(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.

Purpose of this constitutional guarantee:
"to recognize and affirm the rights of [Aboriginal peoples] held by virtue of their direct relationship to this country's original inhabitants and by virtue of the continuity between their customs and traditions and those of their [Aboriginal] predecessors" [*Powley*, 29]

Existence of the Aboriginal Right
- **Aboriginal claimant brings** -
a. Characterize the claim (***Van der Peet***) (practices of the Sto:lo integrally include exchange of fish for money or other goods) - ***Sparrow*** → expert historical evidence enough - ***VdP*** → to characterize the claim properly, court should consider the nature of the action, nature of the impugned legislation, and the practice being relied upon to establish a right - not up to the Judge to characterize the claim (up to the Nations)
i. The court characterizes the claim in a criminal case ***Sparrow*** → subsistence rights; CA's characterization of the right as "existing aboriginal right to fish for food and social and ceremonial purposes" ***Gladstone*** → commercial right (exchange and trade), not subsistence right
ii. The Aboriginal claimant characterizes the right in a civil case ***Haida*** → assert title, want Crown to have duty to consult or accommodate ***Tsilqot'in*** → wanted declaration of land title from the court
b. Is the activity integral to the pre-existing distinctive cultures of the individual's ancestors? (***VdP***)
INTEGRAL → activity must have been integral; *incidental* (did while doing other things) doesn't count. In case of the Sto:lo, couldn't prove bartering fish was central to the culture. Has to almost be the defining feature of the culture Difficult to prove without written documentation, although written proof similar to that found in ***Gladstone*** is very rare – commercial trade *can be integral*. To be integral, a practice, custom or tradition must be distinctive of those cultures and → "The court cannot look at those aspects of the aboriginal society that are true of every human society (e.g. eating to survive), nor can it look at those aspects of the aboriginal society that are only incidental or occasional to that society…" (par 56 ***VdP***)
PRE-EXISTING → Pre-contact or pre-sovereignty? For Aboriginal right, PRE CONTACT. Evidence needs to be directed at showing activity had origins in pre-contact society that continues to the present day (continuity). - continuity is the primary means through which "frozen rights" appr is avoided - continuity can't be broken in case of activity, where it can for occupation
CULTURES → not difficult to overcome; the *aboriginal* claimants must simply demonstrate that the custom or tradition is a defining characteristic of their culture (***VdP***)

Existence of Aboriginal Title

- Aboriginal claimant brings -

1. Land must have been occupied prior to the Crown's assertion of sovereignty over land

Assertion of sovereignty = Oregon Treaty, between the UK and US, N to Prince George

- super North of BC, when BC joined with Canada in 1871

Delgamuukw → not every passing across the land reveals Aboriginal title

Tsilqot'in → determining sufficient occupation must be approached from settler common law and "Aboriginal perspective" (assumedly of the group in question)

- one must take into account "the group's size, manner of life, material resources, and technological abilities, and the character of the lands claimed" (Understanding Aboriginal Rights, ref @ para 35 in ***Tsilqot'in***)
- common law → possession and control of the lands; extends beyond that which is physically occupied to include lands that are used, controlled
- must show that it has "historically acted in a way that would communicate to third parties that it held the land for its own purposes" (***Tsilq*** at 38)
- Tsilq adopts Marshall reasoning, that sufficiency of use requires the assertion of possession of land *over which no one else has a present interest or with respect to which title is uncertain* (***Tsilq*** at 39)
- inclusive of nomadic peoples: notion of occupation must reflect way of life of the Aboriginal people (para 38) – at [44], for nomadic/semi-nomadic people, can establish title but have to establish significant physical possession (a question of fact) "regular use of definite tracts of land for hunting, fishing, or otherwise exploiting its resources" can suffice (para 66 in ***Delgamuukw***)

2. Continuous use

Present occupation: some reliance for title claim [***Tsilqot'in*** at 57]

- useful if can prove continuity between present and pre-sovereignty occupation [***Delgamuukw*** at 143]

No need to establish "an unbroken chain of continuity" (***Van der Peet***, 65)

- occupation/use of lands can have been disrupted (ie. colonizers pushed them out)
- would be unconstitutional to impose a strict requirement for proving unbroken continuity of occupation
- must be "substantial maintenance of the connection" between the people and the land, taken from ***Mabo*** (Australian High Court) → adopted in ***Delgamuukw***

