35 This is to say that the treaties of surrender, in which all rights outside of those remaining at the pleasure of the state were given up, were consistent with the “honour of the Crown.”

Additionally, at times justices have employed the term more as a critical standard, though generally only in dissent, that is, in order to heighten their opposition to a ruling in favour of an expression of state power. For instance, in *Bonanza Mining*, a non-Indian case from 1915, Idington J. argued that the appeal of a joint-stock mining company incorporated in Ontario, but having licenses from the federal government for claims in Yukon Territory, was wrongly dismissed, and in a way that triggered his concern for the “honour and dignity of the Crown.”  

36 In his dissent in *George* (1966), Cartwright J. made the first critical use of the term in Canadian Indian law, in his distinction between the idea of the sovereign’s honour and Canada’s actions towards Indians, while quoting from Lord Edward Coke’s opinion in the 1613 *St. Saviour's Southwark (Churchwardens)* case:

> principles which have uniformly governed the British Crown in its dealings with the aborigines (*ibid.* at para. 1).

35 *Supra* p. 200 n. 32, at 103.

36 *Supra* p. 200 n. 31, at 570.
If two constructions may be made of the King's grant, then the rule is, when it may receive two constructions, and by force of one construction the grant may according to the rule of law be adjudged good, and by another it shall by law be adjudged bad; then for the King's honour, and for the benefit of the subject, such construction shall be made that the King's charter shall take effect, for it was not the King's intent to make a void grant…

Cartwright J.'s turn to the work of Coke to support his critique of state regulation is significant. Coke’s long-running (and personally costly) battles as a jurist and as an opposition member of Parliament to constrain royal power were grounded in his determination to advance the rule of law over the prerogative of the sovereign.


38 In the only other opinion invoking Churchwardens (1613) in Canadian law prior to Marshall ([1999] 3 SCR 456, at para. 43). R. v Walker, [1970] SCR 649, at 662, Martland J. wrote for the majority, with Cartwright C.J. concurring, that:

The Crown, just as much as individuals, is obligated to perform its contracts. Such obligation may be discharged by appropriate statutory provisions, but in the absence of clear statutory authority, it cannot evade that obligation (ibid. at 665).

Of the other five opinions referring to Churchwardens (1613), one, like Walker, was a non-Aboriginal rights case concerned with leasing park lands: Abbott v Canada, [2001] 3 FCR 342. The other four are Marshall, Manitoba Métis Foundation (2013 SCC 14, at para. 73), Beattie v Canada, 2005 FC 715, and the more recent Corporation de négociation Ashuanipi c. Canada (Procureur général), 2014 QCCA 920.

For an overview of Coke’s approach to common law and his battles with proponents of James I’s royal prerogative, see Jason S. Crye “Ancient Constitutionalism: Sir Edward Coke's Contribution to the Anglo-American Legal Tradition” (2009) The Journal of Jurisprudence 3(2) 235. Coke’s often-quoted remark on the role of precedent: “Out of the old fields must come the new corn,” and his own ability to find precedent in decisions rendered hundreds of years before his own time, may well indicate that the use of honour in Churchwardens is applicable to its use in Canadian courts. My point is simply that it can’t be regarded as having played the sort of historically significant role that McLachlin C.J. or the courts post-Marshall have suggested. See Allen D. Boyer Sir Edward Coke and the Elizabethan Age (Stanford CA: Stanford University Press, 2003) at 155, and Crye, ibid. at 249. For a recent argument that Coke’s approach to common law reasoning was as much an effort to ensure the authority of the king as it was to protect the “ancient constitution,” see David Chan Smith “Remembering Usurpation: the Common Lawyers, Reformation Narratives and the Prerogative, 1578–1616” (2013) Historical Research 86(234) 619.

The other precedent citation giving substance to the historically rooted vision of the “honour of the Crown” is Roger Earl of Rutland’s Case (1608), 8 Co. Rep. 55. See The Reports of Sir Edward Coke, (Dublin: J. Moore, 1793), v 4, image 304. Available at: Eighteenth Century Collections Online, accessed 3 October 2014. As with Churchwardens (1613), this is also only cited in Marshall, Manitoba Métis Foundation, and the other two opinions just mentioned above. In both of those additional cases, the courts’ dismissal of the appeals rejected the appellants’ “honour of the Crown” invocations. Ashuanipi
However, this critical construction of the “honour of the Crown” in *Churchwardens* (1613): that it serves to block the actual aims of royal, or in Canada’s case – federal or provincial – power, is difficult to maintain when viewed through the history of the “honour of the Crown” as used by the courts. Admittedly, in *Marshall* (1999), and more recently in *Manitoba Métis Federation* (2013), *Churchwardens* appears quoted as it was in *George*. And it may well be that this is what McLachlin C.J. meant in referring to the “historical roots of the principle.” These references, though, do little to demonstrate the kind of continuity that one would think the “historical roots” of a major legal principle would be capable of demonstrating.

In the 33 years between *George* and *Marshall*, reference to Cartwright’s dissent in *George* only crops up within three opinions in Canada’s courts, while five other opinions incorporate the majority view. In two of those appearances, both dissents, one referred to Cartwright, and Cartwright himself (by then SCC chief justice), authored the other. The two dissenting opinions mention neither the “honour of the Crown” nor *Churchwardens*, although Cartwright C.J.’s

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concerned an Innu association’s financial irregularities in the use of DIAND land claim research funds. In *Beattie* an individual of non-Indian status, but married into a Treaty 11 family, attempted to collect treaty annuity payments for himself. In *Scott v Canada (Attorney General)*, 2013 BCSC 1651, a non-indigenous case invoking the Aboriginal rights conception of the “honour of the Crown,” the British Columbia Supreme Court traced its English lineage:

No Canadian court has applied the doctrine of the Honour of the Crown outside of the Aboriginal context, although it was referenced in the context of the sale of land: *Doe dem. Henderson v Westover* (1852), 1 U.C.E. & A. 465 (U.C.C.E.A. at 468) and in the context of statutory interpretation: *R. v Belleau* (1881), 7 SCR 53 at 71 and *Windsor & Annapolis Railway Co. v R*, (1885), 10 SCR 335 at 371. It was also referenced in England in the context of a criminal prosecution: *The King v Garside and Mosley* (1834), 2 A.D. & E. 266, 111 E.R. 103 (K.B.) at p. 107: “We are not to presume that any promise made by the King even to the meanest and most criminal of his subjects will not be sacredly observed”. These older decisions (two of which predate the Confederation of Canada) suggest that the Honour of the Crown doctrine has a lengthy history that extends beyond the Aboriginal context (*ibid.* at para. 30).

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fellow dissenter in *Daniels v White*, Hall J., does refer to a statement in the 1932 Alberta case *R. v Wesley*, which employs a critical use of the term “honour.” Thus, the one opinion in pre-sec. 35(1) jurisprudence that actually incorporates Cartwright’s view of the honour of the Crown as a critical principle against state action is the 1981 Ontario Court of Appeals judgment in *Taylor and Williams*. In the approximately 25 opinions since the recognition of Aboriginal and treaty rights in sec. 35(1), references to George’s affirmation of provincial laws over treaty rights appear in approximately 15 denials of Aboriginal appeals; while references to the Cartwright dissent occur in eight approvals of Aboriginal appeals, and in two dissents.

If this brief survey of the usage of the “honour of the Crown” is fair, then rather than maintaining that the term has served historically as a principle critical of royal power, it seems just as apt to say that, historically, Canada’s courts have employed the term in an affirmation of either royal or

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40 Hall quoted *R. v Wesley* [1932] 4 DLR 774, where McGillivray J. had written:

> In Canada the Indian treaties appear to have been judicially interpreted as being mere promises and agreements….Assuming as I do that our treaties with Indians are on no higher plane than other formal agreements yet this in no wise makes it less the duty and obligation of the Crown to carry out the promises contained in those treaties with the exactness which honour and good conscience dictate and it is not to be thought that the Crown has departed from those equitable principles.


41 *Regina v Taylor and Williams* (1982), 34 OR (2d) 360. Quoting Cartwright J. In regard to treaty interpretation, McKinnon J. added – in a passage itself often quoted in post-sec. 35(1) jurisprudence – that “the honour of the Crown is always involved and no appearance of ‘sharp dealing’ should be sanctioned” (*ibid.* at 12).

42 Opinions making a precedent of the George ruling include many similar to *R. v Steinhauer*, 1985 CanLII 1891 (ABQB), upholding the summary conviction of Clifford Steinhauer, a “treaty Indian,” for illegal use of a gill net; or *R. v Eninew*; *R. v Bear*, 1984 CanLII 2691 (SK CA), upholding two separate summary convictions for hunting in violation of the *Migratory Birds Convention Act*, R.S. C. 179, s. 1. More recently, and despite the finding in *R. v Blackbird* (2003), 64 O.R. (3d) 385, at 11 that George had been rendered obsolete by *Sparrow*, George has reappeared in *Hiawatha v Minister of the Environment* 2007 CanLII 3485 (ON SCDC) at 55, and *Ktunaxa Nation v British Columbia (Forests, Lands and Natural Resource Operations)*, 2014 BCSC 568 (CanLII) at 181. In both of those opinions, findings for provincial approval of development plans (a subdivision on a burial ground, and a ski resort on a sacred site) proceeded after dismissing the significance of the George dissent.
legislative power. Or, one might even conclude that it has played a very small historical role, at best. It may be that its function is more of what I referred to in Chapter 1 as an example of Hobsbawm’s idea of an “invented tradition,” than as the historically functional concept suggested by McLachlin C.J. (though one might argue in response that it is rather a “legal fiction,” and still an adequate tool for addressing obligations under the duty to consult). A second point of trouble, as I also noted earlier, is that the concept carries a presumed obviousness evident in the burgeoning extent of its usage post-\textit{Haida Nation}. I think a discourse perspective can uncover even deeper difficulties than are evident within its historically ambiguous usage, despite widespread efforts to employ it as a critical principle in recent jurisprudence.

