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# History and Context

## Royal Proclamation of 1763

* Set out guidelines for European settlement of Aboriginal territories in what is now NA.
* Forbade settlers from claiming land from Aboriginal occupants, unless it has been first bought by Crown and then sold to settlers.
* Only Crown can buy land from FN. Sometimes called “the Indian Magna Carta.”
* Foundation for the process of establishing treaties.
* British Crown recognizing indigenous communities as ‘nations’.

### S. 35 *Constitution* - Recognizes and affirms past and future rights

**35. (1)** The existing aboriginal & treaty rights of the Ab peoples of Canada are hereby recognized & affirmed.
(2) In this Act, "Ab peoples of Canada" includes the Indian, Inuit, and Metis peoples of Canada.
(3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired. **Brings modern day treaties into the area of protected 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**

### S. 25 Charter - Guarantee of rights and freedoms for Ab peoples

25. The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including
(a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and
(b) any rights or freedoms that may be acquired by the aboriginal peoples of Canada by way of land claims settlement.

### Barriers to understanding: Law, sovereignty, treaties

Law:

Governments make statements that may just be meant as non-binding policy.

Aboriginal peoples often have seen these as statements of law and have relied upon them.

 Sovereignty

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

Treaties

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

# Early Jurisprudence

**Marshall Trilogy (US Supreme Court): View of aboriginal relations imported into Canadian jurisprudence**

* **These U.S. decisions end up being used as precedence in Canada (also in St. Catherine’s Milling)**
* **Key legal principles:**
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) – guardian / ward relationship (paternalistic)
5. Indigenous powers of governance
6. Indigenous interests in land/treatment
7. Nature and status of Crown-Indigenous treaties

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| Johnson and Graham’s Lessee v William M’Intosh (1823) US \* Doctrine of DiscoveryCourts will not recognize title to land that Indians sold to private individual. * Indians do not have power to grant land.

Doctrine of Discovery * **Agreement between European countries that they would recognize each others territorial claims.**
* Absolute title exclusive to European conquesters - gov’t whose subjects discovered new territory.
* Rights of original inhabitants not entirely disregarded, but impaired
* Power to dispose of land at own will denied
* **‘Might makes right’** – conquest gives title which courts of conqueror cannot deny

Terra Nullius* **British took land as being vacant even when it was occupied by Indians**
* Non-Christians not seen as capable of owing land
* So far as respecting authority of Crown, **no distinction was taken between vacant lands and lands occupied by Indians**
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| Cherokee Nation v Georgia (1831) \* Ab rights to land |
| **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 / guardian.
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| St. Catherine’s Milling v The Queen (1888) JCPC \* Nature of Indian Interest in Land**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.**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.** Source of Indian Interest in Land – Royal Proclamation* **Royal Proclamation seen as source of Indian interests in land –** seen as setting out nature and extent of these interests
* **Interprets Royal Proclamation -** Indian title is only a ‘personal and usufructuary rights’:
	+ ‘personal’ = inalienable (can’t be sold to other parties);
	+ 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.
* Indian title is a burden or blemish on the Crown title that is removed when there is a treaty signed.
* Crown title is then “perfected”.
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# Pre S. 35 Cases

## 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
	+ Surrender of land interests in exchange for services (ie reserves, education)
	+ Treaties 1-11 basically the same in writing
* **Inuit** are fed responsibility under 91(24); were basically ignored until 1920s/1930s

