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# History and Context

## Pre- Royal Proclamation

- When British arrived in Americas in mid-1600s they gradually pushed the Dutch out, but took over the same methods of interacting w/ aboriginals

- Emergence of land surrender treaties by mid-1700s w/ British colonies in the US

- Aboriginals thought they were entering into treaties to share resources and have mutual understanding – Europeans saw treaties as transfer of land

- Iroquois ended up getting pushed to West side of US

- Dissonance between Iroquois and British assumptions and expectations about purposes and effects of treaties dealing w/ land rights had continued to reverberate down centuries and has its mirror images in treaty-making in 19th and 20th Cs w/ other Aboriginal peoples and other colonial gov’ts

- By 1760, Britain had emerged as supreme in NA against French – problematic as French had allies w/ certain indigenous groups

## Royal Proclamation of 1763

Doc that set out guidelines for European settlement of Aboriginal territories in what is now NA. Initially issued by King George III in 1763 to officially claim British territory in NA after Britain won 7 Years War. Ownership over NA is issued to King George. BUT explicitly states that Aboriginal title has existed and continues to exist, and that all land would be considered Aboriginal land until ceded by treaty. Forbade settlers from claiming land from Aboriginal occupants, unless it has been first bought by Crown and then sold to settlers. Sets out that only Crown can buy land from FN. Sometimes called “the Indian Magna Carta.” Set a foundation for the process of establishing treaties. British Crown recognizing indigenous communities as ‘nations’.

NB: in what is now BC the colonial gov’t did not follow the policy set out in the RP – the gov’t assumed control over the management of lands and resources.

# Early Jurisprudence

## Context

- Over time the American state asserted itself over territory – those who had purchased land from Indian tribes argued that they had valid title – but American gov’t went and granted same land to other individuals

- **Marshall Trilogy (US Supreme Court)**: distorted view of aboriginal relations history imported into Canadian jurisprudence

- View of history informs judgment of these cases – history plays a role in justifying some of legal principles that have developed – Marshall tells story that then becomes legal history about settlement of NA

- **Key legal principles, positions and concepts that emerge from Marshall Trilogy:**

1. Doctrine of discovery
2. Occupation (in relation to ownership/title)
3. Jurisdiction/Dominion (in relation to ownership/occupation)
4. Protection (in relation to sovereignty)
5. Indian powers of governance
6. Indian interests in land/territory

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

F: Ps claim land under 2 grants, purporting to be made in 1773 and 1775 by chiefs of certain Indian tribes. D held land under grant from gov’t.

I: Can this title be recognized in courts of US?

C: Ps do not exhibit title which can be sustained – judgment affirmed.

### Doctrine of Discovery

- Title to newly discovered lands lay with gov’t whose subjects discovered new territory.

* Doctrine has been primarily used to support decisions invalidating or ignoring aboriginal possession of land in favor of colonial or post-colonial gov’ts.
* Exclusion of all other Europeans gave to discovering nation sole right of acquiring land from natives and establishing settlements.

- Rights of original inhabitants **not entirely disregarded, but impaired –** admitted to be rightful occupants, but rights to complete sovereignty, as independent nations, were necessarily diminished and **power to dispose of land at own will denied** by original fundamental principle that discovery gave exclusive title to those who made it.

- **Exclusive title** is the title that a state has which underlies all other possible titles – ‘radical title’/’absolute title’/’allodial title’

- Marshall does say that the doctrine cannot be used extravagantly – e.g. to claim lands to Pacific upon discovery of Atlantic sea coast

- All European conquerors consented to this principle, and American states inherited it

### Conquest

- Principle of exclusive right of US to extinguish title and to grant soil was imported from UK principle – discovery gave exclusive right to extinguish Indian title of occupancy, either by purchase or by conquest, and gave also a right to such a degree of sovereignty as circumstances of people would allow them to exercise

- Absolute title to lands cannot exist at same time in different persons or in different gov’ts – all institutions recognize absolute title of Crown, subject only to Indian right of occupancy, and recognize absolute title of Crown to extinguish that right – incompatible w/ absolute and complete title of Indians

- Title by conquest is acquired and maintained by force – conqueror prescribes limits

* General rule that conquered shall not be wantonly oppressed
* BUT Indians were savages, occupation was war, subsistence drawn chiefly from forest – could not leave them in possession of country or govern them as a distinct people

- ‘Might makes right’ – conquest gives title which courts of conqueror cannot deny

- There is excuse, although not necessarily justification, for principles that Europeans have been applying to Indian title – Europeans have not always been the aggressors

- As white population advanced, Indians receded – land which Crown originally claimed title, being no longer occupied by ancient inhabitants, was parceled out according to will of sovereign power

- By treaties concluded between US and Indian nations, whose title Ps claim, country comprehending the lands in controversy has been ceded to US w/o reservation of title

- So far as respecting authority of Crown, **no distinction was taken between vacant lands and lands occupied by Indians – Terra Nullius – British took land as being vacant even when it was occupied by Indians**

## Cherokee Nation v Georgia (1831)

Indians have unquestionable right to lands they occupy until that right shall be extinguished by voluntary cession to gov’t. **Domestic dependent nations** rather than foreign nations. Their relations to US resemble that of ward to his guardian.

## Worcester v Georgia (1832) US

F: State of Georgia passed acts which seize on whole Cherokee country, parcel it out among neighbouring counties of state, extend her code over whole country, abolish its institutions and its laws, and annihilate its political existence. Ps charged w/ offence of residing within limits of Cherokee nation w/o license/permit and w/o having taken oath to support and defend constitution and laws of state of Georgia and uprightly demean themselves as citizens thereof.

I: Are impugned Georgia laws unconstitutional and void?

C: Acts are void and judgment a nullity – conviction of Ps reversed.

### History of Aboriginals

- Slightly different from *Johnson* – acknowledgement that aboriginals had their own institutions and gov’ts

- Reaffirmation of ‘**might makes right’:** power, war and conquest give rights which, after possession, are conceded by the world and which can never be controverted by those on whom they descend.

### Doctrine of Discovery

Slightly watered down version. Cannot affect rights of those already in possession. BUT Indians referred to as occupants. ‘Indian nations had always been considered as distinct, independent political communities’ – single exception being power of Europeans over them through doctrine of discovery.

### Analysis

Charter granted to Georgia from UK Crown for land. **Power of war given only for defence**, not for conquest. One of objects was civilization of Indians and conversion to Christianity. Securing and preserving friendship of Indian nations a priority during American revolution. *Treaty w/ Delawares* in 1778. *Treaty of Hopewell*. Cherokee nation is a **distinct community occupying its own territory**, w/ boundaries accurately described, in which laws of Georgia can have no force, and which citizens of Georgia have no right to enter, but w/ assent of Cherokees themselves, or in conformity w/ treaties, and w/ acts of congress.

## St. Catherine’s Milling and Lumber Company v The Queen (1888) JCPC

F: Fed gov’t granted lumber license to P 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)?

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

People – province has rights to resources once surrendered to gov’t.

### Nature of Indian Interest in Land

- Interprets RP to mean that Indian title is only a ‘**personal and usufructuary rights’:** ‘personal’ = inalienable; usufructuary = for use and benefit only – dependent upon goodwill of Sovereign

- Indian title is a **burden on Crown land**. Aboriginal title over land was allowed only at Crown’s pleasure (‘depend on good will of the Sovereign’), and could be taken away at any time.