Scholars have highlighted the reflection of inherited extra-legal connotations within the “honour of the Crown.” In particular, James Sákéj Henderson refers to the Crown as “a mystical concept that represents the constitutional authority for the existence of federal or provincial governments. However, since the expression of government has never been a juristic entity, it is a vague legal fiction of British law.” \footnote{44} Henderson’s characterization of the “Crown” as a mystical entity cannot

\footnote{43} Drawing on the work of Lon Fuller, collected in his \textit{Legal Fictions} (Stanford CA: Stanford University Press, 1967), Karen Petroski, in a recent study of US Supreme Court usage of the term “legal fiction,” notes that when the justices refer to a legal fiction, “it is a sign that the explanation in question is coming close to the limit of what the writer perceives as justifiable to readers who are outsiders to the legal community’s conventions. The term functions as a label for other legal terms, or for concepts named by legal terms, that cannot be succinctly justified in lay language, but are nevertheless accepted by judges and lawyers as ingredients of conventional forms of legal reasoning.” In her \textit{“Legal Fictions and the Limits of Legal Language”} (2013) \textit{International Journal of Law in Context} 9(4) 485, at 498.

\footnote{44} Henderson, \textit{supra} p. 132 n. 29, at 30. As I noted in Chapter 1, John Borrows and Mariana Valverde have also employed what we could call a debunking strategy in considering the impact of the “Crown” on Aboriginal law in Canada, and in refutation of McLachlin C.J.’s \textit{Haida Nation} denial that the “honour of the Crown” is a “mere incantation” (\textit{supra} p. 1 n. 2, at para. 16). See Borrows, \textit{supra} p. 38 n. 94, and Valverde, \textit{supra} p. 39 n. 95.
be lightly dismissed. The papers collected from a 2010 conference held in the Senate, in Ottawa, and endorsed by the Harper government and the “Friends of the Canadian Crown,” for instance, demonstrate the many fronts on which the “Crown” functions as a mystical authority. In that volume the ceremonial installation of Governor General David Johnston in 2010 is described as “sublime.”\(^45\) The “real purpose” of royal symbols is said “to express a psychological truth, the significance of which can only be grasped if the correspondence between the material object and the spiritual quality is understood.”\(^46\) The Queen or her representative are said to possess “liturgical authority” in opening Parliament.\(^47\) The “Crown” is described as the “fount of all honour.”\(^48\) John Fraser, master of Toronto’s Massey College, is quoted from remarks delivered at a 2000 Ascension Day Service, saying:

> The fact remains that the magic and mystery behind our Constitution is all tied up with a hereditary monarchy. It is our past, which if denied, will confound our future; it is our dignity, which if cast carelessly aside, will make us crasser people; it is the protection of our rights, which if abandoned could lead to demagogic manipulation.\(^49\)

On the other hand, in addition to the suspicion that Henderson casts on the lingering influence of “mystical” thinking on law (though perhaps “theological” is a better term), he also offers a deep endorsement of the legal implications of linking this particular conception of the “Crown” to honour.

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\(^{46}\) ibid. at 130.

\(^{47}\) ibid. at 133.

\(^{48}\) Christopher McCreery “The Crown and Honours: Getting it Right” in Smith and Brown *ibid*, at 139.

The honour of the Crown transforms the mystical and symbolic concept of the Crown into a protecting entity for the rights of Aboriginal peoples, rather than the constitutional authority and legitimizing principle for treaties with First Nations and the existence of federal or provincial governments. The honour of the Crown is more than the concept of legitimacy of governmental action developed slowly over the centuries in England and Britain. It provides the foundational idea in British constitutional theory and history for sovereignty, which shields the rights of Aboriginal peoples from negative government action. This new concept creates a deep divergence between the historical fictions of the concept of the Crown in British common law tradition as developed from central royal courts through royal writs, the Crown's role in treaties, imperialism and colonization, and its present responsibilities in the Constitution of Canada and its underlying principles.\(^{50}\)

The “honour of the Crown” plays a crucial role in his conception of “dialogical governance,” amounting to the “central principle of constitutional supremacy of Aboriginal and treaty rights.”\(^{51}\) Henderson assembles the many references to the concept within post-sec. 35(1) jurisprudence, weaving them together to show that the court has provided Canada with a strong vision of its obligation to transform its relationships with indigenous nations.\(^{52}\) He provides a confident expression of the “honour of the Crown” as the key to a dynamic transformation of Canada’s legal and political order, capable of infusing both the duty to consult and the renewal of treaty relationships. He proceeds, however, without serious attention to the discursive implications of the court’s reliance upon honour as the primary ideal for assessing Canada’s relations with First Nations and other indigenous communities. At the same time, in making honour the operative critical principle within his dialogical mode of governance, he is clearly

\(^{50}\) Henderson, *supra* p. 132 n. 29, at 30-31.

\(^{51}\) *Ibid.* at 52.

\(^{52}\) For instance, he lists the following seven descriptors derived from “honour of the Crown” references in duty to consult cases:

- It is always at stake in the Crown's dealings with Indian people. It arises with the Crown's assertion of sovereignty over Aboriginal lands. It obligates the Crown to treat Aboriginal peoples fairly and honourably, and to protect them from exploitation. It continues when ownership of the underlying title is vested in the Crown. It requires the Crown to act with honour and integrity. It avoids even the appearance of "sharp dealing." It is involved in the resolution of claims (*ibid.* at 54).
interested in increasing the prominence of discourse itself as central to the principled depiction of rejuvenated legal relations between Canada and indigenous nations. He emphasizes that the ultimate upshot of a discursively renewed political order requires the creation of a full-fledged new branch of government, and laments its failure:

As long as the Crown fails to establish a distinct branch of government for Aboriginal peoples based on their constitutional rights to perform this role, with more democratic accountability and greater investigative, technical, financial, and administrative resources than the traditional judiciary now enjoys, dishonourable action will not be remedied.\(^{53}\)

However, from a discourse perspective, I doubt that the “honour of the Crown” as developed within the duty to consult jurisprudence has the capacity to lead Canada in the direction that Henderson advocates. Nor do I think that its proponents can show that it leads to more consistent outcomes than could be obtained by considering state actions affecting Aboriginal and treaty rights through concepts of justice, or a critical view of the rule of law, such as Lon Fuller as well as Habermas have provided (and as I discussed in Chapter 2).

If we examine the “honour of the Crown” as a discursive practice, we have to begin with the recognition that this particular form of honour cannot be sequestered from the usage of “honour” within other pragmatic contexts, if only because the courts do not provide “honour” with a specifically legal gloss. The political theological heritage of the “Crown” cannot be thought to shape what such a standard might be, unless one could obtain agreement from parties in dialogue oriented towards mutual understanding, that this heritage was especially apt in their particular communicative context (a hearing, a tribunal, a public meeting). Even so, the political theological heritage is never made a theme of discourse in the courts. As I demonstrated above, Canada’s courts have employed the term overwhelmingly in the context of simple attributions of

\(^{53}\) *Ibid.* at 56.
status or office to individuals appearing before or functioning within the settings of the courts, a usage I will return to below.

Its next most common usage stems from the context of financial transactions, in which one “honours” one’s debts. This second usage is equivalent to saying that one is willing to be bound by one’s promises, the germ of its function as a critical term. In this vein, honour requires individuals to act against inclinations that might be more immediately satisfying or protective of their self-interest. It envisions conduct willingly undertaken according to a higher standard: dueling, for instance, required an indifference to the results of a contest that one would only undertake in order to maintain one’s honour.

Examples of the indifference that is key to employing honour as a critical standard of conduct are available across a wide range of cultural contexts. As historian David Chaney argues in his examination of changing approaches to honour in modernizing Britain, the code of honour employed by the classic figure of the English gentleman entailed a cultivated appearance of indifference to consequences. Chaney equates this English form of honour as indifference with that of the Balinese cockfighters whom Clifford Geertz characterized some time ago as engaged in a kind of “deep play.” Writing in the same decade as Geertz, French sociologist Pierre Bourdieu captured what is discursively at work in the use of honour, with his characterization of

54 See his “The Spectacle of Honour: the Changing Dramatization of Status” (1995) Theory, Culture & Society 12(1) 147, at 153. Geertz, in his influential “Notes on a Balinese Cockfight,” portrayed the contest of honour in cockfighting as a communal demonstration of status, which becomes more visible the more equal are the odds in a particular fight. Those who play for money rather than honour are “highly dispraised by the ‘true cockfighters’ as fools who do not understand what the sport is all about, vulgarians who simply miss the point of it all.” See his The Interpretation of Cultures (New York: Basic, 1974) at 434.
it as “symbolic capital.” As capital, honourable action extends something: solidarity, protection, hospitality, resources; to someone in need of such generosity. But, it also incurs indebtedness to and dependence upon the one who appears to function on the basis of a higher standard of conduct. Key to the operation of the code of honour, he stresses (in ways similar to Chaney), is the disinterested, or “seemingly ‘gratuitous’ surrender” of wealth in order to gain more wealth and prestige, a process he refers to as “social alchemy.”

In these examples, the logically distinguishable employment of honour as a marker of status and its invocation of a higher standard of disinterested conduct are intertwined (as they likely are within any use of the term). In both forms of use, however, they are performative acts: they transform, commit, revive or insure, securing the elevation of the one who receives honours. Chaney emphasizes the inherent connection between employment of the term “honour” in a wide range of public contexts, and the performance of ceremony. He suggests that:

the language of honour is a mode of dramatization. An individual is singled out for public attention through a form of ceremony. A self-conscious ritual of performance may only take place on very specific occasions when the possession of honourable status is formally recognized, but the deference that is due to honour is displayed and confirmed in myriad ceremonializations.

