LAW 201b – Aboriginal and Treaty Rights

History and Context 3

Pre- Royal Proclamation 3

Royal Proclamation of 1763 4

Early Jurisprudence 4

Context 4

Johnson and Graham’s Lessee v William M’Intosh (1823) US 4

Doctrine of Discovery 4

Conquest 5

Cherokee Nation v Georgia (1831) 5

Worcester v Georgia (1832) US 6

History of Aboriginals 6

Doctrine of Discovery 6

Analysis 6

St. Catherine’s Milling and Lumber Company v The Queen (1888) JCPC 6

Nature of Indian Interest in Land 6

Pre S. 35 Cases in the 20th Century 7

History and Context 7

Indian Act 1876 7

Calder v British Columbia (Attorney General) (1973) 7

Key holdings within the Supreme Court split 7

Context 8

Impact of Decision 8

Royal Proclamation 8

Indian Title 8

Extinguishment [FOCUS OF THE CASE] 8

The impact of the decision 9

Questions (coming more or less directly out of the case itself) 10

Critical reflections on *Calder* 10

The Treatment of Historical Treaties (non-Section 35 analysis) 11

*R. v. Sioui* (1990) 1 S.C.R. 1025 11

Guerin v The Queen (1984) 12

Outcome 12

Nature of Aboriginal TItle – Fiduciary Obligation 12

“Aboriginal Rights” General Framework Established 13

Section 35 13

Purposes of s 35 14

Interpretation of S 35 14

Charter Section 25 14

R v Sparrow (1990) 14

Context 14

Relationship between Crown and Aboriginals 14

Effect of Constitutionalization 14

Sparrow Test 15

The nature and existence of Aboriginal Rights under S. 35 16

Royal Commission on Aboriginal Peoples (1996) Report 17

R v Van der Peet (1996) – *the* integral to distinctive culture test for an AR. 17

Reasoning – Lamer: 17

Aboriginal Rights 17

Ten Factors to Consider 17

L’Heureux-Dubé – Dissent 18

McLachlin – Dissent 18

R v Gladstone (1996) Adjusting the Sparrow Framework 21

Context 21

Alteration of test from *Sparrow* – Infringement 21

Alteration of Test from *Sparrow* – Objectives 21

Possible Adjustment to the *Sparrow* Framework: 22

*Mitchell v. M.N.R*. (2001) 1 S.C.R. 911 [another way to justify infringement] 22

McLachlin J.’s dissent in *R. v. Van der Peet* [1996] 2 S.C.R. 507 22

R v Sappier; R v Gray (2006) 23

How do you characterize the right? 23

Survival Purposes? 23

Distinctive Culture 23

Lax Kw’alaams Indian Band v Canada (Attorney General) (2011) 23

“Aboriginal Title”: The Framework 25

Delgamuukw v British Columbia (1997) 25

Place of Aboriginal Lands in the Legal and Political Structure of Canada 25

Test for Aboriginal Title 25

Role of Indigenous Law and Political Structures 26

Ability of Canadian Governments to Extinguish and Infringe Upon Aboriginal Title 26

Justification of Infringement 26

Movement Toward a Vision of Reconciliation 27

Competing Theories on Self-Governance 27

Tsilhqot’in Nation V British Columbia 2014 SCC 27

Tsilhqot’in – Issue-by-Issue 30

OBITER: 32

two constitutional limits on Provincial power to regulate land held under aboriginal 32

statutory interpretation - what does the *Forest Act* mean? 32

paramountcy and IJI 33

Now, practical problems... 34

Treaties and Treaty Rights 34

Cultural and Political Distinctions 34

Nature of Treaties in Canadian Law 35

R v Marshall #1 (1999) 35

Interpretation of Treaties 35

Most significant jurisprudential development 35

Other Interpretive principles: 35

1) Use of extrinsic evidence (in absence of ambiguity): 35

2) Treaty rights in the new constitutional framework: 36

R v Marshall #2 (1999) 36

Badger Test 36

*Grassy Narrows First Nation* v. *Ontario*, 2014 SCC 48, [2014] 2 S.C.R. 447 36

Recent challenges (in relation to historic treaties) 41

The First Nation of Nacho Nyak Dun v. Yukon (Government of), 2015 YKCA 18 41

Metis Rights Under Section 35 41

R v Powley (2003) 41

Metis Identity 42

Test for Metis Rights 42

Recent Developments in Metis Law 42

Daniels v. Canada (2013) FCA 42

Problem of Definition 43

Do Metis and Non-Status Indians fall under 91(24)? 43

Manitoba Metis Foundation Inc v Canada (AG) (2013) 43

Manitoba Court of Appeal (2010) 43

SCC Findings 44

Fiduciary Doctrine 44

Honour of the Crown 44

Duties to Consult and Accommodate 44

Haida Nation v British Columbia (Minister of Forests) (2004) 44

History of Duties to Consult and Accommodate 45

Challenges Around Using Interlocutory Injunctions 45

Underpinnings of Duty to Consult and Accommodate 45

Duty to Consult and Accommodate 45

Spectrum 46

Duties on others 46

Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage) (2005) 47

Duty to Consult in Treaties 47

Rio Tinto Alcan Inc v Carrier Sekani Tribal Council (2010) 47

Assessing Consultation versus Consulting 47

New Developments 49

Chippewas of the Thames First Nation v. Enbridge Pipelines Inc., 2015 FCA 222 [NEB + Absence of Crown] 49

Yahey v. British Columbia, 2015 BCSC 1302 [Cumulative Effects] 49

Yellowknives Dene First Nation v. Canada (Aboriginal Affairs and Northern Development), 2015 FCA 148 50

Legislative Action 53

Courtoreille v. Canada (Aboriginal Affairs and Northern Development), 2014 FC 1244 53

Hupacasath First Nation v. Canada (Foreign Affairs and International Trade Canada), 2015 FCA 53

Some Aspects of International Law that Intersect with Section 35 53

Various UN instruments and provisions within instruments 53

Inter-American Human Rights Commission 54

United Nations Declaration on the Rights of Indigenous Peoples 54

What might be the legal problems with implementing these in Canada? 55

# 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’. [Nation to nation negotiation which relates specifically to the transfer of land; note that in BC, there is no treaty whereby the Crown acquired the land in the province]

# Early Jurisprudence

How much of this still persists today?

General discussions:

The role played in these decisions by the construction of history

The development of legal doctrine (where does it come from?)

The justification of legal doctrine

The meeting of peoples (and their laws, political structures, worldviews, etc.)

## 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. Indigenous powers of governance
6. Indigenous interests in land/treatment
7. Nature and status of Crown-Indigenous treaties

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

**F:** Same parcel of land has 2 grants: 1 purporting to be made in 1773 and 1775 by chiefs of certain Indian tribes to Π; the second grant from US gov’t to Δ.

**I:** Do the Indians have the power to give, and can private individuals receive from Indians, title to land?

**C:** The Indians do not have the power to grant land, therefore, a title obtained from the Indians cannot be sustained in the Courts of the United States. Judgment for Δ.

### 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
* use and occupation rights are left [similar to St. Catherine’s Milling]
* but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it.

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

- Institutions recognise the absolute title of the crown, subject only to the Indian right of occupancy, and recognise the absolute title of the crown to extinguish that right. This is incompatible with an absolute and complete title in the Indians.

- 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. Πs 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:** Indian’s right to self-governance is PRE-discovery, not something to be granted by US gov’t, the power of self-gov’t cannot be intruded upon by GA’s statutes. The treaty did not grant power to regulate inside Cherokee country, plus **must be interepreted *in the Indian’s favor***. Protection doesn’t mean giving up self-government

**RATIO**

*Suzerainty:* settled doctrine of the law of nations is, that a weaker power does not surrender its independence-its right to self government, by associating with a stronger, and taking its protection. A weak state, in order to provide for its safety, may place itself under the protection of one more powerful, without stripping itself of the right of government, and ceasing to be a state.

### 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

**GENERAL QUESTIONS:**

* Confusing, throws into confusion the whole treaty making process
* Why would Crown need treaties if they already had absolute title?
* If there’s something they need to do, what is it they’re doing w/ the treaties?
* PC takes one side of this and runs with it – focusing on the side that indicates that the British have absolute title

# 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.

Key holdings within the Supreme Court split **(3-3-1)**

6 of 7: Nisga’a title is grounded in the pre-existing interests of the Nisga’a [St. Catherine’s milling goes by the wayside, which said that source of Indian interests in land was royal proclamation]

3 of 7: those interests persist into the colonial era, and can only be extinguished through legislative acts showing ‘clear and plain intent’ [Hall]

3 of 7: colonial instruments were sufficient to extinguish Nisga’a title [Judson]

1 of 7: the Nisga’a did not (as required) receive permission to sue [Pigeon]

[A condensed look into *Calder*, comparing and contrasting positions taken by the two main camps (and arguments in support of these positions)

### 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.

*Key parts of this have dramatically changed post Delgamuukw and Tsilhqot’in*

### Extinguishment [FOCUS OF THE CASE]

- 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

[this is still the test for extinguishment (picked up in 1990 by *Sparrow*)]

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

**NATURE OF TREATIES**

**Judson J.: “**The territorial limitations of the treaty (8) and the fact that the Indians of northeastern British Columbia were included with those in the Northwest Territories may have some significance. But the answer of the Province is still the same—that original Indian title had been extinguished in the Colony of British Columbia prior to Confederation and that there were no Indian claims to transfer to the Dominion…”

**Hall J.:**

“Surely the Canadian treaties, made with much solemnity on behalf of the Crown, were intended to extinguish the Indian title. What other purpose did they serve? If they were not intended to extinguish the Indian right, they were a gross fraud and that is not to be assumed…Certain statements in the treaty are entirely inconsistent with any argument or suggestion that such rights as the Indians may have had were extinguished prior to Confederation in 1871…If there was no Indian title extant in British Columbia in 1899, why was the treaty negotiated and ratified?”

