**S.35(1):** the existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

* “Existing” means it applies to rights in existence in 1982, not those previously extinguished. But it’s flexible, rights should be allowed to evolve over time (*Sparrow*)
* “Recognized and affirmed” incorporates the fiduciary relationship, restrains the exercise of sovereign power (*Sparrow*)

**“Considerations”**, **“Requirements”**

**1. Is there an existing aboriginal right being claimed?**  (onus on aboriginal community to prove)

**How to Characterize Aboriginal Rights (*Van der Peet*)**

**Test:** “*In order to be an aboriginal right an activity must be an element of a practice, custom or tradition (PCT)* ***integral to the distinctive culture*** *of the aboriginal group claiming the right*.” Ten factors that should be considered in applying this test:

1. *Courts must take into account the* ***perspective*** *of aboriginal peoples themselves*
2. *Courts must identify precisely the* ***nature of the claim*** *being made in determining whether an aboriginal claimant has demonstrated the existence of an aboriginal right*

* The court must first correctly determine what the right is that is being claimed. To characterize an applicant’s claim correctly, a court should consider such factors as:

1. The nature of the action (which the applicant is claiming was done pursuant to an aboriginal right)
2. The nature of the governmental regulation
3. The PCT being relied on to establish the right
4. *In order to be integral, a PCT must be of* ***central significance*** *to the aboriginal society in question*

* The applicant must demonstrate that the practice didn’t just take place in their society
* It was a central and significant part of the society’s distinctive culture. It was one of the things which made the culture of the society distinctive – that it was one of the things that truly made the society what it was
* Ask: without this PCT, would the culture in question be fundamentally altered, or other than what it is?

1. *The PCT’s which constitute aboriginal rights are those which have* ***continuity*** *with the PCT’s that existed* ***prior to contact***

* The relevant time period is the period **prior to contact**, NOT the period prior to the assertion of sovereignty by the Crown
* Evidence: doesn’t need to be shown from pre-contact. Can be from post-contact, but must point at aspects of the community that have their origins pre-contact
* Continuity: the evolution of PCT’s into modern forms will not, provided that continuity with pre-contact PCT’s is demonstrated, prevent their protection as aboriginal rights. Avoids “frozen rights”
  + Evidence doesn’t have to be shown of an unbroken chain of continuity

1. *Courts must approach the rules of evidence in light of the* ***evidentiary difficulties*** *inherent in adjudicating aboriginal claims*
2. *Claims to aboriginal rights must be adjudicated on a* ***specific rather than general basis***

* Just because one community has a right, doesn’t mean that another does

1. *For a PCT to constitute an aboriginal right it must be of* ***independent significance*** *to the aboriginal culture in which it exists*

* It can’t exist simply as an incident to another PCT. It must be itself of integral significance to a society

1. *The integral to a distinctive culture test requires that a PCT be* ***distinctive****; it doesn’t require that a PCT be distinct*

* It’s not relative. It just makes up part of what the culture is, not that it’s different from other cultures (ie. In Sparrow, fishing isn’t distinct, but it’s a distinctive part of their culture)

1. *Influence of* ***European*** *culture only relevant to the inquiry if it’s demonstrated that the PCT is only integral because of that influence*

* Ok if PCT altered after European arrival, but if arose solely in response to European influence, won’t meet standard of a right

1. *Courts must take into account both the relationship of aboriginal peoples* ***to the land*** *and the* ***distinctive societies*** *and cultures of aboriginal peoples*

* Courts must not focus so entirely on the relationship of aboriginal peoples with the land, that they lose sight of the other factors relevant to the identification and definition of aboriginal rights. Aboriginal title is just a subset of aboriginal rights

**Modifications to Show Aboriginal Title (*Delgamuukw*) – use in light of considerations in *Van der Peet***

1. *Sufficiency of Occupation –* land must’ve been occupied **prior to sovereignty** (NOT contact, like PCT rights). Approach from both perspectives:
   1. Aboriginal Perspective – focuses on laws, PCT’s of group. Take into account the group’s size, manner of life, material resources, technological abilities and character of lands claimed
   2. Common Law Perspective – idea of possession/control of lands. Possession extends beyond sites that are physically occupied, to surrounding lands that are used and over which **effective control is exercised**