However, in the context of modern Britain, and within western societies in general, these ceremonies, once primarily contests of violence between individuals, are now produced largely through the media of professional sports and mass entertainment. While that consequent sort of celebrity status carries with it some of the older notion of a life conducted according to a higher standard, that standard is no longer the critical sense of indifference that required English, and


other, men of honour to renounce the substance of their wealth for the sake of their honour alone. Consequently, those ceremonies have come to reflect the opposite of indifference to outcomes, generally demonstrating celebrity commitment to self-advancement. ⁵⁷

Clearly, the courts are more likely to be employing the “honour of the Crown” as a critical standard of conduct, bearing some linkage to honour’s earlier cultivated sense of indifference, than to those standards operative in the mediated dramas of sports and entertainment. As Dickson C.J. maintained in Sparrow, the consequence of recognizing Aboriginal and treaty rights in sec. 35(1) requires the state to plausibly accept a substantial “burden” on its actions. In a small number of cases, the courts have employed the concept of the “honour of the Crown” in order to quash state projects or the permitting of corporate developments. Some of these cases have aimed directly at the extraction of resources (Haida Nation, Halfway River First Nation, ⁵⁸ or more recently Ehattesaht First Nation ⁵⁹), while others have aimed more indirectly at public management (Mikisew). Cases such as Sparrow or Marshall have loosened some of the hold of federal or provincial regulations on indigenous users of resources in particular contexts.

However, it seems just as reasonable to conclude that the courts have sought to tighten the implications of the “honour of the Crown” because they have recognized that the appropriate level of indifference necessary to deal justly with the depths and extent of indigenous grievances

⁵⁷ Links between law, ceremony and honour are depicted in Foucault’s Discipline and Punish, supra p. 88 n. 2. For a study of ceremony and politics in modern sports grounded in Foucault’s work on power and ceremony, see Varda Burstyn The Rites of Men: Manhood, Politics and the Culture of Sport (Toronto: University of Toronto Press, 1999).

⁵⁸ Halfway River First Nation v British Columbia (Ministry of Forests), 1999 B.C.C.A. 470.

⁵⁹ Ehattesaht First Nation v British Columbia (Forests, Lands and Natural Resource Operations, 2014 B.C.S.C. 849.)
in Canada would involve a very great burden. As I noted above in relation to the theme of “reconciliation,” *Haida Nation* seemed most intent on constructing an understanding of reconciliation as a kind of negotiation. Similarly, if maintaining the “honour of the Crown” is consistent with conducting hard-nosed negotiation in modern treaty agreements or in resolving outstanding title claims, it is unlikely that the state’s representatives will feel inclined towards exhibiting the honourable “indifference” of a duelist or an aristocratic gambler. Nor will the court be likely to back away from the crabbled versions of reconciliation and justification it has reiterated from *Delgamuukw* to *Tsilhqot’in Nation*. The ease with which the chief justices moved from acknowledging the solidity of Aboriginal rights to the pressing need to lighten such rights by weighing them against the needs of the larger society, as Lamer C.J. did in *Gladstone*, is difficult to grasp if such weighting is supposed to reflect a standard of honour consistent with its historical range of meaning. Or, as McLachlin C.J. collated the themes of reconciliation, honour and consultation with the end result of negotiation:

> I conclude that consultation and accommodation before final claims resolution, while challenging, is not impossible, and indeed is an essential corollary to the honourable process of reconciliation that s. 35 demands. It preserves the Aboriginal interest pending claims resolution and fosters a relationship between the parties that makes possible negotiations, the preferred process for achieving ultimate reconciliation.  

Her tendency in *Haida Nation* to shape honour into a concept that really only pushes towards the act of compromise is clear in her gloss on the meaning of accommodation:

> The accommodation that may result from pre-proof consultation is just this – seeking compromise in an attempt to harmonize conflicting interests and move further down the path of reconciliation. A commitment to the process does not require a duty to agree. But it does require good faith efforts to understand each other’s concerns and move to address them.  

60 *Haida Nation*, *supra* p. 1 n. 2, at para. 38.

Her conditioned gloss here seems (to this reader, at least) written to reassure settler interest
groups that consultation regarding Aboriginal and treaty rights will not necessarily place them in
danger of losing out in legal contests with First Nations. Such harmonizing of “conflicting
interests,” and avoiding any compulsion to agree, are both far removed from the effort to uphold
honour grounded in indifference to consequences.

“The honour of the Crown” is now the primary normative standard available for First Nations
and other indigenous communities to employ in settings of legal challenge, or affecting decisions
and discourse within arenas of policy formation, or within the public sphere as a whole. Its
strength as a normative standard within the context of Canada’s courtrooms might be assessed, at
least roughly, by noting the proportion of court decisions that have held for indigenous plaintiffs
who have employed it in their complaints against the state. To take only two examples for the
sake of my argument here, and disregarding the merits of any of the cases, according to CanLII,
in Alberta, the Court of Queen’s Bench has decided 15 such cases since Sparrow. In 11 of those,
the indigenous parties’ claims were dismissed. Of the five cases that went on to appear before the
Alberta Court of Appeal, all five were dismissed. In British Columbia, while the proportion of
non-dismissals is higher, it still reflects the courts’ predominant tendency to dismiss claims
invoking the “honour of the Crown.” There, out of the 43 cases appearing before the BC Court of
Appeal, 37 were dismissed. Of the 87 cases appearing before the BC Supreme Court, 68 were
dismissed. If these proportions are even roughly reflective of the situations facing indigenous
parties in other jurisdictions, then simply from the standpoint of its usage, the “honour of the
Crown” is at best a difficult standard to employ in seeking justice regarding a claim of
Aboriginal or treaty rights. Further, if we examine the “honour of the Crown” from the
standpoint of Habermas’s discourse principle, three features of its use as a “core precept” seem especially troubling, particularly if we bear in mind Habermas's distinction between performative and pragmatic communication.

1) As I noted above, invocations of honour in a wide range of discursive situations are essentially performative. That is, they create or accomplish something outside the communicative context of the assertion itself. In this, invocations of honour resemble the performative functions of doodem icons, as I discussed in Chapter 4. There, I tried to show that making discursive sense of intersocietal treaty-making at Montréal requires that we acknowledge how the doodem icons established the legitimacy of that intersocietal legal agreement through their performative functions. I argued also, though, that if they did produce the grounds for Anishinaabe consent to the treaty, the French agreement was still dependent upon the sufficient translation of those culturally deployed meanings through subsequent pragmatic statements, as delivered in the oratory of the indigenous Anishinaabe and Haudenosaunee leaders recorded in the treaty text. Thus, for intersocietal legal legitimacy, the promise-making enacted in the treaty needs to be seen as having been achieved through the combination of both performative and pragmatic communicative acts.

This distinction between performative and pragmatic communication oriented towards mutual understanding can make sense of the courts’ use of “honour of the Crown.” As I indicated above, the attribution of honour is, as Geertz, Chaney, Bourdieu and other scholars have demonstrated, performative, even dramatic. That is, it is made real through ceremonies and invocations in ritually specific ways. The performative use of this language, which is grounded in the culturally
specific context of English political history and its class structure, could play a legitimate role within an intersocietal legal context. However, as performatively based discourse, it cannot be expected that the particular performative context that makes it meaningful to courts and representatives of “the Crown” will readily translate across cultural boundaries. Even if we accept the more robust view of public sphere legal discourse that Habermas advocates (contra Rawls), which would make any party’s commitment to employing products of particular traditions not shared across the board legitimate contributions to a process oriented towards mutual understanding, the performative basis of honour invocation is at best incomplete in a discourse situation, and an insufficient means of establishing pragmatic legal legitimacy, especially in an intersocietal legal context.

Thus, the court’s deployment of honour language, assuming the court is committed to developing a process of mutual understanding regarding First Nations standing in relation to the duty to consult, has to be supplemented by a pragmatic turn in its use of honour language. That pragmatic turn is parallel to the one reflected in the oratory of the Anishinaabe and Haudenosaunee leaders at Montréal. There French negotiators were able to absorb a sufficient amount of doodem categories and normative expectations, as reflected in the indigenous oratorical responses to Callière’ own speech, into language they could acknowledge as normative statements of binding promises. These pragmatic statements constituted intersocietal critical dialogue concerning the commitments being formed by the 1701 treaty, and seem a workable illustration of what Habermas means when he says that discourse oriented towards mutual understanding requires the possibility of “yes/no” responses.
Just as the employment of doodem icons in treaty-making at Montréal also required participants to turn from the performative to the pragmatic dimension of discourse, in order to create the intersocietal possibility of mutual understanding: consent to the promissory commitments in the treaty, so too does the employment of “honour of the Crown” language in the courts. However, what remains clouded in the courts’ use of honour language, is whether this pragmatic aim resembles the ideal-type of “communicative action” – an aim to create possibilities of mutual understanding; or whether it resembles the ideal-type of “strategic action” – such as one party aiming to increase its control or domination over another (and which Bourdieu found to inhere within the code of honour\(^{62}\)). Canada’s courts have consistently tied the invocation of honour to the aim of reconciliation; and if a reader of court decisions credits this linkage, rather than suspecting it of masking an aim of domination, then from a discourse perspective we have to ask how that aim can be fulfilled in the sorts of discursive situations where honour language occurs.

2) At the heart of any usage of the term “honour” is a particular pragmatic communicative situation. Honour cannot credibly be asserted by a single party, unless the honour referred to is an inherently personal code, as when I say my own standard of honour prohibits me from doing X, or requires me to do Y. As employed within public contexts, honour is awarded, accorded, recognized, attributed, bestowed – all taking the passive voice because the one honoured is not the actor, but rather the recipient of the action. Even within systems of domination shaped by codes of honour, such as families and feudal societies where it provides “symbolic capital,” the domineering figure or figures receive their honour from the dominated. I would argue that these assumptions of ordinary language use hold true for the courts’ own usage of honour, unless or

\(^{62}\) Bourdieu, *supra* p. 211 n. 55, at 196.
until the courts have laid out how legal usage in this context should be regarded differently than ordinary usage, and which they have not for the “honour of the Crown.”63

Seen from the perspective of Habermas’s discourse principle, how does the “honour of the Crown” function as a normative standard for the duty to consult? Consider McLachlin’s formulation of it as a principle in *Haida Nation*: “It is not a mere incantation, but rather a core precept that finds its application in concrete practices.”64 One of the striking features of her discussion of the “honour of the Crown” in *Haida Nation* is that this distinction between a core precept and concrete practices only receives elucidation in terms of the various concrete practices. We thus know what the “honour of the Crown” might mean only by reference to these concrete practices. In part, this may be attributed to judicial practice. As Henderson puts it in his vision of “dialogical governance,” courts have the limited interpretive function of assessing the law in relation to a particular grievance, and not the larger function of addressing systematically the nature of legal, political or moral concepts.

