# Aboriginal Law

**Charter Rights**:

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.

**“Outside of the Charter” (Constitutional)**:

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.

# Pre-Charter Jurisprudence And AT:

**St. Catherine’s Milling**: *Source of Aborig int = RoyalProc, usurfunctory right*, *crown has underlying title (excludes other)*

-F: feds granting license to SCM for land contained under Treaty 3, using 91(24). Prov challenges issuance.

-L: the **source** of aborig interest in land = RoyalProc, but this was **usurfunctory right**, because crown has **underlying title** – BNA Act gives provinces all existing interest in land.

-A: due to BNA act, prov had entire *beneficial int* in “ceded land”. Treaty removed burden of the land, but did not grant any new interest to the crown. If Indians owned the land in FS, then the surrender would have been to the fed govt and not covered by the BNA Act.

-C: treaty lands not covered by s91(24), since never “owned” by aborig.

**Calder**: (1973) *Argument that AT had never been EXTINGUISHED*

-C: *SCC* dismisses case on *procedural* grounds. 3-3 split

-A: Title in BC stems from something *OTHER* than RoyalProc, since Nisga’a had been on the land since “time immemorial”. When BC became a colony, this right became dependent on the “good will of the Sovereign”. When leg opened the area up for settlement, any aborig rights were extinguished. Nothing to be made of treaties after this was done. RoyalProc = policy expression that eventually became law. Possession = a source of rights, but only if there were a legal system in which those rights could exist. Nisga’a only seek **personal and usurfunctory** **burden on crown title**, following *St. Catherine’s*. **Extinguishing the rights can be done by *plain and clear intent*.** However, the intent was not present in this case in the legislation referred to, and treaties after this time were evidence that there were still rights that needed to be ceded.

**Geurin**:(1984) *Sui Generis*, *Fiduciary obligation*, *burden on crown title*

-F: Musq want to lease portion of land for golf course to get revenue stream, but have to go to govt. Terms agreed upon are 10% of actual value. Would not have agreed if they knew actual terms.

-L: **AT** = **sui generis**: **more than just personal right, but less than beneficial ownership**..**.= burden on crown title** (although they pre-date crown sovereignty – ***St.* Catherine’s).** when surrendered, either turns into the fee, or disappears. Usurfunct and personal right cannot pass (cannot create a trust). S18 of **Indian Act** may impose a **FIDUCIARY OBLIGATION** in certain contexts (not same as trust) –govt has **discretionary power to act in their best interest**. Because of the **inalienability of their land**, the aborig have no where to go, and need to place confidence in trusting relationship with crown, that they secure their interest.

-C: unconscionable to ignore terms they understood when signing (breach of fidicuiary).

# Aboriginal Rights under s35(1)

Now rights are recognized and affirmed, and s1 doesn’t apply, since not part of the Charter. Infringement of those rights will have to be “justified”.

**\*\*\*\* Sparrow**: *ABO RIGHT, INFRINGMENT, AND JUSTIFICATION TEST*

-F: fishing with net exceeding max length set out in Indian Food Fishing license held by Musqeum. Arguing he has **original right** under s35. S35 calls for “just settlement for aboriginal peoples” thus, treaties and statutes should be interpreted to assist the Indians and the **HOC** (honour of the crown) must be presumed. S35 recognized Indian Rights that historically existed and that have **NOT been extinguished** by the crown (if wishing to extinguish now, **clear intention required**, and **justifying** it).

-\***Note: FISHING FOR CEREMONIAL PURPOSES** (inherently limited).

