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# Aboriginal Rights

* **Aboriginal Rights** belong to communities; each gets a unique bundle, possessed by families and individuals within each community; Purpose to protect the Aboriginal culture in question
* Some relatively radical opinions on Aboriginal rights (part of broader policy/academic discussions):
  + They’re not relevant today, remnants of Colonial times
  + These rights should not be contained in the Charter/Constitution
  + They’re Colonial tools that offer only a limited amount of autonomy, and force Aboriginal people to define their culture in a way that fits modern common law
* Terminology: “Native” and “Indigenous” not contemporary legal terms; Indigenous used in international doctrines (e.g. UN). “Indian” is important legal term in Canada and US, but rather discriminatory/Colonial. “Aboriginal” better; affirms historical connection to land. “First Nations” used in prov legislation, quite popular, but not often defined. Best: use the names the Aboriginal groups give themselves in their own languages

# History

## Timeline of Aboriginal Relations

* Early interactions between Euro powers/settlers and Indigenous nations along NA eastern side
  + Europeans debated the legality of what they were doing in North America when they first settled here
* Establishment of rules around interactions between European powers
  + **Doctrine of Discovery**: the title of the land belongs to the government/nation (the claimor) who discovered it; Practical meaning: Jurisdictional authority of an European nation to exclude other nations from that Abor land, and then consummate that possession of land
* Treaties were the standard practice of dealing with Aboriginal people; brief agreements between the colonial governments (on behalf of their monarchs) and the bands of people they met
  + **Wampum belts**: contained symbols that conveyed the promises that were made; cognizable to both parties, but often emphasized things different from the written terms
  + **Covenant Chain**: series of treaties between British govt and 6 First Nations
    - Since Iroquois had a lot of relative economic and military might at the time, they were able to have a significant impact on the future
* **Seven Years War**: England was the big winner, gaining New France and Florida; France gave Louisiana to Spain
  + Iroquois aligned with England to prevent the French from forming their cordon; made this agreement to let English live on their land, as long as they respected Iroquois rights
* Establishment of policy – that some see as crystallizing into law – around British-Indigenous interactions
  + Culminating in ***Royal Proclamation of 1763***: statement by Crown, not enacted by colonial/imperial govt
    - Opening paragraph of it is quite important; comes up in the cases below
    - The wording “ceded to or purchased by us” implies consent
    - “Tribes with whom we are connected, and who live under our protection”: the nature of this protection is debated on in the following 3 cases
    - Any land beyond Quebec and beyond HBC land is reserved for Indian use
    - Led to a certain policy that went on in future – dealing with land, also protection of Aboriginals
* Shift in understanding of that policy/law: Marshall CJ’s decisions and *St. Catherines’s* (1820-30s), though these cases did show that they re-understood what the Royal Proclamation meant
* Rise of the **oppressive Canadian state**: The *Indian Act*, residential schools, a vast web of law and regulation
  + See *Sparrow* case where there were more restrictions on fisheries
* Mid-1900s: Govt tries to complete project of assimilation (e.g. *White Paper*) 🡪 Rise of Indigenous pol activism
* Recognition of pre-existing Indigenous interests: *Calder* decision changed legal landscape with recognitions
* Govt responses: Land claims policy (the one still in place today), new treaty negotiations, pilot programs (e.g. new fishery programs along the West Coast)

## Entrenched Constitutional Rights

### S. 35 Constitution Act, 1982

* Recognizes and affirms past and future rights
* S. 35(1): The existing abor. and treaty rights of the abor. peoples of Canada are hereby recognized and affirmed.
  + (2): In this Act, “aboriginal peoples of Canada” includes the Indian, Inuit, and Metis peoples of Canada.
  + (3): For greater certainty, in (1) “treaty rights” includes rights that now exist by way of land claims agreements or may be so acquired. (AKA: It brings modern day treaties into this area of protected rights)
* S. 35.1: The government of Canada and the prov govts are committed to the principle that, before any amendment is made to Class 24 of s. 91 of the *Constitution Act, 1867*, to s. 25 of this *Act*, or to this Part:
  + (a) a constitutional conference that includes in its agenda an item relating to the proposed amendment, composed of the PM of Canada and the first ministers of the provinces, will be convened by the PM; and
  + (b) the PM will invite representatives of the abor peoples to participate in the discussions on that item

### S. 25 Charter

* S. 25: The guarantee in this *Charter* of certain rights and freedoms shall not be construed so as to abrogate or derogate from any abor, treaty, or other rights or freedoms that pertain to the abor peoples of Canada, incl.:
  + (a) any rights or freedoms that have been recognized by the *Royal Proclamation* of Oct 7, 1763; and
  + (b) any rights or freedoms that may be acquired by the abor peoples by way of land claims settlement.

## RCAP Report

* Condensed hundreds of years of history of Abor and European relations into a report
* Commissioned as a result of recognition of Aboriginal crisis
* An interesting attempt to condense multiple historical issues into one report

## Barriers to Understanding

* Law: Governments make statements that may just be meant as non-binding policy
  + Aboriginal peoples often have seen these as statements of law and have relied upon them
* Sovereignty: Brits saw RP 1763 as a declaration of their sovereignty over North America, while Abors saw RP as a declaration of the British’s concern over the Abor people’s interest
* Treaties: Aboriginals historically saw treaties as agreements for resource sharing and a mutual understanding, whereas Europeans saw these treaties as a document that transferred ownership of the land

# Early Jurisprudence 1600s – early 1800s

## The Marshall Trilogy (SCOTUS)

* Distorted view of Abor relations history, later precedence in Can jurisprudence (similarities in *St. Catherine’s*)
* State of Georgia trying to rid itself of Indian peoples, and then CJ Marshall became aware of what they’re doing
* Doctrine of discovery claimed in US and became the basis for much of treatment of Abor land relations
  + Claimed European nations accepted it because it was in their self-interest

#### Johnson & Graham’s Lessee v McIntosh (1823) US

|  |  |
| --- | --- |
| Facts | P’s claimed title to property conveyed by Piankeshaws before Am. Revolution but after *Royal Proclamation* of 1763. D claimed title to the same property based on a grant from the US govt. |
| Issue | Is the grant title recognized in US courts? |
| Discussion and Analysis | - All held lands were originally granted by the Crown  - View of history informs the judgments of the cases; it plays a role in justifying some of the legal principles that have developed |
| Ratio | Uninhabited land is the property of the discoverers, and the government holds ultimate title. P has no title which can be sustained in US courts. |

#### Worcester v Georgia (1832) US

|  |  |
| --- | --- |
| Facts | P was condemned for the crime of living within limits of the Cherokee Nation without a license, as per a new Act passed in Georgia. |
| Issue | Is this Act, which bans white persons from living on Cherokee land without a license, valid? |
| Ratio | Any intercourse between the US and the Cherokee Nation is, by Constitution and laws, vested in the US government. |
| Holding | The condemnation of P should be reversed and annulled. |

#### Cherokee Nation v Georgia (1831) US

* Key legal principles, positions, and concepts that emerge from the Marshall trilogy:
  + Doctrine of Discovery
  + “Occupation” (in relation to ownership or title)
  + “Jurisdiction” or dominion (in relation to ownership or occupation)
  + “Protection” (in relation to sovereignty)
  + Indian powers of governance
  + Indian interest in land/territory

