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# Aboriginal Rights

* **Aboriginal Rights** belong to communities;
	+ Each community gets a unique bundle, possessed by families and individuals within each community;
	+ Purpose of aboriginal rights is 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 a 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 ; diplomatic practice used in that time (18th C)
		- 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**: World War among colonial powers and their colonies (fought all over the world; determined the fate of many countries and their creation)
	+ England was the big winner, gaining New France and Florida; France gave Louisiana to Spain
	+ Iroquois = critical ally to have, wanted by both sides; 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
	+ Ended in 1763 with Treaty of Paris (Aboriginals not a party to the Treaty); also year that *Royal Proclamation* created
* Establishment of policy – that some see as crystallizing into law – around British-Indigenous interactions
	+ Culminating in ***Royal Proclamation of 1763***: foundational document of Canadian Constitution and Canada in general; 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
		- Promulgated directly by King
		- A very strategic decision
		- Formalized British policy with respect to Indigenous peoples
		- Established the terms on which British colonies and subjects were expected to deal with Indigenous peoples in North America
		- It starts out by saying that lands that have not been seeded or purchased by the Crown are reserved for Indians. By reserving these lands, it implies that these lands were already in possession of the Indians – this is an important issue because possession of land is critical under both Indigenous and common law
		- Also acknowledges that consent is required for the Crown to be able to acquire these lands
		- Colonies have to stay within their territory and it is not their duty to run Amok and acquire new lands
		- The Crown is putting itself between private citizens and the Indigenous – it is a government to government relationship
* 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)
* **Colonization**
	+ Extremely complicated process
	+ When European settlors arrived – indigenous peoples were here, and the Europeans did not merely arrive but also brought a lot of ideas and practices with them
	+ They were not just cultures (although it is true that there are Indigenous cultures, this is not the whole stories) – can’t reduce the Indigenous to just a culture
	+ Europeans asserted sovereignty (Dominion) – established colonies, issued Charters, controlled plantations, etc. different techniques.
		- Used the law and also debated the law
		- Debating how to go about organizing, settling, and controlling the territory
		- Used different bases to justify the settlement
	+ One way in which settlor governments learned to deal with the Indigenous is through treaties – they became a standard practice in N. America especially in the Eastern parts of the government. Colonial governments get instructions from their superiors and come to agreements with the Indigenous they encountered.
		- One reason for this was safety from being attacked
		- Another reason is so that they don’t undergo agreements with other nations
		- The Europeans came from different nations!
	+ The early treaties came across as extremely ambiguous, since they had different languages and traditions – was difficult to come to understanding of how you are to live side by side. To some extent they had to be ambiguous because they had to cater to different perspectives. One problem we see from the European side is that the texts are very short and perhaps improperly communicated.

## 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
* In Part II, not actually the *Charter*
* Key word “existing” aboriginal and treaty rights
	+ What does EXISTING mean? They left the ambiguity in here so that people would agree to it.
* First case dealing squarely with s 35 is *Sparrow*

### 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 (USSC)

* 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.* This case doesn’t have any Indigenous parties – it is between two American claimants to the same piece of land
* Johnson claims title from Illinois tribe and Pankeshaws tribes (claims he got land directly from those tribes).
* M’Intosh claims title The USA (via discovery of North America from John Cabot).
* M’Intosh ends up winning
 |
| 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.****Doctrine of discovery:** If you discover the land, you have the right to acquire title to it.* + It does not automatically give you title. You have the right to ACQUIRE title.
	+ The doctrine of discovery applies to the Europeans.
 |

* Draws line between occupancy and dominion (another analogy is property vs. territory) – ownership vs. governance
* Creates possibility of extinguishing privileges/rights by conquest
* The reason the Indians can’t keep their law but the French can is because the Indians were viewed as at a lower civilization (probably religious reasons, and racism, technology, economic organization, etc).

