**HISTORY**

**ROYAL PROCLAMATION 1763**

Set our rules to govern the new territories in North America that England had acquired. This included a formal policy towards Indigenous peoples. It acknowledged the prior possession of the land, reserved lands “not ceded or purchased” as hunting lands, and required consent prior to acquisition of these lands. In other words, the Crown placed itself between settlers and Indigenous peoples.

**DOCTRINE OF DISCOVERY**

This was a rule among European nations that discovery of lands created a right to acquire title to those lands. The doctrine is not necessarily consistent with the *Royal Proclamation* in that it allowed for extinguishing Indigenous rights and title without their consent.

Marshall applied this doctrine in *Johnson v M’Intosh* to settle two competing title claims, one acquired through an Indigenous nation and the other based on a grant from the government of the United States. The government grant was deemed to have passed valid title.

Essentially the doctrine allowed Europeans to assert dominion over North America and therefore govern it. Indigenous peoples were left with a right to occupy the lands. If the doctrine of continuity had been applied, Indigenous people would have been allowed to keep their laws, as was the case in Quebec with the civil law.

This was a pragmatic method of avoiding and managing the conflicts that were inevitable due to European interests in the land and resources. In the words of Marshall, the Indigenous peoples were viewed as “savages” and it was thought that “to leave them in possession of their country was to leave the country a wilderness”. They were also viewed as “fierce” and “ready to repel by arms every attempt on their independence”. The Europeans felt they were more advanced and civilized, and used these ideas to justify their treatment of Indigenous peoples, their assertion of dominion and the taking up of lands.

Marshall did recognize the prior occupation of Indigenous peoples, most notably in *Worchester v Georgia* where he discusses inhabitation by a distinct people “having institutions of their own and governing themselves by their own laws”. He scrutinizes the doctrine of discovery and identifies the difficulty in the proposition that inhabitants of one side of the globe could claim dominion over inhabitants on another side of the globe, claiming their lands and annulling their pre-existing rights. He found that a treaty made with the Cherokee nation made them an independent community occupying its own territory, where the laws of Georgia had no effect.

However, underlying the decision is the fact that rights of Indigenous peoples are limited to that found in the treaty. “Treaties” and “nations” are European constructs, as Marshall himself acknowledges, and they are still under the dominion of the US government. In other words, the Indigenous rights only exist because the US government allows them to exist.

**ABORIGINAL LAW IN CANADIAN PRE-1982**

In *St. Catherine’s*, Lord Watson was not faced with quite the same situation as Marshall had faced in the 1820’s. Marshall had to be pragmatic and manage the conflicts between colonialists and Indigenous peoples, and more broadly, between nations. Watson, on the other hand, was not facing the disposition of Indigenous people in the first instance. By this time colonialism was more entrenched and the issue facing Watson could be characterized as merely a federalism issue.

Watson finds that the *Royal Proclamation* is the source of Indigenous interests in lands. This is not consistent with Marshall’s view that Indigenous interests were pre-existing and defeated by the doctrine of discovery. Furthermore, Watson talks about “extinguishment” of Indigenous title, which is not consistent with the requirement of consent in the *Royal Proclamation.*

Watson goes on the state that Indigenous interests are “a personal and usufructuary right, dependent on the will of the sovereign.” He further states that “there has all along vested in the Crown a substantial and paramount estate underlying the Indian title”. In other words, an Indigenous land right is a burden on the underlying absolute title of the Crown, is a right to use the land but not a right to the land itself, and finds it source in the Crown. This is the framework that Watson uses to resolve the federalism issue and it sets a precedent for future cases to follow.

In *Calder,* the court was split on this issue of the existence of Aboriginal title. Judson J agreed with the court in *St. Catherine’s* in that the *Royal Proclamation* was the origin of Aboriginal title; however the *Proclamation* did not apply to Nisga’a territory. For Judson J, this source of Aboriginal title was the prior occupation of the Nisga’a peoples and it was “…a right to live on their lands as their forefathers had lived and…dependent upon the goodwill of the Sovereign.” In this case, Judson found that the actions of the Sovereign had extinguished that title through the proclamations of the BC colonial government between 1858 and 1871.

Hall J disagreed on the three main issues: he found the *Royal Proclamation* to be the source of Aboriginal title; he found the Nisga’a title had never been extinguished because they “…were never conquered nor did they at any time enter into a treaty or deed of surrender…” as was the case in *St. Catherine’s*; and he described title as not a claim to *fee* but closer to a usufructuary right. He stated that the onus is on the Crown to prove a “clear and plain” intention to extinguish title and the authority to do so, and these requirements were not met in this case.

In *Geurin,* the court was faced with a situation where the Musqueam surrendered part of their reserve land to the government for the purpose of the leasing the land to a golf course. After the surrender was completed, the Department of Indian Affairs leased the land on substantially different terms that the Musqueam had agreed to. The court found the Crown has a trust-like relationship or “fiduciary duty” towards First Nations, specifically in regards to reserve lands, and therefore must act in their best interest.