## Royal Proclamation, 1763

* Below all titles, there’s an underlying title to the govt
* A treaty at this time meant that interest in land released, therefore perfected Crown title on the land
* Determined that Aboriginal land rights/interests are a burden on the perfection of the Crown title
* Abor possession can only be ascribed to RP’s general provisions in favour of all Indian tribes then living under the sovereignty and protection of the British Crown; no change since in character of their interests in lands
* The lands reserved are expressly stated to be “parts of the dominion 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 Indians as their hunting grounds, under his protection and dominion (*St. Catherine’s*?)
* RP not applicable in BC because it’s not needed to govern treaty rights

## Indian Act, 1876

* Document asserting fed govt policy on Abor peoples – assimilation primarily, and what can be done on reserves
* Still exists today, though both govts and Aboriginals want it abolished (although for different reasons)
* 1927-1951: prohibited fundraising for Indian claims
* 11 Treaties signed in total; *Treaty 8* applies to BC
* S. 91(24) and s. 109 of the *Constitution Act, 1867* are relevant to aboriginal rights
  + S. 91(24) grants the ability to create Indian reserves

## St. Catherine’s Milling and Lumber Co v The Queen (1888), PC

|  |  |
| --- | --- |
| Facts | Indian title was extinguished. Dominion of Canada and the Province of Ontario both want claims to lumber collected from that land, to sell to P. P/A; D/R. |
| Issue | Who’s entitled to benefit from resources collected on land whose Indian title has been extinguished? |
| Ratio | Interprets RP to mean that Indian title is only a “personal and usufructuary right”. |
| Holding | Appeal dismissed. The Crown is entitled. |

* Rights come from the goodwill of the Crown (*Royal Proclamation* para 7)
* Worrisome note: the language of this case did not include permission of the Aboriginal peoples: instead, “surrender or otherwise be extinguished”
* **Personal rights** examples: contracts, common law right to fish; not rooted in land

|  |  |  |
| --- | --- | --- |
|  | Source of Indian Interest | Extinguishment of Indian Interest/ Perfection of Crown Interest |
| Royal Proclamation | Prior occupation and activity | Purchase or cession |
| Marshall CJ | Prior occupation and activity | Purchase or conquest |
| *St. Catherine’s* | Goodwill of sovereign (as shown in RP) | Surrender or otherwise |

# Pre S. 35 Cases in the 20th Century

## White Paper

* Trudeau’s *White Paper* stated that treaties were no longer to have legal recognition
* A failed attempt at assimilation, wanted to repeal *Indian Act* 🡪 Unsuccessful, never became law
* With advent of *Charter*, post-1982 treaties not just legal instruments but constitutionally protected instruments

## Calder v Attorney-General of British Columbia, 1973 SCC

|  |  |
| --- | --- |
| Facts | Govt attempted to abolish *Indian* Act and implemented assimilation policies. P claim that the aboriginal title over a piece of land that had been present before Confederation had never been extinguished, and that the tribe therefore still had title to the land. This claim was denied at trial and upheld at appeal. P/A = reps BC Nisga’a Tribe; D/R. |
| Issue | Do the alleged aboriginal land claims exist? If so, were they extinguished? |
| Discussion and Analysis | - Test for **extinguishment** (judges looked to *Marshall Trilogy* on this issue): it requires clear and plain intent in colonial instruments. Crown must provide proof (e.g. treaty doc clearly stipulated intent to remove Indian title) |
| Ratio | RP not the sole source of Indian Title; it recognized them but didn’t create. Abor land claims extinguished once government exercises control over the lands. |
| Holding | Appeal dismissed since P can’t sue Crown. But majority voted in P’s favour. |

* Ordinary *intra vires* govt legislation can amend treaty rights
* In order to consider joining Canada, BC insisted on maintaining Indian rights as liberal as the ones they already had; which is ironic because they weren’t really liberal to begin with
* All Aboriginal rights that they wanted to extinguish had to be extinguished between 1858-1871 because there was no Crown/colonial govt to do it before 1858, and Confederation occurred in 1871 so after that BC lacked the jurisdiction to do such a thing
* Initiated a change in govt policy toward Aboriginals: Spurred govt into allowing for comprehensive claims and special claims, helped initiate creation of s. 35
* Pulled through from St. Catherine’s:
  + Indian title as “personal or usufructuary right” (Judges not a fan of that)
  + Indian title as a burden on underlying Crown title
  + At assertion of sovereignty, Crown came to possess “radical” (underlying) title
  + Crown is the sole/absolute sovereign (no concept of “domestic dependent nationhood” is considered, let alone recognized)
* Suggestion that Indian titel could be simply grounded in *possession*; was mentioned but this is not fully settled or fully adopted as law (see recently released *William* case)

## Guerin v the Queen (1984) SCC

|  |  |
| --- | --- |
| Facts | P, a member of Musqueam Band, sued D over the bad deal they were negotiated into regarding surrendering a portion of their reserve land so that D could lease it. Golf course went in and got a sweet deal. P wanted damages. |
| Discussion and Analysis | - Can’t be a real trust for the Band because there’s no longer an interest for them |
| Ratio | The Crown may owe a fiduciary duty to Aboriginal peoples in certain contexts (e.g. surrendering reserve lands) because the Crown took over responsibility for their interests. This is not in the law of equity and not subject to statutory limitations. |
| Misc. | Trial: Accepted that they would not have consented to the surrender if they had known what the actual agreement would look like. Awards damages for breach of trust relationship. CA: Overturns. |

* Decision treats Musqueam in a paternalistic fashion: this is the emergence of the **fiduciary doctrine**
* **Fiduciary duty**: The party with more power must act honestly and in good faith with a view to the best interests of those they look after. This concept can create “paternalism in the law” – parent to child and therefore there is an unequal power balance
* There cannot be a trust because the Musqueam didn’t possess a legal interest, their title is different. The land title they gave up was *sui generis* (goes back to *St. Catherine’s* idea of personal and usufructuary right)
* How is this related to the notion that ‘Aboriginal title’ constitutes a “**personal and usufructuary right**”?
  + = ***sui generis*** (unique) – fiduciary interest can only be created because this is not a legal interest which related to AT and “personal and usufructuary right 🡪 something that does not fit into the traditional land title system of BC
* Where we stand on aboriginal title and rights issues after this decision:
  + Aboriginal title is now firmly ensconced in the common law as ‘*sui generis’* – it is neither simply a ‘beneficial interest’ nor a ‘personal and usufructuary right’. 🡪 it does not disappear after surrender nor does it exist like fee simple – it is somewhere in between
  + Indigenous interests in land (whatever their nature) seem to have to be surrendered to the Crown in order to serve economic purposes.
  + A powerful undercurrent of paternalism remains unchallenged.