-L: **THE RIGHT and INFRINGEMENT**

1. **Is there an existing Abo right? (Onus on claimant)**

**From Van Der Peet \*IF THERE IS AN INTERNAL LIMIT (not considered much in Sparrow)**:

1. **Court must take into account the perspective of aboriginal people themselves.** 
   1. Courts must reconcile the special status of aboriginal rights with crown sovereignty. Each must be given **equal weight**.
2. **Court must identify precisely the nature of the right claimed** 
   1. Characterization of the claim is important because what the evidence supports depends on what claim it’s supposed to support. Factors to help characterize
      1. Nature of the activity claimed to be a right
         1. Selling fish
      2. Nature of the statute or regulation being impugned
         1. Fishery regulations charging her
      3. Practice, custom, or tradition relied on to ground right
         1. Practices invoked to justify right to sell fish
      4. Activity must be a modern form of a practice
3. **To be “integral,” practice must be of *central importance* to the abo society** 
   1. Claimant must prove more than just that the practice took place.
   2. Must show it was ***integral* and *significant*** to the society. One of the things that made the society what it was – that made it distinct.
   3. Can’t be something common to all societies – must be a defining attribute of this society. Without it, society would be fundamentally altered – related to distinctiveness. Makes it truly integral.
   4. It’s the distinctive features that must be **reconciled** with crown sovereignty. Crown sovereignty > merely incidental features.
4. **Must have continuity with the practices, etc. that existed prior to contact**
   1. Relevant time period = prior to European contract, not Crown sover.
   2. Need to show only that practice is rooted in pre-contact practices – not that it has continued since.
   3. Must permit **evolution** of practice into modern forms – modern form of ancient practice does not preclude its status as a right
5. **Court must approach rules of evidence in light of evidentiary difficulties inherent in adjudicating aboriginal claim**
   1. Court must not undervalue evidence because it doesn’t conform to usual standards. Evidence is old and difficult + oral.
   2. (**Bernard/Marshal**) – *“standard of usefulness and reasonable reliability*”
6. **Claims must be adjudicated on a specific, rather than general, basis**
   1. Facts of each case are important.
   2. Court considers existence of right for the specific group claiming.
      1. One group having right is not enough to establish for other
7. **Activity must be of independent significance to abo culture claiming it to be a right**
   1. Practice must be significant, not merely incidental.
   2. Incidental practices cannot piggyback on integral ones.
8. **Practices must be distinctive; doesn’t require it to be distinct**
   1. Doesn’t have to be unique (distinct)
   2. Just has to be definitive, distinguishing (Distinctive) – makes culture what it *is*
   3. E.g, right to fish for food is not unique, but it is integral (distinctive)
9. **Influence of European culture is relevant only if practice is integral only because of that influence** 
   1. but practice isn’t right if it arose *solely* as a response to Euro Influence (presence of euro’s made selling the fish **integral** to the abo group -> thus, it can’t be integral if a response to this)
10. **Court must take into account both the relationship of aboriginal peoples to the land, and the distinctive cultures and societies of abo people**
    1. courts must not focus so entirely on abo relation with land so as to lose sight of other rights
11. **If there is an existing right, has it been extinguished? (Onus on crown – CALDER)**
12. **Prima facie infringement (onus on claimant). *Gladstone* says easy to meet.:**

\*To est, a limitation must be: unreasonable, or imposing undue hardship, OR denying holders of a right their preferred means of exercising that right.

**4. JUSTIFICATION (onus on government)**

If the claimant proves a **prima facie infringement**, the **Crown must justify** it. To justify it, the Crown must demonstrate the following:

1. **First, is there a valid – ‘*compelling* and *substantial*’- legislative objective?** 
   1. Public interest is too vague, but includes *preservation*.
   2. Here, it’s conservation and resource management which is OK
   3. Justification fails if it fails this part.
   4. HARM to themselves or other
2. **If there is a valid legislative objective, then consider the honour of the Crown in dealing with Aboriginals.** 
   1. The Crown owes a **fiduciary duty**. ***Requires prioritizing Indian interests****.*
   2. Scarce resources mean conflict of interests but Indians must be prioritized ***after*** valid conservation measures are implemented.
      1. Prioritize indian interest in scarce fishing resources. Indians get priority after valid conservation measures have been effected.
   3. *Gladstone* talks about what Aboriginal priority means.
3. **(Help in est. #2) Other factors that may come up, depending on the factual context, to determine whether the Crown has justified infringement.** 
   1. Has there been minimal infringement?
   2. Is fair compensation available?
   3. Has the group been consulted?
   4. List is not exhaustive
   5. In *Gladstone,* court says that these are helpful factors for determining infringement, not necessary elements.

**Decision**: case sent back to trial, to be properly dealt with. Not much of a Q in *sparrow* itself on whether right existed (seemed pretty clear). Suggested a scheme that places environment first (trump), and then aboriginal food/ceremonial fishing then commercial fishery.