- All along vested in Crown a substantial and paramount estate, underlying Indian title, which became a plenum dominium whenever that title was surrendered or otherwise extinguished

- **RP seen as source of Indian interests in land – seen as setting out nature and extend of these interests**

- This case sets landscape in Canada until 1970s

# Pre S. 35 Cases in the 20th Century

## History and Context

- **Treaty making** – treaties entered into when resources discovered – last major treaty entered into in 1921 in NWT

* Most of BC not under treaties – BC took position until 1992 that no aboriginal interests existed in the province

- Inuit are fed responsibility under 91(24); were basically ignored until 1920s/1930s

## Indian Act 1876

- Canadian fed law that governs in matters pertaining to Indian status, bands, and Indian reserves. Throughout history it has been highly invasive and paternalistic, as it authorizes Canadian fed gov’t to regulate and administer in affairs and day-to-day lives of registered Indians and reserve communities.

- Assertion of fed gov’t policy of aboriginal peoples. Primarily a policy for assimilation.

- For the ‘gradual civilization’ of Indians: (1) enrollment/status; (2) marrying out; (3) enfranchisement (different ways a person could lose status); (4) non-status emerge

- Banning of ceremonies etc.; banning of raising money for legal challenges; pass system

- Residential schools 1840s – 1996

## Calder v British Columbia (Attorney General) (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?

C: 3-3-1 split – Nisga’a interests no longer exist today. Judson: whatever interests the Nisga’a had were extinguished. Hall: interests still exist in 1973 – feds had not passed leg that explicitly extinguished interest.

### Context

- History of struggle of Nisga’a – wanted to negotiate w/ Canadian gov’t. Restrictions on funding legal challenges removed from *Indian Act* in 1951.

- Trudeau’s **White Paper**: proposed that *Indian Act* be repealed and to take leg steps to enable Indians to control Indian lands and acquire title to them; proposed that provincial gov’ts take over same responsibility for Indians as for other citizens; make funds available for Indian economic dev’t; wind up *Department of Indian Affairs and Northern Development*; eliminate treaties

* Indian activism arose in response to White Paper – deflected Trudeau’s mission

### Impact of Decision

- Trudeau makes changes to leg following judgment: *Comprehensive Claims Policy* (1974) – disagrees w/ Judson that Nisga’a lost interest

- BC agree w/ result, don’t change position until 1992

- Treaty negotiations and modern treaties: *James Bay and Northern Quebec Agreement* (1975); *Northeastern Quebec Agreement* (1978); *Inuvialuit Final Agreement* (1984)

- *Crown Proceedings Act* (1974)

- *Nisga’a Final Agreement* (2000): creation of treaty

- *Campbell v BC* (2000): Gordon Campbell claimed Nisga’a treaty was unconstitutional; ended up dropping case

- Gives some negotiating strength to aboriginal groups in Canada

- Affirmed from *St. Catherine’s*: **Indian title as personal and usufructuary right; Indian title as burden on underlying Crown title; at assertion of sovereignty Crown came to possess ‘radical’ (underlying) title; Crown is sole/absolute sovereign (no concept of domestic dependent nationhood is considered, let alone recognized) – suggestion that Indian title could be simply grounded in possession**

### Royal Proclamation

- Judson: source of Indian title, but **not only source**; does not apply to BC; when settlers came to BC, Indians were there, organized in societies and occupying land as their forefathers had done for centuries

- Hall: RP follows flag and therefore applies everywhere in Canada (like the Magna Carta); through land practice RP became law; some Indians see RP as Indian ‘Bill of Rights’; applies geographically, not just prescriptively.

### Indian Title

- Judson: Nisga’a territory became part of colony of BC when it was established; right claimed by Nisga’a dependent on goodwill of sovereign; title of Indians in fee of public lands has never been acknowledged by gov’t, but rather distinctly denied

- Hall: Indian interests exist after BC joined Confederation; **possession is of itself at CL proof of ownership**; right to possession claimed is not prescriptive in origin because a prescriptive right presupposes a prior right in some other person/authority; Nisga’a do not claim interest in land which is alienable.

### Extinguishment

- Judson: original Indian title had been extinguished in colony of BC prior to Confederation and no Indian claims to transfer to Dominion

- Hall: treaties were intended to extinguish Indian title; **extinguishment requires clear and plain intent in colonial instruments** **–** onus rests on gov’t

- **Canadian law/courts has presumption that Crown acts honourably**

## Guerin v The Queen (1984)

- Creation of reserves in BC; 1938 transfer of title to reserve lands in BC passed to fed Crown

- S 18(1) of *Indian Act*: Subject to the provisions of this Act, reserves shall be held by Her Majesty for the use and benefit of the respective bands for which they were set apart; and subject to this Act and to the terms of any treaty or surrender, the Governor in Council may determine whether any purpose for which lands in a reserve are used or are to be used is for the use and benefit of the band.

F: Musqueam don’t have a treaty. They were approached about surrendering a portion of reserve so it might be leased. Led to believe an agreement containing certain particular terms will be reached w/ golf course developer – agree agreement is very different. Several years later they find out about changing of terms.

I: Does Crown owe a fiduciary duty to FN?

C: 4-3-1. In favour of Musqueam – reinstated award granted by TJ.

### Outcome

- **Crown may owe fiduciary obligations in certain contexts** [still underlying presumption of absolute Crown sovereignty]

**- Aboriginal title is ‘sui generis’ - not simply a beneficial interest or personal and usufructuary right – somewhere in between**

* Personal in sense that it cannot be transferred to a grantee, but also gives rise upon surrender to a distinctive fiduciary obligation on part of Crown to deal w/ land for benefit of surrendering Indians

### Nature of Aboriginal TItle – Fiduciary Obligation

- Dickson (majority): Crown’s obligations are **not a trust, but rather a fiduciary duty** – upon breach Crown is liable in same way as if they breached a trust

* Nature of Indians’ interest is best characterized by its general inalienability, coupled w/ fact that **Crown is under an obligation to deal w/ land on Indians’ behalf when interest is surrendered**
* Indians’ interest in land is an independent legal interest – Crown’s obligation is not a public law duty
* No trust because of sui generis interest in land, just a ‘trustlike’ relationship – not adversarial – affirmation of aboriginal rights must be defined in light of this historic relationship
* Honour of the Crown is at stake in dealings with aboriginal peoples. The special trust relationship and the responsibility of the government vis-à-vis aboriginals must be the first consideration in determining whether the [infringing] legislation or action in question can be justified.

- Wilson: Bands do not have the fee in the lands; their interest is limited – Indians do not have an actual property interest in their land

* Crown did not create these interests – weren’t theirs to begin w/

- Wilson: s 18 of *IA* does not create a fiduciary obligation, but rather recognizes existence of such an obligation – Indian Bands have a beneficial interest in their reserves and Crown has a responsibility to protect that interest

* Crown does not hold land in trust for bands because bands do not have fee in lands
* Open to characterization of Musqueam interest as one that ‘merges in the fee’ on surrender – Crown prior to surrender had title to land subject to Indian title. When the Band surrendered the land to the Crown, the Band’s interest merged in the fee. Crown then held land free of Indian title but subject to trust for lease to golf club on terms approved by Band – creation of trust upon surrender to Crown.

# “Aboriginal Rights” General Framework Established

## Section 35

**35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.**

(2) In this Act, “aboriginal peoples of Canada” includes the Indian, Inuit and Métis peoples of Canada.

(3) For greater certainty, in subsection (1) “treaty rights” includes rights that now exist by way of land claims agreements or may be so acquired.

