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# Aboriginal Rights

* **Aboriginal Rights** belong to communities; each gets a unique bundle, possessed by families and individuals within each community 🡪 purpose: 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

* 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 claimer) who discovered it
	+ Practical meaning: Jurisdictional authority of a European nation to exclude other nations from that Abo 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; intentionally ambiguous
	+ **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)
* **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
	+ 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
		- 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 govt

## Royal Proclamation 1763

*“And whereas it is just and reasonable, and* ***essential to our Interest****, and the Security of our Colonies, that the several Nations or Tribes of Indians with whom We are connected, and who* ***live under our Protection****, should not be molested or disturbed in the Possession of such Parts of* ***Our Dominions and Territories*** *as, not having been* ***ceded to or purchased by Us****, are reserved to them, or any of them, as their Hunting Grounds -- We do therefore, with the Advice of our Privy Council, declare it to be our Royal Will and Pleasure, that no Governor or Commander in Chief in any of our Colonies of Quebec, East Florida or West Florida, do presume, upon any Pretence whatever, to grant Warrants of Survey, or pass any Patents for Lands beyond the Bounds of their respective Governments as described in their Commissions: as also that no Governor or Commander in Chief in any of our other Colonies or Plantations in America do presume for the present, and until our further Pleasure be known, to grant Warrants of Survey, or pass Patents for any Lands beyond the Heads or Sources of any of the Rivers which fall into the Atlantic Ocean from the West and North West, or upon any Lands whatever, which, not having been ceded to or purchased by Us as aforesaid, are reserved to the said Indians, or any of them.”*

* Document that set out guidelines for European settlement of Aboriginal territories in what is now North America.
* Issued by King George III in **1763** to officially claim British territory in North America after Britain won the Seven Years War.
* 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

Some more things to pull out of Royal Proclamation…

* **Below all titles, there’s an underlying title to the govt**
* A treaty at this time meant that interest in land released, therefore finalised Crown title on the land
* Determined that Aboriginal land rights/interests are a **burden** on the establishment of the Crown title
* Abo 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
* **RP not applicable in BC because it’s not needed to govern treaty rights**

## What is a ‘constitution’?

* supreme law
* statement of will of people
* principles that are binding on Gov’t
* above politics, unalterable
* Rule of Law: part of what happened in 1982 we went from one form of gov’t to another, we put in s 52 and other parts that reflect that we are now a constitutional democracy (no longer parliamentary supremacy)

## Role of the Judiciary

* In *Reference re Manitoba Language Rights*, [1985] “It is... the "supreme law" of the nation, unalterable by the normal legislative process, and unsuffering of laws inconsistent with it.  **The duty of the judiciary is to interpret and apply the laws of Canada and each of the provinces, and it is thus our duty to ensure that the constitutional law prevails**.”

# Early Jurisprudence 1600s – early 1800s

**The Marshall Trilogy (SCOTUS)**

* Distorted view of Abo relations history, later precedence in Canadian jurisprudence (similarities in *St. Catherine’s*)
* State of Georgia trying to rid itself of Indian peoples 🡪 CJ Marshall becomes aware of this
* **Doctrine of Discovery** claimed in US and became the basis for much of treatment of Abo land relations
	+ Claimed European nations accepted it because it was in their self-interest
	+ Progressive position: Abo capable of governing selves; **however,** not ready to give them protections (**Doctrine of Continuity**)—used Doctrine of Discovery that diminished their rights/protections
		- Their laws became simply evidence that lawyers could use to prove rights in a common law system

Johnson & Graham’s Lessee v McIntosh (1823) US

Facts:

* P’s claimed title to property conveyed by Piankeshaws before American Revolution but after *Royal Proclamation* of 1763. D claimed title to the same property based on a grant from the US govt.

Issue: Is the grant title recognized in US courts?

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
* Right of preemption: The exclusion of all other Europeans necessarily gave to the nation making the discovery the sole right of acquiring the soil from the natives and establishing settlements upon it.
	+ Those relations which were to exist between the discoverer and the natives were to be regulated by themselves. No other power could interpose between them.
* **The rights of the original inhabitants were in no instance entirely disregarded, but were necessarily to a considerable extent impaired.** The original inhabitants’ power to dispose of the soil at their own will to whomsoever they pleased was denied by the original fundamental principle that discovery gave exclusive title to those who made it.
* **Discovery gave an exclusive right to extinguish the Indian title of occupancy** either by purchase or by conquest, and gave also a right to such a degree of sovereignty as the circumstances of the people would allow them to exercise.

Doctrine of Discovery: 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.
* “The tribes of Indians inhabiting this country were fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest. To leave them in possession of their country, was to leave the country a wilderness; to govern them as a distinct people, was impossible, because they were as brave and as high spirited as they were fierce, and were ready to repel by arms every attempt on their independence…”
* “However extravagant the pretension of converting the discovery of an inhabited country into conquest may appear; if the principle has been asserted in the first instance, and afterwards sustained; if a country has been acquired and held under it; if the property of the great mass of the community originates in it, it becomes the law of the land, and cannot be questioned. So, too, with respect to the concomitant principle, that the **Indian inhabitants are to be considered merely as occupants, to be protected, indeed, while in peace, in the possession of their lands, but to be deemed incapable of transferring the absolute title to others**.”
	+ **Only Crown can hold title and grant it unto others 🡪 Abo do not have right to govern, and cannot sell land except to state; necessarily subordinate to sovereign**

The United States has clear title to all the lands within the boundary lines described in the treaty [which concluded the war of the revolution], subject only to the Indian right of occupancy, and that the exclusive power to extinguish that right was vested in that government which might constitutionally exercise it.

* *If a civilized nation is conquered 🡪 retains its law*
* *If a non-civilized nation is conquered 🡪 no right to its titles and laws*

**British Constitution**: All vacant lands are vested in the Crown, as representing the nation, and the exclusive power to grant them is admitted to reside in the Crown as a branch of the royal prerogative.

* The principle was as fully recognized in America as in the Island of Great Britain.
* **No distinction was taken between vacant lands and lands occupied by the Indians (so far as respected the authority of the Crown).**

**The undercurrent of this decision:**

* the judge recognizes that it’s unjust to apply the European law to these people, but he also recognizes that the reality requires it
* he doesn’t just treat them like savages but there isn’t anything he can do

Cherokee Nation v. Georgia (1831):

* “The Indians are acknowledged to have an unquestionable, and heretofore an **unquestioned, right to the lands they occupy until that right shall be extinguished by a voluntary cession to our Government**. [The Indians] may more correctly, perhaps, be denominated domestic dependent nations. They occupy a territory to which we **assert a title independent of their will**, which must take effect in point of possession when their right of possession ceases... Their relations to the United States resemble that of a ward to his guardian. **They look to our Government for protection, rely upon its kindness and its power, appeal to it for relief to their wants, and address the President as their Great Father.**”
* this is now how Nations are understood in American Law - no sovereignty or independence

Worcester v Georgia (1832) US

**CJ Marshall retreats slightly what he said in Johnson**

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.
* plaintiff alleges that the act under which the prosecution was instituted is repugnant to the treaties between the United States and the Cherokees (which acknowledge their right as a sovereign nation to govern themselves and all persons who have settled within their territory, free from any right of legislative interference by the several states composing the United States of America), and is, therefore, unconstitutional and void.

Issue: Is this Act, which bans white persons from living on Cherokee land without a license, valid?

Analysis:

* treaty of Holsten 1791, wherein the US “explicitly recognizing the national character of the Cherokees, and their right of self-government; thus guarantying their lands; assuming the duty of protection”
* Cherokee nation is distinct in its own territory, has its own laws and citizens of Georgia can be there only with their permission
* The treaties and laws of the United States contemplate the Indian territory as completely separated from that of the States, and provide that all intercourse with them shall be carried on exclusively by the government of the Union.
* However, any intercourse between the US and the Cherokee Nation is, by Constitution and laws, vested in the US government.

(in Canada this will later become s 91(24): **“Indians, and lands reserved for Indians” is under federal jurisdiction**)

Decision: The condemnation of P should be reversed and annulled; Georgia Act UV

* argued unconstitutional - **Marshall retracts what he said in *Cherokee Nation* a little**:

“It is difficult to comprehend the proposition, that the inhabitants of either quarter of the globe could have rightful original claims of dominion over the inhabitants of the other, or over the lands they occupied; or that the discovery of either by the other should give the discoverer rights in the country discovered, which annulled the pre-existing rights of its ancient possessors.”

**Comments about this case:**

"The actual state of things" > power and war have given rise to these situations which we must deal with

* + Judge recognizes that the indigenous have laws and traditions, they were independent, but we cannot possibly recognise them
	+ **He sets it up as a battle of absolutes**: you either have sovereignty or not. Either the Europeans own the land or they do not. No mediation or middle ground suggested.
	+ He's trying to retreat from the logic that European conquest cancels out the rights of Indigenous peoples, but it's a question of how far he can or does retreat.
	+ He says that at least in the case of the Cherokee and at least under the terms of this treaty, some indigenous self-government *can* survive under American sovereignty (as opposed to what was pronounced in Johnson)

# Key legal principles, doctrines, and concepts:

**1. The ‘doctrine of discovery’**

* + agreement btwn Euro powers to recognize claims
	+ doesn’t describe rel’p between Euro nation and Indian nation (i.e. Dutch and NY-area Nations)
	+ Places where doctrine described not just in terms of Euro: grants jurisdictional auth to Euro power that ‘discovers’ area. Suggests that e.g. France in E Canada, if they discovered it they gain dominion over it

**2. ‘Occupation’ (in relation to ownership or title)**

* + rights of “occupation and use” left unmolested, but doctrine of discovery magically somehow imposed jurisdictional authority: probably not the kind of interest one thinks of: no discussion of ’title’

**3. ‘Jurisdiction’ or dominion (in relation to ownership or occupation)**

* + in Jackson’s piece indicated that Brit in interacting w/ Indian allies, careful to lay out boundaries for instance, discussion of 2-row wampum for e.g. as symbolizing the parallel paths of the two nations
	+ Marshall’s discussion tells a different story

**4. ‘Protection’ (in relation to sovereignty)**

* + Jackson talks about alliance, mutual protection b/c thru 16-1700s Shoshonee were pre-eminent military force.
	+ Marshall talks about protection OF Indian nations by US/sovereign authority which is protecting their interests which is a very different idea

**5. Indian powers of governance**

* + not recognized exc. in ***Worcester***

**6. Indian interests in land/territory**

* + rights only to use and occupy land “personal usufructory right”

# Meanwhile in Canada…

* 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 political 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)

## Indian Act, 1876

* Document asserting fed govt policy on Ab 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 🡪 because didn’t want Bands having lawyers and suing the Crown
* 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; authority over Indians and Lands reserved to Indians

St. Catherine’s Milling and Lumber Co v The Queen (1888), PC

**Rights come from the goodwill of the Crown (*Royal Proclamation***); **RP as source of AT**

Facts:

* Federal case: Dominion made treaty with Salteaux Ojibwa for 50k sq. miles of territory, 32k in ON. Dispute btwn ON and Canada as to legal consequences.
* Land surrendered to Crown; right given to Lumber Co to go in and cut trees 🡪 prov govt complains because land given to them not to the feds
* Ontario wanted royalties and feds claimed they had right to them instead = constitutional issue
* the actual Aboriginal band that gave up rights to land not party to the case

Issue: Who’s entitled to benefit from resources collected on land whose Indian title has been extinguished?

Analysis:

* This one is like our Johnson; decided by Privy Council (Lord Watson)
* Watson was no Marshall (not a statesmen); not looking ahead, just laying it out
* His account of history, not as comprehensive
* Watson doing something different from what Marshall doing : writing for the judicial committee of the PC
* Marshall talking about uncivilised people that need to have Christianity imparted on them; Watson talking about BNA, the law, technical terms etc
* not talking about seizing power and justifying it; Watson bolstering empire : working with and within the law
* mechanics of govt; imposing one legal system on another = complicated, technical judgement
* “the tenure of the Indians was a personal and usufructuary right, dependent upon the good will of the Sovereign”
	+ echoing Marshall lang of ‘use and occupation’ - assertion that Royal P is source of Indian title
	+ “C has all along had a present proprietary estate in the land, upon which the Indian title was a mere burden” on C land.
	+ Because the land is not “subject to any trusts” it becomes ON’s jurisdiction after surrender to the Crown
* Interprets RP to mean that Indian title is only a “personal and usufructuary right”; Crown holds all land title and AT = burden on Crown Land

**Decision:** **Crown had all along estate underlying Indian title which became dominant when Indian title extinguished**.

*BNA Act* transferred all Indian lands belonging to provinces to Dominion

**Comments on this case**

**Worrisome note**: the language of this case did not include permission of the Aboriginal peoples: instead, “surrender or otherwise be extinguished”

* so somehow magically the Crown acquired dominion and indian title (which is merely usufructory anyway) is a “burden” or encumbrance on it, when this is removed by surrender or extinguishment it becomes clear title: no exchange of sovereignty, just a release in interest in the land that clears it for the Crown
* usufructuary 🡪 personal right to use the land but no right to title; if they HAD property rights (fee simple) things might have been different, but…this is still to some degree good law, just as the Marshall decisions in the US are still good law.

Lord Watson had profound effect on relation between Aboriginal peoples and the Crown as a result of this judgment 🡪You might say that he lacked the vision from Marshall's judgment in *Johnson*

His account of history is not as comprehensive 🡪Watson doing something different from Marshall

* + He is not dealing with dispossession or trying to justify dispossession of aboriginal peoples
	+ He is writing from a culture (British Empire) which is very familiar with indigenous systems and law
* They use different types of justifications
* Marhsall: cultural and economic necessity, the will of Christianity
* Watson talks in terms of law, the BNA Act, the difference between a fee and some sort of interest, etc.
	+ He does not talk about justifying the terms of power
* He *works with and within the law* to bolsters the authority of the empire
* Watson does not seem to acknowledge that prior occupation of land by Aboriginals could lead to legal title 🡪 he asserts that Indian title is granted by the good will of the sovereign

# How do Indigenous peoples of Canada fit into this vision of constitutional law?

**Entrenched Constitutional Rights**

## S. 35 Constitution Act, 1982

* Recognizes and affirms past and future rights
* S. 35(1): The existing Abo and treaty rights of the Abo 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**.

🡪 (**It brings modern day treaties into this area of protected rights**)

* (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.
* 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 Abo peoples to participate in the discussions on that item

## 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 Abo treaty, or other rights or freedoms that pertain to the Abo 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 Abo peoples by way of land claims settlement.

## **Report of the Royal Commission on Aboriginal Peoples, ‘Separate Worlds**’

* Condensed hundreds of years of history of Abo and European relations into a report
* Commissioned as a result of recognition of Aboriginal crisis
* Established to address issues of aboriginal status arising out of the Oka Crisis and other events.
* Chapter 4 described the social, political and scientific state of 5 aboriginal groups at or pre-contact: Mi'kmaq, Iroquois, The Blackfoot Confederacy, Northwest Coast, and Inuit.
	+ It does this to emphasize that Aboriginal peoples were organized and had established systems of government, property, etc.
	+ Although these systems are different from the common European notions, they were as established and complex as any.
	+ Thus the notion that they weren't civilized enough to hold property is incorrect.
* Original intentions of European settlers were varied and changed quickly, but in general those coming north arrived peacefully and established agreements and treaties with the native population.

## 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 Abo saw RP as a declaration of the British’s concern over the Abo 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**

# Pre S. 35 Cases in the 20th Century

Momentous events of the mid-20th century

## White Paper

* Trudeau’s *White Paper* stated that **treaties were no longer to have legal recognition**
	+ contested by eg. Red Paper by Harold Cardinal and was shelved - would have got rid of Indian Act
* failed attempt at assimilation 🡪 Unsuccessful, never became law
* With advent of *Charter*, post-1982 **treaties** not just legal instruments but **constitutionally protected instruments**
* Thought this was useful progression regarding the bad treatment of Aboriginals
* A lot of people supported scrapping of Indian Act because tool of colonisation; others saw it as an attempt at assimilation and didn’t want the Indian Act repealed

Calder v Attorney-General of British Columbia, 1973 SCC

**Royal proclamation is NOT the sole source of Indian title; Test for Extinguishment**

Facts:

* Govt attempted to abolish *Indian* Act and implemented assimilation policies.
* Frank Calder, Musqueum, four bands: Gitlakdami, Canyon City, Greenville and Kincolith = officers of the Nisga’a Tribal Council and councillors of each of the four Indian bands.
* Sue BC, as representatives of the Nishga Indian Tribe
	+ **sought a declaration** (statement of the law)
	+ 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.
	+ Had to do seek declaration because rights not Constitutionally entrenched yet (all they had was CA 1867 which stated Indian affairs under Parliament’s discretion; no treaty either)
* This claim was denied at trial and upheld at appeal

Issue: Do the alleged aboriginal land claims exist? If so, were they extinguished?

