**LAW100b: Aboriginal**

**Full CAN (2014)**

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Table of Contents

Early Jurisprudence 1

ROYAL PROCLAMATION 1

*ST CATHERINE’S MILLING & LUMBER CO v THE QUEEN, 1882* 1

*CALDER v AG, 1973* 1

*GUERIN v THE QUEEN, 1984* 2

“Aboriginal Rights” General Framework Established 2

*R v SPARROW, 1990* – FRAMEWORK FOR RIGHTS INFRINGEMENT 3

*R v VAN DER PEET, 1996* – FRAMEWORK FOR ABORIGINAL RIGHTS 4

*R v Gladstone, 1996* – Framework of Infringement for Rights w/ Non-internal Limit 5

*Mitchell v Canada (Minister of National Revenue), 2001* 5

*R v Sappier; R v Gray, 2006* – Application of *VDP Test* for “Distinctive Culture” 6

“Aboriginal Title”: The Framework 6

*R v DELGAMUUKW, 1997* – FRAMEWORK FOR ABORIGINAL TITLE 6

ABORIGINAL TITLE POST *DELGAMUUKW* 8

*R v Bernard; R v Marshall, 2005* – Common Law Perspective 8

*William v BC, 2012* – Common Law Perspective 8

Métis Rights 9

*R V POWLEY, 2003* 9

*Manitoba Métis Federation v Canada (AG), 2013* 9

Treaty Rights 9

*R V MARSHALL (NO 1), 1999* 9

*R v Marshall (No 2), 1999* 10

*R v Morris, 2006* 10

Duty to Consult 11

*HAIDA NATION V BC, 2004* – TEST FOR DUTY TO CONSULT 11

*Mikisew Cree First Nation v Canada (Minister of Heritage), 2004* 11

*Rio Tinto Alcan v Carrier Sekani Tribal Council, 2010* 11

Early Jurisprudence

ROYAL PROCLAMATION

Below all titles there is an underlying title to the gov’t. Indian interests are a burden on that title.

* A treaty at this time meant that interest in land released and therefore perfects crown title on the land.

*ST CATHERINE’S MILLING & LUMBER CO v THE QUEEN, 1882*

Interprets RP to mean that Indian title is only a “personal and usufructuary right” → aboriginal title = burden on Crown land

*CALDER v AG, 1973*

- Royal proclamation is **NOT the sole source** of Indian title

- Extinguishment requires **clear and plain intent**

* Crown must provide proof of intent (ex. treaty doc clearly stipulated intent to remove Indian title

Pulled through from ***St. Catherine’s Milling***

* Indian title as ‘personal and usufructuary right’
* 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

*GUERIN v THE QUEEN, 1984*

The Crown may owe a **fiduciary duty** to aboriginal peoples in certain contexts (ex. surrendering reserve lands) → presumption of Crown sovereignty frame entire discussion.

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| **Facts**: Guerin is a member of the Musqueam Band and they sued Crown over the bad deal they were negotiated into with regard to surrendering a portion of their reserve land so that the Crown could lease it. Golf course went in and got a sweet deal. TJ accepts 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 🡪 SCC |

Decision treats Musqueam in a **paternalistic** fashion: this is the emergence of the **fiduciary doctrine**

SCC determines there is not a trust but a fiduciary duty. The federal government has a fiduciary duty to aboriginal people because the Crown has taken over responsibility for Aboriginal people’s interests. This means that it is not in the law of equity and not subject to statutory limitations.

**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.

Prof doesn’t like b/c this concept creates “paternalism in the law” – parent to child and therefore there is an unequal power balance

Why no trust: there cannot be a trust because the Musqueam didn’t possess a legal interest, their title is different. Remember the land title they gave up was *sui generis* (goes back to ***St. Catherines*** idea of *personal usufructuary right*)

**How is this related to the notion that ‘Aboriginal title’ constitutes a ‘personal and usufructuary right’?**

*= sui generis – 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

***Section 35(1)*** – “The **existing** **aboriginal and treaty rights** of the aboriginal peoples of Canada are hereby **recognized and affirmed**.”