**R v Van Der Peet**: *sets out framework for* ***“is there a RIGHT”***(added into 1. Of *Sparrow*).

-F: VDP is charged with selling fish contrary to the Fisheries Act. Argues she has abo right under 35(1).

-Q: right to **SELL** fish abo right (of StoLo peoples).. how to determine the existence of abo right?

* **C**: - Here, the right claimed is the right to exchange fish for money. To be a right, it must be an integral part of the society. **But the StoLo did not exchange for fish for money until after European contact**, so no claim. Plus, the right was only incidental.

**[DISSENT]**: **DUBE**: aboriginal rights (s35) should be interpreted in a manner that gives the rights meaning to natives, hence it is not right to give **equal weight** to common law perspective. Focus should *emphasize* the significance of the activity to NATIVES rather than activities themselves. She would’ve said they had a right to trade for livihood.   
**McLachlin**: [SPARROW CRIT] there was not only prior occupation, but also prior native legal regime. Although on a small scale, the right claimed is still one of commerce – rights are *general* but exercise is *specific*. Disagrees with necessity of pre-contact practice: what should be shown is that the ancestral customs/laws are being observed. “Integral” comes from *Sparrow* but was not intended to really be a “test”, as it is too broad and categorical (all or nothing). It was supposed to be a pretty fact-specific approach to the crown’s fidicuiary obligations, and gives a lot of judicial discretion (hence kind of like a non-test). Instead, an **empirical approach** should be used: identify what qualified as aboriginal rights in the past. The right in this case is a right to continue to use the resource to provide for traditional needs, albeit in modern form. [GLADSTONE CRIT] Justification: she denies the view in *Gladstone* allowing for very **broad justification** for a few reasons: 1. The “Pressing and substantial” objectives impinging on abo-rights *functions* like a s1. Of the Charter, despite it not being part of the Charter. 2. More political than legal and does not provide constitutional gaurantee 3. Doesn’t think that the 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. 4. Finally, the *Gladstone* approach to justification is unconstitutional -> unilaterally transferring benefits/rights to non-aboriginals is a direct violation of s35(1).

**R v Gladstone**: *Justification analysis MODIFICATION for right* ***w/o******INTERNAL limit***. *Crown Friendly analysis*.

-F: accused charged /w offering to selling herring spawn in excess of the weight permitted by their indian fishing license. They argue they have right to exploit for **commercial use**, and the regulation is therefore contrary to 35(1). COURT RECOGNIZES THE ABO RIGHT TO FISH THIS KIND OF FISH COMMERCIALLY (hence the problem).

-Q: is there a commercial Abo right beyond the license? Has crown justified infringement?

-New trial ordered.

-L: the court ultimately changes two things in sparrow, since the right here is potentially **unlimited and EXCLUSIVE**. Crown has onus to justify infringement after claimant proves *prima facie* infringement, but this case is distinguished from Sparrow*.* Two modifications to the **JUSTIFICATION PHASE** of SPARROW:

**1.** **Changes to fiduciary obligation part of Sparrow** (**changes meaning of PRIORITY**): in Sparrow, ceremonial purposes limited the right, but commercial sale’s only constraint = the market demand. Prioritizing abo right only makes sense when right is self-limiting, but here it would result in unlimited exclusiveness. Crown’s fiduciary duty will require something **LESS** than justification in *Sparrow*.

**Priority:** the government must show that it has ***taken account of* the *existence* *and importance*** of Abo rights in allocating the resource

* + 1. The resource must be allocated in a manner ***respectful of the fact that Abo rights have priority* over other commercial fishers.**
  1. This is a procedural and substantive duty. Gov must show:
     1. *Process of allocating resources* reflects Abo priority (process takes into account their right, and prioritizes it)
     2. *Actual allocation* resulting from the process must reflect Abo priority
  2. Factors to determine whether gov has given priority to Abo rights. Not an exhaustive list, **but factors to guide inquiry**
     1. Were the affected Abo groups consulted?
     2. Was there sufficient compensation to them?
     3. Has the Crown accommodated Abo participation in the regulated conduct?
     4. Do the gov’s objectives reflect the need to take into account the priority of Abo rights?
     5. How has the gov’t accommodated different abo rights in a particular fishery (e.g, balancing food vs commercial rights)
     6. How important is the right to the economic and material well-being of the band in question?
     7. How does the regulation differ for abo’s from other users?