#### Indian Act 1876

* Canadian federal statute - governs 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.
* Cradle to grave, legislates Status Indians entire life
* **“Status Indians” are wards of the Canadian federal government**,
	+ a paternalistic legal relationship that illustrates the historical imperial notion that Aboriginal peoples are "children" requiring control and direction to bring them into more "civilized" colonial ways of life.
* Indian Act only applies to status Indians. Not [Métis](http://indigenousfoundations.arts.ubc.ca/home/community-politics/metis.html) and Inuit peoples.
* As a result, the Métis and Inuit have not had the rights conferred by this status despite being Indigenous to Canada and participating in Canadian nation building. (This is not to be confused with the Canadian Constitution’s recognition of Indian, Métis and Inuit peoples as Indigenous peoples, and thus with constitutionally protected rights)
* **Who can achieve status**?
	+ 1. Any male person of Indian blood reputed to belong to a particular band;
	+ 2. Any child of such person;
	+ 3. Any woman who is or was lawfully married to such person.5
* The problematic nature of Indian status as created by the Indian Act has resulted in wide-ranging implications for Aboriginal peoples ineligible for status. Aboriginal people without status under the Indian Act remain legally unrecognized as Aboriginal peoples by the Canadian government.  Non-status Indians face the challenges of being legislated out of their communities, unable to participate in band politics, and ineligible for the same rights and various types of government support offered to status Indians. However, status and non-status Indians also share many common concerns – displacement from their ancestral homelands and their traditional ways of life, socio-economic challenges, a desire to practice their own cultures and traditions and to determine their own identities and futures.
* 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
* White Paper – Trudeau and Chretien’s plan to repeal the Indian Act and Indian Affairs, assimilate Indians into Canada and shift responsibility to Provinces
* After Calder, Trudeau pulled back the White Paper and started a treaty making process in Canada
* Aboriginal Title always recognized as lying above Crown Title. Aboriginal Title is a burden on Crown Title. Treaties extinguish aboriginal title to specific areas of land and resolve the burden on the Crown, by allowing Crown the FULL title with no burden.

Calder v British Columbia (Attorney General) (1973) \* Extinguishment “clear and plain intent”

**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.

#### Nisga’a title is grounded in the pre-existing interests of the Nisga’a 6 of 7 judges

#### St. Catherine’s Milling goes by the wayside, which said that source of Indian interests in land was Royal Proclamation]

#### “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…”

Extinguishment test: clear and plain intent in legislative instruments that purpose was to extinguish Indian title

#### onus rests on gov’t [this is still the test for extinguishment (picked up in 1990 by *Sparrow*)]

#### Indian title as a burden on underlying Crown title

#### Crown is the sole/absolute sovereign (no concept of ‘domestic dependent nationhood’ is considered, let alone recognized

R v Sparrow (1990) \* 4 part test for Ab Rights \* justifying infringement – internal limits

**First big case following creation of s 35**

**Facts:** *Salmon Fishery Regulations for BC* 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.

**Issue:** **Does an Ab right to fish exist? If so, what are limits? How does it fit within regulation of fishing?**

**Holding:** Aboriginal right to fish not extinguished.

#### Relationship between Crown and Aboriginals

* **Presumption of honour of Crown** – trust-like rather than adversarial relationship
* **“There has never been in doubt that sovereignty and leg power and indeed the underlying title, to lands is vested in Crown” at 1103**
* BUT Crown sovereignty must be reconciled w/ s 35
* Fiduciary duty means the fiduciary must act on the needs of the beneficiary.

#### 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
* 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
* 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 to Establish Ab rights

1. **Characterize existence of the right: SEE VAN DER PEET 10 part test**
	1. Identify the nature of the claim
	2. Pre-European contact practice that was **integral to the distinctive culture** in question (central, not incidental, but need not be unique)
	3. Sufficient continuity between the modern activity and the traditional practice?
2. **Does the right still exist? Has it been extinguished before 1982 / S 35?**
	1. Onus on Crown
	2. After S 35 extinguishment is not possible w/o consent
	3. Before 1982 test from Calder: legislative intention must be clear and plain
3. **Prima facie infringement – does legislation have effect of interfering w/ an existing aboriginal right?** → if YES to any = infringement
	1. Onus on claimant on BOP
	2. Limitation unreasonable?
	3. Pose undue hardship?
	4. Regulation deny rights holders the preferred means of exercising their right?

1. **Justification of infringement (onus on Crown) SEE: GLADSTONE**
	1. Is there a valid objective on the part of the Crown? (public interest is not sufficient, must be compelling and substantial – conservation / safety)

ie objective aimed at preserving s 35 rights by conserving natural resource or an objective purporting to prevent exercise of s 35 rights that would cause harm to general population or to Aboriginal people

* 1. Is the government employing means which are consistent with their fiduciary duty to the aboriginal nation at issue?