**Existing = *Sparrow*** makes clear that “existing” indicates that s. 35(1) applies to the rights that were in existence when the *Constitution Act, 1982* came into effect. S. 35(1) does not revive extinguished rights, and it also does not incorporate the specific way in which rights were regulated in 1982. The rationale behind this decisions is that if they were to incorporate rights as they were regulated it would create “a crazy patchwork of regulations” (***Sparrow***). The phrase “existing aboriginal rights” must be interpreted flexibly so as to permit their evolution over time, which is why the court has rejectd the “frozen rights” approach to aboriginal rights.

**Recognized and Affirmed =** s. 35(1) is not the source of aboriginal rights, it recognized and affirmed rights that already exist. Aboriginal rights are recognized and affirmed in order to reconcile the existence of distinctive aboriginal societies prior to the arrival of Europeans in North America with the assertion of Crown sovereignty over that territory (***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. (***Gladstone***)”

*R v SPARROW, 1990* – FRAMEWORK FOR RIGHTS INFRINGEMENT

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| **Facts:** S charged under *Fisheries Act* for fishing w/drift net that was longer than permitted w/his Indian fishing license. S claimed he had existing aboriginal right to fish & thus *Act* is inconsistent w/ s. 35(1) of the Constitution Act & invalid. He was unsuccessful in lower courts, appealed to SCC.  |

**TEST OF JUSTIFICATION:**

1. **Is there an aboriginal right** (i.e. is the activity claimed to be an aboriginal right an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right)? (Onus on claimant) [***Van der Peet*** modifies this aspect of the test]
	1. Identify the **nature of the claim**
	2. **Determine if it was part of a pre-European contact practice that was integral to the distinctive culture in Q** (central, not incidental, but doesn’t have to be unique) [***Sappier; Gray*** expand on what “distinctive culture” means]
	3. If so, was there **sufficient continuity between the modern activity and the traditional practice?**
2. **If there is an aboriginal right, has it been extinguished?** (Onus on Crown)
	1. Does the legal regulation demonstrate a **“clear and plain”** **intention to extinguish** the right? (from a gov’t who has authority over particular issue) (***Calder***)
	2. **Mere fact that a right had, in the past, been regulated by the gov’t not sufficient to extinguish right**
3. **If the aboriginal right has not been extinguished, can the claimant show *prima facie* infringement?** (Onus on claimant) [***Gladstone*** – says below factors not requirements, absence of one does not preclude infringement]
	1. Is the limitation **unreasonable**?
	2. Does it pose **undue hardship**?
	3. Does the regulation deny rights holders the **preferred means** of exercising their right?
4. **Can the gov’t justify the infringement?** (Onus on Crown)
	1. Is there a **valid objective** on the part of the Crown?
		1. (Ex. conservation & resource mgmt.; prevent harm to public/Abo peoples themselves)
		2. **Valid objective** – must be **compelling & substantial** & directed at either **the recognition of the prior occupation of NA by aboriginal peoples; OR at the reconciliation of aboriginal prior occupation with the assertion of the sovereignty of the Crown** (**more important** @ justification level) (***Gladstone***)
	2. Is the gov’t employing means that are **consistent with their fiduciary duty** to the aboriginal nation at issue?
		1. Was the infringement as **minimal** as possible?
		2. Were their **claims given priority** over other groups? (***Gladstone*** – **doctrine of priority** re: non-internal limit right [i.e. commercial purposes])
		3. Was the affected aboriginal group **consulted**?
		4. If there was **expropriation**, was there **fair compensation**?

*R v VAN DER PEET, 1996* – FRAMEWORK FOR ABORIGINAL RIGHTS

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| **Facts:** V (member of Stó:lō Nation) charged for selling 10 salmon that her CL husband & his bro caught under their native food fishing license. Under the license they were forbidden from selling their catch. At trial, judge held that the abo right to fish for food did not extend to the right to sell fish commercially. This was overturned at summary appeal but restored at CA. **Held:** L’Heureux = not enough evidence to make judgment, ordered new trial; McLachlin = Crown didn’t sufficiently justify regulation so appeal must be allowd.  |

