**Winter**

19

Constitutional Law Summary

Professor Wright

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I. Federalism

### Introduction

* **Federalism:** The method of dividing powers so that the general and regional governments are each within a sphere coordinate and independent – K.C. Wheare
* Three features
  + Distribution of legislative powers between two orders of government – central and regional
  + Both orders are “coordinate and independent”
  + Citizens are subject to laws of both orders
* Federal systems are distinct from:
  + **Unitary states**: ultimate political authority rests with the central government. Local governments exist but are not entrenched by a constitution so can be changed or abolished unilaterally by central government
    - E.g. France, New Zealand
  + **Confederal states**: ultimate political authority rests with regional governments, not central government
    - E.g. USA from 1777-87
* Why federalism for Canada?
  + Delegates from Quebec were keen to protect their French language and civil legal system.
  + Maritime provinces were likewise concerned about protecting their local customs
  + adoption of a federal system was a political compromise between Ontario, who would have been happy with a central government, and Quebec and maritime provinces would wanted provincial governments to hold power
  + “The significance of the adoption of a federal form of government cannot be exaggerated. Without it, neither the agreement of the delegates from Canada East [Quebec] nor that of the delegates from the maritime colonies could have been obtained” (*Secession Reference*, 1998 SCC)

### Division of Powers

At the heart of the federal system in Canada are ss. 91 and 92 of the *Constitution Act, 1867*

**s. 91** – Federal Legislative Authority

* Two distinct parts:
  + POGG/Residuary clause
    - The federal Parliament may make laws “for the Peace, Order and good Government of Canada, in relation to all Matters not coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces”
    - The effect of this clause is to confer residual power on parliament – so if the provincial government’s can’t do it, the federal government can.
  + Classes of subjects
    - Assigns exclusive legislative authority over 30 classes of subjects to parliament
    - Many are economic in nature or are related to transportation
    - Our focus: POGG, Trade and Commerce, Crim, Indians

**s. 92** – Provincial legislative authority

* Assigns exclusive legislative authority over 16 “classes of subjects” to the provinces
* S. 92(13) – property and civil rights in the provinces has often been interpreted to capture all of private law. So, in practice, this might be the actual residuary power because it is so broad.
* Property and civil rights, matters of a merely local or private nature, other important ones – municipal institutions, admin of justice in province.

### Debates About Division of Powers

**Debate #1** – Different perspectives about Canada as a political community/nation

* Provincial equality view
  + Pro-provincial jurisdiction - provinces, as institutions, are the central focus of Canada as a nation
  + This view conceives of the provinces as equal territorial units
  + This is accepted outside of Quebec, mostly in Alberta and among political conservatives
* Pan-Canadian view
  + Pro-federal jurisdiction
  + This view conceives of Canada as a union of people, not a union of provinces
  + The focus is on the people who form one political community, not on the provinces
  + Accepted more outside of Quebec
* Two nation view – English and French
  + Canada viewed as a compact between two nations living in a single state – the English majority and French minority
  + This view favours granting special protection to minority French population
  + Popular view in Quebec
* Three or more nations view
  + View favours protections for Indigenous communities

**Debate #2** – Different perspectives about the role of/how to evaluate federalism (Richard Simeon)

* Community
  + Allocations of power are defended or criticized on their ability to protect certain political communities
  + Conflict arises out of competing models of community: between a single pan-Canadian community, a union of 10 provincial communities, two national communities
  + Also, controversy about whether to define communities in political terms or in the relationship of linguistic and ethnic communities
  + Popular view in Quebec
* Democracy
  + Allocations of power are assessed for the ability to promote democratic participation and responsiveness
  + View more widely accepted in USA than in Canada
* Functional effectiveness
  + Federal system is evaluated in terms of its ability to respond to the needs of citizens
  + Powers should be allocated according to which order can most efficiently and effectively carry out any given responsibility of government
  + Popular view outside of Quebec
* Canada seems to fluctuate between preoccupation with community and functional effectiveness.

**Debate #3** – Different perspectives about interpretation

* Democratic objectives to judicial review
* Institutional competence objections
* Originalist vs. generous/progressive interpretation

**Hogg & Wright** – These debates manifest in 4 primary ways:

1. Debates re the intentions of the “Fathers”
   1. English scholars usually argue the fathers intended a centralized government
   2. French scholars usually argue the fathers intended a decentralized government
   3. Authors argue that the framers were divided, some arguing for centralized federalism and others for loose confederacy
2. Debates re what to glean from the text of the *Constitution Act, 1867* as drafted
   1. *Act* contains a number of features that indicates that it was intended to form the foundation of a highly centralized federal system:
      1. The *Act* subordinated the provinces to the federal government in many respects
         1. E.g. s. 90 gave fed. Gov. power to invalidate prov. statutes
      2. The distribution of powers in the *Act* is more centralized than the distribution of powers in the US Constitution
         1. E.g. In Canada, the list of specified federal heads of power included several topics left to the states in the US Constitution (i.e. banking, marriage)
      3. The distribution of power was structured to make the fed. Gov. fiscally dominant
   2. But several features of the *Act* also provides support for the argument that the *Act* was intended to form the foundation of a less centralized federal system:
      1. The power assigned to the prov. legislatures by s. 92(13) to make laws concerning property and civil rights in the province
      2. The allocation of the residuary legislative power
   3. Overall, the *Act* includes conflicting signals as to the degree of centralization or decentralization stipulated by the federal scheme that the *Act* established. The framers probably did this on purpose because they needed to accommodate conflicting goals between English and French Canada
3. Debates re whether the Privy Council was biased in favour of the provinces, and if so, whether this has served Canada well
   1. There is no doubt the PC favoured the provinces in federalism cases
   2. **Subsidiarity:** the principle that decision-making should be kept as close to the individuals affected as possible. This expresses a bias in favour of action at the provincial, rather than the federal, level.
   3. Canada was not badly served by the Privy Council
4. Debates re the Supreme Court’s treatment of the Privy Council’s decisions
   1. SCC has expanded the scope of federal heads of power – this was inevitable as a corrective to unsustainable Privy Council restrictions on federal power
   2. Overall, decisions of the SCC have not markedly altered the balance of power between parliament and the legislatures

### Types of Federalism Challenges

There are 3 types of arguments that can be used to challenge legislation on division of powers grounds:

1. Validity

* Pith and substance doctrine
* Double aspect doctrine
* Necessarily incidental/ancillary powers doctrine

1. Operability

* Federal paramountcy doctrine

1. Applicability

* Interjurisdictional immunity doctrine

**Unlike with the *Charter*, there is a presumption of constitutionality in federalism challenges. Governments are presumed to have acted within their jurisdiction. The burden is on the party challenging the law to prove that the law is unconstitutional.**

### Interpretive Paradigms

The heads of powers under ss. 91 and 92 of the *Constitution Act, 1867* have been approached in different ways over time.

* **Classical Paradigm** 
  + Emphasis on exclusivity, or “watertight compartments”
  + No/little room for overlap of heads of powers
  + Gives a big role to the courts because someone has to make sure the federal & provincial governments stick to their own areas
  + More support in Quebec
* **Modern Paradigm**
  + Allowance for overlap and interplay
  + Accepts that the Constitution was drafted in 1867 and the role of government has changed & the things it regulates have changed
  + Less of a role for courts here
  + Not favoured in Quebec – when there is overlap there is a chance of federal paramountcy
* **Cooperative Federalism**
  + Allowance for overlap and interplay
  + The main difference between this and the Modern Paradigm is the role of the courts here the courts are also more deferential, but they act as “facilitators” of allocations of power worked out cooperatively
  + The principle suggests that if the two levels of government are left to work out their jurisdictional disputes themselves, rather than have the courts resolve them, those governments will find a way to resolve those disputes through some form of cooperative action
  + We have largely been in this paradigm since about 2007.

Validity

* The argument in this case is that the legislation was enacted in relation to a “matter” beyond the enacting level of government’s jurisdiction and thus within the exclusive jurisdiction of the other level of government.
* If the law enacted is in relation to a “matter” that comes within the enacting level of government’s jurisdiction, then the law is ***intra vires*** and so is **valid**.
* If not, the law is ***ultra vires***, and is not valid. A law that is held to be *ultra vires* is permanently invalid – it is of no force and effect.

**There are 3 doctrines the courts use to resolve challenges to the validity of legislation:**

1. Pith and Substance Doctrine
   1. Use if the entire law is being challenged
2. Double Aspect Doctrine
3. Ancillary powers doctrine
   1. Use if only part of the law is being challenged

### Pith and Substance Doctrine

The pith and substance doctrine is used to determine if a law is in relation to a “matter” that comes within a “class of subjects” allocated to the enacting order of government.

* If yes, the law is *intra vires*; if not, the law is *ultra vires*
* “Classes of subjects” refers to the spheres of jurisdiction over which each level has been assigned control in ss. 91 and 92 of the *Constitution Act, 1867*

**Analysis**:

Step 1: Determine the law’s “matter” (*Morgentaler*, 1993)

* This is done by characterizing the law – identifying its “pith and substance”
* The law’s pith and substance is its dominant or essential feature/character (*Morgentaler*, 1993)
* **Examine two things** (*Morgentaler*, 1993)**:**
  + **Purpose.** Identify purpose using:
    - Intrinsic evidence: evidence from the law itself (*Morgentaler*, 1993)
      * E.g. text of the law, its structure, purpose clauses, preambles
    - Extrinsic evidence: evidence from outside the law itself (*Morgentaler*, 1993)
      * E.g. related laws, legislative history (although of limited reliability)
  + Can be relied upon if relevant and not inherently unreliable **Effects**
    - **Legal effects -** refers to how the legislation as a whole affects the rights and liabilities of those subject to its terms (*Morgentaler*, 1993)
      * Determined from the terms of the legislation itself (*Morgentaler*, 1993)
      * Usually a good indicator of the purpose of legislation (*Morgentaler*, 1993)
    - **Practical effects** - the actual or predicted effect of the legislation in operation
      * Unlike legal effects, practical effects are not always relevant (*Morgentaler*, 1993)
      * They are relevant in appropriate cases such as where the practical effects differ substantially from the purpose and the legal effects might suggest the law actually has a different purpose
      * Some sort of evidence will be needed for determining practical effects (*Morgentaler*, 1993)
* Purpose is often key; effects help illuminate purpose (*Morgentaler*, 1993)
* Where the law’s effects differ significantly from its purpose, this would suggest that maybe that isn’t actually the purpose
* It is usually possible to characterize the law in more than one way, and one characterization will often come within a federal head of power and one will come within a provincial head of power.
* Thus, how you characterize the law will often determine its validity.

Step 2: Assign the “matter” to one of the classes of subjects in ss. 91 and 92 (*Morgentaler*, 1993)

* Determine how a law so characterized fits within the heads of power in ss. 91 and 92
* This may involve interpreting the head of power
* If the law is in pith and substance “in relation to” a “matter” that falls within the enacting government’s jurisdiction, it is *intra vires*. If not, it is *ultra vires*.

**Note: Incidental effects are permitted**

* The pith and substance doctrine permits laws that have “incidental effects” on matters that fall outside the jurisdiction of the enacting government, provided the law is in pith and substance in relation to a head of power allocated to the enacting legislature

## R v Morgentaler, 1993 SCC – Analysis for Pith and Substance

**Facts:** Nova Scotia enacted regulations under the *Medical Services Act* that made it an offence to perform an abortion outside a hospital. They also enacted regulations denying medical services insurance coverage for abortions anywhere other than in a hospital. Dr. Morgentaler opened an abortion clinic and was charged with 16 counts of violating the *Medical Services Act*. Morgentaler argued that the regulations are an unlawful encroachment on Parliament’s jurisdiction over criminal law.

**Issue:** Are Nova Scotia’s *Medical Services Act* and the regulations made under it *ultra vires* the province of NS on the ground that they are in pith and substance criminal law?

**Held:** Yes, the Act and regulations are *ultra vires* the province of NS.

**Sopinka J (unanimous):** The law is in pith and substance criminal law. Analysis:

Step 1: classifying the law

* Classification of a law for purposes of federalism involves first identifying the “matter” of the law
* A law’s “matter” is its leading feature or true character, often called its pith and substance
* The legislations dominant purpose is often the key to constitutional validity
* The approach to determining pith and substance must be flexible, but should consider purpose and effects
* **Purpose**
  + What is the purpose the law was enacted to achieve?
  + Identify purpose using:
    - Intrinsic evidence: evidence from the law itself
      * E.g. text of the law, its structure, purpose clauses, preambles
    - Extrinsic evidence: evidence from outside the law itself
      * E.g. related laws, legislative history (although of limited reliability)
      * Can be relied upon if relevant and not inherently unreliable
* **Effects** – two types of effects are important
  + **Legal effects**: refers to how the legislation as a whole affects the rights an liabilities of those subject to its terms
    - Determined from the terms of the legislation itself
    - Usually a good indicator of the purpose of legislation
    - Is relevant even when the effect is not fully intended or appreciated by the enacting body
  + **Practical effects:** The actual or predicted effect of the legislation in operation
    - Unlike legal effects, practical effects are not always relevant
    - They are relevant in appropriate cases such as where the practical effects differ substantially from the purpose and the legal effects might suggest the law actually has a different purpose
    - Some sort of evidence will be needed for determining practical effects

Step 2: assigning the law as classified to ss. 91 or 92

* Focus placed on *precedent*, which has already interpreted the relevant heads of power
* S. 92 allows the provinces to regulate “the place for delivery of medical service with a view to controlling” the quality and nature of care
* The criminal law (s. 91(24)) is defined, for the purpose of the division of powers, as any law that has as its dominant characteristic the prohibition of an activity, subject to penal sanctions, for a public purpose such as peace, order, security, health or morality

Application to case

Step 1: an examination of the purpose and effect lead to the conclusion that the legislation’s dominant characteristic is the restriction of abortion as a socially undesirable practice that should be suppressed or punished.

* Purpose:
  + The law partially reproduced the federal law struck down by the SCC in 1988, supporting an inference that it was designed to serve a criminal law purpose
  + The legislative history of the law suggested the true purpose of the law was to stop Morgentaler from opening his clinic (rather than regulation of health services)
* Effect:
  + Legal effect is to prohibit traditionally criminal conduct
* The guiding principle is that provinces may not invade the criminal law field by attempting to stiffen, supplement or replace the criminal law, or to fill perceived gaps therein
* The absence of federal legislation does not enlarge provincial jurisdiction, it simply means that if the provincial legislation is found to be *intra vies*, no problem of paramountcy arises

Step 2: the legislation falls within Parliament’s criminal law power

**Wright:** Sopinka denies that he’s invoking the colorability doctrine, but in practice he is. So be careful about using this case as a precedent for how the principles are applied.

### Doctrine of Colourability

**Colourability doctrine:** The substance of a law rather than its form is controlling in the process of characterizing is “matter” (or “pith and substance”). The colorability doctrine is invoked when a statute bears the formal trappings of a matter within the jurisdiction of the enacting legislature, but in substance is addressed to a matter outside its jurisdiction.

* When courts determine that legislation on its face addresses matters within its jurisdiction, but in pith and substance it is directed at matters outside jurisdiction, legislation is said to be “**colourable**” and therefore invalid
* colorability is engaged at stage 1 when you are characterizing the law, You would say likely ht purpose of the law says that it is doing A but other evidence than can be gathered says that it is actually doing B and then you have to figure out what is the actual characterization of the law.

## Re Employment Insurance Act (Can), 2005 SCC – Generous, Purposive Approach to Interpret s. 91/92, evidence Of original intent is relevant but not conCLUSIVE.

**Facts:** At issue was the validity of maternity and parental benefit provisions of the federal *Employment Insurance Act*. Quebec launched a reference, arguing that these provisions were directed at supporting families with children and therefore fell within s. 92(13) property and civil rights, and/or s. 92(16) matters of a local or private nature in the province. Federal government argued that the provisions were directed at providing replacement income for working parents when their employment is interrupted as a result of the birth or adoption of a child. Argued this fell within s. 91(2A) unemployment insurance.

**Issue:** Are the maternity and parental benefit provisions of the *Employment Insurance Act* *ultra vires* Parliament’s power over unemployment insurance in s. 92(2A)?

**Held:** No. Federal maternity and parental benefit provisions are valid under s. 91(2A).

**Deschamps J:** Criticizes the Quebec CoA for adopting an “original intent” approach to s. 91(2A). Evidence of original intent is relevant but not conclusive. Affirms a generous and progressive (living tree) approach to interpreting ss. 91 &92 (step 2 of the analysis). Analysis should start with the text of the head of power, and see if the impugned law is consistent with its natural evoluhtion. Should consider judicial precedent in interpreting heads of powers.

Analysis:

* Step 1: determine the law’s matter
  + The pith and substance of the impugned provisions was to replace the income that was lost when income was interrupted de to the birth or arrival of a child (not to provide the benefits themselves)
* Step 2: assign the matter to ss. 91 or 92
  + Unemployment insurance head of power is broad enough to sustain the federal *Employment Insurance Act*
  + Unemployment insurance can include voluntary interruptions to employment such as birth, not just involuntary interruptions such as job loss
  + Maternity and parental benefits are the natural evolution of the unemployment insurance power under s. 91(2A)
  + The new social realities are the evolution of the role of women in the labour market

### Double Aspect Doctrine

“…subjects which in one aspect and for one purpose fall within s. 92, may in another aspect and for another purpose fall within s. 91” (*Hodge v The Queen*, 1883 PC)

* The text of ss. 91 and 92 uses the language of “exclusivity”
* But the language of the provisions actually overlap (i.e. marriage)

Two types of overlap:

1. De jure overlap
   1. Overlap of jurisdiction legally, including ability to regulate the same “aspects” of the same subjects
2. De facto overlap
   1. Overlap only in practice, stemming from the power to regulate different “aspects” of a subject

**Concurrency:** refers to a situation where both the federal and provincial governments have the power to enact laws in relation to a particular subject matter. Only a few subjects are expressly (or *de jure*) concurrent in the Canadian Constitution: see, in particular, old age pensions (s. 94A), agriculture (s. 95) and immigration (s. 95). However, the double aspect doctrine operates to create various areas of *de facto* concurrency (as do, to a lesser degree, the pith and substance doctrine and the necessarily incidental/ancillary powers doctrine).

**The Double Aspect Doctrine is a de facto overlap**. The heads of powers do not overlap, but the matters of the law overlap.

* E.g. the regulation of dangerous driving could be seen to tall under federal jurisdiction under criminal law, or under provincial jurisdiction over civil rights. Mutual modification under the classical paradigm of interpretation would give either the federal or provincial government the power to regulate dangerous driving. Under the double aspect doctrine, dangerous driving is said to have two aspects: one that falls under federal criminal law and another aspect that falls under provincial civil law. The court would say dangerous driving has a “double aspect”.

Application of Double Aspect Doctrine

* Start with precedent - first look at whether there are any precedents that tell you whether the double aspect doctrine applies to your case. Get list of cases: entertainment in taverns (*Real Hotel Ltd v New Brunswick Liquor Licensing Board*), Gaming (*R v Furtney, Simens v Manitoba*), interest rates and insolvency, maintenance of spouses and child custody, securities regulations (*Multiple Access, v Mutchueon*), temperance (abstain from alcohol).

Limits of Doctrine

Trade (parliament has exclusive over international and trade between provinces)

intra provincial (provinces)

labour regulations - provinces

aeronautics - federal

* The doctrine should apply where contrast between the federal and provincial aspects of a subject is not sharp - i.e. where federal and provincial aspects are of roughly equal importance (Bill Lederman, affirmed by *Multiple Access Ltd*)

The Courts have understood the doctrine in 3 different ways:

1. Original understanding from *Hodge v The Queen* (1883 PC)

* The double aspect doctrine does not more than open the door to the possibility that both levels of government might be able to legislate in the same area. Whether or not that possibility is realized in a given context depends on the manner in which the legislation at issue is characterized.

2.

* Over time, the SCC came to view the doctrine as not only a “door opener”, but viewed is at capturing the notion that not only is it possible in some circumstances for both levels of government to legislate in the same area, it is *often inevitable and sometimes a good thing* that they should be able to do so
* This understanding of the doctrine led to courts invoking it to justify upholding federal and provincial legislation touching the same areas that overlapped to a very significant degree
* Beetz J and some others worried that the more areas in which both levels of government could legislate meant that there were more areas in which the federal paramountcy doctrine could be applied, at the cost of provincial autonomy

3. Professor Bill Lederman’s approach

* Approach calls for the court to ask in respect of legislation that was being challenged: (1) whether that legislation has a federal aspect; (2) whether it also had a provincial aspect; and (3) if the legislation was held to have both, which one of those aspects could be said to be more important

## Multiple Access Ltd v McCutcheon, 1982 SCC – Division of Powers used as shield to litigation

**Facts:** The Ontario *Securities Act* prohibited insider trading in shares trading on the TSX. The *Canada Corporations Act* had almost identical provisions, applicable to corporations incorporated under federal law. A shareholder brought an action against traders at Multiple Access Inc. for insider trading under the Ontario *Securities Act*. The respondents, the insider traders, argued the Ontario statute could not apply to their case because the regulation of trading in shares of federally incorporated companies falls within exclusive federal jurisdiction.

**Issue:** Is Ontario’s *Securities Act* valid under provincial heads of power?

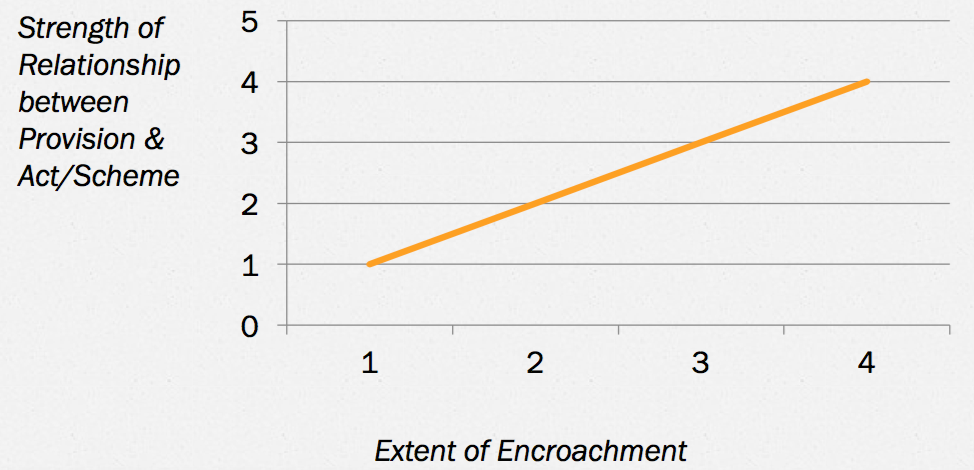
**Held:** Yes, the Ontario laws are valid.

**Dickson J:**

* The double aspect doctrine applies when the contrast between the relative importance of two aspects is not so sharp, or of roughly equal importance (affirms Lederman’s test)
* Here, insider trading has a double aspect:
  + Federal (POGG power) – it has a company law aspect because it impacts corporate powers, organizations and management
    - Power to regulate with reference to incorporation of companies with other than provincial objects = Canada overall. Goes beyond incorporation, includes maintenance of company, protection of creditors, safeguarding interests et.
  + Provincial (property and civil rights) – it has a securities law aspect because it impacts share trades
* Where, as here, corporate-security federal and provincial characteristics of the insider trading legislation are roughly equal in importance there would seem little reason, when considering validity, to kill one and let the other live
* The result is that virtually identically laws re insider trading were upheld.
* So legally, the laws maintain a fiction of exclusivity, but in practice, almost identical federal & provincial laws are sustained
* While generally DAD used for highway traffic field, ample precedent for its use in provincial securities matters

### Necessarily Incidental/Ancillary Powers Doctrine

* The pith and substance doctrine results in a law being upheld if its dominant characteristic falls within the classes of subject matter allocated to tphe jurisdiction of the enacting government
* This means that a law may have an impact on matters outside the enacting legislature’s jurisdiction, so long as these effects remain secondary or incidental features of the legislation rather than its most important feature
* An extension of the idea of incidental effects is the **ancillary powers doctrine (aka necessarily incidental doctrine)**
* The ancillary doctrine is used in cases where the provision being challenged is part of a larger scheme of legislation. When the impugned provision is examined in isolation, it appears to intrude into the jurisdiction of the other level of government. However, if the larger scheme of which the impugned provision is part is constitutionally valid, the impugned provision may also be found valid because of its relationship to the larger scheme.
* The provision will be upheld or not based on how integrated the provision is into the statute
* If the legislative scheme and the particular provision are NOT closely integrated, it is more likely that the provision will be declared invalid and will be severed
* If the legislative scheme and the particular provision are closely integrated, then the provision will be seen as necessarily incidental



* **“Incidental”** in the context of the “necessarily incidental” doctrine refers to the relationship between the provision under challenge and the rest of the statute
* **“Incidental”** in the context of “incidental effects” means not the dominant feature of the impugned legislation. It is a way of acknowledging that the impugned legislation has an “aspect” or “feature” that connects it to a head of power assigned to the other order of government than the one that enacted it, but that connection is not considered fatal to its validity.

### ANALYSIS FOR ANCILLARY POWERS DOCTRINE:

1. Does the impugned provision encroach on provincial powers, and if so, to what extent? (*General Motors*) – can be used for provincial on federal too!
   1. This involves conducting a full pith and substance analysis of the impugned provision (*Quebec v Lacombe*)
      1. The ancillary powers doctrine applies ONLY where the provision is in pith and substance outside the jurisdiction of the government that enacted it. Mere incidental effects will not warrant the application of this doctrine (*Quebec v Lacombe*)
   2. If the provision is found not to encroach, the provision is *intra vires* and the inquiry ends
2. Is the scheme/*Act or a severable portion of it* itself valid? (*General Motors*)
3. Can the provision be found valid by reason of sufficient integration into the scheme/Act? (*General Motors*)
   1. If the impugned law only encroaches marginally on provincial powers, apply the **rational functional test** (*Quebec v Lacombe*).
      1. Under the **rational functional test**, the provision must be rationally and functionally connected to the purpose of the Act. The provision must not merely supplement, but has to actually further the legislative scheme (*Quebec v Lacombe*)
      2. So must first determine **purpose** of the Act, then determine if impugned provision **furthers** that purpose (*Quebec v Lacombe*)
   2. If the impugned provision is highly intrusive on provincial powers, then the provision must be **truly necessary** or **integral** (*General Motors*)

## General Motors v City National Leasing, 1989 SCC – Analysis for Ancillary Powers Doctrine

**Facts:** City National Leasing brought a civil action against GM alleging that it suffered losses as a result of a discriminatory pricing policy that constituted anti-competitive behaviour that was prohibited by the federal *Combines Investigation Act*. S. 33.1 of the *Act* created a civil cause of action, on which CNL was relying on. GM argued that the provision was beyond the jurisdiction of Parliament because the creation of civil causes of action falls within provincial jurisdiction in relation to property and civil rights.

**Issue:** Is s. 33.1 valid?

**Held:** Yes, s. 33.1 of the federal *Combines Investigation Act* is *intra vires*.

**Dickson CJ (majority):** Outlines a 3-step test for the doctrine:

1. Does the impugned provision encroaches on provincial powers, and to what extent?
   1. If the provision is found not to encroach, the provision is *intra vires* and the inquiry ends
   2. In most cases the provision can be characterized as encroaching (Wright: this has changed in recent cases)
2. Is the scheme/*Act* itself valid?
   1. If the scheme or Act itself is not valid, then the inquiry ends. You cannot hold a provision valid when the entire Act is not valid.
3. Can the provision be found valid by reason of sufficient integration into the scheme/Act?
   1. The mere inclusion of a provision in a valid legislative scheme/act does not *ipso facto* confer constitutional validity upon a particular provision. The provision must be sufficiently related to that scheme for it to be constitutionally justified
   2. Different levels of “fit” will be required in different cases. “Fit” refers to how well the provision is integrated into the scheme of the legislation and how important it is for the efficacy of the legislation
   3. If the impugned law only encroaches marginally on provincial powers, then the provision must be **functionally related** to the Act
   4. If the impugned provision is highly intrusive on provincial powers, then the provision must be **truly necessary** or **integral**

Application to Case

* Step 1: does s. 33.1 encroach on provincial powers and if so, to what extent?
  + As s. 33.1 creates a civil right of action, it encroaches on provincial power the creation of civil actions is generally a matter falling under s. 92(13)
  + The encroachment is NOT severe because:
    - It is a remedial provision helps enforce the substantive provisions of the *Act*, it doesn’t create a new substantive provision
    - It is of limited scope it doesn’t create a general cause of action applicable outside the terms of the *Act*
    - There is precedent for federally created civil rights of action in the past where it is shown to be warranted
* Step 2: is the *Act* valid?
  + Yes, under s. 91(2)
* Step 3: Is s. 33.1 sufficiently integrated so as to be held valid?
  + Because the encroachment on provincial power is limited, the correct approach is to ask whether the provision is **functionally related** to the general objective of the legislation and to the structure and content of the scheme
  + A civil remedy would improve the effectiveness of competition law
  + Thus s. 33.1 is sufficiently integrated, and so it is valid

## Quebec (Attorney General) v Lacombe, 2010 SCC – Amendments to General Motors Test

**Facts:** A municipality in Quebec enacted a by-law that prohibited the construction and use of aerodromes in a particular part of the municipality where people had summer homes on a lake.

