**Aboriginal CAN**

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# HISTORY

## Time Line of Aboriginal Relations

* 1. early interactions between European powers and settlers and Indigenous nations along the eastern side of North America
	2. Establishment of rules around interactions *between* European powers

 🡪Doctrine of discovery – played key rule in structuring relations between Euro powers

* 1. Establishment of policy – that some see as crystallizing into law – around British-Indigenous interactions (culminating in the *Royal Proclamation, 1763*, and evident in treaty-making past that point)

 🡪 RP led to a certain policy that went on in future – dealing with land, and also protection of aboriginals

* 1. Shift in understandings of that policy/law – Marshall C.J.’s decisions and *St. Catherine’s Milling*

 🡪 but these cases show us that they re-understood what the RP meant (1820-30s)

* 1. Rise of the oppressive Canadian state – the *Indian Act*, residential schools, a vast web of law and regulation

 🡪 Canadian state became oppressive with these things 🡪 see Sparrow case when there were more restrictions on fisheries

* 1. Mid-twentieth century – attempts on the part of the Canadian government to complete the project of assimilation, and the rise of Indigenous political activism

 🡪 Trudeau’s White Paper an attempt at assimilation

* 1. Recognition of pre-existing Indigenous interests (*Calder*)

 🡪 ***Calder*** decision changed legal landscape b/c of recognitions

* 1. Government responses – land claims policy, new treaty negotiations, pilot programs (for example, new fishery programs along the West Coast)

🡪 developed the land claim policy that is still in place today

## Entrenched Constitutional Rights

### S. 35 *Constitution Act* 1982: recognizes and affirms past and future rights

**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 Metis 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.

**35.1** The government of Canada and the provincial governments are committed to the principal that, before any amendment is made to Class 24 of section 91 of the "Constitution Act, 1867", to section 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 Prime Minister of Canada and the first ministers of the provinces, will be convened by the Prime Minister of Canada; and

(*b*) the Prime Minister of Canada will invite representatives of the aboriginal peoples of Canada to participate in the discussions on that item.

* s.35(3) brings modern day treaties into this area of protected rights.

### S. 25 *Charter*

25. The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including

(*a*) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and

(*b*) any rights or freedoms that may be acquired by the aboriginal peoples of Canada by way of land claims settlement.

## *RCAP Report* = condensed hundreds of years of history of A and Euro relations into a report

Commissioned as a result of recognition of Aboriginal crisis

An interesting attempt to condense multiple historical issues into one report

## *Bearing Witness* = diff. conceptions of treaties from 1600s

* Jackson’s historical research indicates how contrasting assumptions of treaties dates back to some of the first treaties formed in North America occurring between the British and the Iroquois.
* *“ the dissonance between Iroquois and British assumptions and expectations about the purposes and effects of treaties dealing with land rights has continued to reverberate down the centuries and has is mirror images in treaty-making in the 19th and 20th centuries with other Aboriginal peoples and other colonial governments”*
* Different conceptions about treaties, world views continue to haunt the treaty making process to this day.
* Issue of different understanding of a treaty occurred in the **Marshall decision**

## Barriers to Understanding: law, sovereignty, treaties

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

* ***R*o*yal Proclamation*, 1763** captures differing understandings of sovereignty.
* British say the ***Royal Proclamation*** as a declaration of their sovereignty over North America.
* Aboriginals saw ***Royal Proclamation*** as a declaration of the British’s concern over the Aboriginal peoples interest.

Treaties

* Aboriginals historically saw treaties as agreements for resource sharing and a mutual understanding. Whereas Europeans saw these treaties as a document that transferred ownership of the land.

# Early Jurisprudence 1600s – early 1800s

### The Marshall Trilogy (U.S. Supreme Court): distorted view of aboriginal relations history imported into Canadian jurisprudence

* **These U.S. decisions end up being used as precedence in Canada** (similarities in ***St. Catherine’s Milling***)
* State of Georgia trying to rid itself of Indian peoples
* CJ Marshall became aware of what State of Georgia was trying to do.
* **Doctrine of discovery** claimed in U.S. and became the basis for much of treatment of aboriginal land relations

### *Johnson and Graham’s Lessee v. William M’Intosh (1823)*

* **View of history informs the judgement of the cases**
* History plays a role in justifying some of the legal principles that have developed

### *Worcester v. Georgia (1832)*

* “doctrine of discovery” = if you were the first European power to discovery a land, you could exclude other European powers from your claim. This European power that discovers has **jurisdictional authority**.

### *Cherokee Nation v. Georgia (1831)*

Key legal principles, positions and concepts that emerge **Marshall** **trilogy**

1. The ‘doctrine of discovery’
2. ‘occupation’ (in relation to ownership or title)
3. ‘jurisdiction’ or dominion (in relation to ownership or occupation)
4. ‘protection’ (in relation to sovereignty)
5. Indian powers of governance
6. Indian interests in land/territory

## *Royal Proclamation, 1763* = aboriginal land rights burden on perfection of crown title

* Below all titles – there is an underlying title to the government
* Indian interests are a burden on that title.
* A treaty at this time meant that interest in land released and therefore perfects crown title on the land.

Whilst there have been changes in the administrative authority, there has been no change since the year 1763 in the character of the interest which its Indian inhabitants had in the lands surrendered by the treaty. Their possession, such as it was, can only be ascribed to the general provisions made by the royal proclamation in favour of all Indian tribes then living under the sovereignty and protection of the British Crown. It was suggested in the course of the argument for the Dominion, that inasmuch as the proclamation recites that the territories thereby reserved for Indians had never "been ceded to or purchased by" the Crown, the entire property of the land remained with them. That inference is, however, at variance with the terms of the instrument, which shew that the tenure of the Indians was a personal and usufructuary right, dependent upon the good will of the Sovereign. The lands reserved are expressly stated to be "parts of the dominions 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 the Indians, as their hunting grounds, under his protection and dominion.