(**This is effectively a balancing act**).

**2.** **Changes to PRESSING AND SUBSTNATIAL objective test**:

-> **ECO & REGIONAL FAIRNESS NOW SUFFICE** (plus historical reliance considered for non-aboriginals)

1. Objectives that **recognize** the prior occupation of Abo’s
2. **Reconciliation** of Abo prior occupation with crown sovereignty (as long as crown is doing this, whatever they’re doing is generally OK).\*\***Why is this happening in court.**
   * 1. Abo rights are recognized to reconcile their interests with those of the rest of society. The interests of the broader community, too, are equally a necessary of reconciliation. Therefore, some limits on Abo rights will be justified to reconcile competing interests.
     2. E.g., conservation in *Sparrow* recognized the legit interests of broader society, but aboriginals too, by giving them priority.
     3. **Some valid objectives**: ***conservation, pursuit of economic and regional fairness, recognition of non-Abo interests in fisheries.***
     4. So, there needs to be balancing between Abo and other interests as part of reconciliation.

**C:** *There is a right to commercially exploit herring spawn*, but in order to address the possibility of exclusion and unlimitedness, the fiduciary duty (notion of priority) and pressing and substantial objectives are modified to balance the right.   
  
**R v Sappier/R v Gray 2006 SCC**: *Rights – Survival Practices, “distinctive to integral culture”*

-F: S&G charged with unlawful cutting/possession of crown timber. They claimed harvesting it was aborig right. Evidence of pre-contact practice of harvesting trees for a variety of uses.

-Q: is this “distinctive” enough? Integral to the culture?

-A: **Aborig rights are founded on practices, not resources** (common law property). Have to be more specific than “harvesting wood”, instead must be characterized as “Harvest of wood for… DOMESTIC uses”. Thus, “domestic” qualifies the allowed uses -> no commercial. Integral to pre-contact culture? Trial judge: **Survival purposes do 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 (eating to survive). **However, court disagrees with trial judge**: ***integral doesn’t mean distinct or unique*, it’s characteristic: a practice that formed part of the identity of that culture** (e.g. fishing for food). Doesn’t matter that the culture could’ve used some *other* practice for survival. The practices must also be allowed to *evolve* in to modern ones (e.g. if used for wigwams and canoes for survival before, they should be allowed to be used for modern dwellings today).

-**C:** The aboriginals had right to harvest timber for *survival needs* and the crown didn’t adduce any evidence to justify the infringement.

**Delgamuukw v BC** (1997) SCC *(AT recognized, but self-govt not addressed*)

F: D and W nation seeking declaration of ownership and legal justification over hereditary territories.

-Q: What is AT and can/did the govt extinguish or infringe on it?

-A: **Nature of Aboriginal Title**: *Exclusive USE and OCCUPATION* of the land (more than just license to occupy); right to choose what uses it is put to, so long as it is **not irreconcilable** with the **nature of attachment** that forms the **basis of title** (*Sui Generis* title) – can’t deprive progeny of its benefits. Not limited to the “uses” that are integral and distinctive to that culture. It is held *communally* and not individually, alienable only to the crown (holds the fee). Source (*St Catherine’s Milling*): pre-sovereignty occupation of the land. **Spectrum of rights covered by s35(1)**: Aboriginal Rights, Site-Specific Rights to a Particular Activity, and Aboriginal Title.

-**To show title, there needs to be**: 1. **Occupation PRIOR to sovereignty**; 2. **If present occupation is used as proof of prior occupation, must be *continuous*;** 3. **Occupation must be exclusive**.

-3 -> Need evidence to show exclusivity. **EQUAL weight on CL and abo perspective for meaning of exclusive occupation.** Must have “**intention and capacity to retain exclusive control**”, but exclusivity can be “shared” (sometimes it even supported the fact that you had exclusivity – e.g. permission sought by outsiders). You take into account the size, lifestyle, resources, technological abilities of claimant and character of land being claimed.

-**If you can’t establish title**: *you can still establish a lesser “site-specific*” *right*. Maybe because you can’t show EXCLUSIVE use but can show that the area was used by a number of groups non-exclusively to hunt.

