

Saturday Morning at the Law School



UNIVERSITY OF  
CALGARY

# Aboriginal Law 101



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February 20, 2016

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## Objectives of this Lecture

1. The relevant history.
2. The current situation of First Nations, Inuit and Métis Peoples.
3. Constitutional rights of First Nations, Inuit and Métis Peoples.
4. The Crown's duty to consult and accommodate; and
5. Canada's International obligations.

Report of the Royal Commission on Aboriginal People (1996) described four stages in history that overlap and occur at different times in different regions.

1. Pre-contact – Different Worlds - Contact
2. Early Colonies (1500-1763)
3. Displacement and Assimilation (1764-1969)
4. Renewal to Constitutional Entrenchment (1969+)

## Early Colonies 1500-1763

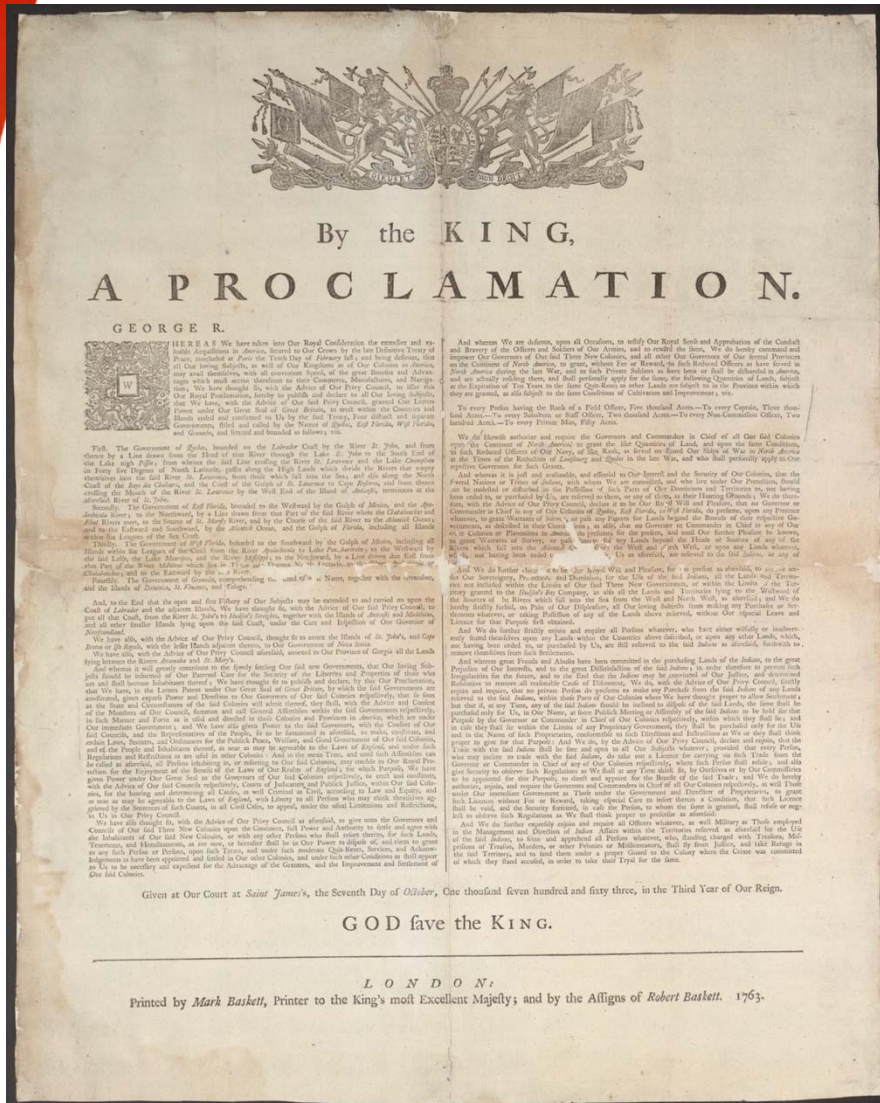
1. Mercantile colonies – traded with First Nations for the benefit of the mother country – technology exchange.
2. European Imperial powers such as France, Holland, Spain, Portugal and England were engaged in a contest to expand their colonies and influence in the Americas. Early treaties of peace, alliance and trade with First Nations, who were familiar with them, assisted in this expansion and contest.
3. These nation to nation treaties acknowledged the sovereignty of First Nations, as they did not concern themselves with matters internal to the First Nations.