Analysis:

* Split 3 ways: very complicated judgement
1. **Judson:**
	* RP not only source of title, doesn’t apply in BC. “the fact is that when the settlers came, the *Indians were there,* organized in societies and occupying the land as their forefathers had done for centuries. **This is what Indian title means** and it does not help one in the solution of this problem to call it a ‘personal or usufructuary right’”
	* **BUT:** “When the Colony of British Columbia was established in 1858, there can be no doubt that the Nisga’a territory **became part of it**.” “There can be no question that this right [to live on their lands] was “dependent on the goodwill of the Sovereign”. [63, emphasis added]
	* So no title
2. **Hall:**
	* **Possession is proof of ownership** and - what they are claiming is a right to possession. “In enumerating the indicia of ownership, the trial judge overlooked that possession is of itself proof of ownership. Prima facie, therefore, the Nisga’as are the owners of the lands that have been in their possession from time immemorial and, therefore, the burden of establishing that their right has been extinguished rests squarely on the respondent.”2)
	* “It would, accordingly, appear to be beyond question that the onus of proving that the Sovereign intended to extinguish the Indian title lies on the respondent and that intention must be “**clear and plain**” 🡪 “There is no such proof in the case at bar [applying the test, above]; no legislation to that effect.”
	* “Surely the Canadian treaties, made with much solemnity on behalf of the Crown, were intended to extinguish the Indian title. 🡪 “**statements in the treaty are entirely inconsistent with any argument or suggestion that such rights as the Indians may have had were extinguished prior to Confederation** in 1871. … If there was no Indian title extant in British Columbia in 1899, why was the treaty negotiated and ratified?”
3. **Pigeon:**
	* can’t just sue the Crown: have to ask for permission to bring this case into the courts (Nisga’a didn’t follow this process) – case never should have gotten this far
* **Big distinctions between the two different judgements:**
1. Source of title (Judson: RP not ONLY source of AT; Hall: RP is only source)
2. Nature of title (Judson: not usufructuary right; Hall: usufructuary right)
3. Status (Whether it’s been extinguished) – Judson says extinguished, Hall disagrees because neither of the two conditions for extinguishment met
4. Authority to do it
5. Clear and plain intention

### Test for extinguishment

* Requires **authority**
* **clear and plain intent** in colonial instruments 🡪 Crown must provide proof (e.g. treaty doc clearly stipulated intent to remove Indian title)

**Decision**: **Royal proclamation is NOT the sole source of Indian title 🡪 it recognizes title but didn’t create.**

* **Extinguishment requires authority and clear and plain intent** Crown must provide proof of clear and plain intent (ex. treaty doc clearly stipulated intent to remove Indian title
* **Case recognized that Aboriginal title was justiciable**
* **Aboriginal land claims are extinguished once government exercises control over the lands.**

|  |  |  |
| --- | --- | --- |
|  | **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  |
| ***Calder*** | NOT just RP | Authority + Clear and Plain Intent |

Some Context

* Rule of law and constitutionalism
* Ordinary *intra vires* govt legislation can amend treaty rights
* In order to consider joining Canada, BC insisted on “maintaining Indian rights as liberal as the colonies had always been”🡪ironic because they weren’t really liberal to begin with
* All Aboriginal rights that they wanted to extinguish had to be extinguished between **1858-1871** because there was no Crown/colonial govt to do it before 1858, and Confederation occurred in 1871 so after that BC lacked the jurisdiction to do such a thing🡪 13 year window period that was like “twilight zone” where BC (governor Douglas) could do it themselves
* After 1871 BC couldn’t extinguish title anymore because now part of Confederation 🡪 had to be done under sole jurisdiction of Parliament (s 91(24))
* Initiated a change in govt policy toward Aboriginals: Spurred govt into allowing for comprehensive claims and special claims, helped initiate creation of s. 35

Think about:

1. **Source of aboriginal title**
* Judson 🡪the Royal Proclamation + their pre European presence on the land
* In dissent judge Hall says that the title doesn’t depend on treaty/legislative enactment; so we are still unclear/we can see court moving from one paradigm to another)
1. **Nature of title**
* Judson🡪says (p.37) that it is not helpful to call it personal/usufructuary right, but it is rather a right to continue living on the land; a community property right (different from private property)
* Hall still talks about personal right, fees, and interest in occupying the lands
1. **The status of title**
* Judson 🡪It has been extinguished
* Hall says it is still present
* If there is no such thing as title, why would the G even engage in a treaty?-->this was the position in this case

Pulled through from St. Catherine’s:

* Indian title as “personal or **usufructuary** right” dependent on good will of sovereign (Judges not a fan of that) = **concept known to civil law; right to use land but not the land itself**
	+ Indian interest in land is limited: can do stuff on the land, use it, but don’t get to own it
	+ Got this from the RP (weird because RP doesn’t use this language)
	+ This language is pretty much dead now
* Indian title as **a burden on underlying Crown title** 🡪 implication that Crown title has always existed (confusing because that’s not true) = source of all title is in the Crown and the Indian Title is superimposed on it
* 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)
* Watson uses RP as original source of Indian Title; RP grants it (whereas we talked about the RP as recognising it: it existed before RP, wasn’t granted by RP)
* 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)
* Bottom of paragraph 7: “whenever title surrendered or otherwise extinguished” = affirms doctrine of discovery; “otherwise extinguished” = what could this mean?
* Slightly contradicts RP
* Problematic because affects certainty
* If don’t have a title, why would they be entering treaty? Clearly, title was recognised at some point
* What’s important is what happened after this case: govt wakes up to AT rights

# Fiduciary Doctrine

Guerin v the Queen (1984) SCC

**Crown has a fiduciary obligation to Aboriginal groups; AT is *sui generis***

**Facts:**

* Per the Indian Act, the Musqueam in 1950‘s surrendered land to the Crown after consultation regarding the terms of a lease to the Shaughnessy Golf Club
* Terms for the lease obtained by the Crown were less favourable for the Band than those agreed upon at the surrender meeting
	+ new terms not mentioned in surrender doc
* Indian Affairs officials did not give the Band opportunity to approve revised conditions
	+ Instead, withheld key information and induced plaintiffs to sign a document surrendering the land.
* Guerin 🡪 a member of Musqueam Band
	+ sued Crown over the bad deal they were negotiated into regarding surrendering a portion of their reserve land so that D could lease it (🡪 Golf course bought it and got a sweet deal)
	+ Band wants damages. 🡪 TJ accepts that they would not have consented to the surrender if they had known what the actual agreement would look like.
	+ Awards damages for breach of trust relationship 🡪 CA overturns 🡪 SCC

Issue: Does Crown owe anything to Guerin and Musqueam Band?

Analysis:

* Presumption of Crown Sovereignty frames this decision
* Wilson finds that s 18 does not *create* a trust it recognizes one: “the Crown has a fiduciary obligation to the Indian Bands with respect to the uses to which reserve land may be put
* This duty arises out of uniqueness of Aboriginal Title (AT) = *sui generis*
	+ This makes it an inalienable right which may in a particular instance be surrendered to the Crown in which case the Crown must ensure that the land is used for the interests of Indians.
* There is a “trustlike relationship” because under the Indian Act, aboriginal groups MUST cede land to the Crown in order to alienate it
* therefore the Crown **must** act in good faith to deal with that land in the aboriginals’ best interests.
	+ This is an equitable obligation**, but not a “trust”/beneficiary relationship** because the Aboriginal Title is sui generis, **not a legal interest in land**
* This is not in the law of equity and not subject to statutory limitations

“It is true that the *sui generis* interest which the Indians have in the land is personal in the sense that it cannot be transferred to a grantee, but it is also true, as will presently appear, that the interest gives rise upon surrender to a distinctive fiduciary obligation on the part of the Crown to deal with the land for the benefit of the surrendering Indians. These two aspects of Indian title go together, since the Crown's original purpose in declaring the Indians' interest to be inalienable otherwise than to the Crown was to facilitate the Crown's ability to represent the Indians in dealings with third parties. The nature of the Indians' interest is therefore best characterized by its general inalienability, coupled with the fact that the Crown is under an obligation to deal with the land on the Indians' behalf when the interest is surrendered. Any description of Indian title which goes beyond these two features is both unnecessary and potentially misleading. [382]”

Decision: Crown owes a fiduciary duty and they breached it 🡪 Band gets damages

Comments on this case

* Fiduciary doctrine emerges out of this decision; source: surrender requirement + sui generis nature of AT
* **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/child-like relationship = unequal power balance
* ***sui generis*** (unique) = only fiduciary interest can be created because this is not a legal interest related to AT and “personal and usufructuary right 🡪 something that does not fit into the traditional land title system of BC

Where we stand on aboriginal title and rights issues after these decisions:

* **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’. but partakes of both, lying somewhere in-between or alongside
* It either ‘disappears’ on surrender, or is ‘merged in the fee’.
	+ Perhaps not much hinges on this, as they both entail that Aboriginal title is no more than a burden on underlying (perfectible) Crown title.
* Indigenous interests in land (whatever their nature) seem to have to be surrendered to the Crown in order to serve economic purposes.
* Once again, there is no mention here of rights of self-determination, or of governance issues – rather, the presumption of absolute Crown sovereignty frames the entire discussion (indeed, it appears here, in covert form, as that which underpins the existence of fiduciary relationships).
* A powerful undercurrent of paternalism remains unchallenged.

# “Aboriginal Rights” General Framework Established

## BC AND FISHING

* 1878 regulations were the first to mention Indians.  They simply provided that the Indians were at all times at liberty, by any means other than drift nets or spearing, to fish for food for themselves, **but not for sale or barter**
* Increasing reg from 1917, the power to regulate even food fishing by means of conditions attached to the permit.
* Provisions against Indian commercial fishing increase as commercial fisheries develop
* Indian food fishing provisions remained essentially the same from 1917 to 1977.
* The regulations of 1977 retained the general principles of the previous sixty years:
	+ An Indian could fish for food under a **"special license" specifying method, locale and times of fishing**
	+ The 1981 regulations provided for the entirely new concept of a Band food fishing license

## Section 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.

* **s 35 NOT IN THE CHARTER**
* and “existing” wasn’t in the provision originally = BC and AB resisted; in BC tradition of not recognising such a thing as Aboriginal rights

How was this section interpreted?

* what does “existing” mean?
* No agreement as to what existing means, but signed anyway – would deal with after/as it came up (and it did, in *Sparrow*)
* Didn’t know what “recognised and affirmed” meant
* Didn’t know how to identify Aboriginal rights
* **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.**
	+ BUT 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 exist.
	+ Aboriginal rights are recognized and affirmed in order to **reconcile the existence of distinctive aboriginal societies prior to the arrival of Europeans in North America with the assertion of Crown sovereignty over that territory** (***Gladstone***).
* “Aboriginal rights are a necessary part of the reconciliation of aboriginal societies with the broader political community of which they are part; limits placed on those rights are, where the objectives furthered by those limits are of sufficient importance to the broader community as a whole, equally a necessary part of that reconciliation. (***Gladstone***)”

**R v Sparrow (1990) SCC**🡪 VERY INFLUENETIAL CASE – know this case

**Bias against extinguishment; Test for Infringement; Honour of the Crown + Crown Sovereignty + Fiduciary Duty; Consultation**

**Facts**:

* Defendant a member of the Musqueam Indian Band 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).
* S 91(12) gives Feds jurisdiction over fisheries and this specific fishery act
* Sparrow agrees that he broke the law = argument that gov’t has no right to regulate this
* Example of a **Test Case** 🡪 purposefully breaking the law to “test” it ; had anthropologist on hand etc ready to give evidence

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?

**Analysis**:

* Defendant claims he was 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*
	+ Consequently, regulation effectively extinguished his aboriginal right
	+ This should make the regulation invalid
* The FSC gives Aboriginals the right to fish for food and ceremonial purposes
	+ D claims that his Aboriginal Right encompasses a right to fish for commercial purposes because Aboriginals **always** had the right to fish for whatever reason Band deemed fit as long as not hurting anyone or stock/environment 🡪 Crown contests this
* Court looks at s 35(1) and adopts a “**purposive approach**” to interpretation: a generous, liberal interpretation of the words
* Find that s 35(1) doesn’t incorporate specific manner in which rights are *regulated* 🡪 there’s a difference between right and how it’s regulated
* Reconciliation language is used in this case
	+ Crown is sovereign but this is not unlimited 🡪 Must be reconciled with s. 35
* 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
* 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
* Section 35 creates a **bias against extinguishment** of Aboriginal rights
	+ Intention to extinguish must be **clear and plain**.
* **Creates a Test for the justification of AR extinguishment:**
	+ **Onus on the Abo group to show that a right *does* exist and is being infringed on; onus on Crown to show extinguishment (right no longer exists) and that interference with right can be justified**
* Treaties and statutes should be interpreted **in favour of Ab** and **Honour of the Crown** must be presumed
* Unanimous court says that AR can be regulated, but cannot be extinguished
* S.52 affirms that any legislation that is inconsistent with a right will be invalid 🡪so Sparrow says that on this basis his s.35(1) right is infringed and the Fisheries Act should be struck down
	+ So why aren’t laws that infringe AR automatically invalid?
	+ Because these statutes don’t completely extinguish the rights but only regulate them🡪and this is not unconstitutional

Decision: The Musqueam have an aboriginal right to fish the Fraser, but this makes no broad statements about other native band fishing rights.

### Sparrow Framework

Section 35 creates a **bias against extinguishment** of Aboriginal rights 🡪 intention to extinguish must be **clear and plain**

1. **Is there an existing Aboriginal right?** (Abo onus)
	1. Integral to a distinctive pre-contact culture
	2. With sufficient continuity between traditional practice and modern activity
2. **Has this right been extinguished?** (Crown Onus)
	1. Clear and plain intent
	2. Authority
3. **Prima facie infringement of s 35(1)** (Abo onus)
	1. Is the limitation unreasonable?
	2. Does it cause undue hardship?
	3. Denies holder of rights of their preferred means of exercising that right?
4. **Can the infringement be justified?** (Crown Onus)
	1. Valid legis objective? 🡪 examples: conservation/managing of natural resources or prevention of harm
	2. Honour of the Crown in respect of fiduciary duty
		1. **Infringement minimal** as possible?
		2. Abo **claims given priority** over other groups?
		3. **Consultation** with Abo group?
		4. If there was **expropriation**, was there **fair compensation**?

## ABOVE TEST EXPANDED…

**1) Is there an existing aboriginal right being claimed?** (Abo) [***Van der Peet*** modifies this aspect of the test]

I**s 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?**

1. **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
1. **If so, was there sufficient continuity between the modern activity and the traditional practice?**

🡪 For *Sparrow*, the court found this was easily met: The salmon fishery has always constituted an integral part of their distinctive culture

**2) Has the right been extinguished?** (Crown)

1. **Does legal regulation demonstrate a “clear and plain intent” to extinguish the right**
2. **And does the government have the authority to do it?** (applies *Calder*)
* Mere fact that a right had in the past, been regulated by the gov’t not sufficient to extinguish right

🡪In *Sparrow*, Crown argued that this right had been regulated out of existence (**court unanimously says no to this)**

**🡪** from 1917- lots of regulation but no ‘clear and plain intent’ to extinguish:

“There is nothing in the Fisheries Act or its detailed regulations that demonstrates a clear and plain intention to extinguish the Indian aboriginal right to fish.  The fact that express provision permitting the Indians to fish for food may have applied to all Indians and that for an extended period permits were discretionary and issued on an individual rather than a communal basis **in no way shows a clear intention to extinguish**.  These permits were simply a manner of controlling the fisheries, not defining rights.” [1099]

🡪 so regulation CAN extinguish rights but it has to expressly say that.

