**Aboriginal Law ROADMAP ☺**

**3 ways to proceed:**

* **ROUTE 1 – Unjustified Infringement**
  + ***Route 1(a) – Title***
  + ***Route 1(b) - Rights*** 
    - 4 – step Sparrow test applicable to rights and title
* **ROUTE 2: Breach of duty to consult**
  + Stand alone challenge from Haida Nation
  + Trigger – low
    - Real/constcutive knowledge of the right, and contemplating conduct that has the possibility of infringing that right
    - Negotiation themselves IS NOT a trigger, but can provide knowledge of rights…and knowledge of possibility of infringing the rights
* **ROUTE 3: Violation of Honour of the Crown**
  + Unwritten constitutional principle
  + Separate, independent basis for challenging the Crown (Manitoba Metis Federation)

**Route 1(a) - TEST FOR ABORIGINAL TITLE**

(Delgamuukw) (**Aff’d by Tsilhqot’in)**

1. **Sufficiency** (Prior Occupation)

* Land must have been occupied prior to sovereignty (1846)
* Take into account both:
  + **Aboriginal Perspective**: Consider among other things any aboriginal laws in relation to land (land tenure system or laws governing use)
  + **Common Law Perspective**: Physical occupation established by proof of possession:
    - Buildings
    - Cultivation and enclosure of fields
    - Regular use of definite tracts of land for hunting/fishing/exploiting resources
  + Contextual analysis based on the characteristics of the group and the land
* **Relaxation of sufficiency requirement for semi-nomadic peoples (Tsilquotin)**
  + Possession is extremely difficult to prove in CL terms if you are a semi-nomatic person
  + SCC relaxes standard of proof: Aboriginal title not limited to village sites
    - Includes lands used for hunting, fishing, trapping, foraging, and other cultural purposes/practices
    - Surrounding lands which a Nation has effective control
  + Sufficient to ground title:
    - Warning off tresspassers, Cutting trees, Fishing in tracts of water, Perambulation

1. **Continuity**

* If descendants present occupation is relied on as proof of occupation pre-soverignty, there must be a continuity between present and pre-sovereignty occupation
  + Unbroken chain is NOT required
* **Regular use of land is sufficient (Tsilquotin)**
  + Not necessary to show intensive use of land
  + Look at chains of transmission
    - Allowed to use land for variety of purposes - Ceremonial; economic; survival
    - Uses are not frozen in the past

1. **Exclusivity**

* Band has ability to exclude other at sovereignty
* Exclusivity must rely on both aboriginal/common law perspectives:
  + **CL Perspective:** 
    - Emphasizes factual reality of occupation
    - Exclusivity can be demonstrated by the “intention and capacity to retain exclusive control”
  + **Aboriginal Perspective:**
    - Consider aboriginal laws on trespass, use, and residence
    - What looks like trespass to the CL may not undermine exclusive control under aboriginal laws
    - Exclusivity can be demonstrated even if other Aboriginal groups were present, ot frequented the claimed lands
* **Can be established in a variety of ways: (Tsilquotin)**
  + Proof of keeping others out, others requiring permission for access to land
  + Existence of trespass laws
  + Treaties made with other aboriginal groups
  + Lack of challenges to occupancy (intention/capacity to control)
* Others on land does not negate exclusivity
* Whether intention/capacity of control land is established 🡪 question of fact for trial juge
  + Depends on various factors:
    - Characteristics of the claimant group
    - Nature of othe groups in the area
    - Characteristics of the land in question
* Exclusivity considered from both CL and Aboriginal perspectives

**NATURE OF ABORIGINAL TITLE 🡪“sui generis” (Delgamuukw)**

1. ***Inalienable***
   * Incapable of sale to third party, except to Federal Crown
   * Can be surrendered to the Federal Crown by treaty
2. ***Source***
   * Arises from prior occupation of Canada by Aboriginal peoples
   * Aborginal title survives British Sovereignty
   * Aboriginal title only applies to land of central significance (to their distinctive culture)
3. ***Communal***
   * Aboriginal title is a collective ownership – members of the community
   * Cannot be held by individual persons

**CONTENT OF ABORIGINAL TITLE (Delgamuukw)**

1. Encompasses the right to EXCLUSIVE USE + OCCUPATION of the land

* For variety of purposes
* Need not be aspects of aboriginal practices/customs/traditions which were integral to distinctive aboriginal cultures