Was the infringement as minimal as possible?

Were their claims given priority over other groups?

Was the effected aboriginal group consulted?

If there was expropriation, was there fair compensation?

R v Van der Peet (1996) \* VDP Test Integral to distinctive culture \* Existence of Right

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.

#### Integral distinctive culture test:

#### “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.”

#### Ten Factors to Consider to Determining whether integral practice

1. Perspective of aboriginal peoples
2. Identify precisely the nature of the claim being made
3. Practice, custom or tradition must be of central significance to the aboriginal society in question
4. Continuity w/ the practices, customs and traditions that existed prior to contact
5. Evidentiary difficulties inherent in adjudicating aboriginal claims
6. Claims adjudicated on a specific rather than general basis
7. Practice must be of independent significance to the aboriginal culture in which it exists
8. Practice, custom or tradition be distinctive; it does not require that that practice, custom or tradition be distinct
9. Evolution is constrained - 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
10. Relationship of Ab peoples to the land and the distinctive societies and cultures of Ab peoples

R v Gladstone (1996) \* Changes Sparrow - Justifying infringement – no-internal limits

**Facts:** D tried to sell herring spawn. Charged under *Pacific Herring Fishery Regs*. They claimed they had an Ab right to sell herring, presented evidence at trial showing trade in herring spawn was part of pre-contact society.

**Issue:**

* Do the appellants have an aboriginal right to fish? If so, does the right extend to commercial exploitation? If so, is the Crown justified in restricting the right using regulation?

**Two streams to justify infringement:**

* **Test from *Sparrow* applies to rights w/ internal limits –**
	+ Prioritizing rights holders, fiduciary obligation
* **Altered test from *Gladstone* applies to rights w/o internal limits** –
* In allocating the resource, must be respectful of Ab rights, give priority to Ab rights over exploitation of fishery by other users
* Broader Test from *Sparrow* – Crown must just act as a fair sovereign to all – 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**
* Takes the teeth out of requiring a pressing and substantial objective (emphasized in Sparrow) b/c now what’s required is showing that the Crown is exercising power in a way that has ‘broader importance’
* **Objectives such as pursuit of economic and regional fairness, and recognition of historical reliance on fishery by non-aboriginal groups may satisfy justification**

R v Sappier; R v Gray (2006) \* Clarifies VDP – integral activity does not have to be core

**Facts**: Claimed right refers to practice of harvesting trees to fulfill domestic needs of pre-contact communities for e.g. shelter, transportation, fuel and tools.

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

**Pre-contact practice is central to *VDP* test – Activity does not have to be core to culture, just integral**

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

#### 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
* **Those pre-contact practices are not FROZEN IN TIME -** Practices can evolve with time but the nature of the right stays the same.
* 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

# “Aboriginal Title”: The Framework

Delgamuukw v British Columbia (1997) \* Sets the test for AT, can prov govt extinguish?

**Facts:** Delgamuukw and the Wet'suwet'en Nation seeking declaration of ownership and legal jurisdiction over hereditary territories. Forestry license.

**Issue:** **What is aboriginal “title” and can the government extinguish or infringe on title?**

#### Aboriginal Title

* A right to exclusive use and occupation of land.
* 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**

* **AT is sui generis “without precedence”**: Held communally, not a usage based right, not simple as title, still being defined in CL, sort of like fee simple

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

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

#### Test for Aboriginal Title – continuous occupation, exclusive use of land

1. **Occupation -** Land must have been occupied prior to sovereignty (1846 for BC)
2. **Continuity** - Must be continuity between present and pre-sovereign use and occupation of land
3. **Exclusive** - At sovereignty, that occupation must have been exclusive

Evidence: At trial, oral evidence was not accepted. At CA - oral histories of Aboriginal groups are admissible as evidence. Sent back for trial but never happened.