* + One reason for this high standard = political recourse, but also so that easier to make a claim (have right, now don’t), fiduciary relationship
* Test for “intent” has implications for treaties; e.g. Position of the Crown is that terms in the treaties meet 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
* Hunting is an example: provinces always regulate this (which animals, how much etc)
* Water is another example 🡪 BC Water Act = all rights to water vested in BC govt (is that clear and plain enough? BC thinks so); no reference to aboriginal rights though

**3) Does the legislation in question prima facie infringe on s 35(1) (on an existing right)?** (Abo)

**Three questions must be asked to determine if there is infringement:**

1. **Is the limitation unreasonable?**
2. **Does the regulation impose undue hardship?**
3. **Does the regulation deny to the holders of the right their preferred means of exercising that right?**
	* + E.g. trapping, hunting in a particular place, etc.
		+ This is an easy one – almost all the cases use this: this is out preferred way, can’t do it anymore = infringement
* 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” = *prima facie* infringement
	+ Says factors not requirements 🡪 absence of one does not preclude finding of infringement
* Problematic because these guidelines are so vague and unclear – how do we know if something is causing “undue hardship”?
* Also, “unnecessary” infringement = how is this *prima facie*? Sounds more like a justification argument would then have to be made

**s. 35(1) – NOT PART OF CHARTER (but Constitutionally protected under s 52)**

* + “Const Act expresses the will of the people” (minus Aboriginal people….)
	+ S 35(1) language is vague deliberately so making Aboriginal rights trump everything else = impossible; have always been amenable to regulation
	+ *Right to fish includes right to regulate fishing*
	+ Pg 133 = need to find a compromise; you can’t have robust Aboriginal rights that trump everything (But Musquem have already compromised by coming under umbrella of “Aboriginal Rights” (since never signed onto treaty to begin with)) 🡪 sovereign power (of Crown) kept in check by rights that are not absolute
	+ Federal power must be balanced with federal duty = this is the best way to achieve balance between Crown rights and Aboriginal rights
	+ Complexity and scarcity 🡪 constraint that makes these issues so drawn out and complicated

**4) Can the infringement be justified?** (Crown)

 **Similar to the Oakes test**

**Stage 1:** **Is there a valid legislative objective to law/on the part of the Crown**?

* + 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***)
	+ Examples: protection of natural resources, preventing harm to the general populace or even the Abo people themselves
	+ “Public interest” is not enough (but note *Gladstone*)

**Stage 2: is the govt employing means that are consistent with the honour of the Crown/fiduciary duty**

* + 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 pose challenges for Crown:

*“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.  If the objective pertained to conservation, the conservation plan would be scrutinized to assess priorities.  While the detailed allocation of maritime resources is a task that must be left to those having expertise in the area, the Indians' food requirements must be met first when that allocation is established.”*

🡪 **SCC list to prioritize rights (Bucket imagery)**

* + - Conservation 🡪 Indian food fishing 🡪 commercial fisheries 🡪 sport fisheries
	+ Some other considerations: minimal impairment , fair compensation
		- How much it would have cost to catch? To sell? To buy at the store?
	+ Pretty vague again, lots of problems (great for Crown though)
	+ Honour of the Crown always at stake
	+ This test considers how much Crown should pay for a breach of the protected right
	+ Evidence of consultation: Court giving Crown to engage (but still have to look at whether engagement was meaningful)

What comes out of this case? (Other than Sparrow Framework)

* At this point, still didn’t know how to identify what’s an Aboriginal right
* Established framework for **infringement** (interference with the exercise of the right)
* Crown has 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 with respects to Abo peoples (implied fiduciary duty when engaging in Ab relations)
	+ **S. 35 is not the source of Aboriginal rights, but it provides a solid constitutional base on which later decisions can be made**
* Cites the *Manitoba Language Reference* – which emphasized how the Constitution 1982 is the “Supreme Law” of Canada, and because s. 35 is in the Constitution this must be given effect
* 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 used to fish
* **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
* “**Honour of the Crown**” presumption stems out of presumption of **Crown sovereignty** 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]
* **Reconciliation** 🡪 first time concept in used in aboriginal rights jurisprudence
	+ “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
* **“Existing Rights”:**
	+ **A right that existed at 1982** (If right extinguished by 1982, no revival)
	+ An existing aboriginal right cannot be read so as to incorporate the specific manner in which it was regulated before 1982.
	+ Existing = unextinguished
	+ Intent to extinguish must be clear and plain 🡪 in a treaty or elsewhere

## General Framework for Aboriginal Rights and Aboriginal Title

R v Van der Peet, 1996 SCC

Integral & distinctive to culture test; 10 factors to consider

Facts:

* D, member of the Stó:lō Nation, was selling 10 fish and was charged under the Fisheries Act (federal act) because, under her food fishing licence, she’s forbidden from selling the catch
* Claims it’s her aboriginal right to sell fish under s 35(1)

Issue: What is the test for determining an "aboriginal right" under s. 35 of the *Charter*?

Analysis:

* 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
* BCCA: Evidence doesn’t support a claim to have a right to sell fish 🡪 Restored conviction
* BCCA 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
* SCC: Lamer identifies the general legal principles
	+ 1) the **special fiduciary** relationship between aboriginal peoples and the Crown
	+ 2) s 35 should be interpreted in a **purposive** manner.
	+ Applies *Sparrow* test 🡪 identifies the specific right claimed as the right to exchange fish for money – therefore it is this right that must be characterized as an integral part of the distinctive culture of the Stó:lō community.
	+ finds that the lower court judges did not apply the proper legal framework (the newly formed test) HOWEVER the findings of fact indicate that the Stó:lō **did not exchange fish for money until after the Europeans came**
	+ thus the claim cannot be made out
	+ Further, if the right did exist, it was **only incidental to the culture**. This is indicated by the fact that the particular community in this case had a band level of societal organization, and there were no members of the tribe working in the exchange of fish.
* **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.**
* **DISSENTS:**

**L'Heureux-Dubé**

* + common law **should not** be given equal weight when dealing with aboriginal issues due to the special fiduciary relationship between the Crown and aboriginal peoples
	+ aboriginal rights **have to be interpreted in the context of the history and culture of the specific aboriginal society and in a manner that gives the rights meaning to the native**
	+ S [35(1)](http://canlii.org/en/ca/laws/stat/schedule-b-to-the-canada-act-1982-uk-1982-c-11/latest/schedule-b-to-the-canada-act-1982-uk-1982-c-11.html#sec35%7Cs.) is meant to protect the "distinctive culture" of aboriginals 🡪 to accomplish this, cannot treat aboriginal rights as **frozen in time**

**McLachlin**

* + Interpretation of rights must be reflective of the existing culture
	+ the question of whether a right is "**distinctive**" is a question of fact that must be determined by a judge in each individual case
	+ does **not** need to be traced back to pre-contact times
		- **What must be established is continuity between the modern practice at issue and a traditional law or custom of the native people.**
	+ we should look to **history** to see what sort of practices have been identified as aboriginal rights in the past.  From this we may draw inferences as to the sort of things which may qualify as aboriginal rights under s. 35(1).

**Decision**: Appeal dismissed, no right to sell fish

* L'Heureux-Dubé: not enough evidence to make a judgment, orders a new trial
* McLachlin: Crown did not sufficiently justify the regulation of the aboriginal right; appeal must be allowed

Comments on this case

* First rights case after Sparrow
* **Severely restricts the framework set out in Sparrow – integral and distinctive part of the test is intensified 🡪 have to establish that practice has central significance to the culture and has to define the culture**
	+ **What was just one component of the Sparrow test is now THE WHOLE test**
* **Purposive approach** to interpretation: interpret provision by its purpose after purpose is established
	+ For s 35(1), it’s the protection of Aboriginals and their rights **but also reconciliation** of prior occupation with British crown sovereignty
* Section 35(1) was intended to protect that the dual nature of aboriginal rights.
	+ **Section 35(1) did not create the legal doctrine of aboriginal rights; aboriginal rights existed and were recognized under the common law**.
	+ Deemed that the doctrine of Abo rights exists and is affirmed by s. 35(1) simply because, when Europeans arrived in NA, Abo peoples were already here, living in communities on the land, and participating in distinctive cultures as they had done for centuries (**recognising prior occupation)**

* **However, subsequent to s 35(1) aboriginal rights cannot be extinguished and can only be regulated or infringed consistent with the justificatory test laid out in *Sparrow*.**
* Const aimed at a country’s future as well as its present
	+ But what about the PAST? Majority left it out in this case
		- They mention prior occupation, assertion of sovereignty 🡪 but disregard past when applying it to rights
	+ If coming from place of disadvantage, would WANT the past to be addressed because helps navigate future
	+ Does a disservice to our legal system to exclude the past because our Const DOES have a past 🡪 comes from UK
		- This is important because there’s a distinctive cultural perspective at work (British) in our Con and to disregard the past is not okay (inherently biased)
* **Lamer: Abo rights are Common law rights**
	+ They’re equal but they’re different from other rights
	+ Uses prior case law, French version of provision, other jurisdictions, however doesn’t look at the history of the provision or at ANY historical analysis
	+ Sees Abo rights as minority rights and must be viewed differently from Charter rights because only Abo members of Canadian society have them (nothing about how they were here first or are tied to the land)
	+ Have to do justice to both parts of the phrase: both the fact that they’re rights and that they’re Ab

*“Aboriginal rights cannot, however, be defined on the basis of the philosophical precepts of the liberal enlightenment.  Although equal in importance and significance to the rights enshrined in the Charter,* ***aboriginal rights must be viewed differently from Charter rights because they are rights held only by aboriginal members of Canadian society.****They arise from the fact that aboriginal people are aboriginal.  As academic commentators have noted, aboriginal rights "inhere in the very meaning of aboriginality".*

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 (band + site specific + pre-contact)**

* + 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
	+ also, are courts equipped to deal with these kinds of analyses?
	+ Also, the assumption that cultures DO have essential cores and that courts can identify them = end up with a dichotomy between certain Ab cultures and “other” (non-savages)
* From *Sparrow*, they found that salmon fishing has always been an integral part of their culture however, selling for commercial purposes at all, not allowed because **incidental**
	+ Court doesn’t find the right to sell fish as part of culture; sale not integral part of culture because only sold the excess (did it when they had the chance)
	+ Link between exchange of salmon and maintenance of kinship relations not persuasive
	+ No regularised trading system (but how do you define a market? Where is the line between barter and market?)
	+ More than individualised transactions, but not more is said on the point
	+ Apparently division of labour would make the argument more convincing, but court doesn’t see evidence of this because Stolo is a band and bands don’t do division of labour

**Lamer CJ provided ten factors that a court should consider as it applies this test in any particular situation**

### 10 FACTORS

1) Courts **must** take into account the perspective of Aboriginal peoples themselves

* IS there an Ab perspective? Many? How do you get to this? Sounds like stereotyping = but this is purposive analysis: the “Cons is an expression of the will of the people”
* But that perspective must be framed in terms cognizable to the non-Ab legal system/Canadian legal and constitutional structure
	+ CL can only recognise what the CL says: puts burden on Ab to reconcile, but almost impossible because different systems (square peg, round hole)
	+ But doesn’t have to be that way: CL does not have to be the starting point
* 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 precisely the nature of the claim being made in determining whether an Abor claimant has demonstrated the existence of an Abor right

* Look at the claim being made (brought up in Sparrow)
* Para 53 outlines three aspects that should be considered when characterizing an applicant’s claim correctly to see if there’s enough evidence to support claim (p 47):
	+ 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
* the court must bear in mind that the activities may be the exercise in **a modern form of a practice**, custom or tradition that existed prior to contact, and should vary its characterization of the claim accordingly.
	+ 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)
	+ One of the things that truly made the society what it is; core factor that **defines** the culture
	+ Would be fundamentally altered without it
	+ 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
	+ 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**

* Key point in time is **contact, not at the time that sovereignty asserted = different ; contact is just shows up, comes off ship, says hi, leaves**
* 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
* Not talking about freezing rights btw = not as rigid as it could sound, but you do need some measure of continuity between what was practiced then, and what is practiced now (flexibility; don’t really know how continuity is shown; know the ends on each end of spectrum though (don’t need to show NO interruption at all, but it can’t be something that was done once and never again))

5) Courts **must** approach the rules of evidence in light of the **evidentiary difficulties** inherent in adjudicating Abor claims

* courts can’t undervalue evidence presented by aboriginal claimants simply b/c it doesn’t adhere precisely to common laws of evidence
* No written evidence of practices that occurred pre-contact
* 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
* However, issue of hearsay: oral stories are stories that were passed on, may not be what originally happened – however, CL needs to adjust
	+ ***Delgamuukw* says “oral evidence” should be given weight**
	+ Court has to figure it out, can’t just dismiss it because not the traditional way of presenting evidence

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

* customs that are **integral** to abo community will constitute abo rights, but those that are merely incidental will not
* Can’t be incidental; difference of degree issue that depends on how right is defined
* **Treaty rights are different though: reasonably incidental practices are** allowed (right to hunt and incidental practices as well, such as crossing territory TO hunt etc)
* 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;** it does not require that the practice, custom, or tradition be distinct

* **Distinct: unique, would be hard to prove; distinctive: defining of your culture/who you are**
* 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
* This part is not about raising the bar to an unreasonable level but about *defining* these cultures

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

* If the practice, custom or tradition was an integral part of the aboriginal community’s culture prior to contact with Europeans, the fact that that practice, custom or tradition adapted in response to their arrival, is not relevant
* BUT 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.

10) Courts **must** take into account both the relationship of Abor peoples to the land and the distinctive societies and cultures of Abor peoples

* Don’t reduce defining feature of Ab people as tied to the land
* *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

## Test for Justification of Infringement on AR

R v Gladstone, 1996 SCC

**Framework of Infringement for rights with non-internal limit; Doctrine of Priority; does not grant aboriginals exclusive or unlimited rights**.

**Facts:**

* Defendants charged under *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.
* fish was confiscated and sold by officials
* 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
* right had been established, had been infringed, infringement justified – appeal

Issue:

Do the appellants have an aboriginal right to fish? Yes ; If so, does the right extend to commercial exploitation? Yes; If so, is the Crown justified in restricting the right using regulation? Yes

Analysis:

* Here, focusing on the 4th element, justification
* **At justification stage: 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**
	+ If tied to a process of reconciliation 🡪 broadens the range of objectives to include regional/economic fairness, policy (McLachlin doesn’t think this is acceptable)
	+ Actions must be consistent with fiduciary duty 🡪 no longer “honour of the crown”
	+ (has the test been diluted? No longer talking about the Crown (different from Sparrow))
* *Gladstone* distinguished from *Sparrow* on basis that *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)
* What does Lamer mean?
	+ Food and ceremony right has built in limit: can only eat so much fish, and your community is so large
	+ However, in commerce, not limited because you trade/sell
	+ (But is this just one definition of commerce? Maybe other cultures see commerce transactions differently?)
* Sparrow justification test doesn’t work here 🡪 third bucket of commercial fishing would never be full
* Made adjustments to the *Sparrow* framework for infringement of right with non-internal limit
	+ But original Sparrow framework based on priority scheme (4 different groups) still exists because it makes sense for when there *is* an internal limit
* New test/framework incorporates **Doctrine of Priority**
	+ **For rights that are not inherently limited, gov’t can regulate the right as long as the regulations take into account the existence of aboriginal rights and are put in place in a manner that is respectful of the fact that aboriginal rights have priority over other users**
	+ Govt must show the process of allocation of resource both procedurally and substantially
		- **Must** reflect the prior interest of abo rights holders in the fishery
* **Abo peoples don’t get veto though, and don’t get exclusivity**
* **Reconciliation a justifiable reason for placing limits on Abo ri**ghts 🡪 ‘part of reconciliation process’

*“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”.***

* range of ‘valid’ objectives justifying infringement widened

“objectives *such as the* ***pursuit of economic and regional fairness*** *and the* ***recognition of 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 depends on their successful attainment*”

* McLachlin strongly opposes this

**Decision**: appeal allowed**;** 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.

should take into account VDP factors (**some are mandatory** – have to look at specific language of each factor)

**2 major differences in *Gladstone***

**1. The test for infringement AND justification will be modified for non-internal limits like commercial.**

* 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.
* Instead, **the doctrine of priority requires that the government demonstrate that, in allocating the resource, it has taken account of the existence of aboriginal rights and allocated the resource in a manner respectful of the fact that those rights have priority over the exploitation of the fishery by other users**.
* This right is at once both procedural and substantive; at the stage of justification the government must demonstrate both that the process by which it allocated the resource and the actual allocation of the resource which results from that process reflect the prior interest of aboriginal rights holders in the fishery.

**2. When assessing government objectives, it can be tied to a process of reconciliation** 🡪 **broadens range of objectives: regional and economic fairness, policy**

* With regards to the distribution of the fisheries resources after conservation goals have been met, objectives such as **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.

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**?

