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**CASES AT A GLANCE**

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

***R v Sparrow*** -- first decision re s 35: sets framework for SCC judges in approaching Aboriginal/treaty rights

***R v Van der Peet*** -- made sig changes to first step of *Sparrow* test, finding of existing Ab right

***R v Gladstone*** -- made changes to test once a claimant CAN prove a right; possibility of recogn’d comm’l right

***Lax Kw'alaams Indian Band v Canada (AG)*** -- brings court up to date with *Gladstone*

***R v Marshall*** -- decision on fishing rights in NS, found to be protected by very early treaty’s trade clause

***Haida Nation v BC (Minister of Forests)*** -- deals with the duty to consult wrt resource extraction and govt devs

***Delgamuukw v British Columbia*** – modifies *Sparrow* test for proving Aboriginal title

***Tsilhqot'in Nation v British Columbia*** – first Cdn judicial recognition of title; builds on *Delgamuukw* title test

***R v Powley*** *–* adaptation of *Van der Peet* test for proving Métis rights

***Manitoba Métis Federation Inc v Canada*** -- builds on Honour of the Crown & whether Métis have Ab title

# 1. Is there an existing Aboriginal right?

## Aboriginal Rights

**Characterization of right:**

(*Sparrow*) – Descriptive: expert historical evidence enough to find a right

(*Van der Peet*) – Ab rights are held *because Ab people are aboriginal.*  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. Consider:

1. **Nature** of claim being made
   1. to characterize claim properly, court should consider nature of action, nature of legislation being impugned, practice being relied upon to establish right
   2. (*Lax Kw’alaams*) Not up to J to characterize the claim – “commission of inquiry” approach not as suitable in civil litigation
2. In order to be **integral**, a practice, custom, or tradition must be sth that made the society what it was
   1. Must be of independent significance of the culture – can’t be incidental practice
   2. Influence of European culture only relevant to inquiry if demonstrated that the practice, custom or tradition only integral because of that influence
   3. (*Gladstone*) Possible to find commercial trade as integral practice
   4. (*Lax Kw’alaams*) re: evolution of Aboriginal rights
      1. Aboriginal rights are subject to evolution (eg fishing rights don’t require rights holders to fish from canoes) – but there are quantitative and qualitative limits
      2. For fishing, species-specific limits exist – can’t go from eulachon grease to other fish
      3. General commercial rights aren’t automatically made out of original importance – sustenance, not “standard of prosperity”
3. **Historical continuity** between pre-contact social practices and claimed rights
   1. Evidence needs to be directed at showing aspects of society with origins in pre-contact, that continue to present day – POST-CONTACT evidence continuous from PRE-CONTACT
      1. Continuity is primary means through which “frozen rights” approach is avoided
      2. Continuity can be broken, but integrality should be shown
   2. (*Lax Kw’alaams*) “Pre-contact practices must engage the essential elements of the modern right” – continuity as an interpretive statement rather than time analysis?

All this should be done with the Aboriginal perspective given “equal weight”

## Aboriginal Title

**Characterization of Title:**

(*Delgamuukw*) – Somewhere in the middle of inalienable FS and usufructuary rights – *sui generis* (inalienability, unique source, and communal holding = special characteristics)

Content of Aboriginal title summarized by two propositions:

* Exclusive right to use and occupation for variety of purposes
* Inherent limit – uses can’t be irreconcilable with nature of attachment to land (eg can’t use land for things that would destroy value for future use eg strip mining traditional hunting grounds)
  + *Surrender* – Aboriginal people can surrender in exchange for valuable consideration despite inherent limit
  + (*Tsilhqot’in*) whether use is irreconcilable with inherent limit is an issue to be determined when issue arises (ie judicial action); not confined to pre-sovereignty uses

(*Tsilhqot’in*) – Legal characterization of Aboriginal title is a beneficial interest in land, conferring ownership rights similar to those associated with FS interests but with inherent limit of communal holding and non-alienation

Right to control land means that others seeking to use land must *obtain consent* or *establish justification*