**What continues on from this case in Canadian law**

* “The fact is that when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries…”
* Test for extinguishment (clear and plain intent by the Crown-sovereign)
* Pulled through from ***St. Catherine’s Milling***
  + Indian title as ‘personal and usufructuary right’
  + Indian title as a burden on underlying Crown title
  + At assertion of sovereignty Crown came to possess ‘radical’ (underlying) title
  + Crown is the sole/absolute sovereign (no concept of ‘domestic dependent nationhood’ is considered, let alone recognized)

Some of these ideas have gone out of style but still some persistence; courts still say things like this

* *Suggestion* that Indian title could be simply grounded in *possession*

|  |  |  |
| --- | --- | --- |
|  | **Judson** | **Hall** |
| **Royal Proclamation 1763** | Origin of Indian title, but not sole source of title. They were organized in societies + occup’d land for centuries. | BC = terra incognita; unilateral expression of general policy of Crown thru practice of it. |
| **Nature + Status of Indian title** | Estab’ment of BC (1858) brought Nishga territory into it, Nisga’a land right dependent on good will of the Sovereign. | Nishga’s have never ceded or extinguished Aboriginal title w/n territo.  Possession is, at CL, proof of ownership to Nisga’a. |
| **Extinguishment** | Sovereign authority has complete dominion over lands, but gave right of occupancy to N. Absolute exclusive title excludes all others not compati. | Actual extinguishment of title must be plain and unambiguous.  - w/o, Indian title continues.  Onus on Sovereign to prove. |
| **Nature of treaty [& making]**  **(RE treaty 8)** | They surrendered their rights prior to Confederation, only after estab’ment of BC as colony. | CAN treaties meant to extinguish Indian title, otherwise, why negotiate + ratify treaties? |

## The impact of the decision

* + 1. Change in federal policy
* *Comprehensive Claims Policy* (1974)
* Went the other way from the former White Paper
  + 1. Treaty negotiations and modern treaties
* James Bay and Northern Quebec Agreement (1975)
* Northeastern Quebec Agreement (1978)
* Inuvialuit Final Agreement (1984)
  + 1. Lead up to constitutional struggles
    2. *Crown Proceedings Act* (BC, 1974) Means that you can sue the gov’t w/o asking them first
    3. *Nisga’a Final Agreement* (ratified in 2000)
* Began in the 1970s as a result of the Calder case
* Not actually ratified under the BC treaty negotiations
* Finally, gov’t in 1992 relented; agment finalized and then ratified
* Seems like this is the high water mark of treaties
  + 1. *Campbell v. British Columbia* (2000, BCSC)
* Launched suit on part of opposition party, which challenged the terms to the Nisga’a treaty based on the argument that 91+92 gave all the possible rights and there wasn’t any ‘room’ left for the Nisga’a to have their own rights ∴ unconstitutional
* Ct accepted arguments from const’l scholars which stated that concurrency solves most of that problem
* Still fine, constitutionally speaking

## Questions (coming more or less directly out of the case itself)

1. Can Indigenous interests only survive to the extent they fit with the exercise of Crown sovereignty? Will be dealt with more extensively in Sparrow
2. Where are Indigenous rights to governance in this ongoing legal process? Not talked about in Calder
3. Is it important that the pre-contact nature of Indian interests in land be determined in order to settle questions of Indian land interests today? Not the focus; there was a presumption that the Nisga’a occupied vs today where there’s a lot of evidence entered in order to prove,
4. If so, should that pre-contact nature be set out in the form in which they existed (and potentially continue to exist) within Indigenous legal/political orders, or in some form that is translated into the idiom of the common law?

Suggested in Delgamuukw and Tsilhqot’in but not set out in Calder; really stopped at the idea that they’re there, and that’s enough to ground property interest; much murkier today and something to track as we get into more recent cases

## Critical reflections on *Calder*

* 1. What can be seen from this case (and its history) that provides insight into the relationship between Canadian law and the history of colonialism?

Where does the idea come from that Canada states it can go to someone else’s land and claim it? That’s colonialism for you…

* 1. What should be made of the notion (expressed at several points in this case) that certain things are/were properly done ‘for’ Indians (for their ‘protection’, or for their ‘benefit’)?

No agreement but there was an exchange of goods – the Nisga’a got civilization and that’s more than enough…

* 1. What is the role of deceit (and/or fraud and misrepresentation) in this long story?

When we get to the last few years, the SCC comes to be enamoured w/ idea of the honour of the Crown – used to measure what the Crown did or didn’t do in the past but a lot of what seems to be happening in Nisga’a territory was pretty obviously misrepresentative and fraudulent

* 1. Is it appropriate that British Columbia attempt to appeal to the passage of time as an escape from its obligations when it actively prevented Indigenous peoples from asserting claims in its courts – in their struggles to right perceived wrongs – all through this period (from the 1850’s up to the 1970’s (and right up to at least 1990)?

Arguments in Calder that too much time has gone by but Nisga’a had always been resistant and then there was a law passed mandating that the Nisga’a *couldn’t* assert their claims in court. Once they were allowed to in the 1950s, they jumped on it.

* 1. What is the ‘frame’ (or the frames) within which all this litigation progresses? How are arguments limited or constrained (right from the point of engagement)? Who seems to control the nature of the frames of reference in this context? Is it appropriate that the Nisga’a seem to have to work out how to function within these constraints?

Obviously seen in Berger’s statement in court about what the Nisga’a were claiming

* 1. How might one *explain* what has transpired in this litigation (for example, how might one reasonably explain the narrow breadth within which arguments had to be constructed)? What forces do you expect account for why this long history plays out the way it does?

# The Treatment of Historical Treaties (non-Section 35 analysis)

## *R. v. Sioui* (1990) 1 S.C.R. 1025

**F:** The four respondents convicted for cutting down trees, camping and making fires in places not designated in Jacques‑Cartier park contrary to ss. 9 and 37 of the *Regulation respecting the Parc de la Jacques‑Cartier*…

The respondents admit that they committed the acts but they alleged that they were practising certain ancestral customs and religious rites which are the subject of a treaty between the Hurons and the British, a treaty which brings [s. 88](http://www.canlii.org/en/ca/laws/stat/rsc-1985-c-i-5/latest/rsc-1985-c-i-5.html#sec88_smooth) of the[*Indian Act*](http://www.canlii.org/en/ca/laws/stat/rsc-1985-c-i-5/latest/rsc-1985-c-i-5.html) into play and exempts them from compliance with the regulations:

**88.**  Subject to the terms of any treaty [clearly means that province can’t pass laws if there’s a treaty in the way…] and any other Act of Parliament, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that those laws are inconsistent with this Act or any order, rule, regulation or by‑law made thereunder, and except to the extent that those laws make provision for any matter for which provision is made by or under this Act.

**NB:** [Referential incorporation: Fed gov’t: 91(24) – power over Indians // s.88 allows prov’l law to become fed’l law through referential incorporation; had to be laws of **general application**, they can’t deliberately target Indian populations]

The document the respondents rely on in support of their contentions is dated September 5, 1760 and signed by Brigadier General James Murray.  It reads as follows:

THESE are to certify that the CHIEF of the HURON tribe of Indians, having come to me in the name of His Nation, to submit to His BRITANNICK MAJESTY, and make Peace, has been received under my Protection, with his whole Tribe; and henceforth no English Officer or party is to molest, or interrupt them in returning to their Settlement at LORETTE [pretty much the line Crown is relying upon to state that this is just a pass for safety into their territory]; and they are received upon the same terms with the Canadians, being allowed the free Exercise of their Religion, their Customs, and Liberty of trading with the English [this is what the case turns on]:  --  recommending it to the Officers commanding the Posts, to treat them kindly.

1. Does the [document provided above]…constitute a treaty within the meaning of s. 88 of the *Indian Act*, R.S.C. 1970, c. I‑6?
   1. Capacity of the parties
      1. Great Britain → still locked in warfare on French territory; so answer it in eyes of the Huron: would they have thought that Crown had power to enter a treaty as long as Brits controlled Canada
      2. General Murray → also reasonable from Huron point of view that Murray would’ve been capable
      3. Hurons → Not land that Huron trad’lly lived on; but a treaty doesn’t have to be about land. This treaty is about the continuation of custom and practice
   2. Legal Nature of the Document: From these extracts it is clear that what characterizes a treaty is the intention to create obligations, the presence of mutually binding obligations and a certain measure of solemnity
      1. *Intent: can be evidenced by:*
      * continuous exercise of a right in the past and at present,
      * the reasons why the Crown made a commitment,
      * the situation prevailing at the time the document was signed,
      * evidence of relations of mutual respect and esteem between the negotiators, and
      * the subsequent conduct of the parties
2. If the answer to question 1 is in the affirmative, was the "treaty" still operative on 29 May 1982, at the time when the alleged offences were committed?
3. If the answers to questions 1 and 2 are in the affirmative, are the terms of the document of such a nature as to make ss. 9 and 37 of the *Regulation respecting the Parc de la Jacques‑Cartier* … made under the[*Parks Act*, R.S.Q., c. P‑9](http://www.canlii.org/en/qc/laws/stat/cqlr-c-p-9/latest/cqlr-c-p-9.html), unenforceable in respect of the respondents?
   1. Territorial aspect?
   2. Are the interests of the Huron compatible w. the interests of having a park? → Determined that they are, they’re using park land as it should be

## 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 [this sets out the framework for s. 35 jurisprudence]

* 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.

**REMNANTS OF CALDER AND ST. CATHERINE’S:**

* Aboriginal title is now firmly ensconced in the common law as ‘sui generis’ – it is neither simply a ‘beneficial interest’ nor a ‘personal and ususfructuary right’.
* It does, however, partake of both, lying somewhere in-between or alongside.
* It either ‘disappears’ on surrender, or is ‘merged in the fee’. Perhaps not much hinges on this, as they both entail that Aboriginal title is no more than a burden on underlying (perfectible) Crown title.
* Once again, there is no mention here of rights of self-determination, or of governance issues – rather, the presumption of absolute Crown sovereignty frames the entire discussion (indeed, it appears here, in covert form, as that which underpins the existence of fiduciary relationships).
* Indigenous interests in land (whatever their nature) seem to have to be surrendered to the Crown in order to serve economic purposes.
* A powerful undercurrent of paternalism remains unchallenged.

# “Aboriginal Rights” General Framework Established

## 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 argued that [35(1)](http://canlii.org/en/ca/laws/stat/schedule-b-to-the-canada-act-1982-uk-1982-c-11/latest/schedule-b-to-the-canada-act-1982-uk-1982-c-11.html#sec35%7Cs.) rights are more securely protected than [*Charter*](http://canlii.org/en/ca/laws/stat/schedule-b-to-the-canada-act-1982-uk-1982-c-11/latest/schedule-b-to-the-canada-act-1982-uk-1982-c-11.html#PART_I_CANADIAN_CHARTER_OF_RIGHTS_AND_FREEDOMS__554%7C) rights, and thus any infringement is automatically of no force or effect because there is no similar "reasonable limits" clause as in [s. 1](http://canlii.org/en/ca/laws/stat/schedule-b-to-the-canada-act-1982-uk-1982-c-11/latest/schedule-b-to-the-canada-act-1982-uk-1982-c-11.html#Guarantee_of_Rights_and_Freedoms__1022%7C)

- Ct finds that legislation affecting the exercise of aboriginal rights will be valid if it meets a **test of justification which arises from the fiduciary relationship**; there is nothing in "recognized and affirmed" which makes such rights absolute

### Sparrow Test

1. Characterize existence of the right: is the activity claimed to be an aboriginal right an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right? (onus on claimant)

* 1. Identify the nature of the claim
  2. Determine if it was part of a pre-European contact practice that was integral to the distinctive culture in question (central, not incidental, but need not be unique)
  3. If so, was there sufficient continuity between the modern activity and the traditional practice?

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 claimant – BoP)

* 1. Is the limitation unreasonable?
  2. Does it pose undue hardship?
  3. Does the regulation deny rights holders the preferred means of exercising their right?

→ if YES to any = infringement

* *Gladstone* clarifies that this should be an easy test to meet.