### *The Indian Act* (1876): federal doc. asserting fed. policy over A ppls - assimilation

* An assertion of federal government policy of aboriginal peoples
* Primarily a policy for assimilation
* Still exists to this day.
* Both government and aboriginals want it abolished for different reasons.

### St. Catherine’s Milling and Lumber Co. v. The Queen (1882) = Interprets RP to mean that Indian title is only a “personal and usufructuary right” – cnts burden idea from RP

* Established Indian title as a burden on Crown land
* Idea continues to this day
* **Indian title** is a “personal and usufructuary right”

# Pre S.35 Cases in the 20th Century

## *White Paper* - “a failed attempt at assimilation”

* Trudeau’s “***White Paper***” stated that treaties were to no longer have legal recognition.
* An attempt to assimilate aboriginal peoples. Wanted ***Indian Act*** repealed. This was unsuccessful and did not become law.
* With the advent of the ***Charter*,** post 1982 treaties are not just legal instruments but now constitutionally protected instruments.

## *Calder v Attorney General (1973):* “RP NOT sole source of Indian Title”, “extinguishment requires CLEAR AND PLAIN INTENT”

* FACTS: case arose because of aboriginal activism responding to the governments attempts to abolish ***Indian Act*** and assimilation policies.
* Nisga’a at heart of case trying to show title
* Nisga’a technically lost because not possible at this time to sue crown but if you analyze the numbers breakdown between the sitting judges, they did accomplish a win.
* Nisga’a win b/c judge recognizes that the **RP** is the source of Indian Title, but not the **sole source.**

(by another judge: Judson J)*“… 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.”*

* Judge says concept of **“personal or usufructuary right”** from ***St. Catherines***is not helpful.
* **extinguishment**: judges look to ***Marshall******Trilogy*** on issue of extinguishment

Test: extinguishment requires **CLEAR AND PLAIN INTENT** in colonial instruments.

The Crown must provide proof: ex. treaty doc clearly stipulated intent to remove Indian title

* Calder initiated a change in government policy towards aboriginals:

gov allowed for comprehensive claims and special claims

helped initiate creation of **s.35**

* Pulled through from ***St. Catherine’s Milling***
* Indian title as ‘personal and usufructuary right’
* Indian title as a burden on underlying Crown title
* At assertion of sovereignty Crown came to possess ‘radical’ (underlying) title
* Crown is the sole/absolute sovereign (no concept of ‘domestic dependent nationhood’ is considered, let alone recognized
* *Suggestion* that Indian title could be simply grounded in *possession*: was mentioned but this it not settled or fully adopted as law (see William case that just came out)

## *Guerin v. the Queen (1984)* = the crown may owe a fiduciary duty to aboriginal peoples in certain contexts (ex. surrendering reserve lands) 🡪 presumption of Crown sovereignty frames whole discussion

**Facts**: Guerin is a member of the Musqueam Band and they sued Crown over the bad deal they were negotiated into with regard to surrendering a portion of their reserve land so that the Crown could lease it. Golf course went in and got a sweet deal.

- 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

Decision treats Musqueam in a **paternalistic** fashion: this is the emergence of the **fiduciary doctrine**

SCC determines there is not a trust but a fiduciary duty. The federal government has a fiduciary duty to aboriginal people because the Crown has taken over responsibility for Aboriginal people’s interests. This means that it is not in the law of equity and not subject to statutory limitations.

**Fiduciary duty =**

The party with more power must act honestly and in good faith with a view to the best interests of those they look after.

Prof doesn’t like b/c this concept creates “paternalism in the law” – parent to child and therefore there is an unequal power balance

Why no trust: there cannot be a trust because the Musqueam didn’t possess a legal interest, their title is different. Remember the land title they gave up was *sui generis* (goes back to ***St. Catherines*** idea of *personal usufructuary right*)

**How is this related to the notion that ‘Aboriginal title’ constitutes a ‘personal and usufructuary right’?**

*= sui generis – fiduciary interest can only be created because this is not a legal interest which related to AT and “personal and usufructuary right* 🡪 *something that does not fit into the traditional land title system of BC*

Where we stand on aboriginal title and rights issues after this decision:

Aboriginal title is now firmly ensconced in the common law as ‘sui generis’ – it is neither simply a ‘beneficial interest’ nor a ‘personal and usufructuary right’. 🡪 it does not disappear after surrender nor does it exist like fee simple – it is somewhere in between

Indigenous interests in land (whatever their nature) seem to have to be surrendered to the Crown in order to serve economic purposes.

A powerful undercurrent of paternalism remains unchallenged.

#  “Aboriginal Rights” General Framework Established

## *R v Sparrow (1990)* – est. framework for infringement, Crown has fiduciary obligation, Crown sov. remains but must be reconciled with s. 35

**Facts:** member of the Musqueam Indian Band, was charged under Fisheries Act for fishing with a drift net longer than that permitted by the terms of the Band's Indian food fishing licence.

Sparrow argued: he was exercising an **existing aboriginal right** to fish and that the net length restriction contained in the Band's licence is inconsistent with **s. 35(1)** of the Constitution Act, 1982 and therefore invalid.