**Note on municipalities:** Municipal by-laws are enacted under legal authority granted to provinces under the division of powers. Because the provinces cannot confer legal authority that they do not have, municipalities have to respect the provincial and federal division of powers. This means a municipal by-law cannot regulate areas that fall under a federal head of power. **Thus, if given a municipal by-law on an exam, must assess whether it falls under the provincial heads of power**.

**Issue:** Is the by-law valid?

**Held:** No, the by-law is invalid.

**McLachlin CJ (majority):** Offers clarification on the ancillary power test from *General Motors*:

* The *General Motors* decision hinted that the 1st step of the test required a full pith and substance analysis for the impugned provision. But the decision also said that step 1 was rarely not satisfied, and the application to the case supports the proposition a full pith and substance analysis isn’t required.
* McLachlin clarifies that you DO have to engage in a full pith and substance analysis.
* The ancillary powers doctrine applies ONLY where the provision is in pith and substance outside the jurisdiction of the government that enacted it. Mere incidental effects will not warrant the application of this doctrine.

Application to case:

* Because the impugned by-law is an amendment to the municipality’s general zoning by-law, the ancillary powers doctrine must be used, not the pith and substance doctrine
* Step 1: does the impugned by-law encroach on federal powers, and if so, to what extent?
  + The by-law is in pith and substance about the regulation of **aeronautics**. From precedent, we know this falls under federal jurisdiction over aeronautics, which falls under the **POGG** power
  + The encroachment is not serious (no explanation given)
* Step 2: is the zoning by-law as a whole valid?
  + Yes, under s. 92(13)
* Step 3: sufficient integration?
  + No
  + The by-law does not constitute a serious encroachment on federal jurisdiction, so the **rational functional** test.
  + Under the rational functional test, the provision must be rationally and functionally connected to the purpose of the scheme. It must not merely supplement, but has to actually further the legislative scheme (Wright: is this a real distinction?)
  + So, must determine the purpose of the scheme/act here, the purpose is the regulation of land use with regard to the underlying characteristics and uses of the land for the benefit of the public
  + Then must determine whether the impugned by-law furthers this purpose here, no. The by-law treated similar parcels of land differently, and treated different parcels of land similarly
  + So by-law fails 3rd stage of the ancillary powers doctrine test

Applicability

* This argument seeks to limit the applicability of provincial statutes
* Even if you have legislation that is valid and operative, the law’s application may have to be read down so as not to touch matters that lie at the core of the other level of government’s jurisdiction
* In such cases, the law as a whole is valid, but certain provisions do not apply permanently – the unconstitutional application is precluded by reading down the law

The doctrine used to resolve applicability issues:

1. Interjurisdictional Immunity Doctrine

### Interjurisdictional Immunity Doctrine

Core: cannot impair Protected by IJI

Non-Core: Probably can impair

* Unlike the pith and substance, double aspect and ancillary powers doctrines, which create overlapping jurisdiction, the IJI doctrine emphasizes exclusivity of jurisdiction
* It comes into effect where a law is valid and generally applicable, but overreaches on one of its applications
* Where the doctrine applies, the law is not declared invalid, it is just read down and held not to apply to the other order of government (inapplicable)
* The ovals represent federal jurisdiction. Provincial laws can impair non-core items, but not the core items
* **Undertakings:** refer to certain entities and businesses, often which are federal incorporated (but not necessarily), that operate in areas of federal legislative competence (i.e. aeronautics, communications)

### Analysis for IJI:

1. **Does the law engage the protected “core” of a legislative power allocated to the other order of government – or a vital or essential part of an undertaking it constitutes? ( Canadian Western Bank)**
   1. Whether law would impair the basic “minimum unassailable core” of a legislative power granted to the other (usually federal) order of government
      1. This is the minimum content necessary to make the grant of the legislative power effective for its intended purpose
      2. The core of a federal power is the authority that is absolutely necessary to enable Parliament to achieve the purpose for which exclusive jurisdiction was conferred (Quebec v Copa)
         1. Application: location of aerodromes lies within the core of aueronautics power (**COPA**)
   2. Impair a vital or essential part of an undertaking constituted by it
      1. Vital or essential means absolutely indispensable
         1. Application: Banks = federally regulated undertaking, Insurance too far removed
         2. For vital or essential we look to whether the law impacts one of the undertaking’s core operation that makes them the object of federal regulation (**Western Bank v Alberta**)
2. **If so, wold applying the impugned law significantly “trammel” or impair it?** 
   1. For the first formulation:
      1. Proper test is impairment: an impact that “seriously or significantly trammels the federal power” – is it “sufficiently serious” to invoke IJI (**COPA**)
   2. For the second formulation:
      1. An adverse consequence of some sort (**Western Bank**)
      2. In general – needs to do more than simply “affect a vital part of the operation of an undertaking (**Bell 1 Case**)

Criticisms of the Doctrine of IJI:

* IJI is at odds with the modern paradigm’s (and cooperative federalism’s) embrace of overlapping allocations of jurisdiction
* It privileges federal jurisdiction in practice by protecting “core” areas of provincial jurisdiction from the impact or interference of otherwise valid laws enacted at the provincial level
  + Note: IJI has only been used to protect core areas of federal jurisdiction, but the SCC has acknowledged that it could work the other way (*Canadian Western Bank v Alberta*)
* It is unnecessary, because federal government can protect exclusive areas of federal jurisdiction with the federal paramountcy doctrine

Established IJI

* Indians granted immunity from provincial adopted legislation (natural parents v Superintendant)
* Federally regulated transport undertaking granted immunity from provincial transport regulations.
* Postal workers granted immunity from provincial labour relations legislation.

## McKay v The Queen, 1965 SCC

**Facts:** A municipal by-law prohibited the display of all signs in a residential area, with a few exceptions. The McKay’s erected a sign during a federal election campaign promoting a candidate. They were charged under the by-law. No challenge was made to the validity of the by-law because it would have obviously been upheld under s. 92(13) property and civil rights.

**Issue:** Whether the by-law could constitutionally be applied to the McKays.

**Held:** No.

**Cartwright J:** Governments should not be permitted to do indirectly what they cannot do directly. Federal elections are the jurisdiction of the federal government. If the municipality had made a by-law targeting the erection of federal election campaign signs, such a by-law would have been struck down as encroaching on exclusive federal legislative jurisdiction over federal elections. If follows that the municipality should not be allowed to enact a generally worded by-law and then seek to apply it to the erection of a federal election sign.

## Commission Du Salaire Minimum v Bell Telephone Co of Canada (Bell #1), 1966 SCC

**Facts:** The Quebec *Minimum Wage Act* gave the Commission the power to regulate matters such as minimum wages, working hours and conditions. The Commission sought to impose a levy on Bell, and Bell refused to pay it. Bell argued the statute did not apply to it because of Bell’s status as a a federally regulated communications undertaking within exclusive federal jurisdiction pursuant s. 92.

**Issue:** Did the *Minimum Wage Act* apply to Bell?

**Held:** No, it does not apply to Bell or other federally regulated undertakings even though no other federal min wage applies.

**Martland J: All aspects vital parts of operations of interprovincial undertaking as a going concern are matters which are subject to exclusive legislative control of fed parliament.**  Issues related to employment contracts, such as rates of pay and hours of work qualify as vital parts of the management and operation of undertakings. Thus, the minimum wage law could not apply to federal undertakings because it effected these areas.

**Significance:** This ruling initiated a significant doctrinal change by broadening the test for IJI applicable to federal undertakings. Previously, courts had applied the same test for federally incorporated companies and federal undertakings – the “impairment” test. On this test, a valid provincial law could apply to federal undertakings or federally incorporated companies so long as it did not **impair** their operations (undertakings) or statutes or essential powers (companies). After this case, a valid generally worded provincial law could be held not to apply to federal undertakings if it was found to **affect** **a vital part of their operation or management**. This created a much larger area of immunity from provincial legislation for federal undertakings. After this case, a broadly worded provincial law could be held not to apply to fed undertaking if it was found to affect a vital part of their operation management.

**Note: This case is overturned by *Canadian Western Bank v Alberta*.**

## Canadian Western bank v Alberta, 2007 SCC – Modern Conception of IJI, Standard of Impairment

**This case is the genesis of cooperative federalism.**

**Facts:** Banking falls under s. 91(15). The insurance industry falls under s. 92(13) property and civil rights. At the time of the case, banks were not authorized to sell insurance. Parliament amended federal banking laws to allow banks to promote, but not actually sell creditor insurance. Banks began to promote insurance, and Alberta required the banks to comply with provincial insurance regulations. The banks (federally regulated undertakings) invoked IJI and claimed that the provincial regulations did not apply to them.

**Issue:** Are the provincial insurance regulations applicable to federally regulated banks?

**Held:** Yes, consumer protection requirements in Alberta’s insurance laws apply to insurance promotion by banks

**Binnie & LeBel JJ (majority):**

Basis & justification for IJI:

* The doctrine is rooted in reference to “exclusivity” throughout ss. 91 and 92 if the authority to be granted under the heads of powers are to be truly exclusive, they cannot be invaded by the other order of government
* IJI is consistent with the principle of federalism (no explanation offered)

Scope of IJI should be limited:

* It is inconsistent with the flexible, cooperative federalism that the courts should promote in DOP cases a court should favour where possible the ordinary operation of statutes enacted by both governments
* Excessive reliance on IJI would create uncertainty because it requires courts to define the “core” of heads of powers
* IJI creates legal vacuums despite the absence of law enacted at one level of government, the laws enacted by the other level cannot have even incidental effects on the “core” jurisdiction
* It creates an unintentional centralizing tendency by protecting federal heads of power from incidental intrusion by provinces

Restricts scope of IJI in 3 ways:

1. Threshold raised from “affects” to “impairs”
   1. The law as it stood prior to *Bell #1* better reflected our federal scheme
   2. It is not enough for the provincial legislation to simply “affect” the federal core.
   3. “Affects” does not imply any adverse consequences, whereas “impairs” does
2. Restricted to situations covered by precedent
   1. Suggests the doctrine should not be expanded to cover new contexts – it should only be applied in areas where it has been applied in the past
   2. Wright: this has not always been followed – seems to be more of a preference rather than a restriction.
3. Consider IJI after federal paramountcy
   1. EXCEPT in cases where there is a precedent applying IJI; if there is, apply IJI before federal paramountcy

Standard of Impairment

* Impairment can arise in 2 different ways”

1. If application of the law would “impair” the basic, minimum, unassailable core of a legislative power granted to the other order of government
   1. Identify if the law impacts “basic, minimum, unassailable core”
      1. This is the minimum content necessary to make the grant of the legislative power effective for its intended purpose
   2. Determine if there is an impairment of this core
      1. Must be an adverse consequence of some sort

OR

1. If application of the law would “impair” a vital or essential part of an undertaking constituted by it. Two requirements here:
   1. Identify if impacts part of vital or essential (aka absolutely indispensable) part of undertaking.
   2. Determine if there is an impairment of this part
      1. Must be an adverse consequence of some sort

Application to case:

* Banks = federally regulated undertaking

Step 1: whether application of the Alberta consumer protection law to the banks’ promotion of insurance impacts a “vital or essential” part of the banks?

* Focus must be on whether the law impacts a part of the banks’ operations that make them the object of federal regulation – their *banking* operations
* No. The promotion of insurance is NOT a vital or essential part of the *banking* operations of the banks. It is too far removed
* So doctrine of IJI does not apply to immunize federal banks from Alberta’s insurance laws.

**Wright:** Note that the IJI doctrine is said to protect federal heads of power, but in practice it is usually used to protect federal undertakings or corporations.

**Note:** This case clearly limits the scope of IJI. It is generally agreed that this case was rightly decided.

## Quebec v COPA, 2010 SCC

**Facts:** Two residents of Quebec constructed an airstrip on their land and registered it with the federal Minister of Transport, making it subject to federal standards. The land was designated as agricultural land, and s. 26 of Quebec’s *Act respecting the preservation of agricultural land and agricultural activities* prohibited the use of land for any reason other any agriculture. A provincial agriculture protection Commission ordered the residents to demolish the airstrip. The residents challenged the order on the ground that s. 26 of the *Act* was ultra vires, or alternatively inapplicable insofar as it affected the location of aerodromes.

**Issue:** Is s. 26 of the *Act* applicable?

**Held:** No, the provincial land-use law is inapplicable to the extent that it prohibits aerodromes in agricultural zones

**McLachlin CJ (majority):**

Step 1: does the law trench on the protected core of federal competence?

* The core of a federal power is the authority that is absolutely necessary to enable Parliament to achieve the purpose for which exclusive legislative jurisdiction was conferred
* Yes. Precedent has repeatedly and consistently held that the location of aerodromes likes within the core of the federal aeronautics power
  + Wright: the cases don’t actually support this statement. If we took *Western Bank* seriously, IJI should not apply to this case because there is no precedent.
  + **Note:** how McLachlin frames the first part of the test no reference to “vital or essential”

Step 2: If so, is the effect on the exercise of the competence “sufficiently serious” to invoke IJI?

* The proper test is impairment = an impact that seriously or significantly trammels the federal power
* Here, the application of the provincial law would impair the federal power because parliament would be forced to legislate if it wanted to override the provincial law

**Dissent (Deschamps & LeBel JJ):** Rejects majority’s analysis that the focus of IJI is protecting federal legislative competency in the abstract. The focus should be on the impact of the activity itself, not parliament’s power. When looking at the impact of the activity, we see that land reserved for agriculture use ~ only 4% of Quebec’s territory. There is no evidence of impairment.

**Takeaway:** This case firmly places the focus of IJI on protecting federal legislative power in the abstract sense. Saying that anything that narrows parliament’s legislative options constitutes an impairment under IJI significantly **broadens the application of IJI**.

A consequence of this expansion of IJI is that it **protects federal inaction**. Even where the parliament has not regulated in an area, the provincial government is not able to enact legislation. This is **completely contradictory** to the court’s concern about legislative vacuums in *Western Bank*

Operability

* This argument seeks to limit the operability of provincial statutes
* In this case, there is a valid federal law and a valid provincial law, but they are overlapping in some context.
* The question then becomes: is there a conflict?
* If there is a conflict, the provincial law becomes **inoperative** (operation is suspended, but only for as long as the conflict exists)
* Operability arguments can only be made against provincial laws

The doctrine used to resolve operability arguments:

1. Federal Paramounty Doctrine

### Federal Paramountcy

Paramountcy provides a mechanism for dealing with overlaps between federal and provincial laws.

* The doctrine of federal legislative paramountcy dictates that where there is an inconsistency between **validly** enacted but overlapping provincial and federal legislation, the provincial legislation is **inoperative** to the extent of the inconsistency (*Rothmans, Benson & Hedges*)
* Only provincial laws can be rendered inoperative. Federal laws are never declared inoperative (the exception is s. 94A which actually makes provincial law paramount in the case of a conflict)
* If a conflict is found to exist by virtue of the application of the paramountcy rule, the provincial law is not declared invalid. Its operation is merely **suspended to the extent that, and for so long as**, it conflicts with federal legislation
* If the federal legislation it conflicts with is repealed, the conflict disappears and the provincial law may once again be applied

### What Constitutes a “Conflict”?

Note that the choice between a narrow and broad conception of “conflict” has profound implications for the balance of powers between the federal and provincial governments.

1. Impossibility of dual compliance (*Multiple Access, BMO v Hall, M&D Farm v MACC, Rothmans, Benson & Hedges, Maloney*)

* Asks whether it is impossible for the people who are subject to the federal and provincial enactments in question to comply with both. Note: the focus is on the people that are actually subject to both laws.
* Involves an actual conflict in operation as where one enactment says “yes” and the other says “no” – compliance with one is defiance of the other (*Multiple Access*)
* Impossible to comply simultaneously (*Rothmans, Benson & Hedges*)
* Expanded in *Maloney* – “substantive”, “contextual” approach not limited to where it is impossible to comply with both laws (*Maloney*)

2. Impossibility of giving dual effect (*M&D Farms v MACC, Rothmans, Benson & Hedges*)

* Asks whether those that are actually enforcing federal or provincial law (usually judges) can give effect to both laws (*M&D Farms v MACC*)
* Treated as a sub-category of IODC (*Rothmans, Benson & Hedges*)
* Questionable whether this is still a test because it was not mentioned in *Maloney* – could signal abandonment.

3. Frustration of federal purpose (*BMO v Hall* – kind of; *Rothmans, Benson & Hedges, Quebec v COPA, Maloney*)

* Asks whether permitting the provincial enactment to operate in the circumstances in question would serve to frustrate the purpose underlying the federal enactment
* Seemingly adopted by La Forest but he framed it under IODC, so unsure if this is an independent test (*Bank of Montreal v Hall*)
* Framed as the overarching test (*Rothmans, Benson & Hedges*)
* Test:

1. Must determine the purpose of the federal law (*Quebec v COPA*)
2. Must determine whether the operation of the provincial law would result in a conflict (*Quebec v COPA*)

* Standard for invalidating on this basis is high (*Quebec v COPA*)
* *Maloney* somewhat decreases the importance of this test by increasing scope of IODC

4. Federal intention to cover the field (*BMO v Hall –* sort of; *Rothmans, Benson & Hedges*)

* Asks whether parliament, by legislating in a particular area, has enacted a code that was intended to be exhaustive and thus by implication was intended to oust the operation of any provincial laws
* Some suggestion of test in reasoning re federal purpose (*Bank of Montreal v Hall*)
* This is valid as a basis for conflict ONLY where there is “very clear statutory language” that Parliament’s purpose is to cover the field (*Rothmans, Benson & Hedges*)

5. Duplication?

* Asks whether the provincial legislation duplicates the federal legislation (the polar opposite of the impossibility of dual compliance standard)
* **Expressly rejected**(*Multiple Access*)

## Multiple Access v McCutcheon, 1982 SCC – Duplication does NOT cause conflict

**Facts:** The Ontario *Securities Act* prohibited insider trading in shares trading on the TSX. The *Canada Corporations Act* had almost identical provisions, applicable to corporations incorporated under federal law. A shareholder brought an action against traders respondents of Multiple Access Inc. for insider trading under the Ontario *Securities Act*. The respondents, the insider traders, argued the Ontario statute could not apply to their case because the regulation of trading in shares of federally incorporated companies falls within exclusive federal jurisdiction. In the alternative, they relied on the doctrine of paramountcy to assert that the Ontario provisions were rendered inoperative. Note: the two pieces of legislation regulated insider trading in virtually identical ways.

**Issue:** Is the Ontario *Securities Act* rendered inoperative to the extent that it overlaps with the virtually identical provisions of the federal *Canada Corporations Act*?

**Held:** No, the Ontario *Securities Act* is not inoperative.

**Ratio:** Mere duplication without actual conflict or contradiction is not sufficient to invoke the doctrine of paramountcy and render otherwise valid provincial legislation inoperative.

**Dickson J (majority):**

* Rejects duplication test for conflict
  + There is no conflict in the case of merely duplicative provisions since it does not matter which statute is applied; the legislative purpose of parliament will be fulfilled regardless of which statute is invoked. Duplication is in fact the “ultimate harmony”
* Affirms impossibility of dual compliance test
  + This involves an actual conflict in operation as where one enactment says “yes” and the other says “no” – compliance with one is defiance of the other.
  + Dickson suggests this is the ONLY definition of conflict
  + Note: this if a very narrow understanding of conflict

Application to case:

* There is no IODC here. The federal and provincial insider trading laws were virtually identical. Thus it is possible to comply with both. The legislative objective of both federal and provincial laws would be fulfilled by applying either law.
* Any inefficiency that results from overlapping laws is the price we have to pay for having a federal system
* Any concerns about double recovery can be dealt with by the courts

## BMO v Hall, 1990 SCC – Frustration of Federal Purpose test for conflict?

**Facts:** Hall took out a loan from the bank and in return granted the bank a security interest in a piece of farm machinery, pursuant to the *Bank Act*. Hall defaulted on his loan and the bank, pursuant to the *Bank Act*, seized the machinery and brought an action to enforce its real property mortgage loan agreement. The bank did not notify Hall of their intention to seize, as required by the provincial *Limitation of Civil Rights Act*. The bank argued the provincial *Act* was inoperative.

**Issue:** Is there a conflict between the federal *Bank Act* and the provincial *Limitation of Civil Rights Act*?

**Held:** Yes. The provincial law requiring notice before foreclosure proceedings is inoperative.

**La Forest J (unanimous):**

* Impossibility of dual compliance?
  + Takes Dickson J’s framing of this type of conflict from *Multiple Access* totally out of context to significantly widen this category of conflict.
  + Frames issue as whether there is an actual conflict in operation between the federal and provincial laws in the sense that the legislative purpose of Parliament stands to be displaced in the event that the actors are forced to comply with the provincial legislation.
    - **Wright:** Dickson J was not talking about purpose at all in his framing. This framing shifts the concern away from compliance and towards considering the purpose of the federal law.
    - It is not impossible to comply with both laws here. They aren’t telling the bank to do conflicting things.

Application to case:

* The federal purpose of the *Bank Act* is frustrated by the provincial legislation. The *Bank Act* provides that a lender may, on default of his borrower, seize his security, whereas the *Limitations of Civil Rights Act* forbids a creditor from immediately repossessing the secured article. To require the bank to defer to provincial legislation is to displace the legislative intent of parliament

## M & D Farm v MACC, 1999 SCC – Impossibility of giving dual effect test

**Facts:** Manitoba’s Agricultural Credit Corporation (MACC) gave mortgage to Plaintiff. P defaulted on mortgage and MACC moved to foreclose. P had obtained a stay of proceedings under federal law. The purpose of the stay was to provide P and MACC with time to work out a settlement. While the stay was in effect, MACC obtained an order under provincial law that allowed them to foreclose. MACC did nothing further until the federal stay expired (i.e. refused to settle), and then foreclosed on P’s farm.

**Issue:** Is the foreclosure a nullity because the provincial law is inoperative?

**Held:** Yes. The provincial order is null because the provincial law is inoperative. Foreclosure proceedings under the order were null.

**Binnie J:**

* Provincial law inoperative because a court could not simultaneously give effect to a stay of proceedings issued under a federal law and a provincial law that allowed proceedings to be initiated
  + **Wright:** But MACC could have complied with both laws by waiting until the federal stay had expired before seeking the provincial order
  + Binnie J flips the impossibility of dual compliance test by focusing on those who have to **enforce** the law, rather than those subject to the law.

## Rothmans, Benson & Hedges v Saskatchewan, 2005 SCC – Frustration of federal purpose test

**Facts:** Post *RJR-MacDonald*, the federal government enacted new legislation prohibiting the promotion of tobacco products. S. 30 of the federal *Tobacco Act* carved out exceptions for displaying tobacco products in retail locations. S. 6 of the provincial *Tobacco Control Act* then came into force and bans all advertising, display and promotion of tobacco or tobacco products in any premises in which persons under 18 years of age are permitted. Tobacco companies tried to use the constitution as a shield to not have to follow the more restrictive provincial laws.

**Issue:** Whether s. 6 of Saskatchewan’s *Tobacco Control Act* is rendered inoperative because of conflicts with s. 30 of the federal *Tobacco Act*?

**Held:** No, the provincial law is not inoperative. There is no conflict here.

**Major J (unanimous):** There are two types of conflict sufficient to trigger the paramountcy doctrine:

1. IODC if it is impossible to comply simultaneously
2. Frustration of federal purpose provincial legislation displaces or frustrates parliament’s legislative purpose
   1. Frustration of federal purpose is framed as the overarching test; IODC framed as an example of it

Rejects **federal intention to cover the field** as a basis for conflict it is inappropriate to impute this intent to Parliament to cover the field “in the absence of very clear statutory language”

Application to case:

* IODC?
  + No, the federal law did not create a positive entitlement to display tobacco products, it just carved out exceptions from a general ban, and so it is possible to comply with both laws
  + It was also possible to give **effect** to both laws, so no impossibility of giving dual effect
* Frustration of federal purpose?
  + No. The provincial law did not frustrate, and in fact furthered, the objectives of the federal law

Look to other order of government – in this case fed government intervened saying same health related purpose no frustration, we’re good. Not determinative but cooperative federalism.

## Quebec v COPA, 2010 SCC – Test for frustration of federal purpose

**Facts:** Two residents of Quebec constructed an airstrip on their land and registered it with the federal Minister of Transport, making it subject to federal standards. The land was designated as agricultural land, and s. 26 of Quebec’s *Act respecting the preservation of agricultural land and agricultural activities* prohibited the use of land for any reason other any agriculture. A provincial agriculture protection Commission ordered the residents to demolish the airstrip. The residents challenged the order on the ground that s. 26 of the *Act* was ultra vires, or alternatively inapplicable insofar as it affected the location of aerodromes.

**McLachlin CJ:** Sets out two-part test for frustration of federal purpose test for conflict: (burden on party seeking to invoke federal paramountcy)

1. Must determine the purpose of the federal law
2. Must determine whether the operation of the provincial law would result in a conflict

The standard for rendering provincial legislation inoperative on the basis of frustration of federal purpose is high.

* It is not enough if a permissive federal law is merely restricted by provincial law’s operation
* I.e. if a federal law merely allows a party to do something, but does not require it, and a provincial law restricts the federal permission, there is no conflict.

## Alberta (Attorney General) v Maloney, 2015 SCC

**Facts:** Respondent caused a car accident while he was driving uninsured. The province of Alberta compensated the injured individual and sought to recover the amount of the compensation from the respondent. The respondent did not pay the province, and claimed bankruptcy under the federal *Bankruptcy and Insolvency Act* and was released from all debts. Under Alberta’s *Traffic Safety Act*, Alberta suspended the respondent’s vehicle permit and driver’s licence. Respondent contested the suspension, arguing that the *TSA* conflicted with the *BIA* in that it frustrated the purpose of bankruptcy.

**Issue:** Is there a conflict between the provincial law and federal law such that the doctrine of federal paramountcy applies to render the provincial law inoperative?

**Held:** The provincial law is inoperative where it is used to enforce a debt discharged in bankruptcy federally.

**Gascon J (majority):** On the basis of the frustration of federal purpose test, the provincial legislation at issue conflicts with the federal legislation.

* Courts should adopt a substantive, contextual approach in determining whether there is an impossibility of dual compliance
  + IODC is NOT limited to where it is impossible to comply with both laws
* A conflict arises in one of two situations:
  + There is an operation conflict because it is impossible to comply with both laws, or
  + Although it is possible to comply with both laws, the operation of the provincial law frustrates the purpose of the federal enactment
* Conflict will not arise if provincial law is more restrictive than the other unless the federal purpose of the federal law provides for a positive entitlement that the provincial law restricts
* The burden of the proof rests on the party alleging the conflict. Discharging the burden is not easy as the standard is high
* Finds IODC here – it is impossible for the respondent to simultaneously be liable to pay the judgement debt under the provincial scheme and be released from that same claim pursuant to the federal scheme.
  + But dual compliance is technically possible – he doesn’t have to pay the province, only has to pay if he wants his licence back.
* Note: seems to expand the application of the IODC test

**Cote J (dissent):** Disagrees with majority’s IODC analysis – says it conflates the IODC test and the frustration of federal purpose test. An IODC exists only if there is an “express condition” that results directly from the wording of the two provisions. Any more substantive frustration should be considered under the frustration of federal purpose test.

Remarks – suggests that paramountcy allows for dialogue, that allows for safeguard of provincial power and this is consistent with cooperative federalism.