**Purposes underlying s. 35(1)’s recognition & affirmation of aboriginal rights:**

1. Means by which Constitution recognizes the fact that prior to the arrival of Europeans in NA land was already occupied by distinctive abo societies
2. Means by which that prior occupation is **reconciled** w/assertion of Crown sovereignty over Canadian territory

**TEST TO DETERMINE AN “ABORIGINAL RIGHT” UNDER S. 35:**

**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.**

**Factors to Consider:**

1. The **perspectives of the aboriginal peoples themselves**, framed in the Canadian legal & constitutional structure
2. **The precise nature of the claim**
	1. After the claim is specified, it must be determined if there is enough evidence to support the claim
	2. Factors to consider include:
		1. Nature of the action
		2. Nature of the regulation
		3. Tradition or custom being relied upon to claim the right
	3. The activities might be a modern form of a practice, tradition or custom
3. **To be “integral”, the custom or tradition must be of a central significance to the society**
	1. The claimant must do more than prove that the practice took place – must be demonstrated as a significant part of their distinctive culture
	2. These elements can’t be things common to all human societies, must be defining & central attributes of society in Q (w/o this practice, society would be fundamentally altered)
4. **Aboriginal rights exist in practices, customs and traditions that have continuity w/those that existed prior to contact**
	1. The relevant time period is the time **prior to the arrival of Europeans, not prior to Crown’s assertion of power**
	2. Claimant doesn’t need to provide conclusive evidence connecting the practice all the way from pre-contact times → activities need only be rooted in pre-contact societies
5. Courts must **approach rules of evidence in light of evidentiary difficulties inherent in adjudicating aboriginal claims** – courts can’t undervalue evidence presented by aboriginal claimants simply b/c it doesn’t adhere precisely to common laws of evidence
6. Aboriginal rights claims must be **adjudicated on a specific rather than general basis** – specific facts of each case very important & each abo society has diff. rights
7. For something to be an aboriginal right it must be of **independent significance** to the culture where it exists (i.e. customs that are **integral** to abo community will constitute abo rights, but those that are merely incidental will not)
8. Aboriginal rights must be customs, practices or traditions that are **distinctive**, not distinct
	1. Practice doesn’t need to be unique, just needs to be a part of what makes the aboriginal community a distinctive culture
9. European influence is only relevant if practice is integral **because of influence**
10. Courts must consider **relationship between aboriginals and the land** & the distinctive societies/cultures of abo peoples
	1. Rights not tied to land (language), rights in the middle (fishing & land), rights tied to land

*R v Gladstone, 1996* – Framework of Infringement for Rights w/ Non-internal Limit

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| **Facts:** G (Heiltsuk) charged under *Fisheries Act* w/offence of offering to sell herring spawn on kelp caught under authority of Indian fishing license. License permitted sale of 500lb; G caught selling 4,200lb. Claimed they had abo right to commercially exploit herring & that regulation is contrary to s. 35(1).  |

***Gladstone*** distinguished from ***Sparrow*** b/c S was about a right w/ an **internal limit** (fish for food & ceremonial purposes), whereas G is about a right w/**no internal limit** (fishing for commercial purposes).

* Lamer J: main diff. between this case & sale of fish in VDP is that in this case trade was a central & significant part of the Heiltsuk culture, not merely incidental to the social & ceremonial activities of the community
* **Factors used to establish *prima facie* infringement are not requirements –** negative answer to one of them does not preclude infringement

**Justification:**

* For rights that are not inherently limited, gov’t can regulate the right as 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** → less than exclusivity, but still gives aboriginals priority = **doctrine of priority** (recognizes priority over other users w/o granting exclusivity, which could occur under the ***Sparrow*** test)
	+ Factors to consider in determining whether regulations in line w/abo priority are: (not exhaustive)
		- Were the affected aboriginal peoples **consulted**? (***Haida*** makes this a separate duty)
		- Is there **ample compensation** for aboriginals?
		- Has the Crown **accommodated aboriginal participation** in the regulated conduct?
		- Do the Crown’s **needs require a limit** on aboriginal rights?
		- How has the Crown **accommodated different abo groups**?
		- How **important is the right** to the affected communities?
		- How does the **regulation for abos differ from other users**?
* Right = procedural & substantive → at stage of justification gov’t must demonstrate **both** that **process** by which it allocated the resource & **actual allocation** of resource that results from that process reflect the prior interest of abo rights holders in the fishery
* When assessing gov’t objectives it can be tied to a process of **reconciliation** → broadens range of objectives: regional & economic fairness, policy (McLachlin doesn’t agree)
	+ **Valid objective** – must be **compelling & substantial** & directed at either **the recognition of the prior occupation of NA by aboriginal peoples; OR at the reconciliation of aboriginal prior occupation with the assertion of the sovereignty of the Crown**