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

**Fed gov’t has exclusive jurisdiction to both extinguish and legislate in relation to ARs b/c of 91(24)**

* Prov laws of general application apply to Indians and Indian lands – but they cannot function to extinguish ARs 🡪 In Tsilchotin provinces can infringe on AT

#### Justification of Infringement

* **AT doesn’t have an internal limit**, so affirmation of ***Gladstone framework*** *to justify infringement*
* **Fiduciary duty does not demand that ARs always be given priority** – only have to “respect” AR

#### Has Crown met its fiduciary duty? Higher scrutiny level since its AT not Crown title.

1. **Exclusive nature of AT -** Gov’t must demonstrate that resource allocation reflects interest of AT holders
2. **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**

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| Tsilhqot’in Nation v BC 2014 SCC \* Successful AT claim, declaration of breach of duty to consult |
| ***Note: Haida Nation applies when you are asserting a right but don’t have it yet.***Aboriginal title requires (Delgamuukw plus) 1. **Land occupied prior to sovereignty** “**sufficient**” – Context specific now.
2. “**Continuity**” - **Doesn’t require evidence of unbroken chain of continuity**, but present occ. rooted in pre-sovereignty.
3. **At sovereignty, occupation must have been** “**exclusive”**. Regular use w/o exclusivity would give rise to user-only rights. Evidence of other people on land doesn’t necessarily negate exclusivity, esp if permission given.
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#### Inherent Limits from Delgamuukw applied to Tsilhqot’in

* **Can’t use the land in a way that:**
	+ **Is irreconcilable with previous and continuous use (no mall on AT land)**
	+ **Will deprive future generations from use and benefit of the land**

#### Crown power over land with AT:

* Crown has power to legislate in relation to that land
* **"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
	+ If the Crown tries to get consent but the A.T. holder doesn't consent, the Crown has to turn to section 35 to justify the infringement.
	+ **The court modifies and adds to what is said in Delgamuukw about the Crown justifying infringement "rational connection, minimal impairment, and proportionality of impact"**
* **Federal** - Land falls under section 91(24) - "land reserved for Indians"
* **Province** - Can legislate over property and civil rights b/c of s 92(13) of Constitution Act, 1867

# Treaties and Treaty Rights

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| Aboriginal Understanding | Euro Understanding  |
| * Treaties confer rights to BOTH sides
* European rights in Americas come about through treaties made w/ FNs
* 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
 | * Pledge of honour of 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**
 |

#### Canada thinks of treaties as divorce documents, First Nations think of them as marriage documents

#### 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**: R v Sioui

(1) Intention to create obligations,

(2) Presence of mutually binding obligations and

(3) A certain measure of solemnity

* Treaty rights are constitutionally protected – must distinguish treaties from other types of agreements

R v Marshall #1 (1999) \* Treaty rights S 35 \* Honour of the Crown \* Regulating in Treaty

Marshall fishing eels and charged under fed fishery regs. Claimed he had a treaty right to do so. Mikmaw bring things to the truck stores in exchange for modern necessaries. Modern rights flow from 1760 agreement.

#### 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.

#### Crown can regulate treaties within the treaty, doesn’t involve S 35

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

#### Principles of Interpretation of Treaties

1. **unique agreement** 🡪 attract special principles of interpretation
2. **liberally construed** 🡪 ambiguities should be resolved **in favour of aboriginal signatories**
3. **common intention** 🡪 choose which best reconciles interests of both parties at time treaty signed
4. **honour of Crown is presumed**
5. Be sensitive to unique cultural and linguistic differences between parties
6. Words must be interpreted as naturally used by parties at the time
7. Technical or contractual interpretation of treaty wording should be avoided
8. Courts cannot alter terms of treaty
9. Treaty rights must not be interpreted in a static or rigid way 🡪 **modern practices** apply

R v Marshall #2 (1999) \* Regulating within Treaty

#### Three Ways 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.
	* **Need to show a pressing and substantial objective and fiduciary obligations**

#### Fed and provincial gov’ts have regulatory authority

* within their respective leg fields subject to constitutional requirement that restraints on treaty rights have to be justified on basis of conservation or other compelling and substantial public objectives
* ***Sparrow* applies where there IS an internal limit**, ***Gladstone* applies where there is no internal limit**

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

**Crown can take up treaty land without being an infringement**

* However if taking up leaves no meaningful “right” then infringement must be justified
* IJI does not apply – Federal paramountcy more important

# Metis Nation of the Northwest

**Nation**

* A nation is a political actor, a polity, and once it crosses the political threshold in remains one
* Ethnic group enters the political arena and attempts to influence the distribution of power

**Mixed ancestry isn’t enough to be considered Metis**.

* You don’t get to call yourself Metis just be genealogy.
* Nomadic people, so how do you find where they have AR to? Courts cant grapple with big geographic areas as not bounded by provincial barriers.