While the judiciary is obliged to give a decision on specific matters that come before them through litigation, they are not supposed to interpret the Constitution for its own sake or to provide impressive scholarly essays on the meaning of constitutional provisions. Their judicial responsibility is to determine what the Constitution means in order to decide whether a government's impugned statute should be upheld or invalidated. Their interpretation must have relevance to the particular issue.65

Thus, the SCC has gradually elaborated the list of applications of the precept of the “honour of Crown” as they have dealt with new situations; while various government departments

63 For a useful effort to trace the differences as well as the overlaps between language use in a variety of legal contexts, and ordinary usage, see Lawrence B. Solum “Communicative Content and Legal Content” (2013) *Notre Dame Law Review* 89(2) 479.

64 *Haida Nation*, supra p. 1 n. 2, at para.16.

65 Henderson, supra p. 132 n. 29, at 42.
periodically revise their protocols to demonstrate that they are functioning in line with the latest application of the duty to consult. Lower courts, meanwhile, have whittled away at broadstroke interpretations of its workings – especially when indigenous parties bring their concerns to court framed in light of the duty to consult and the “honour of the Crown.”

From a discourse perspective, the problem here is not simply one of legal semantics: as though the courts needed to settle on a fundamental definition of the norm of honour, as though it were perhaps a “natural kind,” and as though they were instead trying to avoid producing such a definition by settling for lengthy references to its attributes or requirements, or what Ronald Dworkin calls “manifestations,” in particular legal circumstances. Nor is it a more generally “philosophical” problem, as though a deep, but obscured, fundamental meaning of honour needed exposure by the relentless questioning of a Socrates. My point is simply that McLachlin C.J.’s lack of interest in a workable, common sense definition of honour, and her contentment with listing its legal attributes, is inconsistent with her own willingness to marshal such definitions of other terms in *Haida Nation*, such as her turn to the OED to define “accommodation.” Her use of a common source of English definitions there suggests that the same concern with ordinary meaning could have helped her explain her emphasis on honour

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66 Ronald Dworkin advocated this in his argument with H.L.A. Hart. Drawing on Hilary Putnam’s externalist theory of semantics, though without ever mentioning Putnam, Dworkin maintained that legal concepts were like Putnam’s “natural kinds,” that is, words such as “tiger” or “water,” the meaning of which descends from that natural entity. For Dworkin’s views, see his “Hart’s Postscript and the Character of Political Philosophy” (2004) *Oxford Journal of Legal Studies* 24(1) 1, at 12-13. There, he says, after first holding that legal and political concepts are not like “natural kinds,” that they share many similarities, including that “political values have a deep structure that explains their manifestations” (*ibid.* at 12). For a critique of Dworkin on this point, see Dennis M. Paterson “Dworkin on the Semantics of Legal and Political Concepts” (2006) *Oxford Journal of Legal Studies* 26(3) 545.

67 *Haida Nation*, supra p. 1 n. 2, at para. 49.
more easily than by the lengthy process of laying out its functional attributes in different circumstances. It would also have helped account for some sort of common sense core to counter her subsequent statement of what amounts to a notable ethical contextualism: “The honour of the Crown gives rise to different duties in different circumstances.”\textsuperscript{68} Or, as she stated in \textit{Manitoba Métis Federation}: “the duty that flows from the honour of the Crown varies with the situation in which it is engaged. What constitutes honourable conduct will vary with the circumstances.”\textsuperscript{69}

3) At the pragmatic level, the “core precept” of the “honour of the Crown” is troublesome as a principle because the courts have never approached it as something that needs clarification through dialogical responses from those who are subject to it as a norm. Such clarification is a necessary feature of honour, since whether it is as a critical norm, or – more commonly in court usage – as a marker of status and office, it has public meaning only as something bestowed by others. Honour may, as Bourdieu indicated, function as the engine of domination, or even as what he called “symbolic violence.” Nevertheless, it is not unidirectional domination or violence. A discursively adequate use of honour would have to recognize its function as a pragmatic validity claim. That is, in a situation oriented towards mutual understanding, honour should be thought of as something that would be attributed by others more accurately than it could be asserted by oneself. Thus, in the setting of Canada’s courts, the determination of honour is less able to be appropriately applied by judicial figures (themselves still representatives of the same Crown that they purport to judge) than it would by those indigenous parties who bring their claims of injustice into dialogue with Canada's representatives.

\textsuperscript{68} \textit{Ibid.} at para. 18.

\textsuperscript{69} \textit{Manitoba Métis Federation, supra} p. 203, n. 38, at para. 74.
In addition, one presented with a validity claim regarding the “honour of the Crown” might conceivably ask regarding the courts’ use of honour language: how does the "honour of the Crown" amount to something more than a statement regarding the willingness to uphold promises? As I indicated above, the use of honour as a critical standard of conduct most readily amounts to just such a statement. The man of honour is willing to be bound by his word when it runs counter to his self-serving inclinations: to provide the funds for cheques written from his account, to show up on the field after having accepted the challenge of a duel. Without knowing what honour might mean pragmatically, it is impossible to know whether the courts have had in mind such a basic norm, or something else. Many of the descriptors offered in *Haida Nation*, for instance, are empty unless a reader presumes a core meaning, or related group of meanings: "The honour of the Crown is always at stake."70 "[I]t must be understood generously."71 "The honour of the Crown also infuses the processes of treaty making and treaty interpretation."72 "The Crown must act with honour and integrity, avoiding even the appearance of “sharp dealing.”"73 "In all cases, the honour of the Crown requires that the Crown act with good faith."74 These by now classic expressions from McLachlin C.J. all convey an unworkable vagueness as legal statements, unless they are taken to mean something like honour means within other contexts. They are not yet clarified by a single sentence taking the form of “To honour means X” within the jurisprudence descending from *Haida Nation*. This gap between what honour might do or

70 *Haida Nation*, supra p.1 n. 2, at para. 16.

71 Ibid. at para. 17.

72 Ibid. at para. 19.

73 Ibid.

74 Ibid. at para. 41.
require and what honour might be clouds the possibility of deriving clear guidance from the courts, especially since the court has said that what it requires differs in each circumstance. Glosses such as the “honour of the Crown” requires the state to “act with good faith,” at most, can really only be filled in by a clarification along the lines of “and to act with good faith means to reliably uphold one’s word.”

If this is a fair reading, however, then there seems an inherent conflict between the pragmatic force of such statements, and their legal implications. If the "honour of the Crown" means no more than the willingness to fulfill promises, it runs aground, or better, is deflated, on two fronts. On the one hand, in Badger the court had already made the equation between honour and the fulfillment of promises:

First, it must be remembered that a treaty represents an exchange of solemn promises between the Crown and the various Indian nations. . . . Second, the honour of the Crown is always at stake in its dealing with Indian people. Interpretations of treaties and statutory provisions which have an impact upon treaty or aboriginal rights must be approached in a manner which maintains the integrity of the Crown. It is always assumed that the Crown intends to fulfil its promises.75

More recently, in Manitoba Métis Federation, McLachlin C.J. stated that the “honour of the Crown” is not “a cause of action itself; rather, it speaks to how obligations that attract it must be fulfilled.”76 What effect does this have on the pragmatic function of the “honour of the Crown”? In her subsequent discussion of whether Canada had performed its obligations to the Manitoba Métis community stemming from the historic founding of the province of Manitoba, a reader can see how she identified the substance of the “honour of the Crown” with the common sense understanding of

75 Badger, supra p. 20 n. 35, at para. 41.

76 Manitoba Metis Federation, supra p. 203 n. 38, at para. 73.
promise-keeping. There she determined that the lower court holding erred in its agreement with Canada’s submissions, that:

…the government servants may have been negligent in administering the s. 31 grant. He held that the implementation of the obligation was within the Crown’s discretion and that it had a discretion to act negligently: “Mistakes, even negligence, on the part of those responsible for implementation of the grant are not sufficient to successfully attack Canada’s exercise of discretion in its implementation of the grant.”

McLachlin C.J., however, found that the promise regarding the allotment of 1.4 million acres to Métis children contained in sec. 31 of the Manitoba Act, 1870, required “diligence” on the part of the state. As she put it, “the honour of the Crown requires that the Crown: (1) takes a broad purposive approach to the interpretation of the promise; and (2) acts diligently to fulfill it.” She then presented diligence as a new development of the meaning of the “honour of the Crown,” explaining that:

This duty has arisen largely in the treaty context, where the Crown’s honour is pledged to diligently carrying out its promises: Mikisew Cree First Nation, at para. 51; Little Salmon, at para. 12; see also Haida Nation, at para. 19. In its most basic iteration, the law assumes that the Crown always intends to fulfill its solemn promises, including constitutional obligations [references omitted]. But the duty goes further: if the honour of the Crown is pledged to the fulfillment of its obligations, it follows then that the honour of the Crown requires the Crown to endeavour to ensure its obligations are fulfilled.

According to her explanation, diligence is a separate consideration, though perhaps still a corollary, from the making of a promise itself, and honour is what ensures diligence.

Pragmatically, however, if I make a promise to you, can you ever assume that your acceptance of my promise means anything else other than that you believe I am committed to fulfilling my promise? If the promise engages at the level of mutual understanding, that is if I make it under

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77 Ibid. at para. 96.

78 Ibid. at para. 75.

79 Ibid. at para. 79.
conditions conducive to our formation of trust, I can’t really add anything to your understanding of what I have done in making my promise by also saying, “I will work hard to fulfill the promise.” That is, if the promise obligates me, I am not any less obligated under it than I would be by adding some additional expression of my intention to work diligently to fulfill the promise. Otherwise, what is obligatory would not be the promise, but rather the additional commitment to diligence.