Crown argued: regulation **extinguished the aboriginal right**

**Conclusion:** yes the Musqueam have an aboriginal right to fish the Fraser – but this specific to the case- no broad statements about other native band fishing rights 🡪 case sent back for retrial to apply the framework established from ***Sparrow***

* First case to look at s.35 at what it means for the Crown in regard to aboriginal peoples. There is an implied fiduciary duty when engaging in aboriginal relations.
* 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 affect.
* The Constitution is a “**living tree”** and therefore a flexible interpretation must be given. The SCC **rejects the idea that s.35 only protects existing aboriginal rights** – aboriginal rights are not frozen in time and can evolve just like what is in the rest of the Constitution.
* **self-regulation =** Court for the first time subtlety mentions that aboriginal people have historically self-regulated themselves when discussing how the Musqueam did this

*🡪 It was in the beginning a regulated, albeit self‑regulated, right*

* **crown sovereignty =** Court still asserts Crown sovereignty: (*Calder, Guerin, St. Catherines milling picked up)*

 🡪 *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*

* **legal rights not policy =** Court affirms that aboriginal rights are about law and not just policy because they now have a legal footing with their addition to the Constitution:

*🡪 Section 35(1), at the least, provides a solid constitutional base upon which subsequent negotiations can take place*

* Court adopts a **“purposive approach”** to s. 35 interpretation of aboriginal rights

🡪 *generous, liberal interpretation of the words in the constitutional provision is demanded.”*

* **Reconciliation** language is used 🡪 crown is sovereign but this is not unlimited – must be reconciled with **s.35**
* **Honour of Crown, fiduciary duty**
	+ SCC approved idea from ***R v Taylor*** and ***Williams*** that there is a presumption of the **“Honour of the Crown”** (see ***Haida Nation***), and further took from ***Guerin*** idea of ***“*fiduciary duty”**
* **Consultation** 🡪 mentioned for the first time
	+ *… there are further questions to be addressed, depending on the circumstances of the inquiry.  These include the questions of whether there has been as little infringement as possible in order to effect the desired result; whether, in a situation of expropriation, fair compensation is available; and, whether the aboriginal group in question has been* ***consulted*** *with respect to the conservation measures being implemented. [1119]*

### Sparrow Framework for Justification of Infringement

#### 1. Is there an existing aboriginal right being claimed? (onus on abo)

Onus on the aboriginal community

See ***Van der Peet*** to determine how aboriginal community defines right

usually easy to est.

for ***Sparrow***- the court found this was easily met:

*the salmon fishery has always constituted an integral part of their distinctive culture*

SCC found definite right for food and ceremonial b/c at heart of culture 🡪 but commercial ?

####  2. Has the right been extinguished? (onus on Crown if wants to prove)

Crown will have to show there was **“clear and plain intent**” to extinguish the right (applies ***Calder***)

*The test of extinguishment to be adopted, in our opinion, is that the Sovereign's intention must be clear and plain if it is to extinguish an aboriginal right*

test for “intent” has implications for treaties 🡪-

Ex = Position of the Crown is that terms in the treaties meant an extinguishment of A rights 🡪 but if a treaty nation disagrees with this b’c they thought it meant differently 🡪 this would Not be clear & plain intent

#### 3. Is there a prima facie infringement? (onus on abo community)

Three questions must be asked to determine if there is infringement and the aboriginal community has onus of establishing this:

*To determine […] a prima facie infringement of s. 35(1), certain questions must be asked.* ***First,*** *is the limitation unreasonable?* ***Second,*** *does the regulation impose undue hardship?* ***Third,*** *does the regulation deny to the holders of the right their preferred means of exercising that right? [1112]*

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 is a “sense of infringement” = *prima facie infringement*

#### 4. Can the infringement be justified? (onus on the Crown)

**2-stage analysis**

**1.** Is there a valid legislative objective to the law which is infringing?

* “public interest” is not enough (but note ***Gladstone***)
* must be a **“pressing and substantial objective”** if it is to be considered a valid objective
* EX. of valid obj: protect natural resources, exercising a s.35 aboriginal right would cause harm to the general populace or even the aboriginal ppl themselves.

**2.** If a valid objective is found, is the infringing law’s means in keeping with the Crown’s duty to act honourably?

* Honour of the Crown and fiduciary pose challenges for Crown
* The SCC gives a list to prioritize rights:

1. Conservation

2. Indian Food Fishing

3. Commercial Fisheries

4. Sport Fisheries

## *R v Van der Peet (1996)*: gives the test for characterizing an aboriginal right – pre-contact practice is central to the proving the right is “integral and distinctive to your culture”

**Facts**: Van der Peet tried to fight her charge. She sold ten fish that she was not allowed to b/c she only had a food fishing licence from her band. Sto:lo had been around Chilliwack area for thousands of yrs and they obviously believed that had a right to fish that included a right to sell fish

**Holdings:** lower courts – show that under this right to fish there are subsidiary rights including to sell fish. this case goes up through the courts and there is disagreement between courts what the Sto:lo have rights too.

Prov ct: *salmon trade that occurred was incidental and occasional*

BCSC: *evidence in this case was consistent with an aboriginal right to sell fish because it suggested that*

*aboriginal societies had no stricture or prohibition against the sale of fish,*🡪if right to fish = right to sell

BCCA: evidence doesn’t support a claim to have a right to sell fish (Lambert JA in dissent: we must ask go to the aboriginal group them what is the significance of the practice to their culture 🡪 they have pre-existing legal systems 🡪 McLachlan agrees)

Lamar J majority reasons at SCC:

* sees aboriginal rights as minority rights

*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.***

**=** rights b/c are aboriginal 🡪 nothing about how they were here first and tied to land

* Analyzing the **intent** behind **s. 35** requires a **purposive approach**
* Analysis of s. 35:

*In my view, the doctrine of aboriginal rights exists, and is recognized and affirmed by s. 35(1), because of one simple fact: when Europeans arrived in North America,* ***aboriginal peoples were already here****, living in communities on the land, and participating in distinctive cultures, as they had done for centuries.*

Problematic for aboriginals that Lamar says this is the only fact that separates aboriginal peoples from other minority groups 🡪 seen as a slip back from ***Sparrow*** highpoint

* + - * + Interesting dissents from McLachlin and L’herouxdube – whose views are more favourable to aboriginals

L’herouxdube = **aboriginal rights should be given a generous and large liberal interpretation and we must go to the people to ask what the right is**

McLachlin = we don’t need to have this second Gladstone framework – but if we just take the approach to defining the right more carefully it will be better