ForWilson J, this fiduciary duty existed “at large” under s 18 of the *Indian Act* and “crystallized upon the surrender into an express trust of specific land for a specific purpose.” In other words, the trust was based in the surrendered lands. For Dickson J, the fiduciary relationship was rooted in Aboriginal title, which has its source in prior occupation. Dickson J used the term *sui generis* to describe the nature of Aboriginal title, as neither usufructuary nor beneficial ownership. It is inalienable except to the Crown, in which case the Crown is under an obligation to deal with the land on the Indian’s behalf.

In this sense, it is Crown sovereignty and the common law which has converted prior occupation into Aboriginal title. The Crown legal system recognizes Aboriginal title and prior occupation is a condition of that title. This legitimizes the rule of the Crown: it is not illegitimate or unruly. However, it is based on its own laws.

**SECTION 35**

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

*(2) In this Act, "Aboriginal Peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.*

*(3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.*

*(4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.*

The purpose of s 35 is the recognition and reconciliation of Aboriginal rights which arise based on the fact of prior occupation (*Van der Peet*).

The word "existing" means the rights to which s 35(1) applies are those that were in existence when the *Constitution Act, 1982* came into effect.  This means that extinguished rights are not revived by the *Constitution Act, 1982*. Further, an existing aboriginal right cannot be read so as to incorporate the specific manner in which it was regulated before 1982. Far from being defined according to the regulatory scheme in place in 1982, the phrase "existing aboriginal rights" must be interpreted flexibly so as to permit their evolution over time. That the right is controlled in great detail by the regulations does not mean that the right is thereby extinguished (*Sparrow*).

* S 35 is not the source of Aboriginal rights.

The words "recognition and affirmation" incorporate the fiduciary relationship and import some restraint on the exercise of sovereign power.  Rights that are recognized and affirmed are not absolute.  Federal legislative powers continue but must now be read together with s 35(1).  In other words, federal power must be reconciled with federal duty and the best way to achieve that reconciliation is to demand the justification of any government regulation that infringes upon or denies aboriginal rights (*Sparrow*).

* This allows for a margin of regulation, rather than an automatic invalidation of Crown laws that infringe s 35. Aboriginal rights are amenable to regulation.
* It is a “compromise”. But aren’t Aboriginal rights already compromised?
* “While it does not promise immunity from government regulation in a society that, in the twentieth century, is increasingly more complex, interdependent and sophisticated, and where exhaustible resources need protection and management, it does hold the Crown to a substantive promise.”
* This is the court recognizing the tension between Aboriginal rights, Canadian citizens, industry, politics, etc.

There are four elements to a s 35 test (*Sparrow*):

1. Establishment of an Aboriginal right;
2. Extinguishment of the right;
3. Infringement of the right; and
4. Justification for the infringement.

**ESTABLISHING AN ABORIGINAL RIGHT**

*Van der Peet:* In order to be an aboriginal right an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right. Factors to be considered in the application of this test include:

* Courts must take into account the perspective of aboriginal peoples themselves.
* In assessing a claim for the existence of an aboriginal right, a court must take into account the perspective of the aboriginal people claiming the right. It must also be recognized, however, that that perspective must be framed in terms cognizable to the Canadian legal and constitutional structure. Courts adjudicating aboriginal rights claims must, therefore, be sensitive to the aboriginal perspective, but they must also be aware that aboriginal rights exist within the general legal system of Canada.
* Courts must identify precisely the nature of the claim being made in determining whether an aboriginal claimant has demonstrated the existence of an aboriginal right.
* Consider such factors as the nature of the action which the applicant is claiming was done pursuant to an aboriginal right, the nature of the governmental regulation, statute or action being impugned, and the practice, custom or tradition being relied upon to establish the right.
* The activities should be considered at a general rather than specific level. Moreover, the activities may be the exercise in a modern form of a practice, custom or tradition that existed prior to contact, and the court should vary its characterization of the claim accordingly.
* This was put into a four-part analysis in *Las Kw’alaams:*

1. Identify the precise nature of the First Nation’s claim to an Aboriginal right based on the pleadings. If necessary, in light of the evidence, refine the characterization of the right claimed on terms that are fair to all parties.
2. Determine whether the First Nation has proved, based on the evidence adduced at trial:
3. The existence of the pre-contact practice, tradition or custom advanced in the pleadings as supporting the claimed right; and
4. That this practice was integral to the distinctive pre-contact Aboriginal society.
5. Determine whether the claimed modern right has a reasonable degree of continuity with the “integral” pre-contact practice.
6. In the event that an Aboriginal right to trade *commercially* is found to exist, the court, when delineating such a right should have regard to what was said by Chief Justice Lamer in *Gladstone* (in the context of a *Sparrow* justification),