*Provincial laws of general application apply unless:*

* Unreasonable
* Impose a hardship
* Deny the title holders their preferred means of exercising their rights
* Such restrictions can’t be justified pursuant to justification framework

(*Delgamuukw*) – **Test for proof of Aboriginal Title** (BOP on claimant):

1. **Land must have been occupied prior to Crown’s assertion of sovereignty over land**
   1. (*Tsilhqot’in*) Sufficient / effective control test: *would the acts of occupation communicate or signal to others the control over land?* Context-specific inquiry
      1. Consider group’s size, resources, ability, nature of land – open to nomadic peoples
2. **If present occupation used as proof of past occupation, there must be continuity**
   1. (*Tsilhqot’in*) Doesn’t require unbroken chain of continuity; just need intention to hold and possess comparable to what would be required to make out claim at CL
   2. Establishing an inference is enough for establishing continuity from post-sovereignty occupation
3. **At sovereignty, occupation must have been exclusive**
   1. Shared exclusivity is a possibility
   2. (*Tsilhqot’in*) to prove, show others excluded; permission required; lack of challenges. Regular use without exclusivity may still give rise to usufructuary rights

## Treaty Rights

**Interpreting Treaties** (*Marshall*)**:** somewhat more relaxed than proving Aboriginal right/title.

*Evidentiary Sources* - Special rules for constructing treaties, due to common disparity in bargaining power of parties here. Strict approach to use of extrinsic evidence should be rejected

* interpretation of K law stricter than treaty law, but parol evidence rule still exist for when written document doesn’t include all terms of the agreement; treaties should be liberally construed
* even in context of treaty doc purporting to contain all terms, Court has made it clear that extrinsic context may be received even absent ambiguities
  + eg documentary record; expert evidence about expectations of participants and historical background; other related treaties and documents with other groups; docs from both sides
* where treaty concluded verbally and written by Crown later, would be unconscionable for Crown to rely on written terms

*Ascertaining the Terms of the Treaty* – if written treaty document incomplete, must ascertain treaty terms

* *Honour of the Crown*: assume that Crown intended to fulfil promises made due to *sui generis* relationship. An interpretation that turns positive treaty demand into negative covenant isn’t consistent with honour and integrity
* *Rights of Other Inhabitants:* treaty can be made on general rights enjoyed by all citizens – issue isn’t content of rights but level of legal protection around rights
* *Limited Scope of Treaty Right* – ambit/extent of treaty right depends on common intention at time agreement was made
  + Treaty rights can’t be frozen at date of signature, must update treaty rights to provide for modern exercise
  + *Eg*. *Marshall*: trade clauses in *1760-61 Treaty of Peace and Friendship*, common intention was access to “necessaries” at truckhouses = not literally promise of truckhouse but continuation of moderate livelihood. Not just bare sustenance though not accumulation of wealth
* Words of treaty should be given sense they would have held at the time, and can’t exceed what is possible on the language

After Treaty right found, follow test for infringement developed for Aboriginal rights

\*\* *Marshall*: in absence of justification for infringement, A acquitted.

## Métis Rights

**Modified *Van der Peet* test for when claimants Métis** (*Powley*):

1. **Characterization of right**
2. **Identification of historic rights-bearing community**
3. **Identification of contemporary rights-bearing community**
4. **Verification of claimant’s membership in relevant contemporary community**
   1. *self-identify as member of Métis community*
   2. *evidence of ancestral connection to historic Métis community* – objective requirement
   3. *demonstrate acceptance by contemporary community* – eg past and continuing participation in shared culture; objective demonstration of bond of past and present mutual identification and recognition of common belonging
5. **Identification of relevant time frame**
   1. Adapt *Van der Peet* test to post-contact, pre-control analysis due to Métis history
   2. Focus on period after community arose and before it came under effective control of European laws/customs
6. **Determination of whether practice *integral* to claimants’ distinctive culture**
7. **Establishment of continuity between historic practice and contemporary right**
8. Extinguishment, Infringement, Justification(same as for Aboriginal rights)