Further, if I do make a promise that I don’t intend to fulfill with diligence, then we can’t really view such a promise as an instance of “communicative action.” Rather, this seems a clear example on my part of “strategic action,” since I am intending to accomplish something other than the fulfillment of the promise, and which requires me in some way to deceive you. As well, if you understood that my making the promise was strategic, you would not be likely to accept the promise in the first place – unless you shared that purpose, or had one of your own. In those cases, however, the formation of trust would not be a likely goal or consequence of the communicative situation.

The communicative assumptions in McLachlin C.J.’s consideration of promise-making and diligence in relation to the Manitoba Mètis grievance suggest that the critical standard of the “honour of the Crown” remains tied to promise-keeping, despite her effort to clarify it as entailing an additional component. Yet, the status of promises to indigenous communities within Canada’s law remains weak, despite the lineage of holdings from Badger that treaties represent exchanges “of solemn promises.” While that may be, the solemn and sacred nature of treaty

80 Badger, supra p. 20 n. 35, at para. 115.
promises does not seem to mean that they take precedence over legislative intent, as Hall J. indicated in his *Daniels v White* nod to McGilvray J.’s 1932 statement in *R. v Wesley* that: “In Canada the Indian treaties appear to have been judicially interpreted as being mere promises and agreements.” ⁸¹ In a number of cases courts have wrestled with the question of whether or not a particular promise was actually made to a First Nation, as in *Benoit* – concerning a treaty promise regarding the imposition of taxes; or *Lax Kw’alaams* – concerning a promise regarding commercial fishing rights. ⁸² A more fraught line of cases engages the question of what sort of legal implications might stem from such promises as have been made? Here the courts have demonstrated a steady tendency to read historical promises as legally empty obligations.

For instance, the lower courts in *Manitoba Métis Federation* held that promises are subject to parliamentary discretion. McLachlin C.J.’s subsequent effort to reframe the “honour of the Crown” does not seem likely to lessen this tendency to weigh parliamentary discretion over treaty promises, since the courts in that decision’s aftermath are distinguishing diligence in relation to Métis promises from those promises at issue in other circumstances. As examples of this tendency, consider first *Ross River Dena Council* – though dating from the year prior to *Manitoba Métis Federation* – where the Supreme Court of Yukon’s Gower J. accepted the testimony of legal historian Paul McHugh that historical treaty promises could not be thought of as binding Canada to their performance. As Gower J. put it in relation to the Ross River argument that the “honour of the Crown” was involved in its compensation claim,

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⁸¹ *Daniels v White*, supra p. 205 n. 39, at 533.

⁸² *Canada v Benoit*, 2003 FCA 236; *Lax Kw’alaams Indian Band v Canada (Attorney General)* [2011] 56 SCC 536. Binnie J., author of *Marshall* and *Mikisew*, two opinions affirming appeals regarding Canada’s obligation to keep treaty promises grounded in the “honour of the Crown,” held in *Lax Kw’alaams* that lower courts had been correct in concluding that no comparable promises could be found for the several Coast Tsimshian first nations appealing in that case.
Dr. McHugh opined, and I accept, that the honour of the Crown would not have been considered a justiciable principle at that time and in the specific context of the 1870 Order. Today, the principle of the honour of the Crown is clearly justiciable. Is the contemporary principle capable of breathing life into the relevant provision in such a way as to render it currently justiciable and enforceable in this Court? . . . Perhaps, but the argument, if there is one, was not pursued by RRDC. 83

Although Gower J. here acknowledged that in the contemporary situation the “honour of the Crown” was “clearly justiciable,” he also cast doubt on its application to any historical matter. In addition to the comment above, he voiced his hesitation in accepting McHugh’s apparently weightless suggestion that a contemporary setting for determining the legal significance of a promise might yield a different conclusion:

Having generally accepted Dr. McHugh’s expert opinion evidence that the relevant provision was not intended to have justiciable legal force and effect “at that time”, I am left struggling to discern any reason how or why the relevant provision could have subsequently acquired legal force and effect in order to be enforceable in this Court. Dr. McHugh allowed that, notwithstanding his opinion as an historian that the relevant provision was not intended to be justiciable at the time of its inclusion in the 1870 Order, this Court would not be precluded from finding that it has legal force and effect today. I specifically asked Dr. McHugh whether he knew of any examples in Canada or elsewhere where a provision has been found by a court not to have legal effect at the time of its enactment, but because of the evolution of law over time, it took on legal effect. Dr. McHugh answered with the example of Liversidge v Anderson [1942] AC 20, as an example of the dynamics of interpretation, however I regret to say that I did not find the answer to be particularly helpful. 84

That a historian of McHugh’s expertise was unable to direct the court to any decision more relevant than a 70 year old English case dealing with national security and German espionage, suggests the limited ability of promise-making to provide a firm ground for indigenous challenges under the “honour of the Crown.” Courts seem likely to continue finding persuasive

83 Ross River Dena Council, supra p. 95 n. 11, at para. 150.

84 Ibid. at paras. 139-140.
McHugh’s argument that legal history and legal theory are inherently different tasks addressing the legal legitimacy of Canada’s promises to indigenous communities. As a second example of this tendency, consider the post-Métis Nation Nova Scotia Supreme Court ruling in Acadia Nation, which distinguished between the promise to the Manitoba Métis and the promises made to Mi'kmaq communities under the various 1760-61 treaties at issue in Marshall. In this case, a number of Mi'kmaq chiefs had filed pleadings to induce Canada to amend fishing regulations in light of the “moderate livelihood” fishery right recognized in Marshall. The court agreed with Canada, that the chiefs’ pleadings for declarations regarding Canada’s obligations to amend the Fisheries Act were unsustainable. Their lack of a focus around a prosecutable offense, or around a motion for judicial review, hobbled the chiefs’ pleadings. The court determined that even though:

The Chiefs may argue, as their counsel touched on in oral argument, that the Crown made “promises” in 1760-61, and though somewhat factually distinct from the specific “promise” that Canada made with the Métis as negotiated in the 1870 Manitoba Act, the honour of the Crown is also engaged here, and the honour of the Crown may require that the Crown take a broad purposive approach to the interpretation of the “promise” and to act diligently to fulfill it.

Nevertheless, in spite of such possible legal argument, I am still of the view that if presented as drafted now, the judge hearing the application would have to exercise their [sic] discretion against granting a declaration as sought here because the pleaded facts,

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85 McHugh’s positivist-inspired separation of fact and norm yields a pragmatic problem. He separates legal history as recovered by historians concerned with the facts, and history as it might be mined for its present normative utility by lawyers, judges and activists. The court in Ross River Dena Council, however, relied on his historical reading to come to normative conclusions. For his argument on what he calls his “contextualist” approach to legal history, and his criticism of Mark Walters’ “textualism,” see his Aboriginal Title, supra p. 163 n. 29, at 306-08. For Walters’ perspective, see his review of McHugh’s Aboriginal Societies and the Common Law: a History of Sovereignty, Status, and Self-Determination (Oxford: Oxford University Press, 2004), in (2007) University of Toronto Law Journal 57(4) 819.

86 Acadia First Nation v Canada (Attorney General), 2013 NSSC 284.

87 Ibid. at para. 76.
(as yet not expanded upon by evidence of a similar nature) do not provide a clear enough picture of the Chiefs’ specific position such that the declaration sought could be said, to be supported by or “attached to specific facts” or, present a real, present or threatened, dispute to be resolved by the Court.  

As of this writing, in the 10 cases subsequent to Mètis Nation where indigenous parties have drawn on McLachlin C.J.’s explanation of honour of the Crown and diligent fulfillment of promises, eight have been dismissed. In one instance, the court held that: “The result of MMF is a rather amorphous duty on the Crown which arises upon a ‘solemn promise.’” Even without considering the various particulars in these cases, the 80% dismissal rate suggests that the courts are cautious about acknowledging the further relevance of McLachlin C.J.’s construal of the “honour of the Crown.”

To sum up, in these last two chapters I have examined the four communicative practices supporting the doctrine of the duty to consult: the narrative of Aboriginal rights, the task of justification, the theme of reconciliation, and the standard of the “honour of the Crown,” from the standpoint of Habermas's discourse theory. I have argued that the court has given the doctrine weak legs, if its aim has been to provide indigenous parties with a reliable means to address issues of injustice against Canada. In its development of the doctrine of the duty to consult, the court has avoided the opportunity to consider pragmatic dimensions of discourse within its

88 Ibid. at para. 78.

articulation of the fundamental communicative practices shaping the doctrine. As laid out within the jurisprudence, the normative core of the doctrine remains tied to ambiguous extra-legal standards, such as reconciliation and honour; and to the employment of discursively lopsided procedures, such as narrating the shared history of Canada and engaging in the task of justification. Each of the four communicative practices that I identified above is evaluable as a discursive norm, capable of being assessed apart from particular views of justice, moral values or political ideology.

When probed from the standpoint of Habermas’s discourse principle, each leg of the duty to consult reflects continuing commitments on the part of courts to support other doctrines defining the legal, political, and historical relations between Canada and indigenous communities, such as the “asserted sovereignty of the Crown.” The discourse principle could also be useful in probing these additional doctrines. The upshot of such effort might well demonstrate that legal assumptions widely held in Canada could be pragmatically reframed. That is, foundational assumptions about Canada’s legal order could be regarded as open to reframing in ways that would be more appropriate for what has been historically in fact, and normatively in the Supreme Court’s often inchoate but aspirational vision, an intersocietal legal order.
A Constructive Conclusion

In this work I have offered a normative reading of the doctrine of Canada’s duty to consult, which I have grounded in the perspective of Habermas’s discourse theory of law. I have drawn on three fundamental assumptions stemming from Habermas’s work. First is his longstanding approach to the pragmatic dimension of communicative action, which has informed my accounts of discursive norms as standards for evaluating the strength of the duty to consult’s communicative practices, the legs of its intellectual scaffold. Second, is the assumption that the pragmatic aspect of communication is what enables the development of the rule of law. Third, is the assumption that legal legitimacy can only be thought of as rational when it reflects the consensus of those who are subject to a system of rules, obligations and penalties. The latter two assumptions inform my argument regarding the weakness of the duty to consult as an instrument that can serve to increase the scope of legal legitimacy in Canadian law as it impacts indigenous people and communities.