4. **Justification of infringement** (onus on Crown)

* 1. Is there a valid objective on the part of the Crown? (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

* 1. Is the government employing means which are consistent with their fiduciary duty to the aboriginal nation at issue?
     1. Was the infringement as minimal as possible?
     2. Were their claims given priority over other groups?
     3. Was the effected aboriginal group consulted? Informed?
     4. If there was expropriation, was there fair compensation?



# The nature and existence of Aboriginal Rights under S. 35

## 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) – *the* integral to distinctive culture test for an AR.

|  |  |
| --- | --- |
| **Facts** | Dorothy Van der Peet, a member of the Stó:lō Nation, was charged for selling ten salmon that Charles Jimmy (her common-law husband) and his brother Steven had caught under their native food fishing licence. Under the licence Jimmy was forbidden from selling his catch.  At trial, the judge held that the aboriginal right to fish for food did not extend to the right to sell fish commercially. This was overturned at summary appeal but the conviction was restored at the Court of Appeal. |
| **Issues** | What is the test for determining an "aboriginal right" under [35 of the *Charter*](http://canlii.org/en/ca/laws/stat/schedule-b-to-the-canada-act-1982-uk-1982-c-11/latest/schedule-b-to-the-canada-act-1982-uk-1982-c-11.html#sec35%7Cs.) |
| **Ratio** | * The basis for the aboriginal rights doctrine is the recognition that aboriginals were living in distinctive cultures prior to European contact. * In order to be an aboriginal right under [35(1)](http://canlii.org/en/ca/laws/stat/schedule-b-to-the-canada-act-1982-uk-1982-c-11/latest/schedule-b-to-the-canada-act-1982-uk-1982-c-11.html#sec35%7Cs.) an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right. |

### Reasoning – Lamer:

### 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) Adjusting the Sparrow Framework

### 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** [first point of departure from Sparrow: what the Crown needs to do to discharge fiduciary obligs]

* 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 [It takes the teeth out of req’ing a pressing and substantial objective (emphasized in Sparrow) b/c now what’s req’d is showing that the crown is exercising power in a way that has ‘broader importance’]

- **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**

# Other Possible Adjustment to the *Sparrow* Framework:

## *Mitchell v. M.N.R*. (2001) 1 S.C.R. 911 [another way to justify infringement]

*Is the Claimed Right Barred from Recognition as Inconsistent with Crown Sovereignty?*

The conclusion that the right claimed is not established on the evidence suffices to dispose of this appeal.  I add a note, however, on the government’s contention that [s. 35(1)](http://www.canlii.org/en/ca/laws/stat/schedule-b-to-the-canada-act-1982-uk-1982-c-11/latest/schedule-b-to-the-canada-act-1982-uk-1982-c-11.html#sec35subsec1_smooth) of the [*Constitution Act, 1982*](http://www.canlii.org/en/ca/laws/stat/schedule-b-to-the-canada-act-1982-uk-1982-c-11/latest/schedule-b-to-the-canada-act-1982-uk-1982-c-11.html) extends constitutional protection only to those aboriginal practices, customs and traditions that are compatible with the historical and modern exercise of Crown sovereignty.  Pursuant to this argument, any Mohawk practice of cross-border trade, even if established on the evidence, would be barred from recognition under [s. 35(1)](http://www.canlii.org/en/ca/laws/stat/schedule-b-to-the-canada-act-1982-uk-1982-c-11/latest/schedule-b-to-the-canada-act-1982-uk-1982-c-11.html#sec35subsec1_smooth) as incompatible with the Crown’s sovereign interest in regulating its borders.

In obiter: crown Sovereignty can be an outright extinguishment of rights – saying that this is an implicit part of the VDP test.

## McLachlin J.’s dissent in *R. v. Van der Peet* [1996] 2 S.C.R. 507

It may not be wrong to assert, as the Chief Justice does, that the dual purposes of s. 35(1) are first to recognize the fact that the land was occupied prior to European settlement and second, to reconcile the assertion of sovereignty with this prior occupation. But it is, with respect, incomplete.  As the foregoing passages from Sparrow attest, ***s. 35(1) recognizes not only prior aboriginal occupation, but also a prior legal regime giving rise to aboriginal rights which persist, absent extinguishment…Aboriginal rights find their source not in a magic moment of European contact, but in the traditional laws and customs of the aboriginal people in question***

My concern is that we not substitute an inquiry into the precise moment of first European contact ‑‑ an inquiry which may prove difficult ‑‑ for ***what is really at issue, namely the ancestral customs and laws observed by the indigenous peoples of the territory***. … In certain circumstances, aboriginals may be required to share their fishing rights with non‑aboriginals in order to effect a reconciliation of aboriginal and non‑aboriginal interests.  In other words, the Crown may convey a portion of an aboriginal fishing right to others, not by treaty or with the consent of the aboriginal people, but by its own unilateral act.

***How, without amending the Constitution, can the Crown cut down the aboriginal right****?* [T]he rights themselves can be diminished only through treaty and constitutional amendment.  To reallocate the benefit of the right from aboriginals to non‑aboriginals, would be to diminish the substance of the right that s. 35(1) guarantees. This no court can do. [Taking a const’l right (s. 35) and balancing it against non-const’l interests]

## 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)

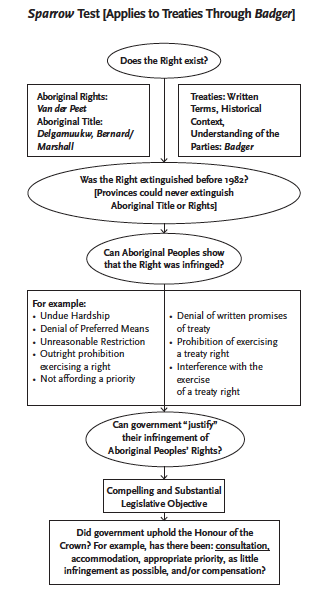
- Fishing community on coast in BC – got most of sustenance from sea. Claimed right was trading resources from sea to generate wealth.

- 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 [**inherent limit**].

**- 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]
* Held communally
* Source of AT?
  + **Physical occupation** – derived from CL principle that occupation is proof of possession in law
  + The **relationship between CL** and pre-existing systems of **Aboriginal law**

→ this is used for showing that title exists but it does not affect the actual **content** of what Aboriginal title ‘means’ – title itself is defined by the common law and not reflective of or affected by the Indigenous systems

- 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 IJI

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

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

* Laws of general application are by their very nature, general, so there can be no clear and plain intent (necessary to find extinguishment)
* *However,* this 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

- **Sufficiently important objectives?** 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

**- 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

- **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?
  + Allows the Crown to define for itself what reconciliation will consist of
  + Very little incentive to actually consider Aboriginal rights – it allows Crown to do whatever it wants, so long as it is able to justify doing it (according to its self-defined requirements)
* 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

|  |  |
| --- | --- |
| Tsilhqot’in Nation V British Columbia 2014 SCC | |
| C | Aboriginal title flows from occupation = regular + exclusive use of land; use, control land, to reap the benefits.  Where title is asserted, but has not yet been established, s 35 of CA1982 req’s Crown to consult w. group asserting title and, if appropriate, accommodate its interests. Consultation req’d varies w. strength of the group’s claim to land + seriousness of potentially adverse effects upon interest claim.  🡪 Injunctive relief, damages, order of consultation or accommodation are remedies  🡪 Once established, incursions on it w. consent of group or justified by compelling public purpose + not inconsistent w. Crown’s fiduciary duty to group = displaces IJI?  Assertion of sovereignty, Crown acquired radical title burdened by pre-existing legal rights of aboriginal group (“land use prior to European arrival” = beneficial interest) giving rise to fiduciary duty 🡪 **Guerin.**  Right to encroach on Aboriginal title if justify infringement if there is compelling + substantial purpose = **Sparrow** and s 35. Justification in two ways:   1. FD to act in way respectful of title group interest, can’t justify substantial deprivation. 2. Proportionality pursuant to Oakes test (“rational connection, minimal impairment, proport”)   **Aboriginal title requires** (**Delgamuukw** plus)   1. Land occupied prior to sovereignty (“**sufficient**”) – Aboriginal (“laws, P/C/Ts, size, resources, character”) + common law (“possession + control of lands, frequency of use, strong presence”) 🡺 context-sp. 2. “**Continuity**” b/w present and pre-sovereignty occupation if present occupation relied on as proof.   Doesn’t require evidence of unbroken chain of continuity, but present occ. rooted in pre-sover.   1. At sovereignty, occupation must have been “**exclusive”** (“in use and occupation”) = proof. Must have intention and capacity to retain exclusive control over land. Regular use w/o exclusivity would give rise to usufructory rights.   Evidence of other people on land doesn’t necessarily negate exclusivity, esp if permission given.  🡪 onus on the claimant group to establish aboriginal title. |
| L | ***Haida Nation v BC (Minister of Forests) 2004:*** used **Delgamuukw**’s conclusions + affirmed spectrum of consultation req’d to discharge fiduciary duty to consult, assess claim, effect. Legal duty to negotiate in good faith to resolve land claims 🡪 **reconciliation.** If group doesn’t consent, gov’t only recourse is to establish that the proposed incursion on land is justified under s 35.  🡪 can’t be justified if incursion would substantially deprive future generations of benefit of land.  ***R v Marshall 2003:*** some act or acts from which an intention to occupy land could be inferred relate to occupation; nature of land and purposes it could reasonably be used; show that whole area was occupied by claimant = culturally sensitive approach to sufficiency; sufficiently regular + exclusive use. |
| H | T had strong PF claim to land, intrusion was significant, duty to consult owed fell at high end of spectrum (**Haida**), req’d significant consultation / accommodation to preserve interest: breach. |
| O | Provincial laws of general application apply to lands held under aboriginal title w. constitutional limits applicable.  s 35 req’ any abridgment of rights flowing from aboriginal title to be backed by compelling purpose, any justifications pursuant to the **Sparrow** test for infringement, + limited by federal s 91(24) power.  Honour of Crown req’s respect potential yet unproven claims, but can legislate over until time title is confirmed by agreement or court order = land can’t be wholly unregulated.  **IJI**: impair protected core of jurisdiction possessed by other level of govt (“prov s 92(13), fed s 91(24)”)  🡪 s 35 + Sparrow test to prohibit or limit prov govt infringement or limitation of aboriginal rights, not doctrine of IJI bcoz both levels of govt are limited in this respect, limits have nothing to do w whether s/t lies at core   1. **Don’t need duelling tests to answer same question or to satisfy goal.** 2. Results in patchwork regulation of forests (“in this case”) 3. That regulatory enviros can be divided into watertight compartments is at odds w modern reality.   IJI should not be applied in cases where lands are held under aboriginal title. |

Before 2014, no case declaring AT… Tsilhqot’in had asserted title from 1980s. This case was the first. The actual case was decided by **Haida Nation**.

### What does title look like before Delagamuukw?

* Crown title is burdened by pre-existing sov’ty
* Terra nullius said not to have ever applied in Canada according to the RP1763, which is contrary to hx
  + No one owned the land prior to assertion of sovereignty
  + No politically organized people were around on the land prior to Crown sovereignty

### Delgamuukw

* If group has full beneficial title, Crown has fiduciary duty and right to encroach as long as they can justify infringement according to framework set out in Sparrow and Gladstone
* Crown has power to legislate.
* Do the Tsilhqot’in have power to legislate too?
* Aboriginal groups have full rights to ownership and Crown doesn’t, but Crown has jurisdictional power.
  + Group owns something but Crown has all the power?