Interpreting Heads of Powers

Recall the Pith and Substance analysis:

1. Characterize the law
2. Allocate the law as characterized to the “class of subjects” in ss. 91 and 92
   1. **Interpretation of the relevant head of power is done at step 2**

POGG Power

**Federal Residuary Power**

* Resurgence of national concern doctrine – where federal power over provincial for matters that deal with national stuff.
* Expansive reading of the doctrine
* Aeronautics with federal government Johannesson *v Rural Municipality of West St Paul [1952]*
* Radio reference – suggested that s. 91 also authorizes federal legislation in relation to subject matters not explicitly assigned to either levels of government,
* Law of contract = provincial
* Power to conserve national capital also belongs to federal government (Munro)

**s. 91** of the *Constitution Act, 1867*

It shall be lawful for [the federal Parliament] to make Laws for the **Peace, Order, and good Government** of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces

* The POGG Power is known as the residuary power
* The language of this section makes it clear that any matter that does not come within a provincial head of power must come within a federal head of power

### Three Branches of POGG:

1. Gap Branch (residuary power)
   1. Allows for federal legislation in relation to matters that don’t fall under the enumerated powers under ss. 91 and 92
2. Emergency Branch
   1. Allows for federal legislation in relation to national emergencies
3. National Concern Branch
   1. Allows for federal legislation in situations of national concern – things that go beyond provincial concerns
   2. This has the largest potential scope so it has often been the most controversial

**Exhaustiveness:** this principle holds that the totality of legislative power is distributed by the division of powers in the *Constitution Act, 1867*. It follows from it that a law that is not competent to one order of government must be able to be enacted by the other order of government. Note: questions have been raised about whether this principle should be modified to some extent to accommodate Indigenous claims of self-government.

### POGG Disputes

1. POGG and the s. 91 heads of power

* View 1: POGG is a general, not a residuary power
  + POGG captures the totality of federal power, and the heads listed are merely examples of what is captured by POGG
  + So the heads of power listed in s. 91 have no individual power – they don’t do anything that the opening phrase of POGG doesn’t already do
  + This view favoured by those who adopt a centralist reading of the Constitution (giving more power to federal government)
* View 2: POGG is a residuary, not a general power
  + Favoured by defenders of provincial power
  + This view restrains federal power

2. POGG and the interpretation of the division of powers

* View 1: POGG supports a centralist reading of ss. 91 & 92
* View 2: It doesn’t support a centralist reading
  + The extent and importance of POGG power depends on how broadly you interpret s. 92.
  + S. 92 has two heads of power (property & civil rights, matters of a private nature) that are very broad
* View 3: The evidence is mixed

### POGG History

National Concern Branch first articulated by Lord Watson, Privy Council, 1896 in a case that has become known as the Local Prohibition Case

* “Their Lordships do not doubt that some matters, in their origin local and provincial, might attain such dimensions as to affect the body politic of the Dominion, and to justify the Canadian Parliament in passing laws for their regulation or abolition in the interest of the Dominion. But great caution must be observed...” The *Local Prohibition Case* (1896, Privy Council)
  + idea here is that certain matters can be initially understood as matters that a re provincial or local in nature but by virtue in some kind of change in society, that the matter might come to attain national dimensions. It might become a matter of national concern and where that happens federal jurisdiction springs up under National Concern branch
  + Note: Lord Watson was pro-province. Lord Watson has become known as one of the wicked stepfather of Confederation because he is one of the two members of the Privy Council most responsible for distorting the meaning of the Constitution Act. He have more powers to the provinces at the expense of the framers

National Concern Branch then largely ignored by Privy Council until post WW2. Focus was on the Emergency Branch. He did not deny that the National Concern branch existed, but what he did was that he interpreted provincial powers so broadly that it was just not necessary to involve the National Concern doctrine. His suggestion that only an emergency would justify the exercise of the federal POGG power led to some strange results to what are generally agreed to be contortions of legal reasoning. The dominant influence was Viscount Haldane, and he framed the branch narrowly.

* Alcohol use was an evil “so great and so general that at least for the period it was a menace to the national life of Canada so serious and so pressing that the National Parliament was called on to intervene to protect the nation from disaster”: *Toronto Electric Commissioners v. Snider* (1925, Privy Council).
* found that federal jurisdiction over liquor use could be justified by Emergency Branch
* history now suggests is that this reflects this predisposition of Viscount Haldane not to breathe life into the National Concern branch of the federal POGG power and an attempt to fall back on the urgency power as a justification for federal intervention
* his view is that the only emergency that was sufficient to trigger the POGG power that persisted until WWII and this led to a series of decisions int he midst of the Great Depression where the Privy Council declared unconstitutional Canada’s equivalent of the New Deal legislation which was attempted to counteract the effects of the Great Depression.

National Concern Branch resuscitated by Viscount Simon in *Canada Temperance Foundation* case (1946, PC)

* this case sets out a test for the National Concern branch
* “If the subject matter of the legislation goes beyond local or provincial concern or interests and must from its inherent nature be the concern of the Dominion as a whole, then it will fall within the competence of parliament as a matter affecting the peace, order and good government of Canada, though it may in another aspect touch on matters specially reserved to the provincial legislatures.”

## 1. Gap Branch

* Operates to fill in gaps in the division of powers, to truly a “residuary power”
* allows for legislation in relation to subjects that do not fall in the enumerated list of powers in either s. 91 or s. 92
* very few gaps have actually been found in our division of powers because most things fall into property and civil rights because it is so broadly interpreted in the early years and this has set the precedent
* Examples are rare because s. 92(13) property and civil rights has been interpreted so broadly that residuary power is not often needed
* Examples:
  + Incorporation of companies with federal objectives (*Citizens Insurance v Parsons*)
    - s. 92(11) gives provinces the law to make laws for provincially legislated companies but there is no power which allows the federal government to incorporate federally incorporated government so {privy Council held that the power in the federal government to incorporate powers federally fell within the gap branch of the POGG power
  + Offshore minerals outside provincial boundaries (*The Offshore Mineral Rights of BC Reference*, SCC)
    - Seabed of Canada that falls outside of provincial jurisdiction but not within international waters has been held to fall within federal jurisdictions and so offshore minerals taken from that have been a controversy
    - in this case the SCC held that offshore minerals taken from that sea bed in federal waters fall within federal jurisdiction under POGG

## 2. Emergency Branch

Allows for federal legislation to rectify an existing national emergency (an emergency that is already occurring) and prevent potential national emergencies (emergency does not have to already exit, Parliament can legislate to prevent a future national emergency) (*Canada Temperance Foundation*, 1946 PC).

* when emergency branch is triggered,t he federal government **temporarily grants power** over a matter that would usually fall to the province to the federal government – so the powers in ss. 91 and 92 are temporarily suspended for the time of the emergency and only for the powers that are necessary
  + once emergency branch is properly triggered, Parliament can enact legislation on any subject that would otherwise fall within provincial legislation as long as emergency exists
* Key limit: emergency branch has only been used to support **temporary laws**, it has never been used to sustain permanent legislation (e.g. *Reference Re Anti-Inflation*)
  + courts have only ever used it or suggested it can be used to justify temporary laws

### ANALYSIS of National Emergency Branch:

Must consider two tests: (*Reference Re Anti-Inflation*)

1. Rational basis standard – based on Laskin J’s opinion for plurality in *Reference Re-Anti Inflation*
   1. As there is a presumption of constitutionality, it is presumed that laws are enacted on a rational basis. This means the **burden of proof is on the party opposing the legislation**. This burden will be satisfied where the party opposing the legislation shows (*Reference Re Anti-Inflation*):
      1. Parliament lacked a rational basis for concluding the law was necessary given the emergency (*Reference Re Anti-Inflation*); **OR**
      2. The law is not rationally connected to alleviating the emergency claimed to exist (*Reference Re Anti-Inflation*)
2. There must be clear evidence of emergency – based on Ritchie J’s opinion for the plurality in *Reference Re Anti-Inflation*

What constitutes an emergency?

* War, famine, insurrection
* Not the Great Depression (part of the reasoning in the “New Deal” cases)

## Reference Re Anti-Inflation Act, 1976 SCC – Scope of Emergency Branch

**Facts:** The federal *Anti-Inflation Act* established a system of price, profit and income controls that applied to certain private sector firms and the federal public sector. This was an attempt to address rising inflation in the 1970’s. It could also apply to the public sector of each province but only if the federal and provincial governments made an agreement that it would apply and opted into the legislation, there was an opt in mechanism. If they fell within the scope of this Act, all of their activities within that province were subject to the limits that the Act posed on wages, prices and profits. Program was administered bye federal Tribunals and federal officials and was made explicitly temporary, it would expire at the end of 1978 if it was not renewed. Governor in Council directed a reference to the SCC to determine whether the Act was ultra vires and whether the Ontario agreement, purporting to make the Act applicable to the Ontario public sector, was valid. It was public sector unions that were opposed to the law ad they argued that it was contrary to division of powers because it regulated matters that fell within provincial jursidiction. By the time the case was being argued, many collective agreements had been adjusted under the Act so to resolve any doubts about the law, federal Cabinet referred it straight to the SCC for a Reference.

Preamble of the act: “Whereas Parliament recognizes that inflation in Canada at current levels is contrary to the interests of all Canadians and that the containment and reduction of inflation has become a matter of **serious national concern**;

And whereas to accomplish such contained and reduction of inflation it is necessary to restrain profit margins, prices, dividends and compensation;…”

**Issue:** Is this legislation laid under the POGG power?

**Held:** Law sustained under emergency branch of POGG. Laskin +6 held the Act is valid under the emergency branch. Beetz J +2 held it could not be sustained under the national concern branch.

**Federal government’s argument:**

1. Main argument: Inflation goes beyond the local/provincial scope, so Act is permissible under the national concern branch.

* court divides on this argument

(2) Inflation is an economic crisis, so Act is permissible under the emergency branch.

**Laskin CJ (plurality of 4 on emergency point):**

* Sustains the legislation under the emergency branch of the POGG power
* says the court should start with emergency argument even thought it is the government’s secondary argument because it is the narrower argument. He then turns around and proceeds to adopt a line of reasoning which suggests a broad scope for federal jurisdiction under the emergency branch
* The Court “would be unjustified in concluding, on all the material before it, that Parliament did not have a **rational basis** for regarding the *Anti-Inflation Act* as a measure that was **temporarily** necessary to meet in a situation of economic crisis imperilling the well-being of Canada….”
  + Note: reference to **temporariness** of the legislation. This is an important consideration for him in finding that this particular law is valid.
  + it suggests that the standard to be applied ind determining whether federal government is justified in invoking emergency power is a rational basis standard which would suggest that an emergency does not necessarily have to exist, that the federal parliament only has to have a rational belief that an emergency actually exists
* The Courts apply a **rational basis standard** in determining whether the federal government was justified in concluding that the law was necessary given the emergency
* As there is a presumption of constitutionality, the **party seeking to have the legislation struck down (opponents)** has the **burden of proving an** **absence of a rational basis**.
  + this flips the burden here. Parliament does not have to say there is a rational basis, the opponents have to say that they did not have a rational basis
  + the assumption is that an emergency will be presumed in the absence of arguments form the opposed that it is not
* This burden will be satisfied where the party opposing the legislation shows:
  + Parliament lacked a rational basis for concluding the law was necessary given the emergency; OR
  + The law is not rationally connected to alleviating the emergency claimed to exist. Show that the legislation does not relate to the national emergency
* This is a much more deferential standard of review than the Privy Council had taken in national emergency cases.
* Deferential approach is manifest in application to case:
  + Treatment of evidence brought forward was deferential. References often do not happen and do not involve a live argument between the parties but here the court allowed the parties to bring forward evidence
    - Little weight given to evidence of 39 of Canada’s leading economists denying that emergency existed. Their brief suggested that there was not an emergency at the time the legislation was drafted and enacted, that eh problem was not as significant as Parliament was claiming but that even if it was it was not anymore. Laskin swats this and says that inflation exceeded 10% in 1974 and that was enough for him to conclude that there was emergency.
    - ssp
  + Dismissed suggestion by Beetz J that the Act itself does not support, and actually contradicts, emergency
    - Beetz points to language of the Preamble of Act that uses “serious national concern” and says that this means that Parliament was intending to operate under the national concern branch, not emergency branch. This suggests that the federal Parliament proceeds don't he basis of its national concern jurisdiction and not on the basis of its emergency power and to Beetz this was significant due to the unique nature and consequences of the emergency branch.
    - Laskin holds the legislation doesn’t need to use the word “emergency”, the language used just needs to be sufficiently indicative
      * “Serious national concern” is sufficiently indicative

**Ritchie +2 others (plurality on emergency point)**

* Does not adopt Laskin’s rational basis standard
* Says there must be clear evidence of emergency
* he joins in the result with Laskin but he does not have the same reasoning
* he says that Parliament needs clear evidence of an emergency in order to invoke their emergency branch

**Beetz J + 1 (dissent on emergency point):**

* he rejects both federal arguments for the law: both the national concern argument (writing with the majority on this however) but also rejects the emergency argument (here he is in the dissent however)
* Legislation cannot be sustained on either emergency or national concern branch
  + For national concern, only done in cases where a new matter was not an aggregate but had a degree of unity that made it indivisible, an identity which made it distinct from provincial matters and a sufficient consistence to retain the bounds of form.
* Impact of invoking emergency power is significant – it temporarily amends the Constitution because it gives the federal government the power to supersede provincial powers. It temporarily gives the federal government power it otherwise would not have which is a temporary amendment to the Constitution. It could do this in any field provided that an emergency has arisen.
* There is no need to use the word “emergency”, but must invoke power in “explicit terms”, through an “unmistakable signal” that Parliament is relying on the power. The reason for this is because the politically accountable branch of government could then be held to account to the general public
* The language of “serious national concern” is insufficient to signal use of emergency branch.

**Wright:** When doing a national emergency branch analysis on exam, must consider both Laskin’s rational basis standard and Ritchie’s standard of clear evidence of emergency, because both were plurality, not majority.

**Emergency legislation after** anti-inflation reference. This is permanent legislation but it is temporarily engaged:

* Defines national emergency as an urgent and critical situation of temporary nature that
  + Seriously endangers the lives health or safety of Canadians is of such proportions or nature as to exceed capacity or authority of a province to deal with it.
  + Seriously threatens the ability of Government of Canada to preserve the sovereignty, security and territorial integrity of Canada
  + And that cannot be dealt with under any other laws of Canada.
* Includes public welfare, public order, international and war emergencies

## 3. National Concern Branch

Whereas the emergency branch temporarily permits federal regulation, the national concern branch **permanently** permits federal legislation (*R v Crown Zellerbach*)

Foundation:

* “... the true test must be found in the real subject matter of the legislation: if it is such that it **goes beyond local or provincial concern or interests and must from its inherent nature be the concern of the Dominion as a whole** (as, for example, in the Aeronautics Case ...), then it will fall within the competence of the Dominion Parliament as a matter affecting the peace, order and good government of Canada, though it may in another aspect touch on matters specially reserved to the provincial legislatures” (***Canada Temperance Foundation*, 1946, PC**)

**National Concern Branch applies to:**

1. New matters which did not exist at Confederation; AND (***R v Crown Zellerbach***)
2. Matters that, although originally of a local and private nature in a province, and so subject to provincial power, have since become matters of national concern, engaging federal power (in the absence of an emergency) (*R v Crown Zellerbach*)

**To qualify as a matter of national concern under either a) or b), the matter must pass both:** (*R v Crown Zellerbach*)

1. **The cohesiveness test:** matter must have a “singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern”; AND
   1. At this stage, it is relevant to consider what would be the effect on extra-provincial interests of a provincial failure to deal effectively with the intra-provincial aspects of the matter (aka the **provincial inability test**). This helps determine whether the matter has the requisite cohesiveness (“singleness, distinctiveness and indivisibility”).
2. **The provincial impact test:** matter must have a “scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of legislative power under the Constitution”

The following have been held to qualify under the national concern branch of the POGG power:

* Aeronautics (*Johannesson v The Rural Municipality of West St Paul, 1952, SCC*)
* Radio (*Radio Reference, 1932, PC*)
* Nuclear energy (*Ontario Hydro, 1993, SCC*)
* National capital region (*Munro v National Capital Commission, 1966, SCC*)
* Marine pollution (*R v Crown Zellerbach, 1988, SCC*)

The following have been held **NOT** to qualify under the national concern branch of the POGG power:

* Inflation – falls under emergency branch of POGG (*Anti-Inflation Reference, 1976, SCC*)
* Health (*Schneider*, 1982 SCC)
* Competition (*General Motors*, 1989 SCC)
* Environment (*Friends of the Oldman River*, 1992 SCC)
* Toxic substances (dissent in *Hydro-Quebec*, 1997 SCC)

## Johannesson v Rural Municipality of West St Paul, 1952 SCC

* Aeronautics qualifies as a matter of national concern branch of POGG
* Case involved a challenge to a municipal by-law controlling the location of airports
* Held that the maintenance and extension of transporting people and resources between provinces, particularly to the north, is essential to the opening up of the country and the development of the resources of the nation

**Problem with this case:** Case hints at but failed to identify the criteria used to determine when something falls under the national concern doctrine. It is hard to reconcile with earlier decisions – it is not enough to be a matter of federal concern to fall under the national concern branch.

## Munro v National Capital Commission, 1966 SCC

* The National Capital Region falls under the national concern branch of POGG
* Munro’s property was expropriated under the *National Capital Act* in the course of establishing a Green Belt outside of Ottawa. This expropriation was part of a master plan for the development of the National Capital Region around Ottawa.

**Problem with this case:** Case hints at but failed to identify the criteria used to determine when something falls under the national concern doctrine. It is hard to reconcile with earlier decisions – it is not enough to be a matter of federal concern to fall under the national concern branch.

## Jones v AG New Brunswick, 1975 SCC

* At issue was the constitutionality of the federal *Official Languages Act*, which provided for the equal status of French and English in federal institutions.
* Court upheld the legislation on the basis that federal institutions are clearly beyond provincial reach and as such, fall within the opening words of s. 91 because “of the purely residuary character of the legislative power thereby conferred.”

## R v Crown Zellerbach Canada Ltd, 1988 SCC

**Facts:** At issue was the validity of s. 4(1) of the *Ocean Dumping Control Act*, which prohibits the dumping of any substance at sea except in accordance with the terms and conditions of a permit. Sea is defined as including internal waters of Canada within provincial jurisdiction other than fresh waters. The respondent carried on logging operations on Vancouver Island. Respondent had a permit to dump waste at a site, but was dredging and dumping waste at a different location within the provincial water boundaries of BC. Respondent was charged under s. 13(1)(c) with violating s. 4(1) of the *Act*. IT had a permit to dump under the act but the permit did not cover this particular site where it engaged in its dumping. There was no evidence that this wood waste had floated outside of provincial waters into federal or international waters. Federal government argues that prevention of marine pollution is a matter of national concern that falls within the federal POGG power.

**Issue:** Whether Parliament has the power to regulate the dumping of substances in provincial marine waters.

**Held:** Yes, marine pollution inside provincial boundaries is covered by the national concern branch of POGG

**Le Dain J (majority):** National Concern Branch of POGG:

* 1. National concern branch is distinct from the emergency branch.
  + Although both fall under the POGG power, the two are governed by different criteria and authorize different kinds of legislation (i.e. emergency branch authorizes only temporary federal legislation, while national concern branch authorizes permanent federal legislation)
* 2. The national concern branch applies to:
  + New matters which did not exist at Confederation; and
    - particularly applicable in situations where we were dealing with a new matter
    - newness is not a requirement but there is an argument that it helps
  + Matters that, although of a local and private nature in a province, and so subject to provincial power, have since become matters of national concern, engaging federal power (in the absence of emergency)
* 3. To qualify as a matter of national concern, the matter must have both of these features:
  + A “singleness, distinctiveness and indivisibility” that clearly distinguishes it from matters of provincial concern (**cohesiveness test**); AND
    - what is being contemplated here is that something that is potentially provincial is b emoting federal so we would naturally be concerned with the impact on provincial legislation and we reflect that by wanting to make sure that provincial legislation is not swallowed up. They need to be cohesive or self contained
    - the matter just has sufficient cohesiveness, that it has defined boundaries and it needs to be something sufficiently containable on its own terms and it is not a broad topic that can swallow up the whole of provincial legislation.
  + A “scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of legislative power under the Constitution” (**provincial impact test**)
    - here you want to figure out what is the status quo (what is the allocation of jurisdiction now), then what are the implications of that status quo of the argument that this matter is a national concern. Are the implications that this would so upset the abase of power that the court should conclude that this is not a national concern
    - **Note:** an example is inflation. Beetz J (majority on this point) in *Anti-Inflation Reference* held inflation was not sufficiently distinct to satisfy the test for the national concern doctrine. It is too broad and diffuse and has an insufficient degree of unity to make it indivisible.
* 4. In determining whether a matter has a “singleness, distinctiveness and indivisibility” (passes the cohesiveness test), it is relevant to consider what would be the effect on extra-provincial interests of a provincial failure to deal effectively with the intra-provincial aspects of the matter (the **provincial inability/failure test**). This helps determine whether the matter has the requisite cohesiveness from a functional and conceptual point of view.
  + he says that in figuring out whether position 3a is satisfied, you have to apply this provincial inability/failure test which requires us to consider what would be the impact on extra provincial interests (interests outside a particular province) of a failure of that province to deal with the matter effectively. This is supposed to help us determine whether a matter has the requisite cohesiveness for the purpose of proposition 3a.
  + Hogg says that this is the most important thing but Le Dain says only one indicia to consider
* steps 3 & 4 are the test

Application to case:

* Marine pollution is a matter of national concern
* Cohesiveness test: it is sufficiently cohesive
  + Boundary between provincial and federal sea is difficult to divide and this supports sufficient cohesiveness.
  + on the one hand, he says that it is difficult to ascertain the boundary between the territorial sea and the internal waters of the state but then he says that marine pollution has its own characteristics
    - **Wright:** You could argue this works the opposite way. Le Dain then says that marine water has its own characteristics different from fresh water. So his reasoning here is somewhat contradictory.
    - **Things floating into one another.**
* Provincial impact test: satisfied (HOW WAS THIS SATISFIED)
  + marine pollution is an extra provincial and international character
  + this legislation is drafted to only capture salt water marine pollution, not in fresh water which cuts back on the scope of the legislation
* Note Le Dain doesn’t actually consider the provincial inability test. This might suggest that it is really only one factor and is not even necessary to consider it in determining whether a matter falls within national concern branch.

**La Forest + 2 others (dissent):**

* dissent resonated with the themes in Beetz J’s decision in *Anti-Inflation Reference*
* says this was impermissible under national concern
* Marine pollution lacks necessary cohesiveness to be a matter of national concern.
  + Can’t draw a clear line between salt water and fresh water – pollution in one impacts the other. (Note: this is the same reason Le Dain uses to find sufficient cohesiveness)
  + Marine waters are affected by coastal activity and deposits from the air
* Environment doesn’t fall within national concern. Environment is so broad that if it was considered a national concern, it would have grave impacts on provincial power.
* also says provincial impact test is not satisfied either

## Friends of the Oldman River Society v Canada (Minister of Transport), 1992 SCC

**Facts:** Federal *Department of the Environment Act* required all federal departments/agencies to determine whether any proposed projects may potentially give rise to adverse environmental effects. If the proposal could have serious adverse environmental effects, there must be public review by an environmental assessment panel. Alberta proposed to construct a dam to create a storage reservoir. Approval was obtained from the federal Minister of Transport under the *Navigable Waters Protection Act* but the Minister did not subject the project to an environmental assessment. The Oldman River Society brought an action to quash the decision of the Minister of Transport and compel the Minister to comply with the *Department of the Environment Act* regulations.

**La Forest J for the court:** Environmental control, as a subject matter, does not have the requisite distinctiveness to meet the test under the national concern doctrine.

Both federal and provincial have to work together legislating on the parts that pertain to their division of powers.

### Remaining Questions about the National Concern Branch

1. What happens if a matter is found to be a national concern under the POGG power?

* One possibility: exclusive federal jurisdiction
* Another possibility: overlapping jurisdiction
  + Both of these can be supported by the language in *R v Crown Zellerbach*
  + The second would be more consistent with the modern/cooperative federalism paradigm

2. What does provincial inability entail? (Sujit Choudhry’s arguments)

* Negative extra-provincial externalities?
  + There are situations where the provinces make decisions that somehow impact neighbouring provinces or the federal government
* Collective action problems?
  + E.g. interprovincial collective action problems certain regulatory regimes need to be international in scope in order to be effective, but an interprovincial solution is impossible/impractical, such as where provinces are competing with each other (e.g. by having lax environmental regulations – race to the bottom)
* True provincial inability?
  + Provinces are truly incapable of acting, e.g. because of lack of jurisdiction.
  + The first two are not really inability; they are failure. Provinces could have acted, but they didn’t.

Criminal Law Power – s. 91(27)

**S. 91(27)** – “…the Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters”

* From the text of s. 91(27) it seems like all criminal law is a matter of federal jurisdiction
* But, for the most part, the federal Criminal Code is actually enforced by the provinces, not by Parliament
* Decisions to investigate, charge, etc. are made by officials that work for the province. This provincial role comes from s. 92(14) administration of justice in the province.

### ANALYSIS:

In order to be held valid under Parliament’s criminal law power, a law must have: (*Margarine Reference*)

1. A prohibition;
2. Backed by a penalty; and
   1. The paradigmatic example of a criminal law is a free-standing prohibition backed by penalties (*RJR, Hydro-Quebec*)
   2. The further a law strays from this (e.g. with a detailed regulatory or licencing scheme), the more likely it is it will not be valid criminal law (*RJR, Hydro-Quebec, Reference re AHRA*)
   3. *RJR, Hydro-Quebec* and *RAHRA* (per McLachlin CJ) give more room than *RAHRA* (per LeBel/Deschamps JJ and Cromwell J)
3. A valid criminal law purpose
   1. Valid criminal law purposes include: public peace, order, security, health, morality & others (*Margarine Reference*)
   2. Paradigmatic example of criminal law is a law aimed at morally blameworthy/harmful acts
   3. The further a law strays from this (e.g. by regulating the non-harmful aspects of assisted human reproduction), the less likely it is to satisfy criminal law purpose (*Reference re AHRA*)
   4. Again, *RJR, Hydro-Quebec* and *RAHRA* (per McLachlin CJ) give more room than *RAHRA* (per LeBel/Deschamps JJ and Cromwell J)
   5. There is disagreement here about what the test is for a valid criminal law purpose
      1. *RJR-MacDonald* and *Hydro-Quebec* interpret this broadly
      2. But *Reference re AHRA* suggests some judges want a harm threshold imposed to limit criminal law power (a reasoned apprehension of harm)
      3. Acknowledge both of these and the lack of clarity, and how the analysis changes if you apply each test

**Note:** the first two “Ps” and the third “P” work in tandem. The more a federal law is directed at a central criminal law purpose (e.g. security, safety), the more likely it is that a court will be lenient as to the first two “Ps” and vice versa.

* It isn’t sufficient for criminal law to have an economic purpose regulating interests between parties themselves. There must be some sort of broader interest at play (*Margarine Reference*).
* Criminal law power extends to new crimes (*RJR-MacDonald*)
* Parliament can create delegated prohibitions – prohibitions with penalties, with exceptions where federal regulations are satisfied (*Reference re AHRA*)

### Early Interpretation of the Criminal Law Power

*Board of Commerce* case (1922, PC)

* Narrow interpretation of criminal law power (decision written by Viscount Haldane, who preferred provincial power)
* Includes a subject that “by its very nature belongs to the domain of criminal jurisprudence”
* Decision implied the criminal law power could not extend to new public wrongs

*PATA* case (1933, PC)

* Broad interpretation, decision of Lord Atkin
* Criminal law power includes anything prohibited with penalties

Post *PATA*

* To fall within criminal law power, need the two “Ps”
  + Prohibition
  + Penalty
* The classic form was “thou shalt not…”
* Concern: this seems to give the federal government unlimited power to extend its criminal law – all it had to do was put a penalty on something

## Margarine Reference, 1949 SCC (aff’d PC) – Test for Criminal Law Power

**Facts:** Federal *Dairy Industry Act* prohibited the manufacture, importation and sale of margarine in an effort to protect the dairy industry.