 263.  ***The history of the interface of Europeans and the common law with aboriginal peoples is a long one.  As might be expected of such a long history, the principles by which the interface has been governed have not always been consistently applied.  Yet running through this history, from its earliest beginnings to the present time is a golden thread ‑‑ the recognition by the common law of the ancestral laws and customs the aboriginal peoples who occupied the land prior to European settlement.***

This is nice but not a very accurate identification because no golden thread

McLachlin thinks that there is a “golden thread” because common law courts have recognized pre-existing aboriginal laws

- if u think bout Crown as being a fiduciary – it doesn’t work if u use the Gladstone reworked test – u can’t take interests that are under the an aboriginal governments control and give them to other parties

She thinks Lamar’s approach threatens the aboriginal rights because it takes historical rights away from aboriginal peoples in the interest of reconciliation.

if u work through the Gladstone framework – u are giving rights to other parties – and this is not constitutionally acceptable

*Having defined the right at issue in such a way that it possesses no internal limits, the Chief Justice compensates by adopting a large view of justification which cuts back the right on the ground that this is required for reconciliation and social harmony: Gladstone, at paras. 73 to 75.*

### “How to Characterize an Aboriginal Rights” Test = a right integral and distinctive to the culture (line taken from *Sparrow* to form test developed in *Van der Peet) 🡪but this places an evidentiary burned on aboriginal peoples* (as seen in *R v Sappier, R v Gray)*

Integral distinctive culture test:

***In order to be an aboriginal right an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right.***

* **Problems w/ test**: it is a test bout culture and it is recovered from the history. But this test does nothing to touch on colonialism, marginalism, and overall a long history of oppression

Lamar CJ , provided **ten factors** that a court should consider as it goes about applying this test in any particular situation

 **1.** Courts must take into account the perspective of aboriginal peoples themselves

***In assessing a claim for the existence of an aboriginal right, a court must take into account the perspective of the aboriginal people claiming the right.***  In *Sparrow*, *supra*, Dickson C.J. and La Forest J. held, at p. 1112, that it is "crucial to be sensitive to the aboriginal perspective itself on the meaning of the rights at stake".  ***It must also be recognized, however, that that perspective must be framed in terms cognizable to the Canadian legal***

***and constitutional structure.***

***--- True reconciliation will, equally, place weight on each.*** but this is not true from what is said above

even once we take into aboriginal perspective – the right must be reconciled with Canadian common law

 **2.** Courts must identify precisely the nature of the claim being made in determining whether an aboriginal claimant has demonstrated the existence of an aboriginal right

51. … *in order to determine whether a claim meets the test of being integral to the distinctive culture of the aboriginal group claiming the right, the court must first correctly determine what it is that is being claimed.*

53. To characterize an applicant's claim correctly, a court should consider such factors as *the nature of the action which the applicant is claiming was done pursuant to an aboriginal right, the nature of the governmental regulation, statute or action being impugned, and the practice, custom or tradition being relied upon to establish the right*.

* Para 53 spells out the three things:
	+ the court considers the three aspects and out of this they are supposed to characterize a right
	+ right ends up being narrow b/c it is tied to the practice – instead of addressing the broad right first we start specific with the practice and therefore this isn’t good for Abs
	+ you begin with the practice to asses the right – but the right unfortunately will end up being very narrow because it is tied to the practice
	+ Prof thinks *Van der Peet* is really talking about activities and not rights

 **3.** In order to be integral a practice, custom or tradition must be of central significance to the aboriginal society in question

*The claimant must demonstrate that the practice, custom or tradition was a central and significant part of the society's distinctive culture.  He or she must demonstrate, in other words, that the practice, custom or tradition was one of the things which made the culture of the society distinctive -- that it was one of the things that truly made the society what it was****.***

*To reconcile aboriginal societies with Crown sovereignty it is necessary to identify the distinctive features of those societies; it is precisely those distinctive features which need to be acknowledged and reconciled with the sovereignty of the Crown.*

* + the right has to be measured at the point of contact, so it has to be something that was done 200 years ago and still practiced today
	+ aboriginal community must show that this right made the community what they were
	+ try and imagine what the people would be like had the practice not existed-
	+ This is quite difficult – the test has developed in that is really difficult for the aboriginal people to establish –anthropologist think it is difficult 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 aboriginal rights are those which have continuity with the practices, customs and traditions that existed prior to contact

*It is not the fact that aboriginal societies existed prior to Crown sovereignty that is relevant; it is the fact that they existed prior to the arrival of Europeans in North America*

* this is very difficult though, it is an uneven test across Canada – if u need to go to the point of contact at each location – must hire historians anthropologists, ethnographers 🡪 so very expensive to natives
* - Lamer says there can be breaks in this continuity but does not specify
* - if the crown does something that makes the break then this should be overlooked and be in the Abs favour
* this would not work for Metis b’c the test will have to be modified b/c the metis culture was not made at point of the contact
* -Lamer also recognises that rights can evolve overtime.

*Sparrow*, *supra*, at p. 1093, that *"the phrase ‘existing aboriginal rights’ must be interpreted flexibly so as to permit their evolution over time*

*The evolution of practices, customs and traditions into modern forms will not, provided that continuity with pre-contact practices, customs and traditions is demonstrated, prevent their protection as aboriginal rights.*

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

* if u are going to a point of contact – this is the point where u need to determine the rights – there is not a lot of evidence – so rules of ev must be looked at in light of these problems
* Delgamuukw says “oral evidence “ should be given weight

 **6** Claims to aboriginal rights must be adjudicated on a specific rather than general basis

* Abs must establish there own rights by themselves. – imagine u have two FN side by side --. If one goes to court to show u need to hunt – this will not translate into anything for the other communities – **so lots of hundreds of millions dollars spent within this area b/c every single community needs to establish their rights on their own**

 **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

* at the very lowest level the prov ct judge thought that the sto:lo’s trading of fish was not integral – so Lamer says if it is only incidental then it is not a sufficient right.
* there was another case that said incidental rights ok in the treaty process but not in the rights process