* Proof of occupancy can come from (1) physical occupancy, or (2) aboriginal law (if they had laws in relation to land, those would be relevant to establishing occupation)

1. *Continuity of Occupation –* **if** present occupation is relied on as proof of occupation pre-sovereignty, there must be a continuity between present and pre-sovereignty occupation

* No need to establish an “unbroken chain of continuity”, but there must be “substantial maintenance of the connection”
* Change in nature of occupation won’t preclude claim for title unless (possibly) use is inconsistent with continued use by future generations

1. *Exclusivity of Occupaiton –* at sovereignty, occupation must’ve been exclusive – meaning they had intention and capacity to retain exclusive control over the lands

* Other groups being on land doesn’t necessarily negate exclusivity (ie. If permission was requested/granted, or treaties made, it may show intention and capacity to control

**1(A). Differences for Metis Rights**  (insert into *Van der Peet*, after characterizing the nature of the claim)

1. *Identification of the Historic Rights-Bearing Community*

* Requires demographic evidence, and proof of shared customs, traditions, and a collective identity
* Must be demonstrated with some degree of continuity and stability (though shifts are fine)

1. *Identification of the Contemporary Rights-Bearing Community*

* Lapses in visibility ok. Community can be largely “invisible,” if it’s explained and doesn’t negate existence of contemporary community

1. *Verification of the Claimant’s Membership in the Relevant Contemporary Community* – three broad factors indicate Metis identity for the purpose of claiming Metis rights:
   1. Self-Identification – the claimant must self-identify as a member of a Metis community
   2. Ancestral Connection – they must present evidence of an ancestral connection to a historic Metis community. Doesn’t require a “blood quantum”, but must be some proof that ancestors belonged to the community by birth, adoption, or other means
   3. Community Acceptance – must demonstrate they are accepted by the modern community
   * Core of this is past and ongoing participation in a shared culture, in the customs and traditions that constitute a Metis community’s identity and distinguish it from other groups
2. *Identification of the Relevant Time Frame* – (substitute this time period in part 4 of *Van der Peet*)

* The time frame is “post contact, but pre-control”. Identifies PCT’s that predate the imposition of European laws and customs on the Metis

**2. Has the aboriginal right been extinguished?**  (onus on the Crown, if it want’s to prove)

Two requirements for extinguishment (*Calder*):

1. You have authority to extinguish the title (usually obvious, dealing with Crown)
2. There was **clear and plain intent** to extinguish the title
   1. Mere regulation won’t meet that standard (*Gladstone*), even if hey are inconsistent with aboriginal rights (*Sappier/Gray*)
   2. A law of general application can’t meet that standard (*Delgamuukw*)

**3. Has this aboriginal right been infringed?** (onus on the aboriginal community to prove)

Three questions are asked, an answer of YES to **any one of these** will be a prima facie infringement (*Sparrow*):

1. Is the limitation **unreasonable**?
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**?

**4. Can the infringement be justified?** (onus on the Crown to prove)

Two stage analysis (*Sparrow*):

1. Is there a valid legislative objective to the law that is infringing?
   1. Must be a “pressing and substantial objective”
      1. Types of objectives that will be allowed are ones that “are in the interest of all Canadians, and, more importantly, where the reconciliation of aboriginal societies with the rest of Canadian society depends on their successful attainment” (*Gladstone*)
2. If a valid objective is found, is the infringing law’s means in keeping with the Crown’s duty to act honourably? Possible things to consider:
   1. Was the infringement as minimal as possible?
   2. Were their claims given priority over other groups? Exclusivity of priority not always necessary (*Gladstone*):
      1. When a right has **no adequate internal limitations**, exclusivity of priority isn’t necessary. Instead, gov required to demonstrate that, in allocating the resource, it’s taken account of the existence of aboriginal 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
      2. Both procedural and substantive. Gov must show (1) that the process by which it allocated the resource, and (2) the actual allocation of the resource which results from that process, both reflect the prior interest of aboriginal rights holders
   3. Was the effected aboriginal group consulted?
   4. If there was expropriation, was their fair compensation?