**s. 5** of the *Act*: No person shall … (a) manufacture, import into Canada, or offer, sell or have in his possession for sale, any oleomargarine, margarine, butterine, or other substitute for butter, manufactured wholly or in part from any fat other than that of milk or cream

**Issue:** Whether s. 5 of the *Diary Industry Act* was valid under the criminal law power.

**Held:** No, s. 5 is not valid under the criminal law power (but the law was upheld under federal trade power)

**Rand J:** The law clearly fits the *PATA* requirements of having a **p**rohibition and **p**enalty. But it is not valid criminal law because the objective is economic – to protect the dairy market.

Imports a 3rd requirement to be valid criminal law: a valid criminal law purpose

* “…some evil or injurious or undesirable effect upon the public against which the law is directed
* The first two “Ps” (prohibition & penalty) are the formal requirements for criminal law, the third P (purpose) is the substantive requirement to fall under criminal law power
* **What is a criminal law purpose?**
  + “Public peace, order, security, health, morality: these are the ordinary though not exclusive ends”

**Takeaway:** It isn’t sufficient for criminal law to have an economic purpose regulating interests between parties themselves. There must be some sort of broader interest at play.

* We can’t conclude from this case that federal government doesn’t have the power to regulate economic matters under its criminal law. Criminal law DOES have the ability to protect economic interests (e.g. theft).

## RJR-MacDonald Inc v Canada (Attorney General), 1995 SCC – Broadens scope of crim. law power

**Facts:** Federal *Tobacco Products Control Act* prohibited advertising and promotion of tobacco products and required manufacturers to display an unattributed health warning on tobacco products. Violations of the Act constituted an offence punishable by summary conviction or indictment. Two tobacco companies claimed the law as ultra vires Parliament as an intrusion into provincial jurisdiction over advertising founded in ss. 92(13) or (16).

**Issue:** Is the *Tobacco Product Control Act* valid federal law under the criminal law power?

**Held:** Yes, the Act is valid federal law under the criminal law power.

**La Forest J (majority):** Criminal law power is plenary in nature and the court has always defined its scope broadly. It is not carved out from a broader power (i.e. property and civil rights). It stands on its own and should be interpreted in its widest possible terms.

Application to case:

1. Prohibition? Yes
   1. Prohibition on advertising, promotion, and sale without prescribed health warnings
2. Penalty? Yes
3. Criminal law purpose? Yes, public health
   1. The broad test for determining what is a criminal law purpose: Is “the prohibition with penal consequences directed at an ‘evil’ or injurious effect on the public?”
   2. The evil targeted by Parliament is the detrimental health effects caused by tobacco consumption

La Forest rejects 3 arguments:

* Is the Act invalid because it does not have an affinity with a traditional criminal law concern?
  + La Forest: no, the criminal law extends to new crimes
* Is the Act a “colourable” intrusion on provincial power?
  + La Forest: no, there is no evidence for this. There is an explanation for parliament failing to criminalize tobacco (its not a viable option given its widespread use) and case law supports this
* Do the broad exemptions make it regulatory?
  + No, broad exemptions in criminal laws are okay. – act has broad exemptions for publications and broadcasts originating outside Canada. Practical effect is that the very same act can be legal when committed by one party ad not another. The exemptions help explain the “contours”

**Major J (dissent):** Criminal law power includes dangerous food and drugs – so unattributed health warnings are ok. It is undisputed that parliament can regulate hazardous food and drugs. But the ban on advertising and promotion is not ok not sufficiently harmful. The activity involved must pose a “significant, grave and serious risk to health, morality, safety or security” and this is not the case with advertising/promotion. Further, the exemptions show the Act is not truly criminal.

**Note:** Major J’s reasoning was picked up in *Reference Re Assisted Human Reproduction Act*.

## R v Hydro-Quebec, 1997 SCC – Broad reading of criminal law power, Enviro Protection = crim law

**Facts:** At issue was part 2 of the *Canadian Environmental Protection Act*, which set out a process for regulating toxic substances.

**La Forest (majority):** Very broad reading of the criminal law power. Protection of environment held to be a valid criminal law purpose. Held that **delegated prohibitions** are ok delegated prohibitions allow for exemptions, the scope of which is actually determined by federal decision makers.

## Reference Re Assisted Human Reproduction Act, 2010 SCC

**Facts:** Federal *Assisted Human Reproduction Act* (*AHRA*) created certain prohibited activities (ss. 5-9) and certain controlled activities (ss. 10-13). The controlled activities were prohibited only if there were not performed in accordance with various regulations. Ss. 14-68 regulated activities in ss. 10-13. Quebec argued that the pith and substance of the impugned provisions was regulation of all aspects of medical practices related to assisted human reproduction, which falls within provincial jurisdiction. Canada argues pith and substance of *Act* is to protect health, safety and public morals, all valid criminal law purposes.

**Held:** Court split 4-4-1. The prohibitions (ss. 5-9) were upheld as valid criminal law, but most of the controlled activities and administration schemes were not valid criminal law.

**McLachlin CJ for 4:** Would have found the entire Act valid under the criminal law power.

* Pith & substance step 1: characterization
  + P & S is to prohibit or punish inappropriate practices associated with human reproduction, NOT the regulation of assisted reproduction in hospitals, labs
* Pith & substance step 2: allocation
  + Criminal law power? First 2 “Ps”? Yes
    - Prohibited activities and controlled activities provisions have both prohibition and penalty
    - Parliament can create delegated prohibitions – prohibitions with penalties, with exceptions where federal regulations are satisfied (adopts thinking from ***R v Hydro-****Quebec* re delegated prohibitions)
  + Criminal law power? Criminal Purpose? Yes
    - Adopts deferential approach to purpose test
    - There are 3 criminal law purposes here that are valid:
      * Morality: Parliament must have a “reasonable basis to expect” that the law will address a moral concern; and there must be a “sufficient consensus in society” that the concern is of “fundamental importance”
        + This is not a hard test for parliament to meet – very deferential
        + Assisted reproduction raises significant moral concerns. The Act responds to this by prohibiting practices that devalue human life
      * Health: the law must address (1) human conduct; (2) that **may** cause harm or elevate the risk of harm; (3) to the health of members of the public
        + This is also a very deferential standard – it is enough that it may cause harm or just elevate the risk.
        + Assisted reproduction raises health concerns because the abuse of it could create a risk to public health
      * Individual security
* **Subsidiarity** contemplates that decisions should, as far as possible, be made by the government closest to those impacted. McLachlin argues subsidiarity does NOT apply here to preclude parliament from acting.

**Le Bel and Deschamps JJ for four:** Would have held all the challenged provisions not valid under criminal law power.

* Pith & substance step 1: characterization
  + P & S of the controlled activities provisions is the regulation of assisted human reproduction – in particular, the regulation of a type of health service provided by health care professionals (so falls under provincial jurisdiction)
  + P & S of the prohibited activities provisions is the control of reprehensible conduct (agrees with McLachlin CJ here)
* Pith & substance step 2: allocation
  + Criminal law purpose? Criminal Purpose? No
    - It is not enough to just identify a public purpose that would justify parliament’s decision to invoke criminal law. The law must be aimed at “suppressing an evil” or safeguarding a threatened interest
    - This will be the case where Parliament demonstrates that:
      * The evil is real and has a concrete basis; and
      * There is a reasoned apprehension of harm if the evil is not addressed
    - **Note:** So a harm threshold is put in place in an attempt to restrict the scope of the criminal law power
    - They suggest the harm must also be “serious” raises the harm threshold even more
    - In this case, nothing in the record of evidence before the court suggests that the conduct here was inherently reprehensible or imposed a serious risk to health or morality.
    - The act doesn’t only regulate harmful stuff, it regulates everything because it imposes a licensing requirement
    - Parliament has made it clear that it regards AHR as beneficial
    - Thus, the harm threshold is NOT met

**Cromwell J:** Sides with McLachlin CJ to find ss. 5-9 and 12 valid. Sides with Le Bel and Deschamps JJ to find the rest not valid.

* Doesn’t explicitly adopt LeBel and Deschamps JJ’s purpose test, but agrees with them that most of the Act is not valid criminal law.

Provincial Power over Morality and Public Order – s. 92(15)

**s. 92(15) –** The Imposition of Punishment by Fine, Penalty, or Imprisonment for enforcing any Law of the Province made in relation to any Matter coming within any of the Classes of Subjects enumerated in this Section

* While s. 91(27) gives parliament power over criminal law, s. 92(15) gives provincial government’s power over morality and public order
* The general approach to reconciling these is that concurrency is embraced (e.g. *McNeil, Chatergee*), with some exceptions here and there (*Westendorp, Morgentaler*, 1993)

## Re Nova Scotia Board of Censors v McNeil, 1978 SCC

**Facts:** The Nova Scotia *Theatres and Amusements Act* and the regulations enacted under it established a system for licensing and regulating the showing of films. The regulations required that all films be submitted to the provincial censor board, which had unfettered power to permit or prohibit the showing of the film. Sanctions for breach was a monetary penalty and revocation of a theatre owner’s licence. When the censor board banned the film “Last Tango in Paris”, McNeil sought a declaration that the Act and the regulations were ultra vires the province.

**Issue:** Whether the province has the power under s. 92 to regulate the exhibition and distribution of films, which are considered unsuitable for local viewing on grounds of morality.

**Held:** Yes, the law is valid under ss. 92(13) or 92(16).

**Ritchie J (for 5):**

* The law is valid under s. 92(13) or 92(16) because it is in pith and substance related to the regulation of the film industry, which falls under provincial property and civil rights.
* The determination of what is and what is not acceptable for public exhibition on moral grounds may be viewed as a matter of a “local and private nature in the Province” within s. 92(16) and thus the legislation may sustained under this power as well.
* It is administrative law; it doesn’t follow the prohibition and penalty form of criminal law. The Act is not concerned with creating a criminal offence or providing for its punishment, but rather in so regulating a business within the province as to prevent the exhibition in its theatres of films, which do not comply with the standards of propriety established by the Board.
* Enforcement of a local standard of morality in the exhibition of films is not necessarily an invasion of the federal criminal field.

**Laskin CJ (dissent for 4):**

* Pith and substance of the law is censorship – preventing access to morally offensive, indecent and obscene content. This falls within the federal criminal law power.
* Criminal law power operates as much as a brake on provincial legislation as a source of federal legislation
  + So the criminal law power operates defensively to prevent the provinces from regulating in some areas
  + Note: underlying this is a view that provincial power should be approached with some scepticism in some instances
* Provincial law cannot supplement federal criminal law

## Westendorp v The Queen, 1983 SCC

This case reversed the trend established in *McNeil* and struck down a municipal by-law regulating public order and morality as an intrusion into the federal criminal law power.

**Facts:** Westendorp was charged with being on a street for the purpose of prostitution in contravention with a by-law of the City of Calgary. The by-law generally dealt with the regulation of the use of city streets and included provisions controlling soliciting or carrying on business on the streets. Westendorp challenged the constitutionality of s. 6.1 of the by-law on the ground that it invaded federal authority in relation to criminal law.

**Issue:** Is s. 6.1 of the by-law valid provincial law?

**Held:** No, the municipal by-law re sex work is invalid.

**Laskin CJ for the Court:** The by-law re sex work is invalid because it is not in pith and substance directed at the regulation of city streets. If the law had been about the regulation of city streets, it would have banned congregation on streets in general, but instead the law singles out a group of people – sex workers. If a province can translate a direct attack on sex work into street control through reliance on public nuisance, it may do the same with respect to trafficking in drugs, assault etc. The by-law overreaches and offends the division of powers. **Note**: Laskin seems to take the view that laws that regulate sex workers are inherently criminal law.

## Chatterjee v Ontario (Attorney General), 2009 SCC

**Facts:** Ontario’s *Civil Remedies Act*, authorizes the forfeiture of proceeds of unlawful activity. Appellant was arrested for breach of probation and police found cash and items associated with the illicit drug trade in his car. AG of Ontario applied under ss. 3 and 8 of the *CRA* for the forfeiture of the seized money as proceeds of unlawful activity. Appellant argued *CRA*’s forfeiture provisions were *ultra vires* the province because they encroached on federal criminal law power.

**Issue:** Are the *CRA*’s forfeiture provisions valid provincial law?

**Held:** Yes.

**Binnie J for the court:**

* The *CRA* was enacted to (1) deter crime and to (2) compensate its victims. The purpose of deterring crime is broad enough that both the federal government (in relation to criminal law) and the provincial governments (in relation to property & civil rights) can validly pursue it. The purpose of compensating its victims falls squarely within provincial competence.
* Forfeiture may have punitive effects in some cases, but its dominant purpose is to make crime in general unprofitable, to capture resources tainted by crime so as to make them unavailable to fund future crime, and to help compensate private individuals and public institutions for the cost of past crimes
  + We look to the dominant feature of an impugned measure
* These are valid provincial objects. It cannot reasonably be said that the *CRA* amounts to colourable criminal legislation
* Crime imposes substantial costs on provincial treasuries. It would be out of step with modern realities to conclude that a province must shoulder the costs to the community of criminal behavior but cannot use deterrence to suppress it.
* Impaired driving = crim code offence but it touches many provincial things: health, highways, automobile insurance and property damage.
* There is no general bar to province’s enacting civil consequences to criminal acs such as financial costs to the system (ex. drunk driving causes damage that they want to avoid)
* The argument arises that the provisions frustrate federal purpose but this is not the case

Economic Regulation – s. 92(13) & 91(2)

* Provincial: property and civil rights (s. 92(13))
* Federal: trade and commerce (s. 91(2))

Debates about economic regulation:

1. Arguments about/for a greater federal regulation

* Transnationalism/globalization
  + Federal regulation is more efficient because it is uniform across the country
  + Integration is just the reality now because of globalization
* Economic union
  + There are still substantial provincial barriers and restrictions on trade of goods and services
  + There are calls for greater federal regulation because the provinces have such a large power to regulate the economy.
  + *R v Comeau*, (2018) SCC
    - involved a debate around the provisions in a NB law that related to the importation of beer from outside of the province
    - this case highlighted this debate that has occurred around the nature of Canada as a economic union internally

Property and Civil Rights – s. 92(13)

* two powers:
  + Primary: Property and civil rights (s. 92(13))
    - this has been interpreted very broadly and the foundations of this approach were laid out` very early on by the Privy Council
  + Usually invoked with s. 92(13): Matters of a local or private nature (s. 92(16))
    - this has not really received any significant independent definition on its own because it is almost never invoked without s. 92(13)
* property and civil rights power has two broad elements:
  + Capture the bulk, but not all, of private law (tort, property, contract, family, etc.)
    - prior to 1867 the term property and civil rights was used to denote the private law meaning the body of law that governs the relationship between individuals
    - the term property and civil rights in this section gives the provinces jurisdiction over a significant portion of private law
  + Captures the regulation of a particular business or trade within the province, except those specifically subject to federal jurisdiction (e.g. federally regulated undertakings) (*Citizens’ Insurance v Parsons*, 1881 Privy Council)
    - this gives the provinces jurisdiction over industries, business or trades that a re not otherwise allocated to federal jurisdiction
    - ***Citizens’ Insurance v Parsons* decision** has been taken to provide foundation for the proposition that the civil rights power gives provinces jurisdiction to regulate trade within the province. Held that only the provinces could impose standard terms in insurance contracts. This decision has in turn been in turn to provide the foundation for the principle that s. 92(13) includes the regulation of business or trades within the provinces.
    - Note how federal power is interpreted in relation to provincial power federal power is viewed as an exception to the provincial power over property and civil rights
* s. 92(13) gives the provinces brand jurisdiction over two significant areas of regulation: (1) significant portion or private law, (2) the regulation of particular business or trades except those industries that are specifically allocated to federal jurisdiction (aeronautics, telecommunications)
* the federal government can regulate the economy as well but due to the road interpretation here it tends to operate as an exception to and a c are out from provincial legislation
* The regulation of intra-provincial trade falls within the scope of s. 92(13) (*Carnation v QAMB*)
* Provinces can enact laws that impact interprovincial and international trade, as long as that is not the law’s pith and substance (*Carnation v QAMB*)
* Thus the provincial jurisdiction in this context is very broad (*Carnation v QAMB*)

## Carnation Co Ltd v Quebec Agricultural Marketing Board, 1968 SCC

A concern for the preservation of the Canadian economic union and the elimination of unacceptable barriers to trade seems to underlie the Court’s reasoning in this case.

**Facts:** The *Quebec Agricultural Marketing Act* created a Board that set the price to be paid to producers of milk in Quebec. The appellant was a purchaser of milk and processed the milk into evaporated milk to be sold outside of Quebec. The appellant argues that the orders of the Board setting the price for milk are invalid because it allows for the control of a product that will largely be used for export out of Quebec. Carnation and to pay higher prices for its milk than it would of had to pay in a free market. Appellant argues this constitutes the regulation of trade and commerce under s. 91(2) so it falls under federal jurisdiction.

**Issue:** Are the orders of the Board setting the price for milk valid provincial law?

**Held:** Yes, the orders of the provincial Board are valid, even though most product is sold outside of Quebec

**Martland J (majority):** The sale of milk from the dairy farmers to the appellants takes place within the province of Quebec. Although fixing the price paid for milk would have extra-provincial effects because it would change the appellant’s costs, it is not sufficient to bring it outside provincial power. Provincial legislation can affect interprovincial and international trade, provided that is not the law’s primary purpose. The main object of the law was the regulation of a local intra-provincial transaction , the sale of milk from farmers in Quebec to Carnation within Quebec and so these transactions fell within the scope of s. 92(13). The ultimate destination of the product did not affect the validity of the Provincial statute because it was directed at a transaction, the sale of milk, from the farmers in Quebec to Carnation took place within the province itself. Those transactions thus fell within the scope of s. 92(13). It was acknowledged that fixing the price paid by Carnation would have an impact on its export since it would affect the companies cost of doing business in the province but it was notes that labour costs also affect the companies cost of doing business in a province and there had not never been any doubts as to the ability of the province to regulate wages for example.

**Takeaways:**

* The regulation of intra-provincial trade (meaning economic transactions that occurs entirely within a province) falls within the scope of s. 92(13)
* Provinces can enact laws that impact or have an affect on interprovincial and or/international trade, as long as that is not the law’s pith and substance and that the pith and substance is in fact trade within a province (intra-provincial trade)
* provinces cannot enact laws that’s pith and substance is intra-provincial or international trade
* Thus, the provincial jurisdiction in this context is very broad

**Federal Powers over Economic Regulation**

* Two major doctrinal developments after 1960:
  + Courts seemed more willing to apply necessarily incidental doctrine in relation to trade and commerce power – regulating some intra-provincial transactions
  + Applied general regulation of Trade doctrine to uphold federal competition legislation
    - But disallowed it for national securities legislation

Trade and Commerce – s. 91(2)

S. 91(2) grants Parliament jurisdiction over trade and commerce

There are two branches of the federal trade and commerce power (*Parsons*, 1991 PC, *General Motors*):

1. The regulation of Interprovincial and international trade; and
2. General regulation of trade affecting the whole dominion (*Parsons*, 1991 PC)
   1. Does not extend to regulation of raw contacts of a business or trade within the province (*Carnation*)
   2. In later cases, the Privy Council severely restricted the scope of this second reach of the trade and commerce power. The result was that this power was limited to the first branch, there regulation of interprovincial and international trade,the regulation of goods and services crossing provincial or national borders.

### First Branch: Inter-provincial and International Trade

* Jurisdiction turns on the location of transactions involved this is the key question for this branch
  + Inter-provincial/international transaction = federal jurisdiction under s. 91(2)
    - if a transaction takes place across a national boundary, (if seller is in Ontario and buyer is in Manitoba) then it falls within federal jurisdiction
  + Intra-provincial transaction = provincial jurisdiction
    - if the transaction occurs within the province (if buyer and seller are in Ontario) then it falls under property and civil rights (s. 92(13))
* the result of this is that no one level of government has jurisdiction over the entirety of a products market
* Federal regulation of intra-provincial transactions is OK if the goods cross provincial or international borders
* What about intra-provincial transactions that have a marked impact on inter-provincial or international trade?
  + Privy Council would strike down federal legislation that even minimally regulated intra=provincial trade
  + SCC broadens the scope a bit. In Carnation case,a province is permitted tor regulate in such s way as to impact inter-provincial or international trade provided that the pith and substance of the law is the regulation of intra-provincial trade (trade within a province)
  + the federal government is now permitted to regulate products at stages of the supply chain that are within a province, something that normally be within provincial jurisdiction, if the good itself is ultimately destined for export and the federal government is regulation for the purpose of regulating that international or intra-provincial trade
* This division between federal and provincial governments means that no one trade or industry will be completely regulated by one level of government
  + This has been highly criticized

### Second Branch: General Regulation of Trade

* Has its roots in *Parsons* case (1881, PC), but then largely neglected until 1970s, The result of this neglect is that its existence was in doubt for a time
* Fully revived in *General Motors* (1989 SCC)
* Where it is properly engaged, it allows the federal government to regulate intra-provincial trade in some cases. There would be not need for the general branch if it did not extend beyond intra-provincial and international trade because that is something that is already allowed under the first branch of the federal trade and commerce power. The significant of this second branch is that it authorizes in some cases the regulation of intra-provincial trade, trade that would otherwise be though to fall within provincial jurisdiction.
* So it gives the federal government broader jurisdiction than the first branch.
* Because a broad reading of s. 91(2) could eviscerate provincial power, the trade and commerce power must be circumscribed to matters that are genuinely national in scope and qualitatively distinct from those falling under provincial heads of power relating to local matters and property and civil rights (*Reference re Securities Act*)

**ANALYSIS**: from *General Motors*

1. Is the impugned law part of a general regulatory scheme?
2. Is the impugned law monitored by a regulatory agency?
3. Is the impugned law concerned with trade as a whole (rather than regulation of a particular industry)?
4. Are the provinces, jointly or severally, constitutionally incapable of acting such legislation?
5. Would the failure to include one or more of the provinces in the scheme jeopardize its success?

These factors are not an exhaustive list and the absence of any one factor is not determinative. The factors are merely a preliminary checklist, the presence of which is an indication of validity (*General Motors*)

* The Court in *Reference Re Securities Act* supports the *General Motors* test:
  + Provided the law is part of a general regulatory scheme aimed at trade and commerce under oversight of a regulatory agency, **it will fall under the general federal trade and commerce power if the matter regulated is genuinely national in importance and scope. To be genuinely national in importance and scope, it is not enough that the matter be replicated in all jurisdictions throughout the country. It must... be something that the provinces, acting either individually or in concert, could not effectively achieve** (*Reference re Securities Act*)

## General Motors of Canada Ltd v City National Leasing, 1989 SCC

**Facts:** City National Leasing brought a civil action against GM alleging that it suffered losses as a result of a discriminatory pricing policy that constituted anti-competitive behaviour that was prohibited by the federal *Combines Investigation Act*. S. 33.1 of the *Act* created a civil cause of action, on which CNL was relying on. GM argued that the provision was beyond the jurisdiction of Parliament because the creation of civil causes of action falls within provincial jurisdiction in relation to property and civil rights.

**Issue:** Is the Act as a whole was valid under the trade and commerce power?

**Recall:** The legislation was upheld under the criminal law power, but it was subsequently amended, so must consider whether it is valid under the second branch of the trade and commerce power.

**Held:** The federal competition law is valid under the general branch of the trade and commerce power.

**Dickson CJ (majority):** S. 91(2) has two branches: (1) power over international and interprovincial trade and commerce; and (2) power over general trade and commerce affecting Canada as a whole.

Test for general branch:

1. Is the impugned law part of a general regulatory scheme?
2. Is the impugned law monitored by a regulatory agency?
   1. that regulatory scheme has to be administered by a federal regulatory agency
3. Is the impugned law concerned with trade as a whole (rather than regulation of a particular industry, business or trade)?
   1. this is an attempt to distinguish federal from provincial jurisdiction
      1. if a particular law is only about regulating a particular trade or business, that would typically be thought to fall within provincial jurisdiction under property and civil rights
4. Are the provinces, jointly or severally, constitutionally incapable of acting such legislation?
   1. scheme has to be of a nature that the provinces, jointly or severely, would be constitutionally incapable of enacting it
5. Would the failure to include one or more of the provinces in the scheme jeopardize its success?

These factors are not an exhaustive list and the absence of any one factor is not determinative. The factors are merely a preliminary checklist, the presence of which is an indication of validity under the trade and commerce power but the presence or absence of these 5 factors need not be determinative. You don't have to have all of these requirements satisfied to conclude that there is federal jurisdiction.

Application to case:

Found to have satisfied all 5 of the factors and therefore was supportable under the general branch of the trade and commerce power

1. Regulatory scheme?
   1. Yes, the *Act* embodies a complex scheme of economic regulation because it includes three elements; (1) a clarification of prohibited conduct, (2), it creates an investigatory mechanism to determine whether or not those prohibitions are engaged (3) and a remedial mechanism to allow for the enforcement of the prohibitions if they re found after an investigation to have been breached.
2. Agency oversight?
   1. Yes, two regulatory agencies that playa role in making sure that this federal scheme is satisfied. (1) The director of Investigation and Research and (2) The Restrictive Trade Practices Commission
   2. There were federal regulators (can be a department or ministry of the federal government or a particular federal administrative agency such as the Restrict Trade Practices Commission)
3. Trade in general?
   1. Yes, concerned with competition in Canadian economy as a whole. Clearly concerned with the regulation of trade ing general excuse its concern is the existence of a health level of competition in and across the Canadian economy as a whole and not with competition policy exclusively within one particular industry.
4. Provinces incapable?
   1. Yes, open borders and economic reality = ineffective provincial regulation of competition. Only national regulation could be effective because of the ability of production to move freely from one province to another to avoid regulation.
5. Failure to include province would jeopardize scheme?
   1. Yes if one province doesn’t regulate, or do so uniformly, the market will be vulnerable to anti completive behaviour because anti competitive behaviour subject tow eat standards in one or more provinces could distort the market in the whole country given the integration of the Canadian economy.

Quebec argues that the province has a role to play in intra-provincial competition policy. Dickson CJ agrees that the provinces do have a role, but says that if parliament regulates only international and inter-provincial aspects of competition, the federal law would be rendered ineffective.

**Takeaway:** This case fully revives the general branch of the federal trade and commerce power

**Conclusion:** Parliament and the provinces have the power to regulate the intra-provincial aspects of competition. Parliament under the general branch of the trade and commerce power and the provinces under the property and civil rights power.

## Reference Re Securities Act, 2011 SCC

**Background:** Provinces have jurisdiction to regulate securities within their boundaries under s. 92(13) (*Lymburn* v *Mayland*, 1932 Privy Council). Every province now has a comprehensive securities regulator which is administered by a provincial regulator. A security takes the form of something that is often most familiar to us as a share. You can think of as security as an interest in a company or a partnership of some sort. Parliament has lots of powers that may affect securities (criminal law, banks, bankruptcy etc.). So generally the provinces are the primary regulator of securities.

**Facts:** In 2009, Federal government proposed to set up a federal scheme to regulate securities. This including provisions regulating aspects of securities trading that were similar to the provisions that we would find in the provincial regulatory schemes. Parliament’s goal was to wholly displace provincial securities regulation. The proposed *Securities Act* included an opt-in provision, so for any province that did not opt-in, the provincial scheme would remain in place. Alberta and Quebec initiated a reference and argued the Act fell under s. 92(13) and 92(16). The goal was to wholly displace provincial regulation of the field which had been in place since the 19th century (Peter Hogg stated this). The act included an opt in formula for bringing the Act into force which stated that the Act would apply only within the provinces that opted into the federal regime. For any province that chose not to opt in, the provincial scheme remained in force. Alberta and Quebec opposed the federal scheme and began references to both of their Courts of Appeal. Both Courts of Appeal ruled that the federal legislation was invalid. The federal government referred the issue to the SCC. Federal government argued that it was valid, relying on the general branch of the trade and commerce power. Alberta, Quebec etc. opposed the scheme arguing that it fell within s. 92(13)- property and civil rights and s. 92(16) matters of a local or private nature.

