ABORIGINAL LAW

CAN

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INTRODUCTION

- **Imperialism**: Policy of acquiring and maintaining an empire.
- **Colonialism**: Practices involved in the transforming of the acquired territories into colonies, typically by transferring settlers from the imperial power to the colony.
- **Canada** established as *settler colony* (as opposed to occupation colonies, like India).

- **Imperial approaches to indigenous peoples** – all four used by UK: Exterminate, enslave, segregate, assimilate.

INITIAL FRAMEWORKS

Royal Proclamation of 1763

- **Purpose was to set guidelines for settlement** of aboriginal territories in the area, set up **nation to nation** relationship.
- **Asserts aboriginal title exists and continues to exist**, and that all land must be considered aboriginal **until ceded by treaty**.
- **R's right only**: Only R can buy land from aboriginal peoples.

- **BC did not comply**, gov assumed control without use of treaties.

Aboriginal Title

- **Nature of AT**
  - **Personal** AT is a personal right [***St Cathrine's*** ✪].
    - **Not a fee but a usofructory right to occupy and enjoy** that does not infringe on R's title [***Calder*** ✪].
    - **Beneficial interest that is sui generis**, right to occupy and possess, is held by the FN [***Guerin*** ★]

  - **Burden on R title** [***St Cathrine's*** ✪].
    - **R is absolute sovereign** [***St Cathrine's*** ✪].
    - **R gained underlying title at sovereignty** [***St Cathrine's*** ✪].
    - **R holds title** [***Guerin*** ★].

  - **Alienation through extinguishment or surrender to R** is only way to give up lands [***St Cathrine's*** ✪].
    - **Fiduciary**: This fact and the Indian Act produce a fiduciary relationship [***Guerin*** ★].

  - **Reserve and non reserve**: AT exists in reserve and non-reserve lands that is enforceable by Cs [***Guerin*** ★].

- **Source is Proclamation and previous occupation** [***Calder*** ✪; ***Guerin*** ★].
- **Extinguishment requires clear and plain intention**, not just by acts of R [***Calder*** ✪].

Treaties

- **Liberal interpretation, ambiguity** resolved in way that favours indigenous claimants [***Sioui*** ✪].
  - **Extrinsic evidence, intention, context** will be used, will go beyond 4 corners of treaty [***Sioui*** ✪].
- **Extinguishment requires clear intention** to do so [***Sioui*** ✪].
- **Broad territorial scope, compatibility**: Broad territorial scope given but only so long as the customs and rites are not incompatible with R's use of territory [***Sioui*** ✪].

Fiduciary Duty, Honour of R

- **R owes fiduciary duty to FNs re AT** because they can alienate only to R, and also because of Indian Act, this is enforceable by Cs [***Guerin*** ★].
  - **Not trust but 'trust-like'**, because of sui generis interest in land, with consequences being same for R [***Guerin*** ★].
  - **Fiduciary duty may arise as a result of discretionary control**: "Crown [assuming] discretionary control over specific Aboriginal interests" [***Haida*** SCC 2004 ✯].
- **Honour of R**: Always at stake when R is interacting with AB people, though honour of R =! fiduciary duty [***Haida*** SCC 2004 ✯].

Source

"The honour of the Crown **arises "from the Crown's assertion of sovereignty over an Aboriginal people and de facto control of land and resources that were formerly in the control of that people**": *Haida Nation*, at para. 32. In Aboriginal law, the honour of the Crown **goes back to the Royal Proclamation of 1763**, which made reference to "the several Nations or Tribes of Indians, with whom We are connected, and who live under our Protection": see Beckman v. Little Salmon/Carmacks First Nation,2010 SCC 53 (CanLII), 2010 SCC 53, [2010] 3 S.C.R. 103, at para. 42." [***MMF*** SCC 2013 ✯]

Purpose

"The **ultimate purpose of the honour of the Crown is the reconciliation** of pre-existing Aboriginal societies with the assertion of Crown sovereignty." [***MMF*** SCC 2013 ✯]

Function

Function varies by situation.

"By application of the precedents and principles governing this honourable conduct, we find that **when the issue is the implementation of a constitutional obligation to an Aboriginal people, the honour of the Crown requires that the Crown: (1) takes a broad purposive approach to the interpretation of the promise; and (2) acts diligently to fulfill it**." [***MMF*** SCC 2013 ✯]

"But the duty goes further: if the honour of the Crown is pledged to the fulfillment of its obligations, it follows then that **the honour of the Crown requires the Crown to endeavour to ensure its obligations are fulfilled**."

See ***MMF*** SCC 2013 ✯ for other times Honour of R is engaged.

Relevant Cases (p19-21)

Johnson v M'Intosh
🕘 USA 1823, p19
🐦 An American case about the doctrine of discovery; FN can possess but not hold title; conveyance impossible.

Cherokee Nation v Georgia
🕘 USA 1831, p19
🐦 FN seek injunction to prevent state laws from affecting; J says FN are 'dependent nation', state/fed have jurisdiction.

Worcester v Georgia
🕘 USA 1832, p19
🐦 404

St Catherine's Milling and Lumber v the Queen
✪ JCPC 1888, p20
🐦 Re reserve lands; underlying R title; extinguishment; aboriginal title.

Calder v BC
✪ SCC 1973, p20
🐦 Seeking declaration of AT; basis of AT; nature; extinguishment.

R v Sioui
✪ SCC 1990, p21
🐦 Cutting down trees in park; treaty raised; treaty interpretation and extinguishment.

Guerin v the Queen
★ SCC 1984, p21
🐦 Important case re fiduciary duty and AT; golf club expansion; AT exists in reserve and non-reserve lands.

S35 FRAMEWORKS

s35 Recognition of Existing Aboriginal and Treaty Rights
(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
(2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.
(3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.
(4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

- **s1 Does Not Apply**: As s35 is outside of CH, s1 does not apply — however Cs have read in limits in other ways.
- **Recognition of Self-Government**: The Charlottetown Accord stipulated a recognition of a right to self-government. Although the referendum failed, it gained the consent of the provincial legislatures, and thus s35 is taken to endorse the concept of self-government — though it is not officially recognized as such.

Two Steps Forward, One Step Back

- **Sparrow represents a shift**: Sparrow is "not just a codification of the case law on aboriginal rights," it "calls for a just settlement for aboriginal peoples" [***Professor Noel Lyon*** ⇪].
  - **Discovery doctrine still present**: "There was from the outset never any doubt that sovereignty and legislative power, and indeed the underlying title, to such lands vested in the Crown" [***Professor Noel Lyon*** ⇪].

Relevant Case (p22)

R v Sparrow
✪ SCC 1990, p22
🐦 Fishing rights; existing rights; justification for infringement.

ABORIGINAL RIGHTS

Establishment

Onus on **claimant**

- **Purpose**: "to understand the way of life of the particular aboriginal society, pre-contact, and to determine how the claimed right relates to it." [***Sappier/Grey*** SCC 2006 ✯].

- **1. Characterization**: What is the nature of the claim? Consider the characteristics of the right at stake, with sensitivity to the aboriginal perspective on the meaning of the right. [***Sparrow*** SCC 1990 ✪].
  - **First characterize right**: Before AB perspectives can be taken into account, C must characterize the right on its own. If a broader right claimed fails, and lesser rights are claimed, it must also fail if it's corresponding pre-contact practice was quantitatively insignificant [***Lax Kw'alaams*** SCC 2011 ✯].
    - **Then AB perspectives into account**, place equal weight on CL and AB perspectives after this in the analysis [***VDP*** SCC 1996 ✪].
  - **Key to scope of protection**: Functions to limit the scope and protection of s35 [***Pamajewon*** SCC 1996 ☆]
  - **Specific not general**: Must be specific to the group, not established through other groups establishing [***VDP*** SCC 1996 ✪].
  - **Resource use; Focus on the *practice***: Highlight the resource's relation to the way of life and show how it may evolve [**Sappier/Grey** SCC 2006 ✯].
  - **Evolution permitted**: Look at the right in the modern context [**Sappier/Grey** SCC 2006 ✯].
    - **Evolution has limits**: Cannot justify a quantitatively and qualitatively different right. Must still be continuous and proportional [***Lax Kw'alaams*** SCC 2011 ✯].

- **2. Integral**: The practice, custom, or tradition must be of central significance to the group [***VDP*** SCC 1996 ✪].

- **3. Distinctive culture**: Must be central, not incidental, but needn't be unique [***Sparrow*** SCC 1990 ✪].
  - **Two-step process**: Look holistically at the way of life; then place the practice within the way of life. Does it contribute to distinctiveness? [***Sappier/Grey*** SCC 2006 ✯].
  - **Consider also**:
    - **Independent significance***: For a practice, custom or tradition to constitute an aboriginal right it must be of independent significance to the aboriginal culture in which it exist [***VDP*** SCC 1996 ✪].
    - **Distinctive not distinct**: Does not have to be absolutely unique [***VDP*** SCC 1996 ✪].
    - **Right to *traditional* means of sustenance** (pre-contact means) can be made out as integral to distinctive culture, but there's no right to 'survival' or 'sustenance' generally [***Sappier/Grey*** SCC 2006 ✯].

- **4. Pre-contact**: Must have been there pre-contact to be continuous [***VDP*** SCC 1996 ✪].
  - **European influence**: 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 — adapted with European influence is OK, purely because of it is not [***VDP*** SCC 1996 ✪].

- **5. Continuity**: Is there there sufficient continuity between the modern activity and the traditional practice? The line needn't be unbroken [VDP] [***Sparrow*** SCC 1990 ✪; ***VDP*** SCC 1996 ✪].
  - **Practice vs right, evolution allowed**: The practice must be considered in the pre-contact context, but the right must be looked at in the modern context [ie wood can be harvested by modern use] [***Sappier/Grey*** SCC 2006 ✯].
    - **Evolution has limits**: Cannot justify a quantitatively and qualitatively different right. Must still be continuous and proportional [***Lax Kw'alaams*** SCC 2011 ✯].
      - **If a broader right claimed fails**, and lesser rights are claimed, it must also fail if it's corresponding pre-contact practice was quantitatively insignificant [***Lax Kw'alaams*** SCC 2011 ✯].