### Inherent Limits from Delgamuukw applied to Tsilhqot’in

* Can’t use the land in a way that is irreconcilable to goals and values in the land.
* Can’t use it in ways that will deprive future generations from use and benefit of the land
* Consent is big part of decision here that Crown must obtain from rights holder
  + If group doesn’t consent, govt’s only recourse is to justify infringement by using Sparrow/Gladstone
  + What does this mean for consent?
    - Consent seen as a procedural matter? Something that must be done… required **unless**…

### How do you show title?

* Sufficiency, continuity, & exclusivity of occupation
* **Para 91:** Where claim is particularly strong, appropriate care must be taken to preserve aboriginal interest pending final resolution of claim.
* SCC went with trial judge’s approach to dealing with how to claim which lands (“bigger pieces of land”)

### Does the provincial Crown have power to legislate before and after 2014?

* Crown doesn’t have an actual argument with premises – it’s circular reasoning.
* Laws of general application do apply but there are limitations to it.
  + Section 92(13) – property and civil rights
  + Section 91(24) – Indians and Lands reserved for Indians
    - **Paramountcy, double aspect, IJI**
* For IJI to apply, provincial legislation must trench or impair the core of federal head of power, **which does not happen in this case (allegedly).**
* **Paramountcy** would come into play if federal govt legislates on the area, then it would supercede.
  + If no PF infringement, then don’t even have to deal with IJI or paramountcy.
* For the purposes of the Forest Act, Crown timber doesn’t actually belong to the Crown. Aboriginal title land is not Crown land for the purposes of this Act (“paragraph 112”)
* Crown argues that if Crown didn’t have interest in or control of land that wasn’t claimed by Aboriginal group, then there would be legislative vacuum 🡪 large pockets of land that wouldn’t be controlled.
  + Tsilhqot’in would argue that it was controlled by them in this case.
* Once Aboriginal group get title, Crown doesn’t have title.
  + **Until** a group gets title, Crown will control it, legislate with Forest Act but thru general application to legislate over all private interests, not specifically on Aboriginal property.
* **Paragraph 125:** sufficient and substantial objective, fiduciary requirement to consult, benefit of the public is proportionate to any adverse effect on Aboriginal interest… this last element is really strange bcoz this seemingly comes out of nowhere. Kind of the reconciliation notion?
* Court didn’t accept the objectives from the provinces, preferred Tsilhqot’in’s counsel’s arguments.
* **Paragraph 128:** Can Provinces legislate at all? Sections 92(13) and 91(24)
  + Double aspect would only apply if provinces using s 92(13) covers Aboriginal title land
* TJ Vickers says the Forest Act wouldn’t apply bcoz Aboriginal title is under federal jurisdiction.
* ***R v Morris 2006***: Provinces don’t have jurisdiction to legislate over treaty rights or land of Aboriginals
* **Calder**: all land that hasn’t been surrendered is still Aboriginal land?
* **Paragraph 135:** Some ambivalence of whether or not Provinces can infringe upon Aboriginal rights.
* **Paragraph 138:** seek to clarify the above: **3** questions to answer in this paragraph
  + Goal of IJI is to make sure both levels of govt can function well without conflict and there is no role for IJI in case like this (para 140-141).
  + IJI is still around and there are no cases where IJI is not supposed to apply when the facts support the fact that it should. They say it doesn’t apply, period, but no real argument made as to why, especially bcoz provincial legislation is acting in way that affects Aboriginal interests.
* Local govts have local interests, so provinces shouldn’t have power over the Aboriginal land bcoz they’ll subordinate Aboriginal interests… their interests will supercede.
* **Two practical problems**
  + Paragraph 146 – duelling tests argument (“why don’t use it consecutively, line up use”)
  + If you have claim for Aboriginal title, Forest Act has to apply to that. Once there is established title, it makes sense that the Aboriginal have power to legislate on own land.
    - Vacuum argument 🡪 not strong bcoz Aboriginal have their own legal system and are perfectly capable of legislating and controlling the area as well as the provinces could.
* Case focuses on Aboriginal rights, when their focus should be on Aboriginal title which is specifically under s 91(24)’s **lands reserved for Indians**
* **Paragraph 149** talks about cooperative federalism = don’t want to make barriers on making efficient legislation.
* Provincial Crown will have to operate under Guerin, Sparrow, Gladstone, Delgamuukw = infringement

## Tsilhqot’in – Issue-by-Issue

-They talk about how title looks up to this point in time

-Crown title is burdened by pre-existing rights

-Second half of para 69: "doctrine of **terra nullius** never applied in Canada, as confirmed by the *Royal Proclamation (1763)*" - this is a statement that people take issue with; there seems to be plenty of evidence that terra nullius DID apply in Canada, so how is this statement supportable?

-There's an odd narrowing-down here of what terra nullius actually means

Paragraph 71-72:

-The court asks: if aboriginal title is full beneficial interest, then what does the Crown have left? What does crown title mean? Comes down to 2 things: 1) Crown has the power to **legislate** in relation to that land, 2) that they have to do so according to the **requirements** of *Sparrow*, *Gladstone*, etc. (a corollary/addendum to the first point). Basically, Crown title is a power.

-A question we're going to think about: Do the Tsilhqot'in have any power to legislate? It's pretty clear from this ruling that the court doesn't think they do

-So we're left with a complete **bifurcation** - one party owns everything, the other party has all the power

-This split means the parties are basically forced to negotiate; it's one of the consequences of this case

Paragraph 74:

-The inherent **limit** that they talked about Delgamuukw seems to have been changed slightly here

-The limit is applied to the Crown too - the Crown can't do things irreconcilable with the ability of the title holders to use/enjoy the land in the future

Paragraph 76:

-"**Consent**" is a big part of this decision

-The crown needs to get the consent of the aboriginal title holder if they want to use the land

-But the court is careful to add a second part - if the Crown tries to get consent but the A.T. holder doesn't consent, the Crown has to turn to section 3t to justify the incursion. So, given this recourse, what does consent really mean in this context?

-There's incentive on the Crown's part to get consent b/c then they don't have to worry about the second part. But even if they don't get consent, they can proceed if they're able to justify the incursion.

-So, this turns consent into a procedural matter

Paragraph 87:

-The court modifies and adds to what is said in Delgamuukw about the Crown justifying infringement

-"rational connection, minimal impairment, and proportionality of impact" - this is *Charter* stuff/*Charter* jurisprudence. The court doesn't mention the Charter jurisprudence, but they're obviously borrowing the language.

-Section 35 is (deliberately) separate from the *Charter*, but here we're clearly dealing w/ section 35 using *Charter* language

-Section 35 jurisprudence has more or less led to the ability of First Nations to slow the government down

Paragraph 91:

-The court is cognizant that it now needs to deal with the whole sequence - first nations claim title, first nations get title

-If your'e disclaiming title, *Haida* applies

-If you're getting title, this case applies

-"Where a claim is particularly strong—for example, shortly before a court declaration of title—appropriate care must be taken to preserve the Aboriginal interest pending final resolution of the claim." <-- Prof. Christie says this is the 'sweet spot'

REMEMBER: Before this decision comes out, the Tsilhqot'in only had asserted title (so *Haida* applied)

-SCC had to grapple with the Trial approach ("exclusively and regularly") versus the Court of Appeal approach ("exclusively and intensively"); the latter is the "postage stamp" approach that would mean the Tsilhqot'in have little pockets where they can reach the CA's threshold for intensive use

-SCC decided to go with the Trial approach

-This still doesn't mean the Tsilhqot'in have title over all their territory

### OBITER:

-The court says this is obiter, which gives the court an out later on - they can go back and change things; it's not settled law

-What goes on after 2014 over the Tsilhqot'in's land? What's the province's power to legislate over this land (provincial crown)? Did the provincial crown have the power to legislate here before 2014? This is a constitutional question

-Christie: "You just *knew* that even if the SCC went with the trial approach, they were going to find some way to let the province legislate - they weren't going to let large chunks of the province get excised"

-They start off w/ their conclusion: "provincial laws of general application apply to lands held under Aboriginal title" but with constitutional limits

-Province can legislate over property and civil rights b/c of s 92(13) of Constitution Act, 1867

two constitutional limits on Provincial power to regulate land held under aboriginal **title**

1) section 35, 2) section 91(24) - the federal power over Indians and Lands reserved for the Indians

-Aboriginal title land seems like it falls squarely under section 91(24) - "land reserved for Indians" - which is a federal responsibility

-Recall: the two big doctrines the court uses to deal with conflicts between fed and prov government: interjurisdictional immunity, and paramountcy

-Paramountcy: only comes into play when you have a TRUE conflict between fed legislation and prov legislation - paramountcy says that fed power always supersedes prov power in this situation

-IJI: you don't need that kind of conflict for IJI to come into play - you don't even need fed gov to have legislated in that area; it's just whether the prov has touched upon the core of the fed head of power

-The court comes to the conclusion that IJI does play a role at all in this context (which is striking)

-Paramountcy is left to the side - this means it's still a viable route, but first the fed gov needs to pass legislation related to aboriginal title land

-How did the court get to the idea that IJI doesn't apply? They do so in a couple of different ways

### statutory interpretation - what does the *Forest Act* mean?

-Standard statutory interpretation stuff

-This leads them to consider whether it applies to Crown timber. What is Crown timber? Timber on Crown land. The *Forest Act* does NOT apply to private land (you have to get permits, but that's another issue). So is Aboriginal title land Crown land? How do you know? This is a key question

-They say one way to think about this is whether the Crown has any interest in aboriginal title land. But they say that the Crown doesn't have any beneficial interest in aboriginal title land, so, for the purposes of the *Forest Act*, aboriginal title land is not Crown Land

-"Can the legislature have intended that the vast areas of the province that are potentially subject to Aboriginal title be immune from forestry regulation? And what about the long period of time during which land claims progress and ultimate Aboriginal title remains uncertain?"

-The court says it wouldn't make sense for large swaths of the province NOT to be covered by the *Forest Act*

-This is troubling - the government is implying is that if the Act didn't apply, there would be no law in that area. The Tsilhqot'in would obviously disagree. They have their own laws. But the court impliedly thinks that aboriginal title holders don't have any legislative power over their land - they talk about the "legislative vacuum" that would exist if provincial laws didn't apply to that land

-Once the Tsilhqot'in get aboriginal title, then that land is no longer crown land. The *Forest Act* no longer applies (like how it doesn't apply to private land). But up to 2014, *Forest Act* WOULD apply to those lands even though there was an assertive claim b/c otherwise (according to the court) that wouldn't make sense - doesn't make sense that the province can't pass legislation over land that is merely claimed

Paragraph 116:

-"I add the obvious - it remains open to the legislature to amend the Act to cover lands held under Aboriginal title, provided it observes applicable constitutional restraints"

-SO. What would the province have to do to legislate/how would they have to amend their legislation to be acceptable?