#### 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; Georgia Act UV |

* Non-native guy charged under Georgia CC statute penalizing non-natives for being on native land
* Challenged for being beyond the jurisdiction of Georgia criminal law to deal with Cherokee issues
* Decided that yes – it is out of jurisdiction and is a Federal issue

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

* **Key legal principles, positions, and concepts that emerge from the Marshall trilogy:**
	1. **Doctrine of Discovery**
	2. **“Occupation” (in relation to ownership or title)**
	3. **“Jurisdiction” or dominion (in relation to ownership or occupation)**
	4. **“Protection” (in relation to sovereignty)**
	5. **Indian powers of governance**
	6. **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 Royal Proclamation to mean that Indian title is only a “personal and usufructuary right”.** A usufruct is a concept known to the civil law in Scotland – it is a right to use things
	+ What he means is that it is not a title to the land itself – it is something different
* Aboriginal title is a burden on Crown land
 |
| Holding | Appeal dismissed. The Crown is entitled. |

* Crown is sovereign – a tricky word. An entity that rules subjects by law. Acts through law and in accordance with law.
* This case is really about constitutionality and rule of law deep down
* Indian title as a “burden” on the Crown title
* Indian title exists “at the good will of the sovereign”
* Bottom of para 7 – “surrendered or otherwise extinguished”
	+ This is not specific – leaves open for how things may otherwise be extinguished
* 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? |
| **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.****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)** |
| Holding | Appeal dismissed since P can’t sue Crown. But majority voted in P’s favour. |

* In this case they were seeking a DECLARATION
* Judgment is split 3 ways (3-3-1)
* This case they are struggling and drawing broadly – it is a very tough case for the judges.
* The one big distinction between Judson and Hall: need authority and need clear intention to do it. Hall says neither of these conditions are met.
* Think of the analysis as these three main factors:
	+ Source of title
	+ Nature of title
	+ Whether it has been extinguished
* Ordinary *intra vires* govt legislation can amend treaty rights
* 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 title 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.TJ accepts that they would not have consented to the surrender if they had known what the actual agreement would look like. |
| Discussion and Analysis  | - Can’t be a real trust for the Band because there’s no longer an interest for them |
| **Ratio** | **The Crown owes a quasi-constitutional 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. |
| Holding | Crown breached its fiduciary duty to the Musqueam. Get award of damages. |

* Decision treats Musqueam in a paternalistic fashion: this is the emergence of the **fiduciary doctrine**
	+ 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. This concept can create “paternalism in the law” – parent to child and therefore there is an unequal power balance
	+ **“Where by statute, agreement, or perhaps by unilateral undertaking, one party has an obligation to act for the benefit of another, and that obligation carries with it a discretionary power, the party thus empowered becomes a fiduciary. Equity will then supervise the relationship by holding him up t the fiduciary’s strict standard of conduct.”**
	+ Example: Will – trustee creates trust for set of beneficiaries. Corporate executive and a shareholder. Parent-child. Crown-aboriginal.
	+ The basic test is that the fiduciary must have some power and discretion they can exercise to alter the state of the beneficiary, and the beneficiary is vulnerable.
* **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*
* 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)
* 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 rejected 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 existed. 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) SCC – framework for rights infringement

|  |  |
| --- | --- |
| 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** | **Established framework for infringement (interference with the exercise of the right)** |
| **Notes** | This is probably a **“test case”** – a case in which you provoke the government into prosecuting you so that the facts are set up and you get caught on purposeThey were going to “TEST” whether the law held up in court |

* At this point, still didn’t know how to identify what’s an Aboriginal 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)
* 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]
* This is probably a **“test case”** – a case in which you provoke the government into prosecuting you so that the facts are set up and you get caught on purpose
	+ They were going to “TEST” whether the law held up in court
* Who bears the burden of proving the right? Complainant
	+ The party attempting to assert the right
* Who bears the burden of extinguishment? Crown
	+ Section 35(1) is not part of the *Charter* and the Oakes test does not apply.
	+ However, there is such thing as a jusitifaible infringement of these rights
	+ This is where we come to the point of reconciliation
		- Federal power must be reconciled with federal duty
		- “Best way to do this is demand justification for any infringement
* What is an infringement?
	+ Interference with the exercise of the right
	+ The complainant has burden
	+ Test is a prima facie infringement. 3 questions:
		- Is the limitation unreasonable?
		- Does the regulation impose an undue hardship?
		- Does it deny the preferred means of exercising the right
* Sparrow vs Oakes Test
	+ First prong for Sparrow is just valid as opposed to “pressing and substantial” in Oakes