Considerations

- **Re Evidence**: Courts must approach the rules of evidence in light of the evidentiary difficulties inherent in adjudicating aboriginal claims [***VDP*** SCC 1996 ✪].
- **Relationship to land and distinctiveness**: Courts must take into account both the relationship of Aboriginal peoples to the land and their distinctive societies and cultures [***VDP*** SCC 1996 ✪].

Extinguishment

Onus on **R**

- **Fed only**: s92(24) protects core of indianness from provincial intrusion [***Delgamuukw*** SCC 1997 ✯].

- **s35 limited to 1982 rights, but be flexible**: s35(1) protects only those rights that existed in 1982, however 'existing' should be interpreted flexibly to allow for evolution [***Sparrow*** SCC 1990 ✪].

- **Clear, plain intention**: Pointing to gov action and legislation that presumes no right is there falls short of this [***Calder*** SCC 1973 ✪; ***Sparrow*** SCC 1990 ✪].
  - **Unilateral**: Prior to 1982, extinguishment may have been unilateral [***Sparrow*** SCC 1990 ✪].
  - **Example**: National Resource Transfer Agreements are one example of extinguishment, as these documents directly contemplated rights [***Sparrow*** SCC 1990 ✪].

Justification for Infringement

"Section 35(1) states that existing Aboriginal rights are hereby "recognized and affirmed". … Recognition and affirmation of Aboriginal rights ***constitutionally entrenches the Crown's fiduciary obligations towards Aboriginal peoples****. While rights that are recognized and affirmed are not absolute, s. 35 requires the Crown to reconcile its power with its duty.* ***"[T]he best way to achieve that reconciliation is to demand the justification of any government***

regulation that infringes upon or denies [A]boriginal rights" *(Sparrow, at p. 1109)."* [***Tsilhqot'in*** SCC 2014 ✯].

NB: May apply in non-prosecutorial cases as well. *"If* ***Ontario's*** *taking up of Keewatin lands* ***amounts to an infringement*** *of the treaty,* ***the Sparrow/Badger analysis*** *under s. 35 of the Constitution Act, 1982* ***will determine whether the infringement is justified****."* [Grassy Narrows SCC 2014 ✯].

- **Two-step process** [***Tsilhqot'in*** SCC 2014 ✯]:
  - **1. Does the legislation interfere with or infringe the Aboriginal right (this was referred to as prima facie infringement in Sparrow)?**
  - **2. If so, can the infringement be justified?**

Prima-Facie Infringement

Onus on **claimant**. Test outlined in [***Sparrow*** SCC 1990 ✪].

- **1. Unreasonable**: Is the limitation unreasonable? Is it reasonable in a vacuum? [***Sparrow*** SCC 1990 ✪].
- **2. Undue hardship**: Is there a poor balancing of interests here? [***Sparrow*** SCC 1990 ✪].
- **3. Preferred means**: Does the regulation deny rights holders the preferred means of exercising their right? [***Sparrow*** SCC 1990 ✪].

- **Example**: General regulatory legislation (ie preventing forest fires) will usually be seen as a reasonable infringement [***Tsilhqot'in*** SCC 2014 ✯].

Justification for Infringement

"This framework permits a ***principled reconciliation*** *of Aboriginal rights with the interests of all Canadians."* [***Tsilhqot'in*** SCC 2014 ✯].

Onus on **R**. Test outlined in [***Tsilhqot'in*** SCC 2014 ✯]:

- **1. Consultation and accommodation**: Did R comply with its procedural duty to consult with the rights holder and accommodate the right to an appropriate extent at the stage when infringement was contemplated? [***Tsilhqot'in*** SCC 2014 ✯].

- **2. Compelling and substantial objective**: Is the infringement is backed by a compelling and substantial legislative objective in the public interest? [***Tsilhqot'in*** SCC 2014 ✯].
  - **Specific**: The objective must be specific [***Sparrow*** SCC 1990 ✪].
  - **Preservation**: Preserving the s35 right by conserving/managing a resource is a legitimate infringement [***Sparrow*** SCC 1990 ✪].
  - **Economic and regional fairness** [***Gladstone*** SCC 1996 ✯].
  - **Historical reliance** by people other than the FN group on the resource [***Gladstone*** SCC 1996 ✯].

- **3. Proportionality**: The benefit to the public is proportionate to any adverse effect on the Aboriginal interest, this is imposed by R's fiduciary duty [***Tsilhqot'in*** SCC 2014 ✯].
  - **Fiduciary duty, honour of R, reconciliation**: Was R's actions in keeping with Crown's fiduciary relationship with Aboriginal peoples? [***Sparrow*** SCC 1990 ✪].

- **Priority where there is a natural internal limitation**: Were the FN's claims given priority over other groups? [***Sparrow*** SCC 1990 ✪].
- **Where there is no internal limitation**: R must demonstrate that when allocating the resource, it has taken the right into account and allocated resources in a way respectful of those rights, giving them priority over others. The process and actual allocation that resulted must both reflect the FN's prior interest [***Gladstone*** SCC 1996 ✯].
  - **Consider also** historical reliance, regional fairness [***Gladstone*** SCC 1996 ✯].
- **Minimal infringement**: Was the infringement as minimal as possible? [***Sparrow*** SCC 1990 ✪].
- **Consultation**: Was the affected aboriginal group consulted? [***Sparrow*** SCC 1990 ✪].
- **Compensation**: If there was expropriation, was there fair compensation? [***Sparrow*** SCC 1990 ✪].

- **3.1 Rational connection**: The incursion is necessary to achieve the government's goal [***Tsilhqot'in*** SCC 2014 ✯].
- **3.2 Minimal impairment**: R went no further than necessary to achieve its goal [***Tsilhqot'in*** SCC 2014 ✯].
- **3.3 Proportionality of impact**: The benefits that may be expected to flow from that goal are not outweighed by adverse effects on the Aboriginal interest [***Tsilhqot'in*** SCC 2014 ✯].

Examples in Practice

Establishment

- **Characterization**
  - ✓ **Exchange of fish for money** or other goods [***Gladstone*** SCC 1996 ✯].
  - ✓ **Right to harvest wood** for domestic use as member of AB community [Sappier/Grey SCC 2006 ✯].
- **Integral/distinctive culture**
  - ✗ **Exchange of fish for money** — only incidental pre-contact [***VDP*** SCC 1996 ✪].
  - ✗ **High stakes gambling** [***Pamajewon*** SCC 1996 ☆].
  - ✗ **Commercial fishing** — no evidence of pre-contact, perhaps only with one specific fish [***Lax Kw'alaams*** SCC 2011 ✯].
- **Pre-Contact**
  - ✗ **Exchange of fish for money** — only incidental pre-contact [***VDP*** SCC 1996 ✪].
  - ✗ **Commercial fishing** — no evidence of pre-contact, perhaps only with one specific fish [***Lax Kw'alaams*** SCC 2011 ✯].
- **Continuity**
  - ✗ **Commercial fishing** — the modern right being claimed is qualitatively different than the historical one, which was more specific and limited [***Lax Kw'alaams*** SCC 2011 ✯].

Extinguishment

- **Clear, plain intention**
  - ✓ **National Resource Transfer Agreements** are one example of extinguishment, as these documents directly contemplated rights [***Sparrow*** SCC 1990 ✪].

Infringement and Justification

Prima Facie Infringement

- Unreasonable
- Undue hardship
  - ✓ **Limiting the amount of fish could be harvested** where before European influence that amount was unlimited [***Gladstone*** SCC 1996 ✯].
- Preferred means

Justification

- Objectives
  - ✓ **Conservation** of resources like fish [***Gladstone*** SCC 1996 ✯].
- Fiduciary duty, honour of R, Reconciliation
  - ✓ **Conservation** of resources like fish [***Gladstone*** SCC 1996 ✯].
- Priority
- As little infringement
- Consultation
- Compensation

Relevant Cases (p22-25)

R v Van der Peet
✪ SCC 1996, p22
🐦 Commercial fishing right; VDP test created; s35 purpose is reconciliation.

R v Gladstone
✯ SCC 1996, p23
🐦 Herring spawn on kelp; commercial rights; rights with no limitation; modifications to sparrow.

R v Pamajewon
☆ SCC 1996, p24
🐦 CC prohibition on gambling; competing characterizations; characterization affects result; narrow characterization fails claim.

R v Sappier; R v Grey
✯ SCC 2006, p24
🐦 Cutting down trees in forest; survival/ sustenance; modifications to VDP; characterization; claim succeeds.

Lax Kw'alaams v R
✯ SCC 2011, p25
🐦 Claim to commercial fishing right; rights may evolve but have limits; right fails; too different.

ABORIGINAL TITLE

Definition and Content

- **Subset of rights**: AB title is a subset of AB rights [***VDP*** SCC 1990 ✪].
- **Definition**: A right to land that is [***Delgamuukw*** SCC 1997 ✯]:
  - Sui generis
  - Inalienable except to R
  - Held communally
  - Arose from prior occupation (not the Royal Proclamation)
  - Grounded in AB perspectives and laws, and CL

- **Right to exclusive use and occupation** of the land held pursuant to that title for a variety of purposes, which need not be aspects of those aboriginal practices, customs and traditions which are integral to distinctive aboriginal cultures [***Delgamuukw*** SCC 1997 ★].
- **Protected uses must be reconcilable** with the nature of the group's attachment to that land [***Delgamuukw*** SCC 1997 ★].
- **Burden on R title**: AB title is a burden on R title [***Tsilhqot'in*** SCC 2014 ★].
  - **R gets no benefits**: R does not retain beneficial interests as AB title holders have right to use, enjoy, profit [***Tsilhqot'in*** SCC 2014 ★].

- **Content similar to fee simple**: Right to decide how land will be used, enjoyment and occupancy of the land, possess the land, economic benefits of land, proactively use and manage the land [***Tsilhqot'in*** SCC 2014 ★].