# “Aboriginal Rights” General Framework Established

## R v Sparrow (1990) SCC

|  |  |
| --- | --- |
| Facts | D, a member of the Musqueam Indian Band, was charged under *Fisheries Act* for fishing with a drift net longer than that permitted by the terms of the Band’s annual Indian food fishing licence (allows fishing for themselves to eat, but not to sell). |
| Issue | SCC found definite right for food and ceremonial catches because they’re at the heart of the culture, but what about for commercial purposes? |
| Discussion and Analysis | - D: Exercising his existing aboriginal right to fish and that the net length restriction in the Band’s license is inconsistent with s. 35(1) of *Constitution Act, 1982* and thus invalid  - R: Regulation extinguished the aboriginal right |
| Ratio | The Musqueam have an aboriginal right to fish the Fraser, but this makes no broad statements about other native band fishing rights. See test above. |

* At this point, still didn’t know how to identify what’s an Aboriginal right
* Established framework for **infringement** (interference with the exercise of the right)
* Crown had a fiduciary obligation; its sovereignty remains but must be reconciled with s. 35
* First case to look at s.35 and what it means for the Crown in regard to Abor peoples (implied fiduciary duty when engaging in Abor relations)
  + S. 35 is not the source of Aboriginal rights, but it provides a solid constitutional base on which later decisions can be made
    - A difference between s. 35 rights and the protection of rights (which is ensured someplace else)
* Cites the *Manitoba Language Reference* – which emphasized how the Constitution 1982 is the “Supreme Law” of Canada, and because s. 35 is in the Constitution this must be given effect
* Constitution is a **living tree** and therefore a flexible interpretation must be given; SCC rejects the idea that s. 35 only protects existing Abor rights, because Abor rights aren’t frozen in time and can evolve just like rest of Const.
* **Self-regulation**: Court for the first time subtly mentions that Abor people have historically self-regulated themselves when discussing how the Musqueam did this
  + In the beginning, it was a regulated, albeit self-regulated, right
* **Crown sovereignty**: Court still asserts Crown sovereignty (*Calder, Guerin, St. Catherine’s*)
  + 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
* Court affirms that Abor rights are about law and not just policy because they now have a legal footing with their inclusion to the Constitution in s. 35
* Court adopts a “**purposive approach**” to s. 35 interpretation: a generous, liberal interpretation of the words
* Reconciliation language is used 🡪 Crown is sovereign but this is not unlimited 🡪 Must be reconciled with s. 35
* SCC approved this idea from *R v Taylor* and *Williams*, that there is a presumption of the “**Honour of the Crown**” (see *Haida Nation* below) and further took from *Guerin* idea of “fiduciary duty”
* **Consultation** mentioned for the first time: whether the Abor group in question has been consulted with respect to the conservation measures being implemented [1119]

### Sparrow Framework for Justification of Infringement

* Test of *prima facie* interference with an existing aboriginal right and justification for such an interference:

1) Is there an existing aboriginal right being claimed?

* Onus on the Aboriginal community to define this right (see *Van der Peet* to determine how they do it)
* Usually easy to estimate
* For *Sparrow*, the court found this was easily met: The salmon fishery has always constituted an integral part of their distinctive culture

2) Has the right been extinguished?

* Onus on Crown to prove that there was “clear and plain intent” to extinguish the right (applies *Calder*)
* Test for “intent” has implications for treaties; e.g. Position of the Crown is that terms in the treaties meat an extinguishment of Abor rights 🡪 But what if a treaty nation disagrees with this because they thought it meant differently? 🡪 This would NOT be clear and plain intent

3) Does the legislation in question have the effect of interfering with an existing aboriginal right?

* If yes, it represents a *prima facie* infringement of s. 35(1)
* Onus of proving infringement lies on Aboriginal community who is challenging the legislation
* Three questions must be asked to determine if there is infringement: [1112]
  + 1. Is the limitation unreasonable?
    - But there’s not really a baseline (how much fish is too much; hourly rates)
  + 2. Does the regulation impose undue hardship?
  + 3. Does the regulation deny to the holders of the right their preferred means of exercising that right?
    - E.g. trapping, hunting in a particular place, etc.
* A finding of Yes to any of these restrictions will be an infringement (later *Gladstone* stated that this was meant to be an easy threshold to reach: as long as there’s a “sense of infringement”, it = *prima facie* infringement)

4) Can the infringement be justified? What constitutes legitimate regulation of a constitutional aboriginal right?

* Onus on the Crown
* Stage 1: Is there a valid legislative objective to the law which is infringing?
  + “Public interest” is not enough (but note *Gladstone*)
  + Must be a “pressing and substantial objective” if it is to be considered a valid objective
    - E.g. protect natural resources, exercising a s. 35 Abor right would cause harm to the general populace or even the Abor people themselves
* Stage 2: If a valid objective is found, does the infringing law’s means keep with Crown’s duty to act honourably?
  + Honour of the Crown and fiduciary pose challenges for Crown
  + SCC list to prioritize rights: Conservation > Indian food fishing > commercial fisheries > sport fisheries

## R v Van der Peet, 1996 SCC

|  |  |
| --- | --- |
| Facts | D, member of the Stó:lō Nation, was selling 10 fish and was charged under the Fisheries Act because, under her food fishing licence, she’s forbidden from selling the catch. D/A. |
| Issue | What is the test for determining an "aboriginal right" under s. 35 of the *Charter*? |
| Ratio | The basis for the aboriginal rights doctrine is the recognition that aboriginals were living in distinctive cultures prior to European contact. In order to be an aboriginal right under 35(1) an activity must be an element of a practice, custom or tradition “integral to the distinctive culture” of the aboriginal group claiming the right. |
| Holding | Appeal dismissed. |
| Misc. | Trial: Aboriginal right to fish for food did not extend to the right to sell fish commercially  BCSC: Evidence in this case was consistent with an Abor right to sell fish because it suggested that Abor societies had no stricture/prohibition against sale of fish, therefore right to fish = right to sell  CA: Evidence doesn’t support a claim to have a right to sell fish 🡪 Restored conviction  BCCA dissent, Lambert JA: Should ask the Abor group what is the significance of the practice to their culture 🡪 they have pre-existing legal systems 🡪 McLachlan agrees |

* From *Sparrow*, they found that salmon fishing has always been an integral part of their culture
* Lamar J majority reasons at SCC:
  + Sees Abor rights as minority rights and must be viewed differently from Charter rights because only Abor members of Canadian society have them (nothing about how they were here first or are tied to the land)
  + Analysis of s. 35 to analyze the intent behind it, which requires a purposive approach:
    - Deemed that the doctrine of Abor rights exists and is affirmed by s. 35(1) simply because, when Europeans arrived in NA, Abor peoples were already here, living in communities on the land, and participating in distinctive cultures as they had done for centuries
      * Problematic for Abor groups, and seen as a slip back from *Sparrow* high point
* L’Heureux-Dube dissent: Abor rights should have generous, liberal interpretation, ask the people what right is
* McLachlin dissent: we don’t need to have a second *Gladstone* framework, but if we just take the approach to defining the right more carefully it will be better
  + Thinks there is a “golden thread” because CL courts have recognized pre-existing aboriginal laws
  + If you think about Crown being a fiduciary: it doesn’t work if you use the *Gladstone* reworked test; you can’t take interests that are under the Abor govt’s control and give them to other parties
  + She thinks Lamar’s approach threatens the Abor rights because it takes historical rights away from Abor peoples in the interest of reconciliation
  + If you work through *Gladstone* framework, you are giving rights to other parties – not Const. acceptable

### “How to Characterize an Aboriginal Right” Test

* A right integral and distinctive to the culture (line taken from *Sparrow* to form a test developed in *Van der Peet*) but it places an evidentiary burden on Abor peoples (as seen in *R v Sappier, R v Gray*)
* **Integral distinctive culture test**: In order to be an Aboriginal right, an activity must be an element of a practice, custom, or tradition integral to the distinctive culture of the aboriginal group claiming the right
  + Problems: it is a test about culture and it is recovered from the history; but this test doesn’t touch on colonialism, marginalism, and overall a long history of oppression
* Lamar CJ provided ten factors that a court should consider as it applies this test in any particular situation

