**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 in Canada.**

**Ask DJ re: content of Crown’s FD depends on nature of aboriginal title (exclusive use; right to choose uses; inescapable economic component)**

* **How to use *Marshall* and *MMF*: HoC**
  + Treaty vs constitutional document context
  + MMF: what would be inconcisstent with HoC; Marshall = how to interpret a treaty

**Aboriginal & Metis Rights**

**1. Is there an Aboriginal Right, or Metis Right?**

***Sparrow*:** originally, aboriginal perspective “crucial” (1112)

* Dr. Suttles gave “scanty” evidence of continuity but sufficient to show salmon fishing integral and remains so (1095)
  + Descriptive expert historical evidence was sufficient

***Van der Peet*:** aboriginal rights exist because Aboriginal people here before Euros [30] 🡪 purpose of aboriginal rights must be to reconcile pre-existence of aboriginal peoples with sovereignty of the Crown [31]

* As such, “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” [46] that arose in those distinct societies prior to contact
  + B/c of reconciliation def’n, aboriginal rights must “take into account the aboriginal perspective, yet do so in terms that are cognizable to the non-aboriginal legal system” [49] 🡪 **equal weight to CL**

**1. How do we characterize the nature of the claim?**

* Nature/scope not defined by regulations (*Sparrow*)
* Determines the evidence needed to prove the right (*VdP* 56; *LK* 42)
* **Consider**:
  + Action taken said to be pursuant to the right, nature of impugned law, practice/custom/tradition relied on to claim right (*VdP* 53; *remember*—those were *fishing* rights)
    - In VdP: claiming right to trade and barter, Court says no,
* Characterize the right based on the pleadings (*LK* 47); qualitative or quantitative difference? (*LK* 59) \*remember civil/regulatory offence differences (civil = onus on P; regulatory means onus on Crown)
  + Can be in modern form (*VdP* 64), but continuity can’t be based on standard of prosperity and thus may be species-specific (e.g. failed claim for general commercial fishery in *LK* based on traditional commercial eulachon trade)

**2. Is there continuity between the pre-contact practice and the modern practiced right?**

* B/c of Lamer CJ’s definition of reconciliation, continuity from pre-contact (*VdP* 60)
  + Evidence may relate to post-contact, but need to show which aspects of society “have their origins pre-contact” (*VdP* 62)
    - Avoid frozen rights; can have broken continuity (*VdP* 65); relax evidentiary rules (*VdP* 68)
* “Pre-contact practices must engage the essential elements of the modern right” (*LK* 46)
  + Johnston: freezes rights b/c core of right must be same then and now

**3. Is the practice and right integral and distinctive to the aboriginal society in question? Custom, practice, tradition**

* “**Integral significance**” to aboriginal society = NOT incidental practice “piggybacking” off of integral one (*VdP* 70)
  + Reject Lambert JA “social significance” test
* **Distinctive**  = “distinguishing characteristic”, not “unique” (*VdP* 71)
  + “It is a claim that this tradition makes the culture what it is” (71)
* May adapt in response to Euros, but must not arise solely from their influence (apparently e.g. Sto:olo & HBC) (*VdP* 89)
  + *VdP* commercial right as response to HBC (fail)
  + May include commercial right: *Gladstone* commercial right IDC (facts?)
* Testing integrality: worked in *Gladstone* and *Sparrow*, but didn’t work in *VdP* or *LK*

**2. Has the right been extinguished?**

* **“Clear and plain intention”** (*Sparrow* 1099; *Gladstone* 31)
* Successive regulations don’t extinguish (*Sparrow* 1097)
  + Higher bar: failure to protect rights ≠ intention to extinguish (*Gladstone* 31)
    - There, restrictive purpose of licensing scheme= protect salmon spawn
    - Evidence of lack of intention to extinguish shown by large % of aboriginal permit holders

**3. If not extinguished, has the right been infringed?**

* ***Prima Facie* infringement** (*Sparrow* 1112)
  + Limitation unreasonable?
  + Impose undue hardship?
  + Deny right holders their preferred method of exercising that right?
* ***Gladstone***: only 1 of above must be answered affirmatively to establish *prima facie*infringement (43)
  + In that case, licensing scheme was challenged, so must look to whole legislative scheme pre- & post-contact
    - E.g. pre-contact Heiltsuk could commercially harvest as much as they wanted subject only to internal limitations; after scheme, limitations on harvest = *prima facie* infringement