(4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons. (96)

- Courts have constructed analysis w/ regard to s 35 similar to s 1 analysis under Charter

- Focus in 1980s to clarify s 35 resulted in addition of (3) and (4)

- NB: Falls outside of the Charter so legislative override s 33 does not apply – feds cannot extinguish rights

### Purposes of s 35

- *VDP*: To recognize and respect fact that Aboriginal occupation of land and establishment of distinct societies in Canada pre-dated European occupation; To reconcile this fact w/ assertion by Crown of its sovereignty over land in Canada

- *Sparrow* and *Haida*: To indicate its strength as a promise to aboriginal peoples of Canada to give real protection to Aboriginal and treaty rights; To require Crown to act honourably in all its interactions w/ Aboriginal peoples

- *Delgamuukw* and *VDP*: To ensure cultural survival of Aboriginal communities and societies

### Interpretation of S 35

- *Sparrow*: consistent w/ general principles of constitutional interpretation, principles relating to Aboriginal rights and constitutional purposes of provision itself – general and liberal interpretation in accordance w/ purpose of affirming Aboriginal and treaty rights

- *VDP*: any ambiguity should be resolved in favour of Aboriginals

- *Sparrow*: applies only to rights that existed at time s 35 was enacted or that will arise pursuant to modern treaties

## Charter Section 25

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 now exist by way of land claims agreements or may be so acquired. (94)

## R v Sparrow (1990)

### Context

- 1878 *Salmon Fishery Regulations for BC*: Indians at liberty, by any means other than drift nets or spearing, to fish for food for themselves, but not for sale/barter

* Fed regs became increasingly strict w/ regard to Indian fishing over time
* 1981 regs: new concept of Band food fishing license, retained comprehensive specification for conditions for exercise of licenses

- First big case following creation of s 35

F: D found fishing w/ net that exceeded acceptable length according to license held by Musqueam. D argued that there should be broad right – right to fish on a communal level and to self-regulate. Crown argued that net size reg extinguished aboriginal right.

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

C: Matter sent back to trial because no framework existed to analyze these sorts of disputes. Aboriginal right to fish not extinguished.

### Relationship between Crown and Aboriginals

- **Presumption of honour of Crown** – trust-like rather than adversarial relationship

- Has never been in doubt that sovereignty and leg power and underlying title to lands is vested in Crown

- BUT Crown sovereignty must be reconciled w/ s 35

### Effect of Constitutionalization

- S 35, at the least, provides solid constitutional base upon which subsequent negotiations can take place – constitutional instrument that is meant to create opportunity for negotiations

- Not just a codification of case law – calls for **just settlement of aboriginal peoples**

- Court takes **purposive approach** to s 35 – adherence to principles that developed in context of treaty interpretation (**in favour of Indians**) and generous, liberal interpretation

- Aboriginal rights are not frozen in time and can evolve just like rest of Constitution

### Sparrow Test

1. Characterize existence of the right

* Onus on aboriginal community – see *VDP*

2. Does the right still exist? Has it been extinguished before 1982?

* Onus on Crown
* After 1982 extinguishment is not possible w/o consent
* Before 1982 test from *Calder*: intention must be clear and plain

3. Prima facie infringement – does the leg have effect of interfering w/ an existing aboriginal right?

* Onus on aboriginal community
* (1) Is the limitation unreasonable? (2) Does the reg impose undue hardship? (3) Does the reg deny to holders of right their preferred means of exercising that right? – YES to any = infringement
* *Gladstone* clarifies that this should be an easy test to meet.

4. **Justification of infringement**

* Onus on gov’t
* (1) Is there a valid leg objective? (public interest is not sufficient, must be pressing and substantial – conservation would suffice)
	+ Compelling and substantial = e.g. objective aimed at preserving s 35 rights by conserving and managing a natural resource or an objective purporting to prevent exercise of s 35 rights that would cause harm to general population or to Aboriginal people themselves
* (2) Did the Crown act as an appropriate fiduciary?
	+ Must be link between justification and allocation of priorities in the fishery
	+ 1st priority is conservation, then aboriginal rights, then commercial fishers
	+ Further factors: as little infringement as possible in order to effect desired result; fair compensation; aboriginal groups consulted or at least informed

## Royal Commission on Aboriginal Peoples (1996) Report

Studies on status of aboriginal peoples in Canada in response to Oka Crisis (land dispute between Mohawk and town of Oka, QC in 1990).

## R v Van der Peet (1996)

### Context

F: D charged w/ selling 10 fish caught by her CL husband under an aboriginal food fishing license. Under food fishing licenses, prohibited from selling fish. D argued that Sto:lo nation had aboriginal right to fish for feed and ceremonial purposes AND for trade.

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

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

### Aboriginal Rights

- S 35 recognizes and affirms existing aboriginal rights, but it must not be forgotten that the rights it recognizes and affirms are aboriginal

- Aboriginal rights are not universal – only accorded to aboriginal peoples

- S 35 exists because: when Europeans arrived in NA, aboriginal peoples were already here, living in communities on land, and participating in distinctive cultures, as they had done for centuries (*Calder*)

* **S 35 reconciles this w/ sovereignty of Crown**
* Substantive rights which fall within s 35 must be defined **in light of this purpose**

- 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**.

### Ten Factors to Consider

1. Courts must take into account the perspective of aboriginal peoples themselves
* Place equal weight on CL and aboriginal perspectives – aboriginal rights exist within general legal system of Canada.
1. 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
* Consider: nature of action; nature of gov’t reg; practice being relied upon
* NB: results in narrowly defined right
1. In order to be integral, a practice, custom or tradition must be of central significance to the aboriginal society in question
* Made the culture what it was – would the culture be fundamentally altered w/o this practice
1. The practices, customs and traditions which constitute aboriginal rights are those which have continuity w/ the practices, customs and traditions that existed prior to contact
* Fact that aboriginal societies existed prior to arrival of Europeans in NA is relevant – BUT loosen rules of evidence – don’t have to produce conclusive evidence from pre-contact times
* Practices which can be identified as having continuity w/ those prior to contact are basis of rights under s 35
* Evolution of practices will not prevent their protection as aboriginal rights
* An interruption in the practice will not preclude establishment of aboriginal right
1. Courts must approach the rules of evidence in light of the evidentiary difficulties inherent in adjudicating aboriginal claims
2. Claims to aboriginal rights must be adjudicated on a specific rather than general basis
3. 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
4. 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
5. 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
6. Courts must take into account both the relationship of aboriginal peoples to the land and the distinctive societies and cultures of aboriginal peoples
* AT is a sub-category of aboriginal rights which deals solely w/ claims of rights to land

### L’Heureux-Dubé – Dissent

- AT, and aboriginal rights in general, derive from historic occupation and use of ancestral lands by natives – ‘inherent theory’ of aboriginal rights, as contrasted w/ ‘contingent theory’

- Occupation was not static, nor should be aboriginal rights flowing from it

- CL perspective should not be considered equal to aboriginal perspective

- Better to describe aboriginal rights in a fairly high level of abstraction, rather than focus on a particular aboriginal practice, tradition or custom

* Emphasis on **significance of activities to natives**, rather than on activities themselves

- ‘Distinctive aboriginal culture’ = despite British sovereignty, aboriginal people were original organized society occupying and using Canadian lands

- British sovereignty should be regarded as having recognized and affirmed practices, traditions and customs which are sufficiently significant and fundamental to culture and social organization of aboriginal people – **doctrine of continuity**

### McLachlin – Dissent

- S 35 recognizes not only prior aboriginal occupation, but also a **prior legal regime** giving rise to aboriginal rights which persist, absent extinguishment

- Rights are generally cast in broad, general terms – **exercise of rights varies, is specific**

- To constitute a right under s 35, right must be of constitutional significance – has priority over ordinary legal principles

- Aboriginal rights find their source not in a magic moment of European contact, but in **traditional laws and customs** of aboriginal people in question

- ‘Integral-incident’ test from majority: too broad; indeterminate; too categorical

- Better approach to defining aboriginal rights is an **empirical historical approach**:

* Look to history to see what sort of practices have been identified as aboriginal rights in past – draw inferences as to sort of things which may qualify as aboriginal rights under s 35

- Running through history is recognition by CL of ancestral laws and customs the aboriginal peoples who occupied land prior to European settlement