Establishment

Evidence and Considerations

- **Oral evidence** must be given equal weight [***Delgamuukw*** SCC 1997 ★].
- **Functional approach**: If there are minor defects in pleadings, overlook these in absence of clear prejudice [***Tsilhqot'in*** SCC 2014 ★].
- **CL and AB**: Approach this problem, definitions of the test, from both perspectives [***Tsilhqot'in*** SCC 2014 ★].

Establishment

- **Occupation**: Evidence of a strong presence on or over the land claimed, manifesting itself in acts of occupation that could reasonably be interpreted as demonstrating that the land in question belonged to, was controlled by, or was under the exclusive stewardship of the Aboriginal claimant group will suffice for sufficiency [***Tsilhqot'in*** SCC 2014 ★].
  - **Not limited to villages**: May be land used for hunting, fishing, other uses [***Tsilhqot'in*** SCC 2014 ★].

- **Exclusive**: Occupation at sovereignty must have been exclusive, must be element of control but others allowed to enter the land too [***Delgamuukw*** SCC 1997 ★]. Must show that acted in way that third parties knew this was their land, evidence of third parties needing permission is good for this [***Tsilhqot'in*** SCC 2014 ★].
  - **Intention and capacity**: "Exclusivity can be established by proof that others were excluded from the land, or by proof that others were not allowed access to the land without permission of the claimant group…. That treaties were made with other groups...even lack of challenges to occupancy may support an inference of an established group's intention and capacity to control." [***Tsilhqot'in*** SCC 2014 ★].

- **At sovereignty**: Land must have been occupied prior to R sovereignty [***Delgamuukw*** SCC 1997 ★].
  - **In BC 1848 is sovereignty**, the Oregon Boundary Treaty.

- **Continuity** between present and pre-sovereignty occupation — some interruption is okay [***Delgamuukw*** SCC 1997 ★].

Extinguishment

- **Clear, plain intention**

- **Federal only**: It is an exclusive federal power to extinguish and legislate aboriginal rights including title — s92(24) protects 'core of Indianness' from prov intrusion [***Delgamuukw*** SCC 1997 ✯].
- **Prov laws irrelevant**, especially those of general application [***Delgamuukw*** SCC 1997 ✯].

R's Obligations to Justify

- **No established title**: R must consult in good faith [***Tsilhqot'in*** SCC 2014 ✯].
- **Title established by agreement or court declaration**: R must seek consent. If no consent, it must fulfill its duty to accommodate and justify the intrusion on title [***Tsilhqot'in*** SCC 2014 ✯].

- **Prov or fed**: All infringements, prov or federal, must be justified [***Tsilhqot'in*** SCC 2014 ✯].
  - **Prov may legislate** generally re aboriginal lands so long as it does not single out AB title land specifically [***Tsilhqot'in*** SCC 2014 ✯].

Justification for Infringement

"Section 35(1) states that existing Aboriginal rights are hereby "recognized and affirmed". … Recognition and affirmation of Aboriginal rights ***constitutionally entrenches the Crown's fiduciary obligations towards Aboriginal peoples****. While rights that are recognized and affirmed are not absolute, s. 35 requires the Crown to reconcile its power with its duty.* ***"[T]he best way to achieve that reconciliation is to demand the justification of any government regulation that infringes upon or denies [A]boriginal rights"*** *(Sparrow, at p. 1109)."* [***Tsilhqot'in*** SCC 2014 ✯].

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- **1. Unreasonable**: Is the limitation unreasonable? Is it reasonable in a vacuum? [***Sparrow*** SCC 1990 ✪].
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- **3. Preferred means**: Does the regulation deny rights holders the preferred means of exercising their right? [***Sparrow*** SCC 1990 ✪].

- **Example**: General regulatory legislation (ie preventing forest fires) will usually be seen as a reasonable infringement [***Tsilhqot'in*** SCC 2014 ✯].

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*"This framework permits a **principled reconciliation** of Aboriginal rights with the interests of all Canadians."* [***Tsilhqot'in*** SCC 2014 ✯].

Onus on **R**. Test outlined in [***Tsilhqot'in*** SCC 2014 ✯]:

- **1. Consultation and accommodation**: Did R comply with its procedural duty to consult with the rights holder and accommodate the right to an appropriate extent at the stage when infringement was contemplated? [***Tsilhqot'in*** SCC 2014 ✯].
  - **Duty varies**: Varies depending on the strength of the claim and the seriousness of the breach. Need "full consent of the Aboriginal nation on very serious issues." [***Delgamuukw*** SCC 1997 ✯]

- **2. Compelling and substantial objective**: Is the infringement is backed by a compelling and substantial legislative objective in the public interest? [***Tsilhqot'in*** SCC 2014 ✯].
  - **Specific**: The objective must be specific [***Sparrow*** SCC 1990 ✪].
  - **Preservation**: Preserving the s35 right by conserving/managing a resource is a legitimate infringement [***Sparrow*** SCC 1990 ✪].
  - **Economic and regional fairness** [***Gladstone*** SCC 1996 ✯].
  - **Historical reliance** by people other than the FN group on the resource [***Gladstone*** SCC 1996 ✯].
  - **Reconciliation**: The objective should be traced back to reconciliation. "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 are the kinds of objectives that are consistent with this purpose" [***Delgamuukw*** SCC 1997 ✯].

- **3. Proportionality**: The benefit to the public is proportionate to any adverse effect on the Aboriginal interest. This is Imposed by R's fiduciary duty [***Tsilhqot'in*** SCC 2014 ✯].
  - **A higher degree of scrutiny is afforded** to the infringement as a result of these aspects of title [***Delgamuukw*** SCC 1997 ✯]:
    - **AT is exclusive, give priority**: Gov must allocate resources accounting for the property priority of AT title [***Delgamuukw*** SCC 1997 ✯].
    - **AT is a right to use land, consult**: There is always a duty of consultation [***Delgamuukw*** SCC 1997 ✯].
    - **AT has economic aspects, compensation**: Compensation is ordinarily required [***Delgamuukw*** SCC 1997 ✯].

    - **3.1 Rational connection**: The incursion is necessary to achieve the government's goal [***Tsilhqot'in*** SCC 2014 ✯].

    - **3.2 Minimal impairment**: R went no further than necessary to achieve its goal [***Tsilhqot'in*** SCC 2014 ✯].

    - **3.3 Proportionality of impact**: The benefits that may be expected to flow from that goal are not outweighed by adverse effects on the Aboriginal interest [***Tsilhqot'in*** SCC 2014 ✯].
      - **Substantial deprivation**: This is an interest of future generations, the infringement cannot substantially deprive future generations of the interest in the land [***Tsilhqot'in*** SCC 2014 ✯].

Examples in Practice

Establishment

- **Occupation**
  - ✓ **Village sites** [***Tsilhqot'in*** SCC 2014 ★].
  - ✓ **Cultivated fields** made in the FN's perspective, managed by them for generations [***Tsilhqot'in*** SCC 2014 ★].
  - ✓ **Network of trails and waterways** to make use of the lands for hunting, fishing, gathering [***Tsilhqot'in*** SCC 2014 ★].
- Exclusive
- At sovereignty
- Continuity

Extinguishment

- **Clear, plain intention**
  - ✗ **Prov laws of general application** are not sufficient [***Delgamuukw*** SCC 1997 ★].

Infringement and Justification

Infringement

- Unreasonable
- Undue hardship
- Preferred means

Justification

- Objectives
  - ✓ **Basically anything** but the key is 'reconciliation' — even "settlement of foreign populations" can be justified [***Delgamuukw*** SCC 1997 ★].
- Fiduciary duty, honour of CR, reconciliation
- Priority (which one)
- Minimal infringement
- Consultation
  - ✗ **Can't not consult**: When there's a claimed interest in land, you cannot act and infringe the land (ie issue forestry licenses and construct related infrastructure) without consultation [***Tsilhqot'in*** SCC 2014 ★].
- Compensation
- Substantial deprivation

Relevant Cases (p26-27)

Delgamuukw v BC

★ SCC 1997, p26

- Suit for self governance; oral evidence not considered properly; sent back to trial; outlines test for aboriginal title.

Tsilhqot'in Nation v BC

★ SCC 2014, p27

- Claim of land in BC; not consulted; reformulates Delgamuuk; notes fiduciary duty.

TREATY RIGHTS

Interpretation of Treaties

- **Sui generis**: Treaties are a unique type of interpretation and merit their own form of interpretation [McLachlin G in ***Marshall*** SCC 1999 ★].

- **Not frozen**: Update treaty rights to provide for their modern exercise. This involves determining what modern practices are reasonably incidental to the core treaty right in its modern context [McLachlin G in ***Marshall*** SCC 1999 ★].

- **Liberal construction, ambiguity**: Treaties should be liberally constructed and ambiguities or doubtful expressions should be resolved in favour of AB signatories [McLachlin G in ***Marshall*** SCC 1999 ★ citing ***Sioui*** SCC 1999 ⇪].
  - **K interpretation or technical interpretation should be avoided** [McLachlin G in ***Marshall*** SCC 1999 ★ citing ***Badger*** 404 ⇪].
  - **Look beyond text**, agreements such as thse have oral terms/contextual elements that can be in play [***Marshall*** SCC 1999 ★].
  - **Be generous but do not severely alter the terms** of the treaty by going beyond what is possible in the language or realistic [McLachlin G in ***Marshall*** SCC 1999 ★ citing ***Badger*** 404].
    - **A term may be implied** however to comply with R's honour [***Marshall*** SCC 1999 ★].

- **Find common intention**: Choose from the various interpretations of common intention and choose the one that reconciles the interests of both parties the best [McLachlin G in ***Marshall*** SCC 1999 ★ citing ***Sioui*** SCC 1999 ⇪].
  - **Extrinsic evidence** can be used for intention and context [***Sioui*** SCC 1990 ⇪]
  - **Communication barriers**: Be sensitive to the unique cultural and linguistic differences between the parties [McLachlin G in ***Marshall*** SCC 1999 ★ citing ***Badger*** 404].
    - **Natural meaning**: Give the words the meaning they would naturally have held for the parties at the time [McLachlin G in ***Marshall*** SCC 1999 ★ citing ***Badger*** 404].