**4. If infringed, can the government justify the infringement?**

**1. Is there a valid legislative objective** **that is substantial and compelling?**

* ***Sparrow*:** “federal **power** must be reconciled with federal **duty** and the best way to achieve that reconciliation is to demand the justification of any government regulation that infringes upon or denies aboriginal rights” (1109)
* ***Gladstone***: court framing of right allows easier justification for infringement (McLachlin dissent)
  + Justification relative to Lamer CJ’s version of reconciliation (b/w aboriginal communities and broader Canadian political community)

***What type of right is it?*** *Is the right limited or unlimited? Subsistence/food/ceremony or right to sell?*

* Conservation; objectives purporting to prevent harm to general populace or Aboriginal people themselves (*Sparrow* 1115)
  + \*For rights analogous to *Sparrow* (fish for food, ceremony, social purposes that is internally limited)
  + Public interest too vague (1113)
    - 🡪 But new *Gladstone* valid objectives let public interest creep in
* Conservation; economic and regional fairness; recognition of reliance and participation in fishery by non-aboriginals (*Gladstone* 75)
  + \*For rights analogous to *Gladstone*
  + Objectives that seek to “reconcile” the pre-existence of aboriginal communities with Crown sovereignty, which entails the recognition that “distinctive aboriginal societies exist within, and are a part of, a broader social, political and economic community” (73)
  + These objectives are in the interest of all Canadians, and “the reconciliation of aboriginal societies with the rest of Canadian society may well depend on their successful attainment” (75)
    - 🡪 Public interest??

**2**. **Does the Crown fulfil its FD/special trust relationship?**

* ***Sparrow***:
  + FD controls/limits power of justification; ensures that the Constitutionalized rights are protected
    - Generates a constitutional priority: controls how Crown makes allocation decisions
      * For food fishery: very strong Constitutional priority
  + (i) As little infringement as possible?
  + (ii) If expropriation, fair compensation?
  + (iii) Whether aboriginal group has been consulted with respect to conservation measures?
  + (**iv**) Adequate **priority**?
    - Priorities where internal limitation: conservation > aboriginal sustenance > non-Aboriginal interests
* ***Gladstone****:*
  + (*Sparrow* questions #1-3 above)
  + *Sparrow* priority would generate exclusive right to fishery; would create a monopoly
  + Adequate priority for right with only external limitations: “where the aboriginal right is one that has no internal limitation then the **doctrine of priority** does not require that, after conservation goals have been met, the government allocate the fishery so that those holding an aboriginal right to exploit that fishery on a commercial basis are given an exclusive right to do so. Instead, the doctrine of priority requires that the government 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*” (62)
    - “Whether gov’t has taken into account existence and importance of such rights”
    - *Accommodated exercise of the right to participate in fishery?* (64)
      * E.g. reduced license fees; taking account of proportion of local population are FN; whether they already have food fishing; how important to Aboriginal economy
    - *Does gov’ts objective in enacting regulatory scheme reflect need to account for priority of aboriginal right holders?*
    - *Aboriginal participation in the activity relative to percentage of whole [non-Aboriginal] population?*
    - *How has the gov’t accommodated different aboriginal rights in a fishery?*
      * E.g. food vs commercial
    - *How important is the fishery to the well-being of the band in question?*
    - *What did the gov’t consider when allocating licenses/resource to different users?*

**Aboriginal Title**

**Content of Aboriginal Title**

**Source: & Legal Characterization:**

* ***Delgamuukw*** at 114:
  + 1. Arises from “prior occupation of Canada by aboriginal peoples”; physical fact of occupation 🡪 proof of possession at CL
  + 2. *Sui generis*: arises from possession *before* sovereignty 🡪 2nd source = relationship b/w CL and pre-existing systems of Aboriginal Law
    - “Unique product of historic relationship” b/w Crown and Aboriginal group (***TN*** 72)
      * Therefore analogies to CL property ownership are inappropriate
  + 3. Communally held (115)
* ***Tsilhqot’in****:*At sovereignty, Crown acquired underlying title to all land; but burdened by pre-existing legal rights of Aboriginals
  + AT is underlying legal interest that gives rise to FD on the Crown (69)
    - AT is a beneficial interest
    - What remains of Crown title is: (1) FD; (2) right to encroach if justified under s 35