*Mitchell v Canada (Minister of National Revenue), 2001*

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| **Facts:** M (Mohawk) attempted to bring goods back across border from USA & refused to pay duty, claiming he had an aboriginal right to trade that exempted him from having to pay duty on goods. Goods intended as gifts to another First Nation as a gift of friendship. Crown argued no abo right that excludes M from having to pay duties at border & that if there was it would be inconsistent w/Canadian sovereignty & invalid. M successful at trial & on appeal. **Issue:** How is evidence dealt w/when determining if AR exists? Is Canadian sovereignty inconsistent w/ some AR?**Held:** Appeal allowed.  |

Looks at ***VDP test*** – 3 things to look for to help define AR:

1. **Nature of the action** appellant claiming was done pursuant to the right
2. **Nature of the gov’t legislation**/regulation alleged to infringe the right
3. **Ancestral traditions & practices** relied on to establish the right

McLachlin confirms that **flexible application of rules of evidence** must be used in abo cases.

* Oral histories can be admitted for 2 reasons:
	+ They may offer evidence of ancestral practices that wouldn’t otherwise be available; AND
	+ They may provide abo perspective on right claimed
* Can’t be prejudicial & must be reliable

*R v Sappier; R v Gray, 2006* – Application of *VDP Test* for “Distinctive Culture”

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| **Facts:** 3 respondents (2 Maliseet & one Mi’kmaq) charged w/unlawful possession & cutting of Crown timber. Argued in defence that they possessed an aboriginal right to harvest timber for person use. S & G also argued they had a treaty right. Aboriginal right found to exist in lower courts, Crown appealed. * Abo Argument: harvesting trees fulfills domestic needs of pre-contact communities for things like shelter, transport, fuel & tools. Maliseet & Mi’kmaq were **migratory**.
* Crown Argument: harvesting wood just done for survival (now don’t need to do this to survive)

**Issue:** How do you define abo rights for migratory peoples? Can survival practices = abo rights?**Central Q: how to define the distinctive culture of such peoples, and how to determine which pre-contact practices were integral to that culture?****Held:** Appeal dismissed.  |

**Don’t characterize aboriginal right as right to resource (**too much like CL property rights) → distinction between **resource & practice** = distinction between end & a mean

* Bastarache J. emphasizes **importance of adducing evidence about pre-contact practices** b/c helps court identify how pre-contact tradition could have evolved in modern times
	+ Pre-contact Practice central to VDP test for 2 reasons:
		1. Court needs **evidence** to base s. 35(1) analysis on
		2. Necessary to identify pre-contact practice upon which claim is founded in order to consider how it could have evolved in modern times (**rights not frozen in time)**
* Says **“culture” really means pre-contact way of life**, including means of survival
* Aboriginal rights **limited to the territory where they were originally practiced**
* In ***Mitchell***, McLachlin made a reference that the **VDP test** requires showing the practice, custom or tradition must be **integral to the distinctive culture in the sense that it is at the “core” of their identity and thus without it the culture could not exist**
	1. ***Sappier; Gray*** – this SHOULD NOT RESULT IN INCREASED THRESHOLD
* Court should look at **how practice relied upon relates to particular way of life**
	1. **Survival practices can be considered aboriginal rights**