1. Protected uses must not be irreconcilable with the nature of the groups attachment to the land

CONTENT: Positive & Negative Rights Perspective **(Tsilquotin)**

**Benefits:**

* Similar to those associated with fee simple
* Right to decide how land will be used
* Right of enjoyment and occupancy of land
* Right to possess land
* Right to economic benefits of the land
* Right to pro-actively use and manage the land
* Some changes, even permenant, are possible

**Restrictions:**

* Collective title for present and succeeding generations
* Cannot be alienated - except the crown
* Cannot be encumbered in ways that would prevent future generations of the group from using and enjoying it
  + Or developed/misuse of the land in a way that would substantially deprive future generations of the benefits of the land

**2. WAS THE TITLE EXTINGUISHED? (sparrow)**

**Intention by Parliament to extinguish an Aboriginal Right must be CLEAR + PLAIN**

* Controlling in great detail through regulations IS NOT extinguishment
* Living tree principle:
  + Existing rights must be interpreted flexibly to permit their evolution over time
  + Rights are affirmed in a contemporary form rather than in their primeval simplicity and vigour
* Cannot allege extinguishment AFTER 1982 (Sparrow)

**3. HAS THERE BEEN INFRINGMENT OF ABORIGINAL TITLE?**

(Sparrow)

* **Provincial Laws Applicable until Aboriginal title is confirmed by agreement or court order (Tsilquotin)**

**PROVE BOTH:**

1. **Does it interfere w/ Aboriginal Title?**
   1. Right to exclusive use/occupation of the land
   2. Right to determine the uses to which the land is put, subject to ultimate limit of sustaining for future generations
   3. Right to enjoy economic fruits of the land
2. **Is there a meaningful diminution of an Aboriginal Right?**
   1. Whether the limitation imposed by the legislation is **unreasonable**
   2. Whether the legislation **imposed undue hardship, OR:**
   3. Whether the legislation **denies the holders of the right their preferred means of exercising the right**

**4. IS THE INFRINGEMENT JUSTIFIED?**

(Sparrow, aff’d & restructured in Tsilhqot’in )

(Crown Onus)

1. **Procedural duty to consult and accommodate has been discharged**

* Elements from *Haida*

**Duty INCLUDES:**

* 1. **CONSULTATION**
* Based on proportionality of the claim

***Weak claim:***

* + Crown must give notice and disclose information to the affected people(s) + discuss issues

***Strong Prima Facie claim:***

* + Crown must consult more extensively to find a satisfactory solution
* Strength of the claim
  + Look at the claim on its face (prima facie
  + Court will look at available evidence (no opportunity for long hearings)
  + Duty to accommodate done in judicial review 🡪 quicker
  + Seriousness of the effect; can be complicated
* Both sides must act in good faith
  + Affected peoples cannot reject reasonable suggestions by the Crown
  + Crown cannot ignore aboriginal requests
  1. **ACCOMODATION**
* No duty to come to an agreement, just a duty to consult
* When consultation suggests an amendment of Crown policy, then the crown must accommodate
  + Includes taking steps to avoid irreparable harm and minimise the effects of the infringement
  + Aboriginals do not have a veto
  + Good faith requirement remains

1. **Actions were backed by compelling and substantial objective**

* Factors from *Delgamuuk:*
  + Development of agriculture, forestry, mining, hydroelectric power,
  + General economic development of the interior of BC
  + Protection of environment or endangered species
  + Building of infrastructure and the settlement of foreign populations
* Conservation/resource management = uncontroversial (sparrow)

1. **Action consistent with fiduciary duty**
2. **Government must act in a way that respects Aboriginal title is a group interest that inheres in present and future generations**

* Substantially deprive future generations of land? Then no…

1. **Obligation of *proportionality* into the justification process**
   1. Requirement the incursion is necessary to achieve the governments goal (rational connection)
   2. Government go no further than necessary to achieve it (minimal impairment)
   3. Benefits expected to flow from action are not outweighed by adverse effects on the aboriginal interest (proportionality)

**Route 1(b) - IS THERE AN ABORIGINAL RIGHT?**

**An element of practice, custom, or tradition integral to the distinctive culture of the Aboriginal group claiming the right** (Van der Peet)

**PROCEDURE FOR ABORIGINAL RIGHT CLAIMS:**

Van der Peet Test as refined in *Sappier/Gray* and *Lax Kw’alaams Indian Band*:

1. **Characterize the right**

* Identify precise nature of the claim to AR based on the pleadings
* If necessary, refine/re-characterize the right claimed on terms fair to all parties

1. **Does the evidence adduced at trial prove:**
   1. The existence of the pre-contact practice/tradition/custom advanced in pleadings
   2. That this practice was integral to the distinctive pre-contact Aboriginal society
2. **Determine whether the claimed modern right has a reasonable degree of continuity with the “integral” pre-contact practice**

* Is the claimed modern right demonstrably connected to, and reasonably regarded as a continuation of, the pre-contact practice
* Take generous but realistic approach to matching pre-contact practices to claimed modern rights
* Must engage the same elements, though need not be exactly the same.