**Content**

* ***Delgamuukw***: somewhere b/w full fee simple and bundle of aboriginal rights: inalienable; source; communally held
  + 1. Right to exclusive use and possession for a variety of purposes (which need not meet the test for AR) (117)
    - **Ownership rights** (***TN*** 73)
      * Right to decide use; enjoyment and occupancy; possession; economic benefits; pro-actively use and manage
  + 2. Those protected uses must not be irreconcilable with the nature of the group’s attachment to the land (117)
    - * E.g. if occupation based on hunting, couldn’t strip mine; if occupation based on ceremony, couldn’t build a parking lot (128);
      * Analogy to **equitable waste**; not a **legal straitjacket**—can be in modern form (132)
    - BUT, ***Tsilhqot’in***: “Some changes—even permanent changes—to the land may be possible”. Irreconcilability of ability of future generations to use land would be case-specific (74)
      * AT post-sovereignty reflects recognition of traditional, pre-sovereignty uses. BUT “these uses are not confined to the uses and customs of pre-sovereignty times…can use land in modern ways” (*TN* 75)

**1. Is there Aboriginal Title?**

**1. Sufficient Occupation prior to Sovereignty**

* Oregon Boundary Treaty 1846 (*Delgamuukw* 146)
* ***Delgamuukw***:
  + “Laws in relation to the land”, e.g. tenure system, governing use (148)
  + Aboriginal perspective + CL perspective (149)
* **Context-specific:** *varies with characteristics of land and group* (***TN*** 37)
  + “…acted in a way that would communicate to third parties that it held land for its own purposes” (38)
    - B/w adverse possession & subjective intent
* **Consistent presence not essential:** *possible for nomadic people*(***TN*** 38)
  + Fields, constructed dwellings, houses, labour, sufficient but not essential for occupation
    - “The notion of occupation must also reflect the way of life of the Aboriginal people”, including nomadic/semi-nomadic (38)
* **Dual perspectives of Aboriginal and CL** (***TN***  41)
* **Regular use sufficient:** *as long as intention to hold or possess* (***TN*** 42)
  + Not continuous; regular use for hunting, fishing, trapping, foraging is sufficient, “provided that such use evinces an intention to hold or possess the land in a manner comparable to what would be required to establish title at CL” (42)

**2. Continuity b/w present and pre-sovereignty occupation: *substantial maintenance of connection; inference***

* ***Delgamuukw***:
  + “Substantial maintenance of the connection” b/w people and land (153)
* “Continuity simply means that for evidence of present occupation to establish an inference of pre-sovereignty occupation, the present occupation must be rooted in pre-sovereignty times” (***TN***  45)

**3. *Exclusive* occupation at sovereignty: *intention and capacity to control***

* ***Delgamuukw***:
  + “Intention and capacity to retain exclusive control” (156) 🡪 CL + Aboriginal perspective
  + Flows from definition of AT (exclusive use); “proof of title must mirror content of the right” (155)
    - Aboriginal perspective important to show intention and capacity to retain exclusive:
      * Trespass by others doesn’t undermine, may reinforce exclusivity; granting permission reinforces (157)
      * Established by proof that others were excluded; or only allowed access with permission.
      * “Even the lack of challenges to occupancy may support an inference of an established group’s intention and capacity to control” (***TN*** 48)
  + If can’t show exclusive 🡪 site specific Aboriginal right (*Delgamuukw* 159); regular use w/o exclusivity = usufructary Aboriginal rights (***TN*** 47)

**—Pre-Proof: Duty to Consult (& accommodate)**

* ***Delgamuukw***: “there is always a duty of consultation” (168)
  + Lamer CJ articulated it as arising out of FD, not HoC
  + Less serious breach: duty to discuss; good faith
  + Most cases it will be “significantly deeper than mere consultation”; may require full consent
* ***TN***: claims stage—good faith duty to consult
  + Where **strong claim**, i.e. before declaration, “appropriate care to **preserve** the Aboriginal interest” (91)
  + “To justify overriding the Aboriginal title-holding group’s wishes on the basis of the broader public good, the gov’t must show that: (1) it discharged its duty to consult and accommodate…” (77)
  + Pre-proof: insufficient specificity for FD to apply
  + Arises from HoC (78)

**Pre-proof Duty to Consult: *Haida***

* Strength of claim vs adverse effects
* Strong claim: duty to preserve?
* (Arises out of HoC)
* Triggered? Scope and content? Fulfillled?
* -Strong claim: duty to **preserve** (strong duty)

**Comes from HoC**

* *Haida*: [18] The honour of the Crown gives rise to different duties in different circumstances.
* Where the Crown has assumed discretionary control over specific Aboriginal interests, the honour of the Crown gives rise to a fiduciary duty. The duty’s fulfillment requires that the Crown act with reference to the Aboriginal group’s best interest in exercising discretionary control over the specific Aboriginal interest at stake.
  + No FD where unproven title