- **R's honour presumed** when you are looking at the intentions of both parties [McLachlin G in ***Marshall*** SCC 1999 ★ citing ***Badger*** 404].
  - **Interpretation of terms** must therefore maintain the integrity of R [***Marshall*** SCC 1999 ★].
  - **R intends to fulfill its promises, cannot ignore oral terms**, given that it was reduced to written terms by only one party [***Marshall*** SCC 1999 ★].

Justification for Infringement

Treaties Are Regulated Rights

- **Regulated right**: "A treaty right is a regulated right and can be contained by regulation within its proper limits" [***Marshall II*** SCC 1999 ★]
- **Taking up clauses** may allow for expropriation of land, though this has an internal limit — if you take up so much land the treaty is meaningless, this may be unjustified [***Grassy Narrows*** SCC 2014 ★].

Background to the Test

"Section 35(1) states that existing Aboriginal rights are hereby "recognized and affirmed". … Recognition and affirmation of Aboriginal rights ***constitutionally entrenches the Crown's fiduciary obligations towards Aboriginal peoples****. While rights that are recognized and affirmed are not absolute, s. 35 requires the Crown to reconcile its power with its duty.* ***"[T]he best way to achieve that reconciliation is to demand the justification of any government regulation that infringes upon or denies [A]boriginal rights"*** *(Sparrow, at p. 1109)."* [***Tsilhqot'in*** SCC 2014 ✯].

NB: May apply in non-prosecutorial cases as well. *"If* ***Ontario's*** *taking up of Keewatin lands* ***amounts to an infringement*** *of the treaty,* ***the Sparrow/Badger analysis*** *under s. 35 of the Constitution Act, 1982* ***will determine whether the infringement is justified****."* [Grassy Narrows SCC 2014 ✯].

- **Two-step process** [***Tsilhqot'in*** SCC 2014 ✯]:
  - **1. Does the legislation interfere with or infringe the Aboriginal right (this was referred to as prima facie infringement in Sparrow)?**
  - **2. If so, can the infringement be justified?**

- **Sparrow applies to treaty rights** [***Badger*** SCC 1996 ⇧].

Prima-Facie Infringement

Onus on **claimant**. Test outlined in [***Sparrow*** SCC 1990 ✪].

- **1. Unreasonable**: Is the limitation unreasonable? Is it reasonable in a vacuum? [***Sparrow*** SCC 1990 ✪].
- **2. Undue hardship**: Is there a poor balancing of interests here? [***Sparrow*** SCC 1990 ✪].
- **3. Preferred means**: Does the regulation deny rights holders the preferred means of exercising their right? [***Sparrow*** SCC 1990 ✪].

- **Example**: General regulatory legislation (ie preventing forest fires) will usually be seen as a reasonable infringement [***Tsilhqot'in*** SCC 2014 ✯].

Justification for Infringement

"This framework permits a ***principled reconciliation*** *of Aboriginal rights with the interests of all Canadians."* [***Tsilhqot'in*** SCC 2014 ✯].

Onus on **R**. Test outlined in [***Tsilhqot'in*** SCC 2014 ✯]:

- **1. Consultation and accommodation**: Did R comply with its procedural duty to consult with the rights holder and accommodate the right to an appropriate extent at the stage when infringement was contemplated? [***Tsilhqot'in*** SCC 2014 ✯].

- **2. Compelling and substantial objective**: Is the infringement is backed by a compelling and substantial legislative objective in the public interest? [***Tsilhqot'in*** SCC 2014 ✯].
  - **Available Objectives**: Expansive range of objectives for infringing: conservation + other compelling objectives such as those articulated in Gladstone [***Marshall II*** SCC 1999 ✯].

- **Specific**: The objective must be specific [***Sparrow*** SCC 1990 ✪].
- **Preservation**: Preserving the s35 right by conserving/managing a resource is a legitimate infringement [***Sparrow*** SCC 1990 ✪].
- **Economic and regional fairness** [***Gladstone*** SCC 1996 ✯].
- **Historical reliance** by people other than the FN group on the resource [***Gladstone*** SCC 1996 ✯].

- **3. Proportionality**: The benefit to the public is proportionate to any adverse effect on the Aboriginal interest. This is Imposed by R's fiduciary duty [***Tsilhqot'in*** SCC 2014 ✯].
  - **Imposed by fiduciary duty** [***Tsilhqot'in*** SCC 2014 ✯].

    - **3.1 Rational connection**: The incursion is necessary to achieve the government's goal [***Tsilhqot'in*** SCC 2014 ✯].
    - **3.2 Minimal impairment**: R went no further than necessary to achieve its goal [***Tsilhqot'in*** SCC 2014 ✯].
    - **3.3 Proportionality of impact**: The benefits that may be expected to flow from that goal are not outweighed by adverse effects on the Aboriginal interest [***Tsilhqot'in*** SCC 2014 ✯].

Relevant Cases (p27-28)

R v Marshall (I and II)
✯ SCC 1999, p27
🐦 FN member charged with fishing offence; test and principles for interpreting treaty rights.

Grassy Narrows FN v ON (Natural Resources)
✯ SCC 2014, p28
🐦 Taking up clauses; jurisdiction.

DUTY TO CONSULT AND ACCOMMODATE

*"**This duty arose from the concept of the honour of the Crown**, which, the Court said [in **Haida** SCC 2004 ✯], means that **the Crown "cannot cavalierly run roughshod over Aboriginal interests where claims affecting these interests are being seriously pursued in the process of treaty negotiation and proof."** To do otherwise, suggests the Court, may render the rights (in this case, land claims) devoid of meaningful content, since if and when the right is finally established in court, the Indigenous interest may have been significantly impaired."*

R's Duties

- **Duty to consult**: R must provide for a meaningful process of consultation in good faith [***Haida*** SCC 2004 ✯].
  - **Delegation**: Procedural aspects can be delegated (but not imposed) but the ultimate duty is with the relevant R, fed or prov, whoever has beneficial interest in the land [***Haida*** SCC 2004 ✯].
    - **R may delegate duty or oversight to tribunal**: The duty to consult may be delegated to a tribunal, alternatively it may confine the tribunals power to a duty to consider

consultation, to determine whether adequate consultation has taken place (as a condition of its statutory decision-making process) — in this case the tribunal is not doing the consultation but assessing whether R has done it properly [***Rio Tinto*** SCC 2010 ✯].

- **1. R knowledge**: Duty arises when R has **real** or **constructive** knowledge of potential existence of AB right or title and contemplates conduct that may adversely affect it [***Haida*** SCC 2004 ✯].
  - **Real**
    - **Treaty**: Duty to consult exists in a post treaty context, gov exercises of power under treaty rights must still involve consultation as this occurs via honour of R [***Mikisew*** SCC 2005 ✯].
      - **Treaty with consultation process mechanism within it** will not dispose of duty to consult, R cannot "contract out of its duty of honourable dealing with Aboriginal people" as the doctrine "applies independently of the expressed or implied intention of the parties" [Binnie J in ***Beckman*** SCC 2010 ⇧].
  - **Constructive**
  - **No need to prove success** of the claim [***Rio Tinto*** SCC 2010 ✯].

- **2. Potential harm or adverse effects**
  - **High significance**
  - **Non-compensable**
  - **Conduct required not limited to legislation**: R conduct or R decisions are not confined to the exercise of statutory powers or decisions that have an immediate impact on lands and resources. The duty to consult extends to "strategic, higher level decisions" that may have an impact on Indigenous claims and rights [***Rio Tinto*** SCC 2010 ✯].
  - **Past wrongs not applicable, must be new harm**: There must be a possibility that the Crown conduct may affect the Indigenous claim or right. Past wrongs, speculative impacts, and adverse effects on negotiating positions will not suffice [***Rio Tinto*** SCC 2010 ✯].

SERIOUSNESS OF IMPACT	GOVERNMENT APPROACH	STRENGTH OF CLAIM
LOW (MINIMAL IMPACT)	Less consultation / possibly no Accommodation	**WEAK**
HIGH (IRREVERSIBLE IMPACT)	More consultation / possible accommodation	**ESTABLISHED**

- **3. Spectrum**: The extent of the duty to accommodate will turn on a preliminary assessment of the strength of the particular Indigenous claim, as well as on the potential effect of the government's planned actions on the right [***Haida*** SCC 2004 ✯].
  - **Low**: If the claim or infringement is low, then R may only have to give notice, disclose information, and discuss any issues raised in response [***Haida*** SCC 2004 ✯].
  - Middling
  - **High**: If there is a strong prima facie claim or serious potential infringement, a deep consultation is needed. The duty to accommodate may also become engaged [***Haida*** SCC 2004 ✯].
    - **May entail**: Opportunity to make submissions for consideration, formal participation in decision making process, written reasons from gov showing that AB concerns were considered [***Haida*** SCC 2004 ✯].

- **4. Accommodation**: If there is potential deep infringement, R may need to take steps to avoid irreparable harm or minimize the effects of infringement pending final resolution of the claim [***Haida*** SCC 2004 ★].
  - **Proportionality**

FN's Duties

- **Duty to be consulted**: There is a duty to consult meaningfully and in good faith; the Indigenous group must not take unreasonable positions to thwart government action [***Haida*** SCC 2004 ★], it is implied that the group must outline their concerns clearly to participate in the process a timely way.
- **No duty to agree** [***Haida*** SCC 2004 ★].
  - **No veto ability**, this is a process of balancing interests [***Haida*** SCC 2004 ★].

Examples in Practice

R's Duties

- **1. R knowledge**
  - **Real**
    - ✓ **Treaty** with a taking up clause [***Mikisew*** SCC 2005 ★].
  - **Constructive**
    - ✓ **Haida Gwaii** claim to land [***Haida*** SCC 2004 ★].