1) Courts must take into account the perspective of Aboriginal peoples themselves

* But that perspective must be framed in terms cognizable to the Canadian legal and constitutional structure
* True reconciliation will, equally, place weight on each, but this is not true from what is said above ^^
* Even once we take into account Abor perspective, the right must be reconciled with Canadian CL

2) Courts must identify precisely the nature of the claim being made in determining whether an Abor claimant has demonstrated the existence of an Abor right

* Para 53 outlines three aspects that should be considered when characterizing an applicant’s claim correctly:
  + 1) Nature of the action which the applicant is claiming was done pursuant to an Abor right
  + 2) Nature of the govt regulation, statute, or action being impugned
  + 3) Practice, custom, or tradition being relied upon to establish the right
  + Right ends up being narrow because it is tied to the practice – instead of addressing the broad right first, we start specific in assessing the right with the practice and therefore this isn’t good for Aboriginals

3) In order to be integral, a practice, custom, or tradition must be of central significance to the Abor society in question

* It is necessary to identify Abor societies’ distinctive features and acknowledge and reconcile those with the Crown’s sovereignty
* The right has to be measured at the point of contact, so it has to be something that was done 200 years ago and is still practiced today
* Aboriginal community must show that this right made the community what it was
  + Try to imagine what the people would be like had the practice not existed
* This is really difficult for the Abor people to establish; anthropologist thinks it’s difficult that some courts have said that the point of assessment in BC should begin at 1793 when Alexander Mackenzie explored the region

4) The practices, customs, and traditions which constitute Abor rights are those which have **continuity** with the practices, customs, and traditions that existed prior to contact

* Relevant that Abor societies existed prior to the arrival of Europeans in NA
* This is very difficult, as it is an uneven test across Canada: to go to the point of contact for each location, must hire historians, anthropologists, ethnographers 🡪 All very expensive to Aboriginal peoples
  + Lamer says there can be breaks in this continuity, but does not specify
  + If the Crown is the one causing such a break, then it should be overlooked and be in Aboriginal favour
* This wouldn’t work for Metis because their culture was not made at the point of contact
* Lamer also recognizes that “existing Abor rights” must be interpreted flexibly so it can evolve over time

5) Courts must approach the rules of evidence in light of the **evidentiary difficulties** inherent in adjudicating Abor claims

* If you are going to a point of contact to determine the rights, the problem is there’s not a lot of evidence so rules of evidence must be looked at in light of these problems
* *Delgamuukw* says “oral evidence” should be given weight

6) Claims to Abor rights must be adjudicated on a specific rather than general basis

* Aboriginal groups must each establish their own rights (Court decision for one’s rights doesn’t translate to other)

7) For a practice, custom, or tradition to constitute an aboriginal right, it must be of **independent significance** to the aboriginal culture in which it exists

* At the very lowest level, the prov court judge thought that the Sto:lo’s trading of fish was not integral – so Lamer says if it’s only incidental, then it’s not a sufficient right
* There was another case that said incidental rights are ok in the treaty process but not in the rights process

8) The integral to a distinctive culture test require that a practice, custom, or tradition be distinctive; it does not require that the practice, custom, or tradition be distinct

* Court says that something that is shared by all cultures (e.g. eating) is not an Aboriginal right; they don’t need to be so distinct that no other Aboriginal group does it, but can’t be so universal that all cultures do it

9) The influence of European culture will only be relevant to the inquiry if it is demonstrated that the practice, custom, or tradition is only integral because of that influence

* Court recognizes that the influence of European culture should not affect the Aboriginal groups but if it solely goes back to European culture, then that is too much mixing

10) Courts must take into account both the relationship of Abor peoples to the land and the distinctive societies and cultures of Abor peoples

* *Sparrow* was about Abor rights; Abor rights are a big thing, and Aboriginal Title is a part of it
* In spectrum from rights not tied to land (e.g. language) to rights tied to land, in the middle are rights like fishing

## R v Gladstone, 1996 SCC

|  |  |
| --- | --- |
| Facts | D were charged under the *Fisheries Act* for offering to sell herring spawn on kelp caught under authority of an Indian food fishing license (which doesn’t allow them to sell spawn, just harvest it). The license permitted the sale of 500lb; the appellants were caught selling 4,200lb. D claimed that they had an aboriginal right to commercially exploit the herring and that the regulation is contrary to 35(1), so by s. 52 of the Constitution Act the regulation has no force. D/A. |
| Issue | Do the appellants have an aboriginal right to fish? If so, does the right extend to commercial exploitation? If so, is the Crown justified in restricting the right using regulation? |
| Ratio | For rights that are not internally limiting (i.e. commercial rights), government regulation is perfectly legitimate so long as the regulations take into account the existence of aboriginal rights and are put in place in a manner that is respectful of the fact that aboriginal rights have priority over other users.  Priority is important, but does not grant aboriginals exclusive or unlimited rights. |
| Holding | Appeal allowed. |

* Made adjustments to the *Sparrow* framework for infringement
* *Gladstone* is about a right that does not have an internal limit (commercial purposes), whereas *Sparrow* was a right that had an internal limit (fish for food and ceremonial purposes)
* *Gladstone* says the test for infringement will be modified for non-internal limits like commercial uses (different set of priorities), while the *Sparrow* priority scheme (4 different groups) makes sense for internal limit
* Sparrow’s **doctrine of priority** requires that the govt demonstrate that, in allocating the resource, it has taken account of the existence of Abor rights and allocated the resource in a manner respectful of the fact that those rights have priority over the exploitation of the fishery by other users
  + Govt must show the process of allocation of resource both procedurally and substantially
  + At justification stage, the govt must demonstrate that the process by which it allocated the resource and the actual allocation which results both reflect the prior interest of Abor rights holders in the fishery
  + If Abor right has no internal limitation, then doctrine of priority doesn’t require that the govt allocate the fishery in such a way that those holding an Abor right get an exclusive right to exploit that fishery on a commercial basis. (AKA If no internal limit, Sparrow doctrine doesn’t require govt to give Abors an exclusive right to exploit that fishery)
* **Test for infringement of non-internal limits**: The court looks at what the Crown has done in its priority scheme for allocating a resource and determines whether this reflects that it has truly taken into account the existence of Aboriginal rights; imprecise, yo
* When assessing govt objectives, it can be tied to a process of reconciliation: this broadens the range of objectives to include regional/economic fairness, policy; McLachlin doesn’t agree

## Mitchell v MNR [2001] SCC

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| --- | --- |
| Facts | Chief Mitchell (of the Mohawk) crossed the St Laurence to buy goods on the US side for resale. Canadian customs asked him to pay duty. He said no, he’s exercising an Aboriginal right, which pre-exists Crown rights in this area. |
| Discussion and Analysis | - SCC used the *Van der Peet* decision as authority  - Crossing of the river is incidental, and so this Aboriginal right cannot be said to be defining this group |
| Ratio | A right to trade is something all cultures do. |

* Established conditions of usefulness and reasonable reliability
* McLachlin’s reference to *Van der Peet* test: It requires showing that practice, custom or tradition is integral to the distinctive culture, i.e. it is at the “core” of their identity and thus without it the culture could not exist