- Upon asserting sovereignty British Crown accepted existing property and customary rights of territory’s inhabitants

- General principle that CL will recognize a customary title only if it be consistent w/ CL is subject to exception in favour of traditional native title

- Right is not right to trade, but right to continue to use the resource in the traditional way to provide for traditional needs, albeit in their modern form

- Any rights by its very nature carries w/ it obligation to use it responsibly

- **Critical of justification of infringement test from *Gladstone***

1. Counter to ‘pressing and substantial’ limits in *Sparrow* and s 35 rights should not be analyzed like individual *Charter* rights
2. More political than legal and does not provide constitutional guarantees
3. Will not lead to reconciliation because **all rights claimed under s 35 would have limitations built into them because they would be based off of pre-existing rights and practices** - true reconciliation would involve negotiations, not the judiciary
4. *Gladstone* approach is unconstitutional – unilaterally transferring benefits of rights to non aboriginals is a direct violation of s 35
* Aboriginal rights can only be diminished through treaty and constitutional amendment
* Gov’t limitation on an aboriginal right may be justified, provided limitation is directed to ensuring conservation and responsible exercise of right

## R v Gladstone (1996)

### Context

F: D tried to sell herring spawn. Commercial case – charged under *Pacific Herring Fishery Regs*. 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?

C: Insufficient evidence provided to determine whether regs were justifiable.

### Alteration of test from *Sparrow* – Infringement

- Right at issue in *Sparrow* has **inherent limitation** – commercial sale of herring spawn here has no such internal limitation

- In circumstance where aboriginal right has no internal limitation, notion of priority as articulated in *Sparrow* would mean that where an aboriginal right is recognized and affirmed, that right would become an exclusive one

- **Where the aboriginal right is one that has no internal limitation, the doctrine of priority requires that the gov’t 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**

* Test is very fact-specific – NB: judges are given a lot of discretion
* NB: this test is very vague – ‘take account of’ and ‘be respectful’?!

- Compared to *Oakes* test – not perfection, but reasonableness

**- Questions relevant to determination of whether gov’t has granted priority to aboriginal rights holders:** those enumerated in *Sparrow* relating to consultation and compensation; whether gov’t has accommodated exercise of aboriginal right to participate in fishery (through reduced licence fees, for example); whether gov’t’s objectives in enacting a particular reg scheme reflect need to take into account priority of aboriginal rights holders; extent of participation in the fishery of aboriginal rights holders relative to their percentage of population; how gov’t has accommodated different aboriginal rights in a particular fishery (food versus commercial rights, for example); how important fishery is to economic and material well-being of band in question and; criteria taken into account gov’t in, for example, allocating commercial licences amongst different users.

* NB: if infringement is this easy, then why do you need s 35? Couldn’t you just use s 15 Charter?

- The fact that a right is controlled in great detail by regs does not mean that the right is thereby extinguished

### Alteration of Test from *Sparrow* – Objectives

- Although the aboriginal rights recognized by s 35 are fundamentally different from rights in Charter, same basic principle – that purposes underlying rights must inform not only definition of rights but also identification of those limits on rights which are justifiable – applies equally to justification analysis under s 35

- Objectives which can be said to be compelling and substantial will be those directed at either **recognition of prior occupation** of NA by aboriginal peoples or at **reconciliation** of aboriginal prior occupation w/ assertion of sovereignty of Crown

- **Aboriginal rights are a necessary part of reconciliation** – limits placed on those rights are, where objectives furthered by those limits are of sufficient importance to broader community as a whole, **equally** a necessary part of that reconciliation

* Objectives such as pursuit of **economic and regional fairness**, and recognition of historical reliance upon, and participation in, fishery by non-aboriginal groups may satisfy standard
* In the right circumstances, these are in interest of all Canadians and for reconciliation of aboriginal societies w/ rest of Canadian society may well depend on their successful attainment
* NB: what is left in s 35 if this is applied?

- **Two streams to justify infringement:**

* **Test from *Sparrow* applies to rights w/ internal limits**
* **Altered test from *Gladstone* applies to rights w/o internal limits**

## R v Sappier; R v Gray (2006)

F: Claimed right refers to practice of harvesting trees to fulfill domestic needs of pre-contact communities for e.g. shelter, transportation, fuel and tools. Aboriginal groups were nomadic. Most evidence on cultural importance of wood.

I: How to define distinctive culture of such peoples and how to determine which pre-contact practices were integral to that culture.

C: Aboriginals win – practice of harvesting wood for domestic uses was integral to pre-contact distinctive culture of both Maliseet and Mi’kmaq peoples.

### How do you characterize the right?

- Aboriginal right cannot be characterized as a right to a particular resource because to do so would be to treat it as akin to a CL property right

- Pre-contact practice is central to *VDP* test:

1. In order to grasp importance of resource to particular aboriginal people, Court seeks to understand how that resource was harvested, extracted and utilized
2. Also necessary to identify pre-contact practice upon which claim is founded in order to consider how it might have evolved to its present-day form

- Claimed right is too general – right to harvest for personal uses – has to be something about right which makes it aboriginal

- Court should identify a practice that helps to define way of life or distinctiveness of particular aboriginal community

- Court decides to characterize claim as: right to harvest wood for domestic uses as a member of the aboriginal community – no commercial dimension

- Binnie dissents re: commercial dimension:

* Division of labour in aboriginal communities pre-contact
* Should be able to sell/trade within and between aboriginal communities

- Right to harvest wood for domestic uses is communal: not to be exercised by any member of the aboriginal community independently of aboriginal society it is meant to preserve

### Survival Purposes?

- No such thing as aboriginal right to sustenance

- BUT **traditional means of sustenance (pre-contact practices relied upon for survival) can in some cases be considered integral to distinctive culture of particular aboriginal group**

- What matters is that the practice is aboriginal – right doesn’t have to be unique to group

- S 35 seeks to protect integral elements of way of life of aboriginal societies, including their traditional means of survival

- Discard notion that pre-contact practice upon which right is based must go to core of society’s identity, i.e. its single most important defining character – don’t apply test too strictly to create artificial barriers

### Distinctive Culture

- Focus of court should be on nature of prior occupation – **what is meant by ‘culture’ is really an inquiry into 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

- Notion of aboriginality must not be reduced to racialized stereotypes of aboriginal peoples

- Nature of right must be determined in light of **present-day circumstances**

## Lax Kw’alaams Indian Band v Canada (Attorney General) (2011)

- Fishing community on coast in BC – got most of sustenance from sea. Claimed right was trading resources from sea to generate wealth.

- Problem in trying to base expansive claimed modern right on a practice which was fairly narrow in scope at time of contact

- Rights can evolve (*VDP*) = **practice can evolve, but right itself can’t evolve**

- Steps a court should take in dealing w/ s 35 claim:

1. Characterization: identify precise nature of claim to AR – if necessary refine
2. Determine whether FN has proved: (a) existence of pre-contact practice advanced as claimed right; (b) that this practice was integral to distinctive pre-contact aboriginal society
3. Determine whether claimed modern right has reasonable degree of continuity w/ integral pre-contact practice
4. In event that right to trade commercially is found to exist, have regard to *Gladstone*: objectives such as economic and regional fariness and recognition of historical reliance upon, and participation in, industry by non-aboriginal groups may satisfy justification of infringement.



# “Aboriginal Title”: The Framework

**\*AT is something that exists within Canadian law – AT is purely Canadian**\*

## 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?

NB: Almost everything in this case is obiter – case hinges on technical matters.

C: Sent back to trial.

### Place of Aboriginal Lands in the Legal and Political Structure of Canada

- **What is AT?** AT is a right in land. AT 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; those protected uses must not be irreconcilable w/ the nature of the group’s attachment to that land.