# 2. Has the right been extinguished?

**Clear and Plain Intention** – onus on Crown

(*Sparrow*) Mere regulation ≠ extinguishment of rights. If no clear and plain intention by Crown to extinguish rights pre-1982, has not proved extinguishment

(*Gladstone*) Failure to recognize right and grant special protection doesn’t mean it’s automatically extinguished (this makes it harder for Crown to prove extinguishment)

(*Delgamuukw*) *Does province have power to extinguish rights or title?* – NO

Primary jurisdiction vested with fed govt re: “lands reserved for the Indians” – Province has power to take land after extinguishment of Aboriginal title, but jurisdiction to extinguish lies at federal level

# 3. Is there a *prima facie* infringement on the right?

**Prima facie infringement test** (*Sparrow*) – onus on claimant

1. **Is the limitation unreasonable?**
2. **Does the regulation impose undue hardship?** (sensitive to aboriginal perspective)
3. **Does the regulation deny to the holders of the right their preferred means of exercising that right?**

(*Gladstone*) As a whole, test asks “does the legislation in question have the effect of interfering with an existing aboriginal right” – prove at least one of the above to prove infringement

In *Sparrow*, regulation was challenged on its own; in *Gladstone,* scope of challenge broader because licencing scheme can’t be scrutinized without considering entire regulatory scheme. Look to existing and historical scheme for effect, *eg*, pre-Contact the Heiltsuk could commercially harvest as much as they wanted only subject to internal limitations; after regulatory scheme, limit to harvest = clear *prima facie* infringement on rights

# 4. Can the government justify the infringement?

(*Sparrow*) Extent of protection of Aboriginal rights should be construed purposively and in light of s 35 purpose of protecting Aboriginal rights – should be done generously and liberally in favour of rights

Rights are not absolute; government can still regulate, though government power must be reconciled with federal duty stemming from s 35. High standard of honourable dealing is expected.

(*Van der Peet*) – s 35 provides constitutional framework for *acknowledging/reconciling* rights with the sovereignty of the Crown, not government power reconciling with fed duty.

**Justification test** (3 parts in *Sparrow*; 2 parts in *Gladstone*; different 3 parts in *Tsilhqot’in*)– onus on Crown

(*Lax Kw’alaams*) Justification of infringement only required once Aboriginal right established

1. **Is there a valid legislative objective that is substantial and compelling?**
   1. (*Sparrow*) “public interest” claim is so vague and broad as to be unworkable for limiting constitutional right BUT conservation would be a valid legislative objective bc consistent with enhancing Aboriginal rights
   2. (*Gladstone*) economic fairness and *reconciliation* also valid legislative objectives
   3. (*Delgamuukw*) valid legislative objectives can include: development of agriculture, forestry, mining, hydroelectric power, general economic development, protection of environment, infrastructure, settlement of workforce for achieving these aims
2. **Is the special responsibility of the Crown fulfilled?**
   1. Legislation must fulfil the special trust relationship/be consistent with the Crown’s fiduciary duty, *eg,* valid legislative objective of conservation of resources
      1. (*Sparrow*) Should prioritize Indian food fishing in conservation, for sustenance interests
      2. (*Gladstone*) Where commercial fishery right, “priority doctrine” not enough because no internal limitation; courts should instead assess govt actions to see if govt has taken into account existence/importance of Aboriginal rights in establishing scheme, eg:
         1. Accommodate exercise of rights where possible, *eg* reduced licence fees
         2. Consider need to prioritize Aboriginal rights holders
         3. Importance of activity in economic health of community, and participation relative to their percentage of population; criteria considered in allocation
      3. (*Delgamuukw*) expectation of compensation for breaches of fiduciary duty
   2. (*Delgamuukw*) – re ABORIGINAL TITLE
      1. fiduciary duty is tied to nature of title when breach of Aboriginal title:
         1. Right to exclusive use/occupation is relevant to degree of scrutiny of infringing measure/action (may go from mere duty to discuss to full consent)
         2. Encompasses right to choose uses for land
         3. Lands held pursuant to Aboriginal title have inescapable economic component
      2. (*Tsilhqot’in*) – incursions CAN’T be justified if they substantially deprive future generations of benefit of land – parallel to inherent limit
3. ***Address other factors depending on the circumstances of inquiry****:*
   1. *Proportionality (as little infringement as possible?)*