I have employed Habermas because I think that discourse theory offers a possibility of what he long ago called an “immanent” critique. That is, its use does not impose a critical reading of law from the standpoint of a specific metaphysical or ideological position. The discourse theory of law differs from other critical readings of law, such as those of the Catholic natural law tradition, the critical legal studies movement, or found within the work of legal theorist Ronald Dworkin. Such readings often appeal to evaluative assumptions not likely shared by those outside the circle of readers already committed to the normative beliefs of the writer. The aim of discourse theory,
by contrast, is to provide a normative account of law’s working, in particular the creation of a communicatively rational legal legitimacy, which the various parties involved in real-world conflicts, and various readers, could all find worth their more-than-begrudging support, because of their own investment in the norms guiding discourse. Its success in doing this, of course, remains subject to dispute among both legal and political theorists, as well as among those scholars more intent, as I have been here, on examining the functioning of discourse in a given legal or political context. Its success and relevance might also be questioned by those actors engaged within such real-world contexts.

The confrontations between indigenous peoples and Canada and its courts since 1982 have created – or better, renewed – an intersocietal, dialogical context. I have tried to show that Habermas’s view of law as discourse makes it suitable for addressing normative questions surrounding this legal context. In particular, I have argued that Canada’s duty to consult embodies normative requirements for legal legitimacy that arise out of the clash of contending, or at least contrasting, legal orders. Canada’s duty to consult has yielded an enormous number of such clashes between the state and First Nations and other indigenous communities, and promises to yield as many more in the years to come. In order to examine the foundations of the duty to consult in light of its specific aim of promoting legally legitimate intersocietal communication, I have thought it necessary to proceed with the support of a theoretical perspective attuned both to the constraints of power on law, and yet still oriented around the normative task of sharpening law’s ability to provide justice.
Habermas’s developing positions over the years have been subject to considerable criticism. Much of this criticism has remained beyond my scope here. Nevertheless, with my exegesis of key themes in his treatment of law in Chapter 2, I have attended to the context in which Habermas has worked out these themes, and to contrasting approaches to the concept of legal legitimacy, in order to provide readers with an opportunity to weigh my reading of Habermas here against their own perceptions and presumptions. His own historical context, that of post-war Germany’s reconstruction of a legal order in the aftermath of the Third Reich’s evisceration of law, and the near destruction of Germany, may seem far from that of the legal struggles facing indigenous communities in contemporary Canada.

I certainly haven’t meant to equate Canada and Nazi Germany. Canada’s rule of law has applied poorly, and quite destructively, to indigenous communities and persons. Yet, it has been, if only aspirationally, a rule of law; and indigenous legal theorists such as John Borrows and James Sákéj Henderson currently seek practical means of harmonizing Canadian law and rejuvenated indigenous legal orders. On the other hand, Nazi Germany, as H.L.A. Hart failed (terribly) to understand, cannot be represented as functioning on the basis of a rule of law. Nevertheless, in both societies, the face of law, whether grounded in the NS Führerprinzip or in Canada’s English-heritage “royal prerogative,” has played a destructive role in subjugating ethnic/religious minorities (Germany), and self-determining, small-scale, indigenous legal and political orders (Canada).1 For Habermas, rational discourse provides the only suitable foundation for the

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1 Thus post-war Germany and post-1982 Canada have both struggled (in different ways and to different degrees of success) to create legal orders capable of overcoming the destructive impact of law grounded in prerogative power on marginal ethnicities (not to mention the German population as a whole) in the one, and indigenous peoples in the other. My sense of relevant parallel finds support in the work of Ernst Fraenkel, the German-Jewish émigré lawyer. His use of the term Massnahmenstaat to describe the fundamental operations of law as a vehicle for political power in Germany could have received a more
successful creation and preservation of democratic legal and political order. His focus has largely concentrated on the post-war need to recreate, or at least to legitimate, the legal-political institutions of German society, and (his more recent interest) the constitutional order of the European Union. I have drawn on him, thinking that the creation of a rationally legitimate intersocietal legal order in Canada, out of the heritage of prerogative power, requires a similar pragmatic foundation. I have argued that the duty to consult, as currently developed, demonstrates the weak points in the Supreme Court of Canada’s own turn to communication to establish the legitimacy of the law in relation to First Nations and other indigenous communities.

In Chapters 3 and 4 I have provided a response to those critical concerns most directly related to this project. In particular, I have acknowledged limitations within Habermas’s understanding of the position of indigenous societies as political and legal entities within North America. I have suggested adaptations to his perspective that I believe have made it more suitable to my discussion of the duty to consult, principally by recasting the discursive foundation of the system of rights from that of individual members of a political order to include a discursive view of the treaty relationships that are the historical heart of indigenous/settler intersocietal legal order. I have also sought to show that his understanding of the norms of pragmatic discourse coheres with norms that might be found operating within various indigenous legal orders, or at least norms that indigenous parties have employed in the context of intersocietal legal discourse, such as in the production of the 1701 treaty at Montréal. As I have said, how extensive such coherence might be, whether it is widely shared across North American indigenous legal orders, or

common English translation than “prerogative state,” perhaps most literally as the “measurement state.” Yet, he himself, and not his translator Edward Shils, made the case for describing NS legality as an exercise of “prerogative,” drawing the term from James I’s 1613 speech to the Star Chamber. See Fraenkel’s The Dual State: a Contribution to the Theory of Dictatorship (New York: Oxford University Press, 1969 [19411]), at 38.
operative within indigenous contexts other than in the intersocietal production of treaties, remains beyond my scope to consider. My only claim here is that the 1701 treaty, with its combination of performative and pragmatic elements, might serve as a useful template for how discursive norms can be thought to function within the sort of intersocietal legal situations that are brought into being by both the duty to consult, and perhaps as well by Canada’s continued need to shape treaties with First Nations. This claim could easily be tempered or confirmed by indigenous and other scholars, or representatives or practitioners of indigenous legal orders, and who are more familiar with the functions of such legal orders than I am.

I have directed my analysis of the duty to consult to what I have called its intellectual scaffolding. Each of the four communicative practices identified in Chapter 1, and examined in Chapters 5 and 6, have enabled the court to provide a platform on which Canada and indigenous communities can address their frequently contending visions of what it means to engage in intersocietal relations ordered by the rule of law. In order to stabilize this platform, the court has employed both the common law and its developing sense of its constitutional duty to insure the legitimacy of law. The court has oscillated between these two avenues of reading the duty to consult. On the one hand, as Dickson acknowledged in *Sparrow*: “There is no explicit language in the provision [sec. 35(1)] that authorizes this Court or any court to assess the legitimacy of any government legislation that restricts aboriginal rights.”² On the other, the court has rested content with deriving the sources of the duty to consult from precedent within the jurisprudence of Canada and, on occasion, other jurisdictions. As McLachlin C.J. put the common law task in relation to the problem in *Haida Nation*:

² *Sparrow, supra* p. 15 n. 21, at 1109.
Our task is the modest one of establishing a general framework for the duty to consult and accommodate, where indicated, before Aboriginal title or rights claims have been decided. As this framework is applied, courts, in the age-old tradition of the common law, will be called on to fill in the details of the duty to consult and accommodate.\(^3\)

As complicated an exercise as this has proven to be, I have argued that it is more complicated still. The communicative practices that the court has employed are fundamentally "extra-legal." That is, they have no self-limiting means of being sequestered from the general range of usage in other pragmatic communicative contexts. Thus they are practices that may well be inherently contested. A likely upshot of such contestability, which reflects the critical input of voices from the larger public sphere, means that without more sustained consideration of how they might be regarded as specifically legal practices, the volume of cases is not likely to ease off in the years ahead. An empirical question that I have not addressed in this project is: might the large number of challenges to state action brought under the duty to consult be traced to uncertainties stemming from its mixture of extra-legal norms – the communicative practices I detailed in Chapter 1, and its incorporation of a wide range of procedural requirements? It may be that further clarification of this extra-legal “messiness,” if I can call it that, could reduce these challenges. On the other hand, the duty to consult is now the primary tool for First Nations and other indigenous communities to employ in their ongoing struggles with the Canadian state. Given the state’s steady, or even increasing, desire for resource development and regulation, and its continued intent to regulate a broad range of other indigenous interests (family relations, financial administration, economic development, education, etc.) these legal challenges don’t seem likely to ease off – nor should they, from my perspective.

\(^3\) *Haida Nation*, *supra* p. 1 n. 2, at para. 11.
From the standpoint of discourse theory (or at least my reading of it), the messiness of duty to consult jurisprudence provides a strong demonstration of Canada’s lack of seriousness regarding its relations with indigenous peoples. Provincial governments and federal departments, business concerns, the law firms that serve them, and perhaps even some First Nations governments, may all see this messiness as most basically indicating that the law needs settling, that the Supreme Court needs to provide certainty above all. The “procedural duty to consult” referred to in *Tsilhqot’in Nation*, if secured by courts intent on promoting regularity and filling in gaps, would, I imagine, satisfy the concerns of most of these groups. However, as Habermas puts it: “legal certainty, which is based on the knowledge of unambiguously conditioned behavioral expectations, is itself a principle which must be weighed against other principles.” Applied here, this means that the procedures insuring certainty concerning the duty to consult could only be regarded as rationally legitimate to the extent that they have been derived from, constructed out of, the specific intersocietal context that is the focus of the duty to consult. Only when derived from conditions of communicative equality could procedures affecting indigenous parties be potentially viewed as legitimate.

Discourse theory suggests another approach to the messiness of the current system than further clarification by what Habermas calls “professionally and judicially institutionalized monopolies on interpretation” charged with “internal revision according to their own standards.” Instead, this messiness could also be viewed as an example of the public sphere influence that inevitably

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4 *Tsilhqot’in Nation*, *supra* p. 43 n. 107, at paras. 77-78.

5 *BFN*, at 220.