**- AT is sui generis**:

* Inalienable to third parties [AT is only ‘personal’ in this sense – does not mean that AT is a non-proprietary interest]
* Source [arises from prior occupation of Canada by aboriginal peoples, not from Crown grant and not from RP]
* Held communally

- ARs which are recognized and affirmed by s 35 fall along a **spectrum w/ respect to their degree of connection w/ the land:**

1. Practices, customs and traditions that are integral to the distinctive aboriginal culture – non-land aboriginal rights
2. Non-site specific aboriginal right
3. Activities which take place on land and might be intimately related to a particular piece of land (might = site-specific right)
4. Aboriginal title itself – confers the right to land itself – property interest

### Test for Aboriginal Title

- **Criteria:**

1. Land must have been occupied prior to sovereignty
* AT crystallized at time sovereignty was asserted – AT is a burden on Crown’s underlying title, but Crown did not gain this title until it asserted sovereignty
1. If present occupation is relied on as proof of occupation pre-sovereignty, there must be continuity between present and pre-sovereignty occupation
2. At sovereignty, that occupation must have been exclusive
* Exclusivity = ability to exclude others from lands – demonstrated by intention and capacity to retain exclusive control
* Proof must rely on perspective of CL and aboriginal, placing equal weight on each
* Joint title can arise from shared exclusivity

- If aboriginals can show that they occupied a particular piece of land, but did not do so exclusively, it will always be possible to establish ARs short of title e.g. site-specific rights to hunting

- **Evidence**: oral histories of Aboriginal groups are admissible as evidence and placed on equal footing w/ types of historical evidence that courts are familiar w/

### Role of Indigenous Law and Political Structures

- Source of AT is grounded both in CL and aboriginal perspective on land; latter includes aboriginal systems of law

- If, at the time of sovereignty, an aboriginal society had laws in relation to land, those laws would be relevant to establishing the occupation of lands

- **Ways to prove possession**: (1) Fact of physical occupation; (2) Aboriginal legal system which recognizes AT

- NB: Court does not directly address aboriginal governance or jurisdiction

- Aboriginal self-gov’t, to the extent that it still exists in Canada, exists under s 35

* NB: basically Canadian gov’t has colonized aboriginal self-governance – not accepting parallel system outside Canadian system
* Aboriginals have to use *VDP* test to try to establish self-governance

### Ability of Canadian Governments to Extinguish and Infringe Upon Aboriginal Title

**- Fed gov’t has exclusive jurisdiction to both extinguish and legislate in relation to ARs**

* S 91(24) protects a ‘core’ of Indianness, including ARs, from provincial intrusion through DII

- Notwithstanding 91(24), provincial laws of general application apply proprio vigore to Indians and Indian lands – cannot function to extinguish ARs

- Provincial laws which would otherwise not apply to Indians proprio vigore are allowed to do so by s 88 of the *Indian Act*, which incorporates by reference provincial laws of general application

* Does not ‘invigorate’ provincial laws which are invalid because they are in relation to Indians and Indian lands – s 88 was not intended to undermine aboriginal rights
* S 88 does not evince the requisite clear and plain intent to extinguish aboriginal rights

### Justification of Infringement

- AT doesn’t have an internal limit, so affirmation of *Gladstone* – **ARs are a necessary part of reconciliation** – limits are equal and necessary part of reconciliation where objectives are of sufficient importance to broader community as a whole

**- Fiduciary duty does not demand that ARs always be given priority** – form and degrees of scrutiny required by fiduciary duty will vary depending on nature of AR at issue

- The dev’t of agriculture, forestry, mining and hydroelectric power, the general economic dev’t of the interior of BC, protection of the env’t 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 w/ this purpose, and, in principle, can justify the infringement of AT

* NB: all provincial powers

- **To consider w/ regard to degree of scrutiny**:

1. Exclusive nature of AT
* Gov’t must demonstrate both that process by which it allocated resource and actual allocation of resource which results from that process reflect prior interest of holders of AT in land
1. AT encompasses right to choose to what uses land be put
* Fiduciary relationship may be satisfied by involvement of aboriginals in decision-making
* There is always a **duty of consultation**
* Nature and scope of duty of consultation varies w/ circumstances
1. Lands held pursuant to AT have an inescapable economic component
* **Compensation** is relevant to question of justification

### Movement Toward a Vision of Reconciliation

Consider:

* What is the suggestion coming out of *Delgamuukw* as to the likely extent of Aboriginal title?
* Would (non-title) Aboriginal rights likely function to protect Aboriginal interests outside title-lands?
* What should one make of the list of government objectives likely considered to be sufficiently ‘compelling and substantial’, and so such as to justify infringement of Aboriginal title?
* What is the likely strength of the negotiating stance of Aboriginal title-holders post-*Delgamuukw*?
* How far beyond *St.Cath/Calder/Guerin* does the law progress?
* Is it conceivable to think of this decision as furthering the policies of assimilation and colonization?

### Competing Theories on Self-Governance

- Gitskan: AT should be at least partially based on their own legal systems/practices/traditions

- Crown has lingering refusal to acknowledge AT; vision of AT as bundle of rights

- McEachern CJ rejected the A’s claim for a right of self-gov’t

* Claim for jurisdiction = claim to govern territories = right to enforce existing aboriginal law, make and enforce new laws, right to supersede laws of BC if 2 were in conflict
* When BC was united w/ Canada, all legislative jurisdiction was divided between Canada and the province
* Characterized the Gitskan and Wet’suwet’en legal system as a most uncertain and highly flexible set of customs which are frequently not followed by the Indians themselves
* NB: In *Campbell v BC* (2000) – BCSC held that aboriginal rights, and in particular a right to self-government akin to a legislative power to make laws, survived as one of the unwritten underlying values of the Constitution

- MacFarlane and Wallace at BCCA essentially agreed w/ TJ w/ respect to analysis of jurisdiction or sovereignty

* Gitskan and Wet’suwet’en peoples do not need a court declaration to permit internal self-regulation, if they consent to be governed
* BUT rights of self-government encompassing a power to make general laws governing the land, resources, and people in the territory are legislative powers which cannot be awarded by the courts – inconsistent w/ Constitution

- Lambert at BCCA disagreed w/ respect to jurisdiction claim

* Need to be open to alternative conceptions of sovereignty and self-governance – leg institution is not essential part of existence of aboriginal right to self-gov’t
* Rights to self-gov’t have been diminished by assertion of British sovereignty, but are still protected under s 35

# Aboriginal Title Post Delgamuukw

## R v Marshall; R v Bernard (2005)

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

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

C: Not sufficient evidence to ground title.

### CL and Aboriginal Perspectives Around Aboriginal Title

- Court’s task in evaluating claim for AR is to examine pre-sovereignty aboriginal practice and translate that practice, as faithfully and objectively as it can, into a **modern legal right**

* NB: aboriginal perspective has to fit into CL

- Court must consider pre-sovereignty practice from perspective of aboriginal people

* But in translating it to a CL right, the Court must also consider the European perspective
* Court should take a generous view of the aboriginal practice and should not insist on exact conformity to the precise legal parameters of the CL right

- Exploiting the land, rivers or seaside for hunting, fishing or other resources may translate into AT to the land if the activity was **sufficiently regular and exclusive** to comport w/ title at CL

- Consider whether practices of aboriginal peoples at time of sovereignty compare w/ **core notions of CL title to land**

- For **exclusion**: all that is required is demonstration of **effective control** of land by group, from which a reasonable inference can be drawn that it could have excluded others had it chosen to do so

- **Oral evidence** can be accepted, provided conditions of usefulness and reasonable reliability set out in *Mitchell* are respected

### Nomadic and Semi-Nomadic Peoples Claim to Title

- Whether a nomadic peoples enjoyed sufficient ‘physical possession’ to give them title to the land, is a question of fact, depending on all the circumstances

- Question is whether a degree of physical occupation/use equivalent to CL title has been made out

- Continuity is required, in the sense of showing the group’s descent from the pre-sovereignty group whose practices are relied on for the right.