 **8** The integral to a distinctive culture test requires that a practice, custom or tradition be  distinctive; it does not require that that practice, custom or tradition be distinct

* Lamer emphasizes the importance of “distinct” –
* the court says that something that is shared by all cultures “like eating” is not an ab right – ab right don’t need to be distinct to the degree that no other ab does it but can’t be so universal that all cultures do it

 **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.

* the court recs that the influence of euro culture should not affect the ab but if it solely goes back to euro culture then that is too much of a mixing

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

* Sparrow was bout ab rights
* this paragraph says ab rights are a big thing, and that AT is a part of Ab rights, it says that at one side there are rights not tied to land (language) then we have rights in the middle fishing and land 🡪 then on the other side we have rights tied to land

## *R v Gladstone*: made adjustments to the Sparrow framework for infringement

**Facts**: Gladstone, an Aboriginal member of Heiltsuk Band, violated Pacific Herring Fishery Regulations, by attempting to sell herring spawn on kelp to a store not caught under the authority of a Category J herring spawn on kelp licence. Gladstone had a Indian food fish licence permitting him to harvest herring spawn but didn’t have the Category J needed to sell spawn.

Gladstone argued: the regulation violates his **s.35 Aboriginal right** and therefore by operation of s.52 of Constitution Act are of no force or effect

* ***Sparrow*** arose in a particular set of circumstances and ***Gladstone*** realizes that we must add adjustments
* ***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)

 **2 differences to Sparrow**

* ***1. Gladstone*** says the test for infringement will be modified for non-internal limits like commercial. The Sparrow priority scheme (4 different groups) makes sense for internal limit

62. *Where the aboriginal right is one that has no internal limitation then the doctrine of priority does not require that, after conservation goals have been met, the government allocate the fishery so that those holding an aboriginal right to exploit that fishery on a commercial basis are given an exclusive right to do so.  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.***

* The government must show the process of allocation of resource both procedurally and substantially
* ***Gladstone*** uses the same idea of priority but a different set of priority
* **Test for infringement of non-internal:** the court looks what the crown has done in its priority scheme for allocating a resource and determines whether this ***reflects that it has truly taken into account the existence of aboriginal rights***.
* this is an imprecise test
* **2.** when assessing gov objectives it can be tied to a process of reconciliation 🡪 broadens range of objectives: regional and economic fairness, policy – but McLachlin does not agree

## *R v Sappier/R v Gray (2006)*: an application of the *Van der Peet* test for “distinctive culture” 🡪 applies dissent from L’Heureux-Dube and McLachlin in *Van der Peet*

**Facts**: both groups charged with unlawfully harvesting forest timber

Aboriginal argument: Two aboriginal groups argue the 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. The claimed right refers to the practice of harvesting trees to fulfil the domestic needs of the pre-contact communities for such things as shelter, transportation, fuel and tools. The Maliseet and Mi’kmaq were migratory living from hunting and fishing, and using the rivers and lakes of Eastern Canada for transportation.

Crown argues: harvesting wood was just done for survival (and now don’t need to do this to survive)

**- *The central question on appeal is how to define the distinctive culture of such peoples, and how to determine which pre-contact practices were integral to that culture.*** Conclusion: **Aboriginals win**: practice of harvesting wood for domestic uses **was integral** to the pre-contact distinctive culture of both the Maliseet and Mi’kmaq peoples.

* ***The pre-contact practice is central to the Van der Peet test*** for two reasons.

1. 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. …*

2. necessary to identify the pre-contact practice upon which the claim is founded in order to consider how it might have evolved to its present-day form. **Recognizes rights not frozen in time**

* **Traditional means of sustenance (**like harvesting timber for shelter) can be considered **integral to the distinctive culture of the aboriginals** even if it is merely undertaken for survival purposes
* In ***Mitchell***, McLachlin made a reference that the **Van der Peet** test requires showing the practice, custom or tradition must be ***integral to the distinctive culture in the sense that it is at the “core” of their identity and thus without it the culture could not exist***
* 🡪BUT ***Sappier, Gray*** says **THIS SHOULD NOT RESULT IN AN INCREASED THRESHOLD**

… As L’Heureux-Dubé J. explained in dissent in *Van der Peet*, “[t]he ‘distinctive aboriginal culture’ must be taken to refer to the reality that, despite British sovereignty, aboriginal people were the original organized society occupying and using Canadian lands … ***The focus of the Court should therefore be on the nature of this prior occupation. 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***. The use of the word “distinctive” as a qualifier is meant to incorporate an element of aboriginal specificity. However, “distinctive” does not mean “distinct”, and the notion of aboriginality must not be reduced to “racialized stereotypes of Aboriginal peoples” (J. Borrows and L. I. Rotman, “The *Sui Generis* Nature of Aboriginal Rights: Does it Make a Difference?” (1997), 36 *Alta. L. Rev.* 9, at p. 36).

* The court is to look at how the practice relied upon relates to a particular way of life 🡪 aboriginals are not frozen in time and can only use wood for canoe –building. Using wood is a practice integral to the way of life as a whole, not integral to building canoes 🡪 ***“If aboriginal rights are not permitted to evolve and take modern forms, then they will become utterly useless”***

# “Aboriginal Title”: The Framework

## *Delgamuukw v. British Columbia*: AT requires = pre-sovereignty occupation, continued occupation till present, exclusivity at sovereignty

**Facts**: Gitzgan people. The case was sent back for re-trial after costing 25 million. Most of what has taken to be law is obiter.