* In order to be integral a practice, custom or tradition must be of central significance to the aboriginal society in question.
* The claimant must demonstrate, in other words, that the practice, custom or tradition was one of the things which made the culture of the society distinctive -- that it was one of the things that truly made the society what it was.
* The court cannot look at those aspects of the aboriginal society that are true of every human society (e.g., eating to survive), nor can it look at those aspects of the aboriginal society that are only incidental or occasional to that society; the court must look instead to the defining and central attributes of the aboriginal society in question.
* The significance of the practice, custom or tradition is relevant to the determination of whether that practice, custom or tradition is integral, but cannot itself constitute the claim to an aboriginal right.
* The practices, customs and traditions which constitute aboriginal rights are those which have continuity with the practices, customs and traditions that existed prior to contact.
* It is those practices, customs and traditions that can be rooted in the pre-contact societies of the aboriginal community in question that will constitute aboriginal rights.
* This does not mean that the aboriginal group claiming the right must produce conclusive evidence from pre-contact times. The evidence relied upon by the applicant and the courts may be post-contact; it simply needs to be directed at demonstrating which aspects of the aboriginal community and society have their origins pre-contact.
* This concept does not require evidence of an unbroken chain of continuity between current practices, customs and traditions, and those which existed prior to contact.
* Courts must approach the rules of evidence in light of the evidentiary difficulties inherent in adjudicating aboriginal claims.
* A court should be conscious of the special nature of aboriginal claims, and of the evidentiary difficulties in proving a right which originates in times where there were no written records. The courts must not undervalue the evidence presented by aboriginal claimants simply because that evidence does not conform precisely with the evidentiary standards that would be applied in, for example, a private law torts case.
* Claims to aboriginal rights must be adjudicated on a specific rather than general basis.
* The existence of an aboriginal right will depend entirely on the practices, customs and traditions of the particular aboriginal community claiming the right.
* The fact that one group of aboriginal people has a particular right is not sufficient to demonstrate that another aboriginal community has the same aboriginal right. The existence of the right will be specific to each aboriginal community.
* 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.
* Where two customs exist, but one is merely incidental to the other, the custom which is integral to the aboriginal community in question will qualify as an aboriginal right, but the custom that is merely incidental will not. Incidental practices, customs and traditions cannot qualify as aboriginal rights through a process of piggybacking on integral practices, customs and traditions.
* The integral to a distinctive culture test requires that a practice, custom or tradition be distinctive; it does not require that that practice, custom or tradition be distinct.
* A culture with a distinct tradition must claim that in having such a tradition it is different from other cultures; a claim of distinctness is, by its very nature, a claim relative to other cultures or traditions. By contrast, a culture that claims that a practice, custom or tradition is distinctive -- "distinguishing, characteristic" -- makes a claim that is not relative; the claim is rather one about the culture's own practices, customs or traditions considered apart from the practices, customs or traditions of any other culture. It is a claim that this tradition or custom makes the culture what it is, not that the practice, custom or tradition is different from the practices, customs or traditions of another culture.
* 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.
* European arrival and influence cannot be used to deprive an aboriginal group of an otherwise valid claim to an aboriginal right. On the other hand, where the practice, custom or tradition arose solely as a response to European influences then that practice, custom or tradition will not meet the standard for recognition of an aboriginal right.
* Courts must take into account both the relationship of aboriginal peoples to the land and the distinctive societies and cultures of aboriginal peoples.
* Courts must not focus so entirely on the relationship of aboriginal peoples with the land that they lose sight of the other factors relevant to the identification and definition of aboriginal rights.

The purpose of this test is to recognize and protect those rights which are “integral parts of their distinctive culture” or certain practices that are essential to the existence of that society. The practices are compared to other cultures and societies. The test also fixes these practices into the past and fits them into component parts, but this is not how culture actually works. Are courts really equipped for this test? It requires experts, historians, anthropologists, etc. Is this really taking a “broad and purposive” approach to Aboriginal rights? The rights must be “in terms cognizable” to the common law, but this places a large burden on Aboriginal culture to adapt. Can you really define what makes a culture what it is?

L’Heureux-Dubé’s dissent: the court should not adopt an approach that distinguishes between what is aboriginal and what is not aboriginal; this approach is majoritarian and restricts aboriginal culture and rights as that which is left over after features of non-aboriginal cultures have been taken away. Rather, the court should look to protecting the “distinctive culture” of which aboriginal activities are manifestations; the focus should be on the significance of the activities rather than the activities themselves. Aboriginal rights must be interpreted flexibly to permit their evolution over time and not frozen at the time of contact. The purposes should not be strictly compartmentalized but rather should be viewed on a spectrum, with aboriginal activities undertaken solely for food at one extreme, those directed to obtaining purely commercial profit at the other extreme, and activities relating to livelihood, support and sustenance at the centre.

*Application of the test:*

*Van der Peet:*

* + The claimant was looking for a right to fish for commercial purposes.
  + The court found that exchanges of fish were only incidental to fishing for food purposes.
  + Exchanging for kinship purposes was not sufficient.
  + There was no regularized trading system or market.
  + Trade with colonialists was qualitatively different from that of the settlers.
  + There was an absence of specialization and division of labour to exploit the fishery.