-**Refused to entertain the Q on Self-govt**

-**Limiting AT**: Crown can justify an infringement still. This is because abo rights = part of *reconciliation* -> crown also has a legitimate interest (general principles from Sparrow & Gladstone apply but **degree of scrutiny depends on the NATURE OF TITLE**).

1.) **Infringement must further a *compelling & substantial legislative objective***.

-Reconciliation means broad range of acceptable objectives (*Gladstone*)

-Economy: agriculture, forestry, mining, hydro, etc.

-Environmental protection

-Infrastructure and settlement

2.) **Infringement must be consistent with the *Crown’s fiduciary duty***. Crown must *recognize and reconcile aboriginal pre-occupation with Crown sovereignty*. Reconcile crown interest with aboriginal interest in land:

-Exclusive use: fiduciary duty doesn’t always mean exclusive priority, but ab-interest **must be considered**. If priority is an issue, use modified-priority in *Gladstone*.

-Right to choose use of land: *Necessary duty to consult* on infringements of land.

-Economic value of land: fair compensation for land is usually required.

\*Note: difficult for METIS: **nomads.** Also, **FEDERAL GOVT HAS EXCLUSIVE JURISDICTION TO EXTINGUISH ABORIG RIGHTS**, so province could not have done so after incorporation. Could prov laws of *GENERAL application extinguish aborig rights? No,* because there has to be clear & plain intention in that case.   
  
**R v Bernard; R v Marshall**: *Abo perspectives – Evidence*, *Nomadic people*

-F: Charged with illegally cutting timber on crown land without permit. Accused argued they were allowed to log because of AT.

-Q: *how to consider both abo & common law perspectives* in determining whether occupation has been proven (*Delga*) + *What are the rights around nomads*? Focus on evidentiary value.

-**Considering BOTH perspectives means**: “*translating the pre-sovereignty abo practice into a modern legal right*”. Ultimate Q -> 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:** you have to establish *effective control of the land*, so that the group could have excluded others if it had chosen to do so,*sufficiently regular use*. MERELY seasonal hunting will probably turn into only a specific right to hunt/fish, but sufficiently regular and exclusive practices on the land may lead to title (like CL). For **nomadic groups**, must show a degree of occupation **equivalent** to CL title.

- you have to give due weight to abo perspective, including **weight to oral testimonies, and unconventional evidence**.. flexibility, if it **meets the standard of *usefulness and reasonable reliability***.

**C:** INSUFFIICIENT evidence to ground title here.

**Williams**: *abo trying to claim they didn’t live around the ENTIRE territory, but claiming it*. But this is not how the caselaw is now set up.. it’s very SITE-specific to prove AT (territorial claims don’t 35’s purpose or even the CL).

-Can only be proven on a definite tract of land where the boundaries are pretty clear.

-\*Delga: land = auto central/distinctive/significant.. but if its territorial claim, would have to prove central/distinctive/significant, thus would be rejected anyways.

# Metis Rights

**R v Powley**: 2003 – *MODIFIED VDP TEST*

-F: P shot a moose without a license and was charged. Claimed he had aboriginal (METIS) right to hunt.

-L: **Nature of Metis Rights**: 1. Established by a modified *VDP* test (different because Metis formed AFTER contact). 2. By analogy, metis rights are those practices that were *integral to the METIS* community’s distinctive existence and relationship to the land 3. The relevant time frame: post-contract, **pre-control.** S

-**How to claim Metis rights**:

1. Identify the customs, traditions, and collective identity that defined the metis community

2. Link those to the modern group claiming the right:

-Group must share those customs and traditions

-Must show a loose connection between this group and the historic Metis community (some degree of continuity and stability to support a site-specific abo right).

3. Prove that *you* are a Metis belonging to a modern group, so that you can claim a right on their behalf:

-Claimant must: identify self as metis, must have ancestral connection to a Metis community, and must show that the modern community accepts him

4. Metis rights are communally held:

-Individuals hold right by virtue of membership + this is how they get the benefit of metis rights (cultural rights).

-**Metis rights can co-exist in the same location as other aboriginal rights**. Treaties with aboriginal communities do not extinguish metis rights -35(2) clearly includes metis in “aboriginal peoples of Canada”.