* 4 main things that came out of the Delga 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*

2. The ability of Canadian governments to (a) extinguish, and (b) infringe upon Aboriginal title;

3. The justification of infringement

4. The movement toward a vision (of reconciliation)

* **1 The content of AT:**

**inalienable =**  the land is **inalienable** (concept retained from ***Calder***and ***Guerin***) and it is different from other property interests because does not come from crown grant

**prior occupation** = source of AT is in **prior occupation** (not from RP as was said in ***St. Catherines***)

**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-gov)

**Definition of AT:** a type of site-specific aboriginal right

***the content of aboriginal title can be summarized by two propositions:***

***(1) first, that 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 are integral to distinctive aboriginal cultures;***

***(2) that those protected uses must not be irreconcilable with the nature of the group’s attachment to that land.***

Requirements for showing AT (this is the likely physical extent of it)

**1**. the land must have been occupied prior to sovereignty

**2.** present occupation is relied on as proof of occupation pre-sovereignty, there must be a continuity between present and pre-sovereignty occupation

**3.** At sovereignty, that occupation must have been exclusive.

occupation = physical (hunting grounds)+ exclusion

**Exclusion** requires the intent to exclude others and the capacity to do so

this is more difficult to show that ***Van der Peet* rights test**

court allows aboriginal perspective to be given weight when determining exclusivity 🡪 **but Abo perspective must fit into Crown perspective**

**shared exclusivity maybe permitted**: *“I would suggest that the requirement of exclusive occupancy and the possibility of joint title could be reconciled by recognizing that joint title could arise from shared exclusivity. “ 🡪****But one group would have to have control***

\*case leaves many questions bout exclusivity

\*AT crystallizes at time of crown sovereignty

court continues to require pre-sov proof b/c holds on to the idea that AT is a burden on crown title

\* case gave a lot to aboriginals because AT was seen more than just a bundle of rights, it was a right to the land

but put limits on the extent of AT

\* if aboriginal cannot show exclusivity required for AT 🡪 can still show rights

The role of indigenous law and political structures determining

a) source of AT

b) content of AT

Unfortunately to the court 1)communally held + 2) decisions bout land ≠self-governance?

**Gitksan** argue that there political system should be the way AT is defined – but this is rejected by court b/c their perspective must fit within Canadian common law

The aboriginals cannot frame their right to self-government too broadly as was done in ***Pamajewon*** (BUT I think framing rights to self-gov narrowly is hard to do)

Aboriginal governance or jurisdiction

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 the ingredients for self-government)

* **2 The ability of the Canadian government to (a) extinguish, and (b) infringe upon aboriginal title**

the *federal government* has exclusive jurisdiction legislate from **s.91(24)** in relation to Aboriginal rights (including title) and flowing from this is the right to extinguish

**BC government CANNOT** extinguish aboriginal 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 aboriginal rights 🡪 would not meet ***Calder***  test for “**clear and plain intent”**)

* **3 The justification of infringement on AT**

Lamar J says that reconciliation is why we have **s.35**

*… 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.***

Infringement can be justified if the “*objectives furthered by those limits are of sufficient importance to the broader community as a whole, equally a necessary part of that* ***reconciliation”***

**Court will not heavily scrutinize crown** when reviewing justification fro infringement

**Follows Gladstone framework** fro infringement not ***Sparrow*** –

**Liberal range of objectives permitted for infringement** 🡪 as long as the crown does not do something corrupt, it is likely that infringement can be justified

*In my opinion, the development of agriculture, forestry, mining, and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations to support those aims, are the kinds of objectives that are consistent with this purpose and, in principle, can justify the infringement of aboriginal* **🡪 weird that these are all provincial powers but provinces can’t infringe ? doesn’t make sense**

**Consultation duty emergence** – (*went beyond* ***Sparrow*** *mention)* you might need to get aboriginal group on board if want to build a mine 🡪 **consultation may satisfy the fiduciary relationship**

**if AT is damaged to a significant point there must be compensation**

* **4 The movement toward a vision (of reconciliation)**
* **Competing theories - On the nature of Aboriginal title (between the parties)**

**Crown**: Lingering refusal to acknowledge the existence of AT

Vision of AT as nothing more than the gathering together (over a tract of land) of the various Aboriginal rights that might exist in relation to that land (the ‘bundle of rights’ theory)

Gitskan/Wet’suwet’en: AT based, at least partially, on their own legal systems/practices/traditions

# Aboriginal Title Post Delgamuukw

## *R v. Bernard/R v. Marshall*: addressed whether nomadic or semi-nomadic peoples can claim title to land (

**Facts**: both cases were separate but came together as went up in the courts.

Both involve the **Micma.** They were **nomadic** so it is difficult for them to show exclusivity and occupation required for AT.

- ***Can oral evidence be used?***

- at trial there claim for AT was not found.

* **Equal weight to both perspectives? =** The court states that the issues before the court must be given equal weight to aboriginal perspective: *But it is important to understand what we mean when we say that in determining aboriginal title we must consider both the common law and the aboriginal perspective.*
* **Not really equal weight** – aboriginal perspective had to fit into the common law: *The Court’s task in evaluating a claim for an aboriginal right is to examine the pre-sovereignty aboriginal practice and* ***translate that practice,*** *as faithfully and objectively as it can,* ***into a modern legal right***.

“square peg into a hole” (but not entirely perfect depiction because the common law can be adjusted too)

**Consider aboriginal perspective** but not give equal weight (In dissent Lebell and Fisher think aboriginal perspective should be given equal weight 🡪 **the SCC has different views on the amount of weight to give aboriginal perspective**

***Adam*** *case* references = seasonal hunting and fishing rights **will not** be AT but will be AR

**Test for AR that fits with the common law:** *Unaided by formal legal documents and written edicts, we are required to consider whether the practices of aboriginal peoples at the time of sovereignty compare with the core notions of common law title to land.* **🡪 we can’t look for Euro-type evidence of title – we must look for the equivalent in the aboriginal culture at issue**

1. **What is meant by exclusion**

in common law, right to exclude others is assumed by dint of law

circular requirement = have to show exclusivity to get title even though title would show exclusivity (b/c that is what title means – it is assumed by dint of law)

**evidence of physical exclusion not necessary – just capacity to exclude**: *evidence of acts of exclusion is not required to establish aboriginal title. All that is required is demonstration of effective control of the land by the group, from which a reasonable inference can be drawn that it could have excluded others had it chosen to do so*