-Does the prov lack the constitutional power to legislate over aboriginal title lands? They've already said they can - remember, the court began with this conclusion - but they examine whether or not there are constitutional hang ups

-If there isn't prima facie infringement, the province's laws will apply...

-Transferring timber to a third party would obviously have an impact on aboriginal title holders b.c they're the ones that own the trees

-So, the *Forest Act* would clearly have to be re-written to apply to aboriginal title land, b/c it doesn't have the necessary objectives

Para 128-129:

SO, fundamental question: can provincial law apply at all?

-92(13) gives prov power to pass things like the *Forest Act* but does it run into conflict with 91(24)?

-What's weird is from here on out the court talks about "indians" but that's not the issue at hand - the issue is "lands reserved for Indians". It's very strange and frustrating that the court just discusses "Indians" (so, the first part of 91(24) and not the second)

-There's only a "double aspect" here if 92(13) covers aboriginal title lands. If it doesn't, then within the province, some land would be federal land - some pieces of BC wouldn't actually part of BC, and there'd be no double aspect. (This is something the trial judge clearly talks about.)

### paramountcy and IJI

-Remember: neither *Canadian Western Bank* nor *COPA* say that IJI isn't a thing anymore

-Trial judge said the *Forest Act* wouldn't apply bc of IJI

-The SCC gets rid of *R v Morris* here

-NOTE: The understanding has been around for a long time that "lands reserved for Indians" means reserve land but also any land that hadn't been surrendered...

-Para 135: SCC says there's been ambivalence up to this point in time as to whether provincial law could apply to aboriginal rights and treaty rights... but there hasn't really been ambivalence in the way they're implying... (I think)

-SCC says it seems like in all these cases, it's not clear whether prov law applies, so they're going to decide now

-Breaks things down into 3 questions that they say they're going to address... but then they don't answer #2 or #3 directly! They only answer them by implication.

Para 139-140:

-SCC notes that section 35 imposes limits

-They're signaling that they're going with the half of the jurisprudence that says provincial law can apply

-They say IJI doesn't apply in this situation - there's no role for that doctrine (which is meant to ensure that prov and fed govs can function reasonably well w/out too much interference w/ each other) here (which: ??? Remember, neither *Can West Bank* nor *COPA* said IJI is out as a doctrine)

-The circular argument: your conclusion is the prov law applies, but your argument can't therefore be that prov law applies... There's no argument. They're basically just saying "we think this is the way it's gonna be"

-Prof. Christie: "There's no good reason why IJI shouldn't apply here."

### Now, practical problems...

-The "dueling tests"

-This is very weird b/c there isn't really a duel going on. Should just be looked at sequentially.

-The SCC basically says there's a conflict; Christie says there isn't - you just do one, and then the other

-Once Tsilhqot'in have established title, they certainly believe that they have the right to enact policies and laws over that land. This is what they've been doing, even though the courts seem to say they can't.

-So, the court's argument that there would be a legislative vacuum is ?

-They say that paramountcy is what's left as tool

- cooperative federalism (nowadays we live in a complicated world so we don't want barriers to efficient governing; as such, we want to reduce IJI to a minimum)

-There's acknowledgement of prov power over aboriginal title land

-It's not a completely bad story though, b/c they've said prov legislation has to fit under *Gladstone* and *Delgamuukw*

-Christie: "There were very good reasons to put Indian stuff under fed gov jurisdiction when they were drafting the Constitution Act. If you can, you should avoid putting those interests under local jurisdiction b/c the provinces have their own interests."

... SO. Things are very unsettled and unclear at the moment. Note: Lower courts are bound by obiter

# Treaties and Treaty Rights

### Cultural and Political Distinctions

|  |  |
| --- | --- |
| **Aboriginal Understanding** | **Euro 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 #1 (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

### Most significant jurisprudential development

→ use of the ‘honour of the Crown’ to find the right to trade and to pursue resources from the sea to trade:

* This appeal puts to the test the principle, emphasized by this Court on several occasions, that the honour of the Crown is always at stake in its dealings with aboriginal people.

### Other Interpretive principles:

#### Use of extrinsic evidence (in absence of ambiguity):

Rejected CA approach that extrinsic evidence relevant only when ambiguous

* b/c it is the Ct’s obligation to identify, from the various possible interpretations of the **common** intention of the parties to the treaty at the time it was made, the one which **best reconciles** the Mi’kmaq interests and those of the British Crown – para 14

#### Treaty rights in the new constitutional framework:

1760 treaty does affirm the right of the Mi’kmaq people to continue to provide for their own sustenance by taking the products of their hunting, fishing and other gathering activities, and trading for what in 1760 was termed “necessaries”. ***This right was always subject to regulation***

## R v Marshall #2 (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

## *Grassy Narrows First Nation* v. *Ontario*, 2014 SCC 48, [2014] 2 S.C.R. 447

**FACTS:**

In 1873 Canada and the Chiefs of the Ojibway Indians entered into Treaty 3 whereby the Ojibway surrendered to Canada a large tract of land, including the Keewatin Lands, situated in what became northwestern Ontario and eastern Manitoba. The Treaty contained a harvesting clause which preserved the right of the Ojibway to hunt and fish on the surrendered land subject to a “taking up” clause. That clause allowed the Government of the Dominion of Canada to take up lands for settlement, mining, lumbering, etc. In 1912 most of the Treaty 3 lands, including the Keewatin Lands, became part of the Province of Ontario. In 1997, Ontario issued a sustainable forest licence which enabled Abitibi-Consolidated Inc., a large pulp and paper manufacturer, to carry out clear-cut forestry operations in certain parts of the Whiskey Jack Forest, which fell within the Keewatin portion of the Treaty 3 territory. In 2005, the Grassy Narrows First Nation, commenced an action, alleging that on a proper meaning of the harvesting clause, any taking up of land by Ontario had to be first authorized by the Dominion of Canada.

**ISSUES:**

1. Does Ontario have the authority under Treaty 3 to “take up” tracts of land in the Keewatin area?
2. Does IJI preclude Ontario from justifying infringement of Treaty 3 rights?

**HELD:**

Ontario had the authority to take up lands in the Keewatin area so as to limit the harvesting rights set out in Treaty 3. By virtue of ss. 109, 92A, and 92(5) of the Constitution Act, 1867, Ontario alone had the ability to take up Treaty 3 land and regulate it in accordance with the treaty and its obligations under s. 35 of the Constitution Act, 1982.

A two-step process involving federal approval for provincial taking up was not contemplated by Treaty 3.

1. Although negotiated by fed’l gov’t – it’s an agreement between the Ojibway and the Crown – the gov’t that exercises or performs the rights/obligations, is determined by the division of powers
2. Nothing in the text or history of the negotiation of treaty 3 suggests the 2-step process. Leg’n dealing w/ treaty 3 land confirms that no step-process was contemplated

**REASONING:**

1. Taking up land:

**a) Constitutional provisions:**

Once Keewatin lands came w/in ON’s borders in 1912, s. 109 of *CA* became applicable:

**109.** All Lands, Mines, Minerals, and Royalties belonging to the several Provinces of Canada, Nova Scotia, and New Brunswick at the Union, and all Sums then due or payable for such Lands, Mines, Minerals, or Royalties, shall belong to the several Provinces of Ontario, Quebec, Nova Scotia, and New Brunswick in which the same are situate or arise, subject to any Trusts existing in respect thereof, and to any Interest other than that of the Province in the same.

[Section 109](http://www.canlii.org/en/ca/laws/stat/30---31-vict-c-3/latest/30---31-vict-c-3.html#sec109_smooth) establishes conclusively that Ontario holds the beneficial interest in the Keewatin lands and the resources on or under those lands.

+ [s. 92(5)](http://www.canlii.org/en/ca/laws/stat/30---31-vict-c-3/latest/30---31-vict-c-3.html#sec92subsec5_smooth) of the [*Constitution Act, 1867*](http://www.canlii.org/en/ca/laws/stat/30---31-vict-c-3/latest/30---31-vict-c-3.html)gives the Province exclusive power over the “Management and Sale of the Public Lands belonging to the Province and of the Timber and Wood thereon”

+ [s. 92A](http://www.canlii.org/en/ca/laws/stat/30---31-vict-c-3/latest/30---31-vict-c-3.html#sec92A_smooth) gives the Province exclusive power to make laws in relation to non-renewable natural resources, forestry resources, and electrical energy.

→ Together, these provisions give Ontario the power to take up lands in the Keewatin area under Treaty 3 for provincially regulated purposes, such as forestry.

The view that only Canada can take up or authorize the taking up of lands under Treaty 3 rests on a misconception of the legal role of the Crown in the treaty context:

* it was negotiated with the Crown in right of Canada but that does not mean that the Crown in right of Ontario is not bound by and empowered to act with respect to the treaty;
* e.g. ct has held that crown obligs to FN are owed by *both* levels of gov’t (*Haida Nation)* and that a change in the level of gov’t responsible for regulating hunting rights did not = treaty modification;
* *St Catherine’s Milling:* Treaty 3 was a “transaction between the Indians and the Crown, not an agreement between the Government of Canada and the Ojibway people”
* ∴ when the province became responsible for the governance of the treaty 3 land w/ respect to matters falling under its jurisdiction by virtue of ss. 109, 92(5) and 92(A) of *CA*, subject to the terms of the treaty → follows that Province entitled to take up land for forestry purposes
* Just b/c fed is responsible for 91(24) areas and can ∴ regulate in ways which will affect prov’l land, that does not mean that provinces need approval from fed

**b) Interpretation of Treaty 3:**

* provides that the Ojibway will have continuing harvesting rights throughout the Treaty 3 lands “saving and excepting such tracts as may, from time to time, be required or taken up for settlement, mining, lumbering or other purposes by Her said Government of the Dominion of Canada, or by any of the subjects thereof duly authorized therefor by the said Government”
* The clause does not contemplate a two-step process involving both levels of government; it only refers to the Government of the Dominion of Canada.
* The treaty, as discussed, was between the Crown — a concept that includes all government power — and the Ojibway.
* Reference to Canada reflects the fact that the lands at the time were in Canada, not Ontario. Canada had beneficial ownership of the lands and therefore jurisdiction to take up the lands.
* Treaty 3 was negotiated against the backdrop of a boundary dispute between Ontario and Canada.  The possibility of provincial acquisition of the lands was patent. It follows that if the drafters of the treaty wanted Canada to have a continuing supervisory role in taking up lands under the treaty, the treaty would have said this.
* Intention to create a two-step process not found for either the Ojibway or the treaty-maker
* Ontario has exercised the power to take up lands for a period of over 100 years, without any objection by the Ojibway.  This also suggests that federal approval was never considered part of the treaty.

→ The text of the taking-up clause supports the view that the right to take up land rests with the level of government that has jurisdiction under the Constitution.