**Daniels v Canada (FC)** 2013??

**Manitoba Metis Federation Inc v Canada (AG)** 2013 SCC, *METIS RIGHTS, HONOUR OF THE CROWN*

-F: Metis people surrendered their self-governance and territory to be part of Canada -> *Manitoba Act*. In exchange, crown promised them some land to their children in the new province. Argued: Crown didn’t uphold its promise in implementing the Act, breached fiduciary duty + Manitoba Act = ultra vires.

-L: **Purpose of act**: to reconcile crown sovereignty with abo interest in land in the area. **Constitutional obligations**: to give metis kids (since must be distinctively aboriginal, collective right). **Honour of crown** -> engaged. The source = *Crown sovereignty..* and purpose is to reconcile crown sovereignty with aboriginal interests. Gives rise to “**honourable conduct”**: a. Fiduciary duty **if c**rown assumes *discretionary* control b. *Broad, purposive* interpretation of 35(1) and other promises c. Duty to consult d. Requirements of HONORABLE negotiation and fairness e. Requires crown to act to fulfill promises (**attain the purposes of the promises**) and must act to *realize its TREATY OBLIGATIONS*.

-This act **did not** give rise to fiduciary duty (*Manitoba Act – how they became part of the* country) but only to ***due diligence*** to perform promise (following from the **HOC**) – *broad purposive approach* to interpreting promise. Government failed to do this (did not give land to children). Claim not limitation barred either -> **does not apply to crown’s failure to fulfill *constitutional obligation*** (not fiduciary).

-C: **RESULT?!**

# Treaties

From abo perspective, Euro rights in the Americas came about through treaties made with abor nations. Canadians have inherited the wealth and resources of this land through these treaties with abos. Both are “treaty parties”. Particular *spiritual* effect for Abos – relationship of trust and kinship, rep’d the HOC. For Europeans, it was to legitimize possession of lands.

**R v Marshall I**– *interpreting treaties*, *HOC*

-F: M fishes eels and is charged under Federal fishery reg. Claimed he had treaty right. Relevant one provided right for aborig to bring fishes and items to British outposts, for the purpose of furnishing them with “necessities”. Q whether it prevented them from trading with anyone else.

-L: **Test**:

1. Goal is to find interpretation that best reflect the **common intention** of the parties

2. **HOC** is always presumed. Interpretation must be consistent with it (goal is to reconcile Crown sovereignty /w abo int)

3. Historical **context** guides interpretation (imply terms where necessary to reflect the overall purpose and efficacy of the treaty)

4. Should allow for **evolution** of rights – don’t have to provide for every contingency. New rights or formulations of rights should be implied to reflect the spirit of the treaty.

5. **Extrinsic evidence** can be brought in to help interpretation. Unconscionable for the court to refuse hearing evidence of oral terms that were understood to be implied in treaty

6. **Ambiguities** should be resolved in favour of Abo – interpreted liberally.

7. **Can’t be too technical or contractual**

8. Can’t do what’s **impossible** with the language of the statute.

-A: *purpose* of treaty was to secure “necessities”, and in MODERN context = **moderate livelihood** (incl small scale commercial exploitation). Lesser interpretation = inconsistent with HOC (undue hardship/bad bargain). The group is making moderate livelihood, thus falls under s35 protection -> subject to *Badger test* (regulation MII).

* **McLachlin J. (Dissent)**^

**R v Marshall II** – *Limiting treaty rights*

-F: elaboration of treaty rights -> Q: can crown limit treaty rights. Argued that treaty rights shouldn’t displace non-aboriginal participants in the fishery.

-L: **Treaty rights are subject to regulation**: govt still sole sovereign in determining how fishing happens. Trying to clarify Mar1: the MIc peoples can only gather things *traditionally* (not just anything). But regulation is possible in **TWO WAYS**:

1. Ministers are free to regulate the treaty right according to the *terms of the treaty*. Interpretation and definition **WITHIN the existing terms** of the treaty. As long as it fits

2. *Sparrow framework* applied to treaties (**Badger**): when you want to regulate treaty right **from outside** of the treaty, you have to justify according to the P&S objective and fiduciary obligations.

-> where treaty with no *internal limit* -> **Gladstone** framework. “Economic & regional fairness”: for pressing & substantial (Gladstone language).

-A: **Binnie put internal limit in treaty by interpreting it** -> treaty right to gather things for trade for a *moderate livelihood*. So here they are regulating WITHIN.