**Issue:** Is the proposed *Securities Act* valid federal law under the general branch of the trade and commerce power?

**Held:** No, the proposed Act is not valid under the general branch of the trade and commerce power.

**The Court:**

* court acknowledged that the division of powers is more flexible and more accommodating of jurisdictional overlap than it used to be BUT
* A broad view of s. 91(2) could eviscerate provincial powers, and make some federal powers meaningless
* The federal and provincial governments are coordinate, not subordinate, and so a federal head of power “cannot be given a scope that would eviscerate a provincial legislative competence”
  + it was important that the scope of the federal trade and commerce power be appropriately circumscribed.
* Thus the trade and commerce power must be circumscribed to matters that are genuinely national in scope and qualitatively distinct from those falling under provincial heads of power relating to local matters and property and civil rights
* The Court here is concerned with constitutional validity, not whether the Act is good policy – don’t confuse optimal policy with constitutional validity
  + Optimal policy and efficaciousness is not a relevant consideration in division of powers analysis
  + It was also important not to confuse optimal policy with constitutional validity. This seemed to be an indirect response to what it clearly thought was the tenure of some of the arguments put to the court: the argument that people recognize the important of a single national securities regulator as a matter of policy so it must follow from that that a single national securities regulator would also be constitutionally valid. The court says, don't confuse those two things: just become something is optimal policy it does not mean it is permitted under the division of powers.
* “Provided the law is part of a general regulatory scheme aimed at trade and commerce under oversight of a regulatory agency, **it will fall under the general federal trade and commerce power if the matter regulated is genuinely national in importance and scope. To be genuinely national in importance and scope, it is not enough that the matter be replicated in all jurisdictions throughout the country. It must... be something that the provinces, acting either individually or in concert, could not effectively achieve.** To put it another way, the situation must be such that if the federal government were not able to legislate, there would be a constitutional gap. Such a gap is constitutional anathema in a federation.”
  + this is the courts reflection not he scope of the general branch of the trade and commerce power as a whole. We have to look for a matter that is genuinely national in importance and scope and to be this it is not enough that the matter be regulated in all jurisdictions it must be something that the provinces could not effectively achieve
* Systemic risk and data collection on a national basis is under general trade and commerce power, but not the day to day regulation of securities. Legislation for minimum standards and integrity of Canada’s financial markets as a whole may be under trade and commerce but this act is too far –reaching
  + Competition only deals with – anti-competitive contracts not all aspects of securities

Analysis of *Securities Act*

* Pith and substance of Act?
  + this is a constitution challenge involving validity that involves a scheme as whole so we know that we apply the pith and substance doctrine in that case.
  + The first step is to characterize the law, to determine its pith and substance
  + The pith and substance of the Act is To implement a comprehensive Canadian regime for the regulation of securities with a view to investor protection, the promotion of fair, efficient and competitive markets, and ensuring the integrity and stability of the financial markets
  + step two is to allocate the law as characterized. Looking at determine whether the law as characterized falls within the head of power that is argued to sustain it, in this case that is the vernal branch of the trade and commerce power.
* *General Motors* test: Court said that the first 2 formal factors were easily satisfied but the other three, the more substantive factors were not satisfied.
  + Regulatory scheme? Yes. This was a general regulatory scheme dealing with securities.
  + Agency oversight? Yes. The scheme was to be under the oversight of a new federal regulatory agency,a new single Canadian securities regulator
  + Trade as a whole? No
    - Lots of trades are affected, and lots of them have long been treated as local matters. There is not enough evidence to show that the local matters have become national matters
    - court acknowledges that much of Canada’s capital market is interprovincial and international in character and indeed that trade and securities is not confined to 13 provincial enclaves BUT the court said that capital markets also existing provinces that meet the needs of local business and investors and to the extent that the Act captured these local aspects, it was not concerned with trade as a whole
    - court did not deny the federal governments argument on a theoretical level it said that it was conceivable that a shift could occur but such an alignment, if it was to occur, could not be assumed by a court but would need to be established by evidence. Court said that the federal government failed to discharge its burden of showing that all aspects of securities regulation had become matters of national importance.
    - court draws a distinction between the international aspects of securities markets and the local aspects of securities markets
    - problem here is that this legislation purports to create a comprehensive regime that regulate all aspects of securities markets not just the international ones but also the intra-provincial local ones as well
  + Could the provinces do this without the feds? No
    - court said yes to some extent because the provinces would be incapable of creating a stable nationals securities scheme aimed at genuinely national goals because the provinces would retain the power at any time to withdraw from the scheme.
    - Provinces could act together and form a national scheme, but there would be no guarantee they would stay together
    - Also, the Act goes beyond matters of “national interest” and reaches down into the detailed aspects of securities regulation including those more local aspects
      * So, the Court accepts there is some role for federal securities legislation, but the Act as currently drafted has gone too far
    - factor 4 not satisfied for the same reason focusing on the scope of the scheme
  + Would one province opting out ruin it? No
    - not satisfied because the Day-to-day securities regulation would not founder if a particular province declined to participate
    - Existence of an opt-in scheme suggests regulation wouldn’t be jeopardized if a province didn’t participate. From this mechanism, the court says that clearly the legislation itself contemplates that it will be successful if one or more provinces choose not to participate in it
* **Result:** So comprehensive securities regulation therefore does not fall within the general branch of the federal trade and commerce power. But, the court did note that certain aspects of the Act could potentially be upheld under the general branch. In particular it said that the management of systemic risk and national data collection addressed matter son genuine national importance that would fall within the general branch. While the Act as whole could not be sustain in its current form, it was possible that a cooperative approach could be established whereby the federal and provincial government could create an interlocking federal-provincial scheme that would allow for comprehensive regulation of securities.
* in 2018, the SCC considered another Reference involving a new scaled back regulator regime involving a greater role for federal regulation that contemplated that interlocking federal and provincial regime with the federal focuses more on systemic risk. Court held that the new scheme was constitutional acceptable and was valid under the general branch of the trade and commerce power. This was a scaled back version, it was not so sweeping and comprehensive as the proposal the court considered in 2011.

**W**r**ight:** There are 2 primary concerns that are keeping the Court from finding securities regulation valid under the general trade and commerce power: (1) the longstanding history of provincial regulation of securities; and (2) the breadth/extent of the Act and how much provincial jurisdiction and legislation it would replace.

Constitution Act s. 91- Powers of Parliament

**91.** It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,

1. Repealed. [(44)](https://laws-lois.justice.gc.ca/eng/const/page-18.html#f44)

1A. The Public Debt and Property. [(45)](https://laws-lois.justice.gc.ca/eng/const/page-18.html#f45)

2.  The Regulation of Trade and Commerce.

2A.  Unemployment insurance. [(46)](https://laws-lois.justice.gc.ca/eng/const/page-18.html#f46)

3.  The raising of Money by any Mode or System of Taxation.

4.  The borrowing of Money on the Public Credit.

5.  Postal Service.

6.  The Census and Statistics.

7.  Militia, Military and Naval Service, and Defence.

8. The fixing of and providing for the Salaries and allowances of Civil and other Officers of the Govern ment of Canada.

9.  Beacons, Buoys, Lighthouses, and Sable Island.

10.  Navigation and Shipping.

11.  Quarantine and the Establishment and Maintenance of Marine Hospitals.

12.  Sea Coast and Inland Fisheries.

13.  Ferries between a Province and any British or Foreign Country or between Two Provinces.

14.  Currency and Coinage.

15.  Banking, Incorporation of Banks, and the Issue of Paper Money.

16.  Savings Banks.

17.  Weights and Measures.

18.  Bills of Exchange and Promissory Notes.

19.  Interest.

20.  Legal Tender.

21. Bankruptcy and Insolvency.

22.  Patents of Invention and Discovery.

23. Copyrights.

24. Indians, and Lands reserved for the Indians.

25.  Naturalization and Aliens.

26.  Marriage and Divorce.

27.  The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Proce dure in Criminal Matters.

28.  The Establishment, Maintenance, and Management of Penitentiaries.

29.  Such Classes of Subjects as are expressly excepted in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

And any Matter coming within any of the Classes of Subjects enumerated in this Section shall not be deemed to come within the Class of Matters of a local or private Nature comprised in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces. [(47)](https://laws-lois.justice.gc.ca/eng/const/page-18.html#f47)

Constitution Act s. 92- Powers of the Provincial Legislature

**92.** In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,

1. Repealed. [(48)](https://laws-lois.justice.gc.ca/eng/const/page-18.html#f48)

2. Direct Taxation within the Province in order to the raising of a Revenue for Provincial Purposes.

3. The borrowing of Money on the sole Credit of the Province.

4. The Establishment and Tenure of Provincial Offices and the Appointment and Payment of Provincial Officers.

5.  The Management and Sale of the Public Lands belonging to the Province and of the Timber and Wood thereon

6.  The Establishment, Maintenance, and Management of Public and Reformatory Prisons in and for the Province.

7.  The Establishment, Maintenance, and Management of Hospitals, Asylums, Charities, and Eleemosy nary Institutions in and for the Province, other than Marine Hospitals.

8.  Municipal Institutions in the Province.

9.  Shop, Saloon, Tavern, Auctioneer, and other Licences in order to the raising of a Revenue for Pro vincial, Local, or Municipal Purposes.

10.  Local Works and Undertakings other than such as are of the following Classes:

(*a*)  Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertak ings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province

(*b*) Lines of Steam Ships between the Province and any British or Foreign Country:

(*c*)  Such Works as, although wholly situate within the Province, are before or after their Execu tion declared by the Parliament of Canada to be for the general Advantage of Canada or for the Advantage of Two or more of the Provinces.

11.  The Incorporation of Companies with Provincial Objects.

12.  The Solemnization of Marriage in the Province.

13.  Property and Civil Rights in the Province.

14.  The Administration of Justice in the Province, including the Constitution, Maintenance, and Organiza tion of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts.

15.  The Imposition of Punishment by Fine, Penalty, or Imprisonment for enforcing any Law of the Prov ince made in relation to any Matter coming within any of the Classes of Subjects enumerated in this Sec tion.

16.  Generally all Matters of a merely local or private Nature in the Province.

Indians, and Lands Reserved for the Indians – s. 91(24)

S. 91(24) protects at least a “core of Indianness” (*Delgamuukw*). This “core” includes:

* Aboriginal rights and title (*Delgamuukw*)
  + Prior to 1982, these could be extinguished by the federal government
  + These could never be extinguished by provincial governments (*Delgamuukw*)
* Includes at least “activities that are integral to the distinctive aboriginal culture of the group” (*Delgamuukw*)
* “…matters touching on Indianness” (*Delgamuukw*)
* Hunting laws (*Delgamuukw*)
* Does NOT include labour relations and the driving of motor vehicles (*Delgamuukw*)

Scope of provincial power

* For aboriginal and treaty rights, the main constraint on provincial power is not IJI, but s. 35 of the *Constitution Act, 1982* (*Tsilhqot’in Nation*).
  + Provincial laws **can** apply to aboriginal and treaty rights so long as they are in accordance with s. 35 of the *Constitution Act, 1982* (*Tsilhqot’in Nation*).
  + This gives provinces broader power to regulate in relation to aboriginal and treaty rights (*Tsilhqot’in Nation*).
* For other matters of indigenous law, IJI is the main constraint on provincial power because IJI protects the “core of Indianness” from provincial intrusion (*Delgamuuwk*)
* Provinces are generally **not** entitled to single out aboriginal peoples (*R v Sutherland*). Singling out aboriginal peoples would make the pith and substance of the law fall within the federal power under s. 91(24) (*Delgamuukw*).
* But provincial laws of general application may apply to Indians and lands reserved for Indians, EXCEPT if IJI is engaged (*Delgamuukw*)

Why was this allocation of power chosen?

* The assumption was that the provinces posed the greatest risk to indigenous peoples because they have an interest in appropriating their land. So the federal government sought to protect them by bringing regulation under federal power

“Indian” per s. 91(24) includes:

* Status “Indians” under the federal *Indian Act*
* Inuit (*Reference re whether “Indians” includes “Eskimo”*, 1939 SCC)
* Métis and non-status “Indians” (*Daniels v Canada*, 2016 SCC)

## Delgamuukw v BC, 1997 SCC – Scope of s. 91(24) & Extinguishment of title & rights

**Facts:** Appellants, who were all Gitksan or Wet’suwet’en hereditary chiefs, claimed separate portions of 58,000 square km in BC. BC argued the appellants have no right or interest in the territory, or alternatively, that the appellants’ cause of action ought to be for compensation from the federal government. There were approximately 7,000 aboriginal peoples living in the area and 30,000 non-aboriginal people living in the area at the time of trial.

**Issue:** Whether the provinces could enact legislation prior to 1982 that could completely extinguish aboriginal title.

**Note:** s. 35(1) of the *Constitution Act, 1982* prevents this, but before 1982 there was no bar to the federal government extinguishing aboriginal title. So, case had to determine whether provinces could do the same.

**Held:** No, provinces cannot extinguish aboriginal rights or title prior to 1982 (and obviously not after)

**Lamer CJ for 4 (majority):**

Scope of federal jurisdiction under s. 91(24):

* The scope of s. 91(24) is unsettled – the boundaries of federal power are largely undefined because the focus has been on provincial laws and whether they are invalidated by federal jurisdiction
* S. 91(24) protects at least a “core of Indianness from provincial intrusion” via IJI. This “core” includes:
  + Aboriginal rights and title
  + Includes at least “activities that are integral to the distinctive aboriginal culture of the group”
  + “…matters touching on Indianness”
  + Hunting laws
  + Does NOT include labour relations and the driving of motor vehicles

Scope of provincial jurisdiction:

* Provinces lack the jurisdiction to “single out” Indians and lands reserved for Indians
* But provincial laws of general application may apply to Indians and lands reserved for Indians, EXCEPT if IJI is engaged
* Provincial law CANNOT extinguish aboriginal rights or title, even pre 1982.
* The reason is the division of powers:
  + A provincial law of general application cannot, by definition, meet the standard that has been set by this court for extinguishment of aboriginal rights without being *ultra vires* the province because the intention to do so would trench on federal jurisdiction
    - Laws that extinguish aboriginal rights and title require “clear language” that would require singling out groups
  + Aboriginal rights and title fall within the “core of Indianness” protected by IJI.

## Tsilhqot’in Nation v BC, 2014 SCC – Broadens Provinces’ scope on aboriginal & treaty rights

**McLachlin CJ for the Court:** Departs from *Delgamuukw* on the application of IJI to aboriginal and treaty rights.

* s. 35 is the primary constitutional constraint on both the federal and provincial governments in relation to aboriginal and treaty rights
* The doctrine of IJI should not be applied in cases of aboriginal or treaty rights
* Aboriginal and treaty rights are not absolutely immune from provincial laws under IJI, but are protected from unjustified infringement by s. 35
  + IJI provided absolute immunity from provincial laws on aboriginal and treaty rights. S. 35 provides less protection, because infringements can be justified
  + So aboriginal and treaty rights can now be touched by provincial laws that would otherwise have engaged IJI

**Takeaways:**

* Provincial laws can apply to aboriginal and treaty rights so long as they are in accordance with s. 35 of the *Constitution Act, 1982*
* IJI still likely prevents application of provincial laws that impair other s. 91(24) matters
* The provinces still cannot “single out” Indians or lands reserved for Indians because this would engage pith and substance
  + For this reason, the provinces still cannot extinguish aboriginal or treaty rights altogether

**Note:** This case is highly criticized for broadening the ability of provincial governments to regulate aboriginal and treaty rights. But there are many merits to the decision as well:

* The benefits of provincial immunity were not without burdens. E.g. provincial immunity gave the province the ability to “buck pass” (no obligation to offer services to indigenous communities because they don’t fall within provincial jurisdiction)
* Immunity from provincial regulation was much less than meets the eye. S. 88 of the federal *Indian Act* operates to make all provincial laws of general application applicable to Indians through incorporation by reference.

Sparrow Test to be covered later!

TRC, 2015: Call to Action 28“

* We call upon law schools in Canada to require all law students to take a course in Aboriginal people and the law, which include the history and legacy of residential schools, the United Nations Declaration on the Rights of Indigenous Peoples, Treaties and Aboriginal rights, Indigenous law, and Aboriginal-Crown relations. This will require skills-based training in intercultural competency, conflict resolution, human rights and anti-racism.

Indigenous Peoples and the Constitution

* 4 Stages in the relationship between indigenous peoples and non-indigenous peoples, as per the Royal Commission on Aboriginal Peoples, 1996:

1. “Separate Worlds” – pre-contact
   1. During this phase Indigenous and non-Indigenous people lived on operate continents and knew nothing of each other
   2. 1973 *Caulder v BC*, SCC said that when the settlers came, the Indians were there organized in societies and occupying the land as their forefathers have done for centuries. So, Canada was not terra nullius or “unoccupied land” and so it cannot be said that sovereignty vested in the British crown and then transferred into the Crown in the Canadian context through a process of discovery which is the idea that colonizers can acquire sovereignty to a particular territory if that land is unoccupied.
   3. A common misconception that comes from this period is that the indigenous peoples and their societies were somehow primitive or savage or “pre-legal”
   4. SCC has dispelled the doctrine of terra nullius it is neither true that indigenous peoples were conquered or that they were pre-legal and that Canada was “discovered”
2. Contact and “Nation-to-Nation Relations” - contact stage with lasted from early 1500’s to late 170’ss and early 1800’s
   1. Treaties
      1. During this stage there were some relationships of peace and friendship between indigenous peoples and settlers. There was a sort of cautious cooperation, where indigenous peoples were treated as nations with the ability to negotiate treaties
      2. treaties were called friendship treaties to reflect that this was more of a period of cooperation
   2. Royal Proclamation of 1763
3. “Respect gives way to Domination” - covered period form early 1800’s to 1970’s
   1. Policies focused on assimilation of displacement
   2. E.g. residential schools
   3. this stage is marred most by the shivery of oppression, displacement and force assimilation
   4. power tilted very much in the direction of the Crown and Indigenous peoples ere displaced form much of their land, moved onto reserves and harsh steps were taken by colonial and Canadian governments to try to assimilate Indigenous peoples
4. “Renewal and Recognition”
   1. E.g. Truth and Reconciliation Commission
   2. E.g. Missing and Murdered Indigenous Women and Girls Inquiry
   3. this is the “truth and Reconciliation” stage. There is a broad based consensus that ti is important that we recognize there wrongs of the past and we attempt to reconcile with Indigenous communities

### P. Macklem, Indigenous Difference and the Constitution of Canada, 2001

* According to the **doctrine of discovery**, European sovereignty could be acquired over unoccupied territory by discovery.
* International law deemed North America to be **terra nullius** – unoccupied – for the purposes of distributing sovereignty
* International law deemed North America to be terra nullius under the doctrine of discovery because European powers viewed aboriginal nations as insufficiently Christian or insufficiently civilized to justify recognizing them as sovereign over their lands and people
* European settlement thus vested sovereignty in settling nations, despite indigenous presence
* One assumption of terra nullius was that aboriginal societies were essentially lawless societies
  + **Aside:** this view partly stems from the assumption that all law is found in statutes or other written legal instruments. But the laws of Canada spring from a great variety of sources, written and unwritten, statutory and customary. For example, the written constitution is based on fundamental UCPs, which govern its status and interpretation.

s. 35 of the *Constitution Act, 1982*

**s. 35 (1)** – The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

**s. 35 (2)** In this Act, “aboriginal peoples of Canada” includes the Indian, Inuit and Métis peoples of Canada.

So s. 35(1) protects and entrenches:

1. Aboriginal Rights
   1. Aboriginal Title is a subcategory of Aboriginal Rights. It has become its own type of right under the bracket of Aboriginal rights.
2. Treaty Rights

S. 35 itself is NOT the source of these rights, it is merely recognizing and affirming rights already considered to exist

* Note that they are not part of the Charter, so are not subject to ss. 1 and 33
* Extinguishment unilaterally by statute (either provincial or federal) no longer permitted
  + Rights can be extinguished by voluntary surrender or constitutional amendment

### Two (of Many) Big Issues

* the “land question” - did the Crown acquire sovereignty (supreme power or authority), and if so, how?
  + de jure (legal) vs. de factor (practical/factual) sovereignty
  + common claims for de jure sovereignty on the Crown side
    - conquest: one argument is that sovereignty can be acquired through conquest (war). you win a war and you claim sovereignty by virtue of that context. This used to be recognized by International law but it is not anymore.
    - cession (surrender) - treaties
    - discovery (*terra nullius* - “nobody’s land”)
    - “asserted”
* recognizing the role of Indigenous legal systems but they were actively oppressed in a variety of ways
  + diversity of sources of law
  + connection to Indigenous languages
  + a relational focus- harmonious relationships
* concerns about mixing with Canadian legal system
  + making case for recognition might lead to distortion
  + mechanisms for recognition might lead to distortion

## Aboriginal Rights

### ANALYSIS for aboriginal rights:

1. Has the **claimant** established an aboriginal right (*Sparrow*)? **Use *Van der Peet* test**:
   1. Step 1: identify the nature of the First Nation’s claim to an aboriginal right based on the pleadings. If necessary, in light of the evidence, refine the characterization of the right claimed on terms that are fair to all parties (*Van der Peet*)
      1. Courts should consider:
         1. The nature of the activity being engaged in;
         2. The nature of the impugned law; and
         3. The nature of the practice, custom or tradition
      2. In framing the right, the court must consider the view of the indigenous group involved
      3. The activities should be framed at a general, not specific, level
   2. Step 2: Determine whether the First Nation has prove, based on the evidence adduced at trial:
      1. The existence of the pre-contact practice, tradition or custom advanced in the pleadings as supporting the claimed right; and
      2. That the practice was **integral** to the **distinctive** pre-contact aboriginal society
         1. Integral = central and significant part of what made the society “distinctive” – something that makes the group what it is
   3. Step 3: Continuity – Determine whether the claimed modern right has a reasonable degree of continuity with the “integral” pre-contract practice. In other words, is the claimed modern right demonstrable connected to, and reasonably regarded as a continuation of, the pre-contract practice? At this step, the court should take a generous though realistic approach to matching pre-contract practices to the claimed modern right. As will be discussed, the pre-contract practices must engage the essential elements of the modern right, though of course the two need not be exactly the same.
      1. The relevant time frame is pre-contact (or date of effective control for Métis - 1850)
      2. Pre-contact evidence is not strictly required – evidentiary rules need to be applied flexibly and with cultural sensitivity (e.g. to oral tradition)
      3. Manner of exercise can evolve, and so can the subject matter
   4. Step 4: In the event that an aboriginal right to trade commercially is found to exist, the Court should, when delineating such a right, have regard to Lamer CJ in *Gladstone (in the context of a Sparrow justification)*:
      1. With regards to the distribution of the fisheries resource after conservation goals have been met, objectives such as the pursuit of economic and regional fairness, and the recognition of the historical reliance upon, and participation in the fishery by non-aboriginal groups, are the type of objective in which can satisfy the standard of justification (*Gladstone*)
      2. “Although by no means making a definitive statement of this issue, I would suggest that with regards to the distribution of the fisheries resource after conservation goals have been met, objectives such as the pursuit of economic and regional fairness, and the recognition of the historical reliance upon, and participating in, the fishery by non-aboriginal groups, are the type of objectives which can (at least in the right circumstances) satisfy this standard. In the right circumstances, such objectives are in the interest of all Canadians and, more importantly, the reconciliation of Aboriginal societies with the rest of Canadian society may well depend on their successful attainment”
2. Has the **government** established the right is not “existing”/was extinguished? (*Sparrow*)
   1. If yes, the claim fails
   2. “Existing,” means those rights that were in existence when the *Constitution Act, 1982* came into effect. Thus extinguished rights are not revived (*Sparrow*)
   3. Need “clear and plain intention” to extinguish a right (*Sparrow*)
   4. Mere regulation of a right does NOT equal extinguishment (*Sparrow*)
3. Has the **claimant** established that the right was infringed? (*Sparrow*)
   1. If not, the claim fails
   2. There will be no infringement on aboriginal rights if the indigenous group consents to the infringement (*Tsilhqot’in*)
   3. Factors to consider (but not firm test – absence of any is not determinative): (*Sparrow*)
      1. Is the limitation on the right unreasonable?
      2. Does the regulation impose undue hardship?
      3. Preferred means of exercise of right denied?
         1. This factor is often the key – where the law significantly burdens the preferred means of exercising a right, the law is usually said to infringe the right
4. Has the **government** established that the infringement is justified? (*Sparrow*)
   1. If yes, the claim fails
   2. Two step test for justification under s. 35(1): (*Sparrow*)
      1. Is there a valid legislative objective? (*Sparrow*)
         1. I.e. conserving and managing natural resources; preventing harm; “other compelling and substantial objectives”; (NOT public interest) (*Sparrow*)
         2. Compelling and substantial objectives could include economic and regional fairness; reconciliation of historical reliance upon and participation in fishery by non-indigenous people (*Gladstone*)
         3. Valid objectives include: the development of agriculture, forestry, mining, and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations to support those aims (*Delgamuukw*)
      2. Is the breach consistent with Crown’s “honour”/fiduciary duty? Consider: (*Sparrow*)
         1. As little infringement as possible to achieve objective (viewed through a lens of priority in this test)?
            1. When rights are not internally limited, government only has to show allocation took priority of aboriginal right into account (*Gladstone*)
            2. In determining if government met this obligation, look to:

Consultation, compensation, accommodation, aboriginal priority taken into account, proportion of aboriginal group participating (*Gladstone*)

* + - 1. Fair compensation for expropriation?
      2. Indigenous group consulted?

### Sources of Aboriginal Rights

Royal Proclamation of 1763?

* Affirmed as a source in *St Catherine’s Milling and Lumber* case (1888, SCC)
* 3 key features for indigenous peoples:
  + (1) Reservation of lands for indigenous peoples in British North America. It recognizes particular spaces for Indigenous communities
  + (2) No private purchase.
    - The power to deal with aboriginal title was placed in the hands of the Crown, rather than in the hands of local representatives in the colonies in order to protect Indigenous peoples from the local assemblies
  + (3) All purchases by and in the name of the Crown
    - No private persons could purchase from indigenous peoples any land reserved for indigenous peoples by the Proclamation
    - Only the Crown possessed the right to acquire a right in indigenous land
  + Until the 1970’s the Royal Proclamation was thought to be the sole source of Aboriginal rights. Affirmed as source in *St. Catherine’s Mining and Lumber* case (1888 PC)

Pre-contact indigenous laws & legal systems?

* Not widely accepted by the courts
* The exception is *Connolly v Woolrich* (1867 Que SC) where the court recognized the authority of Cree law
* This view sees aboriginal peoples as having land being of their own laws, rather than because of a grant from the British Crown
* this view says that aboriginal rights come from pre-contract indigenous laws and legal systems
* the implication of this view is that Indigenous peoples have aboriginal rights that list independently of the Royal Proclamation and have their basis in the laws and legal systems of Indigenous legal systems themselves.

Pre-contact use & occupation of lands?

* Indigenous peoples own land not because of their legal systems and their own laws or the Royal Proclamation, but rather because of their prior use and occupation of the land
* Not widely accepted by the courts until *Calder v BC* (1973 SCC). In this case, the SCC recognized that Aboriginal title continues to exist and that it is derived form the historical use and occupation of the land by Indigenous people pre-contact. This case recognized Aboriginal title as a common law entitlement that exists independently of the Royal Proclamation.
* Affirmed in later cases: e.g. *Guerin* (1984 SCC), *Van der Peet*

### John Borrows’ Lecture

Sources of indigenous law:

* Sacred sources origin stories. Principles and processes come from this source.
* Natural source law is found in the environment. Reasoning by way of analogy from interaction with the land
* Deliberative source law is brought into a human community by talking about what principles have been found and what hey mean. So law must be a living source.
* Positivistic source declarative rules: i.e. do this, don’t do that. Often promulgated through songs, dances, stories
* Customary source a pattern of behaviour done for generations – understanding responsibilities through observing patterns of behaviour over time. This is an inductive source, not necessarily explicit

The common law is a cultural system – it is a product of history.