- **2. Potential harm or adverse effects**
  - **High significance**
    - ✓ **Taking up clause affecting hunting ability** in order to build a highway [***Mikisew*** SCC 2005 ★].
    - ✗ **Past wrongs** will not create a new duty to consult if the new action isn't actually doing the harm [***Rio Tinto*** SCC 2010 ★].
  - **Non-compensable**
    - ✓ **Cutting down red cedar trees** which were important to the Haida FN [***Haida*** SCC 2004 ★].

- **3. Spectrum**
  - **Low**
    - ✓ **Minor effects on hunting due to taking up clause** triggers a low duty to consult. Required to give notice and engage directly after studying the impacts on the treaty right and meaningfully address concerns [***Mikisew*** SCC 2005 ★].
      - ✗ **R failed to do this**, thus the duty was not deposed [***Mikisew*** SCC 2005 ★].
  - **High**
    - ✓ **Cedar trees** being cut down required substantial consultation [***Haida*** SCC 2004 ★].
      - ✗ **R failed to do this** [***Haida*** SCC 2004 ★].

- **4. Accommodation**:
  - **Proportionality**

FN's Duties

- **Duty to be consulted**:
- **No duty to agree**

- **No veto ability**

Push Towards Consultation

"On this point, ***Haida Nation represented a shift in focus*** *from Sparrow. Whereas the Court in Sparrow had been concerned about sorting out the consequences of infringement,* ***Haida Nation attempted to head off such confrontations by imposing on the parties a duty to consult*** *and (if appropriate) accommodate in circumstances where development might have a significant impact on Aboriginal rights when and if established."* [***Beckman*** SCC 2010 ⇪]

"***The duty to consult*** *described in Haida Nation* ***derives from the need to protect Aboriginal interests while land and resource claims are ongoing*** *or when the proposed action may impinge on an Aboriginal right.* ***Absent this duty, Aboriginal groups seeking to protect their interests pending a final settlement would need to commence litigation and seek interlocutory injunctions to halt the threatening activity. These remedies have proven time-consuming, expensive, and are often ineffective****. Moreover, with a few exceptions, many Aboriginal groups have limited success in obtaining injunctions to halt development or activities on the land in order to protect contested Aboriginal or treaty rights.*

The duty seeks to provide protection to Aboriginal and treaty rights while furthering the goals of reconciliation between Aboriginal peoples and the Crown. ***Rather than pitting Aboriginal peoples against the Crown in the litigation process, the duty recognizes that both must work together*** *to reconcile their interests. It also accommodates the reality that often Aboriginal peoples are involved in exploiting the resource.* ***Shutting down development by court injunction may serve the interest of no one.*** *The honour of the Crown is therefore best reflected by a requirement for consultation with a view to reconciliation."* [***Rio Tinto*** SCC 2010 ✯].

"*Specifically,* ***the Court must determine whether the [Governor in Council],*** *in circumstances where the designated project has significant adverse environmental effects and adverse effect on lands covered by a treaty,* ***is required to determine if such effects constitute an infringement to the treaty rights and, if so, whether such effects must be justified according to the test set out in R. v. Sparrow****, 1990 CanLII 104 (SCC), [1990] 1 S.C.R. 1075, [1990] S.C.J. No. 49 (QL) [Sparrow]. It bears noting that in this appeal, there is no challenge to the adequacy of the consultations undertaken by the respondents."*

Prior to 2004 … Aboriginal peoples were required to prove their rights in the context of often time-consuming litigation*. … The focus of Aboriginal rights was thus on the infringement of rights and the justification test when legislation or projects were challenged by Aboriginal peoples.* ***Although Sparrow affirmed a duty to consult incumbent upon the Crown, it was only engaged as part of the justification test****.*

However, with the Haida Nation and Taku River decisions, the Supreme Court moved away from the Sparrow-based infringement approach*. Rather, it imposed on the Crown a duty to consult and accommodate, if necessary, in the event a project might have a significant impact on claimed Aboriginal rights.*

Although Haida Nation does not displace the unfettered right of Aboriginal peoples to commence an action, ***it sets the framework for dialogue between the Crown and Aboriginals for claimed rights (prior to their proof) grounded in the central principle of the honour of the Crown****."* [***Profit River*** FCA 2017 ⇧]

Relevant Cases (p29-31)

Haida Nation v BC (Minister of Forests)
★ SCC 2004, p29
- Logging in Haida Gwaii; insufficient consultation; establishes duty to consult.

Mikisew Cree First Nation v Canada (Minister of Heritage)
★ SCC 2005, p29
- Treaty 8; taking up clause; winter road; adverse impacts; minimal consultation done that didn't even meet the low end.

Rio Tinto Alcan v Carrier Sekani Tribal Council
★ SCC 2010, p30
- BC Hydro project; actual harm happened before and no consultation; no fresh duty to consult.

MÉTIS RIGHTS

- **No fiduciary duty to Métis**, however honour of R is still at steak [***Powley*** SCC 2003 ★; ***Daniels*** SCC 2016 ★; ***MMF*** SCC 2013 ★; defined].
  - **Métis interests in land were individual** not collective, incompatible with AB interest in land, not distinctly aboriginal, not a communal Aboriginal interest in the land that is integral to the nature of the Métis distinctive community and their relationship to the land, were more individualistic rather than from shared identity [***MMF*** SCC 2013 ★].
  - **Breach of honour** of R: [***MMF*** SCC 2013 ★].
  - **Justification for infringement** is thus still required [***Powley*** SCC 2003 ★].
  - **Métis fall under s35** [***Powley*** SCC 2003 ★].
  - **Métis are a fed responsibility** [***Daniels*** SCC 2016 ★].

- **Potentially individual right** [***Daniels*** SCC 2016 ★].

Establishment

Test set out in ***Powley*** SCC 2003 ★. Onus on **claimant**.

- **1. Identify the historic rights-bearing community**: P must prove shared customs and traditions as well as a collective identity.
- **2. Identify the contemporary rights-bearing community**: Requires a loose connection between the historic and contemporary communities
- **3. Verify membership in the relevant contemporary community**, which requires:
  - **3.1 The claimant must self-identify** as a member of the community;
  - **3.2 There must be evidence of an ancestral connection** to a historic Métis community
  - **3.3 Acceptance**: The claimant must demonstrate that he or she is accepted by the modern community.
    - **Concerns**: The criteria in Powley were developed specifically for purposes of applying s. 35, which is about protecting historic community-held rights. … Section 91(24) serves a very different constitutional purpose. It is about the federal government's relationship with

Canada's Aboriginal peoples. This includes people who may no longer be accepted by their communities because they were separated from them as a result, for example, of government policies such as Indian Residential Schools. There is no principled reason for presumptively and arbitrarily excluding them from Parliament's protective authority on the basis of a "community acceptance" test." [***Daniels*** SCC 2016 ★].

Modified Van der Peet Test

- **Relevant time** is not pre-contact but 'effective control' by Europeans [***Powley*** SCC 2003 ★].

Ethnie, Nations

- An Ethnie must have:
  - a collective name;
  - a common myth of descent/an originating story;
  - a shared history;
  - a distinctive shared culture;
  - an association with a specific territory; and
  - a sense of solidarity.
- An ethnie becomes a nation when the group enters the political arena and attempts to influence the distribution of power.

Relevant Cases (p31-32)

R v Powley
★ SCC 2003, p31
🐦 Métis rights; Métis count under s35; modifies Van der Peet.'

Daniels v Canada (Minister of Indian Affairs and Northern Development)
★ SCC 2016, p31
🐦 Three propositions; movement towards individuality focus; no fiduciary duty; Métis fed responsibility.

MB Metis Federation v Canada (AG)
★ SCC 2013, p32
🐦 Breach of R's honour; outline of fiduciary duty; R's honour; Métis rights.

REMEDIES

*"**Prior to establishment of title** by court declaration or agreement, **the Crown is required to consult in good faith** with any Aboriginal groups asserting title to the land about proposed uses of the land and, if appropriate, accommodate the interests of such claimant groups. The level of consultation and accommodation required varies with the strength of the Aboriginal group's claim to the land and the seriousness of the potentially adverse effect upon the interest claimed. **If the Crown fails to discharge its duty to consult, various remedies are available including injunctive relief, damages, or an order that consultation or accommodation be carried out**: Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council, 2010 SCC 43, [2010] 2 S.C.R. 650, at para. 37."* [**Tsilhqot'in** SCC 2014 ★].

TABLE OF CASES

INITIAL FRAMEWORKS

Johnson v M'Intosh

USA 1823

- An American case about the doctrine of discovery; FN can possess but not hold title; conveyance impossible.

Facts

Contest between two settlers regarding title to land, both argued they had good title. P traces title to settler who bought land from Piankeshaw Nation in 1775, M'Intosh traced to land purchase from Piankeshaw by US gov of same land in 1805.

Issue

Do first nations possess title to the land?

Reasons

First nations do not have title to the land, only possession, and therefore cannot convey the land. P's claim invalid.

Precedents

Under the discovery rule, indigenous people possess a right of occupancy but are "deemed incapable of transferring the absolute title to others".

Cherokee Nation v Georgia

USA 1831

- FN seek injunction to prevent state laws from affecting; J says FN are 'dependent nation', state/fed have jurisdiction.

Facts

Cherokee Nation sought fed injunction to prevent state laws depriving them of rights.

Issue

The legal issue to be answered.

Reasons

No original jurisdiction given to Cherokees as they were a 'domestic dependent nation', no a foreign nation. Thus the state and fed gov have power to govern re indigenous lands.

Precedents

The 'domestic dependent nation' doctrine in the US, which gives gov jurisdiction over indigenous lands.

Worcester v Georgia

USA 1832

- 404

Facts

Georgia crim stat prohibited non-indigenous people from being present on indigenous lands without a license. Worcester was a missionary, non-indigenous advocate for Cherokee sovereignty.

Issue

Are impugned Georgia laws unconstitutional and void?