*Sappier/Gray*:

* + It is the practice that must be integral to culture, not the resource itself.
  + They are *sui generis* rights, not common law rights.
  + Rights should remain sufficiently Aboriginal.
  + The rights are founded on culture and are necessary to protect culture.
* The right was to harvest wood for domestic uses as a member of an Aboriginal community.
* It is a communal right. But what does this mean? The court doesn’t elaborate.
* “Section 35 recognizes and affirms existing aboriginal and treaty rights in order to assist in ensuring the continued existence of these particular aboriginal societies.”
* This is different from recognition and reconciliation. A third purpose?
* The court is bouncing around between culture, identity and society.
* “The concept of culture is itself inherently cultural”.
* What is culture?
* System of inherited conceptions? Gives meaning to our lives?
* How we understand our role to have value: why you cook, not what you cooked.
* In *Van der Peet* Lamer CJ didn’t recognize the importance of the exchanges i.e. the connection with culture.
* The Court is putting things in terms cognizable to them: culture is what they define it.
* It doesn’t seem to include:
* Commerce
* Politics
* Common Law
* But the common law is part of the culture from which the court is coming from: the enlightenment perspective; rights as limits on state interference; these are the dominant forces in political and philosophical thought; but it is all a cultural phenomenon; for the court, these ideas are universal; i.e. *Charter.*
* Aboriginal culture is viewed as unique; they are the ones with culture; the court gets to decide their culture; they see the evidence through a filter; the Aboriginal people have the burden to reconcile
* *Van der Peet* talked of “interests”; rights protect interests; balancing and reconciling interests; this is usually connected with economics – things that are good for you and rational to pursue
* **Key**: culture, rights and interests are the foundational ideas in these cases, are they are founded in one culture (the Court’s).

*Mitchell:*

* The right claimed in this case is the right to bring goods across the St. Lawrence River for the purposes of trade.
* The practice was important in defining the right (as in *Sappier*).
* The court finds a “palpable and overriding error” in the trial judge’s view of the evidence.
* The evidence in this case included a single knife, treaties that “make no reference to pre-existing trade”, and the fact of Mohawk involvement in the fur trade; the court did not accept that this was sufficient to establish a right.
* There was also two works, submitted by expert witnesses, purportedly documenting an historical north-south trade in copper and ceremonial knives, respectively.
* The issue of sovereign incompatibility came up because the case involved mobility rights – these are connected to sovereignty.
* The court also discussed the “core” of the people’s identity; this was later retracted in *Sappier*.

*Las Kw’alaams:*

* The pleadings sought a right to harvest and sell all fish in their territory on a commercial scale.
* “When it comes to “evolving” the *subject matter* of the Aboriginal right, the situation is more complex. A “gathering right” to berries based on pre-contact times would not, for example, “evolve” into a right to “gather” natural gas within the traditional territory. The surface gathering of copper from the Coppermine River in the Northwest Territories in pre-contact times would not, I think, support an “Aboriginal right” to exploit deep shaft diamond mining in the same territory. While courts have recognized that Aboriginal rights must be allowed to evolve within limits, such limits are both quantitative and qualitative. A “pre-sovereignty aboriginal practice cannot be transformed into a different modern right” (*Marshall*).
* What does qualitative and quantitative mean?
* It’s all about proportionality.

*Marshall:*

* + This case involved “peace and friendship” treaties and a clause involving truckhouses.
  + The strict approach to treaty interpretation is that extrinsic evidence should not be used in the absence of ambiguity. Here, this approach was rejected for three reasons:
  + Extrinsic evidence is available to show that a written document does not include all of the terms of an agreement.
  + Even in the context of a treaty document that purports to contain all of the terms, extrinsic evidence of the historical and cultural context of a treaty may be received even absent any ambiguity on the face of the treaty.
  + Where a treaty was concluded verbally and afterwards written up by representatives of the Crown, it would be unconscionable for the Crown to ignore the oral terms while relying on the written terms.
* But there is a balance here: “generous” rules of interpretation should not be confused with a vague sense of after-the-fact largesse.
* Note: this may not apply to modern treaties (see McLachlin dissent).
* The right to fish was “reasonably incidental” to the existence of the truckhouses. This is similar to hunting cases and the need for gear and ammo.
* The right was limited to fish for “necessaries”; it is not unlimited and not ‘just getting by’; food, shelter, clothing, etc.

**Métis Rights**

*Powley:* The *Van der Peet* factors are modified to account for the important differences between Aboriginal and Métis claims. Section 35 requires that we recognize and protect those customs and traditions that were historically important features of Métis communities prior to the time of effective European control, and that persist in the present day. This modification is required to account for the unique post-contact emergence of Métis communities, and the post-contact foundation of their aboriginal rights.