Nature of Occupation

- precise nature will have changed between time of sovereignty and present; does not preclude a claim for aboriginal title (***Delgamuukw*** at 154)

3. Exclusive use

Aboriginal group must have had "the intention and capacity to retain exclusive control" over the lands (***Delgamuukw*** at 156)

- regular use without exclusivity does not suffice (***Tsilqot'in*** at 47)
- the fact that other groups or individuals were on the land does not necessarily negate exclusivity of occupation (para 28, ***Tsilqot'in***)

Whether a claimant group had the intention and capacity to control the land *at the time of sovereignty* is a question of fact for the trial judge (48); depends on factors:

- characteristics of the claimant group (nomadic/semi-nomadic?)
- nature of other groups in the area
- characteristics of the land in question

Exclusivity can be established by proof that: (para 48, ***Tsilqot'in***)

- others were excluded from the land
- others were only allowed access to the land with permission of the claimant group
- (could be) permission was requested by another group and was granted/refused
- (could be) treaties were made with other groups
- lack of challenges to the claimant group's occupancy; could support inference of an established group's intention/capacity to control the land

Common Law *and* Aboriginal perspectives

- take into account the context/characteristics of the Aboriginal society (***Delg*** at 157)

Aboriginal Title: Content

BENEFICIAL INTEREST

Guerin at page [382]: "Indians have a legal right to occupy and possess certain lands, the ultimate title to which is in the Crown. While their interest does not, strictly speaking, amount to beneficial *ownership*, neither is its nature completely exhausted by the concept of a personal right."

- the title holders have "the right to the benefits associated with the land – to use it, enjoy it and profit from its economic development. As such, the Crown does not retain a beneficial interest in Aboriginal title land." (***Tsilqot'in*** at 70)

Aboriginal title is a *sui generis* interest in land that is person and is generally inalienable except to the Crown (***Delgamuukw*** at 190)

CROWN'S UNDERLYING TITLE (2 components) ***Tsilqot'in*** at [71]

1) Fiduciary duty owed by the Crown to Aboriginal people
   - function of "legal and factual context" of each appeal (***Gladstone***, 56)
   - priority:
     - aboriginal interests be placed before Crown interests
     - not always, as in ***Sparrow*** [1115], can include questions of whether there has been as little infringement as possible in order to effect the desired results
     - (ie. if infringement justified, should provide fair compensation)

2) Right to encroach
   - if government can justify this in the broader public interest under s. 35

Treaty Rights

Evidentiary Sources

There are special rules for constructing treaties, due to the common difference in the bargaining power of the two parties.

Binnie J writes in *Marshall* that "extrinsic evidence of the historical and cultural context of a treaty may be received even absent any ambiguity on the face of the treaty"

- it would be unconscionable to ignore oral terms while relying on written terms (per Dickson J in *Guerin*)
- "when considering a treaty, a court must take into account the context in which the treaties were negotiated, concluded, and committed to in writing. The treaties, as written documents, recorded an agreement that had already been reached orally and they did not always record the full extent of the oral agreement… it is well settled that the words in the treaty must not be interpreted in their strict technical sense nor subjected to rigid modern rules of construction" (Cory J in *Badger* para 52)
  → while in terms of Cree and Dene, still relevant
- "Generous" rules of interpretation =/= vague sense of after-the-fact largesse (para 14 Marshall)
- Assumptions to be made about Crown's approach to treaty interpretation:
  - that their approach was honourable
  - therefore approach should be flexible
- court's obligation is to "choose from among the various possible interpretations of the <u>common</u> intention (at time treaty made)
- choose interpretation that best reconciles the Mi'kmaq interests with those of the Crown

Ascertaining the Terms of the Treaty

If a written treaty document is incomplete, the Courts must ascertain the treaty terms

Honour of the Crown

"the honour of the Crown is always at stake in its dealings with aboriginal people" (para 49 Marshall)

- courts must interpret treaties and statutes impacting aboriginal/treaty rights in a way that maintains the integrity of the Crown (Badger, 41)
- against interpretations of "sharp dealing"
- assumed that Crown intends to fulfill its promises

Interpretation of events (para 52 *Marshall*)