### 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?** (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/Aboriginal community) [***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)

* 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***)
* Test for “intent” has implications for treaties; e.g. Position of the Crown is that terms in the treaties meant 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
* **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 a *prima facie* infringement?** (Onus on claimant/Aboriginal community) [***Gladstone*** – says below factors not requirements, absence of one does not preclude infringement]

* 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 Crown)

* 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
	+ **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***)
* **Stage 2: Is the government 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**?
	+ Honour of the Crown and fiduciary duty 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.****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
 |
| 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 convictionBCCA 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
	+ See following 10 factors to help establish:
* Best way to use test below is focus on the factors that matter – it is not a checklist where you have to run through everything. Focus on your strengths as an advocate.
	+ But #4, #8 is REQUIRED.
* 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, framed in the Canadian legal and constitutional structure

* 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 the precise 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

* The claimant must do more than prove that the practice took place – must be demonstrated as a significant part of their distinctive culture
* 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)
* 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**

* **Contact differs from sovereignty (lower threshold)**
	+ **The relevant time period is the time prior to the arrival of Europeans, not prior to the Crown’s assertion of power**
	+ **The claimant does not need to provide conclusive evidence connecting the practice all the way from pre-contact times – the activities need only be rooted in pre-contact societies**
* 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

* Specific facts of each case very important & each abo society has diff. rights
* 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

* (I.e. customs that are **integral** to abo community will constitute abo rights, but those that are merely incidental will not)
* 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, not distinct; 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
* Distinctive means defined/defines your culture – not NECESSARILY unique. Distinct means unique.

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.** **Where Aboriginal right has no internal limit the doctrine of priority does NOT require that, after conservation goals have been met, the govt allocate the fishery so that those holding an aboriginal right to exploit that fishery on a commercial basis are given an exclusive right to do so.** |
| Holding | Appeal allowed. |

* Internal limit is synonymous with inherent limit
* *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
* **JUSTIFICATION:** 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)
	+ 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**?
* **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
* 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**
* What are the two purposes of s 35(1)
	+ Recognition of prior occupation
	+ Reconciliation of prior occupation on Crown sovereignty

#### Mitchell v MNR [2001] SCC

|  |  |
| --- | --- |
| 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.Crown argued that there was no Aboriginal right excluding him from having to pay duties at the border and that if there was, it would be inconsistent with Canadian sovereignty and invalid. |
| 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. So it can’t be defined as an integral nor distinctive Aboriginal right.** |

* Looks at ***VDP test*** – 3 things to look for to help define AR:
	+ **Nature of the action** appellant claiming was done pursuant to the right
	+ **Nature of the gov’t legislation**/regulation alleged to infringe the right
	+ **Ancestral traditions & practices** relied on to establish the right
* 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

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) SCC

|  |  |
| --- | --- |
| 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 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

**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**

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

|  |  |
| --- | --- |
| 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. |
| **Ratio** | Allows for evolution of rights |
| 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 Marshall I [1999] SCC

|  |  |
| --- | --- |
| 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/trading post to trade", such right had disappeared with the disuse of the truckhouse system. Obviously ambiguities to whether the treaty provides rights in light of truckhouses no longer being valid.D/A. |
| Issue | How should the courts determine if a treaty provides rights? When is an infringement of treaty rights justified? |
| Analysis | We don’t have any truckhouses anymore. Need to update with the times. This is s 35(1) interpreting old treaty rights. Underlying notion of conservation; supposed to be regulated by feds under s 91(24). |
| **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** | **Says things should be read contextually. However, here, she focuses on strict literal interpretation of the treaty, and that the only right given under the treaty was the right to trade with the British at their outposts.****She lists some important 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**
 |
| Notes | Inadequacy of the written record – common theme in Aboriginal law – what could they possibly have agreed upon and what help does the written record afford? |

**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**

#### 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.****Emphasis that aboriginal treaty rights are subject to regulation by fed govt.** |
| 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