## William v British Columbia (2012)

F: Claim area comprises only about 5% of what Tsilhoqot’in regard as their traditional territory. TJ did not grant AT, but would have granted it in part if claim had allowed for this. TJ held that BC does not have jurisdiction to regulate forestry on land subject to AT – land subject to AT not vested in gov’t.

I: How extensive is title and how can the province infringe upon title?

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

### BCCA Judgment

- Law must recognize and protect AT where exclusive occupation of land is critical to traditional culture and identity of an aboriginal group – this will usually be the case where traditional use of tract of land was intensive and regular

- Exclusive possession in sense of intention and capacity to control is required to establish AT

* Usually by showing regular occupancy or use of definite tracts of land for hunting, fishing or exploiting resources
* Less intensive uses may give rise to different rights

- Requirement of physical occupation must be generously interpreted taking into account both aboriginal perspective and perspective of CL

- Ultimate goal is to translate pre-sovereignty aboriginal right to a modern CL right

- Claim can only be described as being a ‘territorial’ one rather than a site-specific claim to title

- Territorial claim for AT does not meets tests in *Delgamuukw* and *Marshall; Bernard*

- Broad territorial claim does not fit within purposes behind s 35 of *Constitution* or rationale for CL’s recognition of AT

- Broad territorial claims to title are antithetical to goal of reconciliation, which demands that, so far as possible, traditional rights of FN be fully respected w/o placing unnecessary limitations on sovereignty of Crown or on aspirations of all Canadians, Aboriginal and non-Aboriginal

# Metis Rights Under Section 35

AT is very hard for Metis to show. They were nomadic/semi-nomadic and living on top of other people’s territory – best they can hope for is joint title. Metis rights are cultural rights.

## R v Powley (2003)

F: Powley shot a moose w/o a license. Claimed he had an aboriginal (Metis) right to hunt.

C: Metis right to hunt found – charges dismissed.

### Metis Identity

- Metis share common experience of having forged new culture and distinctive groups identity

- In addition to demographic evidence, proof of shared customs, traditions, and a collective identity is required to demonstrate existence of a **Metis community** that can support a claim to site-specific aboriginal rights – must be some degree of continuity and stability – Metis rights are communal

- **Membership requirements** for Metis communities should become more standardized, in meantime case-by-case analysis

- 3 broad factors as indicia of Metis identity for purpose of claiming Metis rights under s 35: (1) self-identification, (2) ancestral connection and (3) community acceptance

### Test for Metis Rights

- **Purpose of s 35 protection for Metis**: to recognize and affirm rights of Metis held by virtue of their direct relationship to this country’s original inhabitants and by virtue of continuity between their customs and traditions and those of their Metis predecessors

* Constitutionally significant feature of Metis is their special status as peoples that emerged between first contact and imposition of European control

- **Modified *VDP* test** for Metis because *VDP* discussion focuses on existence of aboriginals prior to arrival of Crown

* Test for Metis practices should focus on identifying those practices, customs and traditions that are integral to Metis community’s distinctive existence and relationship to land
* **Post-contact but pre-control test** enables identification of practices, customs and traditions that predate imposition of European laws and customs on Metis
* NB: Metis are part-European, part-Indigenous – if they move too far towards Europeans, they may not be able to claim aboriginal rights

## Recent Developments in Metis Law

- Likely that AT principles will be applied w/ some modifications to any Metis claims

- Issues will likely be: sufficiency of use and occupation, exclusive occupation and continuity

- Doubtful that any Metis group will ever be able to meet test of exclusive occupancy or show intention and capacity to retain exclusive control – contradicts Metis history – so likely they will have to make claim for joint occupancy

- *Morin*: land claim in Saskatchewan – to date only Metis land claim that actually seeks declaration that Metis have AT to land

## Daniels v. Canada (2013) FC

Likely to be modified by appeal court. Criticized for conflating definitions for Metis and non-status Indians.

### Problem of Definition

- Do Metis and non-status Indians fall under 91(24)?

- Situations which created non-status Indians: problems recording names during treaty process; fear of treaty process; many Indians (primarily women) lost status or gave it up

- **Non-Status Indians**: no status under *IA* and Indians; those to whom status could be granted by fed leg; people who had ancestral connection not necessarily genetic to those considered as ‘Indians’ either in law or fact or any person who self-identifies as an Indian and is accepted as such by Indian community, or a locally organized community, branch or council of an Indian association or organization w/ which that person wishes to be associated

- **Metis**: from *Powley*: aside from sine qua non of mixed aboriginal and non-aboriginal ancestry, a Metis is a person who (a) has some ancestral family connection, (b) identifies himself as Metis and (c) is accepted by Metis community or a locally organized community branch, chapter or council of a Metis association w/ which that person wishes to be associated

### Do Metis and Non-Status Indians fall under 91(24)?

- *Canard*: s 91(24) created a racial classification and refers to a racial group for whom Constitution contemplates possible special treatment

- Single most distinguishing feature of either non-status Indians or Metis is that of ‘Indianness’, not language, religion or connection to European heritage

- Both in principle and in practice, one of essential elements of 91(24) was to vest in fed gov’t the power to leg in relation to people who are defined, at least in a significant way, by their native heredity

## Manitoba Metis Foundation Inc v Canada (AG) (2013)

- *MMF* case filed in 1981: asked for a series of declarations that (1) in implementing Manitoba Act, fed Crown breached fiduciary obligations owed to Métis; (2) fed Crown failed to implement Manitoba Act in a manner consistent w/ honour of the Crown; and (3) certain leg passed by Manitoba affecting implementation of Manitoba Act was ultra vires - hopes that holding that honor of Crown was breached will lead to negotiations for land, money and self-gov’t

### Manitoba Court of Appeal (2010)

- Entire action is barred by combination of limitation period/laches/mootness

- TJ’s determination not to grant declarations sought should not be interfered w/

- There is a fiduciary relationship between Metis and Crown – not same as fiduciary duty

- No fiduciary duty owed pursuant to s 32 of *Manitoba Act*

- Not necessary for Metis interest in land to be AT

- Possible that Metis could have an interest in land sufficient to establishing a fiduciary duty

### SCC Findings

S 31 of Manitoba Act constitutes a constitutional obligation to Métis people of Manitoba to provide Métis children w/ allotments of land. Immediate purpose of obligation was to give Métis children a head start over expected influx of settlers from east. Broader purpose was to reconcile Métis’ Aboriginal interests in Manitoba territory w/ assertion of Crown sovereignty over area that was to become Manitoba. Obligation enshrined in s. 31 of Manitoba Act did not impose a fiduciary or trust duty on gov’t. However, it engaged the honour of the Crown. This required gov’t to act w/ diligence in pursuit of the fulfillment of promise. Crown failed to do so and obligation to Métis children remained largely unfulfilled. Métis claim based on the honour of the Crown is not barred by law of limitations or the equitable doctrine of laches.

### Fiduciary Doctrine

- In the aboriginal context, a fiduciary duty may arise as a result of Crown assuming discretionary control over specific aboriginal interests

- Fact that the Metis are aboriginal and had an interest in the land is not sufficient to establish an aboriginal interest in land- interest must be distinctly aboriginal: it must be a communal aboriginal interest in the land that is integral to nature of Metis distinctive community and their relationship to land

* Therefore no fiduciary doctrine

### Honour of the Crown

- Honour of the Crown arises from Crown’s assertion of sovereignty over an aboriginal people and de facto control of land and resources that were formerly in control of that people – applies here.