Reasons

FNs own the land they occupy but are not free to sell to whomever they please, the 'discoverer' holds a preemptive right to acquire their property rights.

Precedents

Doctrine of 'residual sovereignty' in the US.

St Catherine's Milling and Lumber v the Queen

✪ JCPC 1888

🐦 Re reserve lands; underlying R title; extinguishment; aboriginal title.

Facts

Concerned treaty 3 in NW ON, with the Ojibway/Anishaabe nation (not party to case). P had permit from fed to log and mill in this area, ON argued s91(24) only extended to lands that were 'Indian Reserves'.

Reasons

JCPC ruled that according to the Royal Proclamation, Parliament had authority to legislate in respect of "all lands reserved, under any terms and conditions, for Indian occupation", including Proclamation lands.

Precedents

"Indian interest in land" was a personal and usufructory right, it is a burden underlying R title, at the time of sovereignty, R came to possess underlying title, and R is the absolute sovereign. AT can be removed by surrender or extinguishment.

Calder v BC

✪ SCC 1973

🐦 Seeking declaration of AT; basis of AT; nature; extinguishment.

Facts

P seeking declaration that AT existed on their lands and had never been extinguished.

Issues

Was there historically AT? If so, had it been extinguished?

Reasons

P's claim to title was based on prior use and occupation of that land form time immemorial. Alternatively, P argued that this was affirmed in the Royal Proclamation, and said that title could not have been extinguished.

Hall J

"This is not a claim to title in fee but is in the nature of an equitable title or interest… a usufructory right and right to occupy the lands and to enjoy the fruits of the soil, the forest and of the rivers and streams which does not in any way deny the Crown's paramount title as it is recognized by the law of nations"

"what emerges from the foregoing evidence is the following: the Nishgas in fact are and were from time immemorial a distinctive cultural entity with concepts of ownership indigenous to their culture and capable of articulation under the common law…"

Precedents

The nature of AT: A burden on underlying R title, an interest usufructory in nature, dependent on good will of the sovereign. The collective interest is only alienable to R.

Source of AT: Royal Proclamation and prior occupation.

Extinguishment: Requires clear and plain intention. Cannot extinguish by acts of R, but clear and plain intention.

R v Sioui

✪ SCC 1990

🐦 Cutting down trees in park; treaty raised; treaty interpretation and extinguishment.

Facts

D cut down trees as part of ancestral custom and religious rites subject to treaty between Hurons and the UK in a park, contra park regulations. Argue exempt due to s88 of the *Indian Act*.

Issues

Was the document a treaty? If so, was it extinguished? If not, does it apply?

Reasons

The C will go beyond the four corners of a treaty to understand it, any ambiguities will be sided for the indigenous signatories. To extinguish a treaty, there must be a very clear intention to do so by R. With regards to the territory, C will side ambiguity in favour of the indigenous claimants, however the rights permitted can only be exercised so long as they're not incompatible with the particular use R makes of this territory.

Precedents

Liberal interpretation of treaties in favour of indigenous signatories. Extrinsic evidence of intention and context is used. There must be clear and plain intention of R to extinguish a treaty. Territorial scope is broad but only so long as the carrying on of the customs and rites is not incompatible with the particular use made by R of this territory.

Guerin v the Queen

★ SCC 1984

🐦 Important case re fiduciary duty and AT; golf club expansion; AT exists in reserve and non-reserve lands.

Facts

Golf club wanted to expand, negotiated with fed to get reserve lands. P alleged fed failed to negotiate fair price or get reasonable concessions, or get Musquem's instructions re the dealings, and deliberately withheld info. Sues for breach of trust.

Issues

Did the fed breach trust?

Reasons

R owes a fiduciary obligation when dealing with surrender of land, and it was breached here. The fiduciary doctrine is to act in the best interest of the beneficiary in the upmost loyalty. It exists here as FN cannot alienate land to anyone but R.

AT can exist both in reserve and non-reserve lands, and Royal Proclamation is not the sole source, but prior occupation as well. Title is still held by R, with legal right of occupation and possession given to FNs, who hold a sui generis beneficial interest. Not strictly a trust.

Precedents

AT can exist in reserve and non-reserve lands. Royal Proclamation is not the sole source of AT, but previous occupation. The legal right of occupation and possession is given, with ultimate title held by R. The nature of the interest is *sui generis*, a beneficial interest. R has a fiduciary duty, enforceable by Cs because of the nature of alienation and statute (Indian Act). Not a trust because of sui generis interest in land, but trust—like.

S35 FRAMEWORKS

R v Sparrow

SCC 1990

Fishing rights; existing rights; justification for infringement.

Facts

The accused, a member of the Musqueam band, was charged under s. 61(1) of the Fisheries Act with fishing with a drift net that was longer than that permitted by the band's Indian food fishing licence. The accused contended that, because he had an aboriginal right to fish, the net length restriction was inconsistent with s. 35(1) of the Constitution Act, 1982, which recognizes and affirms existing aboriginal and treaty rights.

Issues

What is the meaning of: 'existing' aboriginal rights, and 'recognized and affirmed'? Can gov impose any limits on the rights?

Reasons

Justification of Infringement

R may justification of infringement — a limits clause should be read in, despite s35 rights explicitly being placed outside CH to prevent this occurrence.

Application in this Case

The BCCA found that the right to fish was established, and R failed to show it was extinguished as nothing in the *Fisheries Act* demonstrates clear and plain intention to extinguish the right to fish — issuing permits on a discretionary basis is not sufficient to undermine the right. However there was insufficient evidence as to whether the infringement was justified. The conviction is set aside, and a new trial is ordered.

Precedents

Legislation that affects the exercise of aboriginal rights will be valid if it meets the test for justifying an interference with a right recognized and affirmed under s35(1).

ABORIGINAL RIGHTS

R v Van der Peet

SCC 1996

Commercial fishing right; VDP test created; s35 purpose is reconciliation.

Facts

Stó:lō commercial fishing right at issue. D was selling a small amount of salmon for a small amount of money, and had a food fishing license. A BC statute made it an offence to sell fish with such a license.

Issues

What is the test for determining an Aboriginal Right under s 35 of the CA 1982?

Reasons

The purpose of s35(1) is "the reconciliation of the preexistence of aboriginal societies with the sovereignty of the Crown."

"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 that right" [in the pre-contact period].

Application to this Case
This is an aboriginal right to exchange fish for money or other goods, though it is not strictly commercial. This right has not been established by the claimant. The exchange of fish for money/goods was only incidental to this FN pre-contact, it was not a regularized pattern, and thus not integral to the identity of this society pre-contact.

Trade did develop in a significant way with this FN after HBC came to BC. However, it was this interference by HBC, creating a qualitatively and quantitatively different type of trade, that made this a practice, a practice established post-contact.

An analysis of justification of infringement is not needed as the right has not been established.

Appeal dismissed, no Aboriginal Right made out. The Stó:lō did not exchange fish for money until after the Europeans came and thus the claim cannot be made out.

Dissent (L'Heureux-Dubé J)
Summary: AR must be construed broadly, with a "dynamic right" (rather than "frozen right") approach which de-emphasizes pre/post-contact practices distinction. Not imperative for the practices/traditions/customs to have existed prior to British sovereignty, only that it was sufficiently significant to the peoples for a substantial continuous period of time. For Stó:lō, AR established to sell/trade/barter fish for sustenance purposes. Extinguishment, infringement, justification must all go back to trial.

Dissent (McLachlin G [as she then was])
Considered trade to be part of the fundamental Sto:lo right of drawing sustenance from salmon.

Rights should be defined broadly, while exercises of that right are narrow. Use empirical-historical approach to define AR (is this "like" what happened in the past? analogous to creation of common law). For Stó:lō, AR established right for commercial fishing to the extent to provide modern equivalents of amenities traditionally gained from practice. Right not extinguished, is infringed, and can only be justified by objectives of conservation or preventing harm (expansive justifications of majority not needed with empirical-historical approach)

"s. 35(1) recognizes not only prior aboriginal occupation, but also a prior legal regime giving rise to aboriginal rights which persist, absent extinguishment." [some of this relates to majority in *Gladstone*]

Precedents

VDP test. Also, note how purpose of s. 35(1) is articulated: "the reconciliation of the preexistence of aboriginal societies with the sovereignty of the Crown."

R v Gladstone

✯ SCC 1996
🐦 Herring spawn on kelp; commercial rights; rights with no limitation; modifications to sparrow.

Facts

W & D were charged under Pacific Herring Fishery Regulations, claimed that selling fish was AR.

Issues

Did they have AR to sell fish?

Reasons

As before European contact the band could harvest as much spawn as it wished, the scheme prima facie infringed their aboriginal rights.

As conservation is a goal consistent with reconciling aboriginal and the larger Canadian society, it is a compelling and substantial objective which may justify Crown infringement of aboriginal rights. After conservation, objectives such as pursuing economic and regional fairness, and recognizing non-aboriginal groups' historic reliance on the fishery, satisfy the standard. The reconciliation of aboriginal societies with the rest of Canadian society may depend on the attainment of these objectives. However, aside from the first part of the regulatory scheme setting the overall amount of herring that could be caught, the parties addressed neither the Crown objective in limiting the accused's aboriginal rights nor the level of aboriginal participation in the fishery. The first part of the scheme was justified.

A new trial should be held on the issue of the accused's guilt or innocence, including the justifiability of the Crown's allocation of herring under the rest of the scheme.

Precedents

Modifications to Sparrow.

R v Pamajewon

☆ SCC 1996

CC prohibition on gambling; competing characterizations; characterization affects result; narrow characterization fails claim.

Facts

Does the Criminal Code prohibition against gambling without provincial authorization infringe Aboriginal rights of the Shawanaga and Eagle Lake First Nations (Ojibwa/ Anishnaabe)?

Issues

What is the correct characterization of the right?

Reasons

Characterization of the right is key and functions to limit the scope and protection of s. 35. Right to regulate gambling on reserve as part of a right to self-government; or right to participate in, and to regulate, high stakes gambling on reserve?