(*Tsilhqot’in*) – to justify incursion on basis of public good w/o consent from title-holders, Crown **must also** show that it discharged procedural duty to consult/accommodate

* 1. *Is fair compensation available in situation of expropriation?*
  2. *Was the aboriginal group in question consulted?* Should be at least informed

## Duty to Consult

(*Haida*) – Duty to consult/accommodate comes from the Honour of the Crown

Both **Post-proof**  and **Pre-proof**: If Ab group seriously pursuing negotiations, even if not settled, obligation for fed/prov Crown to respect s 35 rights

*When does duty arise?*

When Crown has knowledge, real or constructive, of potential existence of Ab right/title and contemplates conduct that might adversely affect it

*Content and scope of duty*

**Pre-proof**: proportional to

1. Strength of case supporting existence of right/title
2. Seriousness of potentially adverse effect

Spectrum:

* Where claim to title weak, Aboriginal right limited, or potential infringement minor: only duty may be to give notice, disclose info, and discuss issues
* Where strong *prima facie* case, right/infringement of high sign, and risk of non-compensable damage high – deep consultation aimed at satisfactory interim solution

Meaningful consultation required; claimants mustn’t refuse to engage Crown’s overtures, though hard bargaining won’t offend right to be consulted

* Good faith on both sides required
* May oblige Crown to accommodate by making changes to proposed action
  + Not a veto, but must balance interests and seek compromise in good faith

**Post-proof**: varies with circumstances proportionally – minimum duty to discuss (breach less serious) > significantly deeper than mere consultation (most circumstances) > full consent of nation (v serious issues) (*Delgamuukw*)

Crown may be able to justify incursions post-proof BUT if title, duty to consult is higher (*TN*)

*Third party duty to consult/accommodate?* – NO

Since flows from assumption of sovereignty, no support for obligation on 3rd party because Honour of Crown can’t be delegated 🡪 can be found liable in other ways if 3rd parties act negligently, but not for failing to discharge Crown’s duty

## Fiduciary Duty

(*Sparrow*) – government has responsibility to act in fiduciary capacity wrt Aboriginal peoples

(*MMF*) – *when a fiduciary duty may arise* (greatest protection – only shown post-proof/treaty)

In Aboriginal context, may arise if Crown assumes discretionary control over specific Aboriginal interests

* Specific or cognizable Aboriginal interest
  + Must be a communal Aboriginal interest in land that is integral to the distinctive community and their relationship to the land
  + Can’t be established by treaty, but predicated on historic use/occupation
* Crown undertaking of discretionary control over that interest
  + Undertaking is by alleged fiduciary to act in best interests of alleged beneficiary
  + Defined person/class of persons is vulnerable to fiduciary’s control
  + There is a legal/substantial practical interest of beneficiaries that stands to be adversely affected by alleged fiduciary’s exercise of discretion/control

## Honour of the Crown

(*Haida*) – Honour of the Crown arises from Crown’s assertion of sovereignty over Aboriginal people and de facto control of land/resources *(more general – will apply more broadly than fiduciary duty, which basically is only for reserves)*

(*Marshall*) – Assumption that Honour of the Crown exists when reading treaty provisions

(*MMF*) – *What duties are imposed by the Honour of the Crown?* Applies in at least 4 situations:

1. Gives rise to FIDUCIARY DUTY when Crown assumes discretionary control of specific Aboriginal interest
2. Informs purposive interpretation of s 35 and gives rise to DUTY TO CONSULT when Crown contemplates an action that will affect a claimed by unproven Aboriginal interest
3. Requires things like honourable negotiation and the avoidance of sharp dealing during treaty-making and implementation
4. Requires Crown to act in way that accomplishes intended purposes of treat/statutory grants to Aboriginal peoples