1. **Commercial right found?**

* Engage principle from Gladstone:
  + Consider objectives such as pursuit of economic and regional fairness
  + Recognition of historical reliance upon, and participation in, the fishery by non-aboriginal groups
  + Such objectives are in the interest of all Canadians,
  + The reconciliation of aboriginal societies with the rest of Canadian societies depends on their successful attainment

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**IS THERE INFRINGEMENT? (sparrow)**

(Aboriginal onus)

1. **Relationship between legislation and existing right**
2. **Adverse Restriction (prove one)**

🡪purpose, or effect

* 1. Limitation unreasonable
  2. Regulation imposes undue hardship
  3. Regulation denied to holders of the right their preferred means of exercising that right

**If there is an infringement…**

**IS THE INFRINGEMENT JUSTIFIED?** **(sparrow)**

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**No inherent limit**?

* + **Government is justified in regulating the right so long as the regulations take into account the existence of aboriginal rights and are put in a manner that is respectful of the fact that aboriginal rights have priority over others**
  + Not exclusivity, but priority over other users

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**Route 2: BREACH OF DUTY TO CONSULT – STAND ALONE**

**Duty Arises WHEN:** (Haida Nation)

1. Crown has knowledge, real or constructive, of the potential existence of an aboriginal right or title,
2. Contemplating conduct that engages a potential aboriginal right AND:
3. Theres a potential the conduct that might **adversely** effect the aboriginal right

**ADVERSE EFFECT: (Rio Tinto)**

* Must show a causal relationship between the proposed conduct of decision and a potential for adverse impacts on pending claims or rights
* **Past wrongs**, including breaches of duty to consult, ***do not suffice***
* ***Speculative impact***s and ***impacts on future negotiation*** positions ***do not trigger the duty***
* A past or continuing breach of a claim or right, including prior failures to consult, will only trigger a duty to consult if the present decision at issue causes a ***new adverse effect***

**Duty INCLUDES: (**Haida Nation)

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**Route 3: HONOUR OF THE CROWN**

* **Unwritten constitutional principle – separate, independent basis for challenging the Crown**
* Refers to the principle that servants of the Crown must conduct themselves with honour when acting on behalf of the sovereign
* **Arises from the Crown’s assertion of sovereignty over Aboriginal people and de facto control of land and resources that were formerly in control of the people**
  + Goes back to Royal Proclamation
  + Not a paternalistic desire to protect, rather a recognition of their strength
  + Honor of the crown is NOT a paternalistic concept
* Source – the Crown itself?
* Government operates within the Rule of Law and by the Rule of Law

**WHEN IS THE HONOR OF THE CROWN ENGAGED 🡪 ALWAYS!**

1. **Situations involving reconciliation of Aboriginal rights with Crown sovereignty**
2. **By s. 35(1) of the Constitution**
3. **By an explicit obligation to an Aboriginal group that in enshrined in the Constitution**

* Must be explicity owed to an Aboriginal group
* Not engaged by a constitutional obligation in which Aboriginal peoples simply have a strong interest
* Not engaged by a constitutional obligation owed to a group partially composed of Aboriginal people
* **When there is a specific, “solemn” obligation or promise that is intended to create obligations, is made by the Crown to an Aboriginal group**
  + Treaty or other commitment

**WHAT ARE THE DUTIES IMPOSED BY HONOR OF THE CROWN?**

1. Gives rise to fiduciary duty when the Crown **assumes discretionary** control over a **specific Aboriginal interest** (Haida) 🡪 but element not met in this case
2. Informs the purposive interpretation of s. 35 and gives rise to a duty to consult when the Crown contemplates an action that will affect a claimed by yet unproven Aboriginal interest (Haida)
3. Governs treaty-making and implementation (Mikisew)

* Leading to requirements such as honourable negotiation
* Avoidance of sharp dealing

1. Requires Crown to act in a way that accomplishes the intended purposes of treaty and statutory grants to Aboriginal peoples (Marshall, Mikisew)

**The Question:**

**Viewing Crown’s conduct as a whole in the context of the case, did the Crown act with diligence to pursue the fulfillment of the purposes of the obligation?**