* Characterize the right
* Aboriginal hunting rights, including Métis rights, are contextual and site-specific.
* Identify the historic rights-bearing community [*Teillet: this is problematic – the courts get to define who is Métis; community is hard to define for a mobile people i.e. ‘plains’ M*é*tis; courts usually concede the practice*]
* A Métis community can be defined as a group of Métis with a distinctive collective identity, living together in the same geographic area and sharing a common way of life.
* Demographic evidence as well as proof of shared customs, traditions, and a collective identity is required to demonstrate the existence of a Métis community that can support a claim to site-specific aboriginal rights. Different groups of Métis have often lacked political structures and have experienced shifts in their members’ self-identification; however, the existence of an identifiable Métis community must be demonstrated with some degree of continuity and stability in order to support a site-specific aboriginal rights claim.
* Identify the contemporary rights bearing community
* Aboriginal rights are communal rights: They must be grounded in the existence of a historic and present community, and they may only be exercised by virtue of an individual’s ancestrally based membership in the present community. The “continuity” requirement puts the focus on the continuing practices of members of the community rather than more generally on the community itself.
* Verify the claimants membership in the relevant contemporary community [*Teillet: you need a community and to be a member of that community*]
* First, the claimant must self-identify as a member of a Métis community. This self-identification should not be of recent vintage: While an individual’s self-identification need not be static or monolithic, claims that are made belatedly in order to benefit from a s. 35 right will not satisfy the self-identification requirement.
* Second, the claimant must present evidence of an ancestral connection to a historic Métis community. This objective requirement ensures that beneficiaries of s. 35 rights have a real link to the historic community whose practices ground the right being claimed. We would not require a minimum “blood quantum”, but we would require some proof that the claimant’s ancestors belonged to the historic Métis community by birth, adoption, or other means.
* Third, the claimant must demonstrate that he or she is accepted by the modern community whose continuity with the historic community provides the legal foundation for the right being claimed. The core of community acceptance is past and ongoing participation in a shared culture, in the customs and traditions that constitute a Métis community’s identity and distinguish it from other groups. [*Note the emphasis on culture, not politics*]. This is what the community membership criterion is all about. Other indicia of community acceptance might include evidence of participation in community activities and testimony from other members about the claimant’s connection to the community and its culture.
* Identify the relevant time frame
* The focus is on the period after a particular Métis community arose and before it came under the effective control of European laws and customs. This pre-control test enables us to identify those practices, customs and traditions that predate the imposition of European laws and customs on the Métis. [*Culture again*].
* Determine whether the practice is integral to the claimant’s distinctive culture.
* See *Van der Peet.*
* Establish continuity between the historic practice and the contemporary rights asserted.
* Section 35 reflects a constitutional commitment to protecting practices that were historically important features of particular aboriginal communities. A certain margin of flexibility might be required to ensure that aboriginal practices can evolve and develop over time.
* Determine whether or not the right was extinguished.
* The doctrine of extinguishment applies equally to Métis and to First Nations claims.
* If there is a right, determine whether there is an infringement.
* Determine whether the infringement is justified.

**INFRINGEMENT OF AN ABORIGINAL RIGHT**

*Sparrow:* To determine whether an Aboriginal right has been infringed, three questions must be asked. First, is the limitation unreasonable? Second, does the regulation impose undue hardship?  Third, does the regulation deny to the holders of the right their preferred means of exercising that right?  If the answer to any of these questions is yes, then there is a *prima facie* infringement of the right.

*Grassy Narrows:* If the taking up leaves the Ojibway with no meaningful right to hunt, fish or trap in relation to the territories over which they traditionally hunted, fished, and trapped, a potential action for treaty infringement will arise (*Mikisew*, at para. 48).

**JUSTIFICATION FOR INFRINGEMENT OF AN ABORIGINAL RIGHT**

*Sparrow*: To show that an infringement of an aboriginal right was justified:

* + First, the government must have a valid objective.
  + For example, conservation and resource management is a valid objective.
* Second, the government must show that infringement is consistent with the “honour of the Crown”. The special trust relationship and the responsibility of the government vis‑à‑vis aboriginals must be the first consideration in determining whether the legislation or action in question can be justified.
* Here: There must be a link between the question of justification and the allocation of priorities in the fishery. The constitutional nature of the Musqueam food fishing rights means that any allocation of priorities after valid conservation measures have been implemented must give top priority to Indian food fishing.
* The questions to be asked include:
  + Whether there has been as little infringement as possible in order to achieve the desired result.
  + Whether there has been fair compensation.
  + Whether the aboriginal group has been consulted.

This test was modified in *Gladstone:* the right at issue in *Sparrow* (to fish for food, social and ceremonial needs) is internally limited - at a certain point the band will have sufficient fish to meet these needs. The commercial sale of the herring spawn on kelp, on the other hand, has no such internal limitation.

* + Where the aboriginal right is one that has no internal limitation then the doctrine of priority does not require that, after conservation goals have been met, the government 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.