Big change in objectives from VDP to Sparrow to Gladstone:

* Taking purposive approach so limits are seen as internal not imposed upon
* **Limits are part of the right**
* 2 purposes of s 35: recognition of prior occupation **and** reconciliation with prior occupation and Crown sovereignty
* Conservation as valid objective for justification, but also pursuit of regional and economic fairness, and recognition of historical reliance by others NOT in the band but part of the fishery (participation of non-aboriginals) = balancing exercise
* But there’s a danger with this loose language and the lack of definition regarding “reconciliation”
* Talking about interests as a justification: not always appropriate to boil it down to “interests” because diminishes value of rights

# “Aboriginal Title”: The Framework and Test

R v Delgamuukw, 1997 SCC

**Establishes test for establishing abo title and justification for infringement**

Facts:

* Appellants claimed title to a plot of land of more than 58,000 square kilometers on the basis of aboriginal title that was never extinguished.
* There were 71 individual plaintiffs claiming title. In the original trial the plaintiffs tried to obtain "ownership and jurisdiction", however upon appeal this was changed to "aboriginal title and self-government"
* Fight really about trees from Crown’s perspective (want to own the trees, the right to cut them down and sell them)

Issue:

* What is the nature of the content of aboriginal title under [s. 35(1) of the Constitution Act, 1982](http://canlii.org/en/ca/const/const1982.html#sec35)? Did the province have the authority to extinguish the title after confederation?

Analysis:

* Develops 3 part test for determining Abo title based on the *spectrum* of Abo rights found in s 35(1) (abo rights, site-specific rights to a particular activity, and abo title)
* Oral evidence is admissible 🡪 should be considered and weighed favourably

## CONTENT of AT

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

1. **Inalienability** – incapable of sale/transfer/surrender except to the Federal Crown
	* Can be surrendered to the Federal Crown by treaty
	* Incapable of sale to third persons
	* But still like a fee simple
2. **Source – arises from prior occupation of Canada by aboriginal peoples**
* **So its source is not the Royal Proclamation (like in St. Catharine’s)**
	+ AT survives British sovereignty
1. **Held communally**
	* AT is a collective right/ ownership held by all members of the community
	* Cannot be held by individual persons, it is a collective right to land
	* Decisions about the land have to be determined collectively

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

1. Aboriginal title encompasses the right to **exclusive** use and occupation of the land held pursuant to that title for a **variety of purposes, which need not be aspects of those aboriginal practices, customs and traditions which were integral to distinctive aboriginal cultures.**
* This emerges from: Canadian jurisprudence, relationship between reserve lands and lands held pursuant to AT, and the Indian Oil and Gas Act
* As a result “**they are parasitic on the underlying title”**
1. Those protected uses must **not be irreconcilable with the nature of the groups’ attachment to that land (**this limit is the manifestation of the sui generis aspect of AT)
* The existence of an aboriginal right at common law is sufficient, but not necessary for the recognition and affirmation of that right by s 35(1).
* Site-specific rights: 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(1), including site-specific rights to engage in particular activities.

# Test for Establishing Aboriginal Title

* 1. **Prior occupation**
		+ Land must have been occupied prior to sovereignty
		+ have to take into account CL (physical occupation is proof of possession) and Ab perspectives (Abo laws, tenure system etc)
		+ A contextual analysis based on the characteristics of the group and the land – the group’s size, manner of life, material resources, technological abilities, and the character of the lands claimed
	2. **Continuity**
		+ Between pre-sovereignty and modern time
		+ But doesn’t have to be unbroken chain
		+ Must be “substantial maintenance of connection” between the people and the land
		+ Doesn’t matter if nature of occupation has changed
	3. **Exclusivity**
		+ Joint occupation doesn’t negate exclusivity 🡪 have to determine what exclusive occupation means to specific Abo group
		+ For example trespass in CL may not undermine Abo exclusivity rights
* If the above are established, then Abo title exists; if partially fails, possible to establish a claim less than title
* Then applies “new” hybrid test for infringement based on *Sparrow* and *Gladstone*

### Test for Justification of Infringement of Aboriginal Title

**Government infringement of AT**: AT is not absolute and the government is entitled to infringe (develop) if justified (aboriginal groups do not have a veto)

1. **The infringement must be in furtherance of a legislative objective that is compelling & substantial**
* The development of agriculture, forestry, mining and hydroelectric power, the general economic development of BC interior, protection of 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.
1. **The infringement must be consistent w/the special fiduciary relationship between aboriginals & Crown**
	* 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
	* Requirements of fiduciary duty are a function of “legal and factual context” of each appeal
	* In dealings with the bands the governments are supposed to act as a fiduciary – **consultation duty**
	* Property can be developed but things have to be done first:
		+ Opportunity to participate in the development
		+ Duties of **consultation** and **accommodation** (the government must consult and accommodate the band)
		+ Payment of fair compensation – when AT is damaged to a significant point
* This relationship is special because both the ideas of the common law and the aboriginal traditions must be taken into consideration when making the decisions, as aboriginals are a unique case and must be given respect in terms of their traditions and laws

Several important decisions made about aboriginal title:

* court reaffirms AT definitely exists
* provincial governments never had jurisdiction to extinguish AT because it falls under federal jurisdiction under 91 (24)
* it is also given full protection under s 35(1)

AT is special because it is

* + Inalienable 🡪 it cannot be transferred to anyone other than to Crown
	+ Source is unique because arises from occupancy prior to sovereignty
	+ Title is held communally aboriginal title is special for a few reasons.

Decision: has to go back to trial: grouping of the plaintiffs together was seen as unfair to the defendants

Comments about this case

* Regarding **evidence** 🡪 what gets submitted and how does it get interpreted
	+ Stories are passed on from generation to generation orally
	+ Dances are also passed on
	+ Can these be admitted in court? 🡪 without being able to bring in this kind of evidence, left with none (because no written record)
* Regarding **exclusivity** 🡪 can have shared title and shared exclusivity
	+ Abo group has to present some kind of evidence (maps etc) to show occupation and title but Crown would and should never try to pit one nation against another to disprove territorial claims
* Regarding **Aboriginal Title**
* Aboriginals see it as an inalienable fee simple
	+ Crown sees title as a “bundle” of Ab rights; title is exclusive right to occupy land for exclusive Ab activity
	+ Court: deems it *sui generis* = just means “unique”; unifying principle; defined by both AT and CL
		- But what does this *mean*
* Talk about 3 dimensions of AT (para 113)
	+ - 1. **Inalienable**
* Inalienability as a means of protecting title : some valuable things in our country that are not for sale (people, organs, friendship, AT)
* But if you can’t sell it, how can you know it’s worth and what fair compensation would be
	+ - 1. **Source** of AT: not Royal Proclamation, but prior occupation (because Crown asserted sovereignty)
			2. **Communally held:** a collective right to land held by all members of an aboriginal nation.
* **What is the *function* of title 🡪** why is it so important?: **protection for patterns of occupation; protect those patterns in order to protect Ab culture**
	+ **Court is aiming at protecting culture**
* Regarding **use of land** 🡪 how have Abo people traditionally used the land?
	+ Inherent limit: Abo people can’t use the land in a way that would undermine their connection to the land
* Regarding **Infringement** and **justification**
	+ Compelling and substantial legislative objective
		- Small scale sports fishing, usually not substantial and compelling; however, can be broadened and is in this case
		- “reconciliation” is a valid justification of infringement and adds that the fiduciary doctrine does not require aboriginal rights to receive first priority.
		- “general economic development” and “settlement of foreign populations” are, inter alia, objectives consistent with reconciliation and therefore justify infringement.
		- **Reconciling prior occupation WITH Crown sovereignty (Crown not budging)**

**🡪 THIS IS DIFFERENT FROM PRIOR DYNAMIC OF RELATIONSHIP**

* + Consistent with special fiduciary relationship.
		- Doesn’t require a priority; if priority applies then modified form – leave this for later cases
		- Consultation might require some measure of participation from Ab nation; Ab participation in decision making
	+ always a duty to consult. For minor breaches, this involves only discussion, as long as it is in good faith.
	+ Since the land may be used economically, fair compensation: inescapable economic aspect of title
		- but issues of placing value on something that is inherently invaluable (because of inalienability)

main things coming out of this decision:

1. **The place of Aboriginal lands in the legal and political structure of Canada**: In particular, the place of “governance” or “jurisdiction” in the judicial framework developed in *Delgamuukw*
* The land is **inalienable** (concept retained from *Calder* and *Guerin*) and it’s different from other property interests because it does not come from Crown grant
* **Prior occupation**: source of AT is in prior occupation (not from Royal Proclamation, a la *St. Catherine’s*)
* **Communally held**: AT is a collective right held by all members of the Aboriginal nation. Decisions about the land are to be determined collectively (**BUT not self-govt**)
	+ No right to self-governance (despite saying AT allows aboriginals to decide how to use the land and that it is to be held communally 🡪 BUT this seems like ingredients for self-govt)
1. R**equirements for establishing Aboriginal Title**:
	1. **Pre-sovereignty occupation**
		1. Aboriginal perspective: Consider any and all aboriginal laws in relation to land, including a land tenure system or laws governing land use
		2. CL perspective: Requires physical occupation to prove possession, ground title to land
* Can establish occupation in a number of ways: e.g. buildings, cultivation and enclosure of fields, or regular use of definite tracts of land for hunting, fishing, or otherwise exploiting resources
* A contextual analysis based on the characteristics of the group and the land
	1. **Continuity between pre-sovereignty and present occupation**
* If relying on present occupation as proof of pre-sovereignty occupation
	1. **Exclusive** **occupation at sovereignty**
* Not just what Crown argues as “bundle of rights”; but legitimate, exclusive right to land and to use it
* Right to exclusive use and occupation for a variety of purposes; para 125 – inherent limit of the suis generis principle
* CL perspective (para 156): Emphasizes factual reality of occupation
	+ **Exclusivity** can be demonstrated by “intention and capacity to retain exclusive control”
* Aboriginal perspective (para 157): Considers Abor laws on trespass, use, and residence
	+ What looks like trespass to CL may not undermine exclusive control under Abor laws
* Occupation = physical (hunting grounds) + exclusion; difficult to show in *Van der Peet* rights test
* Court allows abor perspective to be given weight when determining exclusivity, but Abor perspective must fit into Crown perspective
* **Shared exclusivity** may be permitted if joint title arises, but one group wouldn’t have control
* AT crystallizes at time of Crown sovereignty
* Court continues to require pre-sovereignty proof because it holds on the idea that AT is a burden on Crown title
* Case saw AT as more than just a bundle of rights (it’s a right to the land), but puts limits on extent of AT
* If Aboriginal group cannot show exclusivity required for AT, it can still show its site-specific rights to engage in particular activity
1. **The ability of Canadian govts to (a) extinguish, and (b) infringe upon Aboriginal title**
* The federal govt has exclusive jurisdiction from s. 91(24) in relation to Abor rights (including title) and flowing from this is the right to extinguish
* **BC govt CANNOT extinguish Abor rights** because these are at the core of “indianness” which is a federal power (even province’s ability to make “laws of general application” cannot extinguish Abor rights 🡪 would not meet *Calder* test for “clear and plain intent”) 🡪 **IJI**
* the only laws with the sufficiently clear and plain intention to extinguish aboriginal rights would be laws in relation to Indians and Indian lands🡪As a result, a provincial law could never, *proprio vigore*, extinguish aboriginal rights, because the intention to do so would take the law outside provincial jurisdiction.
1. **The justification of infringement**
* Lamer J says that reconciliation is why we have s. 35**; Abor rights are necessary to reconciliation of Aborsocieties with the broader political community of which they are a part**
* **Limits placed on Abo rights (AKA infringement) are a necessary part of that reconciliation,** if the objectives furthered by those limits are of sufficient importance to the broader community as a whole
* Court will not heavily scrutinize Crown when reviewing justification for infringement
* Follows *Gladstone* framework for infringement, not *Sparrow*
* **Liberal r**ange of objectives permitted for infringement 🡪 as long as the Crown does not do something corrupt, it is likely that infringement can be justified
	+ E.g. development of agriculture, forestry, mining, hydroelectric power; general econ development of BC interior; protection of environment and endangered species; building infrastructure and settlement of foreign populations
* Consultation duty emergence (went beyond *Sparrow* mention): you might need to get abo group on board if you want to build a mine 🡪 consultation may satisfy the fiduciary relationship
* If AT is damaged to a significant point, there must be compensation
1. **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

Mitchell v MNR [2001] SCC

**Abo right must be practice, custom, or tradition that is integral to the distinctive culture; Rules of evidence relaxed**

Facts:

* Chief Mitchell (of the Mohawk) crossed the St Laurence to buy goods on the US side for resale in Canada
* Canadian customs asked him to pay duty 🡪 refused
* Claimed he had an Aboriginal right to trade which pre-existed Crown rights in this area.
* Another Test Case

Issue:

Analysis:

* SCC thinks trial judge made “**palpable and overriding error” 🡪** steps in and overrules trial court’s decision
* McLachlin confirms that **flexible application of rules of evidence** must be used in abo cases.
	+ Oral histories can be admitted for 2 reasons:
		1. They may offer evidence of ancestral practices that wouldn’t otherwise be available; AND
		2. They may provide abo perspective on right claimed
	+ However, can’t be prejudicial & must be reliable
* SCC used the *Van der Peet* decision as authority
	+ 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
* What is the Aboriginal Right Claimed?
	+ The claim here is the **right to bring goods across the Canada-United States boundary at the St. Lawrence River for purposes of trade**.
* Has the Claimed Aboriginal Right Been Established?
	+ There is no support of an ancestral Mohawk practice of transporting goods across the St. Lawrence River for the purposes of trade.
	+ The relevant evidence in this case – a single knife, treaties that make no reference to pre-existing trade, and the mere fact of Mohawk involvement in the fur trade – can only support the conclusion reached by the trial judge if strained beyond the weight they can reasonably hold.
	+ Even if deference were granted to the trial judge’s finding of pre-contact trade relations between the Mohawks and First Nations north of the St. Lawrence River, the evidence does not establish this northerly trade as a defining feature of the Mohawk culture.
* Does the evidence establish that the alleged practice was integral to Mohawk culture and continuous to the present day?
	+ The claimed right imports a necessary geographical element and the evidence establishes that the right to trade across the St. Lawrence River is not integral to the Mohawks.

**No aboriginal right to bring goods across the border for the purposes of trade has been established.**

* + Crossing of the river is **incidental,** and so this Aboriginal right cannot be said to be defining this group
* Cant have a right that’s incompatible with sovereignty
* **To prove Ab Right requires showing that practice, custom or tradition is integral to the distinctive culture**
	+ it is at the “core” of their identity and thus **without it the culture could not exist**
	+ *This is later retracted in Sappier*

Decision: A right to trade is something all cultures do; has to pay duties

### Rules on the admissibility of evidence

1. The evidence must be useful in the sense of tending to prove a fact relevant to the issues in the case.
2. The evidence must be reasonably reliance; unreliable evidence may hinder the search for the truth more than help it.
3. Even useful and reasonably reliable evidence may be excluded in the discretion of the trial judge if its probative value is overshadowed by its potential for prejudice.
4. Aboriginal oral histories are admissible as evidence where they are both useful (they may offer evidence of ancestral practices and their significance and they may provide the aboriginal perspective on the right claimed) and reasonably reliable, subject always to the exclusionary discretion of the trial judge.
5. **Equal and due treatment** should be given to evidence presented by aboriginal claimants.

This Court has frequently considered the geographical reach of a claimed right in assessing its centrality to the aboriginal culture claiming it.

* It is the exercise of the claimed right in a **specific geographical area** that must be integral.
* The relevance of geography is much clearer in hunting and fishing cases, which involve activities inherently tied to the land, then it is in relation to more free-ranging rights, such as a general right to trade.

R v Sappier/R v Gray (2006) SCC

**Characterising Abo rights while recognising that they are not frozen in time; application of VDP test for “distinctive culture”**

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 personal use.
* S & G also argued they had a treaty right.
* Aboriginal right found to exist in lower courts, Crown appealed

**Issue:**

* How do we determine which pre-contact practices were integral to Aboriginal cultures? How do you define abo rights for migratory peoples? Can survival practices = abo rights?

Analysis:

* Defendant argued that 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
* Right encompassed practice of harvesting trees to fulfil the domestic needs of the pre-contact, migratory communities for shelter, transportation, fuel, tools, etc.
* Crown argues that harvesting wood was for survival, which they don’t need to do to survive anymore
* For once, court sensitive to issues of culture
	+ Concept of culture requires an inquiry into pre-contact way of life
	+ interested in their laws/legal system (part of culture)
	+ *“the traditional means of sustenance, meaning the pre-contact practices relied upon for survival, can in some cases be considered integral to the distinctive culture of the particular aboriginal people.”* 🡪 test can’t be applied too narrowly
	+ Culture really just means way of life.
* Effort must be made not to reduce Ab peoples to stereotypes though (canoe using, basket weaving etc)
* Aboriginal Rights are not frozen in time; have to look at both the resource a particular nation relied on and the pre-contact practice associated with it to consider how it might have evolved

**Decision:** Practice of harvesting wood for domestic uses was integral to the pre-contact distinctive culture of both Aboriginal groups. Appeals dismissed.