“Aboriginal Title”: The Framework

*R v DELGAMUUKW, 1997* – FRAMEWORK FOR ABORIGINAL TITLE

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| **Facts:** D (Gitksan & Wet’suwet’en nations) claimed title to plot of land of more than 58,000 km2 on basis of AT that was never extinguished. In original trial D tried to obtain “ownership”; however on appeal this was changed to “aboriginal title and self gov’t”. Case was dismissed at trial & on appeal claims all grouped together & dismissed. **Issue:** What is nature of protection given to AT under s. 35(1)? Did prov. have authority to extinguish title after confederation? **Held:** Appeal allowed in part, new trial ordered.  |

Characteristics of AT:

* **Inalienable:** land is inalienable (concept retained from ***Calder*** and ***Guerin***) & different from other property interests b/c **does not come from Crown grant**
* **Prior Occupation:** source of AT is in prior occupation (NOT from Royal Proclamation, as was said in ***St Catherine’s***)
* **Communally Held:** AT is a **collective right** held by all members of the aboriginal nation. Decisions about land are to be determined collectively (BUT not self-gov’t)

**The Content of Aboriginal Title:**

1. AT encompasses the **right to** **exclusive use & 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 cultures;
2. That those protected uses **must not be irreconcilable** with the **nature of the group’s attachment** to that land

Affirms that AT is protected by s. 35(1) but that existence of particular aboriginal right at CL not a *sine qua non* for proof of an aboriginal right that is recognized and affirmed by s. 35(1).

**Aboriginal title is a right to the land itself** (abo right is defined in terms of activities)

**TEST FOR ABORIGINAL TITLE:**

1. **The land must have been occupied before sovereignty**
	1. **Pertinent time** = **time at which Crown asserted sovereignty over the land** subject to the title (diff. from time for establishment of abo rights to engage in specific activities [period prior to contact])
	2. Aboriginal title crystallized at time sovereignty was asserted (b/c it’s a burden on Crown’s underlying title, which wasn’t established until sovereignty)
	3. Proof of historic occupation → can rely on CL & aboriginal law
		1. **CL: physical occupation** = proof of possession (buildings, cultivation & enclosure of fields, or regular use of definite tracts of land for hunting/fishing etc.)
* ***Marshall; Bernard*** – AT “is established by aboriginal practices that indicate possession similar to that associated with title at CL” (emphasized CL perspective)
* Q = “whether a degree of physical occupation/use equivalent to CL title has been proved”
	+ 1. **Abo**: consider any aboriginal laws re: land (land tenure or governing use)
1. **If present occupation is relied on as proof of occupation pre-sovereignty, there must be a continuity between pre-sovereignty and modern times** (but not an unbroken chain)
2. **At the time of sovereignty, the occupancy must have been exclusive** (but it could have been jointly exclusive by more than one party or tribe)
	1. **Occupation =** contextual interpretation based on characteristics of group & land; physical (hunting grounds) + exclusion
	2. **Exclusion** requires **intent to exclude others + capacity** to do so
		1. CL perspective:
* Emphasizes factual reality of occupation
* Exclusivity can be demonstrated by “intention & capacity to retain exclusive control” (***Marshall; Bernard***) → **regular occupancy** or **use of definite tracts of land**
	+ 1. Abo perspective:
* Consider abo laws re: trespass, use & residence
* What looks like trespass to CL may not undermine exclusive control under abo laws
	1. More difficult to show than VDP rights test
	2. Court allows abo perspective to be given weight when determining exclusivity → but Abo perspective must fit into Crown perspective
	3. **Shared exclusivity may be permitted**, but one group would need to have control

**TEST FOR JUSTIFICATION OF INFRINGMENT OF ABORIGINAL TITLE:** (same as ***Sparrow***)

1. **The infringement must be in furtherance of a legislative objective that is compelling & substantial**
2. **The infringement must be consistent w/the special fiduciary relationship between aboriginals & Crown**
	1. Relationship is special b/c both ideas of CL & aboriginal traditions must be taken into consideration when making the decisions, as aboriginals are a unique case & must be given respect in terms of their traditions & laws
	2. Requirements of fiduciary duty are a function of “legal and factual context” of each appeal (***Gladstone***)

