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The Charter

Part I

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.

Part II

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.

Background

Report of the Royal Commission on Aboriginal Peoples

Commission 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, 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.

'Separate Worlds'; Excerpt from M. Jackson, Bearing Witness

Written about the legal strategies used in *Delgamuukw*. Details the history of contact from 1492 onwards. After the initial warlike Spanish, arrangements with Dutch, British and French were mostly consensual. British law contained the notion that British subjects carried the law with them. Treaties were made between Britain and the aboriginal peoples, but they were probably understood differently due to different conceptions of property or because the drafters were British. Other differences arose out of "policy statements". The aboriginal groups would have had no concept of non-binding declarations of intent. Lastly, Royal Proclamation would have been understood differently due to different conceptions of sovereignty. Aboriginal peoples likely saw it as a statement of protection and alliance, not an assertion of control.

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.

The Marshall trilogy (SCOTUS)

Johnson and Graham's Lessee v. William M'Intosh (US 1823)

F: Plaintiffs received land under grant direct from chiefs of Illinois and Piankeshaw. This grant was contrary to US policy. Defendant held the land under grant from the government.

I: Who has better title?

L: Doctrine of discovery granted Britain sovereignty over land superior to all claims by other

nations. Although this only applied between European nations, it necessarily removed the ability of native peoples to deal with anyone else. This "sovereignty" was transferred to US when they became independent. Indigenous peoples retained **rights of possession and use,** but not absolute rights.

C: Defendant has title since government retains rights to deal exclusively with Natives.

Worcester v Georgia (US 1832)

F: Following *Cherokee Nation v Georgia*, an 1831 decision that described tribes as "domestic dependent nations", Georgia issued laws prohibiting white people living in Cherokee territories without a licence.

I: Is this law valid?

L: Cherokee nation is recognized as **self governing and independent** and therefore not subject to laws of the states. Federal government retained sole rights to negotiate with Indians.

C: Law struck down as invalid (but this ruling was not enforced by the president).

Pre-Charter jurisprudence and Aboriginal title

St. Catherine's Milling and Lumber Co. v. The Queen (1888 Privy Council)

F: Federal government granted lumber licence to SCM for land contained within Treaty 3, under s 91(24). Province challenged the issuance of this permit.

I: Are lands ceded under treaties covered in 91(24) (...land reserved for Indians).

L: Source of the aboriginal interest in land is the royal proclamation. The proclamation only gave a **personal and usufructuary right.** The crown retains the underlying interest. BNA Act gives the provinces all existing interests in land.

A: Due to the BNA Act, the province had the entire beneficial interest in the ceded land. The treaty removed the burden of the land, but did not grant any new interest to the crown. If Indians had the land in fee simple, then the surrender would have been to the federal government and not covered by the BNA Act.

C: Treaty lands are not covered by s. 91(24) since the lands were never 'owned' by the Aboriginal people.

Calder v Attorney General (BC) (1973)

F: Calder and Nisga'a Tribal Council seeking declaration that aboriginal title existed on their lands and had never been extinguished.

I: Was there historically aboriginal title. If so, has it been extinguished?

L/A: Per Judson: Title in BC stems from something other than the Royal Proclamation, since the **Nisga'a had been on the land since time immemorial,** in societies. But, when BC was established as a colony, this right became "dependent on the goodwill of the Sovereign". When legislation opened the area up for settlement, any aboriginal rights were extinguished. Nothing is to be made of treaties made after this was done.

Per Hall: Royal Proclamation was policy expression that eventually became law and as such "followed the flag" into BC. Possession is one source of rights, but only applies if there was a legal system in which those rights could exist. There was no prior legal system in which it could exist. Nisga'a only seeking interest as **personal and usufructuary burden on Crown title**, following the decision in *St. Catherine's Milling*. **Extinguishing these rights can be done by clear and plain intent.** This intent was not present in the actions of the legislation referred to by Judson. Treaties made after this time are evidence that government considered the aboriginal people in that area still had rights that needed to be ceded.

C: SCC ends up dismissing the case on procedural grounds and split 3-3 on the title issue.

Geurin v. The Queen (1984)

F: Musqeum want to lease a portion of their land for a golf course in order to create a revenue stream. To do so, they have to go through the government. They negotiate an agreement with the government, but the terms the government presents to the developer are at about 10% of the agreed upon value. Trial judge accepts they would not have agreed if they had known of the actual terms.