- turning a positive Mi'kmaq trade demand into a negative Mi'kmaq covenant is not consistent with the honour/integrity of the Crown
  (use of truckhouses to trade with the English [TRADE IN GENERAL] or *only getting to trade with the English at truckhouses* = not trading with anyone else, anywhere else)
- should not be interpreted as a "commercial contract" →but should be interpreted in a way that gives meaning/substance to the Crown's promises

Rights of Other Inhabitants

McLachlin J took view in Marshall that Mi'kmaq possessed only the liberty to hunt, fish, gather, and trade to the extent "enjoyed by other British subjects in the region"

→ Mi'kmaq have no greater liberties but with greater restrictions

- Binnie J points to distinction between liberty enjoyed by all citizens and a *right* conferred by a treaty, which is a specific legal authority
- the appellants have to show **treaty trading rights** (not preferential trading rights)
- "the treaty rights-holder not only has the *right* or liberty 'enjoyed by other British subjects' but may enjoy special treaty *protection* against interference with its exercise" para 47, Marshall

Limited Scope of the Treaty Right

As addressed in *Gladstone*, may be no built-in restriction associated with a commercial right to exploit a resource (though falsely represented Heiltsuk claim as right pre-contact being unlimited)

- "necessaries" ~ "moderate livelihood" in VdP → such basics as "food, clothing and housing, supplemented by a few amenities" but not the accumulation of wealth (Gladstone at 165)
- not to create "wealth which would exceed a sustenance lifestyle"
- court interpreted this as the common intention in 1760, when treaty written
- regulations here then would not infringe on the right + would have to be justified under Badger std.

Metis Rights

Van der Peet is the template for this discussion, but modifies pre-contact focus when claimants are Métis to account for difference between Indian and Métis claims (para 18 *Powley*)

1) Characterize the Right

- Aboriginal hunting rights are contextual and site-specific (19)
- here, right being claimed is "right to hunt for **food** in the environs of Sault Ste. Marie"

2) Identification of the Historic Rights-Bearing Community

- need demographic evidence (21-22)
- need proof of shared customs, traditions, and a collective **identity** (23)
- existence of an identifiable Métis community must be demonstrated with "some degree of continuity and stability" (23)

3) Identification of the Contemporary Rights-Bearing Community

- "Aboriginal rights are communal rights: They must be grounded in the existence of a historic and present community, and they may only be exercised by virtue of an individual's ancestrally based membership in the present community." (para 24) *problem here with the state dictating what rights are and who community members are – ie. Heiltsuk and adoptions
- some loose connection between the contemporary and historical community
- puts a focus on the continuing practices of community members, rather than more generally on the community itself (27)

4) Verification of the Claimant's Membership in the Relevant Contemporary Community

Courts faced with Métis claims will have to ascertain Métis identity on a case-by-base basis, however:

- inquiry must take into account value of community self-definition and the need for identification process to objectively verifiable

Requirements:

a) Self Identification (para 31)

The claimant must self-identify as a member of a Métis community

- self-identification should not be of "recent vintage"
- need not be static or monolithic, can't be later on in life; IDing as Métis in order to benefit from the s.35 right does not meet this requirement

b) Ancestral Connection (para 32)

The claimant must have present evidence of an ancestral connection to a historic Métis community

- ensures that beneficiaries of s.35 have a "real link" to the historic community whose practices ground the right being claimed
- no "blood quantum" *

c) Acceptance by the Modern Community (para 33)

The claimant must demonstrate that he or she is accepted by the modern community that is connected to the historic community out of which the claimed rights are based.

- core of community acceptance is past and ongoing participation in a shared culture, customs and traditions that make a community's ID (distinguishing it from other groups)
- could also include evidence of participation in community activities
- could include testimony from other members about the claimant's connection to the community and its culture
- no need for an objective demonstration of a solid bond of past and present mutual identification and recognition of common belonging

5) Identification of Relevant Time Frame

The practice grounding the right is distinctive and integral to the *pre-control* Métis community, it will satisfy this prong of the test.