C goes with second characterization.

Applies the Van der Peet test: “integral to the distinctive culture pre-Contact”. No evidence of high stakes gambling and no evidence that gambling was regulated by the Ojibwa.

Precedents

Characterization of the right affects the scope of protection.

R v Sappier; R v Grey

★ SCC 2006

- Cutting down trees in forest; survival/sustenance; modifications to VDP; characterization; claim succeeds.

Facts

Respondents were charged with unlawful cutting and possession of R timber. Claimed aboriginal right as a defence, as logs in this area traditionally harvested by the Maliseet (Sappier) and Mi'kmaq (Gray) First Nations. They used chainsaws. Used for house construction, community firewood, and furniture. No intention of selling the logs or any product made from them.

Issues

Can survival practice be defined as integral to the "distinctive culture?" How do you determine which pre-contact practices were "integral?"

Refines VDP
Reference to "core identity" and "defining feature" proved problematic and created artificial barriers to proving Aboriginal rights.

Don't reduce Aboriginal rights to "anthropological curiosities."

How to Characterize
"A right to harvest wood for domestic uses as a member of the aboriginal community." (Not reduced to basket-making or canoe-building as Crown had argued)

No commercial dimension; harvested wood cannot be sold, traded or bartered to produce assets or raise money, even if the object of such trade or barter is to finance the building of a dwelling.

Communal right; it cannot be exercised by any member of the aboriginal community independently of the aboriginal society it is meant to preserve [ie is not commercial]

Site-specific. The right is necessarily limited to Crown lands traditionally harvested by members' respective First Nations.

Satisfies modified Van der Peet test.

[backs away from VDP insistence of independently significant]

Reasons

AR to harvest wood (even by modern means) established.

Precedents

Modifies VDP.

Lax Kw'alaams v R

★ SCC 2011

- Claim to commercial fishing right; rights may evolve but have limits; right fails; too different.

Facts

Lax Kw'alaams had subsistence economy but with loose trade prior to contact, including in eulachon grease and argue they have a commercial fishing right. Fishing including some trade was integral to the FN's way of life pre contact. TJ rejected right to commercial fisheries despite expert evidence as pre-contact "trade" was specific to eulachon, not fish more generally.

Issues

Did the courts below err in isolating the ancestral practice of trading in eulachon grease "as a practice of its own" rather than focusing more comprehensively on the Coast Tsimshian "fishing way of life"?

Reasons

Claimed right (commercial fisheries) could not be established from pre-contact practice. It could only give right to license to fish for food/ceremonial purposes. Even if commercial rights were demonstrated with the specific fish, this does not open up a right to commercial fishing generally.

"The Lax Kw'alaams live in the 21st century, not the eighteenth, and are entitled to the benefits (as well as the burdens) of changing times. However, allowance for natural evolution does not justify the award of a quantitatively and qualitatively different right. It was in part the lack of continuity and proportionality in the Lax Kw'alaams' attempt to build a full-blown 21st century commercial fishery on the narrow support of an ancestral trade in eulachon grease that concerned the trial judge. Her concern, in my view, was well founded."

Claim dismissed. "The evidence satisfied the trial judge that they were not a trading people."

Precedents

Court affirms *Van Der Peet* that first step in analysis is characterizing the claim not inquiring about practices/traditions. Before the court "Take[s] into account perspectives of aboriginal peoples themselves (general context of the culture)," it must characterize the right on its own. After this then do the rest of *Van Der Peet.* If a broader right claimed fails, and lesser rights are claimed, it must also fail if it's corresponding pre-contact practice was quantitatively insignificant.

ABORIGINAL TITLE

Delgamuukw v BC

★ SCC 1997

Suit for self governance; oral evidence not considered properly; sent back to trial; outlines test for aboriginal title.

Facts

Peoples suing for "aboriginal title and self government," Evidence: the existence of a feast hall, dance, and oral history detailing their ownership of the territory.

Issues

What is the content of aboriginal title, how is it protected by s. 35(1) of the Constitution Act, 1982 , and what is required for its proof?

Reasons

Aboriginal Title is sui generis (in a class of its own) with regard to property rights. Not the same as fee simple, more than a bundle of rights to engage in certain activities.

A new trial was warranted because the trial judge erred in his treatment of the oral histories. Oral histories have a broad social role as a repository of the historical knowledge for a culture and are an expression of the important laws, history, traditions and territory of a house.

Precedents

Aboriginal rights may manifest as title to the land itself. Test for Aboriginal Title.

Tsilhqot'in Nation v BC

✯ SCC 2014

🐦 Claim of land in BC; not consulted; reformulates Delgamuuk; notes fiduciary duty.

Facts

BC granted a commercial logging licence on land considered by the Tsilhqot'in to be part of their traditional territory, without consultation with Tsilhqot'in. The band objected to the logging license and sought a declaration prohibiting commercial logging on the land. Talks broke down and Province proceeded with licensing scheme. The original land claim was amended to include a claim for Aboriginal title to the land at issue on behalf of all Tsilhqot'in people. The federal and provincial governments opposed the title claim.

Issues

What is the test for AT? If AT is established, what rights does it confer? Does the BC Forest Act, R.S.B.C. 1996, c. 157, apply to land covered by AT? What are the constitutional constraints on provincial regulation of AT land? How are broader public interests to be reconciled with the rights conferred by AT?

Reasons

Prior to the establishment of title by court declaration or agreement, the Crown was required to consult in good faith with any Aboriginal groups. After Aboriginal title to land had been established by court declaration or agreement, the Crown must seek the consent of the title-holding Aboriginal group to developments on the land. Absent consent, development of title land cannot proceed unless the Crown had discharged its duty to consult. During the time of the issuance of forestry licences, the First Nation held an interest in the land that was not legally recognized, so the Provincial Crown had a duty to consult and accommodate, which it did not do. The Provincial Crown breached its duty to consult when officials engaged in planning process for the removal of timber on Aboriginal title land without meaningful consultation with the First Nation.

Precedents

(1) Alters sufficiency and exclusivity from Delgamuukw (2) Clarifies content of AT (3) Establishes a duty to consult prior to establishment of AT (4) Clarifies infringement test from Delgamuukw (5) Notes a fiduciary duty on the part of the Crown to AT land, and (6) Notes that provincial legislation may apply to AT lands, but must comply with s 35 requirements.

TREATY RIGHTS

R v Marshall (I and II)

✯ SCC 1999

🐦 FN member charged with fishing offence; test and principles for interpreting treaty rights.

Facts

A, a member of the Mi'kmaq First Nation in NS, was charged with offences set out in the federal fishery regulations: Selling of eels (about 450 pounds) without a licence, fishing without a licence, and fishing during the closed season with prohibited net. A treaty says Mi'kmaq may only to barter with managers of truckhouses (trading posts) established by R and phrased in negative terms.

Issues

Did A have treaty right exemption from compliance with Fisheries Act? (ie. positive right to bring products of hunting & fishing to trade …)

Reasons

Turning a Mi'kmaq trade demand into a negative covenant is not consistent with the honour and integrity of R.

The written terms of the truck house clause merely set out a restrictive covenant and said nothing about a positive right to trade. Nevertheless, the written treaty was not limited to the terms of the document executed on 10 March 1760. The written document did not reflect all the terms that had been agreed to by the parties.

Documents indicated that at earlier meetings with the other Indigenous peoples, the British had agreed to establish a truck house at a particular location "for the furnishing them with necessaries, in Exchange for their Peltry." The 1760 treaty with the Mi'kmaq made no reference to this promise to establish a truck house, and merely contained a one-sided restrictive covenant requiring the Indigenous peoples to trade at truck houses. This demonstrated the "inadequacy and incompleteness of the written memorial of the treaty terms by selectively isolating the restrictive trade covenant."

It was therefore appropriate to determine the actual treaty terms, "not only by reference to the fragmentary historical record . . . but also in light of the stated objectives of the British and Mi'kmaq." Looking to this broader context, it is appropriate to read into the treaty an "implied term" granting the Mi'kmaq the right to hunt and fish, so that they would have something to bring to the truck houses.

'In my view, the treaty rights are limited to securing "necessaries" (which I construe in the modern context, as equivalent to a moderate livelihood), and do not extend to the open-ended accumulation of wealth.'

Precedents

What was novel about the approach of the majority in Marshall (No. 1) was the C's willingness to imply a new term into a treaty to recognize a right that was not a part of the written treaty.

Treaty rights can be contained by regulation within limits if it was a regulated right.

Grassy Narrows FN v ON (Natural Resources)

★ SCC 2014

Taking up clauses; jurisdiction.

Facts

In '97 the Ontario Minister of Natural Resources issued licenses to private company to carry out clear cutting operations on crown lands situated in the Keewatin area. The Grassy Narrows Nation brought an action in 2005, seeking to set aside the licenses on grounds that they violated their harvesting rights under Treaty 3.

Issues

(1) Does Ontario have the authority under Treaty 3 to "take up" tracts of land in the Keewatin area? (2) Does the doctrine of interjurisdictional immunity preclude Ontario from justifying infringement of Treaty 3 rights?

Reasons

General principle: Taking up clause permitted taking up of lands throughout Treaty 3 territory, subject only to the legal limits imposed by the honour of the Crown and s. 35

of the Constitution Act, 1982. SCC concludes that Ontario can take up lands without federal authorization. Why? Treaty 3 is an agreement between the Ojibway and the Crown. The level of govt that exercises jurisdiction is determined by the division of powers. Ontario has exclusive jurisdiction to take up provincial lands for forestry, mining, settlement, and other exclusively provincial matters. Based on Tsilhqot'in, interjurisdictional immunity does not apply. Ontario must fulfil duty to consult in "taking up" land. If it takes up so much land that there is no meaningful treaty right left, it may be liable for infringement of treaty right.

Precedents

Discussion of taking up clauses.

DUTY TO CONSULT AND ACCOMMODATE

Haida Nation v BC (Minister of Forests)

✯ SCC 2004

Logging in Haida Gwaii; insufficient consultation; establishes duty to consult.