I: What obligations did the Crown owe? Were they breached?

L: Aboriginal title is *sui generis*. Therefore, when surrendering their interest it either disappears (Dickson) or merges into the fee (Wilson). Since the right is personal and usufructuary there is no ownership and so no legal interest can pass. As a result, it is impossible for a trust to be created.

Wilson finds that Crown may owe fiduciary obligation in certain contexts, recognized (but not created) by s. 18 of the Indian Act – this is different from a trust.

Dickson: The limited interest held by the Indian Bands cannot be interfered with by the Crown without consent. Choosing to surrender lands to the crown creates a fiduciary duty on the Crown because the band has no choice of who to surrender to. The inalienability is in place in order to protect the Indians therefore the crown has to actually protect them.

Affirms that aboriginal interests in land pre-date Crown sovereignty, but that **they are burdens on Crown title (affirming *St Catherine's Milling*).**

"*Sui generis*" means more than just a personal right, but less than beneficial ownership.

Ignoring the terms understood by the Band when they agreed to surrender is unconscionable. Equity does not allow unconscionability in a fiduciary.

No mention of self determination or self governance.

"Aboriginal Rights" under s. 35(1)

R v. Sparrow (1990)

F: Sparrow fishing with a net exceeding the maximum length set out in the Indian Food Fishing licence held by the Musqeum. Sparrow argued he had an aboriginal right to fish and, under s.35, that couldn't be interfered with.

I: Does an aboriginal right to fish exist. If so, what are its limits?

L: British policy was to respect aboriginal rights of occupation, but underlying title and legislative power was always in the crown. Section 35 both constitutionalizes existing case law and calls for "just settlement for aboriginal peoples". Thus, treaties and statutes should be interpreted in favour of the Indians and the **honour of the crown must be presumed.**

Framework for approaching Aboriginal rights:

1. Existence of the right (onus on claimant).
2. Extinguishment (onus on crown). Must be "clear and plain" intent to extinguish. (*Calder*)
3. Prima facie infringement (onus on claimant). *Gladstone* clarifies that this should be an easy test to meet. To establish this, a limitation must be:
    a. Unreasonable OR
    b. Imposing undue hardship, OR
    c. Denying holders of a right their preferred means of exercising that right.
4. Justification of infringement (onus on Crown). This is due to the fiduciary relationship identified in *Geurin.* Requires:
    a. Valid legislative objective. This must be compelling and substantial, and includes preservation, prevention of harm but not "public interest".
    b. Is there a link between the justification and the allocation of priorities? Might also need to consider whether there has been minimal infringement (possibly requiring consultation or compensation).

A: Have to reconcile unlimited crown sovereignty with crown responsibility.

1. There is an aboriginal right to fish for food, ceremonial and social purposes. Fishing may be done in a contemporary manner.
2. Historical limitations on fishing did not constitute a clear intent to extinguish aboriginal rights.

Not enough info at trial for the remaining parts.

C: Sent back to trial, which never occurred. Suggests that the proper scheme should be: environment > aboriginal food/ceremonial fishing > commercial fishery > recreational fishery.

R v. Van der Peet (1996)

F: Dorothy VdP charged with selling fish under a food fishing licence. She argues her aboriginal right is for fishing in general, which includes the right to sell those fish for a moderate livelihood.

I: What is the extent of the Sto:lo right to fish?

L: Aboriginal rights must be understood based on the meaning of aboriginality by using a purposive approach. What is the purpose of s. 35? To recognize pre-existence of aboriginal societies and make them special compared to other minority groups. New definition of reconciliation: reconcile aboriginal societies with sovereignty of the crown.