*Where issue is the implementation of constitutional obligations to Aboriginal peoples, two explicit obligations*:

**1. Take broad purposive approach to interpretation of promise**

**2. Act diligently to fulfil promise**

“Persistent pattern of errors and indifference that substantially frustrates purposes of a solemn promise” may amount to a betrayal of Crown’s duty (just negligence isn’t enough tho)

# Case Summaries

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| **R v Sparrow (1990)** | |
| **ISSUES:**   * What’s the scope of s 35? * Is net length restriction in licence inconsistent with s 35? | **ANALYSIS:**  *“existing Aboriginal and treaty rights*” = those already in existence when CA, 1982 came into effect – if right is existing, they weren’t extinguished  Should be interpretation that allows for evolution over time  *“recognized and affirmed” -* Part of constitution, to be construed purposively  Imports recognition of exercise of Crown power  Rights not absolute but govt power must be reconciled w fed duty of s 35 – thus infringement demands justification  SPARROW TEST for interpretation of s 35:  **1. Is there an Aboriginal right?** Onus on Ab claimant  **2. Has the right been extinguished (pre 1982)?** Onus on Crown  **a)** to extinguish, must be clear and plain – regulation isn’t enough  🡪 yes, Musqueam known to fish there in past, all supported by evidence  **3. Whether that right has been infringed?** Onus on Ab claimant  *a) is the limitation unreasonable?*  *b) does the regulation impose undue hardship?*  *c) does regulation deny to holders of right their preferred means of exercising that right?*  🡪 pretty easy to prove this in this case, adversely affects fishing; look at Ab perspective  **4. Is infringement justified?** Onus on Crown  a) valid legislative objective that is compelling and substantial?  b) consistent with Honour of the Crown?  c) other factors: minimal as possible? Claims given priority? Consultation? Compensation if expropriation?  🡪 “PI” unworkable as objective, though conservation is OK; s35 confers constitutional allocation priority to Indian food fishing |
| **FACTS:** Sparrow, Musqueam, charged under *Fisheries Act* for violation of Band’s licence for drift net length |
| **HOLDING:** new trial ordered (no acquittal or conviction, though fed govt quickly changed *Fisheries Act*) |