**R v Morris**: *closes door on some remarks in marshall*, *GENERAL valid prov laws can’t apply to trenching on treaty rights* (Fed Core).

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

-Does the Wildlife Act Impair the treaty right (prov power)?

-L: Treaty right was understood by the parties at the time to hunt as formerly (at night), 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. This wouldn’t be regulation WITHIN the treaty, but the right itself.

-**IJI** question: province can pass these laws, but the province is trenching on the federal law with a *GENERALLY WORDED, VALID* legislation on the *CORE* of fed area 91(24) – head of authority for Indians and land reserved for Indians. Prov law inapplicable to the extent that it is trenching.

-**Can’t be referentially incorporated** (s88) -> **explicitly says** that this process of turning prov into fed law should not apply to treaties/treaty rights.

C: provincial law inapplicable to the right. Marshall opening, which made it looks like protection for treaty rights weakening (prov and feds can reg), is closed here.

# Duties to Consult and Accommodate

**Haida Nation v BC**: *Duty to Consult and Accommodate*

-F: Abo litigating for *potential* rights. Crown is issuing logging licenses affecting the areas under litigation. Question is whether the crown owes a duty to consult with respect to potential but unproven rights (no title recognized yet). Interlocutory injunctions are not good here because they are **“stopgap”** remedies, and don’t allow for *compromise* and Aboriginal issues would lose anyways.

-**Notion of consultation**: *Sparrow* -> (justification for infringement – whether crown lived up to fiduciary oblig), *Gladstone* (refers to consultation, compensation, accommodation) + *Delga*: **spectrum of duty to consult (WHEN THERE IS A RIGHT/TITLE)**, which is based on the **HOC** (**always there**) High end -> **full consent** on very serious issues. Mid-end: **discussion, chance for submissions.** Minimum: give **notice**, disclose info, etc.

-**Foundation for duty to consult**: Grounded in HOC. Must act in good faith, respect, no sharp dealing, serious intention to substantially address concerns, meaningful, **can’t ignore interests that are being seriously pursued**, just because unproven. (Does not mean *duty to agree* however).

-**Duty with respect to unproven potential rights**:

-The spectrum never reaches the *CONSENT*, but even for potential rights there is **still a duty to consult and reasonably accomdate**.

-Arises when CROWN HAS KNOLEDGE (REAL or CONSTRUCTIVE) that potential rights might be affected, and contemplates conduct that would adversely affect it. Requires good faith as above + correlatives for Abo side (e.g don’t frustrate the crown’s good faith attempts, etc.)

\***NOTE:** province s109 -> argument that “we don’t have any obligations” fails here, because they took the interest subject to **ANY OTHER INTERST**.

\***Standard of reasonableness vs Correctness**: correctness -> Q of law, and reasonableness -> understanding of what the law is. CROWN HAS TO DETERMINE WHETHER THEY HAVE THE DUTY TO CONSULT based on **correctness**, and everything after = on standard of **reasonableness**.

**Mikisew Cree v Canada**: *Duty to Consult* – *Treaties*

-F: Mik has treaty, “taking up laws” -> allows govt to take up land from time to time for certain purposes.. they are just saying they were **acting UNDER** the treaty (no *Sparrow*) justification necessary. (Entire 23km^2 – impact quite severe)

-L: In the case of a treaty, crown **always has notice of its contents**. There is a duty to consult, since a treaty right is affected, low threshold: only once abo interests adversely affected (**not every action will trigger**). Here, the duty arises, and the requirements of good faith, substantially addressing concerns arises..

**Rio Tinto v Carrier Sekani**: *Content of the Duty to Consult – tribunal CAN consult, but depends*

1. Duty to consult arises whenever there is the potential for adverse impact
   1. To prove adverse impact: claimant must show causal relationship between proposed conduct and potential for adverse impact.
   2. Past wrongs do not suffice
2. Duty extends to strategic, higher level decisions that may have an impact
   1. policy decisions, executive decisions, like granting licences, etc
3. Duty to consult exists with respect to rights currently being contested
   1. Duty is there to prevent damage to claimed interests while they’re being challenged, in the event that they are granted
4. DUTY ARISES **WHEN**
   1. Crown has knowledge, real of constructive, of the existence of an actual or **potential** Aboriginal right
   2. Crown **contemplates conduct** that might adversely affect the right