ABORIGINAL TITLE POST *DELGAMUUKW*

*R v Bernard; R v Marshall, 2005* – Common Law Perspective

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| **Facts:** 35 Mi’kmaq Indians charged w/cutting timber on Crown lands in NS w/o authorization. Accused argued that Mi’kmaqs had right to log on Crown lands for commercial purposes pursuant to treaty or AT. Trial court entered convictions that CA overturned. **Issue:** What is the correct test for occupancy that is needed when determining if AT exists? **Held:** Appeal allowed in part, convictions restored.  |

**Emphasis on CL Perspective:**

* Court’s task is to **translate** pre-sovereignty practice into modern legal right
	+ Translation begins w/core of CL right in Q (right is title)
* AT established by abo practices that indicate possession similar to that associated w/title at CL
	+ Look for equivalent of deeds & European assertions of ownership in aboriginal culture
* *Delgamuukw*, AT claimants must prove exclusive pre-sovereignty occupation of the land by their forebears
	+ Condensed elements (i) and (iii) of the *Delgamuukw* test
	+ “Occupation” means physical occupation and can be established by constructing dwellings, enclosing fields, and regular use of definite tracts of land
	+ “Exclusive occupation” means “the intention and capacity to retain exclusive control”
		- Need not show acts of exclusion, so long as you can show “effective control”: forebears could have excluded others
		- Typically established by showing **regular occupancy** or **use of definite tracts of land** for hunting/fishing/exploiting resources
			* Less intensive uses may give rise to diff. rights
		- CL perspective dominant – abo perspective may be used to interpret requirement of physical occupation
* Ignores discussion on abo law from *Delgamuukw*

*William v BC, 2012* – Common Law Perspective

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| **Facts:** Appeals re: title of Xeni Gwet’in and the Tsilhoqot’in in approx. 4, 380km in Chilcotin region of west central interior of BC. W former chief of X; X part of T nation. T considers traditional territory to include vast tract of west central BC. Claiming AT and rights in 2 areas: Brittany Triangle & Trapline Territory. BC proposed forestry activities in both these areas as both located in Williams Lake Timber Supply Area. X got an injunction in Trapline Area; claimed trapping rights. Then wanted to prevent logging in Brittany Triangle. **Issue:** Does X/T have AT to claim area? **Held:** Motion denied by BCCA.  |

**More restrictive than CL approach taken in *Marshall; Bernard*** (“exclusive possession in sense of intention & capacity to control”) **→ “**law must recognize and protect AT where exclusive occupation of the land is **critical to the traditional culture and identity of an Aboriginal group”**

* Usually the case where traditional use of tract of land was **intensive & regular →** “intensive” suggests move towards **site-specific** AT claims
* “Critical to culture” relevant to test for abo rights – ensures that it is one of the things that truly made abo society what it was
* Lamer subsumes “any land occupied pre-sovereignty & w/which parties have maintained a substantial connection is of central significance to their culture” comment from *Delgamuukw* into **occupation**
	+ Couldn’t imagine a situation in which this would affect claim
* **AT must be proven on site-specific basis**
	+ Particular occupance of the land (ex. village sites, enclosed/cultivated fields) OR
	+ Definite tracts of land subject to **intensive use** (ex. specific hunting/fishing/gathering/spiritual sites)
	+ Tract of land must be “reasonably capable of definition”
* Emphasizes narrow reading of CL perspective

**\*\*Challenged at SCC, so this ruling is not confirmed\*\***

Métis Rights

*R V POWLEY, 2003*

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| **Facts:** P & his son killed bull moose in Sault Ste. Marie w/o hunting license. Claimed that as Métis they had aboriginal right to hunt for food in the area & therefore regulations were invalid as they were violation of s. 35(2). **Issue:** How does VDP test apply to Métis?**Held:** Appeal dismissed.  |

**Métis did not exist before European contact = product of that contact.** However, Métis rights are specifically protected in s.35(2) of the Constitution.