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| **R v Van der Peet (1996)** | |
| **ISSUES:**   * How to show if there is an Aboriginal right? * Are fishery regs of no force or effect due to VdP having aboriginal rights within meaning of s35? | **ANALYSIS:**  *Aboriginal rights* to be *recognized and affirmed* different from Charter rights in general – doctrine exists due to need to 1) recognizing prior occupation of Aboriginal peoples and 2) reconcile prior occupation with Crown sovereignty  Notion of “reconciliation” should place EQUAL WEIGHT on Ab perspective and that of CL  VAN der PEET modification to #1 of Sparrow:  **To be an Aboriginal right, activity must be element of practice, custom, or tradition integral to the distinctive culture of the Ab group claiming the right**  Activities need continuity to those integral activities that existed pre-Contact (this is stupidly hard); can’t be incidental; must be integral to culture/be of central significance  🡪 Sto:lo have right to fish, yes, but aboriginal right has to be based on practices related to exchange of fish for money for VdP to be allowed to sell. Court finds it wasn’t significant, integral, or defining feature of Sto:lo society, which traded fish only incidentally to food purposes and lacked a “regularized trading system”. Qualitative difference from pre-Contact practice |
| **FACTS:** Van der Peet, Sto:lo, charged w offence of selling fish under authority of Indian food fishing licence that only allowed for sustenance fishing |
| **HOLDING:** Conviction upheld for violation. |
| **R v Gladstone (1996)** | |
| **ISSUES:**   * Can commercial right to fish exist under s 35? * Are fishery regs of no force or effect due to Ds’ aboriginal rights within meaning of s35? | **ANALYSIS:**  Clarifies *Sparrow* and *Van der Peet* together to apply to different circs at hand  Reconciliation justifiable reason for placing limits on Aboriginal rights – reconciling Aboriginal rights and furtherance of broader community  **1. Was applicant acting pursuant to Aboriginal right?**  🡪 yes; court satisfied by inference on continuity + expert witness info that Heiltsuk had such comm’l level trade pre-Contact that trading it was an integral feature in Heiltsuk society (in contrast to Sto:lo)  **2. Was right extinguished?** – just bc there’s legislation doesn’t mean that there’s clear and plain intention to eliminate aboriginal rights; just bc something didn’t get special protection doesn’t mean this is satisfied 🡪 legislation suggests govt wanted conservation goals pursued in way that Indian food fishery would continue, not eliminate comm’l Indian fishing rights  **3. Was right infringed?** 🡪 subject to regulatory scheme limiting harvest thus clear infringement  **4. Was infringement justified?** 1) valid legislative objective; 2) actions consistent with fiduciary duty of govt towards Aboriginal peoples   * Valid legislative objectives expanded from *Sparrow* * COMMERCIAL SALE different: no internal inherent limit 🡪 Aboriginal fishery has priority, which must be reflected in govt actions; this doesn’t constitute a veto though. This is based on balancing of interests of competing groups |
| **FACTS:** Gladstones caught trying to sell herring spawn on kelp despite Indian food fishing licence only allowing harvest |
| **HOLDING:** New trial directed on criminal culpability as well as justifiability re: govt’s allocation of herring fishery |

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| **Lax Kw’alaams v Canada (2011)** | |
| **ISSUES:**   * Can Lax Kw’alaams claim an Aboriginal right to commercial fishing? | **ANALYSIS:**  Issues with step 1, characterization of right: lack of cont. and proportion  *Re: Continuity*: “pre-Contact practices must engage the essential elements of the modern right” 🡪 eulachon ≠ all fish  *Re: Evolution of Aboriginal rights*: quantitative and qualitative limits to “evolving” the subject matter of rights. There must be continuity and proportionality between pre-Contact practice and the modern right  🡪 Lax Kw’alaams’ eulachon fishery very different in scope from alleged right to access to commercial fishery; standard of prosperity is too high with far-reaching implications, should not be awarded given the facts |
| **FACTS:** Lax Kw’alaams claiming Ab right to comm’l harvest and sale of all fish within traditional waters based on historic trade of eulachon (fallback = way of life) |
| **HOLDING:** Claim to comm’l fishing right not made out, appeal dismissed. |

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| **R v Marshall (1999)** | |
| **ISSUES:**   * How to interpret treaty rights under s 35? | **ANALYSIS:**  Must take purposive and generous approach to constructing treaties – assume that Honour of the Crown being exercised. 🡪 Mi’kmaq treaty incl context from historical records, similar treaties being signed around same time, generous reading that “necessaries” = moderate livelihood  **Once treaty rights found to exist, act as type of protection against interference** (treaty infringements *may* be justified in order to reconcile w balanced interests, but here Crown failed to bring justification argument because they thought not treaty right would be found) |
| **FACTS:** Mi’kmaq Marshalls fished for eels and prosecuted for selling them w/o licence |
| **HOLDING:** Prohibitions inconsistent with treaty rights and thus of no force or effect via s 35, Marshall acquitted bc no Crown justification |
| **Haida Nation v BC (Minister of Forests) (2004)** | |
| **ISSUES:**   * What duty does the govt owe to pre-treaty Haida? | **ANALYSIS:**  *Sparrow* – mentions factor of consultation in justification stage  Duty to consult and accommodate part of process of fair dealing and reconciliation, arising from Crown assertion of sovereignty  Tension between pre-proof Ab title and sovereignty of the Crown – what duty when interest, as here, insufficiently specific for fid duty?  HAIDA DUTY TO CONSULT FRAMEWORK:  **When Crown has knowledge, real or constructive, of potential existence of Ab right/title and contemplates conduct that might adversely affect it** => Duty to Consult  **√** Crown knowledge – province knew, many Haida objections  **√** strong prima facie case bc, on evidence, lower J found “inescapable” conclusions re Haida’s claims  **√** seriousness of potential impact – red cedar integral & v important  Measures and policies taken insufficient – Prov has duty to consult bc involves strategic planning for resource PLUS may req sig accomm due to serious impact on interests |
| **FACTS:** Haida pre-proof title claim, BC continues to issue logging licences without Haida consent |
| **HOLDING:** Govt has legal duty to meaningfully consult; can’t be delegated to company. |