#### Grassy Narrows First Nation v Ontario (Natural Resources), 2014 SCC 48

|  |  |
| --- | --- |
| Facts | In 1873, Treaty 3 was signed by treaty commissioners acting on behalf of the Dominion of Canada and Chiefs of the Ojibway. The Ojibway yielded ownership of their territory, except for certain lands reserved to them. In return, the Ojibway received annuity payments, goods, and the right to harvest the non-reserve lands surrendered by them until such time as they were “taken up” for settlement, mining, lumbering, or other purposes by the Government of the Dominion of Canada. The Treaty 3 lands include the Keewatin area. At the time Treaty 3 was concluded, the Keewatin area was under the exclusive control of Canada. In 1912, it was annexed to Ontario through the Ontario Boundaries Extension Act, S.C. 1912, c. 40 (“1912 Legislation”), and since that time, Ontario has issued licences for the development of lands in the Keewatin area. In 2005, the Grassy Narrows First Nation, descendents of the Ojibway signatories of Treaty 3, commenced an action challenging a forestry licence for lands that fell within the Keewatin area.  |
| Issue | 1. Does Ontario have the authority under Treaty 3 to “take up” tracts of land in the Keewatin area?2. Does the doctrine of interjurisdictional immunity preclude Ontario from justifying infringement of Treaty 3 rights?  |
| **Ratio** | **The duty to consult lies w/ the Crown regardless of whether fed or prov.****Only Ontario has the power to take up lands under Treaty 3. This conclusion rests on Canada’s constitutional provisions, the interpretation of Treaty 3, and legislation dealing with Treaty 3 lands.** * **First, although Treaty 3 was negotiated by the federal government, it is an agreement between the Ojibway and the Crown.**
	+ **The level of government that exercises or performs the rights and obligations under the treaty is determined by the division of powers in the Constitution.**
	+ **Ontario has exclusive authority under the Constitution Act, 1867 to take up provincial lands for forestry, mining, settlement, and other exclusively provincial matters.**
	+ **Federal supervision is not required by the Constitution.**
	+ Once the Keewatin lands came within Ontario’s borders in 1912, s. 109 of the Constitution Act, 1867 became applicable. Section 109 establishes conclusively that Ontario holds the beneficial interest in the Keewatin lands and the resources on or under those lands.
* **Second, nothing in the text or history of the negotiation of Treaty 3 suggests that a two-step process requiring federal supervision or approval was intended.**
* **Third, legislation dealing with Treaty 3 land confirms that no two-step process was contemplated. I elaborate on each of these points below.**

The view that only Canada can take up, or authorize the taking up of, lands under Treaty 3 rests on a misconception of the legal role of the Crown in the treaty context. It is true that Treaty 3 was negotiated with the Crown in right of Canada. But that does not mean that the Crown in right of Ontario is not bound by and empowered to act with respect to the treaty. * The theory of the trial judge, supported by the appellants, was that since the treaty was made with the federal Crown, only the federal Crown has obligations and powers over matters covered by the treaty. But this reasoning does not apply in the treaty context.
* The promises made in Treaty 3 were promises of the Crown, not those of Canada. Both levels of government are responsible for fulfilling these promises when acting within the division of powers under the Constitution Act, 1867. Thus, when the lands covered by the treaty were determined to belong to the Province of Ontario, the Province became responsible for their governance with respect to matters falling under its jurisdiction by virtue of ss. 109, 92(5) and 92A of the Constitution Act, 1867, subject to the terms of the treaty. It follows that the Province is entitled to take up lands under the treaty for forestry purposes.
 |
| Holding | I conclude that Ontario has the authority to take up lands in the Keewatin area so as to limit the harvesting rights set out in Treaty 3. By virtue of ss. 109, 92A, and 92(5) of the Constitution Act, 1867, Ontario alone has the ability to take up Treaty 3 land and regulate it in accordance with the treaty and its obligations under s. 35 of the Constitution Act, 1982. A two-step process involving federal approval for provincial taking up was not contemplated by Treaty 3. |

“I conclude that as a result of ss. 109, 92(5) and 92A of the Constitution Act, 1867, Ontario and only Ontario has the power to take up lands under Treaty 3. This is confirmed by the text of Treaty 3 and legislation dealing with Treaty 3 lands. However, this power is not unconditional. In exercising its jurisdiction over Treaty 3 lands, the Province of Ontario is bound by the duties attendant on the Crown. It must exercise its powers in conformity with the honour of the Crown, and is subject to the fiduciary duties that lie on the Crown in dealing with Aboriginal interests. These duties bind the Crown. When a government — be it the federal or a provincial government — exercises Crown power, the exercise of that power is burdened by the Crown obligations toward the Aboriginal people in question.