Thus, to be an aboriginal right, an activity must be an element of custom or tradition integral to the distinctive culture of the aboriginal group claiming the right. Ten factors must be taken into account:

1. The perspective of aboriginal peoples (in terms cognizable to the Canadian legal framework).
2. Identify the nature of the claim being made in determining whether an aboriginal claimant has demonstrated the existence of an aboriginal right.
3. The custom must be of central significance to the aboriginal society in question. It is only the distinctive features of the society that must be reconciled with sovereignty.
4. The practice must have continuity with those that existed prior to contact. However, the practice may have evolved into modern forms or have experienced interruptions in practice. (Obviously, this cannot apply to Metis, but that's a matter for another case).
5. Rules of evidence should be relaxed to take into account evidentiary difficulties.
6. Claims must be adjudicated on a specific basis. Aboriginal rights are NOT general/universal
7. The practice must be of independent and integral significance to the aboriginal culture in which it exists.
8. This requires only that the practice is distinctive, not necessarily distinct.

9. Influence of European culture is only relevant if the practice is only integral because of that influence. In other words, if the practice arises solely as a response to European influences, then it cannot be an aboriginal right.
10. Take into account relationship of aboriginal peoples to the land and the distinctive societies and cultures of aboriginal peoples.

A: The trading of fish was not integral to the Sto:lo culture, and therefore does not constitute an aboriginal right.

D: L'Heureux-Dubé: Aboriginal rights, under s. 35(1), must be interpreted in a manner that gives the rights meaning to the natives. It is NOT appropriate to give equal weight to the common law perspective. Instead of focusing on a particular aboriginal practice, a higher level of abstraction must be used. Emphasis should be on the significance of the activity TO NATIVES rather than on the activities themselves. All practices viewed as connected to self identity should be included. She concluded the Sto:lo did have a right to trade for livelihood.

McLachlin: There was not only prior occupation, but also a prior legal regime. Although on a small scale, the right claimed is still one of commerce. Rights are general, their exercise is specific. Disagrees with necessity of pre-contact practice. Rather, what must be shown is that the ancestral customs and laws are being observed. “Integral” comes from *Sparrow*, but was not intended as a “test” and is too broad and categorical (all or nothing).

Instead, in order to define aboriginal rights, an empirical approach should be used – identify what qualified as aboriginal rights in the past. Has always been a recognition of aboriginal laws and customs (*Guerin, Sparrow*). The right in this case is a right to continue to use the resource to provide for traditional needs, albeit in modern form. The Sto:lo traditionally traded the salmon, therefore VdP's sale of salmon is the exercise of that traditional right.

On the question of justification, McLachlin rejects the view in *Gladstone* (below) allowing for very broad justification for a number of reasons:

Firstly, saying it is counter to “pressing and substantial” limits outlined in *Sparrow* and that s. 35 rights should not be analyzed like individual *Charter* rights.

Secondly, she says it is more political than legal and does not provide constitutional guarantees.

Thirdly, she does not think this approach will lead to reconciliation because there is an internal limit if the right is defined correctly. Also, true reconciliation would involve negotiations, not the judiciary.

Finally, she says the *Gladstone* approach to justification is unconstitutional. Unilaterally transferring benefits of rights to non aboriginals is a direct violation of s. 35(1).

R v. Gladstone (1996)

F: Gladstone brothers charged with selling herring spawn. They claimed they had an aboriginal right to sell herring and presented evidence at trial showing that trade in herring spawn was part of pre-contact society.

I: Can the right to sell herring spawn be justifiably infringed?

L: Distinguished from *Sparrow* since the right in *Sparrow* (food for ceremonial purposes) had an internal limit, whereas the right to sell has no limit. If *Sparrow* were applied, the "priority" system would give exclusive access to aboriginals. In this context, considering *Oakes* and *Irwin Toy*, court says government does not need to take the least drastic approach. Rather, it is sufficient to take into account the existence of aboriginal rights.

Another difference is that in *Sparrow* the court just had to consider conservation and not other potentially valid objectives. Valid objectives could include the pursuit of economic fairness and recognition of non-aboriginal participation in the fishery. Reconciliation may depend on these objectives.

In this case, priority over other users does not necessitate exclusivity for the aboriginal group.

Some things that should be considered when determining whether regulations are in line with aboriginal priority are:

1. were the affected aboriginal peoples consulted?
2. is there ample compensation for aboriginals?
3. has the Crown accommodated aboriginal participation in the regulated conduct?
4. do the Crown's needs require a limit on aboriginal rights?
5. how has the Crown accommodated different aboriginal groups?
6. how important is the right to the affected communities?
7. how does the regulation for aboriginals differ from other users?

C: Insufficient evidence provided to determine whether the regulations were justifiable.