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| **Delgamuukw v British Columbia (1997)** | |
| **ISSUES:**   * What is the content and nature of aboriginal title? * What evidence can be used? | **ANALYSIS:**  *Evidentiary issues*: Aboriginal rights are *sui generis* and demand unique approach to evidence but without straining Cdn legal structure – oral histories may help to demonstrate that current occupation has origins pre-sovereignty (even if they can’t conclusively est pre-sov occupation)  CONTENT and NATURE of title: Ab title incl right to exclusive use and occupation but there’s an inherent limit: title isn’t limited to provable VdP rights when title proved, but aboriginal group can’t do things irreconcilable to the nature of the interest in land  PROOF of title: 1. req that land be integral to distinctive culture of the claimants is subsumed by requirement of occupancy  2. whereas time for ID of aboriginal rights is time of first contact, for title it's the time at which Crown asserted sovereignty over land (in BC, 1846)  Aboriginal title can be infringed: must be in furtherance of valid leg obj, consistent with special fiduciary relationship  Expands range of valid leg objectives that could justify – are traced to reconciliation of prior occ with Crown assertion of sov |
| **FACTS:** group of Gitxsan and Wet’suwet’en groups claimed ownership and legal jurisdiction over territories (then changed pleadings to aboriginal title) |
| **HOLDING:** Lower courts’ findings of fact can’t stand, so new trial required (prejudice to Crown in change of pleadings) – don’t actually conclude on issue of land dispute |

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| **Tsilhqot’in Nation v British Columbia (2007)** | |
| **ISSUES:**   * Does TN have Aboriginal title under *Delgamuukw* test? * Title for nomadic people? * What duty is owed by BC? | **ANALYSIS:**  *Court largely clarifies and loosens up test in Delgamuukw due to facts. Inferences from available evidence = sufficient for proof*  1. sufficiency of occupation – context-specific; TN’s regular use of land sufficient for intention to hold and possess esp given geography  2. continuity of occupation – doesn’t req unbroken chain, nomadism OK  3. exclusivity of occupation – at time of sovereignty; TN had srs intention and capacity and were v defensive of territory  *Legal characterization of Ab title*: **POST-PROOF** Ab interest is independent legal interest giving rise to fiduciary duty. Not Crown land any more – Crown retains 1) fiduciary duty and 2) right to encroach if justified in broader PI under s 35(1)  Inherent limit softened from Delgamuukw: whether Ab actions are irreconcilable w/ inherent limit is to be det when issue arises  Principle of Justification exists due to reconciliation between parties; must work on moving forward  Only recourse if Crown doesn’t have consent; must show that it:  1. discharged procedural duty to consult/accommodate  2. actions were backed by compelling & subs objective  3. govt action was consistent w Crown’s fiduciary oblig to group  *Provincial Legislation* – possible to apply even post-proof if amended to apply over title lands. General regulatory leg will often pass test of infringement since it won’t impose undue hardship, but this is different from legislation that assigns property rights to 3rd parties   * Issuing timber rights would be diminution of ownership right and must be justified where done w/o consent |
| **FACTS:** TN not treaty people; BC granted logging licence to trees in trad territory. Want decl of Ab title from Court. |
| **HOLDING:** first finding of Aboriginal title in BC; Province breached duty to consult. |