Comments about this case

**Characterisation of claim – integral to distinctive culture – continuity from pre-contact practice – extinguishment**

* Defendants argued that the *resource* important to them= court doesn’t like this; can’t just say “wood” is important (important to everyone) 🡪 have to discuss the PRACTICE
	+ Don’t characterise Abo rights as rights to resources because very similar to CL rights (**and in order for Abo rights to be protected they have to be sufficiently *Aboriginal***)
* Court wants Abo rights to remain sufficiently aboriginal so that they can fit in the “suis generis” definition
	+ Implication: the reason Abo rights exist is to protect *Abo culture* specifically…court never says this explicitly)
* Right to harvest wood too broad 🡪 right to harvest wood for domestic use as a member of that specific community is better
	+ Lamer: “The court cannot look at those aspects of the aboriginal society that are **true of every human society** (e.g., eating to survive)”
	+ **BUT** “traditional means of sustenance, meaning the pre-contact practices relied upon for survival, can in some cases be **considered integral to the distinctive culture of the particular aboriginal people**.”
	+ Trying to tie together the right with the community/culture in order to justify protection
	+ relies on McL and L-D dissents from *VDP*: What is meant by “**culture**” is really an inquiry into the pre-contact way of life of a particular aboriginal community, including their means of survival, their socialization methods, their legal systems, and, potentially, their trading habits.
		- “**distinctive**” = qualifier meant to incorporate an element of aboriginal specificity
	+ ***“If aboriginal rights are not permitted to evolve and take modern forms, then they will become utterly useless.”***
* 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 (not frozen in time)
* **Thus, traditional means of sustenance (e.g. harvesting timber for shelter) can still be considered integral to the distinctive culture of the aboriginals even if it's merely undertaken for survival purposes**
* *Gray* says that *Mitchell*’s assertion that the practice must be at the **core** of the Aboriginal group’s identity **should not result in an increased threshold**
	+ The use of the word **“distinctive” was meant to incorporate an element of aboriginal specificity,** but it doesn’t mean “distinct” and the notion of aboriginality must not be reduced to “racialized stereotypes of Aboriginal peoples” (L’Heureux-Dube J)
	+ Doesn’t need to be single most important feature of a nation’s culture
* Court takes relaxed approach to evidence
* Para 26: “in order to assist the insurance of the continued existence of these societies” (is this different from recognition and reconciliation)
	+ **Are we protecting in order to reconcile or reconciling in order to protect?** – not sure but clearly using these tools as a way to work through these issues
* **Court side-steps issue of self-goverment**

# Culture and politics: an astray ....

1. First reference to culture: Calder (one of the 3 things that make us human: cohesion, laws, culture); culture implies concepts of ownership
2. Then talked about again in Sparrow, VDP, sappier
* However, don’t seem to still have a clear understanding of what culture is
* Many different approaches to culture, but Clifford Geards focuses on **meaning of symbols** : system of inherited conceptions which we use to make our lives meaningful (different from legal/objective focus in Sappier) – not about what you say but *why* you say it
	+ Lamer’s discussion about exchanges and how he totally missed the mark regarding why exchanges happened and what they meant (thought it was simply trade)
* Court defines culture in a very narrow sense
	+ We know what culture ISN’T:
		- politics (**don’t want them talking about self government**)
		- commerce (although maybe change of heart in sappier)
		- CL (not itself culture or intrinsic to a particular community; however CL is *totally* a reflection of a specific culture/culture itself; not culturally neutral)—CL argument not said outright but Hume thinks it’s implied
* S 35 being a limit on what govt’s can do whereas Abo rights only belonging to specific groups = Lamer thinks big distinction between the two = Enlightenment perspective (universal vs particular divide) –“our” rights are different from Aboriginal rights
* European settlers as having transcended culture…culture only talked about in terms of Aboriginal culture
	+ Culture only talked about in terms of Aboriginal culture: in a way, identifying them in order to “help” them and give them the rights they need…but realistically, that separation of us and them is the reason why Aboriginals have these issues…why don’t they just *have* their rights? why have to be *given* them?
* Courts not equipped to talk about this stuff in a way that will do it justice either
* Reconciliation: fundamental purpose 35(1)
	+ Sparrow: federal power must be reconciled with federal duty
	+ VDP: reconc of Abo societies with prior occupation of Crown; protection and recon of interests
	+ ….etc
	+ Two major changes between Sparrow and others: **reconciliation is no longer something Crown has to do, but something Abo people have to do** (reconcile yourselves with the sovereignty of Crown), and it’s been **diluted**: Abo **rights are now called Abo “interests”**
		- Relationship between rights and interests = rights protect interests (VDP) = which means interests logically prior to rights (fact of prior occupation 🡪 interests 🡪 rights)
		- **but not all rights warrant Con protection**
	+ but what’s an interest? Something you want/pursue but it’s also *in your interest* to pursue; it’s an end that you have to find a way to pursue (means) = **instrumental reasoning**
		- problem is that it ignores that people might pursue things out of other motives like duty to family for example
		- can balance, refine, and reconcile interests (interests as common denominator)
		- are interests cultural?
* **The bottom line: oundational ideas we are using are inherently tilted towards Crown**

Lax Kw’alaams Indian Band v Canada, 2011 SCC

**Modern right being claimed must be grounded in continuity and proportionality of the ancestral** **practice**

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 Abo fishery would be within the protection of s. 35(1) of Constitution Act, 1982, subject only to such limits justified under *Sparrow* test.

Issue: can continuity be established to allow for this (new) right?

Analysis:

* P proposed alternative arguments to help them establish their right
* Alternative 1: 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
* Alternative 2: Sought a still more limited Abor right to a food, social, and ceremonial fishery
* “*The Lax Kw’alaams live in the twenty-first century, not the eighteenth,* ***and are entitled to the benefits (as well as the burdens) of changing times****”*
* in order to establish modern AR, **continuity has to be established between pre-contact practices, customs and traditions, and modern rights claims**

“*However, allowance for natural evolution does not justify the award of a* ***quantitatively and qualitatively different right.***

🡪 **there have to be limits**

* Commercial fisheries claim rejected since judge unconvinced that P’s pre-contact customs, practices, traditions supported such an Abo 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 Abo right to have a modern lucrative “industrial” fishery.
* **There must be continuity and proportionality between the ancestral practice/right and the modern one**

Decision: appeal dismissed

Tsihlqot’in Nation v British Columbia

* 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.

**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:**

**1. What is the test for Aboriginal title to land?**

The test for Aboriginal title (Delgamuuk test)**:**

AT must posses 3 characteristics:

1. Prior occupation (sufficiency)

2. Must be continuous (where prior occupation relied on)

3. Must be exclusive occupation at sovereignty

🡪look at both common law and A perspectives when treating these conditions

**1.** **FOR PRIOR OCCUPATION**

**New from this case: relaxation of sufficiency of occupation**

* The common law only recognizes occupation if you have possession
* This is super hard for semi-nomadic people to prove – like the Tsilhquot’n
	+ **So the SCC relaxed the standard of proof here**
	+ The SCC reasoned that Aboriginal title was not limited to village sites but also extends to lands that are used for hunting, fishing, trapping, foraging and other cultural purposes or practices.
* **Aboriginal title may extend:**
* beyond physically occupied sites, to surrounding lands over which a Nation has effective control.
* occupation sufficient to ground title including “warning off trespassers,” “cutting trees,” “fishing in tracts of water” and “perambulation.”
* Further, the SCC affirmed the importance not only of the common law perspective but also of the Aboriginal perspective on title including Aboriginal laws, practices, customs and traditions relating to indigenous land tenure and use.

**2.** **FOR CONTINUITY**

**New for continuity: doesn’t need to be unbroken chain**

* Don’t need to show intensive use of land 🡪 regular use of the land is enough
* Look at **chains of transmission** to find the 3 elements
* Allowed to use the land for a variety of purposes: ceremonial, economic, survival etc., not just for what they used to use it for in the past (not frozen)
1. **FOR EXCLUSIVITY**
* The criterion of exclusivity may be established by **proof of keeping others out**, requiring permission for access to the land, the existence of trespass laws, treaties made with other Aboriginal groups, or even a lack of challenges to occupancy showing the Nation’s intention and capacity to control its lands.
* The fact that other groups or individuals were on the land does not necessarily negate exclusivity of occupation.
* Whether a claimant group had the **intention and capacity** to control the land at the time of sovereignty is a question of fact for the trial judge and depends on various factors such as the characteristics of the claimant group, the nature of other groups in the area, and the characteristics of the land in question.
* Exclusivity also considered from Aboriginal and common law perspectives

**Broad v Narrow approach between BC supreme court and court of appeal**

* Narrow = need site-specific occupation and proof
* Broad = doesn’t need to be site-specific🡪semi-nomadic people wouldn’t be able to prove then
* The SCC agrees with the broad approach

**2. If title is established, what rights does AT confer?**

**Delgamuuk:** AT “encompasses the right to exclusive use and occupation of the land held pursuant to that title for a variety of purposes”, including non-traditional purposes, provided these uses can be reconciled with the communal and ongoing nature of the group’s attachment to the land. Subject to this inherent limit, the title-holding group has the right to choose the uses to which the land is put and to enjoy its economic fruits

**A) The Legal Characterization of AT:**

* **Start with Guerin:** At the time of assertion of European sovereignty, the Crown acquired radical or underlying title to all the land in the province. This Crown title, however, was burdened by the pre-existing legal rights of Aboriginal people who occupied and used the land prior to European arrival.
* **The doctrine of *terra nullius* (that no one owned the land prior to European assertion of sovereignty) never applied in Canada, as** confirmed by the *Royal Proclamation* (*1763*).
* The Aboriginal interest in land that burdens the Crown’s underlying title is an independent legal interest, which gives rise to a fiduciary duty on the part of the Crown.
* **The content of the Crown’s underlying title is what is left when Aboriginal title is subtracted from it**
* The title holders have the right to the benefits associated with the land — to use it, enjoy it and profit from its economic development. As such**, the Crown does not retain a beneficial interest in Aboriginal title land.**
* BUT the Crown still has underlying title 🡪so the Crown can still justify an infringement of AT 🡪so we still have terra nullius? (contradictory)
* The AT is similar to fee simple, but not fee simple because the proof of title requires a sui generis approach

**Crown title = what’s left over after subtracting aboriginal title**

**2 elements:**

**a) A fiduciary duty owed by the Crown to Aboriginal people when dealing with Aboriginal lands**

**b) The right to infringement on Aboriginal title if the government can justify this in the broader public interest under s. 35 (The Court in *Delgamuukw* referred to this as a process of reconciling Aboriginal interests with the broader public interests under s. 35)**

- If we continue with this idea of underlying crown title, there are disadvantages:

* **Problems of proof**
* **Problems of infringement**
* **Problems of legal vacuum 🡪aboriginal governance**

Para 101🡪legal vacuum would exist if provincial law doesn’t apply to A lands🡪 This doesn’t recognizes that the A people could make laws, so there wouldn’t really be a legal vacuum

* AT recognition depends on a court saying that you have AT/ or depends on some treaty
* It will cost A people a lot of money to litigate for AT…

**Important quote:**

Para 72: “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. Aboriginal title is what it is — the unique product of the historic relationship between the Crown and the Aboriginal group in question. Analogies to other forms of property ownership — for example, fee simple — may help us to understand aspects of Aboriginal title. But they cannot dictate precisely what it is or is not. As La Forest J. put it in *Delgamuukw*, at para. 190, Aboriginal title “is not equated with fee simple ownership; nor can it be described with reference to traditional property law concepts”.

**B) Incidents of AT - important**

BENEFITS: AT 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.

RESTRICTIONS: it is **a 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.
* Some changes — even permanent changes – to the land may be possible. Whether a particular use is irreconcilable with the ability of succeeding generations to benefit from the land will be a matter to be determined when the issue arises.

**3. Justification of Infringement**

**Sparrow:**

To justify overriding the A title-holding group’s wishes on the basis of broader public good, the G must show 3 things:

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

* All elements of duty from Haida
* Where Aboriginal title is unproven, the Crown owes a procedural duty imposed by the honour of the Crown to consult and, if appropriate, accommodate the unproven Aboriginal interest.
* By contrast, where title has been established, the Crown must not only comply with its procedural duties, but must also ensure that the proposed government action is substantively consistent with the requirements of s. 35 of the *Constitution Act, 1982*

**2. That its actions were backed by a compelling and substantial objective**

* The compelling and substantial objective of the government must be considered from the Aboriginal perspective as well as from the perspective of the broader public.
* e.g. preventing forest fires or pests 🡪look at all the others mentioned in Delgamuuk (para 165)
* As *Delgamuukw* explains, the process of reconciling Aboriginal interests with the broader interests of society as a whole is the *raison d’être* of the principle of justification.

**3. That the G action is consistent with the Crown’s fiduciary duty to the A group**

* First, the Crown’s fiduciary duty means that the G must act in a way that respects the fact that Aboriginal title is a group interest that inheres in present and future generations.
* Second, the Crown’s fiduciary duty infuses an obligation of proportionality into the justification process.
* Implicit in the Crown’s fiduciary duty to the Aboriginal group is the requirement that the incursion is necessary to achieve the government’s goal (rational connection); that the government go no further than necessary to achieve it (minimal impairment); and that the benefits that may be expected to flow from that goal are not outweighed by adverse effects on the Aboriginal interest (proportionality of impact)

**🡪the G breached its duty to consult with the Tsilqot’in before allowing third parties to conduct forestry activity**

* The honour of the Crown required that the Province consult them on uses of the lands and accommodate their interests. The Province did neither and breached its duty owed to the Tsilhqot’in.

## Provincial Laws and AT

**(1) Do provincial laws of general application apply to land held under Aboriginal title and, if so, how?**

* Broadly put, provincial laws of general application apply to lands held under AT🡪BUT there are important constitutional limits on this proposition.
* As a general proposition, provincial governments have the power to regulate land use within the province. This applies to all lands, whether held by the Crown, by private owners, or by the holders of Aboriginal title. The foundation for this power lies in s. 92(13) 🡪property and civil rights

**Provincial power to regulate land held under Aboriginal title is constitutionally limited in two ways:**

1. First, it is limited by s. 35 of the *🡪* S. 35 requires any abridgment of the rights flowing from Aboriginal title to be backed by a **compelling and substantial governmental objective and to be consistent with the Crown’s fiduciary relationship** with title holders.

2. Second, a province’s power to regulate lands under Aboriginal title may in some situations also be limited by the federal power over “Indians, and Lands reserved for the Indians” under s. 91(24).

**Factors relevant in determining whether a law of general application results in a meaningful diminution of an AR, giving rise to breach (Sparrow):**

(1) whether the limitation imposed by the legislation is unreasonable;

(2) whether the legislation imposes undue hardship; and

 (3) whether the legislation denies the holders of the right their preferred means of exercising the right

🡪All three factors must be considered; for example, even if laws of general application are found to be reasonable or not to cause undue hardship, this does not mean that there can be no infringement of Aboriginal title. (As stated in *Gladstone:* Simply because one of [the *Sparrow*] questions is answered in the negative will not prohibit a finding by a court that a *prima facie* infringement has taken place; it will just be one factor for a court to consider in its determination of whether there has been a *prima facie* infringement)

 **(2) Does the British Columbia *Forest Act* on its face apply to land held under AT?**

* A matter of statutory interpretation
* Under the *Forest Act*, the Crown can only issue timber licences with respect to “Crown timber”.
	+ “Crown timber” is defined as timber that is on “Crown land”
	+ “Crown land” is defined as “land, whether or not it is covered by water, or an interest in land, vested in the Crown.” (s. 1).
	+ The Crown is not empowered to issue timber licences on “private land”, which is defined as anything that is not Crown land.
	+ The Act is silent on Aboriginal title land, meaning that there are three possibilities: **(1) Aboriginal title land is “Crown land”; (2) Aboriginal title land is “private land”; or (3) the *Forest Act* does not apply to Aboriginal title land at all.**
* Aboriginal title confers a right to the land itself and the Crown is obligated to justify any incursions on title. As explained above, the content of the Crown’s underlying title is limited to the fiduciary duty owed and the right to encroach subject to justification. It would be hard to say that the Crown is presently entitled to enjoyment of the lands in the way property that is vested in possession would be. Similarly, although Aboriginal title can be alienated to the Crown, this does not confer a fixed right to future enjoyment in the way property that is vested in interest would. Rather, it would seem that Aboriginal title vests the lands in question in the Aboriginal group.
* **I conclude that the legislature intended the *Forest Act* to apply to lands under claims for Aboriginal title, *up to the time title is confirmed by agreement or court order.* To hold otherwise would be to accept that the legislature intended the forests on such lands to be wholly unregulated, and would undercut the premise on which the duty to consult affirmed in *Haida* was based. Once Aboriginal title is confirmed, however, the lands are “vested” in the Aboriginal group and the lands are no longer Crown lands.**
* **Applied to this case, this means that as a matter of statutory construction, the lands in question were “Crown land” under the *Forest Act* at the time the forestry licences were issued. Now that title has been established, however, the beneficial interest in the land vests in the Aboriginal group, not the Crown. The timber on it no longer falls within the definition of “Crown timber” and the *Forest Act* no longer applies. I add the obvious — it remains open to the legislature to amend the Act to cover lands held under Aboriginal title, provided it observes applicable constitutional restraints.**

 **(3) Is the *Forest Act* ousted by the Constitution of Canada?**

* Where legislation affects an Aboriginal right protected by s. 35, two inquires are required.