## R v Sappier/R v Gray (2006) SCC

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| Facts | Both groups of D were charged with unlawful possession and cutting of Crown timber. D/R. |
| Issue | How do we determine which pre-contact practices were integral to Aboriginal cultures? |
| Discussion and Analysis | Aboriginal argument:  - Practice of harvesting timber for personal use was an integral part of the distinctive culture of the Maliseet and Mi’kmaq peoples prior to contact with Europeans  - Claimed right: Practice of harvesting trees to fulfil the domestic needs of the pre-contact, migratory communities for shelter, transportation, fuel, tools, etc.  Crown argument:  - Harvesting wood was for survival, which they don’t need to do to survive anymore |
| Ratio | Practice of harvesting wood for domestic uses was integral to the pre-contact distinctive culture of both Aboriginal groups. |
| Holding | Appeals dismissed. |

* The pre-contact practice is central to the *Van der Peet* test for two reasons:
  + The court needs evidence in order to grasp the importance of a resource to a particular Aboriginal people. The Court seeks to understand how that resource was harvested, extracted, and utilized. These practices are the necessary “Aboriginal” component in Aboriginal rights.
  + It is necessary to identify the pre-contact practice upon which the claim is founded in order to consider how it might have evolved to its present-day form. Recognizes that rights are not frozen in time
* Traditional means of sustenance (e.g. harvesting timber for shelter) can still be considered integral to the distinctive culture of the aboriginals even if it's merely undertaken for survival purposes
* *Gray* says that *Mitchell*’s assertion that the practice must be at the core of the Aboriginal group’s identity should not result in an increased threshold
  + L’Heureux-Dube J dissent to *Gray*: Focus of the Court should be on the nature of the prior occupation. What is meant by “culture” is really an inquiry into the pre-contact way of life of a particular Aboriginal community. The use of the word “distinctive” was meant to incorporate an element of aboriginal specificity, but it doesn’t men “distinct” and the notion of aboriginality must not be reduced to “racialized stereotypes of Aboriginal peoples”
* The Court is to look at how the practice relied upon relates to a particular way of life: Aboriginals are not frozen in time and can only use wood for canoe-building. Using wood is a practice integral to the way of life as a whole, not integral to just building canoes
  + “If Abor rights are not permitted to evolve and take modern forms, they will become utterly useless”

## Lax Kw’alaams Indian Band v Canada, 2011 SCC

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| Facts | P laid claim to the commercial harvesting and sale of “all species of fish” within their traditional waters, across BC’s NW coast. Such an Abor fishery would be within the protection of s. 35(1) of Constitution Act, 1982, subject only to such limits justified under *Sparrow* test. P/A. |
| Discussion and Analysis | - P alternative: Evidence establishes a variety of “lesser and included” Abor rights, notably the right to a limited commercial fishery (based on traditional potlatch) consisting of a right to harvest and sell fish products sufficient to sustain their communities, accumulate wealth, and develop economy  - P other alternative: Sought a still more limited Abor right to a food, social, and ceremonial fishery |
| Holding | Appeal dismissed. |
| Misc. | Trial: Commercial fisheries claim rejected since judge unconvinced that P’s pre-contact customs, practices, traditions supported such an Abor right. Trade in general fish beyond their traditional single species (eulachon) was not integral to their distinctive society and didn’t provide a foundation for a s. 35 Abor right to have a modern lucrative “industrial” fishery. Upheld by BCCA |

# Treaty Rights

* Term *sui generis* also applies to treaties
* Treaty history = Comprehensive Claims policy (1973-); BC Treaty Process (1992-)
* Treaties have historically been entered into when the parties had different perspectives:
  + Aboriginal treaty perspective: Thought of treaty documents as spiritual instruments and dynamic, like a marriage between people
  + Govt treaty perspective: Saw them as historical documents and static, do not evolve over time
* Historical examples of treaties: *Sioui* case shows that whole treaty was in one paragraph, therefore questionable

#### R v Badger [1996] SCC

* Mentioned in Marshall II

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| Facts | Cree and status Indians (under Treaty No. 8) D + Kiyawasew + Ominayak were hunting for food on private land. D+K were found on a farmer’s land, while O was caught in a field of muskeg. |
| Issue | Do status Indians under Treaty No. 8 have the right to hunt for food on privately owned land which lies within the territory surrendered under that Treaty? Have the hunting rights set out in Treaty No. 8 been extinguished or modified by the *Natural Resources Transfer Agreement*? To what extent, if any, do sections 26(1) (requiring a hunting licence) and 27(1) (establishing hunting seasons) of the *Wildlife Act* apply to D? |
| Ratio | When interpreting a treaty, the following principles apply:  1. A treaty is a solemn promise between the Crown and the various Indian nations.  2. The Crown must be assumed to intend to fulfil its promises, and no appearance of "sharp dealing" will be tolerated.  3. Any ambiguities or doubtful expressions must be resolved in favour of the Indians, any limitations on the rights of Indians must be narrowly construed.  4. Onus of establishing proof of the extinguishment of a treaty or aboriginal rights lies upon Crown. |
| Holding | Badger and Kiyawasew appeals dismissed. Ominayak appeal allowed. |

#### R v Marshall I [1999] SCC

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| Facts | D was caught fishing eels out of season and selling them for a profit and charged with violation of the federal *Fisheries Act*. He argued that he was trying to catch and sell the eels to support himself and his spouse, and that the Indians were entitled to do so by virtue of a right contained in the *Treaty of Peace and Friendship* entered into by the British Crown in 1760. At issue was a "trade clause" in the treaty in which the Mi'kmaq promised not to trade with non-government individuals. The trial judge concluded that the only enforceable treaty obligations were those set out in *Treaty*, and while the trade clause gave the Mi'kmaq "the right to bring the products of their hunting, fishing and gathering to a truckhouse to trade", such right had disappeared with the disuse of the truckhouse system. D/A. |
| Issue | How should the courts determine if a treaty provides rights? When is an infringement of treaty rights justified? |
| Ratio | Aboriginal treaty rights may offer a justification against offences of provincial jurisdiction. Treaties must always be interpreted using the guidelines set out above and in *Badger*. Of particular importance is the presumption that the Crown acted with honour and integrity in recognition of their fiduciary relationship with the aboriginals in creating the treaties. If a regulation violates a treaty right, then it can be justified using the *Badger*/*Sparrow* test. Oral and extrinsic evidence can be given for the contents of a treaty even when the written words are not ambiguous. |
| Holding | Appeal allowed, acquittal entered. |

* McLachlin dissent: Treaties interpretation should be “large and liberal” because as a result of s. 35, they are a constitutional document (and thus extrinsic evidence can be used!)
  + Common intentions must be used
* Binnie J makes use of **honour of the Crown** in finding the right to trade (and to pursue sea resources to trade)
* Treaty rights are subject to regulation, which parallels the paragraph in *Sparrow* that “Crown sovereignty has never been questioned”

#### R v Marshall II [1999] SCC

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| Facts | After the decision in *R v Marshall I* was released, the intervener West Nova Fishermen’s Coalition applied for a stay of the SCC judgment and a rehearing to have the Court address the regulatory authority of the Government of Canada over the fisheries, and to give the government a chance to justify their regulations (the justification issue was not raised in the original trial). |
| Issue | Can an intervener apply to have the Court force the government to attempt to justify its regulations over aboriginal rights? |
| Ratio | Interveners can only request a stay in a judgment (limited or broad effects) in exceptional circumstances – normally one of the parties to the proceeding must request this. |
| Holding | Motion denied. |