History

* Constitutional relations, 1867
  + Treaties, provisions, colonial assertiveness, confederation without indigenous input (except Manitoba)
* 1867-1973: Legal exclusion
  + *Indian Act* 1876 was designed exclusively to assimilate indigenous peoples
  + Limited political participation for indigenous peoples throughout most of colonial history
  + Outlawed economic pursuits, e.g. hunting, fishing
  + Residential schools
  + Limited access to courts
  + Treaty promises not honoured
  + Explicit assimilation policies
  + Script fraud
  + Reserve & membership cut-off
  + Women’s power targeted (i.e. loss of Indian status of Indian woman marries non-Indian man)
  + Mistreatment of veterans
  + Inuit relocation
  + 1951 *Indian Act* amendment
  + Over-incarceration
  + Child welfare 60’s scoop
* Legal Continuity
  + Indigenous law transmission, treaty making, marriage, children, political and legal advocacy, cultural adaptations, underground practices, White Paper rejected, *Calder*

## R v Sparrow, 1990 SCC – establishes the s. 35 test

**Facts:** The appellant was a member of the Musqueam Indian Band. He was charged under s. 61(1) of the federal *Fisheries Act* with the offence of fishing with a drift net longer than that permitted by the terms of the Band’s Indian food fishing licence. The appellant argued that he was exercising an existing aboriginal right to fish and that the net length restriction contained in the Band’s licence was inconsistent with s. 35(1) of the *Constitution Act, 1982* and therefore invalid.

**Issue:** Whether parliament’s power to regulate fishing is limited by s. 35(1) and whether the net length restriction in the licence is inconsistent with s. 35(1).

**Held:** New trial ordered.

**Dickson CJ and La Forest J (majority):** Outlined the s. 35(1) framework:

1. The **claimant** must show that they are acting pursuant to an aboriginal right protected by s. 35(1)
2. The **government** must show that the right is “extinguished”
3. The **claimant** must show that the right has been infringed
4. If the right is infringed, the burden shifts to the **government** to show that the infringement is justified

**Step 1: Has the claimant established an Aboriginal right? If not, the claim fails.**

* Sparrow argued for a broad right to fish, but did not qualify this in any way (e.g. just for food, for ceremonial or for commercial purposes)
* DCJ/LaF accept Sparrow’s argument, but only in part
  + Court recognized a right to fish for food and social and ceremonial purposes, but NOT for commercial or livelihood purposes
* Support for conclusion
  + evidence supports TJ’s conclusion that such a right exists
  + existence of right not in “serious dispute”
* Found that such fishing constitutes an “**integral** part of the [Musqueam’s] **distinctive culture** (note: this language is picked up in *Van der Peet*)

**Step 2: If an Aboriginal right/title is established, has the government established the right is not “existing (was extinguished)? If yes, the claim fails.**

* “Existing,” means those rights that were in existence when the *Constitution Act, 1982* came into effect. Thus, extinguished rights are not revived. Existing means not extinguished
* 3 ways to extinguish an aboriginal right:
  + By surrender (e.g. by treaty) – pre and post s. 35
  + By constitutional amendment – pre and post s. 35
  + By law (federal only) – pre s. 35 only. Most controversial. Idea that s. 35 rights can be exntishued by ordinary operation of federal law. Sparrow focuses on this one. This feature can only happen pre 1982, pre the enactment of s. 35. The reason for this is that Aboriginal and treaty rights have become constitutionalized in s. 92 and so an ordinary law cannot any longer take away a right protected by the Constitution. Federal government can only try to make an extinguishment argument on the basis of an ordinary law is that law was in force prior to 1982.
    - **Underlying question:** should unilateral extinguishment of aboriginal rights even be a thing?
* Need **“clear and plain intention**” to extinguish a right (by any of the 3 methods)
* Mere regulation of a right does NOT equal extinguishment. You need “clear and plaint intention” (for all three ways)
* No extinguishment here the *Fisheries Act* does not demonstrate a clear and plain intention to extinguish the aboriginal right to fish

**Step 3: If the government has not established extinguishment , has the claimant established that the right was infringed? If not, the claim fails.**

* Factors to consider (but not firm test – absence of any is not determinative):
  + Is the particular limitation on the right unreasonable?
  + Does the regulation impose undue hardship on the community?
  + Does the limitation deny to the holders of the right their preferred means of exercise of right denied?
    - This factor is often the key – where the law significantly burdens the preferred means of exercising a right, the law is usually said to infringe the right
* The court sent the issue back to trial to make a determination as to whether the right to fish is infringed
* Sparrow’s claims fails here because they do not have enough evidence!

**Step 4: If the right has been infringed, has the government established that the infringement is justified? If yes, the claim fails. At this stage, the burden shifts to the government.**

* The words “recognized and affirmed” in s. 35(1) = constitutional guarantee of rights
  + S. 35(1) extends beyond the fundamental effects of affording aboriginal peoples constitutional protection against provincial legislative power – s. 35 calls for a just settlement for aboriginal peoples
  + The nature of s. 35(1) itself suggests that it should be construed in a purposive way. It is clear that a generous, liberal interpretation of the words is demanded in favour of aboriginal peoples.
  + because “… treaties and statutes relating to Indians should be liberally construed”
  + Because reading in keeping with the Crown’s fiduciary duty that exists between the Crown and Indigenous peoples.
  + Such a reading is in keeping with the Crown’s fiduciary duty with respect to aboriginal peoples
* But aboriginal rights are NOT absolute – limitations can be justified
  + S. 35 power to legislate must be reconciled with government’s power to regulate under s. 91(24). Recognizing that rights are not absolute, and demanding justification for limits, is the best way to achieve this and promote the special trust like relationship
* **Two-step test for justification under s. 35(1):**
  + **Step 1: is there a valid legislative objective?**
    - Valid legislative objectives include:
      * Conserving and managing natural resources;
      * Preventing harm to the general population or to the particular Indigenous community;
      * “Other compelling and substantial objectives”
    - Public interest held NOT to be a valid objective because its too vague
    - similar to *Oakes*, but unlike *Oakes* in the sense that they articulate some specific examples
  + **Step 2: Is the breach consistent with the “honour of the Crown”, the “special trust relationship” that exists between government and indigenous peoples (language of fiduciary duty often used here)?**
    - Factors to consider:
      * As little infringement as possible to achieve objective (viewed through a lens of priority in this test)?
      * Fair compensation for expropriation?
        + has the government attempted to compensate the community for the breach?
      * Indigenous group consulted?
        + has the government attempted to consult with the particular community in order to try and address their concerns
    - For fishing, after conservation concerns are satisfied, being consistent with Crown’s fiduciary duty requires **priority** be given to the aboriginal rights holder
    - to satisfy this test, this means that the government needs to give priority to Indigenous peoples right to fish for food, after it implements conservation measures. Government can start with conservation but after it does that it has to give priority to the particular Indigenous community that has the right to fish here. This gives Indigenous peoples the priority over other groups including sport fisherman. This priority was said to be grounded in the constitutional nature of the right.

**Note:** Yet again, aboriginal rights are discussed in the context of a criminal trial. Is this really the most appropriate avenue for discussing aboriginal rights?

## R v Van der Peet, 1996 SCC

**Facts:** Appellant, Dorothy Van der Peet, a member of the Sto:lo First Nations, was charged and convicted under s. 61(1) of the *Fisheries Act* with the offence of selling fish caught under the authority of an Indian food fish licence, contrary to s. 27(5) of the *British Columbia Fishery (General) Regulations*. The license is issued under the Federal *Fisheries Act* and it restricted the holder of the license to fishing for good. The sale of fish caught under the fish was prohibited by separate regulations that had been enacted under the Act. Appellant is a member of the Sto:lo and argues that she was exercising an aboriginal right to sell fish. Argues that s. 27(5) infringes her right to sell fish and is therefore invalid on the basis that it violates s. 35(1). This case went further than *Sparrow*. *Sparrow* recognized the existence of a right to fish for food and ceremonial purposes, but this case argued for an even broader right to fish, a right to sell salmon for money and other goods. Appellant invoked s. 35 as a shield arguing that in selling the fish she was exercising an Aboriginal right to sell fish for money or other goods which had been unjustifiable violated by the regulation.

**Issue:** Do the Sto:lo peoples have an aboriginal right to sell fish for money or other goods? Key issue was the first stage of the s. 35 framework.

**Held:** No. Sto:lo have no Aboriginal right to sell fish for money or other goods.

**Lamer CJ for 7:** General Principles (1) S. 35(1) should be given a “generous and liberal interpretation” in favour of Aboriginal Peoples. (2) Any doubts or ambiguities about s. 35(1)’s interpretation and what falls within the scope and definition of s. 35 should be resolved in favour of aboriginal peoples. (3) The justification for these principles is that these principles are consistent with the Crown’s fiduciary duty to indigenous peoples, and thus in its dealings with Aboriginal Peoples, it’s “honour is at stake”. The honour of the Crown has become a fundamental, core concept that the SCC has adopted and applied in later s. 35 cases. The court has even gone so far as to suggest that the honour of the Crown is an underlying principle of the Constitution.

Source of s. 35(1) rights:

* Aboriginal rights are “recognized and affirmed”, and thus protected, by s. 35(1) because of the simple fact that when Europeans arrived in North America, aboriginal peoples were already here, living in communities on the land, and participating in distinctive cultures, as the had done for centuries.
  + So the source of aboriginal rights is **prior use and occupation**

Purpose of s. 35(1):

* The underlying purpose of s. 35 is the reconciliation of the pre-existence of aboriginal societies with their own practices, traditions and cultures with the sovereignty of the Crown
* the idea that the underlying purpose is reconciliation between Indigenous societies in Canada with the sovereignty of the Crown remains a fundamental core organizing concept in s. 35 cases. The idea that s. 35 should be interpreted consistently with its underlying purpose is reflective of the SCC’s more general purposive approach to the interpretation of the Constitution

**Basic test for determining an aboriginal right:**

* 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 asserting the right.
* **Aboriginal rights test** (step 1 of *Sparrow* four part framework):

1. Identify the precise nature of the claim being made
2. Show the right as framed at step 1 is “integral to the distinctive culture of the aboriginal group claiming it”

Step 1: Identify the nature of the claim:

* In trying to define the nature of the claim being made, Courts must consider:
  + Nature of the activity or activities that were being engaged in by the particular Indigenous claimant;
    - Court looked at the actions that led to the appellant being charged
    - in this case this required the court to look at the actions that led to Dorothy Van der Peet being charged. The clear implication here seems to be that the court is only inclined to recognize and address what is necessary to dispose of the particular claim, so in this case the charge that is involved.
    - If Dorthy had only been charged with fishing for food, this seems to suggest that the court would be inclined to limit particular determination to whether or not a right to fish for food had been established and would not be inclined to determine whether a broader right, for example the right to fish for commercial purposes, ought to be recognized
  + The nature of the impugned/challenged law; and
    - This involved looking at the *Fisheries Act* and the regulations under it
    - the question for a court here would be, does it properly interpreted actually prohibit the particular activity in question?
  + The nature of the practice, custom or tradition being relied on
    - in this case, this required the court too look at the practices, customs and traditions she invoked in support of the particular Aboriginal right claim
* the clear implication of these factors, is that a court is going to be somewhat cautious in framing the particular claim, a court is not going to be inclined to make a broader determination that it needs to make to dispose of the particular case before it, in this case the charge that Van der Peet was facing
* Guiding principles:
  + In framing the right, the court must consider views/perspective of the indigenous group involved. “It is possible, and in need crucial, to be sensitive to the Aboriginal perspective itself, not he meaning of the rights at stake”
    - court is clearly saying that in identifying the nature of the claim, it is important for the court to take into account the perceptive of the particular Indigenous people claiming the right itself
  + The activities should be framed at a general, not specific, level
    - E.g. the CoA held that the right being claimed was right was to sell fish on a commercial basis. Lamer CJ rejected this and held that the right should be characterized more broadly as simply the practice of selling fish. What seems to be broader about this, is the idea that it would not be necessary to show that the selling in fish being engage din was part of an ongoing commercial enterprise, that ti was possible to recognize a right to sell fish that was more informal and ado hoc as that was the type of selling of fish that Van der Peet was engaged in. Commercial basis indicated that it was part of some ongoing commercial enterprise, and there was no evidence that the appellant’s actions were part of such an enterprise.

Step 2: Whether the claim, as characterized at step one, is a custom, practice or tradition that is Integral to the distinctive culture of the Aboriginal people claiming the right?

* Meaning of the word Integral:
  + to be integral, the practice, custom or tradition being relied upon to ground the Aboriginal right claim must be Central and significant part of what made the society “distinctive” (not “distinct”). It must be of central significance to the Indigenous community and it would be of central significant where it is a defining characteristic of the society. What makes the society distinctive. The claimant need only show that the custom, practice, tradition that is distinctive, in the sense that it is a defining characteristic of the Indigenous group, something that makes the group what it is.
    - Distinctive: a characteristic of the particular indigenous group – something that makes the group what it is
    - Distinct: something that no one else does
    - the practice, custom and tradition does not need to be distinct, or unique to that particular group.
    - It is not necessary to determine if this is a custom, practice or tradition that ONLY this particular group engaged in, it is rather necessary to determine whether it is distinctive, int he sense of a defining characteristic of the group
    - this threshold would not be met for things that are true of every society (i.e. eating to survive), practices, customs, practices or traditions that are incidental or occasional to the particular society. (there can be an Aboriginal right to hunt for food because this could be distinctive but there cannot be an Aboriginal right to eat to survive because this would not be a defining characteristic of the particular Indigenous group, it is something that is true of every society.
  + Not merely incidental, occasional things.
  + E.g. would not be met for things that are true of every community, like eating to survive
* Need continuity over time. There must be continuity between the contemporary activity for which Constitutional protection is being claimed and pre-contact practice, custom or tradition.
  + The relevant time frame for continuity is pre-contact
    - For Métis, relevant time is date of effective control (1850)
  + The relevant time period for determine whether the custom, practice or tradition was integral to the distinctive culture of the group is the period prior to contact with European settler. This means that the practice, custom or tradition must have developed before contact to be an Aboriginal right because this links to the courts understanding of the course of and justification for Aboriginal rights.
    - Lamer: “Because it is the fact that distinctive Aboriginal societies lived on the land prior to the arrival of Europeans that underlies the Aboriginal rights protected.”
    - **DISSENT (McLachlin and LHD):** Both disagreed with this particular requirement of establishing that the practice can be linked back to the pre contact period. They worried that this requirement could be unduly difficult for Aboriginal claimant to meet. Lamer’s response to this is that the courts should apply evidentiary rules flexibly and with cultural sensitivity taking into account the difficult of proving a right that originated when there were now written records. This means, for example, that taking appropriate account of oral histories is something that ac court must be in these cases.
  + There can be breaks in continuity for a particular time, but only if the pre-contact custom, tradition or practice is later resumed
  + Pre-contact evidence is not strictly required – evidentiary rules need to be applied flexibly, and with cultural sensitivity (e.g. to oral tradition)
  + Continuity does mean rights are frozen in time manner of exercise can evolve. Aboriginal rights should not be interpreted as frozen in time, it is possible for the practice, custom or tradition to evolve over the years as a result of contact but the practice itself has to trace its origins back to the pre-contact practice.
    - Contemporary practice that developed solely in response to European contact would not qualify under this standard BUT it does open the door to the idea that practices, customs or traditions that a re grounded in the pre-contact period can evolve now in the present, they can change in various ways.
    - E.g. *Morris (2006)* SCC held that the accused treaty right to hunt included the right to use guns, spotlights and cars, which were not around during pre-contact times, but were seen as evolutions of hunting rights. This reflected the evolution of the hunting practices, the right protected. It was not necessary that the particular accuse limit himself to hunting in a way that the Indigenous group he was a part of would of hunted according to pre-contact practices, it was acceptable that the hunting being engaged in, which could be traced to the pre-contact period, could evolve and embrace more current methods of hunting including the use of guns, spotlights and cars
  + Subject matter or the right and the manner of its exercise can evolve, but proportionality in evolution is needed
    - Manner: Think about how fishing is done, not the type of fishing being done. For example, a case called *Lax* (2011) said that “the Aboriginal source of fishing rights does not require rights holders in the Pacific North west to fish from dugout canoes.” The manner of the exercise of the right can actually change. (e.g. *Morris* - it is still a right to hunt that is being engaged in but the particular manner of hunting, how you go about hunting, can evolve.)
    - Subject Matter: Courts have said that this evolution is more complex than the manner. Example in the *Lax* case, a gathering right to berries based on pre-contact times would not evolve into a right to gather natural gas within the territories. Courts decisions here suggest that there must be a proportionality int he evolution of the subject of the right involved. A limited trade in a particular type of product gather from a particular type of fish could not properly evolve into a right to a modern commercial fisher in all other fish species and fish products.
  + Aboriginal Rights are to be determined not on a universal basis, but on a case-by-case basis
    - This means that the existence of the Aboriginal right will depend no the practices, customs and traditions of the particular Indigenous community claiming the right.
    - If an aboriginal right to fish has been held to be properly invoked in one aboriginal group, that does not mean it is recognized for all groups

Application to case:

* Step 1: Identify the nature of the claim
  + This is not a broad scale commercial right, it is a right to exchange fish for money or other goods. A broad commercial basis is more regular and there is absence of evidence of selling more than a few times.
  + Lamer notes that the CA had erred in holding that the right claimed was for a right to sell fish on a commercial basis, because the claimant had been charged with selling 10 salmon for $50, not with selling fish as part of an ongoing commercial enterprise. The appellant was not claiming broad right to fish for commercial purposes as part of an ongoing commercial enterprise, what she was claiming was a right to exchange fish for money or other goods, a narrow form of commercial right.
* Step 2: based on a practice, custom or tradition integral to the distinctive culture?
  + No; pre-contact, the exchange of fish was only incidental to fishing for food for Sto:lo. No regularized trading system. The trade engaged in between the Sto:lo and the HBC while of significance to the peoples it was qualitatively different from pre-contact.
  + Lamer said that this is where the claimant’s claim failed because she had failed to demonstrate that the exchange of fish for money or other goods was an integral part of the distinctive culture of the Sto:lo that existed prior to contact with the Europeans.
  + here the emphasis was placed on evidence, and Lamer said that the evidence did show that there was exchange of fish for money or other goods occurred in the society of the Sto:lo before contact with Europeans, however it was incidental to their practice of fishing for food and thus not integral to its distinctive culture. So, yes there was evidence of exchange but it was not brad based exchange, it was incidental to their practice of fishing for food. It was only after contact with Europeans that the Sto:lo had begun to wish to supply a market, a market that had been created by Europeans.
  + It was only post-contact that exchange of fish took off when they fished with HBC. Their exploitation of fishery was not specialized and that suggested that exchange of fish was not a central part of he culture.

**Held:** Van der Peet was convicted and her conviction was upheld by the SCC.

## R v Gladstone, 1996 SCC

**Facts:** Gladstone was a member of the Heiltsuk band. Gladstone was charged with attempting to sell herring spawn on kelp without a proper license contrary to the *Fisheries Act*. Gladstone’s defence to the charge was that he was exercising an Aboriginal right protected by s. 35. The Aboriginal right here was a right to fish for commercial purposes.

**Issue:** Whether Gladstone had a s. 35 protected Aboriginal right to fish for commercial purposes that was unjustifiably infringed?

**Held:** Aboriginal right to fish commercially is recognized and found to be infringed. Issue of justification is sent back to trial.

* He found that the right to fish commercially was recognized (so step 1 of our framework is met) and also that the right had not been extinguished (so step 2 of the framework is also met).
* Evidence showed that before contact with Europeans the Heiltsuk people habitually sold large quantities of herring spawn on kelp to other Indigenous groups and that the trade in herring spawn on kelp was a distinctive feature of Heiltsuk society.
* Lamer also agreed that the Aboriginal right to fish for commercial purposes had been infringed and so the third step of the framework was met as well.

**Lamer CJ for 7:** The first 3 steps of *Sparrow* were met in this case, so there in an infringement of the aboriginal right. Offers refinements to the justification stage:

**Refinement 1 of justification stage: Distinguishing between internally limited rights and non internally limtied rights and the factors to be considered when it is a non internally limited right.**  In Sparrow, the court said that in dealing with justification (step 4 of the *Sparrow* test), that holders of Aboriginal rights would have to be given priority in their access to a resources protected by a particular right, for an infringement of the right to be justified. Thats as true, even if that entailed exclusive access to satisfy the particular right.

* Aboriginal priority “makes sense” where the Aboriginal right is internally limited (limited by its own terms)
  + So exclusive access is only given if the right is limited by its own terms
  + E.g. the right to fish for food is internally limited because the rights holder only needs so much food to survive.
  + E.g. of right that would not be limited by their own terms are the right to fish for commercial purposes, such as the right being argued here to harvest herring spawn for sale in the open market. This right was not internally limited, it was limited only by external factors such as the availability of the resource and demands of the market. Giving priority to the rights holders here, would confer on them the power to absorb the particular resource (i.e. the fishery) entirely, eliminating all non-indigenous access to the recourse.
* He makes a distinction between rights with internal limits and rights without internal limits
  + for rights with internal limits, priority would need to be given so *Sparrow* holds here for rights with internal limits (such as the right to fish for food). While usually there will be enough food for non-indigenous people to have access to these fish for their use too, in some years if the resources are low it may be exclusive to the Indigenous people
  + for rights that a re not internally limited (i.e. rights to fish or hunt for commercial purposes) priority would not entail that the rights holder be given exclusive access. Here, the government would only have to show that it took the allocation of priority, that it took giving the particular Indigenous group priority into account. It was not necessarily to give priority, it was only necessary that the government take the priority of Aboriginal people into account in determining how to allocate access to the resource.
* When rights are not internally limited, government only has to show allocation took priority of aboriginal right into account
* when we are dealign with a right that involves access to a resource (i.e. fishing), you must determine whether it is an internally limited right. If it is an internally limited right then the *Sparrow* priority analysis holds but if it is not an internally limited right (i.e. right to fish for commercial purposes), then you must engage with this newly refined *Gladstone* analysis which is where you just look at whether the government took priority into account and then also whether it considered these other factors below.
  + There is no formula for determining how government can satisfy this obligation, but can look to:
    - Consultation with the particular Indigenous group, compensation offered, accommodation of the Indigenous users (e.g. reduced licence fees), aboriginal priority taken into account (has the government considered the importance of priority access, proportion of aboriginal group participating, the extent of participation of the Indigenous right holder relative to the population (the implication here is that the larger the Indigenous group in question the more priority it may need to be given in order to recognize its particular Aboriginal right but the smaller the group, the less priority access need to be given).
  + This is a much lower standard than actually giving priority to aboriginal peoples, and so priority of aboriginal rights holders is significantly watered down
  + So priority up to an including exhaustive interest in a resource is ONLY available where the right is internally limited

**Refinement 2 of justification stage: Relates to the objectives that are considered valid to justify an infringement of a right.**

* *Sparrow* had noted conservation and management in preventing harm were valid objectives at the first stage of the justification analysis under step 4 of the Sparrow framework. It also referred to the possibility of other “compelling and substantial” objectives to be recognized in the future.
* Adds to objectives that could be considered “compelling and substantial objectives”:
  + Economic and regional fairness
  + Recognition of historical reliance upon, participating in, fishery by non-indigenous
    - So again the test is watered down here. More objectives are added and they are more favourable to the interests of non-indigenous peoples
* The extension of the objectives in this way has been criticized on the grounds that Aboriginal rights would be undermined in order to satisfy the economic demands and interests of the broader non-Indigenous community.
* Expert tests in this case said that the conservation objectives of setting the stock at 20% and as to the difficulties encountered by the herring fishery when the catch was set at much was higher levels, so gave deference to government’s approach to fisheries management. Sent back to trial – to relitigate. Can’t make determinations on this fact. (institutional competence)

Application to the case:

* Lamer concludes that there is insufficient evidence to deal with the case. He said that there was not enough evidence on whether allocation of licences was justified. There is insufficient evidence to determine whether the regulatory scheme for the sale of herring spawn was justified and so he sent the issue back, just like the court did in *Sparrow*, to a new trial for reconsideration.

### Aboriginal Rights Test Summary

1. **Is there an Aboriginal Right?**

* *Van der Peet* test

1. **Is the Aboriginal right “existing”?**

* Extinguished by surrender?
* Extinguished by constitutional amendment?
* Extinguished by law? (pre-35 only)

1. **Is there an interference with the right?**

* Limitation unreasonable?
* Undue hardship?
* Deny to holders preferred means to exercise right?

1. **Is the infringement justified?**

* Valid objective?
* Consistent with honour of the Crown?

### Criticisms of *Van der Peet* Test

1. Adopted a frozen rights approach, freezing aboriginal rights in the past and preventing them from responding to contemporary circumstances. The criticism said that it treated Aboriginal rights as locked in the past, incapable of adjustment to contemporary circumstances

* Indigenous peoples have consistently argued that their rights should be flexible to adapt to modern time (much like the Charter is a “living tree”) so that they do not become mere museum exhibits
* Court appeared alive to this criticism in *Van der Peet* and seemed to reject a frozen rights approach and said that Aboriginal rights could be exercised in a modern form but many have doubted that the approach actually articulated in *Van der Peet* are actually capable of being applied din such a way to fulfill this intention of allowing rights to be exercised in a modern form

2. Pre-contact as a trigger is inappropriate

* Why is contact the time chosen for crystallization of aboriginal rights?
* The very existence of Métis, who only have existed since contact, calls into question whether contact is the appropriate time measure to adopt
* Aboriginal title is framed around sovereignty, not contact. Why the difference?
* strict application of this test would exclude all practices that developed with the fur trade

3. Cultural emphasis is inappropriate

* The test requires the activity be integral to the culture
* this test appears to negate rights that are predominately economic in nature (i.e. commercial fishing right) impeding the ability of Aboriginals to develop their own economies
* But what about economic activities? Why aren’t these considered?
  1. **Includes right to exclusive use, occupation; not limited to practices integral to distinctive culture** (key: can be used for modern practices NOT rooted in aboriginal traditions or customs)
  2. But aboriginal title lands cannot be encumbered in ways that would prevent future generations from using and enjoying the land (***Tsilhqot’in Nation* 2014 SCC**)
* Inalienable, except to the Crown
* Held communally
* Constitutionally protected under s. 35(1)

Aboriginal Title

* a unique type of Aboriginal right
* a subset of aboriginal rights (recognized by SCC in 1996 decision called *Adams*)
* aboriginal title confers the exclusive right to occur and use a particular tract of land
* what is the difference between Aboriginal rights and Aboriginal title?
  + Aboriginal rights are both narrower and broader than Aboriginal title. Aboriginal title would permit the title holders to hunt, fish, harvest and so on on their land. This would flow from their exclusive right to occupy and use the land. However, Aboriginal rights, which are often rights to engage on particular activities such as fishing and hunting may also exist on lands to which Indigenous peoples do not have Aboriginal title. Aboriginal rights are often defined in site specific terms in that they can only be exercised at a particular defined location but it is not necessary for the Indigenous claimants to establish title first before they can claim a particular Aboriginal right protected by section 35. In fact, the SCC has said that Aboriginal rights to particular practices do not necessarily need to be linked or tied to a particular tract of land in order to qualify for protection, it will depend on the nature of the claim being made and the evidence offered in support of it whether the particular Aboriginal right was tied to a particular tract of land
* how do we distinguish Aboriginal rights and Aboriginal title?
  + Aboriginal rights are both narrower and broader than Aboriginal title rights. Aboriginal rights are narrower than title rights in that they relate to only specified activities, perhaps and often, but not necessarily in a particular set location
  + Aboriginal rights are also broader than Aboriginal title rights in that they relate to distinctive practices, customs or traditions that may or may not be connected to a specific location or piece of land. The claimant would have to satisfy the *Van der Peet* test showing that the practice, futon or tradition was integral to the distinctive culture of the particular Indigenous group but Aboriginal title does not need to be shown as well for an activity, such as hunting or fishing, to be established

### Background About Aboriginal title and it’s roots prior to s. 35

* Aboriginal title was recognized by SCC as a common law right before s. 35 came into force (*Caulder v British Columbia* (1973) SCC, *Guerin v The Queen*, (1984) SCC)).
  + the underlying these cases is that the Crown somehow acquired the underlying title to all land in what is now Canada, including land that was used and occupied by Indigenous peoples before contract with Europeans
  + the common law recognized that Aboriginal title, if it was not extinguished by the Crown, survived as a burden on the Crown’s title to the land
* Indigenous peoples efforts to bring their Aboriginal title claims before the courts were prevented by a number of measures including a ban on raising funds for title legislation that was set out in the *Indian Act.* This ban was removed in the 1960’s and the claims of Aboriginal title resumed again.
* Since 1982, aboriginal title has been constitutionally protected by s. 35 from unjustified infringements
* courts have often seemed to deliberately shy away from finding Aboriginal title to exist on a particular set of facts
* courts have usually limited themselves to saying that Aboriginal title exists as a concept to emphasizing that it constitutes a constitutional or at least a legal interest that governments must respect and to encouraging the parties to negotiate in response to claims for it. Only when the parties have failed to come to a negotiation after a considerable period of time have the courts moved beyond this limitation