**A) First, does the legislation interfere with or infringe the Aboriginal right?**

* **A court must first examine the characteristics or incidents of the right at stake. In the case of Aboriginal title, three relevant incidents are:**

(1) the right to exclusive use and occupation of the land;

(2) the right to determine the uses to which the land is put, subject to the ultimate limit that those uses cannot destroy the ability of the land to sustain future generations of Aboriginal peoples;

(3) the right to enjoy the economic fruits of the land

* Next, in order to determine whether the right is infringed by legislation, a court must ask whether the legislation results in a meaningful diminution of the right: *Gladstone*. 🡪 As discussed, in *Sparrow*, the Court suggested that the following three factors will aid in determining whether such an infringement has occurred:

 (1) whether the limitation imposed by the legislation is unreasonable;

 (2) whether the legislation imposes undue hardship;

 (3) whether the legislation denies the holders of the right their preferred means of exercising the right

* **The issuance of timber licences on Aboriginal title land for example — a direct transfer of Aboriginal property rights to a third party — will plainly be a meaningful diminution in the Aboriginal group’s ownership right and will amount to an infringement that must be justified in cases where it is done without Aboriginal consent.**

**B) Second, can the infringement be justified?** 🡪**apply the justification factors from Sparrow**

* In this case there was no substantial and compelling objective
* the economic benefits that would be realized as a result of logging in the claim area and the need to prevent the spread of a mountain pine beetle infestation — were not supported by the evidence.

## Division of powers

* The regulation of forestry within the Province falls under its power over property and civil rights under s. 92(13) 🡪regulation of forestry is in “pith and substance” a provincial matter🡪Thus, the *Forest Act* is consistent with the division of powers unless it is ousted by a competing federal power, even though it may incidentally affect matters under federal jurisdiction.
* “Indians, and Lands reserved for the Indians” falls under federal jurisdiction pursuant to s. 91(24) 🡪As such, forestry on Aboriginal title land falls under both the provincial power over forestry in the province and the federal power over “Indians”.
* **For constitutional purposes, forestry on AT land possesses a double aspect, with both levels of G enjoying concurrent jurisdiction.**

## The Doctrine of IJI doesn’t apply to AT 🡪 the s.35 Sparrow test governs

* The guarantee of Aboriginal rights in s. 35 operates as a limit on federal and provincial legislative powers.
* The *Charter* forms Part I of the *Constitution Act, 1982*, and the guarantee of Aboriginal rights forms Part II. Parts I and II are sister provisions, both operating to limit governmental powers, whether federal or provincial.
* Part II Aboriginal rights, like Part I *Charter* rights, are held *against* government — they operate to *prohibit* certain types of regulation which governments could otherwise impose.
* These limits have nothing to do with whether something lies at the core of the federal government’s powers.

## Why it would be bad to have IJI for AT:

* First, application of IJI would result in **two different tests** for assessing the constitutionality of provincial legislation affecting Aboriginal rights.
	+ Pursuant to *Sparrow*, provincial regulation is unconstitutional if it results in a meaningful diminution of an Aboriginal right that cannot be justified pursuant to s. 35 of the *Constitution Act, 1982*.
	+ Pursuant to IJI provincial regulation would be unconstitutional if it impaired an Aboriginal right, whether or not such limitation was reasonable or justifiable.
	+ The result would be dueling tests directed at answering the same question: how far can provincial governments go in regulating the exercise of s. 35 Aboriginal rights?
* Second, in this case, applying the doctrine of IJI to exclude provincial regulation of forests on Aboriginal title lands would produce uneven, undesirable results and may lead to legislative vacuums.
* The result would be **patchwork regulation** of forests — some areas of the province regulated under provincial legislation, and other areas under federal legislation or no legislation at all. This might make it difficult, if not impossible, to deal effectively with problems such as pests and fires, a situation desired by neither level of government.

**Application to Tsilhqot’in:**

* Provincial laws of general application, including the *Forest Act*,should apply unless they are unreasonable, impose a hardship or deny the title holders their preferred means of exercising their rights, and such restrictions cannot be justified pursuant to the justification framework outlined above.
* The result is a balance that preserves the Aboriginal right while permitting effective regulation of forests by the province, as required by s. 35 of the *Constitution Act, 1982.*

### Provincial Law Should Not Apply When

* 1. Limitation on rights is unreasonable
	2. Regulation/limitation poses undue hardship
	3. Denies rights holders ability to exercise their rights using their preferred means
	4. The above cannot be justified under the infringement test (discharge of duty to consult, substantial and compelling backing, in line with fiduciary duty)

**Professor John Burrows' Lecture** regarding this case

* Process of transmission about what has happened to them part of how judge BC and Canada broadly
* When sovereignty asserted, they were there, regularly using the land
	+ Had to draw on oral history
	+ Intensive use of land not the standard, but a regular use = talked about relationships
	+ **Sufficiency**
	+ **Continuity** of occupation -- as late as '99
	+ **Exclusivity** of occupation- kept others out

= vesting title to land

* Chains of transmission recognised in Canadian law
* Tsilhqot'in law mixing with common law = sui generis = bridge between the two different legal traditions

**Benefits**

* Ceremonial
* Economic
* Right to use the land for wide variety of purposes -- beneficial interest to land; not tied to traditional activities
* BUT NOT FEE SIMPLE; it's sui generis
* They OWN this land and have the right to MANAGE it; **Crown does not retain any beneficial ownership in the land**
	+ **Aboriginal people can use their own laws and pull on own chains of transmission to decide what kind of relationships they want to enter**

* However, more work needs to be done to ensure that Ab rights are protected in our legal system
* State that Doctrine of *terra nullius* eradicated; part of law never applied in Canada
	+ But Crown is "burdened" = Crown still has underlying title even though Ab can theoretically do whatever they want
	+ Thus, Crown can justify infringements on Ab rights if have valid legislative intent etc
	+ Ultimately, these views are racist
	+ Court encouraging getting away from ethnocentrism especially on behalf of Crown because of the ultimate power Crown holds
* If we continue with notion that Crown title underlies Ab title, perpetuate the problem of Crown having ultimate power and control
	+ Ab title depends on Crown/Court agreeing/stating that that title exists to an area
	+ Ab always in a position where they have to prove their title = lot's of litigation and money being wasted
	+ Basically, problems of
		1. Proof
		2. Infringement
		3. Ab governance
* If this was normal property law, Crown would be the one having to prove title because technically, infringed on Ab title as soon as sovereignty asserted
* Crown argues that a legal vacuum on Ab title will occur unless provincial law applies = offensive, because assuming that Ab laws can't be the ones to apply in a certain place (and not provincial laws) = there wouldn't be a vacuum

Forgiveness metaphor as a warming trend over the land

Reconciliation doesn't happen over night, takes time

Can't see through the fog yet, or where we are going but forgiveness slowly emerging

Fee Simple allows you to waste your land -- however, Ab people have an obligation not to do that; can't use their land how they want = odd

**IJI**

IJI: provincial law can now infringe on Abo rights

* IJI no longer serves to protect Abo rights
* **Grassy Narrows**: regarding authority of province of Ontario
* See, release and surrender provision in Treaty 3 (gives Crown right to take over land for certain purposes)
* Grassy Narrows argues: Needed both feds and provinces in order to take up land (two step process)
	+ Court used Constitution, not the Treaty and gave Ontario the right to take over land without feds – s 92(24) totally emasculated
	+ State that the only reason Treaty contains “dominion” is because that’s what had the ultimate authority at the time…”provinces” not on par yet
	+ Para 53: substantive limit: can only take up so much land

# 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
* A question to keep in mind: what role does the written document occupy because of the way treaties were signed (simply presented to Abo group, with terms explained after)
* Also, sometimes treaties made orally first and then transferred onto paper
	+ **court takes flexible approach to treaty interpretation**
	+ **but not interested in re-writing the treaties and imposing things into the treaties that were never there before**
* From *Simon v. R*. (1985) 2 S.C.R. 387 (SCC) In considering the impact of subsequent hostilities on the peace Treaty of 1752, the parties looked to international law on treaty termination. While it may be helpful in some instances to analogize the principles of international treaty law to Indian treaties, these principles are not determinative. **An Indian treaty is unique; it is an agreement sui generis which is neither created nor terminated according to the rules of international law.**
* From *R.v. Sioui* (1990) 1 S.C.R. 1025 (SCC): From these extracts it is clear that **what characterizes a treaty is the intention to create obligations, the presence of mutually binding obligations and a certain measure of solemnity**…
* *R. v. Marshal*l (1999) 3 S.C.R. 456: McLachlin’s principles for treaty interpretation:
	1. Aboriginal treaties constitute a **unique type of agreement** and attract **special principles of interpretation**
	2. Treaties should be liberally construed and **ambiguities or doubtful expressions should be resolved in favour of the aboriginal signatories** (pre-1923, anyway)
	3. The goal of treaty interpretation is to choose from among the various possible interpretations of common intention the **one which best reconciles the interests of both parties at the time the treaty was signed**
	4. In searching for the common intention of the parties, the **integrity and Honour of the Crown is presumed**
	5. In determining the signatories’ respective understanding and intentions, the court **must be sensitive to the unique cultural and linguistic differences between the parties**
	6. The words of the treaty must be given the sense which they would **naturally have held for the parties at the time**: Badger, supra, at paras. 53 et seq.
	7. A **technical or contractual interpretation of treaty wording should be avoided**: Badger, supra; Horseman, supra.
	8. While construing the language generously, courts **cannot alter the terms of the treaty by exceeding what “is possible on the language” or realistic**.
	9. Treaty rights of aboriginal peoples **must not be interpreted in a static or rigid way**. They are not frozen at the date of signature. The interpreting court must update treaty rights to provide for their modern exercise. This involves determining what modern practices are reasonably incidental to the core treaty right in its modern context

Shift away from these principles in more modern cases

R v Badger [1996] SCC

*Mentioned in Marshall II*

### When interpreting a treaty, the following principles apply:

1. A treaty is a solemn promise between the Crown and the various Indian nations.
2. The Crown must be assumed to intend to fulfil its promises, and no appearance of "sharp dealing" will be tolerated.
3. **Any ambiguities or doubtful expressions must be resolved in favour of the Indians**, any limitations on the rights of Indians must be narrowly construed.
4. Onus of establishing proof of the extinguishment of a treaty or aboriginal rights lies upon Crown.

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*
	+ while the trade clause gave the Mi'kmaq "the right to bring the products of their hunting, fishing and gathering to a truckhouse to trade", such right had disappeared with the disuse of the truckhouse system
	+ (truckhouse = trading post)

Issue: How should the courts determine if a treaty provides rights? When is an infringement of treaty rights justified?

Analysis:

* Right = securing necessaries and a livelihood
	+ Necessaries always used when there’s a commercial right aspect
* 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*
	+ presumption that the Crown acted with honour and integrity in recognition of their fiduciary relationship with the aboriginals in creating the treaties is important
* Oral and extrinsic evidence can be given for the contents of a treaty even when the written words are not ambiguous 🡪 court rejects a strict approach/but don’t go too far 🡪BALANCE
* Reasonably incidental right (why would you have the right to hunt if you don’t also have the right to carry the stuff you need for hunting, or the right to build shelters during the weeks-long hunt)
* Honour of the Crown always at stake

Decision: The rights are treaty rights within the meaning of s 35 and are subject to the regulations that can be justified under the *Badger* test. Appeal allowed, acquittal entered.

* McLachlin dissent: Treaties interpretation should be “large and liberal” because as a result of s. 35, they are a constitutional document (and thus extrinsic evidence can be used!)
	+ Common intentions must be used
* Treaty rights are subject to regulation, which parallels the paragraph in *Sparrow* that “Crown sovereignty has never been questioned”

**Both the words of the treaty and its historic and cultural context must be considered in two steps**:

* + The words of the treaty clause at issue should be examined to determine their factual meaning, in so far as this can be ascertained, noting any patent ambiguities and misunderstandings that may have arisen from linguistic and cultural differences.
	+ The meaning of different meanings that have arisen from the wording of the treaty right must be considered against the treaty’s historical and cultural backdrop.

*\*This two-step approach is problematic because it biases the analysis towards the Crown’s perspective – the initial understanding of the right is narrowed by relying on the written document as opposed to the oral agreement*

**In Marshall I the G did not lead any evidence for justification. Marshall II is a motion by the Coalition to allow G to justify the infringement and to not allow the Aboriginal people to fish**

R v Marshall II [1999] SCC

**Power of Crown to infringe upon treaty rights**

* The Coalition argues that the native and non-native fishery should be subject to the same regulations.
* trying to push the "moderate income” thing
* “Is the Crown at War With Us” – movie on the topic
* Court trying to manage tensions in this area

**Decision**: **A license by its very existence is not an infringement of the treaty right - Gov is allowed to regulate for conservation purposes**

* **Rights do not exist in a vacuum** and the rights of one individual or group are necessarily limited by the rights of another
	+ Up to the government to be able to determine and direct the way in which these rights interact

Three ways that the **Crown can internally regulate (infringe) treaty**:

1. Insignificant effects: treaty rights are limited to securing “necessaries”
* **The treaty right itself is limited** *- Regulations that do no more than reasonably define the Mi’kmaq treaty right in terms that can be administered by the regulator and understood by the M community that holds the treaty rights do not impair the exercise and* ***do not*** *have to meet the Badger (Sparrow) standard of justification*
1. Regulations of treaty in treaty: treaty right is a regulated right and can be contained by regulation within its proper limits
2. Can regulate treaty rights as long as they’re justified based on the *Badger (Sparrow)* test
* For example: conservation

# Metis Rights

R v Powley (2003) SCC

**Test for establishing Abo rights for Metis; Post-contact but Pre-control Test**

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
* 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*.

Issue: is the Act a violation of P’s s. 35 rights? How to characterize “Metis”?