- pre-control meaning at time just prior to the assertion of Crown sovereignty

<< then just continue on the *Van der Peet* test for an Aboriginal right >>

ABORIGINAL TITLE

Test for Aboriginal Title	Criteria	Notes	F	C
Establish	Exclusive	-Tsilq adopts Marshall reasoning, that sufficiency of use requires the assertion of possession of land over which no one else has a present interest or with respect to which title is uncertain - Aboriginal group must have had "the intention and capacity to retain exclusive control" over the lands (*Delgamuukw* at 156) -the fact that other groups or individuals were on the land does not necessarily negate exclusivity of occupation (para 28, ***Tsilqot'in***) -regular use without exclusivity does not suffice (***Tsilqot'in*** at 47) Exclusivity can be established by proof that: (para 48, ***Tsilqot'in***) - others were excluded from the land - others were only allowed access to the land with permission of the claimant group - (could be) permission was requested by another group and was granted/refused - (could be) treaties were made with other groups - lack of challenges to the claimant group's occupancy; could support inference of an established group's intention/capacity to control the land		
	Sufficient	-not every passing across land grounds a claim in title (clear from Delg.) -consider "the group's size, manner of life, material resources, and technological abilities, and the character of the lands claimed" (p 35 TQ)		
	Occupation	-inclusive of nomadic peoples: notion of occupation must reflect way of life of the Aboriginal people (para 38) – at [44], for nomadic/semi-nomadic people, can establish title but have to establish significant physical possession (a question of fact) "regular use of definite tracts of land for hunting, fishing, or otherwise exploiting its resources" can suffice (para 66 in Delgamuukw)		
	At sovereignty	1846, Treaty of Oregon (US and UK) super North BC joined in 1871 - question of fact for the TJ (p 48 TsilQ)		
	Continuity	-Present occupation: some reliance for title claim [Tsilqot'in at 57] useful if can prove continuity between present and pre-sovereignty occupation [Delgamuukw at 143]		
Extinguishment	Clear, plain intention	Treaty? "Historical policy on the part of the Crown can neither extinguish the existing aboriginal right without clear intention nor, in itself, delineate that right." (Sparrow)		

Infringement (prima facie infringement test from *Sparrow* – prove at least one to show infringe.)	Is the limitation Unreasonable?	"Simply because one of those questions is answered in the negative will not prohibit a finding by a court that a prima facie infringement has taken place; it will just be one factor for a court to consider…" (Gladstone, 43) If their way of life would be destroyed by this act, then infringes on right.		
	Does the regulation impose Undue hardship?			
	Does the regulation deny to the holders of the right their preferred means of exercising that right ?			
	(Meaningful diminution)	"any meaningful diminution of the appellants' rights will constitute an infringement for the purpose of this analysis" (Gladstone 43)		
Justification	Is there a Valid Legislative Objective that is substantial and compelling?	-(*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 -(*Gladstone*) economic fairness and *reconciliation* also valid legislative objectives -(*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		
	Fid Duty, Honour of Crown	"The special trust relationship and the responsibility of the government vis-à-vis aboriginal people must be the first consideration in determining whether the legislation or action in question can be justified." (Sparrow) *not quantifiable; can say "____ would be dishonourable"		
	Reconciliation	Governing ethos of solving land claims is reconciliation (Tsilqot'in para 17]		
	Priority	- (*Sparrow*) prioritize Indian food fishing in conservation, to the extent of sustenance - (*Gladstone*) where commercial fishery right, "priority doctrine" not enough because *no internal limitation* (according to Court..) -where aboriginal right est. with no limitation, "those rights have priority over the exploitation of the fishery by other users"(Gladstone) -There is therefore no justification for extending [the right] beyond what is required to provide the people with reasonable substitutes for what they traditionally obtained from the resource -- basic housing, transportation, clothing and amenities -- over and above what was required for food and ceremonial purposes. Beyond this, aboriginal fishers have no priority over non-aboriginal commercial or sport fishers." (Van der Peet)		
	Minimal impairment	"the requirement that… the government go no further than necessary to achieve" their goal	[87] in Tsilqot'in	
	Rational connection	"the requirement that… the incursion is necessary to achieve the government's goal"		
	Proportionality	"the requirement that… the benefits that may be expected to flow from that goal are not outweighed by adverse effects on the Aboriginal interest"		