#### 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) \* Treaties only give rights to the parties who negotiate them (so FN treaties don’t apply to Metis)

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

Court found Metis had right to hunt for food regardless of species – charges dismissed.

**Where you can self-identify as Aboriginal, you cannot self-identify as Metis 🡪 need community acceptance proven AND existence of Metis community historically in area.**

**Modified VDP test for Metis**

* *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

Manitoba Metis Foundation Inc v Canada (AG) (2013) \* Honour of Crown \* Fiduciary

*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

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

* Not necessary for Metis interest in land to be AT
* Possible that Metis could have an interest in land sufficient to establish a fiduciary duty
* **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.**
* Therefore no fiduciary doctrine

Daniels v. Canada (2013) FCA \*\* Are Metis and non-status Indians included in 91(24)? YES

* **Métis and non-status Indians are included in s. 91(24) so fall under Fed jurisdiction**

# DUTY TO consult

Haida Nation v British Columbia (Minister of Forests) (2004) \* Asserted Rights \* Duty to consult \* Honour of the Crown

**Facts**: 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.

**Crown must get CONSENT for incursions of s 35 once Ab title is established OR they must justify with a compelling and substantial public purpose and are not inconsistent with the Crown’s fiduciary duty to the Aboriginal group** 🡪 **old test from Guerin / Sparrow**

#### HONOUR of the crown

* Gov’t’s duty to consult and accommodate 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

#### Duty to Consult and Accommodate

**When does it arise?**

* When Crown (1) has knowledge, real or constructive, of potential existence of Aboriginal right/title and (2) contemplates conduct that might adversely affect it

**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
* SPECTRUM ***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 serious issues

**If rights are asserted there is a need to consult** 🡪 **REMEDIES**: Injunctive relief, damages, order of consultation or accommodation

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

* There is **no duty to agree**
* This process does not give Ab groups a veto over what can be done w/ land pending final proof of claim
* “Consent” alluded to in *Delgamuukw* is **appropriate only in cases of established rights.**

#### Spectrum of consultation

* + NB: high end of spectrum does not go as far as veto/consent where rights are not established
	+ Consider Adverse Impact of Infringement 🡪 put on spectrum

 **DUTY TO CONSULT**

 **Low High**

Claim to title is weak Strong prima facie case for claim

Ab right limited Right and potential infringement highly significant

Minor infringement potential, Risk of non-compensable damage is high

Duty to give notice, disclose info, discuss issues Deep consultation – find interim solution

 **May become duty to accommodate:**

 **-** may need to amend crown policy

 - Crown must balance Aboriginal concerns reasonably w/ potential impact of decision on asserted

 right / title and w/ other societal interests

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

Mikisew Cree First Nation v. Canada (2005) \* Honour of Crown 🡪 Duty to Consult – Taking UP Lands

**Facts**: 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.

#### If taking up Treaty lands, Crown has a duty to consult!

* **Must inform itself of the impact their action will have on the Ab people, communicate that to the Ab people, and attempt to address the concerns of the Ab people BEFORE they act.**
* 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

**If a big impact** 🡪 **must consult! If a minor impact 🡪 may not need to (see spectrum).**

Rio Tinto Alcan Inc v Carrier Sekani Tribal Council (2010) \* Duty to Consult

**Facts:** 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.

#### Legislature may choose to delegate to a tribunal Crown’s duty to consult

**Affirms Haida**:

* The duty to consult arises when:
* The Crown has knowledge, actual or constructive, of a potential aboriginal claim or right;
* The Crown must be contemplating conduct which engages a potential aboriginal right; and
* There must be the potential that the contemplated conduct may adversely affect an aboriginal claim or right.