D: See McLachlin in *VdP*, above. But she agrees on sending it back to trial.

R v. Sappier/R v. Gray (2006)

F: S & G charged with unlawful cutting/possession of crown timber. They claimed that harvesting timber is an aboriginal right. They provided evidence of their pre-contact practice of harvesting trees for a variety of uses.

I: How is a distinctive culture defined, and how can you identify the practices integral to that

culture.

L: Aboriginal rights are founded on practices (harvesting of a resource), not importance of a resource. Have to be more specific than just “harvesting wood”. Instead, practice is best characterized as “harvest of wood for ... domestic uses”. Thus, “domestic” qualifies the allowed uses – no commercial use whatsoever.

Is this integral to the pre-contact culture of the Maliseet and Mi'kmaq groups? Trial judge held that use for survival purposes (building shelter) does not qualify as distinctive, relying on *VdP*: “The court cannot look at those aspects of the aboriginal society that are true of every human society (e.g., eating to survive)”

Court holds this is incorrect and instead there can be rights protecting traditional means of survival. Have to be clear on distinctive vs distinct. Goes back to dissents in *VdP* : 'culture' is description of the pre-contact way of life. Harvesting wood for shelter, fuel, tools and transport was essential to this way of life.

Continuity allows for evolution and modern formation – in this case, large permanent dwellings instead of wigwams. Cannot reduce aboriginal culture to “wigwams, baskets and canoes”.

C: There is a right to harvest timber for domestic use.

D: Binnie would extend the right to harvest lumber to include trade WITHIN the aboriginal community.

Aboriginal Title

Delgamuukw v. British Columbia (1997)

F: Delgamuukw and the Wet'suwet'en Nation seeking declaration of ownership and legal jurisdiction over hereditary territories.

I: What is aboriginal “title” and can/did the government extinguish or infringe on title?

L: Title is a right in land for exclusive use and occupation as long as the use is not irreconcilable with the nature of attachment that forms the basis of title. This is the *sui generis* aspect of title. It is held communally, not individually. Its source is the pre-sovereignty occupation of the land. There is a spectrum of aboriginal rights covered by s. 35(1): aboriginal rights, site-specific rights to a particular activity, and aboriginal title.

To show aboriginal title, there must be:

1. Occupation prior to sovereignty.
2. If present occupation is used as proof of prior occupation, must be continuous.

3. Occupation must have been exclusive.

Proof of exclusivity must place equal weight on common law and aboriginal perspectives. There must be “intention and capacity to retain exclusive control”. Exclusivity may be “shared”. For there to be sufficient occupation, must balance common law and aboriginal perspective.

Court refuses to address rights to self-government.

Federal government had exclusive jurisdiction to extinguish aboriginal rights, so province could not have done so after incorporation. Could provincial laws of general application extinguish aboriginal rights? No, because there is no clear and plain intention in that case.

Quoting himself in *Gladstone*, Lamer affirms that “reconciliation” is a valid justification of infringement and adds that the fiduciary doctrine does not require aboriginal rights to receive first priority. Also says that “general economic development” and “settlement of foreign populations” are, *inter alia*, objectives consistent with reconciliation and therefore justify infringement.

Following the scheme in *Gladstone*, since title is exclusive and contains a right to choose, the required justification is minimal. Building on the lack of consultation in *Guerin*, he holds that there is 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 is an aspect of justification.

R v. Bernard/R v. Marshall (2005)

F: Bernard and Marshall caught cutting trees, argued they had title on the land in question.

I: What is the standard to prove title? How can that be applied to nomadic peoples?

L: Considering both aboriginal and common law perspective means “translating the pre-sovereignty aboriginal practice into a modern legal right”. Does the practice “correspond” to the legal right claimed. Title to land must be established by practices which “compare with” the notion of common law title. Therefore, seasonal hunting and fishing translate to a hunting right, not title.

To establish title there must be effective control of the land, so that the group could have excluded others if it had chosen to do so. For nomadic groups, must show a degree of occupation equivalent to common law title.

What evidence can be used to show this? Oral evidence is acceptable provided that evidence is not otherwise available and the witness is a credible source. “reliability” has imported a requirement for supporting documentary evidence. The evidence should be evaluated from the aboriginal perspective.