	Consultation/Accommodation	the level of consultation and accommodation required is proportionate to the strength of the claim and to the seriousness of the adverse impact the contemplated governmental action would have on the claimed right [79 in Tsilqot'in] WHERE TITLE: "The required level of consultation and accommodation is greatest where title has been established." [79] WHERE NO TITLE: "Where Aboriginal title is unproven, the Crown owes a procedural duty imposed by the honour of the Crown to consult and, if appropriate, accommodate the unproven Aboriginal interest." [80]		
	Compensation	(*Delgamuukw*) there is an expectation of compensation for breaches of fiduciary duty		
	Limitation on Power to Justify (Substantial Deprivation)	"Incursions on Aboriginal title cannot be justified if they would substantially deprive future generations of the benefit of the land." (Tsilqot'in [86]) <<comes out of fact that title held communally/ held for future generations>>		

Overall Conclusion: What does your client want? It will take decades and tens of millions of dollars likely to get Aboriginal title. With Aboriginal title you have the strongest chance to stop development on title lands in the future, but this development will not wait for you to get title. In the mean time, we can pursue your right to consultation/accommodation. Through consultation you may be able to lessen the impact of the development (go around, raise on stilts, etc), but effectively have no veto power.

ABORIGINAL RIGHTS

Test for Aboriginal Rights	Criteria	Notes	F	C
Establish Right	Characterization	- In ***Sparrow***: "to fish for food purposes… not to be confined to mere subsistence… right was found to extend to fish consumed for social and ceremonial activities" - In ***Gladstone***: court first asked them to demonstrate that the Heiltsuk had the right to "exchange herring spawn on kelp for money or other goods" and if successful, demonstrate further the right "to sell herring spawn on kelp to the commercial market"		
	Integral	- In ***Van der Peet***: "In order to be integral a practice, custom or tradition must be of central significance to the aboriginal society in question" [54] in ***VdP*** … must demonstrate that practice was "one of the things which made the culture of the society distinctive – that it was one of the things that truly made the society what it was" [55] - In ***Gladstone***: distinguished from Van der Peet and NTC Smokehouse because activity was found to be beyond "purely incidental" to the social and ceremonial activities of their society… "evidence suggests the trade in herring spawn on kelp was not an incidental activity for the Heiltsuk but was rather a central and defining feature of Heiltsuk society" [29]		
	Distinctive Culture	- In **Van der Peet**: what makes aboriginal societies distinctive? Court can't look at those aspects of ab. society that are true of every human society, and not aspects of the society that are only incidental to that society → court must look instead to the defining and central attributes of the aboriginal society in question [56]		
	Pre-Contact	- "prior to the arrival of Europeans" = pre-contact period [***60 in VdP***]		
	Continuity	- In Van der Peet: "It is precisely those present practices, customs and traditions which can be identified as having **continuity** with the practices, customs and traditions that existed *prior to contact* that will be the basis for the identification and definition of aboriginal rights under s. 35(1)"		
Extinguishment	Clear, plain intention	- s. 35 does not revive extinguished rights [***Sparrow***] - In ***Sparrow***: "An aboriginal right is not extinguished merely by its being controlled in great detail by the regulations under the *Fisheries Act*" would have to have clear, plain intention to do so - "Government policy can, however, regulate the exercise of that right but such regulation must be in keeping with s. 35(1)" (***Sparrow***)		

Infringement Introduced in ***Sparrow***	Prima Facie Interference	- In ***Sparrow***: a limitation would be a prima face infringement if it has the "effect" of "interfering with an existing aboriginal right"		
	Unreasonable	"Simply because one of those questions is answered in the negative will not prohibit a finding by a court that a prima facie infringement has taken place; it will just be one factor for a court to consider…" (***Gladstone***, 43) If their way of life would be destroyed by this act, then infringes on right.		
	Undue hardship			
	Preferred means			
Justification	Is there a Valid Legislative Objective that is substantial and compelling?	-(***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 -(***Gladstone***) economic fairness and *reconciliation* also valid legislative objectives - (***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		
	Fiduciary Duty/ Honour of Crown	- ***Sparrow*** → two part test for determining whether government actions infringing on aboriginal rights can be justified (1) demonstrate valid leg objective, and (2) demonstrate that its actions were consistent with the **fiduciary** duty of gov't toward aboriginal peoples → gov't must demonstrate that it gave the aboriginal fishery priority as in *Jack v the Queen* (conservation – Indian fishing – non-Indian commercial fishing – non-Indian sports fishing)		
	Priority	- (***Sparrow***) subject to the limits of conservation, aboriginal rights holders must be given priority in the fishery, to the extent of sustenance (when there's an inherent limit) [difference between Gladstone and Sparrow is fishing for food, social, and ceremonial purposes has an inherent limit, whereas the court in Gladstone doesn't see that an aboriginal commercial fishery would) [57 in ***Gladstone***] - (***Gladstone***) where commercial fishery right, "priority doctrine" not enough because *no internal limitation* (according to Court); content of priority for right to fishery where no inherent limit is "something less than exclusivity but which nonetheless gives priority to the aboriginal right" [63] must remain somewhat vague, subject to court's discretion in specific cases		