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| **R v Powley (2003)** | |
| **ISSUES:**   * Do prohibitions on hunting moose w/o licence infringe Powleys’ aboriginal right to hunt for food? (Do they *have* an aboriginal right?) | **ANALYSIS:**  Court must modify VdP test to reflect unique history of Métis – emphasis on prior occupation/pre-contact test inadequate bc Métis by definition arose post-contact. MODIFIED MÉTIS TEST:   1. **Characterization of right** 🡪 hunt for food in designated territory 2. **ID historic comm** 🡪 distinctive Upper Great Lakes 3. **ID contemporary comm** 🡪 focus on continuing practices; lack of visibility due to discrimination doesn’t dispel persistent comms 4. **Membership:** a)*self-identify*;b) *evidence of ancestral connection to historic comm*;c) *demonstrate acceptance by contemporary comm* 🡪 Powleys had strong bond on all 3 criteria; fact they took treaty benefits by living on reserve once doesn’t extinguish claim 5. **ID relevant time frame** – effective control test (more generous than assertion of sovereignty test) 🡪 Métis thrived in area for while w/ Euros discouraging settlement until colonial policy shifted in 1850s and control set in, Upper Great Lakes meets this step 6. **Practice *integral* to claimants’ distinctive culture?** 🡪 subsistence hunting and fishing constant and major, historical evidence supports 7. **Continuity btwn historic practice and contemporary right** 🡪YUP 8. Extinguishment, Infringement, Justification(same as for Aboriginal rights) 🡪 no evidence of Crown extinguishment; ON doesn’t recognize Métis rights to natural resources at all, which infringes right to hunt for food as continuation of practice; this isn’t justified by conservation, Métis entitled to priority allocation for subsistence like in *Sparrow* |
| **FACTS:** Powleys went hunting and shot/killed bull moose. Ministry of Nat Resources has lottery for authorization of hunt, but req/seas restrictions + # of annual harvest not enforced against Status Indians. |
| **HOLDING:** Métis found to enjoy constitutionally protected right to hunt for food under s 35, Powley acquitted. |

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| **Manitoba Métis Federation v Canada (2014)** | |
| **ISSUES:**   * Did Canada fail to act in accordance with its legal obligations in the *Manitoba Act*? * Did Canada breach fid duty or Honour of the Crown? | **ANALYSIS:**  ***Fiduciary duty*** *–* NOT FOUND –equity reqs fiduciary relationship for fiduciary duty to arise; in aboriginal context, arises in 2 situations:   * Specific or cognizable Aboriginal interest 🡪 Métis had treaty but this wasn’t enough for specific/cognizable; has to be predicated on historic use/occupation showing communal Aboriginal interest that’s integral to nature of distinctive comm and their rel to land * Crown undertaking of discretionary control over that interest 🡪 while *MA* provisions show intention to benefit children/landholders it doesn’t demonstrate undertaking to act in best interests   ***Honour of the Crown*** – FOUND – arises from Crown assertion of sovereignty and de facto control (Haida); engaged where need to reconcile Ab rights w Crown sovereignty eg explicit obligation to Métis  Requires Crown to 1) take broad purposive approach and 2) act diligently to fulfil it. Persistent pattern of errors and indifference may amount to betrayal of duty  🡪 broad purpose of legislation was to reconcile Métis with sovereignty of Crown by giving them head start in race for land/place in province; Canada failed duties by neglecting proper implementation in 1) delay; 2) sales to speculators; 3) issuance of scrip; 4) random allotment  \*\* Claim not barred by Limitations b/c principle of reconciliation demands such declarations of constitutionality not be barred |
| **FACTS:** *Manitoba Act* *(1890)* (constitutional doc) supposed to give Métis lasting place in new province w Métis consultation. Not fulfilled, Métis seeking decl that fed govt breached fid oblig, HoC |
| **HOLDING:** Obligation didn’t impose fiduciary duty, BUTMétis entitled to declaration that Canada failed to implement s 31 as required by the Honour of the Crown. |