C: Not sufficient evidence to ground title.

William v. British Columbia (2012 BCCA)

F: Tsilhqot'in claiming title to a specified area in order to prevent commercial logging.

I: Is there title on the claimed land?

L: Trial judge accepted that the test was whether there was, at the time of sovereignty, effective control of the land by the Tsilhqot'in. BCCA suggests that in order for reconciliation there must be a concept of aboriginal rights as a compromise. “Territorial” claim does not meet the tests in *Delgamuukw* or *Marshall; Bernard*. Furthermore, this kind of claim does not fit within the rationales of s. 35 of reconciliation.

C: Must focus on site specific claims which were not pleaded, and so cannot give any declaration. \

Metis Rights

R v. Powley (2003)

F: Powley shot a moose without a licence and was charged. Claimed he had an aboriginal (Metis) right to hunt.

L: Metis are one of the aboriginal peoples of Canada. Metis rights can co-exist in the same location as other aboriginal rights. Treaties signed with aboriginal communities do not extinguish Metis rights. Ten step test from *VdP* modified for Metis – practice has to relate to a Metis community prior to European political/legal control. “community” not clearly defined.

C: Metis right to hunt found, charges dismissed.

Treaties and Treaty Rights

History/Nature of treaties

Eastern Canada/Maritimes (1600’s-late 1700’s)
- Peace/friendship (trade and alliances)
- No treaties of land cession.

British-Haudenosaunee Relations (emerging out of Dutch-Haudenosaunee relations): 1600’s-1800’s
- Two-Row Wampum
- Covenant Chain
- *Haldimand Proclamation* (1784)

Early 1800’s (today’s southern Ontario)
- Dozens of small land-transfers
- Lump-sum payments

1850 – *Robinson-Huron* and *Robinson-Superior* treaties
- Template for numbered treaties
- Shifted from lump sum payments to Treaty-annuities, large tracts of land, reserve establishment.

- Treaty-annuities were seen as a cost effective measure.

The numbered treaties (Treaties 1 to 11): 1871-1921

- Purportedly: surrender of land/jurisdiction in exchange for treaty annuities, reserves, assurances around continuation of ways of life, varied other promises (education, medical care, etc)

British Columbia: Treaty 8 and the Douglas Treaties

- Douglas treaties = treaties on Vancouver Island. (*Morris*)

The *Manitoba Act* (1870)

- *Manitoba Metis Federation v. Manitoba and Canada* (2013) SCC 14

Modern Treaties – Would also be protected under s. 35, but government attempting to have pieces of the treaties signed off as NOT under s. 35.

- Comprehensive Claims policy (1973-)
- BC Treaty Process (1992-)

Important to note that treaties have had different interpretations due to differing cultural traditions, etc: (From RCAP report)

> Fundamentally, the doctrine of discovery guided the European understanding of the treaties. They were to legitimize European possession of a land whose title was already vested in a European crown. The indigenous understanding was different. Indigenous territories were to be shared; peace was to be made and the separate but parallel paths of European and indigenous cultures were to be followed in a peaceful and mutually beneficial way.

Treaties are not like international treaties, rather they are *sui generis* and international law doesn't apply to them. They are more like contracts, formed out of an intent to create mutually binding obligations.

R v. Marshall (I and II) (1999)

F: Marshall fishing eels and charged under federal fishery regulations. Claimed he had a treaty right to do so.

I: How are treaties to be interpreted and applied?

L: Ambiguities should be resolved in favour of the aboriginals. Try to give effect to common intent of both parties. Assume Crown's intent was honourable. However, treaty rights must be updated to allow for their modern exercise. Have to use extrinsic evidence, including negotiations and subsequent events to interpret the treaty. Marshall #2 clarifies that the crown can still limit the treaty right by justifying the limitation under a compelling and substantial objective. These objectives definitely include those in *Sparrow* and *VdP*, but no determination on whether *Gladstone* applies. Each regulatory scheme and treaty will have to be analyzed independently.

In *Marshall II*, it was argued that treaty rights shouldn't displace non-aboriginal participants in the fishery. Court says this amounts to denying treaty rights if they would be disruptive, which is not a legal principle. Court must give effect to the commitment of s. 35 which promises to give effect to

treaty rights.