**c) Legislation dealing with Treaty 3 Lands:**

The 1894 Agreement between Canada and Ontario, incorporated in the 1891 Legislation, provided that the disputed territory belonged to Ontario and confirmed that as such Ontario would have the power to take up that land under the treaty.  The relevant provision says:

1. With respect to the tracts to be, from time to time, taken up for settlement, mining, lumbering or other purposes and to the regulations required in that behalf, as in the said treaty mentioned, it is hereby conceded and declared that, as the Crown lands in the surrendered tract have been decided to belong to the Province of Ontario, or to Her Majesty in right of the said Province, the rights of hunting and fishing by the Indians throughout the tract surrendered, not including the reserves to be made thereunder, do not continue with reference to any tracts which have been, or from time to time may be, required or taken up for settlement, mining, lumbering or other purposes by the Government of Ontario or persons duly authorized by the said Government of Ontario; and that the concurrence of the Province of Ontario is required in the selection of the said reserves.

* expressly provides that Ontario has the right to take up the lands.
* no mention of any continuing supervisory role for Canada in the process, or any two-step federal/provincial process
* 1894 Agreement *confirmed* Ontario’s right to take up Treaty 3 land by virtue of its control and beneficial ownership of the territory. It did not *amend* Treaty 3.
* The 1894 Agreement covered the disputed territory, not the Keewatin lands.

In 1912, *The Ontario Boundaries Extension Act* extended Ontario’s boundaries to include the Keewatin territory.The 1912 Legislation included the following terms and conditions:

**2** (*a*) That the province of Ontario will recognize the rights of the Indian inhabitants in the territory above described to the same extent, and will obtain surrenders of such rights in the same manner, as the Government of Canada has heretofore recognized such rights and has obtained surrender thereof, and the said province shall bear and satisfy all charges and expenditure in connection with or arising out of such surrenders;

(*b*) That no such surrender shall be made or obtained except with the approval of the Governor in Council;

(*c*) That the trusteeship of the Indians in the said territory, and the management of any lands now or hereafter reserved for their use, shall remain in the Government of Canada subject to the control of Parliament.

* This confirmed that Ontario would stand in Canada’s shoes with respect to the rights of the Indians in those lands (s. 2(*a*)).
* “rights of the Indian inhabitants” in s. 2(*a*) includes the harvesting rights under Treaty 3
* “[t]his condition contemplates, therefore, that Ontario could take up Keewatin lands under the treaty only to the same extent that Canada could validly do so prior to 1912”
* Section 2(*b*) provided that Canada’s approval was required for the *surrender* of Aboriginal rights — not the taking up of land pursuant to the taking-up clause.
* The evidence at trial was that the reference to the surrender of rights is a reference to lands not ceded by treaty
* Finally, s. 2(*c*) provided that the trusteeship of *Indians* and the management of *reserved* lands would remain with the Government of Canada, subject to the control of Parliament.
* → this legislation means that the federal government would remain responsible for Indians and lands reserved to Indians under its power over Indians pursuant to [s. 91(24)](http://www.canlii.org/en/ca/laws/stat/30---31-vict-c-3/latest/30---31-vict-c-3.html#sec91subsec24_smooth) of the [*Constitution Act, 1867*](http://www.canlii.org/en/ca/laws/stat/30---31-vict-c-3/latest/30---31-vict-c-3.html), but that the taking up of other lands within the territory would be for the Province of Ontario alone. Nothing in the legislation contemplates a two-step process involving both levels of government.
* 1894 Agreement *confirmed* Ontario’s rights at the time the parties entered into Treaty 3, while the 1912 Legislation transferred beneficial ownership of the Keewatin lands to Ontario along with the responsibilities which attached to those lands.
* wording of s. 2(*a*) in the 1912 Legislation constitutes an explicit acknowledgement that Ontario could henceforward do whatever Canada had done before it, i.e. take up lands.
* The fact that the words “taking up” were not used in the 1912 Legislation does not diminish the import of s. 2(*a*).
* Transferring to Ontario the right to take up lands within the Keewatin area didn’t amend Treaty 3, just allowed for the taking up of land by the beneficial owner of the land — after 1912, this was Ontario.
* Changing the beneficial owner of the land and the emanation of the Crown responsible for dealing with the lands conveyed did not amend the treaty.
* The 1912 Legislation altered which level of government would have authority in terms of taking up the land.  It did not modify the treaty or change its partners.

**d)   Conclusion With Respect to the Power to Take Up Lands**

* As a result of [ss. 109](http://www.canlii.org/en/ca/laws/stat/30---31-vict-c-3/latest/30---31-vict-c-3.html#sec109_smooth), [92(5)](http://www.canlii.org/en/ca/laws/stat/30---31-vict-c-3/latest/30---31-vict-c-3.html#sec92subsec5_smooth) and [92A](http://www.canlii.org/en/ca/laws/stat/30---31-vict-c-3/latest/30---31-vict-c-3.html#sec92A_smooth) of the [*Constitution Act, 1867*](http://www.canlii.org/en/ca/laws/stat/30---31-vict-c-3/latest/30---31-vict-c-3.html), Ontario and only Ontario has the power to take up lands under Treaty 3. This is confirmed by the text of Treaty 3 and legislation dealing with Treaty 3 lands. However, this power is not unconditional.
* In exercising its jurisdiction over Treaty 3 lands, ON is bound by the duties attendant on the Crown.  It must exercise its powers in conformity with the honour of the Crown, and is subject to the fiduciary duties that lie on the Crown in dealing with Aboriginal interests.
* These duties bind the *Crown*.When a *government* — be it the federal or a provincial government — exercises Crown power, the exercise of that power is burdened by the Crown obligations toward the Aboriginal people in question.
* These duties mean that for land to be taken up under Treaty 3, the harvesting rights of the Ojibway over the land must be respected.
* Any taking up of the land for forestry or other purposes must ∴ meet conditions set out by this Court in *Mikisew*.
  + Crown’s right to take up lands under Treaty 3 is subject to its duty to consult and, if appropriate, accommodate First Nations’ interests beforehand (the duty is grounded in the honour of the Crown and binds the ON in the exercise of the Crown’s powers.)
  + Where a province intends to take up lands for the purposes of a project within its jurisdiction, the Crown must inform itself of the impact the project will have on the exercise by the Ojibway of their rights to hunt, fish and trap, and communicate its findings to them.
  + It must then deal with the Ojibway in good faith, and with the intention of substantially addressing their concerns (*Mikisew*; *Delgamuukw*).
  + Adverse impact of the Crown’s project (and the extent of the duty2C&A) is a matter of degree, but consultation can’t exclude accommodation at the outset.
* Not every taking up will constitute an infringement of the harvesting rights set out in Treaty 3 **but** if the taking up leaves the Ojibway with no meaningful right to hunt, fish or trap in relation to the territories over which they traditionally hunted, fished, and trapped, a potential action for treaty infringement will arise

2) IJI?

* Ontario has the power to take up lands in the Keewatin area under Treaty 3, without federal approval or supervision. Provided it does so in a manner that respects the requirements set out in *Mikisew*, doing this does not breach Treaty 3 harvesting rights**. If Ontario’s taking up of Keewatin lands amounts to an infringement of the treaty, the *Sparrow/Badger* analysis under** [**s. 35**](http://www.canlii.org/en/ca/laws/stat/schedule-b-to-the-canada-act-1982-uk-1982-c-11/latest/schedule-b-to-the-canada-act-1982-uk-1982-c-11.html#sec35_smooth) **of the** [***Constitution Act, 1982***](http://www.canlii.org/en/ca/laws/stat/schedule-b-to-the-canada-act-1982-uk-1982-c-11/latest/schedule-b-to-the-canada-act-1982-uk-1982-c-11.html)**will determine whether the infringement is justified** (*Sparrow; Badger)*
* IJI does not preclude the Province from justifiably infringing treaty rights (*Tsilhqot’in)*

## Recent challenges (in relation to historic treaties)

• The ‘taking up’ clauses (infringement versus extinguishment) → remember that it can only go UP TO A POINT – they can’t extinguish the rights. Aboriginal rights are constitutionally protected and can no longer be extinguished.

• Cumulative effects → one project in isolation is not the point

• The honour of the Crown → can’t whittle away treaty rights to the point where they are no longer meaningful.

Example:

Statement of claim (March 3, 2015): Martin Yahey on his own behalf and on behalf of all other Blueberry River First Nations beneficiaries of Treaty No. 8 and the Blueberry River First Nations

## The First Nation of Nacho Nyak Dun v. Yukon (Government of), 2015 YKCA 18

In the background: Yukon Umbrella Final Agreement (1993)

Under this the UFA individual Yukon FN could finalize modern treaties with the Crown:

* The First Nations of Nacho Nyak Dun, Tr’ondëk Hwëch’in, and Vuntut Gwitchin have each entered into a Final Agreement with Canada and Yukon.
* Each of these Final Agreements is **a “land claims agreement”** within the meaning of [s. 35(3)](http://www.canlii.org/en/ca/laws/stat/schedule-b-to-the-canada-act-1982-uk-1982-c-11/latest/schedule-b-to-the-canada-act-1982-uk-1982-c-11.html#sec35subsec3_smooth) ∴ all rights held by these First Nations under the Final Agreements are treaty rights with constitutional protection (s. 35(1))
* In the Yukon, any law that is inconsistent with a Final Agreement is void to the extent of the inconsistency ([*Yukon First Nations Land Claims Settlement Act*, S.C. 1994, c. 34](http://www.canlii.org/en/ca/laws/stat/sc-1994-c-34/latest/sc-1994-c-34.html), [s. 13(2)](http://www.canlii.org/en/ca/laws/stat/sc-1994-c-34/latest/sc-1994-c-34.html#sec13subsec2_smooth)).
* The provisions in these agreements create a commission to do the land use planning
* Peel Watershed Regional Planning Commission (the “Commission”) was created in 2004 to develop a regional land use plan for the Peel Watershed (excluding the small portion in the Northwest Territories).
* Task was to develop a recommended land use plan and then there would be 2 back and forth stages where the gov’t would consult w/ FN, then the commission would get a chance to reformulate – do the whole thing once more and then you would come to a conclusion

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* Commission recommended a precautionary approach to protect ~80% of the land from development
* Yukon gov’t said they want some changed
* Commission comes back with a similar percentage
* Yukon gov’t says fuck that, we’re going to conserve 20% and substitute their own plan
* Commission wanted to know what was what
* Ct said that the gov’t had misunderstood what was happening and that they couldn’t just make their own plan
* Gov’t appealed; didn’t win *entirely*
* CA said that the gov’t was wrong to do this. TJ they said that now the process has to go all the way back to the first stage with the original recommended plan and follow through properly. But CA said that no, it should go back to where things broke down
* POWER TO DELAY…this is the only thing that FN really have…so they’ve appealed to SCC

# 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

* When applying the [*Van der Peet*](http://casebrief.wikia.com/wiki/R_v_Van_der_Peet) test to Métis claimants, the claimant must demonstrate:
  + there was a historic Métis community in the area,
  + there is a contemporary community that continues from the historic community, and
  + he or she is a member of the contemporary community by showing that he or she has a demonstrable ancestral connection to the historic community.