- Ultimate purpose of honour of the Crown is reconciliation of pre-existing Aboriginal societies w/ assertion of Crown sovereignty.

- Honour of the Crown speaks to how obligations that attract it must be fulfilled

- Honour of the Crown has been applied in at least 4 situations:

1. Gives rise to fiduciary duty when Crown assumes discretionary control over a specific aboriginal interest
2. Informs purposive interpretation of s 35 and gives rise to a duty to consult when Crown contemplates an action that will affect a claimed but as of yet unproven aboriginal interest
3. Governs treaty-making and implementation
4. Requires Crown to act in a way that accomplishes intended purposes of treaty and statutory grants to aboriginal peoples

- When the issue is the implementation of a constitutional obligation to an aboriginal people, honour of Crown requires that Crown: (1) takes a broad purposive approach to interpretation of promise; and (2) acts diligently to fulfill it

# Treaties and Treaty Rights

### Cultural and Political Distinctions

|  |  |
| --- | --- |
| **Aboriginal Understanding** | **European Understanding**  |
| - European rights in Americas come about through treaties made w/ FNs- Treaties are made between nations and every individual member of allied nations assumes personal responsibility for respecting the treaty- Treaties are **vital, living instruments** of relationship- Integration of spiritual and political matters- Modeled on forms of marriage, adoption and kinship:* Aimed at creating living relationships
* Required periodic celebration, renewal and reconciliation
* Evolved over time; agreed interpretation of relationship developed and changed w/ each renewal and generation of children, as people grew to know each other better, traded, and helped defend each other

- Indigenous territories were to be shared; peace was to be made and separate but parallel paths of European and indigenous cultures were to be followed in a peaceful and mutually beneficial way  | - Pledge of honour of the Crown - Business Ks- Doctrine of discovery: treaties were to legitimize European possession of a land whose title was already vested in a European crown- Historical docs that are static - NB: odd that gov’t entered into treaties if they believed they had title to all land  |

### Nature of Treaties in Canadian Law

- An Indian treaty is unique; it is an agreement sui generis which is neither created nor terminated according to rules of int’l law

- **What characterizes a treaty is**: (1) intention to create obligations, (2) presence of mutually binding obligations and (3) a certain measure of solemnity (*R v Sioui*)

- Treaty rights are constitutionally protected – so it is important to distinguish treaties from other types of agreements

- *R v Sioui*: treaties are almost quasi-int’l because Britain treated FNs as being sovereign nations

## R v Marshall I (1999)

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

I: How are treaties to be interpreted and applied?

- **Honour of the Crown is always at stake in dealings w/ aboriginal people**: trade arrangement must be interpreted in a manner which gives meaning and substance to promises made by Crown.

- Interpretation of treaties in their historical context may make use of **extrinsic evidence**

* Court’s obligation is to choose from among various possible interpretations of **common intention** the one which best reconciles

- Treaty right is a **regulated right** and can be contained by regulation within its proper limits

### Interpretation of Treaties

From *R v Marshall* (1999) – **principles of interpretation**:

1. Aboriginal treaties constitute a unique type of agreement and attract special principles of interpretation
2. Should be liberally construed and ambiguities or doubtful expressions should be resolved **in favour of aboriginal signatories**
3. Goal is to choose from among various possible interpretations of **common intention** one which best reconciles interests of both parties at time treaty was signed
4. Integrity and honour of Crown is presumed in searching for common intention
5. Court must be sensitive to unique cultural and linguistic differences between parties
6. Words of treaty must be given sense which they would naturally have held for parties at the time
7. Technical or contractual interpretation of treaty wording should be avoided
8. Courts cannot alter terms of treaty by exceeding what is possible on language or realistic
9. Treaty rights of aboriginal people must not be interpreted in a static or rigid way
* Determine what **modern practices** are reasonably incidental to core treaty right in its modern context

## R v Marshall II (1999)

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

1. Insignificant effects
	* Treaty rights here are limited to securing “necessaries”
	* Regs that do no more than reasonably define treaty right do not impair exercise of treaty right and therefore do not have to meet *Badger* standard of justification
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
	* Subject to regulations that can be justified under the Badger test.

### Badger Test

*- Sparrow* test applied to infringements of treaty rights (From *R v Badger,* 1996)

- It is always open to the Minister to seek to justify the limitation on the treaty right because of the need to conserve the resource in question or for other compelling and substantial public objectives which may include economic and regional fairness, and recognition of historical reliance upon, and participation in, fishery by non-aboriginal groups (NB: this is from *Gladstone*)

* **Crown can regulate treaty rights, but it has to justify doing so according to *Sparrow* framework**

- **Fed and provincial gov’ts** have regulatory authority within their respective leg fields to regulate exercise of treaty right subject to constitutional requirement that restraints on exercise of treaty right have to be justified on basis of conservation or other compelling and substantial public objectives

* NB: Should provinces be able to do this?

- Not clear whether *Gladstone* framework should apply – *Gladstone* applies where there is no internal limit

## R v Morris (2006)

**Provinces can only regulate within treaty or secondarily regulate if meet framework from *Sparrow*.**

F: Provincial reg that you couldn’t hunt with a light. Morris hunted w/ light.

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

C: Hunting w/ a light ok because is a natural extension of hunting w/ a fire in a canoe which was a historical cultural practice.

### Powers of Provinces in Relation to Treaty Rights

**1. Determine whether impugned provisions impair a treaty right**

* 3 possibilities: (1) regulation w/o treaty right engaged; (2) regulation w/in the treaty; (3) regulation “of” the (infringing) treaty

**2. Analyze whether impugned provisions are valid and applicable under constitutional division of powers**

* Where a valid provincial law impairs an integral part of primary federal jurisdiction over Indians and Lands reserved for the Indians, it will be inapplicable to extent of impairment
	+ Treaty right is at core of Indianness under 91(24)
* Provincial laws of general application are precluded from impairing ‘Indianness’
* Where such laws are inapplicable because they impair ‘Indianness’, they may still be found to be applicable by incorporation under s 88 of *IA*
* BUT Parliament has expressly declined to use s 88 to incorporate provincial laws where effect would be to infringe treaty rights
* Where a prima facie infringement of a treaty right is found, a province cannot rely on s 88 by using justification test

- Treaty rights CAN impact on non-Aboriginal people in Canadian society

# Duties to Consult and Accommodate

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

F: Haida Gwaii in process of lands title claim. Area is heavily forested and trees play an important cultural role. Province is continuing to issue licenses to forestry companies in the area. Haida Nation took issue of transfer of a long-standing license to a new company. They argued legal encumbrance, equitable encumbrance and breach of fiduciary duty, all grounded in their assertion of Aboriginal title.

I: If there is no recognized title, what duty does the gov’t owe?

A: - In this case, Aboriginal interest is **insufficiently specific** for honour of the Crown to mandate that Crown act in Aboriginal group’s best interest, as a fiduciary

- Gov’t holds legal title to land – but Haida people also claim title to land – so what duty does the gov’t owe the Haida people? 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.

### History of Duties to Consult and Accommodate

- *Sparrow*: Court affirmed duty to consult w/ west coast Salish asserting an unresolved right to fish

- *Gladstone*: need for consultation and compensation

- *Delgamuukw*: content of duty varies w/ circumstances: from a min duty to discuss important decisions where breach is less serious or relatively minor; through significantly deeper than mere consultation that is required in most cases; to full consent of aboriginal nation on very serious issues

* All this case-law unfolds in context of fiduciary relationship between Crown and Aboriginal peoples

### Challenges Around Using Interlocutory Injunctions

**- Def:** court order to compel/prevent a party from doing certain acts pending final determination of case

1. May not capture full obligation on gov’t alleged by Haida
2. Typically represent an all-or-nothing solution
3. **Balance of convenience test tips scales in favour of protecting jobs and gov’t revenues**, w/ result that Aboriginal interests tend to lose
4. Designed as a stop-gap remedy pending litigation of underlying issues – Aboriginal claim litigation can be very complex and lengthy

### Underpinnings of Duty to Consult and Accommodate

- Gov’t’s duty to consult w/ Aboriginal peoples and accommodate their interests is grounded in **honour of the Crown** – not grounded in fiduciary duty

* **All gov’t interactions w/ Aboriginal peoples engage honour of the Crown and require that it be upheld**

- Historical roots of principle of honour of the Crown suggest that it **must be** **understood generously** in order to reflect underlying realities from which it stems

* In all its dealings with Aboriginal peoples, **from the assertion of sovereignty** to the resolution of claims and the implementation of treaties, the Crown must act honourably.