**Pre-Proof v Post Proof**

* *Haida* [35] The foundation of the duty in the Crown’s honour and the goal of reconciliation suggest that the duty arises
  + •when the Crown has knowledge, real or constructive
  + •of the potential existence of an Aboriginal right or title
  + and contemplates conduct that might adversely affect it
* [36] It is said that before claims are resolved, the Crown cannot know that the rights exist, and hence can have no duty to consult or accommodate. However, it will frequently be possible to reach an idea of the asserted rights and of their strength sufficient to trigger an obligation to consult and accommodate, short of final judicial determination or settlement.

**Strength of the Claim & Adverse Effects….**

* *Haida* [39] The content of the duty to consult and accommodate varies with the circumstances.

The scope of the duty is proportionate to a preliminary assessment of •the strength of the case supporting the existence of the right or title, an •the seriousness of the potentially adverse effect upon the right or title claimed

* Established claims (*Haida* 40):
  + •minor breach, no more than duty to discuss important decisions•most cases, duty significantly deeper than mere consultation some cases may even require full consent
* [43] At one end of the spectrum
  + •the claim to title is weak, •the Aboriginal right limited, or •potential infringement is minor
* Corresponding duty to consult
  + •to give notice, •disclose information, •discuss issues raised in response to notice
* Duty to accommodate: balancing interests (para 48-50 of *Haida*) (don’t forget to test for consultation and accommodation)

**2. Has Title been Extinguished?**

* Provincial gov’ts can’t extinguish title (*cite*)

**3. Post-Proof: Justification of Infringement**

“To justify overriding the Aboriginal title-holding group’s wishes on the basis of the broader public good, the gov’t must show that: (1) it discharged its duty to consult and accommodate; (2) its actions were backed by compelling and substantial objectives; (3) the action is consistent with the Crown’s fiduciary obligation” (***TN*** 77)

“Once Aboriginal title is established, s. 35 of the Constitution Act, 1982 permits incursions on it only with the consent of the Aboriginal group or if they are justified by a compelling and substantial public purpose and are not inconsistent with the Crown’s fiduciary duty to the Aboriginal group…” (***TN*** 2)

**1. Consent of the First Nation**

* ***Delgamuukw***: “some cases may even require the full consent of an aboriginal nation” (168)
* ***TN***: “the right to control the land…means that gov’ts and others….must obtain the consent of the AT holders. If the Aboriginal group does not consent to the use, the gov’ts only recourse is to establish that the proposed incursion on the land is justified under s 35” (76)

**—If no consent 🡪 Justification Analysis**

**1. Valid Legislative objective backed by compelling and substantial purpose?**

* ***Sparrow* + *Gladstone*:** conservation, economic and regional fairness, recognition of reliance and participation by non-aboriginal communities (for aboriginal *rights*)
  + (All in the name of “reconciliation of the prior occupation of North America by aboriginal peoples with the assertion of Crown sovereignty” [*Delgamuukw* 165])
* ***Delgamuukw***: *Gladstone* applies. “In my opinion, the development of agriculture, forestry, mining, and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations to support those aims, are the kinds of objective that are consistent with this purpose [reconciliation] and, in principle, can justify the infringement of aboriginal title.” (165)
  + ***TN***: *Delgamuukw* applies

**2. In line with Crown’s Fiduciary Duty**

* ***TN***: FD means that (find at para 77?):
  + **(1)** No justified incursions “if they would substantially deprive future generations of the benefit of the land” (86)
  + **(2)** Proportionality b/w *benefits* that flow from goal and *adverse effects* on Aboriginal interest
* ***Delgamuukw*** Priority doctrine for infringing AT: apply *Gladstone* 
  + E.g. gov’t accommodates participation of Aboriginal peoples in resource development; conferral of fee simples for development reflect prior occupation; economic barriers reduced (e.g. license fees)
  + Compensation if expropriation (169)
* ***Delgamuukw***: will depend on nature of aboriginal title
  + 1. Right to exclusive use
  + 2. Right to choose uses
  + 3. Inescapable economic component (think valid LO’s)
    - Means the *Gladstone* applies
  + “However, the fiduciary duty does not demand that aboriginal rights always be given priority” (162)

**Legislation that applies? Amendment to provincial legislation to apply? New claim of infringement once proof?**