### 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) FCA

Likely to be modified by appeal court. Criticized for conflating definitions for Metis and non-status Indians. The problem with this judgment is that the judge came to the “right” legal conclusion by what is thought to be the “wrong” path: he says Metis are included within “Indian” by pointing to their Indian ancestry. This is problematic because it denies Metis as a **distinct aboriginal collective.**

At its core, the Daniels case was about settling the ongoing dispute about who has legislative jurisdiction for Métis and non-status Indians – the federal government or the provinces. Métis and non-status Indians have long taken the position that they are included within s. 91(24). The federal government has always understood that “Indians” registered under the Indian Act are in s. 91(24), but has denied responsibility for individuals who are members of Indian communities who are not “status Indians.” A previous reference case to the Supreme Court of Canada in 1939 determined that the Inuit (then referred to as “Eskimos”) were within s. 91(24), even though Inuit are culturally distinct from Indians and not under the Indian Act. In addition to denying its jurisdiction with respect to non-status Indians, the federal government long denied jurisdiction for the Métis. Now, we have a clear answer: **Métis and non-status Indians are included in s. 91(24).**

### 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

- For the purposes of 91(24) the court defines the Métis “as a group of native people who maintained a strong affinity for their Indian heritage without possessing Indian status”

What a shit definition. The problem is, who were the Πs?

* + - Congress of Aboriginal peoples – who believed that Métis = anyone w/ aboriginal heritage
    - This definition cannot be reconciled w/ the history of the Métis Nation, the law (i.e. the SCC cases for last 440 years, Powley, MMF) or the practical implications of this overly broad definition (i.e. anyone w/ some mixed aboriginal ancestry would fall w/in 91(24))

### 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

- When the crown promises you something, they are honour-bound to fulfil that promise. The issues with the Manitoba Act were unacceptable. This is what got the Metis into confederation so you can’t just go back on it now. MMF got a declaration

→ Canada has now agreed to negotiate with the MMF and has appointed a negotiator (w/ the new gov’t) but where is Manitoba in this negotiation? If the province isn’t there, they can’t do anything about land

# 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

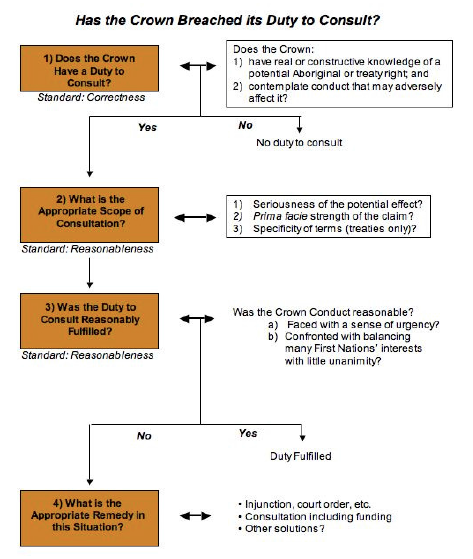
- Gov’t action triggering a duty to consult is not confined to decisions or conduct which have an immediate impact on lands and resources.  **A potential for adverse impact suffices**.

* 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



# New Developments

## Chippewas of the Thames First Nation v. Enbridge Pipelines Inc., 2015 FCA 222 [NEB + Absence of Crown]

**F:** an appeal by the Chippewas of the Thames First Nation (the “Appellant”) from a decision of the National Energy Board (the “Board”) approving an application by Enbridge Pipelines Inc. (“Enbridge”) for the Line 9B Reversal and Line 9 Capacity Expansion Project (the “Project”).

The Appellant asks the Court to quash the Board’s approval of the Project “... because the **Board was without jurisdiction to issue exemptions and authorizations to [Enbridge] prior to the Crown fulfilling its duty to consult and accommodate** the Appellant”.

**There are two issues:**

a) Whether the Board itself has been delegated the power to undertake the fulfilment of **the Haida duty** on behalf of the Crown in relation to the Project; and

b) Whether the Board was required to determine, as a condition of undertaking its mandate with respect to Enbridge’s application for approval of the Project, if the Crown, which was not a party to the application, was under a Haida duty and, if so, whether the Crown had discharged that duty.

- Whether NEB had to decide whether Crown had a duty and then whether the duty had been fulfilled

- Was the NEB req’d to bring the Crown to the board

- If they couldn’t bring them, could they proceed?

- The majority doesn’t think it’s an important factor; in Standing Buffalo, a provision of the NEB that it was acting under was different b/c the crown had to come in at some point and play a part in the ultimate decision

- Because this is under a different provision, the NEB decision would be final

- 2 different sets of facts now

- But they NTL decide that it’s still good law for both situations

Rio Tinto seemed to state that if a tribunal has a duty to consult or a duty to assess consultation, then you have to go to the statute to determine what’s happening

Either the Crown is delegating its authority to the tribunal or the crown is consulting – they need to be doing it somehow

The majority found that standing buffalo was still binding law and that rio tinto didn’t apply

Seem to think that b/c leave to appeal was refused for standing buffalo, that it has quasi-SCC authority

The decision in Carrier Sekani does not refer to the decision in Standing Buffalo and contains no analysis of the role of a tribunal in relation to Haida Determinations when the Crown is not a participant in the proceeding before that tribunal. [The reason that Carrier Sekani didn’t refer to this situation is b/c the Crown was there; sneaky reasoning] In Carrier Sekani, the Crown was before BCUC, and BCUC made the initial Haida Determination, namely that the Crown was not under a Haida duty in the circumstances. In my view, **Carrier Sekani does not go so far as to establish that before undertaking its consideration of the matter at issue in the proceedings before it, a tribunal must make the Haida Determinations irrespective of whether the Crown is a participant in those proceedings**. ...

[No return to what the *point* of the duty to consult and accommodate is…it should be about allowing the Crown to act honourably; not attempting to do that]

## Yahey v. British Columbia, 2015 BCSC 1302 [Cumulative Effects]

The Blueberry River First Nations (“BRFN”) seeks an interlocutory injunction that would prevent the British Columbia government from proceeding with a planned auction of 15 Timber Sale Licences (“TSLs”). The licenses would permit logging of specified areas, or “cut blocks,” totalling 1,690 hectares (16.9 sq. km) of merchantable timber within BRFN’s traditional territory in northeastern British Columbia.

BRFN members have treaty rights to use their traditional territory for hunting, fishing and other traditional activities, but BRFN says **the cumulative effect** **of industrial development has made or will soon make it impossible to meaningfully exercise those rights**. It has commenced an action seeking declarations that the Crown has **breached treaty obligations** as well as **interim and permanent injunction**s to prohibit the Province from doing or permitting any activities that amount to a further breach. In addition to forestry, BRFN’s Notice of Civil Claim refers to oil and gas, mining, hydroelectric infrastructure, roads, agriculture and other development.

→ Although there is a right of ‘taking up’ that is contained in Treaty 8. At some point, the taking up has to come to a breaking point where there is no possibility of actually exercising treaty rights.

Interlocutory Injunction Test:

*[RJR-MacDonald]:*

(a) whether the applicant has demonstrated that there is a serious question to be tried;

→ moved through pretty quickly

(b) whether the applicant will suffer irreparable harm if an injunction is not granted; and

→ defined as “harm which either cannot be quantified in monetary terms or cannot be cured because one of the parties cannot collect damages from the other”. Harm found pretty easily.

(c) whether the balance of convenience favours granting the injunction.

**This is the key question: there are the interests of gov’t and industry versus the interests of the BRFN.**

* For the most part, there has mostly been a tipping in the scales towards industry.
* Even if there is a possibility of irreparable harm, the balance of convenience is determinative.
* The court has to deal with this as a **single matter**, it’s forced to look at it as a single act even though they recognize that there is a historical context
  + concerned that they will be overwhelmed by injunctions and that will unduly hamper industry and that can’t happen.
* BRFN may be able to persuade the court that a more general and wide- ranging hold on industrial activity is needed to protect its treaty rights until trial. However, if the court is to consider such a far-reaching order, it should be on an application that frankly seeks that result and **allows the court to fully appreciate the implications and effects of what it is being asked to do**. The public interest will not be served by dealing with the matter on a piecemeal, project-by-project basis.
  + How is it that the government can claim that the balance of convenience is in their favour because the courts would be plugged up with injunctions and whatnot (i.e. the cumulative effects and implications of granting the injunction for the gov’t), but the BRFN can’t show that the present reality was caused by a historical practice and cumulative effects
  + How can irreparable harm to a constitutional right be satisfactorily balanced against matters of convenience?

**CONCLUSION**

The balance of convenience was found to not support granting of the injunction sought; application is dismissed

## Yellowknives Dene First Nation v. Canada (Aboriginal Affairs and Northern Development), 2015 FCA 148

DAWSON J.A.

**I. Introduction**

* The Yellowknives Dene First Nation are Aboriginal peoples within the meaning of section 35 of the Constitution Act, 1982.
* They claim treaty rights as well as rights under section 35 of the Constitution Act, 1982 in the Drybones Bay area. The area is of critical significance to the Yellowknives Dene; they have occupied the area for hundreds, perhaps thousands, of years.
* To the Yellowknives Dene, the area is without parallel in terms of its importance to their culture. It is unique and irreplaceable; the First Nation’s historic and continued presence on the land is fundamental to its identity and well-being.
* The respondent, Alex Debogorski (Proponent), holds a mineral claim in the Drybones Bay area. He submitted a land use permit application to the Mackenzie Valley Land and Water Board (Land and Water Board) to conduct a diamond exploration project that includes up to 10 drill-holes over a five year period in the Drybones Bay area (Proposed Development).
* **The Mackenzie Valley Environmental Impact Review Board (Review Board)** is established pursuant to subsection 112(1) of the the MacKenzie Valley Resource Management Act, S.C. 1998
  + The Land and Water Board referred the Proposed Development to the Review Board for an environmental assessment.

**II. The Issues**

1. Was the decision that the Proposed Development was unlikely to have any significant adverse impact on the environment reasonable?
2. Was the decision that the Proposed Development was not a cause of significant public concern reasonable?
3. Did the Crown meet its duty to consult and, if required, accommodate the Yellowknives Dene?

**III. Consideration of the Issues**

1. Was the decision that the Proposed Development was unlikely to have any significant adverse impact on the environment reasonable?

On November 30, 2007, in an environmental assessment of an unrelated proposed development (CGV Development) in the Drybones Bay area, the Review Board found that the proposed development there at issue, in combination with the cumulative effects of other present and reasonably foreseeable activities, was likely to cause significant adverse cultural impacts of a cumulative nature (EA0506-005) (CGV Decision).