* Mik’maq people: Their use of the fishery was self-regulating and therefore wouldn’t impact resource
* Court: *Marshall I* was focussed on the very narrow facts related to that defendant because he was a member of a First Nation group who had a treaty
* Court: It’s always up to the Crown to go back and renegotiate or justify infringement in its treaty rights
* Three ways that the **Crown can internally regulate (infringe) treaty**:
  + 1) Insignificant effects: treaty rights are limited to securing “necessaries”
  + 2) Regulations of treaty in treaty: treaty right is a regulated right and can be contained by regulation within its proper limits
  + 3) Can regulate treaty rights as long as they’re justified based on the *Badger (Sparrow)* test
* Court seems to suggest province can infringe upon a treaty right

#### R v Morris [2006] SCC

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| Facts | A treaty protecting Aboriginal hunting rights included hunting at night. The accused was convicted when hunting at night for “unsafe hunting practices”. A provision of the *Wildlife Act* bans night hunting completely. D’s were members of the Tsartlip Indian Band of the Saanich Nation. They were arrested and charged with several offence for hunting at night. At trial, as a defence, D raised their right “to hunt over the unoccupied lands . . . as formerly” under the *North Saanich Treaty* of 1852. They also introduced evidence that the particular night hunt for which they were charged was not dangerous. |
| Issue | To what extent can provincial government interfere with treaty rights? |
| Ratio | Hunting with a light is a natural extension of hunting with a fire in a canoe, which was a historical cultural practice. |
| Holding | Appeal allowed, acquittals entered. |
| Misc. | Trial: Though night hunting + light was employed by the Tsartlip from time immemorial, they didn’t have a treaty right to hunt at night because hunting at night + illuminating device = inherently unsafe  Appeal: unsuccessful  SCC dissent McLachlin & Fish: The treaty does not provide a right to hunt dangerously, and as the total ban on night hunting is required to ban dangerous hunting, then it does not amount to a prima facie infringement of a treaty right. |

* Framework for **provincial infringement** on a treaty right:
  + 1) Find a rights infringement
  + 2) Analyze whether the infringing prov legislation is constitutionally valid under the division of powers
  + But a treaty right is at the core of Indianness under s. 91(24) – prov can’t use s. 88 (laws of general application that make prov laws federal do not apply to treaty process)
  + Province can technically not infringe
* The province can regulate within the treaty or secondly regulate if they fit their power within division of powers framework of the *Badger/Sparrow* test
  + Court: there could have been regulation in *Wildlife Act* that was relating to “safety”, not a complete ban
* Court addresses the fishing coalitions concerns:
  + Aboriginal are no longer political issues but a legal issue because Abor rights are protected in s. 35

# “Aboriginal Title”: The Framework and Test

#### R v Delgamuukw, 1997 SCC

* 4 main things coming out of this decision:

1) The place of Aboriginal lands in the legal and political structure of Canada: In particular, the place of “governance” or “jurisdiction” in the judicial framework developed in *Delgamuukw*

* The land is **inalienable** (concept retained from *Calder* and *Guerin*) and it’s different from other property interests because it does not come from Crown grant
* Prior occupation: source of AT is in prior occupation (not from Royal Proclamation, a la *St. Catherine’s*)
* Communally held: AT is a collective right held by all members of the Aboriginal nation. Decisions about the land are to be determined collectively (BUT not self-govt)
* Definition of **Aboriginal Title**: type of site-specific abor right; its content can be summarized by two propositions:
  + 1. That the aboriginal title encompasses the right to exclusive use and occupation of the land held pursuant to that title for a variety of purposes, which need not be aspects of those Aboriginal practices, customs, and traditions which are integral to distinctive Aboriginal culture
  + 2. That those protected uses must not be irreconcilable with the nature of the group’s attachment to that land
* Aboriginal Title requires (para 143):
  + (i) **Pre-sovereignty occupation**
    - Aboriginal perspective (para 48): Consider any and all aboriginal laws in relation to land, including a land tenure system or laws governing land use
    - CL perspective (para 49): Requires physical occupation to prove possession, ground title to land
      * Establish occupation in a number of ways: e.g. buildings, cultivation and enclosure of fields, or regular use of definite tracts of land for hunting, fishing, or otherwise exploiting resources
      * A contextual analysis based on the characteristics of the group and the land
  + (ii) Continued occupation until present from pre-sovereignty occupation to prove it was true
  + (iii) Exclusive occupation at sovereignty
    - CL perspective (para 156): Emphasizes factual reality of occupation
      * **Exclusivity** can be demonstrated by “intention and capacity to retain exclusive control”
    - Aboriginal perspective (para 157): Considers Abor laws on trespass, use, and residence
      * What looks like trespass to CL may not undermine exclusive control under Abor laws
    - Occupation = physical (hunting grounds) + exclusion; difficult to show in *Van der Peet* rights test
    - Court allows abor perspective to be given weight when determining exclusivity, but Abor perspective must fit into Crown perspective
    - **Shared exclusivity** may be permitted if joint title arises, but one group wouldn’t have control
  + AT crystallizes at time of Crown sovereignty
  + Court continues to require pre-sovereignty proof because it holds on the idea that AT is a burden on Crown title
  + Case saw AT as more than just a bundle of rights (it’s a right to the land), but puts limits on extent of AT
  + If Aboriginal group cannot show exclusivity required for AT, it can still show its rights
* The role of indigenous law and political structures determining: a) source of AT, b) content of AT
  + Unfortunately to the court 1) communally held 2) decisions about land =/= self-governance
  + Gitskan argue that their political system should be the way AT is defined – but this is rejected by the Court because their perspective must fit within Canadian CL
  + The aboriginals cannot frame their right to self-govt too broadly as was done in *Pamajewan*
* Aboriginal governance or jurisdiction: No right to self-governance (despite saying AT allows aboriginals to decide how to use the land and that it is to be held communally 🡪 BUT this seems like ingredients for self-govt)

2) The ability of Canadian govts to (a) extinguish, and (b) infringe upon Aboriginal title

* The federal govt has exclusive jurisdiction from s. 91(24) in relation to Abor rights (including title) and flowing from this is the right to extinguish
* BC govt CANNOT extinguish Abor rights because these are at the core of “indianness” which is a federal power (even province’s ability to make “laws of general application” cannot extinguish Abor rights 🡪 would not meet *Calder* test for “clear and plain intent”)

3) The justification of infringement

* Lamar J says that reconciliation is why we have s. 35; Abor rights are necessary to reconciliation of Abor societies with the broader political community of which they are a part
* Limits placed on Abor rights (AKA infringement) are a necessary part of that reconciliation, if the objectives furthered by those limits are of sufficient importance to the broader community as a whole
* Court will not heavily scrutinize Crown when reviewing justification for infringement
* Follows *Gladstone* framework for infringement, not *Sparrow*
* Liberal range of objectives permitted for infringement 🡪 as long as the Crown does not do something corrupt, it is likely that infringement can be justified
  + E.g. development of agriculture, forestry, mining, hydroelectric power; general econ development of BC interior; protection of environment and endangered species; building infrastructure and settlement of foreign populations
* Consultation duty emergence (went beyond *Sparrow* mention): you might need to get abor group on board if you want to build a mine 🡪 consultation may satisfy the fiduciary relationship
* If AT is damaged to a significant point, there must be compensation