### Treaty Coverage and Aboriginal Title

* there are various areas of Canada that are not covered by treaties and that is particularly true in BC
* Aboriginal title cases have traditionally come from BC
* why fewer treaties in BC?
  + as settlement advanced across the country, treaties were generally entered into by the Crown with Indigenous peoples, however BC was one exception. There was a policy against negotiating treaties there so settlement took place largely without negotiating treaties
* a treaty making process has now been established but it is very slow and so Indigenous popes in BC have often turned to the courts and to s. 35 Aboriginal title claims to establish title to a particular area of land
* Aboriginal peoples outside of BC also make Aboriginal title claims but they run into the issue that the Crown argues that any right to argue this was extinguished or given up in the particular treaty in the area

### Source of Aboriginal Title

* overlaps with discussion about Aboriginal rights but it also adds to it
* the overlapping part are the first three sources of Aboriginal title that have been accepted by the courts at different points and to varying degrees
  + **1) Royal Proclamation of 1763 as source**
    - this was the source relied upon the Pricy Council and the Canadian courts until SCC 1973 decision in *Caulder* when the court moved away from this particular understanding of the source of Aboriginal title
  + **2) Indigenous laws pre-contact/sovereignty** 
    - has been more relied upon by Indigenous peoples and has found less success in Canadian courts is that the source of Aboriginal title are the laws and legal system,s that existed prior to contact and that the Crown’s assertion of sovereignty
    - has not received widespread acceptance amongst Canadian courts, although this is a source that is emphasized by many Indigenous peoples and writers
  + **3) Prior occupation and use pre-contact/sovereignty** 
    - has been emphasized and accepted more since *Caulder* decision
  + **4) “Inter societal law” as best view of source (Brian Slattery)**
    - argued that aboriginal title is best understood as resulting from inter societal law which results fro the fact that “when the settlers came, the Indians were there, organized in societies and occupying the land s their forefathers have done for centuries” (Caulder)
    - he argues that settlers were forced to come to grips with this fact that Indigenous peoples were here and occupying the land as their forefathers have done for centuries.
    - over time they came to acknowledge Aboriginal rights to the land, not always in thd way that Indigenous peoples wished
    - inter societal law: the coming together of two different orders of law and rights
    - there has been some references to this by the courts (*Van der Peet)*

### ANALYSIS for aboriginal title and for ALL s. 25(1) claims:

1. Has the **claimant** established an Aboriginal right or treaty right protected by s. 25(1)? (aboriginal right includes title) (*Sparrow*) Use test from ***Delgamuukw***:. **If Not, the claim fails.**
   1. Clamant must prove sufficient occupation prior to sovereignty (*Delgamuukw*)
      1. Occupation must be determined in a “context-specific” and “culturally sensitive” way, approached from both a common law and indigenous perspective (*Tsilhqot’in*)
      2. “Intensive” occupation is NOT needed; what is needed is a “strong presence”, manifesting in acts of occupation (*Tsilhqot’in*)
   2. Claimant must prove continuity of occupation (ONLY if present occupation is relied on as proof of occupation pre-sovereignty) (*Delgamuukw*)
      1. Need “substantial maintenance of connection” between people and the land for continuity to be established; don’t need unbroken chain
   3. Claimant must prove occupation at sovereignty was exclusive (*Delgamuukw*)
      1. Exclusive occupation means intention and capacity to maintain exclusive control
      2. This stage should take into account the aboriginal group’s perspective and things like:
         1. Characteristics of particular indigenous group
         2. Characteristics of other groups in the area
         3. The nature of the land
2. If a s. 35(1) right is established, has the government established that it is not “existing” (was extinguished)?(*Sparrow*)
   1. If yes, the claim fails
   2. “Existing,” means title that was in existence when the *Constitution Act, 1982* came into effect. Thus extinguished title is not revived (*Sparrow*)
   3. Need “clear and plain intention” to extinguish title (*Sparrow*)
   4. Mere regulation of title does NOT equal extinguishment (*Sparrow*)
3. If the government has not established extinguishment, has the claimant established that the right was infringed?(*Sparrow*)
4. If not, the claim fails
5. There will be no infringement on aboriginal title if the indigenous group consents to the infringement (*Tsilhqot’in*)
6. Factors to consider (but not firm test – absence of any is not determinative): (*Sparrow*)
   * 1. Is the limitation on title unreasonable?
     2. Does the regulation impose undue hardship?
     3. Preferred means of exercise of title denied?
        1. This factor is often the key – where the law significantly burdens the preferred means of exercising title, the law is usually said to infringe title
7. If the right has been infringed, has the government established that the infringement is justified? (*Sparrow*)
   1. If yes, the claim fails.
   2. Government must meet 3 requirements to justify an infringement:
8. The duty to consult must be discharged (*Tsilhqot’in*)
9. There must be a valid legislative objective (*Sparrow*)
10. I.e. conserving and managing natural resources; preventing harm; “other compelling and substantial objectives”; (NOT public interest) (*Sparrow*)
11. Compelling and substantial objectives could include economic and regional fairness; reconciliation of historical reliance upon and participation in fishery by non-indigenous people (*Gladstone*)
12. Valid objectives include: the development of agriculture, forestry, mining, and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations to support those aims (*Delgamuukw*)
13. The breach must be consistent with Crown’s “honour”/fiduciary duty (*Sparrow*)
14. This involves a proportionality analysis:
    1. Implicit in the Crown’s fiduciary duty to the aboriginal group is the requirement that the incursion is necessary to achieve the government’s goal (rational connection); that the government go no further than necessary to achieve it (minimal impairment); and that the benefits that may be expected to flow from that goal are not outweighed by adverse effects on the aboriginal interest (overall balance) (*Tsilhqot’in*).
    2. Considerations such as compensation, accommodation, aboriginal priority taken into account proportion of aboriginal group participating (*Gladstone*) are factors that speak to minimal impairment (*Tsilhqot’in*).
15. Note: there can be no justification if future generations are substantially deprived of the benefits of the land (*Tsilhqot’in*).

### Remedies (tsilhquot’in)

* If aboriginal title is established, the Crown can’t proceed with (approving) developments, unless:
  + The aboriginal title holder consents; or
  + The duty to consult has been satisfied, and the infringement is justified under the *Sparrow* test
* Prior conduct might have to be reassessed (e.g. by cancelling projects already started)
* Legislation might be rendered inapplicable

Aboriginal title is a subset of aboriginal rights, recognized in *Van der Peet, Gladstone*.

* Aboriginal rights are narrower that aboriginal title in the sense that they only relate to specified activities (e.g. hunting, fishing).
  + Where a group has aboriginal title, they have all the aboriginal rights that come with the land
* Aboriginal rights are also broader than aboriginal title in the sense that they relate to distinct practices, traditions and customs that may not be linked to a specific piece of land
  + Aboriginal rights may exist on lands to which aboriginal people do not have aboriginal title
* Aboriginal title was recognized as a common law right in *Clader* and *Guerin*.
  + It took so long for aboriginal title to be recognizes because for a long time, the Crown was immune to lawsuits from indigenous peoples
* Since 1982, aboriginal title has been constitutionally protected in s. 35(1)
* 2014 was the first time a court ever actually found aboriginal title to exist on the facts of the case

### Source of aboriginal title:

* Royal Proclamation of 1763?
  + Not exclusively since *Calder* (1973 SCC)
* Indigenous laws pre-contact/sovereignty?
  + This view not broadly accepted by courts
  + But this view very much reflects aboriginal law perspectives
* Occupation and use pre-contact/sovereignty?
  + Accepted more broadly by courts
  + Reflects common law perspectives (i.e. principles of property law)
* “Intersocietal law” as the best view?
  + Represents a compromise between aboriginal views and common law views – aboriginal title and rights are based on the accommodation between the two

### Aboriginal title as “sui generis”: (*Delgamuukw*)

* Different source: occupation pre-sovereignty
* Different permissible range of uses
  1. **Includes right to exclusive use, occupation; not limited to practices integral to distinctive culture** (key: can be used for modern practices NOT rooted in aboriginal traditions or customs)
  2. But aboriginal title lands cannot be encumbered in ways that would prevent future generations from using and enjoying the land (*Tsilhqot’in Nation* 2014 SCC)
* Inalienable, except to the Crown
* Held communally
* Constitutionally protected under s. 35(1)

## R v Adams, 1996 SCC

This decision elevated aboriginal title from its common law status to the level of constitutional guarantee.

**Lamer CJ (majority):**

* Aboriginal title is a specific subset of aboriginal rights, recognized and affirmed by s. 35(1) of the *Constitution Act, 1982*.
* While claims to aboriginal title fall within the conceptual framework of aboriginal rights, aboriginal rights do not exist solely where a claim to aboriginal title has been made out
* The reason why aboriginal rights cannot be inexorably linked to aboriginal title is because some aboriginal peoples were nomadic

## Delgamuukw v BC, 1997 SCC

* this case considered Aboriginal title claims on behalf of the Gitksan or Wet’suwet’en peoples to 58, 0000 square kilometres in northern BC.

**Facts:** Appellants, who were all Gitksan or Wet’suwet’en hereditary chiefs, claimed separate portions of 58,000 square km in BC. BC argued the appellants have no right or interest in the territory, or alternatively, that the appellants’ cause of action ought to be for compensation from the federal government. There were approximately 7,000 aboriginal peoples living in the area and 30,000 non-aboriginal people living in the area at the time of trial.

**Prior Proceedings:** TJ denied the claims to Aboriginal title being made on behalf of the Gitksan or Wet’suwet’en. Primarily because he rejected most of the evidence they submitted in support of their claim. The case ended up on appeal in SCC.

**Held:** New trial ordered to make new factual findings. Even though the SCC sent the case back for a new trial, it took the opportunity ti lay down important principles about evidence and the substance of the law of Aboriginal title that were to govern this new trial that it ordered.

**Lamer CJ for 4** (this is the opinion most focused on):

Treatment of evidence (first finding of this case was the courts ability to override factual findings made at the trial level):

* Appellate courts typically do not interfere with factual findings made at trial but it was necessary to do so here because the TJ improperly dealt with evidence especially the treatment of oral histories, so it is appropriate to interfere with findings of fact here
  + oral histories showed their attachment to the land. TJ rejected this evidence
* Lamer said that Aboriginal rights “demand a unique approach to the treatment of evidence which accords due weight to” indigenous perspectives
  + this would requires the courts to come to terms with the oral histories of Aboriginal societies, which for many Aboriginal nations are the only record of their past
  + This includes accepting oral histories, otherwise it would be almost impossible to prove occupation because there isn’t much written evidence

Aboriginal title as “sui generis”

* **Sui generis:** unique, in a class by itself. There are a number of differences between aboriginal title and common law title:
  + there are a number of important differences between Aboriginal and non Aboriginal title, in particular there are a number of differences between Aboriginal and non-Aboriginal fee simple title
  + fee simple title: the most substantial interest in land that exists at common law. It gives the owner exclusive rights to use and occupy the land to which the owner holds title. Although essentially equivalent to absolute ownership, land held in fee simple is still held in tenure on the Crown’s underlying title. This means that fee simple ownership, because it is granted by the Crown, relies on the validity of the crown’s interest in the land in the first place and any encumbrances on the Crown’s underlying title also apply to the fee simple interest itself
  + this sections points out main differences between Aboriginal and non Aboriginal title
* (1) Different source: Aboriginal title has it source in the occupation and use of land pre-sovereignty
  + - Unlike non-aboriginal fee simple which derives from a grant of the land by the Crown, which could take place only after sovereignty by the Crown
    - ultimately, non Aboriginal fee simple title is established by showing a chain of title that originates in a Crown grant of the land.
    - Occupation = possession and fee simple arises after crown. (making it truly sui generesis)
    - New source – relationship between Common law and pre-existing systems of aboriginal law –intersocietal law
* (2) Different permissible range of uses
  + **Aboriginal title Includes right to exclusive use for a variety of things and occupation; not limited to practices integral to distinctive culture (key: can be used for modern practices NOT rooted in aboriginal traditions or customs)**
  + But, the uses of the land “must not be irreconcilable with the nature of the attachment to the land which forms the basis of the particular groups Aboriginal title”(i.e. it would be irreconcilable to use aboriginal lands occupied for hunting purposes for strip mining which would destroy their value as hunting lands)
    1. Lamer offers 2 justifications for this, because no such limitation exists on fee simple:
       1. Aboriginal title seeks to afford legal protection not only present day aboriginal peoples but also future generations of aboriginal peoples
          1. implicit in this is a recognition of the importance of the continuity of a relationship of a particular community to it’s land over time. The prevention of uses that would threaten the nature of the particular communities attachment to the land is aimed at protecting this present and future relationship
       2. ?
          1. **Wright:** does this reflect a paternalistic view of aboriginal peoples?
    2. This requirement was softened a bit in *Tsilhqot’in Nation* (2014 SCC) aboriginal title lands cannot be encumbered in ways that would prevent future generations of the group from using and enjoying the land, nor can the land be developed or misused in a way that would substantially deprive future generations of the benefit of the land(shifts focus from inconsistent uses to use that would prevent enjoyment). McLachlin says
       1. the limitation is softened because this new language seems to shift the focus from uses inconsistent with the particular communities attachment to the land (e.g. hunting or fishing) to uses that would absolutely or substantial deprive present and future generations from using or enjoying it. this seems to be broader than the limitation that *Delgamuk* recognized which was focused on the nature of the communities attachment to the land. This new approach is concerned with making sure that present and future generations are able to enjoy the land in the present and in the future more broadly for any variety of purposes
* (3) Inalienable, except to the Crown
  + Lands held pursuant to aboriginal title cannot be transferred sold or surrendered to anyone other than the Crown and is inalienable to other parties.
  + The Crown has to act as an intermediary between the aboriginal title holders and third parties who have an interest in or want to buy the land
  + In order to pass title to a third party, the Indigenous owners must first surrender the land to the crown. The Crown thens comes under a fiduciary duty to deal with the land in accordance with the best interests of the particular Indigenous community (e.g. by ensuring that adequate compensate is received for it).
    - Non Aboriginal title is subject to no such limit or duty.
  + The result is that the crown comes under a fiduciary duty to deal with the land in accordance with the best interests of aboriginal peoples
  + Note: Fee simple is not subject to this sort of regulation
  + There seems to be disagreement among indigenous peoples about this aspect:
    - Some agree that the land is inalienable
    - Some question why their land should be subject to this restriction
* (4) Aboriginal Title lands are Held communally
  + “Aboriginal title cannot be held by individual Aboriginal peoples, it is a collective right to land held by all members of an Aboriginal nation”
  + This means that decisions about the land have to be made communally, not individuals (as they can be with fee simple title lands), and there has to be somebody capable of making these decisions
    - this difference does not mean that Aboriginal peoples hold their land in undivided co-ownership, individuals and groups actually often hold rights to specific tracts of land within their particular community
    - the suggest that the title is communal is best understood as indicating that from the perspective of non-Aboriginal governments, the allocation of the right amongst the members of the particular community is a matter for the Aboriginal community concerned
    - this speaks more to the relationship between the particular Indigenous groups and non-Aboriginal governments and parties
  + The best way to think about it is that allocation of individual land is a matter left to the holder of aboriginal titles
* (5) Aboriginal Title is constitutionally protected under s. 35(1)
  + s. 35 confers constitutional protection on any Aboriginal title that as existing, meaning unextinguished in 1982
  + this protection is not absolute, infringements on Aboriginal title lands can be justified under the *Sparrow* test
* Aboriginal title gives more than site specific benefits

### Test for proof of aboriginal title:

Adjustment framework from Sparrow to see how an Aboriginal title claim would lay over that framework (the framework for an Aboriginal right is dealt with under the Can Der Peet test) (Step 1 of the aboriginal title analysis)

To make out a claim to Aboriginal title in a tract of land, three requirements must be satisfied

1. Claimant must prove sufficient occupation of the land prior to sovereignty
   1. The claimant must establish that the lands were sufficiently occupied at the time at which the Crown asserted sovereignty over the land
      1. in the case of BC the relevant date has been held to be 1846
   2. The enquiry must take into account both indigenous and common law perspectives
      1. E.g. common law occupation is grounded in physical possession, so would look for things like buildings
      2. they could look at proof of the construction of dwellings, proof of the cultivation and enclosure of fields, regular use of particular tracts of land for hunting, fishing or activities that exploit resources on the land
      3. the common law and indigenous perspective including indigenous laws should be reconciled in assessing a claim of Aboriginal title. One should not be given precedence over the other.
         1. “look into groups size manner of life material resources and technological abilities and the character of the lands claimed”
   3. **Note:** this requirement is less stringent than establishing an aboriginal right, for which the *Van der Peet* test says the relevant time is contact)
   4. Justification offered for using date of sovereignty:
      1. Aboriginal title is a burden on the Crown’s underlying title. The Crown’s underlying title only assumed this burden at sovereignty, so this is when aboriginal title crystallized. Aboriginal title only crystallizes at the time sovereignty is asserted by the Crown.
         1. But how does the Crown’s assertion of sovereignty create aboriginal title? If it does, then why couldn’t sovereignty also create aboriginal rights?
      2. From a practical standpoint, the date of sovereignty of aboriginal title is more certain date then the date of contact, which varies in different regions. It is difficult to determine when each Aboriginal group had first contact with European culture.
         1. Again – this doesn’t explain why we use the date of contact for aboriginal rights
2. Claimant must prove continuity of occupation (ONLY if present occupation is relied on as proof of occupation pre-sovereignty). This means that occupation must be continuous, at least if present occupation is relied upon to ground the claim. There must be continuity between present and pre-sovereignty continuity between the land. If the community is asserting that it occupies land now and that should be taken tor Reflect occupation of the land pre-sovereignty then there needs to be evidence of continuity of occupation from pre-sovereignty to the present.
   1. This continuity can be disrupted for a period of time
   2. Need “substantial maintenance of connection” between people and the land for continuity to be established; don’t need unbroken chain
   3. Nature of occupation of the land can change as long as a substantial connection with the land is maintained and continuity is established
3. Claimant must prove occupation at sovereignty was exclusive. Occupation must have been exclusive. The rationalization for this requirement is that otherwise, without the exclusivity requirement, it would be possible for more than one Indigenous community to have title over the same piece of land and then for all of them to attempt to assert the right to exclusive use and occupation.
   1. Exclusive occupation means the intention and capacity to maintain exclusive control. This should be assessed with caution taking both the Indigenous perspective and the context of the Indigenous group at the time of Crown sovereignty into account.
      1. This could be established by: proof that others were excluded from the land in question or indeed just other groups more broadly; evidence that others asked for permission and the particular claimant Indigenous group granted it; proof that other requested and were refused access to the land; that there were a lack of challenges by others to the use and occupancy of the land by the particular Indigenous group; that treaties were made with other groups about the land; the existence of other groups around the land who recognize you group’s claim; evidence of treaties between indigenous communities; indigenous laws related to trespass or laws relating to where consent to use land can be granted.
   2. This stage should take into account the aboriginal group’s perspective and things like:
      1. Characteristics of particular indigenous group (claimant group)
      2. Characteristics of other groups in the area
      3. The nature/characteristics of the land
   3. Because without exclusivity, it would be possible to have more than one indigenous community that could claim title over a particular area of land (note the manifestation of the common law division of land)
   4. Lamer recognize that there is a possibility of joint aboriginal title, where two aboriginal groups live on a piece of land and they recognize each other’s title to the land but nobody else’s
      1. It does not have to show that the land is integral or of central significance to the culture of the Indigenous claimants which is what must be shown to establish an Aboriginal right under *Van DeerPeet* Test so why is this requirement abandoned here?
         1. Lamer says that proof of pre-sovereignty occupation of the land is sufficient to show that title to the land is of central significance to the culture of the claimants. The practical result of this is that post *Delgamuukw* the *Van Derpeet* test applies to Aboriginal right claims while the *Delgamuukw* test applies to Aboriginal title claims with satisfaction of the *Delgamuukw* test being taken to demonstrate sufficient central significant for the purposes of the *Van DerPeet* test.
      2. Look at the intention and capacity to retain exclusive control
      3. Shared exclusivity

### Justification of Infringements on aboriginal title (Step 4 of aboriginal title analysis):

* Assuming that a claim to Aboriginal title has been established, an extinguishment has not been proven and an infringement has been established at stage, we now look at whether the infringement is justified
* the burden is on the party attempting to justify the infringement (usually government)
* The *Sparrow* test for justification of infringements applies to aboriginal title as well as aboriginal rights. Overall, the justification analysis is not different at the fourth stage but there are a few slight variations.
* He says that the range of legislative objectives hat could justify an infringement of Aboriginal title, objectives that are compelling and substantial (*Sparrow*), is fairly broad
  + Lamer says that this broad objectives can be traced to the reconciliation of the prior occupation of NA by Aboriginal peoples with the assertion of Crown sovereignty
* Part 1 of the justification test asks whether there is a valid legislative objective.
  + In this case, Lamer CJ expands the valid purposes to include:
  + “… the development of agriculture, forestry, mining, and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations to support those aims, are the kinds of objectives that … in principle can justify the infringement of Aboriginal title.”
* Part 2 of the justification test asks if the infringement that results is consistent with the Crown’s fiduciary duty (the special just like relationship that exists between the Crown and Indigenous peoples)
  + Where aboriginal title lands are concerned and where title is established (in order to be dealing with justification we are assuming that title has already been established), there is **always** a duty of consultation for decisions taken with respect to the particular lands. Such a duty will vary with the context.
    - The satisfaction of this duty of consultation will be relevant in determining whether the infringement is justified under the 4th stage of the Sparrow framework.
    - Fair compensation will ordinarily be required where Aboriginal title is infringed with the amount of compensation required varying as a result of multiple factors including: the nature of the Aboriginal title affected; the nature and severity of the infringement and the extent to which Aboriginal interests were accommodated
    - Must be in good faith and with intention of substantially addressing the concerns of the aboriginal peoples whose land are at issue
  + Manner in which fiduciary duty operates with respect to 2nd stage will be a function of nature of aboriginal title:
    - Exclusive use – relevant to degree of scrutiny of the infringing measure or action
    - Right to choose land use – consultation
    - Economic component – compensation is relevant to justification as well; fair compensation will be ordered when required.

Lamer CJ’s conclusion:

* “… it is through negotiated settlements, with good faith and give and take on all sides, reinforced by the judgments of this Court, that we will achieve what I stated … to be a basic purpose of s. 35(1): ‘the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown’. Let us face it, we are all here to stay.”

## Tsilhqot’in Nation v BC, 2014 SCC – deals with WHETHER SEMI NOMADIC PEOPLES COULD PROVE OCCUPATION OF LAND sufficient TO MEET DELGAMUUKW CASE

**Facts:** The Tsilhqot’in people are a semi-nomadic group of 6 bands that claimed 4,380 square km in BC prior to contact. In 1983 the province of BC granted Carrier Lumber Ltd a forest licence to cut trees in part of the Tsilhqot’in territory. The Tsilhqot’in objected with blockades and attempted to negotiate with the province of BC and filed a claim for Aboriginal title in 1998. They asked for a declaration from the courts of aboriginal title over these 4,380 square km of land and challenged the validity of the logging licence on the ground that the Tsilhqot’in people had not been consulted which the province was required to do, in their view, prior to issuing the license. After 339 day trial, TJ affirmed the theoretical existence of aboriginal title, he assessed the scope of a potential claim for Aboriginal title in broad terms and he was willing to accept in broad terms that they had a claim for Aboriginal title here but refused to grant a declaration of aboriginal title base on a technicality/procedural defects in the pleadings of the Tsilhqot’in.

**Issue:** Was there sufficient pre-sovereignty occupation of the land claimed?

**Held:** Yes. She accepted both of Tsilhqot’in arguments: (1) Declaration of aboriginal title issued (for the first time ever) and (2) Duty to consult was held to be breached.

**McLachlin CJ (majority):** Begins with a summary of the relevant principles.

* central issue: Was there sufficient pre-sovereignty occupation of the land claimed?
  + Agrees with TJ, Rejects CA’s “postage stamp” view of occupation, where he held there was insufficient occupation because they only intensely settled certain area
  + Occupation must be determined in a “context-specific” and “culturally sensitive” way, approached from both a common law and indigenous perspective (Delgamukv). Indigenous perspective nvolve looking at the characteristics of the land in question but also the characteristics of the particular Indigenous group including their size at the time of sovereignty, their manner of life, their particular material resources and their technological abilities. In addition this would include taking into account norms and legal traditions in relate to their claim for occupation. The common law looks of possession and control.
    - to succeed what was needed was evidence of a strong presence of the land claimed
  + what context specific and culturally sensitive means in practice is that intensity and frequency of use may vary with the characteristics of the group and the character of the land
  + “Intensive” occupation is NOT needed; what is needed is a “strong presence”, manifesting in acts of occupation
    - CA suggested that it was wrong to insist on insensitive occupation as it ignored the character of the land in question
  + quotes Delgamuukv
    - “occupation may be established in a variety of ways, ranging from construction of dwellings through cultivation and enclosure of fields to regular use of definite tracts of land for hunting fishing or otherwise exploiting its resources”
* Found that there was sufficient pre-sovereignty occupation in this case
  + The land, while extensive, is mountainous and capable of supporting only a small group of people because it is such a harsh environment
  + So the semi-nomadic lifestyle of the Tsilhqot’in people is a result of the nature of the land
  + It was therefore wrong for the TJ to insist on intensive occupation of the entire land, because the land can’t support such occupation

Discusses the acquisition of Crown sovereignty:

* Explicitly rejects doctrine of discovery and terra nulls (that no-one owned the land prior to European assertion sovereignty). So, these are not sources of sovereignty
* Conquer was clearly not source of Crown sovereignty
* she said they just said that they were sovereign (through assertion).
* Doesn’t actually say what the source of Crown sovereignty is. This is the elephant in the room.

Discusses aboriginal title and private land:

* Aboriginal title “burdens the Crown’s underlying title”. But fee simple relies on the validity of the Crown’s underlying title.
* Says that there will be no infringement if the particular Aboriginal group i question (title holder) consents
  + relevant to Step 3 of Sparrow framework- is there an argument to be made that the group consented to this infringement in some way?
* This would suggest that private lands can be subject to aboriginal title claims. McLachlin doesn’t answer this. Another elephant in the room.

Refinements to the Justification stage of *Sparrow*: **ADDS TO IT**

* The duty to consult must be discharged for an infringement of aboriginal title to be justified
  + important how the court treats the duty to consult in the context of a duty to consult
  + distinguishing between situations where Aboriginal title has already been established and cases where it has not yet been established but might be argued in a case that is on going
    - where Aboriginal title has been established, for an infringement to be justified the government has to how that it discharged its procedural duty to consult BEFPRE attempting to established a justification of infringement under the regular Sparrow test. If they have not, we do not go on and engage in the rest of the *Sparrow* justification analysis.
    - This this is now Step 1 of, or even a precondition to, the rest of the justification analysis
* Confirms broad objectives from Justice Lamer in Delgamuukv.
* There can be no justification if future generations are substantially deprived of the benefits of the land
  + this is significant because we know that this is baked right into the definition of Aboriginal title. Aboriginal title is subject to a limitation that non Aboriginal title is not subject too which is that the land has to be used in a way to preserve its use for future generations.
  + Crown can never justify an infringement on Aboriginal title that would deprive the community and future generations from the benefit of the use of the land in question
* Imports a full proportionality analysis into the last step of the justification analysis to determine whether the infringement is consistent with the Crown’s fiduciary obligations:
  + refers to this as a rational connection test
  + Implicit in the Crown’s fiduciary duty to the aboriginal group is the requirement that the incursion is necessary to achieve the government’s goal (rational connection); that the government go no further than necessary to achieve it (minimal impairment); and that the benefits that may be expected to flow from that goal are not outweighed by adverse effects on the aboriginal interest (overall balance).
  + The other considerations under this stage of the justification test (i.e. compensation, accommodation), now likely speak to minimal impairment

Comments About Remedies

* If Aboriginal title is established, the Crown cannot proceed with (approving) developments unless:
  + the Aboriginal title holder consents; or
  + the duty to consult has been satisfied, and the infringement is justified under the Sparrow test
* Prior conduct might have to be reassessed - for example, by cancelling projects already started
  + Crown might have to cancel permits or cancel the project
* legislation might be rendered inapplicable to the particular community in question

### TRC Calls to Action

* 43: We call upon [all] governments [in Canada] to fully adopt and implement the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) as the framework for reconciliation
* 47: We call upon [all] governments to repudiate concepts used to justify European sovereignty over Indigenous peoples and lands, such as the Doctrine of Discovery and terra nullius, and to reform those laws, government policies, and litigation strategies that rely on such concepts.