(Justification)		-where aboriginal right established with no limitation, "those rights have priority over the exploitation of the fishery by other users" (***Gladstone***) -There is therefore no justification for extending [the right] beyond what is required to provide the people with reasonable substitutes for what they traditionally obtained from the resource -- basic housing, transportation, clothing and amenities -- over and above what was required for food and ceremonial purposes. Beyond this, aboriginal fishers have no priority over non-aboriginal commercial or sport fishers." (***Van der Peet***)		
	As little infringement	- [***Sparrow***] → a question to be addressed in regards to the justification analysis was that there "has been as little infringement as possible in order to effect the desired result" [1119] - this was in reference to food fishing (described as having an inherent limit) - in cases where fishing for trade/commerce, this question was not deeply analyzed but it would seem that this "as little as possible" will not be strictly required as the priority framework in Gladstone suggests that commercial rights are not seen in the same light		
	Consultation/Accommodation	the level of consultation and accommodation required is proportionate to the strength of the claim and to the seriousness of the adverse impact the contemplated governmental action would have on the claimed right [79 in ***Tsilqot'in***] WHERE TITLE: "The required level of consultation and accommodation is greatest where title has been established." [79] WHERE NO TITLE: "Where Aboriginal title is unproven, the Crown owes a procedural duty imposed by the honour of the Crown to consult and, if appropriate, accommodate the unproven Aboriginal interest." [80]		
	Compensation	- (***Delgamuukw***) there is an expectation of compensation for breaches of fiduciary duty		
Overall Conclusion				

DUTY TO CONSULT

"The duty to consult is a procedural duty that arises from the honour of the Crown prior to confirmation of title." (Tsilqot'in [78])
* it is a constitutional duty *
* not discharged by treaty *

<table>
<tr><th>Test for Duty to Consult</th><th>Criteria</th><th>Notes</th><th>F</th><th>C</th></tr>
<tr><td>Crown Knowledge</td><td>Real/Constructive</td><td>Duty to consult arises when the Crown has "knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it" [35 Haida]
• don't need final judicial determination or settlement to meet this
• knowledge of a credible but unproven claim suffices to trigger this duty
• helps if have tried to assert your claim for a while (ie. been in discussion with province, at treaty table [only since 1993])
• if there is a treaty, Crown has knowledge of the claim</td><td></td><td></td></tr>
<tr><td rowspan="3">Strength of Claim</td><td>Seriously pursued</td><td>Crown must respect Aboriginal interests (potential, unproven) where claims affecting these interests are being "seriously pursued" in the process of treaty negotiations and proof [27]
• to unilaterally exploit a resource while Aboriginal people are resolving a claim to that resource goes against the honour of the Crown</td><td></td><td></td></tr>
<tr><td colspan="2">Strong Prima Facie Claim</td><td>Weak Claim</td><td rowspan="2"></td><td rowspan="2"></td></tr>
<tr><td colspan="2">• claim of Aboriginal right/ title is strong
• high chance of infringement
• infringement is of high significance to the FN
• risk of non-compensable damage is high

= duty on Crown may be deep consultation, aimed at finding a satisfactory interim solution; may entail opportunity to make submissions for consideration, formal participation in the decision-making process, provision of written reasons to show Aboriginal concerns were considered/reveal impact they had on the decision (will vary with circumstances; list not exhaustive or mandatory) [44] in Haida</td><td>• claim to title is weak
• Aboriginal right is limited
• potential for infringement is minor
• damage likely compensable
• when treaty in place + development on surrendered lands/to be taken up