- Honourable negotiation implies a duty to consult w/ Aboriginal claimants and conclude an honourable agreement reflecting claimants’ inherent rights. But proving rights may take time, sometimes a very long time. In meantime, how are interests under discussion to be treated?

* Crown, acting honourably, cannot cavalierly run roughshod over Aboriginal interests where claims affecting these interests are being seriously pursued in process of treaty negotiation and proof.
* BUT **Crown is not rendered impotent** – may continue to manage resource in question pending claims resolution – but honour of the Crown may require it to consult w/ and reasonably accommodate Aboriginal interests pending resolution of claim

### Duty to Consult and Accommodate

- **When does it arise?**

* Arises when Crown (1) has knowledge, real or constructive, of potential existence of Aboriginal right/title and (2) contemplates conduct that might adversely affect it
	+ To facilitate this determination, claimants should outline their claims w/ clarity, focusing on scope and nature of Aboriginal rights they assert and on alleged infringements
	+ NB: this is a forward-looking tool – does not apply to past actions

- **What is the content of the duty?**

* In all cases, honour of Crown requires that Crown **act w/ good faith** to provide meaningful consultation appropriate to circumstances – at all stages, good faith on both sides is required
* To determine content and scope consider: (1) strength of claim for Aboriginal/treaty rights; seriousness of potential effect on Aboriginal/treaty rights; in the case of treaty rights, specificity of treaty promise

- **What does the duty to consult not include?**

* There is **no duty to agree**
* Aboriginal claimants must not frustrate the Crown’s reasonable good faith attempts, nor should they take unreasonable positions to thwart gov’t from making decisions or acting in cases where, despite meaningful consultation, agreement is not reached
* This process does not give Aboriginal groups a veto over what can be done w/ land pending final proof of the claim
	+ “Consent” alluded to in *Delgamuukw* is **appropriate only in cases of established rights.**

### Spectrum

- Content of duty varies w/ circumstances

**- Low end:** claim to title is weak, Aboriginal right limited, or potential for infringement minor – only duty on Crown may be to give notice, disclose info, and discuss any issues raised in response to notice

**- High end:** strong prima facie case for claim is established, right and potential infringement is of high significance to Aboriginal peoples, and risk of non-compensable damage is high – deep consultation, aimed at finding a satisfactory interim solution, may be required

* + May entail opportunity to make submissions for consideration, formal participation in decision-making process, and provision of written reasons to show that Aboriginal concerns were considered and to reveal impact they had on decision
	+ NB: high end of spectrum does not go as far as veto/consent where rights are not established

- Between these 2 extremes of spectrum will lie other situations

- Controlling question in all situations is **what is required to maintain honour of the Crown and to effect reconciliation between Crown and Aboriginal peoples w/ respect to interests at stake**

- **At very tope end of spectrum duty to consult may become duty to accommodate:**

* When consultation process suggests amendment of Crown policy
* Where a strong prima facie case exists for claim, and consequences of gov’t’s proposed decision may adversely affect it in a significant way, addressing Aboriginal concerns may require taking steps to avoid irreparable harm or to minimize effects of infringement, pending final resolution of underlying claim
* Where accommodation is required, Crown must balance Aboriginal concerns reasonably w/ potential impact of decision on asserted right/title and w/ other societal interests

### Duties on others

- Crown alone remains legally responsible for consequences of its actions and interactions w/ third parties, that affect Aboriginal interests

- **Crown may delegate procedural aspects** of consultation to industry proponents seeking a particular dev’t

- Ultimate legal responsibility for consultation and accommodation rests w/ Crown – **honour of Crown cannot be delegated**

- Fact that third parties are under no duty to consult/accommodate Aboriginal concerns does not mean that they can never be liable to Aboriginal peoples

**- Powers (and responsibilities) of the provinces (s 109):** province took land subject to duty to consult and accommodate

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

F: Argument was that Treaty 8 expressly contemplated ‘taking up’ of surrendered lands for various purposes, including roads. Crown knew of fundamental concern to FN that they be able to continue w/ their ways of life after treaty was signed, and that it wanted FN to do so.

I: Is winter road more properly seen as ‘taking up’ pursuant to Treaty rather than infringement of it?

A: - Crown has a treaty right to ‘take up’ surrendered lands for regional transportation purposes, but Crown is nevertheless under an obligation to inform itself of impact its project will have on exercise by Mikisew of their hunting and trapping rights, and to communicate its findings to Mikisew

- Does not mean that whenever a gov’t proposes to do anything in Treaty 8 surrendered lands it must consult w/ all signatory FN, no matter how remote or unsubstantial the impact

- Here impacts were clear, established and demonstrably adverse to continued exercise of Mikisew hunting and trapping rights over lands in question

- The duration, area and general severity of impact can increase/decrease scope and content of consultation

- Proximity of Crown’s conduct to places where Aboriginal group exercises right, as well as importance of right to group, may be important to determine scope/content

- Scope/content of duty may be lower where treaty provisions are more specific

### Duty to Consult in Treaties

- Language of treaty could not be clearer in foreshadowing change, BUT Crown was and is expected to **manage change honourably**

- **In the case of a treaty** **the Crown, as a party, will always have notice** of its contents – question in each case will be to determine degree to which conduct contemplated by Crown would adversely affect those rights so as to trigger duty to consult

- **Duty to consult is triggered at a low threshold, but adverse impact is a matter of degree, as is extent of Crown’s duty**

- Whether Crown has procedural duty to consult is a distinct question from whether Crown has infringed Aboriginal peoples’ substantive rights and can justify such an infringement

## Rio Tinto Alcan Inc v Carrier Sekani Tribal Council (2010)

F: P entered into agreement to sell excess power to BC Hydro. D was not consulted at time of original construction of dam and diversion of water. D argued it should have been consulted about the new agreement.

### Assessing Consultation versus Consulting

L: - Duty on a tribunal to consider consultation and **scope of that inquiry depends on mandate conferred by leg that creates tribunal**

* **Leg may choose to delegate to a tribunal Crown’s duty to consult**
* Alternatively, **leg may choose to confine a tribunal’s power** to determinations of whether adequate consultation has taken place, as a condition of its statutory decision-making process
* Tribunals considering resource issues touching on Aboriginal interests may have neither of these duties, one of these duties, or both depending on what responsibilities leg has conferred on them

- Municipalities do not have a duty to consult

- Gov’t action triggering a duty to consult is not confined to decisions or conduct which have an immediate impact on lands and resources.  **A potential for adverse impact suffices**.

* Duty to consult extends to strategic, higher level decisions that may have an impact on Aboriginal claims and rights

- The claimant must show a **causal relationship between the proposed gov’t conduct or decision and a potential for adverse impacts** on pending Aboriginal claims or rights.

* **An underlying or continuing breach, while remediable in other ways, is not an adverse impact for the purposes of determining whether a particular government decision gives rise to a duty to consult**.

- **Tribunal seeking to engage in consultation itself must possess remedial powers** necessary to do what it is asked to do in connection w/ the consultation