4) The movement toward a vision (of reconciliation)

Competing Theories on the Nature of AT:

* Crown: Lingering refusal to acknowledge existence of AT
  + Vision of AT as nothing more than the gathering (over a tract of land) of the various Abor rights that might exist in relation to that land (the **bundle of rights theory**)
* Gitskan/Wet’suwet’en: AT based, at least partially, on their own legal systems/practices/traditions

# Aboriginal Title Post-Delgamuukw

#### R v Bernard/R v Marshall, 2005 SCC

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| Facts | Contrary to s. 29 of the Act. The Mik’maq are nomadic people. |
| Issue | Can the Mik’maq people log commercially on Crown land without government permission? Does the practice correspond to the core concepts of the legal rights claimed? |
| Misc. | Trial: Claim for AT was not found |

* Condenses elements (i) and (ii) of the *Delgamuukw* test (must prove exclusive pre-sovereignty occupation of the land by their forebears in order to claim AT) (para 55)
* In determining AT, must consider both CL and Abor perspective, though unequal weight on both: considers Abor perspective but it has to fit into CL; Court must examine pre-sovereignty Abor practice and translate it, as faithfully and objectively as it can, into a modern legal right (like fitting a square peg into a round hole)
  + In dissent, Lebell and Fisher think Abor perspective should be given equal weight
* Emphasis on CL perspective:
  + Para 48: The Court’s task is to translate the pre-sovereignty practice into a modern legal right
  + Para 48: Does the practice correspond to the core concepts of the legal right claimed?
  + “**Translation**” actually begins with the core of the CL right in question; in this case, that right is title
  + Para 54: Abor title to land “is established by Abor practices that indicate possession similar to that associated with title at CL”
    - Para 61: Look for the equivalent of deeds and European assertions of ownership in the Abor culture in question
    - Para 66: Has a degree of physical occupation or use equivalent to CL title been made out?
  + Para 56: “**Occupation**” = physical occupation, can be established by constructing dwellings, enclosing fields, and regular use of definite tracts of land
  + Para 57: “**Exclusive occupation**” = intention and capacity to retain exclusive control
    - Para 65: Need not show acts of exclusion, so long as you can show “effective control”; forebears could have excluded others
* *Adam* case references = seasonal hunting and fishing rights will not be AT but will AR
* Test for AR that fits with CL: Unaided by formal legal documents and written edicts, we are required to consider whether the practices of Abor peoples at the time of sovereignty compare with the core notions of CL title to land 🡪 AKA we can’t look for European-type evidence of title, must look for equivalent in Abor culture at issue
* 1) What is meant by exclusion? (in CL, right to exclude others is assumed by dint of law)
  + Circular requirement: have to show exclusivity to get title even though title would show exclusivity
  + Evidence of physical exclusion not necessary – just capacity to exclude
  + No explanation for why exclusion is required, just assumed to be
* Para 70: AT claimants must establish “exclusive possession, i.e. intention and capacity to control” the land
  + Typically established by showing regular occupancy, use of definite tracts of land for hunting, fishing, etc.; SCC said that this was not the only way to establish exclusive possession
  + Less intensive uses 🡪 Different rights
  + *Delgamuukw* discussion of Abor law is absent
* 2) Can nomadic or semi-nomadic people claim title to land?
  + Depends on degree of occupation (*Delgamuukw*: “physical occupation” sufficient to ground title to land may be established by “regular use of definite tracts of land for hunting, fishing, exploiting resources”
* Oral evidence can be accepted, provided the conditions of usefulness and reasonable reliability set out in *Mitchell v MNR* are respected

#### William v British Columbia (2012) BCCA

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| Facts | Tsilhqot’in people claim title to an area that comprises only 5% of what they had as their traditional territory. This came to a head when BC govt was doing logging. |
| Discussion and Analysis | - Groberman J agreed that “territorial approach” better but agreed with Crown that it doesn’t meet the site-specific test  - Groberman didn’t see the “territorial” approach fitting with reconciliation (which demands that FN traditional rights be respected without placing unnecessary limitations on Crown sovereignty or on the aspirations of all Canadians) |
| Holding | Aboriginal group lost because they used the territorial idea, which doesn’t meet the *Delgamuukw* or *Bernard/Marshall* tests. |
| Misc. | Trial: BC did not have constitutional competence to regulate forestry on land subject to Abor title |

* Judge’s **territorial theory** of AT more restrictive than CL site-specific approach taken in *Delga* or *Marshall/Bernard*: “exclusive possession in the sense of intention and capacity to control”
  + Crown argued against territorial theory: AT could only be demonstrated over smaller tracts of land (e.g. village sites, cultivated fields, specific trapping/fishing sites) that were occupied by a First Nation intensively and, if not continuously, at least regularly
* Para 172: “The law must recognize and protect Abor title where exclusive occupation of the land is critical to the traditional culture and identity of an Abor group”
  + “This will usually be the case where the traditional use of a tract or land was intensive and regular”
  + In *Marshall*, SCC found that regular occupancy or use of a definite tract of land could show “exclusive possession” while “less intensive use” could establish other Abor rights
  + BCCA added “intensive” (i.e. AT site-specific), “critical to traditional culture and identity of Abor group”
  + Relevant to the test for Abor rights: ensures that the practice, custom, or tradition is one of the things that truly made the Abor society what it was
  + *Delgamuukw* para 151: any land occupied pre-sovereignty and with which the parties have maintained a substantial connection is of central significance to their culture
    - Subsumed within “occupation”
    - Lamer CJ couldn’t imagine a situation in which this would affect a claim
  + Para 230: AT must be proven on a **site-specific basis**
    - Particular occupancy of the land (e.g. village sites, enclosed or cultivated fields), OR
    - Definite tracts of land subject to intensive use (specific hunting, fishing, gathering, spiritual sites)
  + The tract of land must be “reasonably capable of definition”
  + Emphasizes a narrow reading of the CL perspective

# Metis Rights

#### R v Powley (2003) SCC

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| Facts | D and his son shot and killed a bull moose in Sault Ste. Marie. Moose hunting in Ontario is strictly regulated by the *Game and Fish Act*, and D did not have a hunting license. They claimed that as Métis they had an aboriginal right to hunt for food in the area and therefore the regulation were in violation of s. 35(2) of the *Constitution Act, 1982*. D/R. |
| Issue | How does the *Van der Peet* test apply to the Métis? |
| Ratio | When applying the *Van der Peet* test to Métis claimants, they must demonstrate: (a) there was a historic Métis community in the area, (b) there is a contemporary community that continues from the historic community, and (c) he or she is a member of the contemporary community by showing that he or she has a demonstrable ancestral connection to the historic community.  The appropriate time to look for the integral right is the time just prior to the time of European control over politics and law in the area. |
| Holding | Appeal dismissed. |