Analysis:

* **Métis did not exist prior to European contact = they are a product of that contact. 🡪** so discussion in *Van der Peet* about preserving (*not fixing/freezing*) the **pre-contact state** doesn’t apply to them
* Métis rights are specifically protected in s.35(2) of the Constitution
* However, term “Metis” in s 35 does not encompass all individuals with mixed Indian and European heritage; rather, it refers to
	+ **group of individuals, with a distinctive collective identity, living together in the same geographic area (referenced by way of life), sharing a common way of life (that’s distinctive from other groups)**
* Metis community **identified by**
	+ self-identification (can’t be opportunistic); ancestral connection; and community acceptance (goes back to culture) = **membership**
* Main issue: Metis are a “nomadic” (travelling) people but Powley is arguing for site-specific Abo claim
	+ (Hume says although they are travelling people, their movement has a traceable pattern that cycles each year)
* *Van der Peet* has an “integral culture test” 🡪 “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.”
* Van Der Peet 10 factors modified for Métis:
	+ Because no pre-sovereign aspect required for Metis because they didn’t develop until after contact
	+ so the test for Metis practices should **focus on identifying those practices, customs, and traditions that are integral to the Metis community’s distinctive existence and relationship to the land**
	+ **Post-contact but pre-control Test:** identifies the time when Europeans effectively established political and legal control in a particular area

Decision: Powley has abo (Metis) site-specific right to hunt for food

Test for Establishing Metis Right:

**Practice, custom or tradition integral to a specific Abo group prior to contact**

1. **Characterization of the right**
* Refers to the ultimate use of the harvest (food, exchange, commercial purpose etc.) NOT specific species…general right to hunt for food is for all animals
1. **Identification of the historic rights-bearing community**
* In addition to *demographic evidence*, proof of *shared customs, traditions, and a collective identity* is required to demonstrate the existence of a Metis community that can support a claim to site-specific aboriginal rights.
* Different groups of Metis have often lacked political structures and have experienced shifts in their members’ self-identification. However, the existence of an identifiable Metis community must be demonstrated with some degree of continuity and stability in order to support a site-specific aboriginal rights claim.
1. **Identification of the contemporary rights-bear 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; ancestrally based membership in the present community.
1. **Verification of the claimant’s membership in the relevant contemporary community**
* Courts faced with Metis claims have to ascertain Metis identity on a case-by-base basis. The inquiry must take into account both the value of community self-definition, and the need for the process of identification to be objectively verifiable.
* The criteria for Metis identity under s 35 must reflect the purpose of this constitutional guarantee: to recognize and affirm the rights of the Metis held by virtue of their direct relationship to this country’s original inhabitants and by virtue of the continuity between their customs and traditions and those of their Metis predecessors.
* **Indicia of Metis identity for the purpose of claiming Metis rights under s 35:**

**a) Self-identification** – The claimant must self-identify as a member of the Metis community

* + Must prove shared customs and traditions as well as collective identity
	+ should not be of recent vintage (not opportunistic)

**b) Ancestral connection** - claimant must present evidence of ancestral connection to a historic Metis community

* requires some proof that the claimant’s ancestors belonged to the historic Metis community by birth, adoption, or other means
* Requires a loose connection between the historic and contemporary communities

**c) Community acceptance** – claimant must prove that he/she accepted by the modern community

* Community’s 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**, the customs and traditions that constitute a Metis community’s identity and distinguish it from other groups.
1. **Identification of the relevant time frame**
* **Post-contact** (emergence of Europeans) **but pre-control test** (effective control by Europeans)
* As long as the practice grounding the right is distinctive and integral to the pre-control Metis community, it will satisfy this prong of the test
1. **Determination of whether the practice is integral to the claimants’ distinctive culture**
2. **Establishment of continuity between the historic practice and the contemporary right asserted**
3. **Determination of whether or not the right was extinguished**
* The doctrine of extinguishment applies equally to Metis and to First Nations claims
1. **If there is a right, determination of whether there is an infringement**

**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.**

(Easier test for Metis – some think this should be the test for all Abo groups)

Manitoba Métis Federation v. Canada 2013 SCC

**Honour of the Crown always exists but fiduciary duty only arises sometimes**

**Assertion of sovereignty 🡪Honour of the Crown 🡪 fiduciary duty (sometimes) 🡪duty to consult + accommodate (sometimes)**

* Manitoba Act is a constitutional instrument
* 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 seeking a **declaration** – can be a powerful remedy because Crown has obligation to follow
* Two lines of argument in this case: **fiduciary duty** and **Honour of 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
* **Make decision based on Honour of the Crown –** duty to keep promises; **an unwritten constitutional principle) is a separate, independent basis for challenging the Crown.**
	+ standalone that can have effects when breached
* Crown has to take a broad purposive approach and Crown has to act **diligently** to fulfil obligations
* **When crown makes a solemn promise, must endeavour to/act diligently to ensure that promise is fulfilled.**

**Some comments on this case**

**Source of Honour of the Crown: the Crown itself**

* The phrase “honour of the Crown” refers to the principle that servants of the Crown must conduct themselves with honour when acting on behalf of the sovereign.
* The honour of the Crown **arises “from the Crown’s assertion of sovereignty** over an Aboriginal people and *de facto* control of land and resources that were formerly in the control of that people”.
* In Aboriginal law, the honour of the Crown goes back to the *Royal Proclamation* of 1763, which made reference to “the several Nations or Tribes of Indians, with whom We are connected, and who live under our Protection”.
* This “Protection”, though, did not arise from a paternalistic desire to protect the Aboriginal peoples; rather, it was a recognition of their strength. Nor is the honour of the Crown a paternalistic concept.
* Gov’t operates within the Rule of Law and by the Rule of Law

### When is the honour of the Crown engaged?

1. In situations involving **reconciliation** of Aboriginal rights with Crown sovereignty.
2. The honour of the Crown is engaged by **s 35(1)** of the Constitution
3. The honour of the Crown is engaged by an **explicit** **obligation** to an Aboriginal group that is enshrined in the Constitution.
	* The obligation must be explicitly owed to an Aboriginal group. The honour of the Crown will not be engaged by a constitutional obligation in which Aboriginal peoples simply have a strong interest. Nor will it be engaged by a constitutional obligation owed to a group partially composed of Aboriginal peoples.
	* **When there is a specific, “solemn” obligation or promise that is intended to create obligations, is made by the Crown to an Aboriginal group, such as treaty or other commitment**

**What duties are imposed by the honour of the Crown?**

1. The honour of the Crown gives rise to a **fiduciary** **duty** when the Crown **assumes discretionary control** over a specific Aboriginal interest (*Haida Nation*)
2. The honour of the Crown 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 but as of yet unproven Aboriginal interest (*Haida Nation*)
3. The honour of the Crown governs treaty-making and implementation (*Mikisew*), leading to requirements such as **honourable negotiation** and the **avoidance of the appearance of sharp dealing** (*Badger*)
4. The honour of the Crown requires the Crown to act in a way that accomplishes the **intended purposes** of treaty and statutory grants to Aboriginal peoples (*Marshall*; *Mikisew*)

**The question is simply this: Viewing the 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?**

### When may a fiduciary duty arise

The first way a fiduciary duty may arise is where the Crown administers lands or property in which Aboriginal peoples have an interest. The duty arises if there is:

1. **A specific or cognizable Aboriginal interest, and**
* The fact that the Metis 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: it must be a communal Aboriginal interest in the land that is integral to the nature of the Metis distinctive community and their relationship to the land. They key issue is whether the Metis as a *collective* had a specific or cognizable *Aboriginal* interest in the land (POWLEY); look to words of Act and other evidence
1. **A Crown undertaking of discretionary control over that interest**

# Duty to Consult and Accommodate

* New doctrine
* Basic idea: Crown has to talk to abo groups when contemplating adverse conduct
	+ it’s a *Constitutional* duty
	+ can’t be overridden by statute
* **affirmative duty that Crown has to discharge – not optional**
* BC-driven doctrine; BC is the “home” of consultation
* No veto 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

**Establishes general framework for the duty to consult and accommodate *before* Aboriginal title or rights claims have been decided; HOC always engaged when gov dealing with Abo people**

Facts:

* After Calder, Haida created Council of Haida nation – they’re the ones who brought the claim
* Haida nations’ trees a massive natural resource
* British Columbia continues to issue licences to cut trees on Haida Gwaii to forestry companies.
* Haida argued legal encumbrance, equitable encumbrance and breach of fiduciary duty, all grounded in assertion of Aboriginal title.
* **The government holds legal title to the land**.
	+ Legal title allows govt to grant Weyerhaeuser (company) the right to harvest the forests in Block 6 of the land.
	+ **But Haida also claim title** 🡪 in the process of trying to prove title

Issue: is government required to consult with Haida about decisions to harvest the forests and to accommodate their concerns *before* Haida proves title and Abo rights?

Analysis:

* stakes are huge
* Haida argue that absent consultation and accommodation, they will win their title but will find themselves deprived of forests that are vital to their economy and their culture
	+ Forests will be gone if they have to wait on the court system
	+ Forests take generations to mature, and old-growth forests can never be replaced.
	+ By the time title is proven heritage will be irretrievably despoiled.
* government argues that it has the right and responsibility to manage the forest resource for the good of **all British Columbians**
	+ Until the Haida people formally prove their claim, they **have no legal right to be consulted or have their needs and interests accommodated.**
* chambers judge finds that the government has a **moral, but not a legal, duty to negotiate with the Haida people**
	+ BCCA reversed this decision 🡪 both government and Weyerhaeuser have a **duty to consult with and accommodate the Haida people with respect to harvesting timber from Block 6**
* **SCC: McLachlin**
	+ Government has a **legal duty to consult with the Haida people about the harvest of timber from Block 6, including decisions to transfer or replace Tree Farm Licences.**
	+ **Good faith consultation may in turn lead to an obligation to accommodate Haida concerns**
	+ Consultation **must be meaningful**
	+ **BUT** there is no duty to reach agreement.
	+ duty to consult and, if appropriate, accommodate **cannot be discharged by delegation** to Weyerhaeuser
	+ Weyerhaeuser **does not owe any independent duty to consult with or accommodate the Haida** concerns, although the possibility remains that it could become liable for assumed obligations.

Decision:

It follows that I would dismiss the Crown’s appeal and allow the appeal of Weyerhaeuser.

Comments on this case

* Paragraph 16: Honour of the Crown always at stake
	+ Duties change according to the situation/whether specific interest asserted or not (and the corresponding duty)
* When there is **no treaty**, s. 35 requires the Crown to determine, recognize and respect Aboriginal rights and negotiate with affected groups
	+ Honourable negotiation includes a duty to consult and a duty not to “cavalierly run roughshod over Aboriginal interests” while claims and negotiations are underway
	+ The Crown **must respect these potential interests** even if haven’t yet been legally proven because if it turns out that Abo group *does* have those/that right(s), could end up wiped out
		- **Thus Abo groups ALWAYS have the constitutional right to be consulted**
* **Honour of the Crown *means* you have a duty to consult** (arises out of assertion of sovereignty)
	+ Duty does not extend to private parties (municipalities, companies etc)
	+ however, Crown can authorise private parties to do some consultation on behalf of govt (collecting info etc)

*The Crown, and the Crown alone,* ***has a legal duty to consult with aboriginals when making decisions that could infringe upon their rights or lands, including decisions that could affect rights or lands that are currently being sought through legislation.*** *The extent of the duty* ***varies with the strength of the claims*** *– if the claim is strong, then the Crown has to accommodate the aboriginals and allow them to participate in the decision-making process, but weak claims require only notification*

But what does this look like in practice?

Duty to consult arises when: knowledge meets possibility to impact

* + Honour of the Crown is the **reason beyond 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 out of Honour of the Crown in 3 circumstances:

**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**

* + 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**

* + ***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)
	+ **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***)

“*The extent of the duty* ***varies with the strength of the claims”*** results in a proportionality test

**Duty has to be proportionate to the strength of the claim (prima facie + some evidence) and seriousness of impact/effect**

### Proportionality Test:

* When there’s **strong *prima facie* case** for the right, Crown **must consult more extensively** by:
	+ Allowing Abo group to make submissions for consideration and (potentially) accommodation
	+ Allowing Abo group to formally participate in decision-making
	+ Giving Abo group opportunity to give (written) submissions
	+ Ensuring that Crown publishes reasons showing how aboriginal concerns were factored into their decisions
* When claim to right is **weak**, Crown only has to **give notice** & **disclose info** to affected peoples

**Lowest end**: give notice and disclose information.

**Highest end**: deep consultation, participation in the decision making process, opportunity to give (written) submissions, potential accommodation Aboriginals must provide evidence

* **General requirement of “good faith” and “meaningful consultation” on both sides**
* There is no duty to agree and aboriginal groups cannot take unreasonable positions to thwart government good faith attempts.
* Much like Delgamuukw, there is a spectrum of requirements under the duty to consult, ranging from weak claims and/or minor infringement to strong claims and significant adverse effects.
	+ **Spectrum of duties**:
		- Accommodation (high)
		- Consent required by First Nation
		- Meaningful/substantial
		- Notice (low)
* 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
* **Provinces also must consult** since the interest they take in land under s. 109 is subject to “any other interest in the lands”. The duty to consult arises from the assertion of Crown sovereignty, predating the Union, and so the Province took the land subject to that duty.

**“Accommodation”**

* When the consultation process suggests amendment of Crown policy, we arrive at the **stage of accommodation**.
* strong prima facie case exists for the claim + consequences of the government’s proposed decision = adverse effect
	+ addressing Aboriginal concerns may require **taking steps to avoid irreparable harm or to minimize the effects of infringement**, pending final resolution of the underlying claim
* **Accommodation is achieved through consultation**
	+ Does not mean consent, agreement or veto
	+ Crown has to take steps to avoid irremediable harm
	+ It’s not a separate duty – grows out of the “duty to consult” approach because at some point, consultation isn’t good enough anymore, have to actually *do* something
	+ However, these things cannot be predicted = would subvert the whole consultation process which needs to happen in real-time
* no precedents regarding how to establish proportionality
* if constitutional issue occurs, Abo have *right* to get an injunction against Crown for breach of treaty rights
* “Remedy tail can’t wave the liability dog” – have to go to Crown and sue because duty of the Crown is a duty only the Crown bears

Mikisew Cree First Nation v Canada (Minister of Heritage), 2005 SCC

**Duty to consult flows from Honour of the Crown; exists on a spectrum**

**Facts**:

* Sufficient land was not set aside for P until the 1986 Treaty Land Entitlement Agreement.
* Treaty says government may take up land from time to time for settlement, mining ... *or other purposes*.
* 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.

Issue: What duty does Crown have?

Analysis:

* CA found decision to create new road was part of “taking up” and therefore done pursuant to Treaty, not as an infringement of it (judgement came out before *Haida Nation*)
	+ However, even if part of Treaty and done in accordance with it, Honour of the Crown still (and always) at stake and that includes the duty to consult
	+ Should have consulted with Mikisew in good faith *before* constructing the road
* duty varies in accordance with degree of adverse effect
	+ so even though adverse effect of road was minor, duty to consult to allow for communication and addressing of concerns was breached
* must consult otherwise process of reconciliation is undermined
* Even if have a treaty, the Duty to Consult still applies.

Decision: Having a treaty doesn’t exempt Crown from duty to consult; Crown *always* has duty to consult because that’s in accordance with the Constitution – NOT OPTIONAL

Comments on this case

* Treaty right is not the same as duty to consult
* **Honour of the Crown includes a *process* on how to take up land – this process is duty to consult**
* In this case, low end of duty spectrum talked about differently
	+ **Attempt to minimise adverse effects on treaty rights – this is now at the *low end*!**
* **Duty to consult** analysis intended to be **flexible** – 2 factors from ***Haida Nation*** (strength of claim & seriousness of impact) supplemented w/new factors:
* **Specificities of promises made**
	+ hunting, fishing, and trapping is much broader than giving a group x amount of money yearly
	+ the less specific a right gets, the more consultation is required (to establish what the rights *are*)
	+ the less capacity an Abo group has, the slower the process has to be (can’t rush ahead and force decisions on abo group)
* **Seriousness of impact**
* **History of dealings between Crown & First Nation**
	+ Looks at overall structure of treaty
* Regarding **accommodation**: Have to consider possibility of changing course of action or even preferring Abo proposals or else consultation stalls
* Declaration of breach of duty = usually the only remedy an Abo group gets; sometimes an order to go back and consult more
* Courts don’t like to prescribe specific accommodation remedies to fix the breach of duty
* Court doesn’t like to oversee consultation process, and doesn’t like to administer remedies
* Damages are theoretically available…has never been done before though
* BOTTOM LINE: remedy for breach of duty to consult is inadequate

Rio Tinto Alcan v Carrier Sekani Tribal Council, 2010 SCC

|  |  |
| --- | --- |
| 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.Tribunals may also have duty to consult, depending on the legislation creating them. Or, they may have power only to determine whether adequate consultation has taken place or no duty at all. |
| Misc. | Utilities Commission: Found that the consultation issue could not arise as EPA would not adversely affect any aboriginal interestBCCA: 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. |

### Test for duty to consult arises:

1. Crown’s knowledge, actual or constructive, of a potential Abor claim or right
* 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.
* 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.
* **Proof that the claim will succeed is not essential – what is required is a credible claim**
1. Contemplated Crown conduct
* not limited to statutory decisions, extends to policies, strategic higher level decisions
* There must be Crown conduct or a Crown decision that engages a potential Aboriginal right – conduct that may adversely impact on the claim or right in question
* **Not confined to government exercise of statutory powers or decisions or conduct which have an immediate impact on land and resources**
* **A potential for adverse impact suffices**
1. Potential that the contemplated conduct may adversely affect an Abor claim or right
* immediate physical impact on the land not required – a decision that can lead to other decisions that may lead to impact
* 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)

Duty to Consult owed to *nation* – then the Abo govt decides how consultation happens on their end

# Modern Treaty Making Process

Calder:

* Ab title may exist in BC – still a live issue; comprehensive land base process? Bilateral process = only willing to talk about one nation at a time (Nisqa)
* Legal uncertainty causing the govt money
* Activism motivated by s 35