These duties mean that for land to be taken up under Treaty 3, the harvesting rights of the Ojibway over the land must be respected. Any taking up of the land for forestry or other purposes must meet the conditions set out by this Court in Mikisew. As explained by the Ontario Court of Appeal (at paras. 206-12), the Crown’s right to take up lands under Treaty 3 is subject to its duty to consult and, if appropriate, accommodate First Nations’ interests beforehand (Mikisew, at para. 56). This duty is grounded in the honour of the Crown and binds the Province of Ontario in the exercise of the Crown’s powers.

Where a province intends to take up lands for the purposes of a project within its jurisdiction, the Crown must inform itself of the impact the project will have on the exercise by the Ojibway of their rights to hunt, fish and trap, and communicate its findings to them. It must then deal with the Ojibway in good faith, and with the intention of substantially addressing their concerns (Mikisew, at para. 55; Delgamuukw v. British Columbia, [1997] 3 S.C.R.”

#  “Aboriginal Title”: The Framework and Test

***Title is not the same thing as a right***

* A right is the right to do things
* Title is ability to determine how land is used

#### R v Delgamuukw, 1997 SCC

**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***)

## 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

* **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
	+ 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
* 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
* 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
	+ 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

#### Tsilhqot’in Nation v BC (2014) SCC

|  |  |
| --- | --- |
| Facts | For centuries, people of the Tsilhqot’in Nation — a grouping of six bands sharing common culture and history — have lived in a remote valley bounded by rivers and mountains in central British Columbia. Throughout most of Canada, the Crown entered into treaties whereby the indigenous peoples gave up their claim to land in exchange for reservations and other promises, but, with minor exceptions, this did not happen in British Columbia. The Tsilhqot’in Nation is one of hundreds of indigenous groups in British Columbia with unresolved land claims.The issue of Tsilhqot’in title lay latent until 1983, when the Province granted Carrier Lumber Ltd. a forest licence to cut trees in part of the territory at issue. The Xeni Gwet’in First Nations government (one of the six bands that make up the Tsilhqot’in Nation) objected and sought a declaration prohibiting commercial logging on the land.The Tsilhqot’in now ask this Court for a declaration of Aboriginal title over the area designated by the trial judge, with one exception. A small portion of the area designated by the trial judge consists of either privately owned or underwater lands and no declaration of Aboriginal title over these lands is sought before this Court. With respect to those areas designated by the trial judge that are not privately owned or submerged lands, the Tsilhqot’in ask this Court to restore the trial judge’s finding, affirm their title to the area he designated, and confirm that issuance of forestry licences on the land unjustifiably infringed their rights under that title. |
| Issue(s) | What is the test for Aboriginal title to land? If title is established, what rights does it confer? Does the British Columbia *Forest Act*, R.S.B.C. 1996, c. 157, apply to land covered by Aboriginal title? What are the constitutional constraints on provincial regulation of land under Aboriginal title? Finally, how are broader public interests to be reconciled with the rights conferred by Aboriginal title? |
| Discussion and Analysis  | Consider requirements for Aboriginal title: sufficientpre-sovereignty occupation; continuous occupation (where present occupation is relied on); and exclusive historic occupation.The claimant group bears the onus of establishing Aboriginal title. The task is to identify how pre-sovereignty rights and interests can properly find expression in modern common law terms. In asking whether Aboriginal title is established, the general requirements are: (1) “sufficient occupation” of the land claimed to establish title at the time of assertion of European sovereignty; (2) continuity of occupation where present occupation is relied on; and (3) exclusive historic occupation. In determining what constitutes sufficient occupation, one looks to the Aboriginal culture and practices, and compares them in a culturally sensitive way with what was required at common law to establish title on the basis of occupation. Occupation sufficient to ground Aboriginal title is not confined to specific sites of settlement but extends to tracts of land that were regularly used for hunting, fishing or otherwise exploiting resources and over which the group exercised effective control at the time of assertion of European sovereignty.  |
| **Ratio** | * **Aboriginal title flows from occupation in the sense of regular and exclusive use of land – lower threshold than occupying – so migration within an area is okay**
	+ **Aboriginal title confers the right to use and control the land and to reap the benefits flowing from it**
* **Where title is asserted, but has not yet been established, s 35 of the *Constitution Act, 1982* requires the Crown to consult with the group asserting title and, if appropriate, accommodate its interests**
* **Once Aboriginal title is established, s 35 of the *Constitution Act, 1982,* permits incursions on it only with the consent of the Aboriginal group or if they are justified by a compelling and substantial public purpose and are not inconsistent with the Crown’s fiduciary duty to the Aboriginal group;… For purposes of determining the validity of provincial legislative incursions on lands held under Aboriginal title, this framework displaces the doctrine of interjurisdictional immunity.**