**Modification of VDP Test for Métis – in order to establish right, claimant must:**

1. Identify the **historic rights-bearing community** → must prove shared customs & traditions as well as a collective identity
2. Identify the **contemporary rights-bearing community** → requires loose connection between historic & contemporary communities
3. Verify membership in the relevant contemporary community, which requires:
	1. The claimant must **self-identify** as a member of the community;
	2. There must be evidence of an **ancestral connection** to **historic Métis community**; AND
	3. Claimant must demonstrate they are **accepted by the modern community**

**Test: for Métis practices should focus on identifying those practices, customs and traditions that are integral to the Métis community’s distinctive existence and relationship to the land.**

Relevant time to look for Métis right = **just prior to when Europeans effectively established political/legal control in the area (**post contact; pre-control)

* Right that is **integral to Métis distinctive culture at this time**
* **Easier test** for Métis

*Manitoba Métis Federation v Canada (AG), 2013*

Wanted a declaration about what the law is re: metis

* Base challenge on honour of the crown – first time it was used to create independent basis for obtaining relief (in this case, declaration
* Claims of a declaration not barred by statute of limitations b/c legislature can’t stop courts from stating the law
* S. 31 – doesn’t trigger fiduciary duty
	+ 2 elements to establish FD:
		- Sufficient or cognizable aboriginal interest
		- Crown has to undertake discretionary control over that interest.
	+ High bar to establish FD – fact that Métis are aboriginal and had an interest in the land not sufficient to establish an aboriginal interest in land → interest must be **distinctly aboriginal (**i.e. communal aboriginal interest in the land that is integral to the nature of the Métis distinctive community and their relationship to the land

Treaty Rights

*R V MARSHALL (NO 1), 1999*

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| **Facts:** M (Mi’kmaq) fishing for eels, sold for approx. $800 – charged w/violation of federal *Fisheries Act*. M rests his case on treaty right from *Treaty of Peace and Friendship, 1760* (promise is to only trade w/English at “truckhouses”). Trial judge said only enforceable treaty obligations were those set out in 1760 treaty, and while trade clause gave Mi’kmaq right to bring products of hunting/fishing to truckhouse to trade, right had disappeared w/disuse of truckhouse system. NSCA upheld conviction. **Issue:** How should courts determine if a treaty provides rights? When is an infringement of treaty rights justified?**Held:** Appeal allowed; acquittal entered.  |

**3 Reasons to Look at Extrinsic Materials** (beyond the treaty):

1. Modern commercial context – look at extrinsic evidence
2. Even in context of treaty doc that purports to contain all the terms, Court has made clear in recent cases that extrinsic evidence of historical & cultural context of treaty may be received even if treaty not ambiguous on its face
3. Treaties concluded verbally & reduced to writing have to be understood in oral context – unconscionable for Crown to ignore oral terms while relying on written

Court will “**presume the honour of the crown”** in treaty negotiation

**If a regulation violates a treaty right, it can be justified using *Sparrow* test**

**MCLACHLIN DISSENT:**

**Factors for Consideration when Interpreting Treaty Rights:**

1. Aboriginal treaties are unique agreements and attract special interpretation;
2. They must be liberally construed and ambiguities must be resolved in favour of aboriginals;
3. They are meant to best reconcile the interests of both parties at the time the treaty was signed;
4. The integrity and honour of the Crown is presumed in treaty negotiations;
5. The words of the treaty must be given the meaning that they would naturally have held for the parties at the time;
6. The interpretation must be sensitive to the unique cultural and language differences between the parties at the time;
7. A technical or contractual interpretation should be avoided;
8. Courts cannot alter the terms of a treaty by exceeding what is possible through the language;
9. Treaty rights must not be interpreted in a static way

*R v Marshall (No 2), 1999*

**Summary of *Marshall (No 1)*:**

* The **treaty right** is a **narrow right**
* Paramount **objective** of the regulations is conservation of resources
* Valid objectives not limited solely to conservation issues
* Abo entitled to consultation when regulations limiting their rights are created as a byproduct of the special relationship w/ the Crown
* Minister can regulate using any means possible, so long as it can be justified using ***Sparrow*** test