A: Treaty rights in this case are limited to securing necessaries (meaning a moderate livelihood). This is based on the honour of the Crown principle: “I do not think an interpretation of events that turns a positive Mi’kmaq trade demand into a negative Mi’kmaq covenant is consistent with the honour and integrity of the Crown.”

R v. Morris (2006)

F: Morris charged with hunting at night using a light contrary to BC *Wildlife Act*. He claimed a treaty right to hunt in such a manner.

I: Is a treaty right impaired by the *Wildlife Act*?

L: Treaty right, as understood by the parties at the time, was for a liberty to hunt as formerly, as long as they don't endanger lives or property. Using an electric light is an acceptable modern evolution of that right. Not all night hunting is dangerous, and therefore those provisions of the *Wildlife Act* infringe upon the treaty right.

A province, due to division of powers, may not apply the *Sparrow* test to justify infringement.

Duty to Consult and Accommodate

Haida Nation v. British Columbia (Minister of Forests) (2004)

F: Haida Nation claiming title to land that BC has granted a forestry licence to Weyerhaeuser.

I: If there is no recognized title, what duty does the government owe?

L: Interlocutory injunctions are not a good solution since they are stopgap remedies, don't allow for compromise and Aboriginal issues would lose anyway. However, with no legal tool the Haida may win title to land already deprived of forests. What is the basis for the duties to consulate and accommodate? The honour of the Crown, which must be understood generously.

A: 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 to avoid “cavalierly run[ning] roughshod over Aboriginal interests” while claims and negotiations are underway. The Crown must respect these potential interests.

This duty arises when the Crown has real or constructive knowledge of a potential Aboriginal right. Therefore Aboriginal claimants must outline claims with clarity. Both sides have to act in good faith, and “sharp dealing is not permitted.

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. Lowest end: give notice and disclose information.

Highest end: deep consultation, participation in the decision making process, potential accommodation.

The legal duty to consult lies on the Crown, not on any third parties (who may be liable in other ways).

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.

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

F: Road to be built on Treaty 8 lands. Treaty says government may take up land from time to time for settlement, mining ... or other purposes.

I: Is the treaty right infringed?

L: Court of appeal found that the decision to create a road was part of the "taking up" and therefore done pursuant to the treaty, not as an infringement of it. The court of appeal judgement came out before *Haida Nation*.

In "taking up" the land, even if done according to the treaty, the honour of the Crown is still at stake. Therefore, there will be a duty to consult with the Mikisew in good faith before constructing the road. Once again, this duty varies according to the degree of adverse effect.

A: Adverse effect of a minor road is small, but the duty to communicate and address concerns was breached.

Rio Tinto Alcan v. Carrier Sekani Tribal Council (2010)

L: Tribunals may also have duty to consult, depending on the legislation creating them. Alternatively, they may have power only to determine whether adequate consultation has taken place or no duty at all.

Doctrines/Themes Summary

Doctrine of Discovery

Arrival of European nations gave them sovereignty and reduced aboriginal rights (*Johnson v M'Intosh*)

Self Governance

Worcester v Georgia asserts that aboriginal peoples were self governing prior to European arrival. Ditto in *Calder*.

Delgamuukw refuses to consider whether there is a right of self governance. However, communal decisions for communal land necessarily requires a communal decision making process.

Source of aboriginal interest in land

St Catherine's Milling – Royal proclamation.

Calder – Per Judson: Royal proclamation AND “the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries”.

Delgamuukw – Prior occupation, arising BEFORE assertion of sovereignty.

Content of aboriginal interest in land

Johnson v M'Intosh – Possession and use, not absolute rights.

St Catherine's Milling – Personal and usufructuary. Dependent upon the good will of the Crown.

Calder – Personal and usufructuary.

Geurin – Sui generis

Delgamuukw – Sui generis, which means a right to use land for any use not inconsistent with the uses giving rise to the interest. Can only be held communally. More than a bundle of various aboriginal rights.

Duty to consult

Sparrow: one factor of justification is "consult[ation] with respect to the conservation measures being implemented"

McLachlin in dissent in *VdP* – negotiations better path to reconciliation than litigation.

Gladstone: need for "consultation and compensation"

Duty in *Delgamuukw*, ranges from discussion, consultation, to full consent, depending on the infringement.