Questions relevant to the determination of whether the government has granted priority to aboriginal rights holders are those enumerated in *Sparrow* relating to consultation and compensation, as well as:

* + Whether the government has accommodated the exercise of the aboriginal right to participate in the fishery (through reduced licence fees, for example);
  + Whether the government's objectives in enacting a particular regulatory scheme reflect the need to take into account the priority of aboriginal rights holders;
  + The extent of the participation in the fishery of aboriginal rights holders relative to their percentage of the population;
  + How the government has accommodated different aboriginal rights in a particular fishery (food *versus* commercial rights, for example);
  + How important the fishery is to the economic and material well-being of the band in question; and
  + The criteria taken into account by the government in, for example, allocating commercial licences amongst different users.

*Gladstone* also expanded on examples of objectives that would potentially be valid:

* + The pursuit of economic and regional fairness, and the recognition of the historical reliance upon, and participation in, the fishery by non-aboriginal groups, are the type of objectives which can (at least in the right circumstances) satisfy this standard.
  + In the right circumstances, such objectives are in the interest of all Canadians and, more importantly, the reconciliation of aboriginal societies with the rest of Canadian society may well depend on their successful attainment (*Gladstone – emphasis not added*).

The test of justification has two parts (*Delgamuukw*):

* The infringement of the aboriginal right must be in furtherance of a legislative objective that is compelling and substantial.
* In my opinion, the development of agriculture, forestry, mining, and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations to support those aims, are the kinds of objectives that are consistent with this purpose and, in principle, can justify the infringement of aboriginal title. Whether a particular measure or government act can be explained by reference to one of those objectives, however, is ultimately a question of fact that will have to be examined on a case-by-case basis.
* The infringement must be consistent with the special fiduciary relationship between the Crown and aboriginal peoples.
  + The exclusive nature of aboriginal title is relevant to the degree of scrutiny of the infringing measure or action. For example, if the Crown’s fiduciary duty requires that aboriginal title be given priority, then it is the altered approach to priority laid down in *Gladstone* which should apply.
  + This might entail, for example, that the government accommodate the participation of aboriginal peoples in the development of the resources of British Columbia, that the conferral of fee simples for agriculture, and of leases and licences for forestry and mining reflect the prior occupation of aboriginal title lands, that economic barriers to aboriginal uses of their lands (e.g., licensing fees) be somewhat reduced.
  + Other aspects of aboriginal title suggest that the fiduciary duty may be articulated in a manner different than the idea of priority.
  + Aboriginal title encompasses within it a right to choose to what ends a piece of land can be put.
  + Aboriginal title has an inescapably economic aspect, which suggests that compensation is relevant to the question of justification.

*Tsilghot’in:*

* That it discharged its procedural duty to consult and accommodate.
* That its actions were backed by a compelling and substantial objective.
* That the governmental action is consistent with the Crown’s fiduciary obligation to the group.
* First, the Crown’s fiduciary duty means that the government must act in a way that respects the fact that Aboriginal title is a group interest that inheres in present and future generations. The beneficial interest in the land held by the Aboriginal group vests communally in the title-holding group. This means that incursions on Aboriginal title cannot be justified if they would substantially deprive future generations of the benefit of the land.
* Second, the Crown’s fiduciary duty infuses an obligation of proportionality into the justification process.
* The incursion should be necessary to achieve the government’s goal (rational connection);
* The government go no further than necessary to achieve it (minimal impairment); and
* The benefits that may be expected to flow from that goal are not outweighed by adverse effects on the Aboriginal interest (proportionality of impact).

**ABORIGINAL TITLE**

**Establishing Aboriginal Title**

In order to make out a claim for aboriginal title, the aboriginal group asserting title must satisfy the following criteria (*Delgamuukw*):

1. The land must have been occupied prior to sovereignty.

* Occupation may be established in a variety of ways, ranging from the construction of dwellings through cultivation and enclosure of fields to regular use of definite tracts of land for hunting, fishing or otherwise exploiting its resources.
* It would seem clear that any land that was occupied pre-sovereignty, and which the parties have maintained a substantial connection with since then, is sufficiently important to be of central significance to the culture of the claimants.

1. If present occupation is relied on as proof of occupation pre-sovereignty, there must be continuity between present and pre-sovereignty occupation.

* There is no need to establish “an unbroken chain of continuity”.
* There must be “substantial maintenance of the connection” between the people and the land.

1. At sovereignty, occupation must have been exclusive.

* Exclusive occupation can be demonstrated even if other aboriginal groups were present, or frequented the claimed lands. Under those circumstances, exclusivity would be demonstrated by “the intention and capacity to retain exclusive control”.
* The requirement of exclusive occupancy and the possibility of joint title could be reconciled by recognizing that joint title could arise from shared exclusivity
* Trespass by other aboriginal groups does not undermine, and that presence of those groups by permission may reinforce, the exclusive occupation of the aboriginal group asserting title.

*Tsilqhot’in:* to ground Aboriginal title this occupation must possess three characteristics. It must be *sufficient*; it must be *continuous* (where present occupation is relied on); and it must be *exclusive*.