* cultural impacts are being caused by incrementally increasing development in this important area, including the proposed development.
* The Review Board is of the opinion that **these cumulative cultural impacts are at a critical threshold**. Unless certain management actions are taken, this threshold will be surpassed.
* Because of its conclusion that the CGV Development was likely to cause significant adverse cultural impacts of cumulative nature, **the Review Board prescribed six measures to reduce or avoid the adverse impacts.**
* One measure was of particular importance. It required the federal and territorial governments to work with the Yellowknives Dene and other Aboriginal land users to produce a local “Plan of Action” for the shoreline zone within a specified time frame.
* At a minimum, the Plan of Action was, among other things, to be drafted and implemented with substantial input from Aboriginal parties, address future development in the shoreline zone (including provisions to protect sensitive environmental, cultured and spiritual sites) and provide clear recommendations for managing development and recreational activity in the shoreline zone.
* Once the responsible minister accepted the Review Board’s decision, he was to provide a policy direction to the Land and Water Board requiring it to consider the Plan of Action before reaching any determinations regarding preliminary screening of all new applications for developments in the shoreline zone.
* The Review Board recommended that the CGV Development could proceed only if the six measures were implemented **→ The measures prescribed by the Review Board were never implemented**.
* Instead, on April 13, 2010, pursuant to section 130 of the Act, the Minister of Indian Affairs and Northern Development requested that the Review Board further consider some of the measures proposed → Board stuck to its guns
* But then, in reconsidering, it also said that the proposed development itself was ‘small enough to pass’
* Dene state that by relying on the effectiveness of measures that the minister never actually implemented, the Review Board’s conclusions about the Proposed Development were reached in a false context.
* Put another way in oral argument, having accepted that “impacts from various human activities have reached a critical threshold in the Drybones Bay area” (Decision at page 29), the Review Board ought to have recognized that even a small project would add to the cumulative impact. Its failure to do so renders the Decision illogical and unreasonable.

→ Ct says no, the board made it clear that they didn’t think the measures had been put in place. They nonetheless found reasons for deciding the proposed development was okay.

1. Was the decision that the Proposed Development was not a cause of significant public concern reasonable?

* Argument that the Review Board made the same error when considering whether the Proposed Development would be a cause of significant public concern (i.e. it relied upon the measures it had proposed in the CGV Decision to address the public’s concerns.)

→ Ct says no, the Review Board did not rely upon the measures it had previously recommended in order to conclude that there was no basis for significant public concern.

1. Did the Crown meet its duty to consult and, if required, accommodate the Yellowknives Dene?

During oral argument, counsel for the First Nation agreed that in the present case little significance flows from whether the duty is characterized to be at the mid or high end of the Haida Nation range because, in the circumstances of this case, the content of the duty would not vary. The First Nation says that the Review Board process was, in any event, not capable of providing the required remedy: land-use planning. Therefore, the duty to consult was not met. As well, there was no accommodation afforded to the Yellowknives Dene. ...

→ Ct says no, review board process was sufficient to discharge duty to consult

***Principles:***

* It is now settled law that Parliament may choose to delegate procedural aspects of the duty to consult to a tribunal. Tribunals considering resource issues that impinge on Aboriginal interests may be given: the duty to consult; the duty to determine whether adequate consultation has taken place; both duties; or, no duty at all.
* In order to determine the mandate of a tribunal, it is relevant to consider whether the tribunal is empowered to consider questions of law and what remedial powers the tribunal possesses (Rio Tinto at paragraphs 55-65).
* The consultation process does not dictate a particular substantive outcome. Thus, **the consultation process does not give Aboriginal groups a veto over what can be done with land pending final proof of their claim**.
* Nor does consultation equate to a duty to agree; what is required is a commitment to a meaningful process of consultation. Put another way, perfect satisfaction is not required. **The question to be answered is whether the regulatory scheme, when viewed as a whole, accommodates the Aboriginal right in question** (Haida Nation at paragraphs 42, 48, and 62).
* Good faith consultation may reveal a duty to accommodate. Where there is a strong prima facie case establishing the claim and the consequence of proposed conduct may adversely affect the claim in a significant way, the honour of the Crown may require steps to avoid irreparable harm or to minimize the effects of infringement (Haida Nation at paragraph 47).

***Application:***

* the Act provides for a comprehensive consultation process, which in turn allows for significant consultation between a developer and affected Aboriginal groups.
* regime reflects **Parliament’s intent that the Review Board engage in the required consultation process as part of and prior to completing an environmental assessment**.
* allows formal participation in the decision-making process.
* the view of the Review Board, the Proposed Development was unlikely to negatively affect the environment ∴ not necessary for it to recommend measures similar to the land-use measures recommended in the CGV Decision
  + land-use planning can’t be the only outcome that could result from meaningful consultation.
* On the basis of those findings there was, at law, no need for accommodation measures to avoid irreparable harm or to minimize the effects of the Proposed Development. The duty of consultation does not always require substantive, as opposed to procedural, consultation

**IV. Conclusion**

Appeal dismissed

# Legislative Action

When it comes to drafting new laws, the court is not going to impose a duty to consult on the legislative arm.

## Courtoreille v. Canada (Aboriginal Affairs and Northern Development), 2014 FC 1244

- This case dealt w/ omnibus bills

- no precedent to say that’s possible

- Separation of powers issue: the judicial branch is not going to tell the leg what to do

- FCA is hearing this soon

## Hupacasath First Nation v. Canada (Foreign Affairs and International Trade Canada), 2015 FCA

- involved the negotiation of free trade agments

- not part of what’s contemplated under Haida

- Separation of powers again

# Some Aspects of International Law that Intersect with Section 35

## Various UN instruments and provisions within instruments

*International Covenant on Civil and Political Rights (1966)*

Article 27

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language. → Women went to argue that the right to enjoy their own culture was being infringed by virtue of the discriminatory Indian Act provisions which stripped women of status if they married out. UN agreed. Canada was embarrassed. May have had something to do with the change that occurred in 1985 to those laws.

## Inter-American Human Rights Commission

Example: *Hul’qumi’num Treaty Group petition[P-592-07]*

- You can only go to int’l law if you’ve exhausted all your domestic avenues

- The group went to the inter-american commission and they agreed

- Treaty unavailable to the group b/c there is no land left to treaty about – it was all given in a private property grant made in 1884.

## United Nations Declaration on the Rights of Indigenous Peoples

Affirming that indigenous peoples are equal to all other peoples, while recognizing the right of all peoples to be different, to consider themselves different, and to be respected as such,

Affirming further that all doctrines, policies and practices based on or advocating superiority of peoples or individuals on the basis of national origin, racial, religious, ethnic or cultural differences are racist, scientifically false, legally invalid, morally condemnable and socially unjust,

Recognizing the urgent need to respect and promote the inherent rights of indigenous peoples which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies, especially their rights to their lands, territories and resources,

Further recognizing the urgent need to respect and promote the rights of indigenous peoples affirmed in treaties, agreements and other constructive arrangements with States,

Convinced that control by indigenous peoples over developments affecting them and their lands, territories and resources will enable them to maintain and strengthen their institutions, cultures and traditions, and to promote their development in accordance with their aspirations and needs,

Recognizing also that indigenous peoples have the right freely to determine their relationships with States in a spirit of coexistence, mutual benefit and full respect,

Also considering that treaties, agreements and other constructive arrangements, and the relationship they represent, are the basis for a strengthened partnership between indigenous peoples and States,

Bearing in mind that nothing in this Declaration may be used to deny any peoples their right of self-determination, exercised in conformity with international law,

Convinced that the recognition of the rights of indigenous peoples in this Declaration will enhance harmonious and cooperative relations between the State and indigenous peoples, based on principles of justice, democracy, respect for human rights, non-discrimination and good faith,

Encouraging States to comply with and effectively implement all their obligations as they apply to indigenous peoples under international instruments, in particular those related to human rights, in consultation and cooperation with the peoples concerned,

Solemnly proclaims the following United Nations Declaration on the Rights of Indigenous Peoples as a standard of achievement to be pursued in a spirit of partnership and mutual respect,

**Article 3**

Indigenous peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development. [Are these things meant to exemplify or limit the right?]

**Article 4**

Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.

**Article 5**

Indigenous peoples have the right to maintain and strengthen their **distinct political, legal,** economic, social and cultural institutions, while retaining their rights to participate fully, if they so choose, in the political, economic, social and cultural life of the State.

### What might be the legal problems with implementing these in Canada?

* Art. 3: Self-determination means the right to determine what happens w/o constraint vs. self-gov’t is inward-looking and how to govern one’s own affairs (i.e. membership, local affairs, etc.)
  + Issues re: a third order of gov’t emerging
  + If self-determ gets to be powerful enough, it starts to seem like it could be a right to say no. Probably the scariest thing historically for the Canadian gov’t
* Art. 5: Distinct legal institutions – if this really means the right to do this outside of the view or coordination with the Canadian gov’t then that’s problematic
* The Indian Act is still the primary means of interaction between First Nations and the gov’t
  + Does this mean replace the Indian Act in consultation w/ First Nations, that could be good
  + But does this mean that groups don’t even need the Indian Act anymore.

**Article 7**

1. Indigenous individuals have the rights to life, physical and mental integrity, liberty and security of person.

2. Indigenous peoples have the collective right to live in freedom, peace and security as distinct peoples and shall not be subjected to any act of genocide or any other act of violence, including forcibly removing children of the group to another group.

**Article 8**

1. Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture.

2. States shall provide effective mechanisms for prevention of, and redress for:

(a) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities;

(b) Any action which has the aim or effect of dispossessing them of their lands, territories or resources;

This is one thing that s. 35 is intended to deal with – the dispossession. Nothing in the language that indicates that UNDRIP would work w/ s. 35. Would crown ability to infringe still be available? Would this force BC to actually finally conclude treaties?

(c) Any form of forced population transfer which has the aim or effect of violating or undermining any of their rights;

(d) Any form of forced assimilation or integration by other cultures or ways of life imposed on them by legislative, administrative or other measures;

(e) Any form of propaganda designed to promote or incite racial or ethnic discrimination directed against them.

**Article 10**

Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.

**Article 14**

1. Indigenous peoples have the right to establish and control their educational systems and institutions providing education in their own languages, in a manner appropriate to their cultural methods of teaching and learning.

2. Indigenous individuals, particularly children, have the right to all levels and forms of education of the State without discrimination.

3. States shall, in conjunction with indigenous peoples, take effective measures, in order for indigenous individuals, particularly children, including those living outside their communities, to have access, when possible, to an education in their own culture and provided in their own language.

**Article 18**

Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.

**Article 19**

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order **to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them**.

→ this is **the** challenging core to UNDRIP because the flip side to this is the power to say no…This would be de-colonization; a redistribution of power.

**Article 23**

Indigenous peoples have the right to determine and develop priorities and strategies for exercising their **right to development**. In particular, indigenous peoples have the right to be actively involved in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions.

→ the language is indicative of the idea that the **point** is development. The way past colonial history is to get Indigenous populations involved in development. Mix it up with capitalism and it’ll be okay.

**Article 26**

1. Indigenous peoples have **the right to** the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired. [lands that you had in the past]

2. Indigenous peoples have **the right to own, use, develop and control the lands**, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired. [lands that you currently have – could be okay for gov’t if you use that w/in s. 35 framework]

3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.

- doesn’t have any limitations; doesn’t have the onus to prove title as a burden on the crown’s underlying title

- no tests – doesn’t look very much like the req’ments of s. 35.

- Though ‘right to land’ is flexible – needs unpacking.

**Article 28**

1. Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, of a **just, fair and equitable compensation**, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.

2. **Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status** or of monetary compensation or other appropriate redress.

Behind it all, there is always the idea that money can really address the wrongs.

\*\*\*all of this to say that there are certain articles that will be problematic for the government but perhaps not as problematic as the previous gov’t might have assumed and indicated