= duty on Crown may be to give notice, disclose information, and discuss any issues raised in response to the notice (consultation = talking together for mutual understanding) [43] in Haida</td></tr>
<tr><td>Potential Harm/ Adverse Effect</td><td colspan="3"></td><td></td><td></td></tr>
</table>

Spectrum	Low to High	Level of consultation required varies with each case and may change as the process goes on and new information comes to light.		
Accommodation	Proportionality	Crown is bound by its honour to balance societal and Aboriginal interests in making decisions that may affect Aboriginal claims. → balance and compromise will be necessary [45] • good faith consultation may reveal a duty to accommodate • accommodation is achieved through consultation and negotiation (As in ***Marshall***) Though it was put forth by the Minister in ***Mikisew Cree***, the treaty itself does not discharge the Crown from the duty to consult and accommodate. "Consultation that excludes from the outset any form of accommodation would be meaningless. The contemplated process is not simply one of giving the Mikisew an opportunity to blow off steam before the Minister proceeds to do what she intended to do all along. Treaty making is an important stage in the long process of reconciliation, but it is only a stage. What occurred at Fort Chipewyan in 1899 was not the complete discharge of the duty arising from the honour of the Crown, but a rededication of it." [54 in ***Mikisew Cree***]		
Duty on First Nation	To be consulted	The First Nation has a duty to BE CONSULTED. If they do not, they do not have an opportunity for remedy. There is a reciprocal onus on the FN to "carry their end of the consultation, to make their concerns known, to respond to the government's attempt to meet their concerns and suggestions, and to try and reach some mutually satisfactory solution." [65 in ***Mikisew***]		
No Duty to Agree	No veto	This process does not give Aboriginal groups a veto over what can be done with land pending final proof of claim. Consent is only in cases of established rights [***Delgamuukw***] Accommodate = "adapt, harmonize, reconcile" [49] Engaging in the consultation process may help them get accommodation that can lessen the impact of the development…		
(Third Parties)	Ie. Weyerhauser	Duty to consult and accommodate flows from the *Crown's* assumption of sovereignty over lands and resources formerly held by the Aboriginal group. The Crown alone remains legally responsible for the consequences of its actions and interactions with third parties that affect Aboriginal interests. Still, third parties do not have a duty to consult and accommodate. [53] in ***Haida***		
Overall Conclusion				

S 35 FINAL EXAM REVIEW CLASS – 06 APR

ID which information is missing, and show where you're making an assumption

What does you client want?? "The WFN is determined to stop the pipeline with any means at their disposal"

^^ not nec. title, duty to consult, just STOP the pipeline

Don't spend a lot of time on a weak argument

In *Sparrow*, *supra*, Dickson C.J. and La Forest J., writing for a unanimous court, held that an analysis of a claim under s. 35(1) has four steps: first, the court must determine whether an applicant has demonstrated that he or she was acting pursuant to an aboriginal right; second, a court must determine whether that right was extinguished prior to the enactment of s. 35(1) of the *Constitution Act, 1982*; third, a court must determine whether that right has been infringed; finally, a court must determine whether that infringement was justified.

JURISDICTION CLAIM – DELGAMUUKW

Internal regulation ok, "However, the 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. Such jurisdiction is inconsistent with the *Constitution Act, 1867* and its division of powers. When the Crown imposed English law on all the inhabitants of the colony and when British Columbia entered Confederation, the aboriginal people became subject to Canadian (and provincial) legislative authority. For this reason, the claim to jurisdiction failed." Delgamuukw at [34]

R v Sparrow [1990] SCR 1075

Facts:

- Sparrow charged in 1984 under the Fisheries Act
- Fished with a drift net longer than that permitted by the terms of the Band's Indian food fishing license
- Claimed aboriginal right to fish and net length restriction was invalid

Issue:

- Is fish net length restriction inconsistent with s.35 of the Constitution Act 1982?

Analysis:

- An Aboriginal right is not extinguished merely by its being controlled by the Fish. Act
- S. 35 is to be construed in a purposive way with a generous, liberal interpretation

- "recognition and affirmation" → indicates the government's responsibility to work in a fiduciary capacity with respect to Aboriginal peoples // must use restraint on exercise of sovereign power