### United Nations Declaration on the Right of Indigenous Peoples (UNDRIP), Article 26

1. Indigenous peoples have the right to the lands, territories and resources, which they have traditionally owned, occupied or otherwise used or acquired.
2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.
3. States **shall** give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.

### United Nations Declaration on the Right of Indigenous Peoples (UNDRIP), Article 32

1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.
2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.
   1. a lot of people read this to give Aboriginal peoples a veto over decisions relating to their lands and their rights so when the federal government said they were intending to fully implement UNDRIP they were happy about it but the government said that they do not ready UNDRIP to have a requirement of consent but rather that it confers the right to a process but not the right to an actual veto. Governments reads this as requiring a duty to consult so the government will talk to Aboriginal people but it is not necessarily required to obtain their consent.
3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

### Treaty Rights

### ANALYSIS for treaty rights:

1. Has the **claimant** established a treaty right? (*Sparrow*)
   1. Get this from treaty itself. Consider principles of treaty interpretation (below)
2. Has the **government** established the treaty right is not “existing”/was extinguished? (*Sparrow*)
   1. If yes, the claim fails
   2. “Existing,” means treaty right was in existence when the *Constitution Act, 1982* came into effect (*Sparrow*)
   3. Need “clear and plain intention” to extinguish title (*Sparrow*)
   4. Mere regulation of title does NOT equal extinguishment (*Sparrow*)
3. Has the **claimant** established that treaty right was infringed on? (*Sparrow*)
4. If not, the claim fails
5. Factors to consider (but not firm test – absence of any is not determinative): (*Sparrow*)
6. Is the limitation on treaty rights unreasonable?
7. Does the regulation impose undue hardship?
8. Preferred means of exercise of title denied?
   * + 1. This factor is often the key – where the law significantly burdens the preferred means of exercising rights, the law is usually said to infringe title
9. Has the **government** established that the infringement is justified? (*Sparrow*)
10. Government must meet 3 requirements to justify an infringement:
11. The duty to consult must be discharged (*Tsilhqot’in*)
12. There must be a valid legislative objective (*Sparrow*)
13. I.e. conserving and managing natural resources; preventing harm; “other compelling and substantial objectives”; (NOT public interest) (*Sparrow*)
14. Compelling and substantial objectives could include economic and regional fairness; reconciliation of historical reliance upon and participation in fishery by non-indigenous people (*Gladstone*)
15. Valid objectives include: the development of agriculture, forestry, mining, and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations to support those aims (*Delgamuukw*)
16. The breach must be consistent with Crown’s “honour”/fiduciary duty (*Sparrow*)
17. This involves a proportionality analysis:
    1. Implicit in the Crown’s fiduciary duty to the aboriginal group is the requirement that the incursion is necessary to achieve the government’s goal (rational connection); that the government go no further than necessary to achieve it (minimal impairment); and that the benefits that may be expected to flow from that goal are not outweighed by adverse effects on the aboriginal interest (overall balance) (*Tsilhqot’in*).
    2. Considerations such as compensation, accommodation, aboriginal priority taken into account proportion of aboriginal group participating (*Gladstone*) are factors that speak to minimal impairment (*Tsilhqot’in*).
18. Note: there can be no justification if future generations are substantially deprived of the benefits of the land (*Tsilhqot’in*).

### 3 Treaty Eras:

1. Pre-confederation (contact-1867)
   1. Approximately 375 treaties
   2. Many exchanged hunting and fishing rights for peace
   3. Most did not involve explicit ceding of land
   4. E.g. “Peace and Friendship Treaties” in the Maritimes
   5. Indigenous people had relatively greater bargaining power, largely because settlers needed their support
2. Post-confederation (1867-1973)
   1. Approximately 150 treaties, e.g. 11 “Numbered Treaties”
   2. Many involved ceding of indigenous lands
   3. Indigenous peoples looked at treaties as sacred, about sharing the land
   4. Crown took a more dominant role in negotiations and had more bargaining power but they never succeeding in entirely overwhelming the agency of Indigenous people.
   5. Non-indigenous peoples/governments looked at treaties as contracts for the surrender of land
   6. Most treaties were written by Crown representatives and were never translated into indigenous languages. They were sometimes drafted before the actual negotiation even took place, and so often diverge quite a bit from what was negotiated
   7. Indigenous peoples often argue for the true terms of the treaty to be enforced, not for the treaty to be abolished
3. Modern era (1973-present)
   1. 1973 was the year of the *Calder* decision
   2. Treaties viewed in two groups
      1. Comprehensive treaties (land claims agreements)
         1. tend to deal wth parts of the country that have not previously been dealt with in the historic treaties and the title comprehensive refers to the fact that they re very long, complicated agreements (hundreds of pages) and deal with a huge host of different things (e.g. financial compensation, fishing and trapping, self government and lawmaking powers etc).
         2. 24 comprehensive treaties, 2 self-government agreements (one for Nunavut and the other Labrador)
         3. Often enormous treaties negotiated in areas where there historically were no treaties
      2. Specific treaties
         1. Almost 500 existing, over 100 in negotiation now
         2. they tend to be much shorter in their terms Usually deal with very particular matters and are often in response to grievances for breaches of historical treaties

### Treatment of Treaties

* Old view: treaties are legally unenforceable
  + At best, treaties are political agreements, so do not need to be respected by the Crown
  + based on the view that Indigenous peoples were “uncivilized” and that the Crown did not need to respect agreements between the Crown and Indigenous peoples
* Current era
  + Tension between at least two views:
    - Treaties as ordinary contracts, so subject to legislative extinguishment
    - Treaties as special, sacred, not ordinary contracts

### Features of Treaties

1. Parties: Crown and indigenous group
2. Agency: representatives must have authority to bind
3. Intention to create legal relations
4. “Consideration”: obligations assumed by both sides
5. Formality: “measure of solemnity”, usually written

### Principles for treaty interpretation: (from *R v Badger,* 1996)

1. A treaty represents an exchange of solemn promises between Crown and indigenous peoples. It is an agreement whose nature is sacred. This adopt the second perspective that treaties are not mere ordinary contracts they are agreements that are sacred in nature that reflect solemn promises between the Crown and Indigenous peoples.
2. Interpretation of treaties must be approached in a manner which maintains the honour of the crown
   1. Must assume the Crown intends to fulfill its promises
   2. No sharp dealing on the part of the Crown
3. Treaties should be liberally construed and any ambiguities in the wording of the treaty or document must be resolved in favour or indigenous groups
   1. Any limitations which restrict the rights of indigenous peoples under treaties must be construed narrowly
4. The onus of proving that the treaty or aboriginal right has been extinguished lies upon the Crown.
   1. the standard is a clear and plain intention to extinguish treaty rights (*Sparrow*)

Justifications for these principles?

* Unequal bargaining power – these principles are seen as a way to correct for this
* The Crown typically created the written text of treaties, which were not translated and do not always accurately represent the negotiations that took place or the Indigenous understanding of the treaty itself
* The honour of the Crown is at stake

## R v Marshall, 1999 SCC

**Facts:** Donald Marshall Jr., a Mi’kmaq citizen, was charged with selling 463 pounds of eels for $787.10 without a licence, fishing without a license and fishing during closed season with illegal nets contrary to federal regulations under the Fisheries Act. Marshall admitted the facts that constituted the offence but claims a treaty right to trade which included a right to hunt, fish and gather in support of that trade. Marshall argued that the was entitled to sell the eels by virtue of a treaty right agreed to by the British Crown in 1760. This treaty said nothing explicit about catching or selling fish but it did say that they wold not trade except with truck houses which were government owned trading posts. The effect of this clause was that the Mi’kmaq were agreeing tot trade only with the British. The treaty contained a trade clause, but it was unclear whether the clause, which was framed in negative terms as a restraint on trade, reflected the grant of the positive right to Mi’kmaq people to bring the products of their hunting, fishing and gathering to a truck house (government sponsored trading post) to trade. Marshall was arguing that he had a positive right to trade but it was a stretch to argue that the truck house clause protected a positive rights to trade because what it seemed to do was actually impose a negative restrain on the Mi’kmaq community not to trade with anyone but the truck house. There was evidence that in the negotiations leading up to the signing of the treaty that the Mi’kmaq leaders thought that they were agreeing to a positive right to trade, which was not reflected in the text of the treaty but there was evidence that Mi’kmaq chefs thought they were agreeing to that.

**Prior Proceedings:** TJ and CA rejected Marshall’s claim.

**Ratio:** If the government creates a licensing regime that confers discretion on government decision makers in some way and does not include language how an Aboriginal or treaty right will be respected that will necessarily constitute an infringement of the treaty and Aboriginal right. It is the existence of the discretion that constitutes the infringement,

**Issue:** Whether Marshall had an existing treaty right to trade, which includes the right to hunt, fish and gather.

**Held:** Yes, Marshall had a valid treat right, which was violated unjustifiable. The requirement of needed a licence meant that they were subject to whether the civil servants wanted to give the license. Conviction vacated.

**Binnie J for 5:**

* The treaty is not limited to its written terms, because it did not actually reflect everything that was agreed to by the parties. He rejected the TJ and CA approach which took the view that this extrinsic evidence should only be utilized in interpreting the treaty if there is ambiguity in the text of the treat. Binnie says there does not need to be ambiguity in the provision first, this external evidence will always be important in determining exactly what was agreed to. In interpreting them you need to go beyond the written terms and reflect on and take into account the broader historical record.
* Documents of earlier meetings showed that the Crown had agreed to establish a truck house “furnishing…with necessaries, in exchange for the peltry”
  + This supports the claim that the actual treaty terms negotiated contained the positive right to trade
* Binnie J reads into the treaty an implied term granting the Mi’kmaq the positive right to hunt, fish and gather, so they have something to trade at the truck house
* **But** the right only applies to “necessaries” they have the right to hunt, fish and gather to make a moderate livelihood, not wealth. They concluded this because the minutes of the meeting had suggested that he positive right to trade was only a right to trade for necessaries which was the equivalent today of a right to hunt, fish and trade in order to make a moderate livelihood, it was not a right to accumulate wealth, it was only a right to necessities such as food, housing and clothing supplemented by a few amenities.
* The test for an **infringement** of a treaty right is the same as the test for an infringement of an aboriginal right
* The test for **justification** of an infringement on a treaty right is also the same as the test for justification of an infringement on an aboriginal right
* \*\*the third and fourth stages of the *Sparrow* framework also relate to treaty rights.

**Key takeaway:** Implied terms can be read into treaties to reflect what was actually agreed to. What was actually agreed to can be determined from looking at the circumstances surrounding the negotiation. Context is important.

**Fallout from this case:** Burnt Church crisis

* *R v Marshall #2*, (1999 SCC) there was an application for rehearing and the Court issued a second set of reasons clarifying its reasons in the original case.
* This clarification is actually a narrowing of the decision
* Treaty right is only to hunt, fish and gather things traded at the truck house in 1760 when the treaty was negotiated. The court says there can be evolution, but it can’t change completely in kind.
* Only a right to do so for the “necessaries”. “Necessaries” does not include a broad commercial right

Duty to Consult

* Even if the courts are willing to recognize an Aboriginal right, the litigation that it takes to establish that right can take years. Until this duty was recognized, the Indigenous communities claiming the right had to sit back and watch while the Crown made decision in relation to their land or right that would impact it in different ways
* duty to consult was created so that the particular Indigenous community could participate in decision in relation to the land or the resource in question, that it could share in the benefits and have its interests at least partially protected in the interim
* this has had a huge impact on decision making
* duty to consult has its roots in *Sparrow* case, as Dickinson and LaForest said that in determining whether an infringement was justified one thing that would be taken into account is whether Crown consulted with community in question.
* The duty to consult plays two roles:

1. **Interim:** arises prior to the establishment of aboriginal right/title, and exists to protect the right/title on an interim basis prior to resolution of a claim (*Haida*)
   1. might require government to engage in process in the interim until case is finally adjudicated by a court
2. **Post-recognition:** as part of the test for justification of a s. 35(1) infringement (***Tsilhqot’in***)
   1. where a court has recognized a right to exist it plays a role in 4th stage of Sparrow at justification stage.

### ANALYSIS for Duty to Consult:

1. Is the duty to consult triggered?
   1. **Pre-establishment** of a rights/title claim: use the *Haida* test. If yes to the following factors, duty arises:
      1. There is Crown conduct or a Crown decision (*Haida*)
      2. The Crown has real or constructive knowledge of a potential aboriginal rights/title or treaty rights claim; and (*Haida*)
      3. The title/right might be adversely impacted (*Haida*)
      4. if it is at pre establish stage then you would not do the *Sparrow* framework and just do this *Haida* duty to consult framework
   2. **Post-establishment** of a rights/title claim:
      1. Duty is triggered by infringing a s. 35(1) right at stage 3 of Sparrow framework
      2. If there is an infringement found at the Sparrow framework, then do duty to consult
      3. duty to consult now goes to the beginning of the justification stage of the Sparrow framework (stage 4)!!
   3. The duty to consult also arises for historical and modern treaties (*Mikisew, Beckman*)
2. If duty was triggered, was the duty satisfied?
   1. What does the duty require? The level of consultation required is proportionate to 2 factors (*Haida*):
      1. The strength of the claim (*Haida*). Consider:
         1. The nature of the claim (*Haida*):
            1. Aboriginal title claims will demand a higher level of consultation than aboriginal rights claims (*Haida*)
            2. The required level of consultation will be the greatest where title is actually established (*Haida*)
            3. Duty in relation to historical and modern treaties falls on the lower end of the consultation spectrum (*Mikisew, Beckman*)
         2. The strength of the claim (*Haida*):
            1. This requires the Crown to engage in some preliminary assessment of the strength of the claim for rights/title (*Haida*)
            2. If it seems like a weak claim, the duty to consult is lower (and vice versa) (*Haida*)
      2. The seriousness of the adverse impact on aboriginal right, title, treaty right (*Haida*)
         1. This is the factor that usually significantly modifies the duty to consult
         2. If the breach is less serious or minor, the duty to consult is less serious
   2. Was the duty satisfied on the facts?
3. If not, what should be the result?
   1. Pre-establishment of claim (*Haida*):
      1. Injunctive relief
      2. Damages
      3. Order to satisfy the duty
   2. Post-establishment of claim (*Haida*)
      1. Obtain consent from indigenous group (if there is consent, there is no infringement)
      2. If no consent obtained, justify infringement as per *Sparrow* test
      3. If no consent and infringement can’t be justified, there are various options: order by court to reassess prior conduct/decision, legislation rendered inapplicable to rights/title, order for decision to be stopped/reversed (*Haida*).

## Haida Nation v British Columbia (Minister of Forests), 2004 SCC

**Facts:** BC government authorized a logging company to cut trees on provincial Crown land that were the traditional lands of the Haida people. Haida claimed title to these lands for over 100 years. The claim had formally been accepted for negotiation as part of the land claims settlement process a few years prior, but had not yet been resolved so they ere in this interim stage before the right or rights claim has been recognized by the courts. The cutting of tress would have had the effect of deriving the Haida people of some of the economic benefit of their land which would be gone. Haida claimed they would suffer economic loss from the logging and that the red Cedar trees were an integral part of their culture and so protected by an Aboriginal right under s. 35 so they used the trees to make canoes and totem poles.

**Issue:** Does the Crown have a duty to consult where an aboriginal title claim has not yet been resolved? Is there a role in the pre establishment context for the duty to consult?

**Held:** Yes, provincial government was required to consult with the Haida re tree a harvesting licence **before** title establishment.

**McLachlin CJ:**

Source of the duty to consult:

* The honour of the Crown (not fiduciary duty). The duty to consult is grounded in the honour of the Crown.
  + Note: the “honour of the Crown” is independent of fiduciary duty, and has actually been taken so far as to constitute a separate cause of action
  + she doesn't use the language of fiduciary duty however
  + honour of the Crown is a broader context than the fiduciary duty. Drown’s fiduciary duty is engaged only in certain situations.

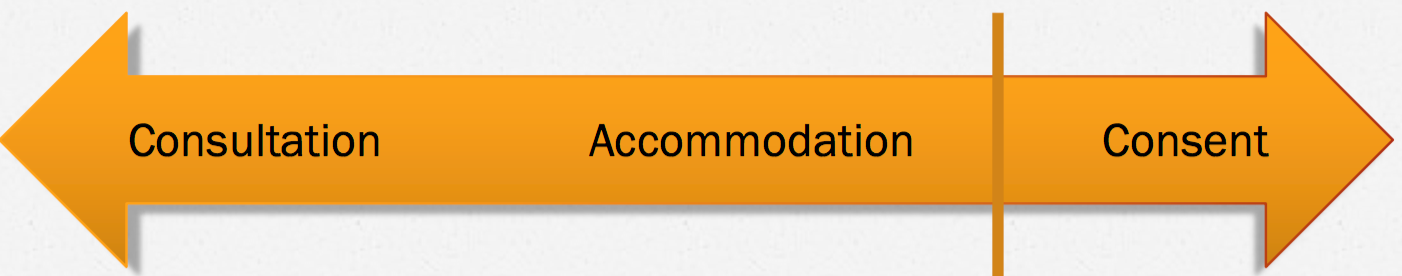
When is the duty to consult triggered? 3-step test for determining when **pre-establishment** (of right/title) duty to consult is triggered:

1. There is Crown conduct or a Crown decision involved
   1. important because the decisions of private parties will not trigger the duty to consult. If Wire Houser owned this particular land and wanted to do something on it it would not trigger the duty to consult it is the fact that Wire Houser is going to the provincial government to get a license for this land that triggers it
   2. So private parties do not have a duty to consult
2. The Crown has real or constructive knowledge of a potential aboriginal rights/title or treaty rights claim; and
   1. really 2 requirements in one: (1) there has to be a potential claim for an Aboriginal or treaty right and this will be the case where the community has demonstrated that they have a prima facie case or a credible argument to be made for the particular Aboriginal treaty right and (2) Crown has to have real (actual knowledge, knowledge in fact, Crown has to be aware of it such as the filing of the claim in court) or constructive knowledge (the Crown out to be aware of it) of that claim
   2. An implication of this is that the Crown has an obligation to inform itself as to whether there are potential or existing aboriginal rights/title/treaty rights claims
3. The title/right claim might be adversely impacted by Crown conduct or Crown decision being contemplated
   1. speculative impacts will not be enough, there has to be a clear sense on the evidence that the right claimed would be adversely impacted if the Crown makes a particular decision.
   2. So must be some connection between the impugned action and the right/title

When we are **post-establishment** (of right/title), the duty to consult is triggered by an infringement.

What is required to satisfy the duty? - Requirements vary with context and duty falls on a spectrum

3 levels of the duty to consult:

* Consultation (lowest level): good faith discussion about the nature of the concerns raised
  + Requires the Crown to at least inform itself as to whether there are any actual or constructive claims
  + involves a good faith discussion between the two parties and the emphasis here is on good faith. The Crown cannot just go through the motions and send out representatives who let the community talk. They have to engage in a good faith way with the community and attempt to address their particular concerns.
  + where a duty to consult is triggers, Drown has a duty to give notice to the community that it is contemplating making a decision that would impact a particular right of the community
  + In all cases, consultation includes a requirement for the Crown to notify the indigenous group of their plan
  + Lowest level of consultation includes:
    - This is the bare minimum required any time the duty to consult is triggered
    - Notice to the indigenous community
    - Provision of information by crown to indigenous community about proposed conduct
    - Chance for discussion with particular indigenous community about their concern
  + Deep consultation is a higher form of consultation:
    - if the case falls a little bit further along the spectrum (will see later how they'd determine where it falls on the spectrum) and
    - Entails formal participation of the indigenous community in the decision-making process in relation to the decision (Indigenous community given formal status as decision-maker)
    - Requires Crown to provide written reasons as to why it came to its decision
  + Consultation is always required to be in good faith, because the duty to consult must be meaningful
  + consent is not required here or an obligation to accommodate the community. This is just consultation, just a good faith discussion.
* Accommodation
  + Requires more than consultation but where accommodation is required it is typically that Crown is under an obligation to engage in deep consultation as well. Deep consultation and accommodation go together
  + Requires the Crown to take steps to avoid if possible and if not possible to mitigate the effect of the particular decision that is being contemplated. Crown must take steps to reduce and if possible eliminate the adverse impact on the particular community
  + determine the level of accommodation required, the courts engage in balancing the particular claim of the community against broader societal interest
  + Requires the Crown to modify its decision to some extent (which is not required by consultation)
  + Crown has to take steps to minimize harm to indigenous groups
* Consent
  + Highest form of the duty to consult
  + hardest form that is basically a veto for the community. It retries getting the consent of the community or communities impact
  + it was hinted at in *Delgamuukw* but in *Haida*, McLachlin says that when you are in the interim stage there will never be a duty on the Crown to get the consent of the community which is why there is a line blocked accommodation and consent
  + **in the interim stage, the only duties the Crown can have are consolation and accommodation but never consent !**
  + Requires the crown to obtain consent from the indigenous community before proceeding
  + It ONLY applies in cases where aboriginal rights/title are established
    - Seen to be a narrowing from Delgamuukw

The level of consultation required is proportionate to two things:

**1. The Strength of the Claim. Consider:**

* 1. The nature of the claim
     1. important because title claims tend to demand more consultation that other Aboriginal right claims
     2. Aboriginal title claims will demand a higher level of consultation than aboriginal rights claims
     3. if the right has already been established then the level of consultation is higher as well
     4. The required level of consultation will be the greatest where title is actually established
  2. The strength of the claim:
     1. Requires the Crown to engage in some preliminary assessment of the strength of the claim for rights/title
     2. the stronger the claim after that preliminary assessment, the most consultation will be required. Even if it is a dubious claim, that will still attract a duty to consult but that will fall at the low end of the spectrum triggering merely a duty of notice
     3. If it seems like a weak claim, the duty to consult is lower (and vice versa)

**2. The Seriousness of the Adverse impact from the Crown conduct or decision being contemplated**

* 1. This is the factor that usually significantly modifies the duty to consult
  2. the more significant the impact on the right being asserted the more consultation will be required
  3. If the breach is less serious or minor, the duty to consult is less serious

**What if the duty to consult isn’t satisfied? It is triggered but not satisfied. It very deepening if we are at the interim or post establishment stage**

* **Pre-establishment of claim:**
  + Injunctive relief: community can get an injunction from the court that stops or halts the Crown from making a decision
  + Damages
  + Order to satisfy the duty: a declaration
* **Post-establishment of claim**
  + Obtain consent from indigenous group (if there is consent, there is no infringement) to avoid an infringement
  + If no consent obtained, justify infringement as per *Sparrow* test. Stage 4 of the 4 part framework which includes satisfying the duty to consult (*Tsilhqot’in*)
  + If no consent and infringement can’t be justified, there are various options: order by court to reassess prior conduct/decision, legislation rendered inapplicable to rights/title of that particular community, order for decision to be stopped/reversed

Application to Case:

* Was the duty to consult triggered here?
  + Yes, in relation to both title and aboriginal rights claims
  + Crown had actual knowledge of the potential rights and title claims
  + There was Crown conduct which was their decision to give the license, the second age is satisfied because the Haida’s claims to title and the particular right to harvest the trees were support day a good prima facie case.
  + Province knew about the particular claim so there was actual knowledge here. This was going through the land claims process
  + There would be a serious adverse impact if the decision was made to grant the licenses to Wire Houser
* If so, Was the duty satisfied?
  + No, there was no consultation at all that happened
  + BC government took the position that the duty to consult was not triggered at the interim phase so they refused to engage in consultation in this context because of this view that they took that there was no duty to consult.
* **Therefore the decision to issue the logging licence is invalid**

**Obiter:** McLachlin hints that given the serious impact of the licensing decision, the Crown might have to significantly accommodate the Haida people to preserve their right and title claims pre-resolution. Suggests that this falls further along the spectrum because there is a good claim here and the particular rights being asserted to title would be seriously adversely impacted.

**Wright:** Note in this case that McLachlin uses the language of “*de facto* sovereignty” when referring to the Crown’s ownership of land. Prior to this case, the Court usually just asserted the Crown had acquired “sovereignty”. McLachlin’s language suggests the Crown might not actually have full legal sovereignty over the land. But *Tsilhqot’in* was decided 10 years later and the crown went back to the language of “sovereignty”.

## Taku River Tlingit First Nation v BC, 2004 SCC

**Facts:** Indigenous community objected to the construction of a road that would lead to a mine.

**Held:** The duty to consult was triggered, and the duty was satisfied.

What was required to satisfy the duty here?

* Something significantly deeper than minimum consultation and some measure of accommodation
* Reasons:
  + The impact of the project is serious as the road goes through a part of the traditional land that is of great significance to the indigenous community
  + On the evidence, the claim for aboriginal title was strong

The standard was satisfied because:

* Consultation was accomplished during the environmental assessment process
* The community’s concerns were listened to and the final measures taken included measures to address the community’s concerns.

## Mikisew Cree First Nation v Canada, 2005 SCC

**Issue:** Does the duty to consult arise in the case of the Crown “taking up” or extinguishing historical treaties?

**Held:** Yes, the duty to consult arises in the context of Crown executing written terms of treaties (so not only in the case of aboriginal/treaty rights and title).

* The duty to consult here was triggered by the exercise of treaty “take up” clause. Court effectively read the duty to consult into the treaty
* Court explicitly rejects the argument that the duty to consult doesn’t arise in the case of extinguishing treaties because treaties contain all the rights that both parties have.
* Thus treaties are only part of the reconciliation process – the crown can’t view treaties as satisfying their duty to consult.

What was required to satisfy duty to consult here?

* Duty to consult falls at the lower end of the spectrum. Reasons:
  + Impact was minor
  + The treaty itself is invoked as a reason to find duty falling within lower end of spectrum

Duty was not satisfied here.

* The requirement for notice and direct consultation was not satisfied by the Crown’s unilateral declaration of their decision

**Takeaway:** the duty to consult applies to Crown’s attempt to extinguish historical treaties, but the fact of a treaty itself suggest that what is required to satisfy the duty will be on the low end of the spectrum.

## Beckman v Little Salmon, 2010 SCC

**Facts:** A modern treaty included a “take up” clause and included a provision defining consultation, but the provision in relation to taking up land wasn’t made subject to consultation in the treaty.

**Issue:** Does the duty to consult arise in the case of the Crown “taking up” or extinguishing modern treaties?

**Held:** Yes, the duty to consult is triggered by exercise of treaty “take up” clause in a modern comprehensive treaty.

**Reasons:**

* While modern treaties are intended to create some precision around modern governance, they would not achieve their goal if they were not commercial contracts. So we can’t treat treaties as if they’re a final agreement that achieves reconciliation
* The duty to consult flows from the honour of the crown
* The Crown cannot, by treaty or contract, “contract out” of the duty. The Crown can alter its impact through treaties, but not get rid of the duty to consult.

What was required to satisfy duty to consult here?

* Duty held to be at the lower end of the spectrum – accommodation not necessary here
* It was satisfied here by notice and direct consultation

**Dissent (Deschamps J):** Emphasizes the need to give effect to the terms of modern treaties. The duty to consult only applies when the treaty fails to deal with consultation.

**Takeaway:** The duty to consult applies to modern treaties as well as historical treaties, but the duty to consult seems to be low in relation to treaties.

## Tsilhqot’in Nation v BC, 2014 SCC

* Not only will the duty to consult vary by context, but it will also vary with time, depending on where we are in the claims process.
* In the early claim stage, the Crown would owe a duty to consult and where appropriate, accommodation.
* But where the claim is established, the crown will owe a higher duty to consult (unless infringement can be justified under *Sparrow*)

The duty to consult was triggered in this case, and the duty fell at the high end of the spectrum

* The Tsilhqot’in had a strong *prima facie* claim to the land, and the infringement on the land was significant
* Thus the duty to consult fell at the high end of the spectrum which required accommodation
* No consultation at all was undertaken, so the duty to consult was breached