**“To justify overriding the Aboriginal title-holding group’s wishes on the basis of the broader public good, the government must show: (1) that it discharged its procedural duty to consult and accommodate, (2) that its actions were backed by a compelling and substantial objective; and (3) that the governmental action is consistent with the Crown’s fiduciary obligation to the group: *Sparrow*.”** |
| Holding | * In this case, Aboriginal title is established over the area designated by the trial judge
* In this case, the Province’s land use planning and forestry authorizations were inconsistent with its duties owed to the TQ people
 |
| Misc. |  |

* TQ people asked for declaration of aboriginal title over an area in BC
* At the time it was said you needed intensive usage of the land, but SCC showed that BCCA got it wrong – they didn’t have to show intensive usage of land
* All they had to show was a regular use of land – a part of their relationships
* It was also found that there was a continuity of occupation
* There was an exclusivity of occupation (they kept others out)
* Result – title to land vested in TQ people
	+ Right to be able to use land for wide variety of purposes – not confined to traditional uses. Title holders have right to benefits associated with land – to use it, enjoy it, and profit from its economic development. They have the right to manage the land.
		- Furthermore, court said “Crown does not retain any beneficial ownership in the land”
	+ Similar to fee simple in that it is something only they can use, but it is not fee simple in that it is a sui generis interest
		- The interest flows from both common law and the TQ peoples’ law
* Three problems still exist:
	+ Problems of proof
	+ Problems of infringement
	+ Problems of Aboriginal governance in relationship to the territory

# Metis Rights

#### R v Powley (2003) SCC

|  |  |
| --- | --- |
| 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. |

**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
* **Metis community** can be defined as a group of Metis with a distinctive (not distinct) 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
* S. 35 ONLY protects those rights existing when *Constitution Act, 1982* came into effect, which isn’t whole story
* Geographic area is based on their way of life

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

* Our govt governs according to the Rule of Law (sovereign)

|  |  |
| --- | --- |
| 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.*** 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
	+ Distinctly aboriginal = not just fee simple. Must be the sui generis right.
 |
|  | 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. |

**Who are the Metis?**

* Complicated question
* Two levels of defn – community and individual member of the community
* Continuous subject of debate and discussion

**The Powley Test**

* Metis are not just individuals with mixed ancestry – they are one of the aboriginal peoples of Canada and that has meaning in law
* Courts have recognized Metis rights-bearing communities from Ontario to Alberta (the Metis nation)
* Two identification issues – (1) ID of the historic Metis rights-bearing community, and (2) whether the accused is a Metis member of a modern Metis community that is in continuity with the history continuity

**Metis individual**

* Self-identify as Metis – recent self-identification is negative presumption – courts frown upon individuals who are more recently self-identified
* Ancestrally connected to historic Metis community by genealogy, adoption, marriage, or other means
* Accepted by metis community
* “A metis community can be defined as a group of Metis with a distinctive collective identity, living together in same geographical area, and sharing common way of life”