* **Metis community** can be defined as a group of Metis with a distinctive collective identity, living in same geographic area, sharing a common way of life; discussion in *Van der Peet* on purpose of s. 35 (1. To recognize pre-existing peoples to Crown, and 2. Reconciliation of Crown with them) doesn’t fit them
  + Metis didn’t exist before European contact, and the *Van der Peet* test specifies preserving (not fixing/freezing) the pre-contact state
  + But they were a separate people created, so s. 25 still applies and there’s a need to protect them
  + *Van der Peet* has an “integral culture test” 🡪 The existence of Abor ways of life 🡪 Therefore for the Metis, this idea slides over as the purpose for s. 35
  + Canada continues to fight the word “peoples” used in the international context because “peoples” have specific rights vs what Canada prefers as “populations”
    - Aboriginal people don’t have to prove that they belong to a particular group
* **Modified *Van der Peet* test for Metis**: (modified by the Metis “cultural” idea)
  + No pre-sovereign aspect required for Metis because they didn’t develop until after contact: so the test for Metis practices should focus on identifying those practices, customs, and traditions that are integral to the Metis community’s distinctive existence and relationship to the land
    - Post-contact but pre-control test that identifies the time when Europeans effectively established political and legal control in a particular area
  + Easier test for Metis – some think this should be the test for all Abor groups
* S. 35 ONLY protects those rights existing when *Constitution Act, 1982* came into effect, which isn’t whole story

#### Manitoba Métis Federation v. Canada 2013 SCC

* Laches: Equitable doctrines
* Our govt governs according to the Rule of Law (sovereign)

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| Facts | Manitoba entered Confederation on July 15, 1870, following the passage of the *Manitoba Act, 1870*. S. 31 of the Act provided for grants of land in Manitoba to Métis children. S. 32 contained quieting of title provisions to assure recognition of existing property rights. In 1981, P commenced an action for declaratory relief against D and Manitoba. P/A; D/R. |
| Issue | Does P have a claim for relief based on ss. 31 and 32? |
| Ratio | SCC agreed with the courts below that the s. 32 claim was not established and found it unnecessary to consider the constitutionality of the implementing statutes. The obligations in ss. 31 and 32 of the Manitoba Act did not impose a fiduciary duty on the Crown. |
| Holding | Appeal dismissed. P should be granted standing. The Métis were entitled to a declaration that the federal Crown failed to implement the land grant provision set out in s. 31 in accordance with the honour of the Crown. P’s claim based on the honour of the Crown was not barred by the law of limitations or the equitable doctrine of laches. |
| Misc. | MBQB: Refused to grant any of the declarations sought by P and dismissed their claims. Held, *inter alia*: (1) P lacked standing to pursue the action; (2) P’s action, having been commenced in 1981, was statute barred by the *Limitation of Actions Act* (Man.); (3) **Doctrine of laches and acquiescence** applied as complete defence to P’s claim; and (4) No fiduciary relationship between Canada and the Métis, nor was the doctrine of honour of the Crown implicated. MBCA: Dismissed P’s appeal  SCC dissent Rothstein, Moldaver: Wanted to grant the appeal. |

# Duty to Consult and Accommodate

* No veto for unproven rights, that’s not what the Duty to Consult and Accommodate is about

#### Haida Nation v British Columbia (Minister of Forestry), 2004 SCC

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| Facts | The Haida want a legal revenue to question resource extraction on land they assert title to without having this granted by the courts. Injunctions weren’t working, and courts became reluctant to grant them so they were harder for Aboriginal groups to get. |
| Discussion and Analysis | - P: Absent consultation and accommodation, they will win their title but find themselves deprived of forests that are vital to their economy and their culture 🡪 Forests will be gone if they have to wait it out in the court system |
| Ratio | “Honour of the Crown” requires a “new tool”: Duty to Consult. |

* Honour of the Crown is the reason beyond Duty to Consult, NOT fiduciary duty
  + Honour of Crown enters picture at time when the Crown is thinking about asserting sovereignty
  + Guides the Crown from moment of asserting sovereignty, treaty negotiation, treaty implementation
* Consultation can solve the issue when there is an absence of a treaty or no established rights 🡪 A major period of development in which the BC govt went about business as usual 🡪 Need new tool of Duty to Consult
* Balancing development consultation:
  + Court recognizes the Crown must develop – but must be done in a responsible manner
* **Duty to consult** arises when: knowledge meets possibility to impact
  + When the Crown has knowledge, real or constructive, of the potential existence of the Abor right or title and contemplates conduct that might adversely affect it
* Aboriginals must provide evidence
* General requirement of “good faith” and “meaningful consultation” on both sides
* “Accommodation” and consultation DO NOT give Aboriginals a veto!
* **Spectrum of Consent**: (get a treaty if you want consent)
  + Accommodation (high)
  + Consent required by First Nation
  + Meaningful/substantial
  + Notice (low)
  + \*The higher the rights are (better evidence) and the higher the impact, the higher end of the spectrum
* Honour always required to ensure s. 35 reconciliation. The controlling question in all situations is what is required to maintain the Honour of the Crown and to effect reconciliation between the Crown and the ABor peoples with respect to the interests at stake
* Duty to Consult is always on the Crown
  + Third parties may have contractual obligations

#### Mikisew Cree First Nation v Canada (Minister of Heritage), 2005 SCC

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| --- | --- |
| Facts | Sufficient land was not set aside for P until the 1986 Treaty Land Entitlement Agreement. In 2000, fed govt approved a winter road to run through their reserve without consulting with P. After protest, the road alignment was changed to track the boundary (w/o consulting again), which would have adversely affected many families’ trapping/hunting grounds. |
| Ratio | Even if you got a treaty, the Duty to Consult still applies. |
| Holding | Adequate consultation, duty of which flows from the honour of the Crown, did not take place and breached the obligation to respect the existing treaty rights of Abor peoples. Govt’s approach undermined process of reconciliation. |

#### Rio Tinto Alcan v Carrier Sekani Tribal Council, 2010 SCC

* Para 31: 3 elements of the test for **duty to consult**:
  + 1. Crown’s knowledge, actual or constructive, of a potential Abor claim or right
  + 2. Contemplated Crown conduct
  + 3. Potential that the contemplated conduct may adversely affect an Abor claim or right

|  |  |
| --- | --- |
| Facts | A dam and reservoir was built in the 1950s which altered the amount and timing of water in the Nechako River. D claim the Nechako Valley as their ancestral homeland, and the right to fish in the Nechako River. Pursuant to the practice at the time, they were not consulted about the dam project. Excess power generated by the dam is sold by P to BC Hydro. In 2007, the First Nation asserted that the new Energy Purchase Agreement should be subject to consultation under s. 35. P/A. |
| Issue | When does a duty to consult arise? |
| Holding | Appeal allowed. |
| Misc. | Utilities Commission: Found that the consultation issue could not arise as EPA would not adversely affect any aboriginal interest  BCCA: Reversed the UC's orders and remitted the case to the Commission for evidence and argument on whether a duty to consult the First Nations exists and, if so, whether it had been met. |

# Reconciliation

* In *Sparrow*: **Reconciliation** meant the idea that there were legal obligations that temper the Crown’s power
  + With the advent of s. 35 Abor rights gained Constitutional protection based on principles of rule of law
* In *Van der Peet*: Lamar CJ sees reconciliation as in the pre-existence of Abors will be reconciled with the sovereignty of the Crown. THIS is what s. 35 is about
* In *Gladstone*: Court said that the Crown must be the Crown for ALL of Canada, and therefore must do things in the interest of everyone
* In *Haida Nation*: Controlling question in all situations is what is required to maintain the honour of the Crown and to effect reconciliation between the Crown and the Aboriginal peoples with respect to the interests at stake
  + Crown must always ask if what it’s doing is honourable in circumstances, in order to affect to s. 35 reconciliation