## End of 1980s

* **Sparrow:** trilateral table; needed to be involved in these talks
* Moving away from one nation at a time approach = BC Claims Task Force (appointed by federal and prov govts etc)
* 19 recommendations = well received
* Process complicated: BC, Canada, First Nations Summit = BC Treaty commission which oversees treaty process
	+ 1. Nation has to submit intent
		2. Prepare for negotiations
		3. Negotiate a framework agreement (list of issues want to talk about) – talks need to be open to all issues
		4. Agreements and principles agreement – actual negotiations begin
		5. Negotiating final
		6. Implementation
* BC recently pulled out from one of commissions
* Commission writes annual reports = pretty negative for the past decade = things going badly ; criticising provincial govt
* Roughly 48 tables at various phases of the process = commission tends to be overwhelmed
* ~ 1997 = stall in the process
* Delagmwuk created uncertainty in the period; 2001 = election of BC Liberal party; referendum brought in = first time process brought to public attention in this way; low turn-out, vey loaded questions
* = new rigid mandate
* Now, very little progress; nothing happening
* Nisqa treaty not decided based on the process

## Internal and external obstacles to the process

* Internal: finances – but govt has become more flexible in terms of taxation etc
* External: (harder to overcome) mandates – pretty rigid, templates – treaties look similar because govt wants them to be uniform; politics – referendum was the only time publicly politicised ; emergence of viable alternatives (specific deals made for specific issues instead of dealt with all at once)

“we won’t negotiate with you if you litigate against us” = ultimatums rarely work

Still a frustrating process that doesn’t give nations the result they want, fast enough

Alternatives more popular: consultation, litigation, strategic agreements

# Reconciliation

Purpose of s 35 = reconciliation

* Core of Aboriginal Law and this course
* Fundamental purpose of AL
* But what does it *mean*?
* Federal power must be reconciled with federal duty (objective of s 35) > constrains exercise of authority in s 91(24)
* Ab rights don’t have to be protected against all infringements, only those that are serious
* Concept of reconciliation very different from case to case
* Culture also brought up in Sparrow and VDP (Hall also talks about it in earlier case); this information comes from anthropological evidence
* culture starting to play a more important role (“fishing big part of physical and cultural survival”)
* But why do we care about culture?
* “commerce can’t exist without white people”
	+ have to watch these assertions regarding what colonisers brought to the table, v what the Ab brought to the table
	+ when court says “no commercial fisheries before whites” 🡪 contrasts barter and trade (?)
* using language of “early society” = implying a timeline; pre-determined path that societies follow as they “evolve”= polite way of saying these people are savages?
* these issues keep coming up
* examples of extinguishment: National Resource Transfer Agreement (affected treaty rights in prairie provinces)

 - para 12 used as a “sufficiently clear” example of rights extinguishment

 - Constitutional amendment ; but does not mention extinguishment or treaty rights directly, however it does have the effect of extinguishing rights to hunt and fish commercially

But what does that mean? – Burrows perspective

* Indigenous perspective is important
* 5 contemporary examples: nisqa, tsawassen,… etc
* Modification of rights different from extinguishment?
* MFA Preamble: set up foundations to support the agreement; not speaking with unified voice: BC and Canada as more authoritative voice
* Aboriginals are Canadian citizens who “may” have rights; possess legal rights that “burden” crown sovereignty
* Strong incentive for govt to negotiate
* 7: Canada sees itself as multicultural country – but
* Land calibrated according to how many individuals in the population – toquaht wanted twice as much land than would be getting under the formula
* Concurrent jurisdiction situation – treaty sets out which laws prevail (usually federal/prov law prevails)

## ‘Evolution’ of Reconciliation

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

# SUMMARY OF THE MAIN CASES/POINTS IN ABO LAW

Royal Proclamation 🡪 AT becomes Crown’s when **purchased or surrendered**

**Johnson**🡪 **Doctrine of Discovery** : **conquest or purchase** ; doctrine gives exclusive right to title to those who make it

**Cherokee** 🡪 for some Abo groups (because of treaties) some self-govt can survive

**St. Catherine’s** 🡪 **surrender or otherwise**; Crown had proprietary estate all along which became dominant when BNA Act transferred all Indian lands to Crown and extinguished title; **RP is the source** of AT possession 🡪 reserved for the use of Abos, under protection and due to goodwill of sovereign

**Calder** 🡪 RP NOT the sole source of AT; AT survived colonisation; extinguishment of AT requires authority + clear and plain intent

**Guerin** 🡪 AT = independent legal interest that is specially categorised as *suis generis;* it makes it an **inalienable right** that places an **obligation** on the Crown because it can only be surrendered to Crown who then has a **fiduciary duty** to Abo ; AT is a **burden on Crown title;** fiduciary duty arises from surrender requirement…

**Sparrow** 🡪 s 35 not the source of Abo RIGHTS but constitutionally protects all AR not extinguished prior to April 1982; Crown has onus of justifying any infringements/denials of AR by establishing compelling and substantial purpose + acting consistent with fiduciary duty to Abo group

**VDP** 🡪 AR existed and recognised by CL – s 35 constitutionally protects

**Delgamuukw** 🡪 existence of AR at CL sufficient but not necessary for protection; AT is *suis generis* 🡪 reflected in 3 special characteristics: inalienability, source: pre-sovereignty occupation, communally held

**Tsilhqot’in** 🡪 Crown title = Crown Title – Aboriginal Title

**Haida** 🡪 Duty to Consult (involve) and even accommodate Abo groups whenever interference with Abo land *even prior to legal establishment of AT claim* ; Crown always has a **moral and legal duty to negotiate in good faith**

* Radical or underlying Crown title is subject to Aboriginal land interests where they are established.
* Aboriginal title gives the Aboriginal group the right to use and control the land and enjoy its benefits.
* Governments can infringe Aboriginal rights conferred by Aboriginal title but only where they can justify the infringements on the basis of a compelling and substantial purpose and establish that they are consistent with the Crown’s fiduciary duty to the group.
* Resource development on claimed land to which title has not been established requires the government to consult with the claimant Aboriginal group.
* Governments are under a legal duty to negotiate in good faith to resolve claims to ancestral lands.

Source of the **Honour of the Crown** is the Crown itself because the Crown is a sovereign that acts according to law

* + sovereignty isn’t just about power and dominance but about authority
	+ and that authority is premised on the rule of law
	+ court is forcing the Crown to take on the responsibility that comes with asserting Crown sovereignty
* so when Crown says something to someone who is subject to it, should mean something
* when you assert sovereignty on those who do not consent, gives rise to responsibilities: Sovereignty🡪 Honour of the Crown 🡪 FD 🡪 DTC 🡪 reconciliation (Haida, Sparrow)
* Honour of the Crown is always present when dealing with Abo rights
	+ Fiduciary duty arises when there’s a special
* Duty to consult operates alone but when going through infringement of rights test, duty to consult (Haida) is infused at the justification stage

Questions from class

1. relationship between title and rights:

* **Relationship between title and rights** 🡪**they are not the same**
* title get to determine how the land is used; right to the land itself
* right: capacity to DO things, like fish
* **if you can establish title, can establish the right (because the rights tied to the land) 🡪 BUT fish is always tricky because depends on what the fish are in (lake? Ocean? Can you assert title over that body of water)**
* he wants us to speak in the language of “that law does not apply/infringes on AT” NOT “Abos *asserting* their Abo rights”
* for Justification, use Tsilhqot’in (paragraph 77/78) 🡪 Crown always has to discharge its duty
* backed by compelling and substantial objective
* fiduciary duty – proportionality (looks like Oakes test) (paragraph 88..)
	+ Broken into 2 parts

3. test for aboriginal rights pretty flexible 🡪 Sparrow sets up overall framework; cases after start to flesh it out (VDP – magnifies one part of the Sparrow test; Gladstone); **BTW ten factors in VDP – not a checklist; don’t have to go through all of them**

unjustified infringement of right (after establishing right first) OR breach of duty to consult

but sometimes, DTC is part of justification analysis, depending on what the question is asking you

# Three Big Tests

### Aboriginal Title (and infringement)

1. **Is there an existing Aboriginal Title?** (Abo onus)
	1. **Prior Occupation**
* Land must have been occupied prior to sovereignty
* Have to take into account both CL (physical occupation and possession) and Abo (lands used for hunting, fishing, trapping, foraging, or other cultural practices) perspectives
* “**Occupation”** interpreted more broadly after Tsilhqot’in – test is no longer one of strict *possession*
* AT may extend beyond physically occupied sites over which Nation has **effective control**
	1. **Sufficient Continuity**
* between traditional practice and modern activity
* Doesn’t have to be unbroken chain 🡪 chains of transmission acceptable
* Originally, had to be “substantial maintenance and connection” btwn ppl and land but now intensive use of land no longer needed 🡪 **regular use of land** is enough
* Allowed to use land for a variety of purposes **not just for how used in past**
	1. **Exclusivity**
* Ability to keep others out, requiring permission for access to land, existence of trespass laws, treaties made with other Abo groups, lack of challenges to occupancy = shows nation’s **capacity and intention to control** its lands
* Joint occupation doesn’t negate exclusivity 🡪 have to determine what exclusive occupation means to specific Abo group
* **Nomadic peoples may be able to claim title to land – depends on degree of physical occupation and regular use of definite tracts of land (Delgamuwwk); continuity is required though**
* Less intensive uses 🡪 gives rise to different rights
1. **Has this title been extinguished?** (Crown Onus)
	1. **Authority** 🡪Crown must have the authority to do it
	2. **Clear and plain intent** 🡪 evidenced in a Treaty, statute, etc; has to come out and say it publicly
2. **Prima facie infringement of s 35(1)** (Abo onus)
	1. Is the limitation unreasonable?
	2. Does it cause undue hardship?
	3. Denies holder of title of their preferred means of using land?
* Don’t have to establish all three 🡪 one is sufficient
1. **Can the infringement be justified?** (Crown Onus)
	1. **Is there a valid legislative objective?**
* Infringement must be in furtherance of a legislative objective that is **compelling and substantial**
* either **the recognition of the prior occupation of NA by aboriginal peoples OR**
* **at the reconciliation of Abo prior occupation with the assertion of the sovereignty of the Crown**
* i.e. Conservation, development, and resource management
	1. **Is the govt employing means that are consistent with the HOC and fiduciary duty**
* Was infringement as minimal as possible?
* Were their claims given priority? **Conservation -- Indian fishing -- non-Indian commercial fishing -- non-Indian sports fishing**
* Was the affected Abo group consulted?
* If expropriation – fair compensation?

### Aboriginal Rights (and infringement)

Unanimous court says that AR can be regulated, but cannot be extinguished (**Sparrow)**

1. **Is there an existing Aboriginal right?** (Abo onus)
	1. **Existence of an ancestral custom, tradition or practice**
* Pre-European contact practice
	1. **Custom, tradition or practice is “integral” to pre-contact society, making it distinctive**
* This is what makes the right an *aboriginal* right; central not incidental but not “unique”
	1. **Continuity between pre-contact practice and contemporary claim**
* Rights are not frozen in time

1. **Has this right been extinguished?** (Crown Onus)
	1. **Authority** 🡪Crown must have the authority to do it
	2. **Clear and plain intent** 🡪 usually AR can only be regulated, not extinguished
2. **Prima facie infringement of s 35(1)** (Abo onus)
	1. Is the limitation unreasonable?
	2. Does it cause undue hardship?
	3. Denies holder of title of their preferred means of using land?

Don’t have to establish all three 🡪 one is sufficient to establish infringement

1. **Can the infringement be justified?** (Crown Onus)
	1. **Is there a valid legislative objective?**
* Infringement must be in furtherance of a legislative objective that is **compelling and substantial**
* either **the recognition of the prior occupation by aboriginal peoples OR**
* **at the reconciliation of Abo prior occupation with the assertion of the sovereignty of the Crown**
* i.e. Conservation, development, and resource management
	1. **Is the govt employing means that are consistent with the HOC and fiduciary duty**
* Was infringement as minimal as possible?
* Were their claims given priority? **Conservation -- Indian fishing -- non-Indian commercial fishing -- non-Indian sports fishing**
* Was the affected Abo group consulted?
* If expropriation – fair compensation?
1. **Did the Crown discharge its procedural duty to consult and accommodate** (**Haida**)

**1. Does Crown have knowledge, actual or constructive, of a potential claim/right;**

**2. Is Crown contemplating conduct which engages a potential aboriginal right**

**3. There must be potential that contemplated conduct may adversely affect an aboriginal claim/right**

AT unproven 🡪 Crown owes a procedural duty imposed by the honour of the Crown to consult and, if appropriate, accommodate the unproven Aboriginal interest.

AT established 🡪 Crown must comply with its procedural duties, but must also ensure that the proposed government action is substantively consistent with the requirements of s. 35 of the *Constitution Act, 1982*

**Gladstone: The test for infringement AND justification will be modified for non-internal limits like commercial -Doctrine of Priority** ensures that Abo rights to priority over others’ are preservedhowever infringements on the basis of conservation and reconciliation are justified (range of objectives broadened to include economic fairness and policy)

### Metis Title/Rights

1. **Characterization of the right**
* Refers to the ultimate use of the harvest (food, exchange, commercial purpose etc.)
* Right to hunt for food is not species-specific but general 🡪 do not have to prove right to hunt for every animal
* **Metis right to hunt is a general right to hunt for food in the traditional hunting grounds of Metis community**
1. **Identification of the historic rights-bearing community**
* A historic Métis community was a **group of Métis** with a **distinctive collective identity**, who **lived together in the same geographic area** and **shared a common way of life**.
* The historic Métis community must be shown to have existed as an identifiable Métis community **prior to the time when Europeans effectively established political and legal control** in a particular area
* Different groups of Metis have often lacked political structures and have experienced shifts in their members’ self-identification. However, the existence of an identifiable Metis community must be demonstrated with **some degree of continuity and stability** in order to support a site-specific aboriginal rights claim.
1. **Identification of the contemporary rights-bear community**
	1. Community must self-identify as a Metis community
	2. Must prove that contemporary Metis community is a continuation of the historic Metis community
2. **Verification of the claimant’s membership in the relevant contemporary community**
* Courts faced with Metis claims have to ascertain Metis identity on a case-by-base basis. The inquiry must take into account both the value of community self-definition, and the need for the process of identification to be objectively verifiable.
* The criteria for Metis identity under s 35 must reflect the purpose of this constitutional guarantee: to recognize and affirm the rights of the Metis held by virtue of their direct relationship to this country’s original inhabitants and by virtue of the continuity between their customs and traditions and those of their Metis predecessors.
* **Indicia of Metis identity for the purpose of claiming Metis rights under s 35:**

**a) Self-identification** – The claimant must self-identify as a member of the Metis community

* + Must prove shared customs and traditions as well as collective identity
	+ should not be of recent vintage (not opportunistic)

**b) Ancestral connection** - claimant must present evidence of ancestral connection to a historic Metis community

* requires some proof that the claimant’s ancestors belonged to the historic Metis community by birth, adoption, or other means
* Requires a loose connection between the historic and contemporary communities

**c) Community acceptance** – claimant must prove that he/she accepted by the modern community

* Community’s 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**, the customs and traditions that constitute a Metis community’s identity and distinguish it from other groups.
1. **Identification of the relevant time frame**
* **Post-contact** (emergence of Europeans) **but pre-control test** (effective control by Europeans)
* As long as the practice grounding the right is distinctive and integral to the pre-control Metis community, it will satisfy this prong of the test
1. **Determination of whether the practice is integral to the claimants’ distinctive culture**
* General hunting for food an important aspect of Metis life and defining feature of their relationship to the land
1. **Establishment of continuity between the historic practice and the contemporary right asserted**
* There must be some evidence to support the claim that the contemporary practice is in continuity with the historic practice. Aboriginal practices can evolve and develop over time.
1. **Determination of whether or not the right was extinguished**
* The doctrine of extinguishment applies equally to Metis and to First Nations claims
* A Métis individual, who is ancestrally connected to the historic Métis community, can claim Métis identity or rights even if he or she had ancestors who took treaty benefits in the past
1. **If there is a right, determination of whether there is an infringement**
* total failure to recognize any Métis right to hunt for food or any special access rights to natural resources was an infringement of the Métis right to hunt.
1. **Justification of infringement**
* Conservation, health and safety are all reasons that government can use to justify infringing an Aboriginal right, but they have to prove that there is a real threat.
* Even if a specific species under threat, Metis still get priority allocation to satisfy subsistence needs (Sparrow)

**Did the Crown discharge its procedural duty to consult and accommodate** (**Haida**)

**1. Does Crown have knowledge, actual or constructive, of a potential claim/right;**

**2. Is Crown contemplating conduct which engages a potential aboriginal right**

**3. There must be potential that contemplated conduct may adversely affect an aboriginal claim/right**