*R v Morris, 2006*

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| **Facts:** Treaty protecting Abo hunting rights to be performed “as formerly”, which included hunting at night. M convicted when hunting at night for “unsafe hunting practices”. M (Tsartlip band of Saanich Nation) was hunting at night when they shout at decoy deer set up by prov. conservation officers to trap illegal hunters. Charged under *Wildlife Act*. Trial said that “night hunting w/illumination” was a method employed by Tsartlip people, but said didn’t have a treaty right b/c hunting at night w/illuminating device = “inherently unsafe”. M unsuccessful at lower courts & appealed to SCC. **Issue:** To what extent can prov. gov’t interfere w/treaty rights?**Held:** Appeal allowed; acquittal entered.  |

* What extent of impairment is required to constitute *prima facie* impairment of treaty right?
	+ Deschamps & Abella – only require “**meaningful diminution**” which is **anything but an insignificant interference w/ treaty right**
		- ***Sparrow*** test can also be used to justify infringement

Duty to Consult

*HAIDA NATION V BC, 2004* – TEST FOR DUTY TO CONSULT

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| **Facts:** BC issued “Tree Farm License” on QC islands, H had pending land claim that had not been recognized at law, also claimed AR to harvest red cedar in that area. 1999 Minster authorized transfer of license to a company w/o consent from or consultation w/H. H brought a suit requesting that replacement & transfer be set aside. Crown successful at trial, but overturned at CA where court found that both Crown & company had duty to consult H. **Issue:** How do you know duty exists? What does duty entail? **Held:** Appeal dismissed.  |

**Duty to consult arises out of honour of the Crown – arises when:**

1. **The Crown has knowledge, actual or constructive, of a potential claim/right;**
2. **The Crown must be contemplating conduct which engages a potential aboriginal right; AND**
	1. Gov’t conduct - **not limited to exercise of stat powers, extends to “strategic, higher level decisions”** that may have an impact on AR (***Rio Tinto***)
3. **There must be potential that contemplated conduct may adversely affect an aboriginal claim/right**
	1. ***Mikisew*** – adds specificities of promises, seriousness of impact & history of dealings as factors to consider (also, just b/c there’s a treaty, doesn’t exempt court from duty to consult)
	2. **Adverse affect =** claimant must show **causal relationship** between proposed gov’t conduct & potential for adverse impacts on pending claims/rights (past wrongs, including breaches of duty to consult, DO NOT SUFFICE) (***Rio Tinto***)

Test for Context/Scope = **Proportionality Test:**

* When claim to right is **weak**, Crown only has to **give notice** & **disclose info** to affected peoples
* When there’s **strong *prima facie* case** for right Crown **must consult more extensively** – requires allowing First Nations:
	+ To make submissions for consideration
	+ To formally participate in decision-making; AND
	+ Ensuring that Crown publishes reasons showing how aboriginal concerns were factored into their decisions

Accommodation doesn’t mean rights have veto power

“Remedy tail can’t wave the liability dog”

*Mikisew Cree First Nation v Canada (Minister of Heritage), 2004*

Duty to consult analysis intended to be **flexible** – 2 factors from ***Haida Nation*** (strength of claim & seriousness of impact) supplemented w/new factors:

* Specificities of promises made
* Seriousness of impact
* History of dealings between Crown & First Nation
	+ Looks at overall structure of treaty

Having a treaty doesn’t exempt Crown from duty to consult

*Rio Tinto Alcan v Carrier Sekani Tribal Council, 2010*

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| **Facts:** A dam & reservoir was built in 1950s that altered the amount & timing water in Nechako River. C claimed N Valley as their ancestral homeland and right to fish in the river, but, pursuant to practice at the time, they were not consulted about the dam project. First Nation asserted that new Energy Purchase Agreement in 2007 should be subject to consultation under s. 35. **Issue:** When does duty to consult arise? **Held:** Appeal dismissed.  |

McLachlin – reaffirmed general approach in ***Haida Nation*** that duty to consult arises when the Crown has knowledge of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it.

* Gov’t action that triggers duty **not limited to exercise of stat powers, extends to “strategic, higher level decisions”** that may have an impact on AR, including transfer of tree farm licenses, approval of multi-year forest mgmt. plan
* **Adverse affect =** claimant must show **causal relationship** between proposed gov’t conduct & potential for adverse impacts on pending claims/rights (past wrongs, including breaches of duty to consult, DO NOT SUFFICE)