6 *Ibid*. at 222.
surrounds the courts and requires discursive responses – and the establishment of discursive procedures – that resonate with indigenous parties, that is, could be intersocietally endorsed. Approach as a contentious site of law within an intersocietal public sphere, the clarification needed of the duty to consult would look somewhat different from that provided so far. The extra-legal qualities of the communicative practices that I have argued undergird the duty to consult could be seen as markers of a different set of questions. They could perhaps give hope of pragmatically achieved answers that would provide the duty to consult with a greater degree of legal legitimacy in the intersocietal context that is its focus.

I would suggest that this different sort of clarification might consider the duty to consult’s reliance upon extra-legal communicative practices as a positive feature. That is, these practices could be seen as spurs for developing a stronger intersocietal basis for Canada’s legal relations with indigenous communities. As I have argued, these communicative practices are inherently public. They remain frequently embedded within our traditions of moral discourse (or theological discourse in the case of reconciliation), and inescapably tied to our imaginative projects – that is, our willed envisioning of the legal relations we choose to see ourselves maintaining.

I have sought to show that the discursive norms they embody require that these practices be extended beyond the range of employment that the courts have been most comfortable acknowledging. Admittedly, this assumes that the courts have been sincere in holding that the purpose of the duty to consult is to provide for reconciliation, and to respect indigenous rights that Canada has most typically “honoured in the breach” – in Dickson C.J.’s so-softly phrased
construal of law’s reach in *Sparrow*. For instance, I have argued that at the pragmatic level of communication, one cannot attribute honour to oneself, nor can one justify a policy or decision, without consensual feedback from those over whom the claim of honour would hold sway, or those who would be affected by the policy or decision. That is, while still considering oneself to be functioning within a democratic legal order.

However, the courts have largely been content, thus far, to bolster their vision of the duty to consult in ways that would eviscerate the possibility that the duty is likely to promote communication “oriented towards mutual understanding,” as Habermas phrases the normative goal of pragmatic discourse. When followed into the ground, the pillars of the duty to consult rest on extra-legal doctrines that remain unchanged since the colonial era – as the idea of reconciling indigenous communities to the “assertion of Crown sovereignty” illustrates. That the courts, the Canadian state, and large segments of the public as well, remain content with this colonial inheritance can easily give credit to the dark suspicions of Canada’s rule of law found within the work of indigenist authors such as Taiaiake Alfred, although it is not confined to intellectuals. John Borrows has expressed what he sees as a common and deep-seated suspicion of law’s impact on indigenous people:

> Most Indigenous people do not feel it is safe to go to the courts as they are currently constituted. Their testimony and history are subject to discrediting cross-examinations and harsh burdens of proof. Their legal traditions do not form standards for judgment in relation to their testimonies. Furthermore, Indigenous peoples do not find peace or security when raising their issues in the political sphere.\(^7\)

Habermas’s discourse perspective, like other critical approaches to law, can also yield the easy conclusion that law’s general effects on indigenous individuals and communities, and the effect of the duty to consult in particular, amount only to “strategic action,” serving to do little

\(^7\) Borrows, *supra* p. 107 n. 31, at 173.
more than advance the hold of money and power over indigenous “lifeworlds.” Although I have not really offered a reading of the strategic factors affecting the implementation of the duty to consult in particular, or law in general, this does not mean that I think they are insignificant – and even capable of deforming any potential for law to serve as a vehicle for justice between Canada and indigenous peoples.

Personally, it seems to me a fair reading of the jurisprudence to say that Canada’s courts have not yet found their equivalent of the US *Brown v the Board of Education*, which refuted the long-standing racial doctrine of separate but equal. As I argued in Chapter 5, at most the courts have suggested that times change, and that with those changes certain communicative practices and presumptions of value may go by the way. However, doctrines such as the “assertion of Crown sovereignty,” or the “doctrine of discovery” cannot be shelved as though they were simply the product of another age. For McLachlin C.J. to hold, as I also noted in Chapter 5, that the doctrine of *terra nullius* “never applied in Canada, as confirmed by the Royal Proclamation,” is to scoot around an issue that the courts should be expected to confront directly.⁸

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⁸ By scooting, I mean that the chief justice may only have had in mind the conclusions of Lamer C.J. in *Van der Peet*, that “the maxim of *terra nullius* was not to govern here” (*supra*, p. 2 n. 3 at para. 270). But, it is just as likely that she had in mind the academic debates regarding the historical usage of the term in Australia (since Lamers C.J. was also referring to Australia). This suggests, however, that she was tilting only at a straw man. A number of scholars have demonstrated that *terra nullius* is not found within 18th and 19th century international law (at least up until the 1880s), or within the writings of colonial-era Australians. Rather, it emerges in the late 19th century work of European lawyers concerned with the rationalization of colonial regimes in Africa. More prominently, it appears in late 19th and 20th century questions related to exploration and development of, first, the polar regions; and later, lunar space. Australia’s *Mabo* decision, then, famous for overturning the doctrine: “The lands of this continent were not terra nullius or ‘practically unoccupied’ in 1788,” therefore only succeeded in defeating an anachronism. See *Mabo v Queensland* (No 2) [1992] HCA 23, at 56. Or, in *Mabo* the Australian court created a fiction of the fiction of *terra nullius*. For an influential critique of the “stage-managed” legal discourse produced in Mabo, see David Ritter “The ‘Rejection of Terra Nullius’ in Mabo: a Critical Analysis” (1996) *Sydney Law Review* 18(1) 5, at 33. For an overview of the subsequent deeply-politicized debate (admittedly, from one of its continuing key players) as well as the history of the term’s use in international law, see Andrew Fitzmaurice “The Genealogy of *Terra Nullius*” (2007) *Australian*
It may be that the courts themselves, by inclination or ideology, or by an understandable sense of judicial restraint, cannot be expected to conceive of law in terms of the discursive framework that Habermas has advocated, and that I have somewhat recast here in an intersocietal direction. However, even if that is so, I can imagine, for the sake of argument at least, a couple of examples as to how the courts could still be expected to consider the merits of challenges that might be brought under discursive considerations. First, assume that a well-prepared indigenous claim is not dismissed for any of the myriad procedural reasons that regularly prove insurmountable, such as laches, or the increasing number of dismissals for “collateral attack” that have occurred since *Lefthand.*9 Imagine that in its submissions justifying its action: providing a tree farm license,

*Historical Studies* 129(1) 1. None of this reconstruction diminishes, as these authors acknowledge, the necessity of confronting the legal doctrines that did justify, whether prior to or subsequently, the erosion of indigenous control of traditional territories in North America. Although the label *terra nullius* does not necessarily fit here, the “doctrine of discovery” does, given that it informs the basis of Indian law in the US Marshall cases, incorporated into *St. Catharines Milling and Lumber,* and discussed uncritically by the justices on both sides of the title question in *Calder,* supra p. 95 n. 11, at 327 and 381); and by Dickson C.J. in *Guerin,* supra p. 17 n. 26, at 378). For a post- *Tsilhqot’in Nation* mention of the “astounding consequences” of the doctrine of discovery in Canada, see *Tyendinaga Mohawk Council v Brant,* 2014 ONCA 565, at 62. For a recent argument that in New France *terra nullius* was in fact the source of key practices undergirding corporate purchase of land, and making any legal doctrine irrelevant in the historically causal process of indigenous dispossession, see Edward Cavanagh “Possession and Dispossession in Corporate New France, 1600-1663: Debunking a "Juridical History" and Revisiting *Terra Nullius*” (2014) *Law and History Review* 32(1) 97.

9 *R. v Lefthand,* supra p. 179 n. 65. In this frequently cited decision (37 times as of this writing), the Alberta appeals court thought the time had come to restrict appeals to the duty to consult arising from individual violations of provincial regulations and other indirect challenges to the validity of regulations. The court found that:

From one perspective collateral attack runs contrary to the rule of law. It undermines the jurisdiction of the courts. Collateral attack also undermines the right of the community to be consulted before aboriginal rights are impacted. Indeed, the duty of consultation with the community is difficult to reconcile with a legal position that, even after such consultation and the enactment of regulations by a democratically based process, aboriginal individuals might on their own initiative simply decline to accept the regulatory scheme achieved, and disobey it. Collateral attack also usurps the legitimate jurisdiction of the regulators to manage the fishery. It distorts the respectful relationship that should exist between individuals and their democratic government. Acceptance of collateral attack in one area of legal regulation, moreover, may demoralize the otherwise law-abiding as to other areas of law (*ibid.* at para. 24).
authorizing the damming of a river, or changing regulations due to conservation concerns; the state draws on the “assertion of Crown sovereignty,” or defends its exercise of prerogative on the basis of appeals to the division of powers contained in the Constitution Act, 1867.

From a pragmatic discourse perspective, in which underlying presumptions, or “validity claims,” can be brought to light and “discursively redeemed,” the assertion of sovereignty should be treated as just such a contestable claim. That is, its discursive validity within a pragmatic context would be secured best by the concurrence of those it addressed. An indigenous party or its counsel could raise pragmatic questions, such as: how is it that the state presumes for itself sovereignty over the appellants? Where is evidence of their communal concurrence in the assertion of sovereignty? Through what measures did indigenous communities renounce their historical self-determination and become subjects of Canada’s sovereignty? Such pragmatic questions, grounded only in the appeal to legitimacy achieved through mutual understanding, would press the courts to offer compelling accounts of why the communicative practice of the “assertion of Crown sovereignty,” or others anchoring the duty to consult, deny the communicative standing of indigenous parties as equals.