# Duty to Consult and Accommodate

* In Canada, the **duty to consult and accommodate** with Aboriginal peoples arises when the Crown contemplates actions or decisions that may affect an Aboriginal person's Aboriginal or Treaty rights. This duty arises most often in the context of natural resource extraction such as mining, forestry, oil, and gas.
* It is very difficult to practically separate the duty to consult and accommodate because consultation may lead to the fulfillment of the duty to accommodate and consultation is meaningless if accommodation is excluded from the outset. As such, the two are intertwined and must be addressed together.
* The broad purpose of the duty to consult and accommodate is to advance the objective of reconciliation of pre-existing Aboriginal societies with the assertion of Crown Sovereignty. This duty flows from the honour of the Crown and its fiduciary duty to Indigenous peoples.The obligation to provide consultation and a decision-making process that is compatible with the honour of the Crown is embedded in Section Thirty-five of the *Constitution Act, 1982* and Treaties. In a Treaty context, the duty to consult serves to remedy “a procedural gap” in the Treaty.
* No veto (unilateral power in Aboriginals) 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

|  |  |
| --- | --- |
| Facts | Haida people launch claim re: lands of Haida Gwaii and lands surrounding it. In 1961: Province of BC issues licence to allow a private firm to harvest trees in the designated area of Haida Gwaii. In 1999: government approved transfer of licence to Weyerhaeuser Co. Haida challenged this: sought order that the replacements and transfer be set aside.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.**Crown owes a duty to consult with aboriginal people. This extends also to a duty to accommodate, but is not a duty to agree. Third parties have no duty to consult.This duty is owed not just for established but also any asserted rights. |

**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”

* Honour of the Crown is the reason behind 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
* **Duty to consult** arises when: knowledge meets possibility to impact
	+ **Test is…**
		- 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 (unilateral power)!
	+ Aboriginal claimants should not frustrate the Crown’s good faith attempts, nor should they take unreasonable positions to thwart the government
* Consultation is not only the exchange of information but also testing, amending policy proposals, and providing feedback
* The duty is contextual – it is left up to the parties. But it does give you some guidance. It is all about proportionality.
* **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

|  |  |
| --- | --- |
| 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 have 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. |

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

1. Specificities of promises made
2. Seriousness of impact
3. History of dealings between Crown & First Nation
	1. Looks at overall structure of treaty

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

The more general a right is (less specificity), the more consultation is required

Standard remedy is usually a declaration that a duty has been breached – sometimes an order to go back and consult some more.

#### 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. **BC Hydro, as a Crown corporation, held the Crown’s duty to consult.** |
| **Ratio** | **Duty to consult can extend upstream into policy and legislation, so any legislative decision affecting Aboriginals will require consultation.** |
| 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. |

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)

#### Bain

Duty to consult owed to the NATION

## Honour of the Crown

* Refers to the sometimes generous attitude the law takes to the definition of Aboriginal rights.
	+ Source of honour of the Crown is the Crown itself
	+ Authority and sovereignty is premised on the law
	+ Unwritten constitutional principle
	+ Honour of the crown is a broader concept which can include or give rise to a fiduciary duty
* Duty to consult and accommodate is grounded in the honour of the Crown
* "The historical roots of the principle of the **honour of the Crown**suggest that it must be understood generously in order to reflect the underlying realities from which it stems. In all its dealings with Aboriginal peoples, from the assertion of sovereignty to the resolution of claims and the implementation of treaties, the Crown must act honourably. Nothing less is required if we are to achieve the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown.
* "The honour of the Crown also infuses the processes of treaty making and treaty interpretation. In making and applying treaties, the Crown must act with honour and integrity, avoiding even the appearance of sharp dealing....
* "Put simply, 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.... 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."

# Reconciliation

1. In *Sparrow*: **Reconciliation** meant the idea that there were legal obligations that temper the Crown’s power
	1. With the advent of s. 35 Abor rights gained Constitutional protection based on principles of rule of law
2. 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
3. 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
4. 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
	1. Crown must always ask if what it’s doing is honourable in circumstances, in order to affect to s. 35 reconciliation

# Making a Challenge

***Can challenge in two ways:***

1. Breach of duty to consult
2. Infringement of right
* There are advantages and disadvantages to each methodology.
* You don’t need to address consultation to establish a right but it may be part of the justification analysis of an infringement of a right if you get to that point.
* Duty to consult can be used on its own or as part of the justification analysis – so it will usually come up.