**Modification for Justification of Infringement of Aboriginal Title – Tsilhqot’in/Delgamuukw**

To justify overriding the title holding group’s wishes on the basis of the broader public good, government must show:

1. That it discharged its procedural duty to consult and accommodate

* Degree of consultation required lies on a spectrum (*Haida*). Proportionate to strength of claim and the seriousness of the adverse impact
* Duty to consult arises when (*Rio Tinto*):
  1. The Crown has knowledge, real or constructive, of the potential existence of Aboriginal title or right
  2. The Crown is contemplating conduct which engages the potential aboriginal right
     1. This is any conduct which has the potential for adverse impact, including “strategic, higher level decisions”
  3. There is the potential that the contemplated conduct may adversely affect the aboriginal claim or right
     1. P must show a causal relationship between the proposed conduct and potential adverse impacts

1. That its actions were backed by a compelling and substantial objective
   * These are objectives that are directed at either the recognition of the prior occupation of North America by aboriginal peoples or the reconciliation of aboriginal prior occupation with the assertion of the sovereignty of the Crown (*Gladstone*)
   * Objectives that are of sufficient importance to the broader community as a whole are equally a necessary part of that reconciliation
2. That the action is consistent with the Crown’s fiduciary obligation to the group:

* Government must act in a way that respects that Aboriginal title is a group interest that inheres in present and future generations. SO incursions on title can’t be justified if they would substantially deprive future generations of the benefit of the land
* It also infuses an obligation of proportionality into the justification process. Rational connection, minimal impairment and proportionality are implicit in the fiduciary duty

**Concepts**

**The Content of Aboriginal Title (From *Delgamuukw*)**

The idea that aboriginal title is sui generis is the unifying principle underlying the various dimensions of that title:

1. *Inalienability –* lands held pursuant to aboriginal title can’t be transferred, sold, or surrendered to anyone other than the Crown
2. *Source –* it arises from prior occupation of Canada by aboriginal peoples (not sourced in RP, just recognized there)
3. *Communally Held –* it can’t be held by individual aboriginal persons, it is a collective right to land held by all members of an aboriginal nation. Decisions about that land are also made by that community

The content of aboriginal title can be summarized by two propositions:

1. It 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 PCT’s which are integral to distinctive aboriginal cultures
   1. This means, the title holders have the right to the benefits associated with the land, to use it, enjoy it, and profit from it (*Tsilhqot’in*)
   2. 2 things remain to the Crow: (1) fiduciary duty when dealing with aboriginal land, and (2) the right to encroach on aboriginal title if it can be justified in the broader public interest under s.35 (*Tsilhqot’in*)
2. Those protected uses must not be irreconcilable with the nature of the group’s attachment to that land

* Ie. Uses of land that would threaten the continuity of the relationship of an aboriginal community with its land in the future are excluded from the content of aboriginal title

**Fiduciary Duty**

Arises in 2 situations (*Manitoba Metis Federation*):

1. Where the Crown administers land or property in which Aboriginal peoples have an interest (*Guerin*). Requires:
   1. A specific or cognizable aboriginal interest
   2. A Crown undertaking of discretionary control over that interest
2. Where the Crown undertakes to act in the best interests of Aboriginals (or Metis)

**The Honour of the Crown (From *Manitoba Metis Federation*)**

Honour of the Crown – the principle that servants of the Crown must conduct themselves with honour when acting on behalf of the sovereign

* Arises from Crown’s assertion of sovereignty over an Aboriginal people , and characterizes the “special relationship” that arises out of subjecting Aboriginals to a legal system they didn’t share

Gives rise to different duties in different situations (*Haida*). Not a cause of action itself, rather it speaks to how obligations that attract it must be fulfilled

4 situations (so far) in which HoC has been applied:

1. Gives rise to a fiduciary duty when the Crown assumes **discretionary control** over a specific Aboriginal interest
2. Informs the **purposive intention of s.35**, and gives rise to a **duty to consult** when the Crown contemplates an action that will affect a claimed but as of yet unproven Aboriginal interest (*Haida*)
3. Governs **treaty-making and implementation**, leading to requirements such as **honourable negotiation** and the avoidance of the appearance of sharp dealing
4. Requires the Crown to act in a way that accomplishes the intended purposes of treaty and statutory grants to Aboriginal peoples, ie. **Fulfill promises** (*Mikisew*)

When the issue is the implementation of a constitutional obligation to an aboriginal people, the HoC requires that the Crown (1) takes a broad and purposive approach to the interpretation of the promise; and (2) acts diligently to fulfill it

* Implementing an obligation may be imperfect, and not necessarily bring dishonor to the Crown, but a persistent pattern of errors and indifference that substantially frustrates the purposes of a promise may betray the HoC

**The Duty to Consult**

The duty to consult is grounded in the HoC. In all its dealings with Aboriginals, the Crown must act honourably.

* Para 25: “Canada’s Aboriginal peoples were here when Europeans came, and were never conquered. Many bands reconciled their claims with the sovereignty of the Crown through negotiated treaties. Others…have yet to do so. The potential rights embedded in these claims are protected by s.35 of the Constitution. The honour of the Crown requires that these rights be determined, recognized and respected. This, in turn, requires the Crown, acting honourably, to participate in processes of negotiation. While this process continues, the honour of the Crown may require it to consult and, where indicated, accommodate Aboriginal interests” (*Haida*)

The controlling question is: What is required to maintain the HoC and to effect reconciliation between the Crown and the aboriginal peoples with respect to the interests at stake?

Duty to consult is only for government – doesn’t extend to third parties.

**Evidence (*Mitchell v. MNR*)**

**Admissibility of Evidence:** traditional rules of evidence should be treated flexibly in aboriginal claims. 3 rules underlie the admissibility of evidence:

1. The evidence must be useful in the sense of tending to prove a fact relevant to the issues in the case
2. The evidence must be reasonably reliable; unreliable evidence may hinder the search for the truth more than help it
3. Even useful and reasonably reliable evidence may be excluded in the discretion of the trial judge if its probative value is overshadowed by its potential for prejudice

Oral histories may be admitted for two reasons:

1. They may offer evidence of ancestral practices and their significance that would not otherwise be available
2. They may provide the aboriginal perspective on the right claimed

BUT, this isn’t a blanket admission of oral histories. Still must consider reliability and prejudice – does the witness represent a reasonably reliable source of the particular peoples history?

**Interpretation of Evidence:** no precise rules, but two general principles for interpreting or weighing evidence in aboriginal claims:

1. Courts need to interpret/weigh the evidence with a consciousness of the special nature of aboriginal claims
2. It’s imperative that the laws of evidence operate to ensure the aboriginal perspective is given due weight by the courts

**Treaties**

Treaty rights can still be regulated in two ways (*Marshall 2*):

1. Regulate the right within the terms of the treaty, so long as it’s within the limits of the treaty, it will be valid
2. Can still regulate so long as it can be justified

Factors to consider when interpreting treaty rights (*Marshall 1* Dissent):

1. Aboriginal treaties constitute a unique type of agreement and attract special principles of interpretation
2. Treaties should be liberally construed and ambiguities should be resolved in favour of the aboriginal signatories
3. The goal of treaty interpretation is to choose from among the various possible interpretations of common intention the one which best reconciles the interests of both parties at the time the treaty was signed
4. In searching for the common intention of the parties, the integrity and honour of the Crown is presumed
5. In determining the signatories’ respective understanding and intentions, the court must be sensitive to the unique cultural and linguistic differences between the parties
6. The words of the treaty must be given the sense which they would naturally have held for the parties at the time
7. A technical or contractual interpretation of treaty wording should be avoided
8. While construing the language generously, courts can’t alter the terms of the treaty by exceeding what is possible on the language or realistic
9. Treaty rights of aboriginal peoples must not be interpreted in a static or rigid way, they aren’t frozen at the date of signature. Court must update treaty rights to provide for their modern exercise, which involves determining what modern practices are reasonably incidental to the core treaty right in its modern context