No explanation for why exclusion required just assumed to be

**2. Can nomadic or semi-nomadic people claim title to land**

it will depend on the degree of occupation: ***Adams*** *asserts that one of the reasons that aboriginal rights cannot be dependent on aboriginal title is that this would deny any aboriginal rights to nomadic peoples {..] BUT****, Delgamuukw*** *contemplates that “physical occupation” sufficient to ground title to land may be established by “regular use of definite tracts of land for hunting, fishing or otherwise exploiting its resources”*

**Oral evidence** can be accepted: *provided the conditions of usefulness and reasonable reliability set out in* ***Mitchell v. M.N.R.*** *are respected.*

## *William v. British Columbia (2012 BCCA)* = Delga revisited?

**Facts**: The Tsilhqot’in people claim title to an area that comprises only about five

percent of what they as their traditional territory.

- This came to a head when the BC government was doing logging.

Conclusion**:** aboriginal lost because they used the territorial idea and this does not meet the test in ***Delga*** or ***Bernard, Marshall***

* TJ held that: ***British Columbia did not have constitutional competence to regulate forestry on land subject to Aboriginal title***.
* BCCA judge develops a theory of AT from the Tsilhqot’in people: a territorial theory of AT (versus the site-specific theory in the **Delga** and **Bernard, Marshall**)
* Crown argued against the territortial theory of AT: *Aboriginal title could only be demonstrated over smaller tracts of land (like village sites, cultivated fields, and specific trapping or fishing sites) that were occupied by a First Nation intensively and, if not continuously, at least regularly*
* Groberman J agreed that a “territorial approach” is better but agreed with crown that this didn’t meet the test of site-specific from test in ***Delga*** or ***Bernard, Marshall.***
* Groberman J did not see the “territorial approach” fitting with reconciliation:

*Further, as I will attempt to explain, I do not see a broad territorial claim as fitting within the purposes behind* [*s. 35*](http://www.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_smooth) *of the* [*Constitution Act, 1982*](http://www.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) *or the rationale for the common law’s recognition of Aboriginal title.*

*Finally, I see broad territorial claims to title as antithetical to the goal of reconciliation, which demands that, so far as possible, the traditional rights of First Nations be fully respected without placing unnecessary limitations on the sovereignty of the Crown or on the aspirations of all Canadians, Aboriginal and non-Aboriginal.*

# Metis Rights

## *R v. Powley* (2003)

Facts:

* The discussion in van der Peet on the purpose of s.35 doesn’t fit the metis:
* to recognize pre-existing ppl to crown, and 2) reconciliation of crown with this pre-existing ppl
* but the metis were not pre-existing – they were a separate ppl created. So s.35 for the metis means that there is a need to protect them.
* there is an understanding of the court that aboriginal rights are grounded in a pre-existence pre-contact way 🡪 so for metis s. 35 must focus on a different thing
* van der peet has a “integral cultural test” 🡪 the existence of aboriginal ways of life 🡪 therefore for the metis this idea slides over as the purpose for s. 35
* Canada continues to fight the world “peoples” used in the international context b/c “peoples” have specific rights vs what Canada prefers as “populations”
* **Modified *Van der Peet* test for Metis**

metis “**cultural**” idea modifies the ***Van der Peet*** test.

no pre-sovereign aspect required for metis b/c didn’t develop until after contact: *the 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. This unique history can most appropriately be accommodated by a post-contact but pre-control test that identifies the time when Europeans effectively established political and legal control in a particular area*.

**easier test** for Metis – some think this should be test for all aboriginal groups

# 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:**
			* Aboriginals thought of treaties documents as **spiritual instruments** and **dynamic**
			* “treaties are akin to a marriage between people”
		- **Government** **treaty perspective**:
			* historically saw treaties as historical documents that are static 🡪 do not evolve with time
			* odd that government gave treaties when they believed they had title to all of the land
* Every Canadian has treaty obligations – aboriginals think all Canadians are treaty people and continue to benefit from treaties
* Historical examples of treaties
	+ - *Sioui* case shows that whole treaty was contained in one paragraph therefore questionable
* Interpretation of Treaties: can be evolving docs

## *R v. Marshall I* – Binnie J says “honour of crown” required for interpretation of treaties

Facts: Marshall caught with illegal fishing. his band was part of a treaty

* McLachlin in dissent says treaties interpretation should be “large and liberal” because as a result of **s.35** they are a constitutional document
* The court will **“presume the honour of the crown” in treaty negotiation**
* Binnie J. makes use of ‘honour of the Crown’ in finding the right to trade (and to pursue resources from the sea to trade):
	+ binnie says the honour of crown demands him to interpret this right to trade as gathering (new Manitoba Metis Case: honour of the crown is key – it is the fundamental principle that case involved – therefore according to the Prof – there has been an evolution)
* **extrinsic evidence** can be used in treaty interpretation b/c is constitutional –like document
* **common intentions** must be used
* **treaty rights are subject to regulation 🡪** which parallels the paragraph in ***Sparrow*** that “crown sovereignty has never been questioned”

## *R v. Marshall II (1999)* – power of crown to infringe on treaty rights – 3 possible ways

Facts: non-native fishing coalition concerned with outcome in ***Marshall 1****.* Concerned that their fishing portion would be removed so brought issue to court

* Micma people argued that there use of the fishery was self-regulating and therefore would not impact resource.
* court first points out that marshall 1 was focused on the very narrow facts related to mr. marshall b/c he was a member of a fn group who had a treaty
* court said also that it is always up to the crown to go back and renegotiate or justify infringement its treaty rights
* court says the case bout traditional gathering – berries, fish, it was not before the court whether oil and gas involved
* court first tries to calm things down by saying above – this was anarrow case – specific to circumstances
* **Three Ways that the Crown can internally regulate (infringe) treaty:**
	+ - 1) insignificant effects
			* *treaty rights are limited to securing “necessaries”*
		- 2) regulations of treaty in treaty
			* *The treaty right is a regulated right and can be contained by regulation within its proper limits.*
		- 3) can regulate treaty rights as long as justified based on the Badger(**Sparrow**) test
			* .*and are subject to regulations that can be justified under the Badger test.*
* Court seems to suggest province can infringe on a treaty right

## *R v. Morris* – what are the powers of the provinces in relation to treaty rights? = prov can only regulate within treaty or secondarily regulate if meets the framework from *Sparrow (ABORIGINAL RIGHTS NOT political issue BUT legal)*

**Facts**: Provincial regulation that you couldn’t hunt with a light. This

aboriginal group did this and was charged. deer are attracted to light

Conclusion: hunting with a light okay because is a natural extension of hunting with a fire in a canoe which was a historical cultural practice.