* Sufficiency of occupation is a context-specific inquiry.
* The intensity and frequency of the use may vary with the characteristics of the Aboriginal group asserting title and the character of the land over which title is asserted.
* The Aboriginal group in question must show that it has historically acted in a way that would communicate to third parties that it held the land for its own purposes.
* Note: the BCCA had required “intensive use”; this would create “postage stamps” areas of title.

**Content of Aboriginal Title**

*Delgamuukw*:

Aboriginal title encompasses the right to use the land held pursuant to that title for a variety of purposes, which need not be aspects of those aboriginal practices, cultures and traditions which are integral to distinctive aboriginal cultures.

The characteristics of Aboriginal title flow from the special relationship between the Crown and the Aboriginal group in question. It is this relationship that makes Aboriginal title *sui generis* or unique.

Inalienability

* + Lands held pursuant to aboriginal title cannot be transferred, sold or surrendered to anyone other than the Crown and, as a result, is inalienable to third parties.

Source

* + It arises from the prior occupation of Canada by aboriginal peoples. It arises from possession before the assertion of British sovereignty, whereas normal estates, like fee simple, arise afterward.

It is held communally

* + Aboriginal title cannot be held by individual aboriginal persons; it is a collective right to land held by all members of an aboriginal nation.

Inherent Limit: lands held pursuant to Aboriginal title cannot be used in a manner that is irreconcilable with the nature of the attachment to the land which forms the basis of the group’s claim to Aboriginal title.

* + There is a special bond between the group and the land in question such that the land will be part of the definition of the group’s distinctive culture.
  + This is why there is a requirement for occupancy (“one of the most critical elements”)
  + Culture is both the basis of title and its constraint
  + The land has an inherent and unique value in itself, which is enjoyed by the community with aboriginal title to it. The community cannot put the land to uses which would destroy that value.
  + The land is more than just a fungible commodity, hence the inalienability.
  + If aboriginal peoples wish to use their lands in a way that aboriginal title does not permit, then they must surrender those lands and convert them into non-title lands to do so.

Because aboriginal rights can vary with respect to their degree of connection with the land, some aboriginal groups may be unable to make out a claim to title, but will nevertheless possess aboriginal rights that are recognized and affirmed by s 35 including site-specific rights to engage in particular activities.

*Tsilghot’in:*

Aboriginal title confers ownership rights similar to those associated with fee simple including: the right to decide how the land will be used; the right of enjoyment and occupancy of the land; the right to possess the land; the right to the economic benefits of the land; and the right to pro-actively use and manage the land.

* + The title holders have the right to the benefits associated with the land — to use it, enjoy it and profit from its economic development (“lock, stock and barrel” – Burrows). As such, the Crown does not retain a beneficial interest in Aboriginal title land.
  + It could be inferred that Indigenous law will govern the use of title land (“In-house debate” – Burrows).
  + But Crown still has the underlying title. Aboriginal title is a “beneficial interest”. This is a hierarchal relationship; a continuance of the doctrine of discovery and *terra nullius*; it is inherently racist; “legislative vacuums”

Aboriginal title, however, comes with an important restriction — it is collective title held not only for the present generation but for all succeeding generations. This means it cannot be alienated except to the Crown or encumbered in ways that would prevent future generations of the group from using and enjoying it. Nor can the land be developed or misused in a way that would substantially deprive future generations of the benefit of the land.

The right to control the land conferred by Aboriginal title means that governments and others seeking to use the land must obtain the consent of the Aboriginal title holders. If the Aboriginal group does not consent to the use, the government’s only recourse is to establish that the proposed incursion on the land is justified.

**DUTY TO CONSULT**

*Haida:* A duty to consultarises when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it.

*Rio Tinto:* This test can be broken down into three elements:

* The Crown must have real or constructive knowledge of a claim to the resource or land to which it attaches.
* The threshold, informed by the need to maintain the honour of the Crown, is not high.
* Actual knowledge arises when a claim has been filed in court or advanced in the context of negotiations, or when a treaty right may be impacted (*Mikisew*).
* Constructive knowledge arises when lands are known or reasonably suspected to have been traditionally occupied by an Aboriginal community or an impact on rights may reasonably be anticipated. While the existence of a potential claim is essential, proof that the claim will succeed is not. What is required is a credible claim. Tenuous claims, for which a strong *prima facie* case is absent, may attract a mere duty of notice.
* There must be Crownconduct or a Crown decisionthat engages a potential Aboriginal right.
* Such action is not confined to government exercise of statutory powers.
* Further, government action is not confined to decisions or conduct which have an immediate impact on lands and resources. A potential for adverse impact suffices. Thus, the duty to consult extends to “strategic, higher level decisions” that may have an impact on Aboriginal claims and rights.
* The potential that the contemplated conduct may adversely affect an Aboriginal claim or right.
* The claimant must show a causal relationship between the proposed government conduct or decision and a potential for adverse impacts on pending Aboriginal claims or rights.
* Past wrongs, including previous breaches of the duty to consult, do not suffice. An underlying or continuing breach is not an adverse impact for the purposes of determining whether a particular government decision gives rise to a duty to consult.
* The adverse effect must be on the future exercise of the right itself; an adverse effect on a First Nation’s future negotiating position does not suffice.
* High-level management decisions or structural changes to the resource’s management may adversely affect Aboriginal claims or rights. This is because such structural changes to the resources management may set the stage for further decisions that will have a *direct* adverse impact on land and resources. For example, a contract that transfers power over a resource from the Crown to a private party may remove or reduce the Crown’s power to ensure that the resource is developed in a way that respects Aboriginal interests in accordance with the honour of the Crown. The Aboriginal people would thus effectively lose or find diminished their constitutional right to have their interests considered in development decisions.