Facts

Council of the Haida Nation brought an application for judicial review of decisions of British Columbia's Minister of Forests to allow logging in parts of the Queen Charlotte Islands. The Haida people had claimed title to these lands for more than one hundred years (though it had not been proven in court), and also claimed that red cedar trees from the Island's old growth forests were an integral part of the Haida culture.

TJ found the Haida's claim to title to Haida Gwaii is strong. But it is also complex and will take many years to prove. In the meantime, the Haida argue, their heritage will be irretrievably despoiled.

Issues

Is there a duty to consult? What does the duty to consult entail?

Reasons

In the case at bar, the Province failed in its duty to consult the native band. The Province had knowledge of potential aboriginal title. Red cedar was integral to the Indian band's culture, and the logging licence covered a large amount of the island.

Precedents

Establishes the duty to consult.

Mikisew Cree First Nation v Canada (Minister of Heritage)

✯ SCC 2005

Treaty 8; taking up clause; winter road; adverse impacts; minimal consultation done that didn't even meet the low end.

Facts

Treaty 8 granted the Mikisew Cree First Nation rights to hunt, trap, and fish throughout territories that they had surrendered to the Crown, with the exception of tracts "as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes."

There was a proposal to build a winter road through Wood Buffalo National Park, in this territory. The government's objective was to "meet regional transportation needs" including that of other First Nations. However there would be a signiifcant impact on hunting and trapping. Building the road amounted to "taking up" of treaty lands for the winter road. Very minimal consultation with the FN ("open houses" with public).

Issues

Was there a duty to consult? Did R discharge it's duty?

Reasons

C found that Parks Canada had not consulted directly with the Mikisew Cree about the road or about mitigating the impacts of the road on their treaty rights until after important routing decisions had been made.

R failed to demonstrate an intention of substantially addressing Aboriginal concerns through a meaningful process of consultation. C found that because the taking of the land for the road adversely affected the Mikisew Cree's treaty right to hunt and trap, Parks Canada was required to consult with the Mikisew Cree before making important decisions.

C held that the impacts on the hunting and trapping rights were fairly minor, and that as a result, the lower end of the consultation spectrum (Haida) was engaged.

R was required to provide notice to the Mikisew Cree and to engage directly with them. This engagement was to include the provision of information about the project, addressing what R knew to be the Mikisew Cree's interests and what R anticipated might be the potential adverse impact on those interests. R was also to solicit and listen carefully to the Mikisew Cree's concerns, and attempt to minimize adverse impacts on its treaty rights.

Precedents

SCC confirmed that the duty to consult exists in a post treaty context. Even though gov't have power to exercise their treaty rights, those rights are subject to a duty to consult in situations where the exercise of those treaty rights would have an adverse effect on Aboriginal treaty rights. Honour of the Crown dictates that they manage the change in the territory honourably.

Rio Tinto Alcan v Carrier Sekani Tribal Council

★ SCC 2010

BC Hydro project; actual harm happened before and no consultation; no fresh duty to consult.

Facts

P entered into agreement to sell excess power to BC Hydro in 2007. 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.

Issues

Was there a duty to consult?

Reasons

The duty to consult was not engaged.

Although the FN had long used the River for fishing and sustenance, the evidence before the Commission was that the 2007 agreement would not have any physical impacts on water levels or fishing. R had failed to consult the FN when originally

building the dam. However, that was an underlying infringement, which may give rise to a claim for compensation, but did not trigger a "fresh duty" to consult.

Precedents

Past wrongs do not create a new duty to consult; must be a fresh action for a fresh duty.

MÉTIS RIGHTS

R v Powley

★ SCC 2003

Métis rights; Métis count under s35; modifies Van der Peet.

Facts

A and his son shot and killed a bull moose in Sault Ste. Marie. Moose hunting in ON is strictly regulated, A did not have a hunting license. A claimed that as Métis they had an AB right to hunt for food in the area and therefore the regulations were invalid as they were in violation of s35(2).

Issues

How does the Van der Peet test apply to the Métis?

Reasons

Applying this test to the facts, C finds that the Métis had a right to hunt for food in the designated territory at the time just prior to European control – around 1850, and that this right was an integral part of the Métis culture. The rest of the test is also satisfied in this case - the current right is the same as the historic right; there was continuity; the right was not extinguished, it was infringed by the regulation, and the infringement was not successfully justified. Although R tried to argue that the difficulty in identifying members of the Métis community justified the infringement, C wholeheartedly rejected this argument.

Precedents

C modified the relevant time frame in respect of the determination of Métis rights under s35 of the Constitution Act. Since the Métis peoples arose as a result of the contact between Indigenous peoples and Europeans, it was evident that a "pre-contact" time frame for the identification of Métis rights would not be appropriate, since it would effectively deny the Métis the protection of s35. C held that Métis rights were to be determined by reference to the date of "effective control" by Europeans.

Daniels v Canada (Minister of Indian Affairs and Northern Development)

★ SCC 2016

Three propositions; movement towards individuality focus; no fiduciary duty; Métis fed responsibility.

Facts

Three declarations were sought by the plaintiffs when this litigation was launched in 1999: that Métis and non-status Indians are "Indians" under s. 91(24) of the Constitution Act, 1867; that the fed R owes a fiduciary duty to Métis and non-status Indians; and that Métis and non-status Indians have the right to be consulted and negotiated with, in good faith, by fed gov on a collective basis through representatives of their choice, respecting all their rights, interests and needs as AB peoples.

Issues

What is the status of these declarations?

Reasons

Granting the first declaration undoubtedly met the threshold of having practical utility. Métis are a fed responsibility.

There is no consensus on who is considered Métis or a non-status Indian, nor need there be. Definitional ambiguities do not preclude a determination into whether the two groups, however they are defined, are within the scope of s. 91(24). The historical, philosophical, and linguistic contexts establish that "Indians" in s. 91(24) includes all Aboriginal peoples, including non-status Indians and Métis.

The Federal Court of Appeal and the trial judge correctly held that the second and third declarations should not be granted. The third because it would be a restatement of existing law.

Precedents

SCC held that the federal legislative jurisdiction under section 91(24) includes the Métis people and non-status Indians.

MB Metis Federation v Canada (AG)

✶ SCC 2013

Breach of R's honour; outline of fiduciary duty; R's honour; Métis rights.

Facts

The Manitoba Métis Federation ("MMF") brought an action for declaratory relief, alleging that Canada breached its obligation to implement the promises it made to Métis in the MB Act ("MA"). In particular, P sought declarations that (1) in implementing the MA, fed R breached fiduciary obligations owed to the Métis, (2) fed R failed to implement the MA in a manner consistent with the honour of R, and (3) certain legislation passed by MB affecting the implementation of the MA was ultra vires.

Issues

Did R breach it's honour?

Reasons

Canada did not owe a fiduciary duty to the Métis in implementing ss. 31 and 32 of the MA. The relationship between the Métis and the Crown, viewed generally, is fiduciary in nature.

While the Crown undertook discretionary control of the administration of the land grants under ss. 31 and 32, the fact that the Métis are Aboriginal and had an interest in the land was not sufficient to establish a communal Aboriginal interest in the land that was integral to the nature of the Métis distinctive community and their relationship to the land. The trial judge found that the Métis used and held land individually, rather than communally, and permitted alienation. While individual Métis held interests in land, those interests arose from their personal history, not their shared Métis identity. The trial judge concluded that Métis ownership practices were incompatible with claimed Aboriginal interest in land. Neither the words of s. 31, nor the evidence, established a pre-existing communal Aboriginal title held by the Métis. The same reasoning applied to s. 32.

However, the plaintiffs were entitled to a declaration that the Crown failed to implement the land grant provision in s. 31 in accordance with the honour of the Crown, the ultimate purpose of which is the reconciliation of pre-existing Aboriginal societies with

the assertion of Crown sovereignty. The honour of the Crown is a constitutional principle engaged by s. 35(1) of the Constitution Act, 1982 ("CA") and by an explicit obligation to an Aboriginal group that is enshrined in the constitution. When the implementation of a constitutional obligation to an Aboriginal people is in issue, the honour of the Crown requires that the Crown (1) take a broad purposive approach to the interpretation of the promise and (2) act diligently to fulfil it.

The honour of the Crown required the government to act with diligence in pursuit of the fulfilment of the promise. On the findings of the trial judge, it failed to do so and the obligation to the Métis children remained largely unfulfilled.

Situations Where Honour of R Operates — Following is Direct Quote with Emphasis Added:
(1) **The honour of the Crown gives rise to a fiduciary duty when the Crown assumes discretionary control over a specific Aboriginal interest** (Wewaykum, at paras. 79 and 81; Haida Nation, at para. 18);

(2) **The honour of the Crown informs the purposive interpretation of s. 35** of the Constitution Act, 1982, **and gives rise to a duty to consult** when the Crown contemplates an action that will affect a claimed but as of yet unproven Aboriginal interest: Haida Nation, at para. 25;

(3) **The honour of the Crown governs treaty-making and implementation**: Province of Ontario v. Dominion of Canada, (1895), 25 S.C.R. 434, at p. 512, per Gwynne J., dissenting; Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage), 2005 SCC 69 (CanLII), 2005 SCC 69, [2005] 3 S.C.R. 388, at para. 51, **leading to requirements such as honourable negotiation and the avoidance of the appearance of sharp dealing** (Badger, at para. 41); and

(4) **The honour of the Crown requires the Crown to act in a way that accomplishes the intended purposes of treaty and statutory grants to Aboriginal peoples**: R. v. Marshall, 1999 CanLII 665 (SCC), [1999] 3 S.C.R. 456, at para. 43, referring to The Case of The Churchwardens of St. Saviour in Southwark (1613), 10 Co. Rep. 66b, 77 E.R. 1025, and Roger Earl of Rutland's Case (1608), 8 Co. Rep. 55a, 77 E.R. 555; Mikisew Cree First Nation, at para. 51; Badger, at para. 47.

Precedents

Finding that honour of R was breached.