* **Framework for provincial infringement on a treaty right:**
	+ - find a rights infringement
		- analyze whether the infringing provincial legislation is constitutionally valid under the division of powers
	+ but a treaty right is at core of indianess under **s.91(24)** – prov can’t use **s. 88** (laws of general application that make prov laws federal do not apply to treaty process)
	+ province can technically not infringe
* **Subsidiary ways to infringe**
	+ - the prov can regulate within the treaty or secondly regulate if they fit their power within division of powers in the Badger/Sparrow test.
		- the court says that they could have had a regulation in the wildlife act that was relating to “safety” not a complete band
* **The Court addresses the fishing coalitions concerns:**
	+ - Aboriginal are no longer political issues but a **legal issue** because aboriginal rights are protected in **s.35 of the Constitution**

*What is more, it is a political argument that was expressly rejected by the political leadership when it decided to include s. 35 in the Constitution Act, 1982. The democratically elected framers of the Constitution Act, 1982 provided in s. 35 that “[t]he existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed” (emphasis added).*

*It is the obligation of the courts to give effect to that national commitment.*

# Duty to Consult and Accommodate

## *Haida Nation v. British Columbia (Minister of Forests)*: honour of crown requires a “new tool” = duty to consult 🡪high rights + high impact = high consultation

**Facts**: The Haida want a legal avenue to question resource extraction on land they assert title to without having this granted by the courts

* **injunctions** not working – court became reluctant to grant them and this was hard for aboriginal groups to get
* *The Haida argue that absent consultation and accommodation, they will win their title but find themselves deprived of forests that are vital to their economy and their culture.*🡪 **the forests will be gone if they have to wait it out in the court system**
* **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 bout asserting sovereignty

guides the crown from moment of asserting sov, treaty negotaion, treaty implementation

* **Consultation** can solve the issue when there is an absence of a treaty or no established rights 🡪 a major period of development in which the BC gov went about business as usual🡪 need new tool of duty to consult
* **Balancing development with consulation**:

court recognizes the crown must develop – but must be doen in a responsible manner

**Duty to consult arises when:** knowledge + possibility to impact

*when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it…*

**Aboriginals must provide evidence**

General requirement of ‘**good faith’** and ‘meaningful consultation’ on both sides

**Consultation DOES NOT GIVE aboriginals a veto**

Spectrum of Consent: *get a treaty if you want consent*

accommodation (high)

consent required by FN

meaningful/ substantial

notice (low)

\*- higher the rights are (better evidence) and the higher the impact = higher end of spectrum

**Honour always required to ensure s.35 reconciliation.** *The controlling question in all situations is what is required to maintain the honour of the Crown and to effect reconciliation between the Crown and the Aboriginal peoples with respect to the interests at stake.*

**Duty to consult is always on the Crown** (third parties may have contractual obligations though)

# Reconciliation

* Concept of reconciliation has differed between the cases.
* In ***Sparrow*** reconciliation meant the idea that there were legal obligations that temper the crown’s power. ***Sparrow*** said that with the advent of **s.35** aboriginal rights gained constitutional protection based on principles of the rule of law and that the Constitution is the supreme.

* In ***Van der Peet***, Lamar CJ sees reconciliation as in the pre-existence of aboriginals will be reconciled with the sovereignty of the crown. This is what s.35 is about

*30.* ***In my view, the doctrine of aboriginal rights exists, and is recognized and affirmed by s. 35(1), because of one simple fact: when Europeans arrived in North America, aboriginal peoples were already here, living in communities on the land, and participating in distinctive cultures, as they had done for centuries.***

*31. …* ***what s. 35(1) does is provide the constitutional framework through which the fact that aboriginals lived on the land in distinctive societies, with their own practices, traditions and cultures, is acknowledged and reconciled with the sovereignty of the Crown***

* ***Gladstone***: - the court is basically saying that the Crown must be the Crown for al of Canada – and therefore must do things in the interest of everyone.

73. … ***Because … distinctive aboriginal societies exist within, and are a part of, a broader social, political and economic community, over which the Crown is sovereign, there are circumstances in which, in order to pursue objectives of compelling and substantial importance to that community as a whole (taking into account the fact that aboriginal societies are a part of that community), some limitation of those rights will be justifiable***.  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.

* ***Haida Nation***

45 Between these two extremes of the spectrum just described, will lie other situations.  Every case must be approached individually.  Each must also be approached flexibly, since the level of consultation required may change as the process goes on and new information comes to light.  **The controlling question in all situations is what is required to maintain the honour of the Crown and to effect reconciliation between the Crown and the Aboriginal peoples with respect to the interests at stake**.  Pending settlement, the Crown is bound by its honour to balance societal and Aboriginal interests in making decisions that may affect Aboriginal claims.  The Crown may be required to make decisions in the face of disagreement as to the adequacy of its response to Aboriginal concerns.  Balance and compromise will then be necessary.

* The crown must always ask if what it is doing is honourable in circumstances
	+ all this is connected to reconciliation – the crown must be acting honourable in order to affect to s. 35 reconciliation