The government’s duty to consult with Aboriginal peoples and accommodate their interests is grounded in the honour of the Crown.

The content of the duty to consult and accommodate varies with the circumstances.

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 Aboriginal peoples with respect to the interests at stake.

* Good faith on both sides is required.
* The commitment is to a meaningful process of consultation.

In general terms, the scope of the duty is proportionate to the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed.

At one end of the spectrum lie cases where the claim to title is weak, the Aboriginal right limited, or the potential for infringement minor.

* + In such cases, the only duty on the Crown may be mere notice, disclose information, and discuss any issues raised in response to the notice.

At the other end of the spectrum lie cases where a strong *prima facie* case for the claim is established.

* + The right and potential infringement is of high significance to the Aboriginal peoples, and the risk of non-compensable damage is high.
  + In such cases deep consultation, aimed at finding a satisfactory interim solution, may be required.
  + This may entail the opportunity to make submissions for consideration, formal participation in the decision-making process, and provision of written reasons to show that Aboriginal concerns were considered and to reveal the impact they had on the decision. This list is neither exhaustive, nor mandatory for every case. The government may wish to adopt dispute resolution procedures like mediation or administrative regimes with impartial decision-makers in complex or difficult cases.

When the consultation process suggests amendment of Crown policy, the effect of good faith consultation may reveal a duty to accommodate.

* + Where a strong *prima facie* case exists for the claim, and the consequences of the government’s proposed decision may adversely affect it in a significant way, addressing the Aboriginal concerns may require taking steps to avoid irreparable harm or to minimize the effects of infringement, pending final resolution of the underlying claim.
  + This process does not give Aboriginal groups a veto over what can be done with land pending final proof of the claim.
  + Accommodation is seeking compromise in an attempt to harmonize conflicting interests and move further down the path of reconciliation. A commitment to the process does not require a duty to agree. But it does require good faith efforts to understand each other’s concerns and move to address them.

The Crown may delegate procedural aspects of consultation to industry proponents seeking a particular development. However, the ultimate legal responsibility for consultation and accommodation rests with the Crown. The honour of the Crown cannot be delegated.

Treaty 8 therefore gives rise to Mikisew procedural rights (e.g. consultation) as well as substantive rights (e.g. hunting, fishing and trapping rights).

The Crown was required to provide notice to the Mikisew and to engage directly with them (and not, as seems to have been the case here, as an afterthought to a general public consultation with Park users). This engagement ought to have included the provision of information about the project addressing what the Crown knew to be Mikisew interests and what the Crown anticipated might be the potential adverse impact on those interests. The Crown was required to solicit and to listen carefully to the Mikisew concerns, and to attempt to minimize adverse impacts on the Mikisew hunting, fishing and trapping rights. The Crown did not discharge this obligation when it unilaterally declared the road realignment.

**HONOUR OF THE CROWN**

*Marshall:* the honour of the Crown is always at stake in its dealings with aboriginal people.

*Sparrow:* this is where the doctrine of priority comes from.

*Guerin:* it can give rise to a fiduciary duty.

*Marshall:* this is why there is a broad and flexible approach to the interpretation of treaties.

*Haida:* this is why there is a duty to consult.

*MMF:*

* The Crown agreed to set aside 1.4 million acres for the Métis children.
* Fiduciary duty: you need a specific or cognizable Aboriginal interest.
* “The fact that the Métis are Aboriginal and had an interest in the land is not sufficient to establish an Aboriginal interest in land. The interest (title or some other interest) must be distinctly Aboriginal: itmust be a communal Aboriginal interest in the land that is integral to the nature of the Métis distinctive community and their relationship to the land.”
* There was no such interest in the land here: land was held individually and not by the Métis communally; it was not “distinctly Aboriginal”.
* The Honour of the Crown is a Constitutional principle.
* It arises from the assertion of sovereignty.
* It is always in the background.
* Honour of the Crown meant that the Crown had to take their promise to the Metis seriously;
* “…endeavor to ensure its obligations are fulfilled”.
* “…assume the Crown always intends to fulfill its solemn promises.
* It is really about authority: the Crown is sovereign and stands in relation with its subjects; its authority is premised in the rule of law; the assertion of sovereignty without consent.