As a second example, consider again the idea that First Nations lack a “veto” over development projects affecting their traditional lands. From a discourse perspective, the courts’ view that the duty to consult provides no right of a veto seems inherently backwards. As the courts have cast it, the ability of First Nations to say “no” to a project could only be the result of their first having been given that right, or that legal standing, by the state. The presumption in discourse theory, as I have laid it out, is that, by contrast, all communication oriented towards mutual understanding
between rational beings requires the inherent ability to exercise the option of what White and Farr refer to as “no-saying,” as I mentioned in Chapter 2.\textsuperscript{10} Without the ability to disagree: to refuse another party’s strategic or pragmatic intent, to object to the other party’s presumptions, or the other party’s account of facts; discourse approaching mutual understanding is impossible. Although certain social contexts might be exceptions to this option of “no-saying,” they are deviations from the fundamental norm of communicative equality. Even to maintain these deviations, the power of some over others within given settings (family, school, work, the military, prisons) requires a pragmatic explanation that those who don’t stand as communicative equals could be expected to acknowledge as legitimate. The public sphere, however, in which the law develops as the sinews of democratic, constitutional order, requires communicative equality, and always entails Habermas’s “risk of dissensus.” Any effort by the state or the courts to explain why they presume that indigenous communities share more with those contexts of dependency or subordination than they do with self-determining legal political orders (such as provinces) could only be redeemed if indigenous peoples themselves concurred.

However, in Canada’s legal relations with First Nations, most publicly in the duty to consult, communicative equality, and the “risk of dissensus” has disappeared from the settings in which state and indigenous communities address settler desires to impact indigenous rights or interests.\textsuperscript{11} As a successfully “redeemed” pragmatic, communicative act, to assert sovereignty would require an affirmation from those who concur to be subject to that sovereignty. To invoke

\textsuperscript{10} White and Farr, \textit{supra} p. 66 n. 39.

\textsuperscript{11} That is, if we presume that communicative equality was operative, or at least more operative, during the treaty formations of the colonial era, and perhaps, or to a lesser extent, within the formation of the numbered treaties.
honour is to need the confirmation of those who recognize that honour has been maintained or achieved. To justify a policy impacting others is to receive their confirmation that the justification is legitimate. To narrate the shared history of Canada’s consideration of Aboriginal rights requires the voices of those whose gifts (or what James Sinclair referred to as bagijiganan, as I noted in Chapter 4) made the country possible. Without the presumption of communicative equality, the communicative practices that have laid the foundations for Canada’s duty to consult regarding Aboriginal and treaty rights with indigenous parties remain far from embraceable, and far from rationally legitimate.

Perhaps the presumption of communicative equality needs glossing as the American courts have done with regard to “reserved rights” in general – meaning that rights are held until willingly given up, instead of being created, by an act of treaty. Justice McKenna expressed the ultimate reason for the reservation of Yakama fishing rights at issue in Winans as being they are: “not much less necessary to the existence of the Indians than the atmosphere they breathed.” If such a construction were put on the pragmatic claim of communicative equality, or if it were regarded

12 That doctrine was expressed in United States v Winans, 198 U.S. 371 (1905), at 381, and – although tied only to the question of water rights – in Winters v U. S., 207 U.S. 564 (1908). It was based on canons of treaty interpretation in U.S. law dating back to the Marshall cases, and summarized in Jones v Meehan, 175 U.S. 1 (1899). In Sioui, Lamers C.J. incorporated this canon into Canadian law with his quotation of Jones v Meehan (R. v Sioui, [1990] 1 SCR 1025, at 1036). As Justice McKenna framed these prior rights in Winans:

The right to resort to the fishing places in controversy was a part of larger rights possessed by the Indians, upon the exercise of which there was not a shadow of impediment, and which were not much less necessary to the existence of the Indians than the atmosphere they breathed. New conditions came into existence, to which those rights had to be accommodated. Only a limitation of them, however, was necessary and intended, not a taking away. In other words, the treaty was not a grant of rights to the Indians, but a grant of rights from them — a reservation of those not granted (ibid, at 381).

as what Brian Slattery has called a “generic right,” it would go a long way towards reorienting
the context in which the courts and Canada have seen the duty to consult to function.\textsuperscript{13}

This would mean that the pressing questions of clarification that might be woven into future
legal challenges to specific development projects could push Canada to justify – to redeem – its
validity claims regarding how, where, and when indigenous nations lost their presumptions of
communicative equality. That this justification could only proceed with the concurrence of those
who are presumed to have lost this condition indicates that Habermas’s vision of justification is
not that employed by chief justices Dickson, Lamer or McLachlin. However, as I have tried to
argue at several points, I think this focus on communicative equality coheres with the calls of
indigenous scholars for a revamping of the legal order that Canada shares with First Nations and
other indigenous communities. Of course, these same scholars might strongly disagree with my
seeking to bring them on board.\textsuperscript{14} Nevertheless I think the pragmatically necessary assumption of
communicative equality provides clears a path for thinking about how any such revamping might

\textsuperscript{13} See his “A Taxonomy of Aboriginal Rights,” in Foster, Raven and Webber \textit{supra} p. 106 n. 31, at 123.

\textsuperscript{14} Space prohibits me from addressing this dovetailing any further than I already have in Chapter 4, where
I indicated that even the stridency of Taiaiake Alfred’s ethnic nationalism reveals a strong communicative
core. I think this core is also operative within the work of such scholars as Val Napoleon, Henderson,
Borrows, Dale Turner, and others. Napoleon herself draws on Habermas’s argument for a civic rather
than an ethnic nationalist legal and political order in Canada, in arguing for a civic view of indigenous
nationalism in Canada. See her “Extinction by Number Colonialism Made Easy” (2001) \textit{Canadian
Journal of Law and Society} 16(1) 113, at 137. See also Turner \textit{supra} p. 96 n. 14, at 120-121. As well, see,
generally, Henderson’s “Dialogical Governance,” \textit{supra} p. 132 n. 29. John Borrows does not directly
pursue communicative themes in his call for revisioning our thinking of Canada’s constitutional order,
focusing instead on a more Foucauldian view of legal practices, \textit{supra} p. 107 n. 31, at 284. Nevertheless,
his project of reconciling civil, common and indigenous legal traditions entails the position of
communicative equality that I have argued for here. He notes, for instance, “another important way to
ensure that our legal traditions remain open to new and healthy influences is to regard them as being
situated within interpretive communities in which those who are affected by them are able to participate
in their continued construction,” \textit{ibid.} at 9-10.
proceed. In particular, I think this is so because Canada’s courts can be found to share in this same necessary assumption.

The discourse view of legal legitimacy conceives of law as developed democratically within a real-world context of communication by equals. Courts also embrace this same view of legitimacy, and employ communicative measures that they presume will be accepted as legitimate by those affected by their rulings. Although many lawyers and judges may presume the heritage of Weberian or Hartian conceptions of legal legitimacy, they must also at some level subscribe to Habermas’s rendering of discursive rational legitimacy as democratic. In Canada, this understanding of legal legitimacy stands out most strongly in the *Quebec Succession Reference*. There the court tied the legitimacy of legal and political order to a source other than “sovereign will.”

The consent of the governed is a value that is basic to our understanding of a free and democratic society. Yet democracy in any real sense of the word cannot exist without the rule of law. It is the law that creates the framework within which the “sovereign will” is to be ascertained and implemented. To be accorded legitimacy, democratic institutions must rest, ultimately, on a legal foundation. That is, they must allow for the participation of, and accountability to, the people, through public institutions created under the Constitution. Equally, however, a system of government cannot survive through adherence to the law alone. A political system must also possess legitimacy, and in our political culture, that requires an interaction between the rule of law and the democratic principle. The system must be capable of reflecting the aspirations of the people. But there is more. Our law’s claim to legitimacy also rests on an appeal to moral values, many of which are imbedded in our constitutional structure. It would be a grave mistake to equate legitimacy with the “sovereign will” or majority rule alone, to the exclusion of other constitutional values.15

Here the court can be seen to have given legitimacy a communicative cast, placing it firmly within the democratic public sphere – the product of “participation of, and accountability to, the people,” animated by “moral values,” and not least, “the interaction between the rule of law and

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the “democratic principle.” That law, politics and morality all function together to create the conditions of legal and political legitimacy, suggests that discourse grounded in communicative equality is also at the heart of the court’s rendition of Canada’s constitutional tradition. If so, I think it further underscores my argument, that the “extra-legal” communicative practices supporting the duty to consult require, and are capable of receiving, the additional support and extension of both Canada’s and indigenous nations’ best attempts to embrace an intersocietal legal order.

Finally, I should acknowledge that I can see the argument I have made easily leading to a variety of critiques, or further developments. With my having employed a key figure in the theory wars, readers committed to positions contrary to the one engaged here might want to show the limitations inherent in Habermas’s version of discourse theory. As I have said, I am not at all opposed to the critical positions on law developed within other prominent perspectives. I merely think they provide a more solid analytical rather than a normative framework. Some readers might simply object to the idea that law is anything more than the weapon of the powerful. Others, perhaps more sympathetic to Habermas’s concerns, might object to my rendition of the specific themes I have drawn upon here.

I can also imagine, as I indicated above, that readers better grounded in indigenous legal orders than I am could qualify, or dismiss, my characterization of the discourse basis of such orders. The diversity present across indigenous North America, in terms of both historical patterns of interaction with settler power, and in terms of socio-political organization, kinship structures and worldviews, could yield a range of claims about how legal orders have functioned, traditionally;
as well as in their interactions with the forces, and courts, of settler society. Such readers might also address questions about the range of perspectives within indigenous communities on the functioning of the duty to consult: such as its strength as a means for resolving conflicts stemming from settler state development or regulative interests, or specific suggestions for improving its capacity to provide intersocietally legitimate resolutions to such conflicts. As well, scholars and representatives of particular indigenous legal orders might find it useful to address the utility or the disutility of my argument for a discourse reading of the duty to consult, in terms of its relevance to the normative perspectives on law contained within such particular legal orders.

Finally, I can also imagine that readers oriented towards empirical studies of the law might find a number of my claims suitable for examining further. How does the duty to consult measure up when contrasted with legal instruments available in other common law jurisdictions? What factors – ideological, historical, regional, or other – affect the outcomes in specific cases? What factors lead First Nations to adopt specific strategies in seeking consultation or in challenging the range of rulings brought against their claims? What patterns of communication might impact outcomes in particular cases, or ranges of cases? All of these questions would be helpful to answer in seeking to understand the workings of the duty to consult. As empirical questions, however, I do not think that on their own they would be capable of dismissing the normative qualities of a discourse theory approach to the duty to consult.
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