## French Indian Wars of 1754-1763

1. These colonial conflicts, an extension of a wider European war, culminated in a contest between France and Britain in North America where French and British colonies and troops together with their respective First Nation allies fought in what is commonly called the French Indian Wars of 1754-1763.
2. The capture of Quebec lead to The Treaty of Paris, 1763 where France surrendered most of its colonies in North America to Britain. Britain's claim to its North American colonies against other European colonial powers was secured.

# Royal Proclamation, 1763

The Royal Proclamation, 1763 administered the former French lands and addressed the concerns of First Nations over pressures on their territory from colonists. It established four new colonial governments, and drew a boundary known as the “frontier” beyond which the Colonial Governors could not to grant land.



Given at Our Court at Saint James's, the Seventh Day of October, One thousand seven hundred and sixty three, in the Third Year of Our Reign.

GOD save the KING.

L O N D O N :

Printed by Mark Baskett, Printer to the King's most Excellent Majesty; and by the Assigns of Robert Baskett. 1763.

## Royal Proclamation, 1763

1. The frontier was along the borders of the new colonies and in existing colonies along the heights with the “Lands beyond the Heads or Sources of any of the Rivers which fall into the Atlantic Ocean from the West and North West” reserved as “Hunting Grounds” for First Nations
2. To stamp out private rampant land speculation, a constant source of disruption, the Royal Proclamation established a Crown monopoly on land purchases. First Nations who were inclined to dispose of their “Hunting Grounds” would only be purchased by the Crown after a public meeting of the “Indians” held for that purpose.

## Royal Proclamation, 1763

3. This process was also intended to finance the colonies as the Crown could subdivide and resell First Nation land surrendered to the Crown to colonists seeking land.
4. This “frontier policy” was a significant contributor in the American Revolution as leading figures had speculated in Indian lands in the Ohio Valley beyond the frontier.
5. This monopoly surrender to the Crown, was subject to some abuses particularly in Eastern Canada, but continued to be the policy that would govern First Nation and government relations for the next two centuries.



## Treaty at Niagara 1764

1. In 1764, at Niagara, Ontario a meeting was held with some 2000 First Nation Chiefs from 24 First Nation as far east as Nova Scotia, as far west as Mississippi, and as far north as Hudson Bay. Some evidence suggest the attendance of the western plain First Nations of the Cree and Lakota (Sioux).
2. At that meeting British officials read out the Royal Proclamation, 1763 and gifts were exchanged to make a treaty. Most notably a two row wampum was given to symbolize the First Nation understanding of that Treaty.
3. To date Canadian Courts have not recognized this Treaty.

## Displacement and Assimilation (1764+)

1. The claims of the British Crown were gradually changed to a concept of *territorial* sovereignty. This process was complete by the end of the War of 1812 when First Nations lost any bargaining power they had in their military alliances.
2. This assertion of territorial sovereignty by Britain over a territory acted in disregard of First Nations' ownership of land and sovereignty in that territory.
3. The First Nations' understanding of relations with Britain had not changed but Britain's concept of relations with First Nations had changed.

# Historical Treaties 1725-1975



Reserves within Treaty Areas are still being allocated and surveyed in 2016+

## Displacement by Treaty

1. 500+ Treaties were made between Crown and First Nations. Treaties continued to be made to the 1930s, implicitly acknowledging First Nation sovereignty by, among other things, asking First Nations to swear allegiance to the Queen.
2. First Nations claimed ownership of their land but Courts said “indian title” was less than ownership as it was a:  
  
“personal and usufructuary right, dependent upon the good will of the Sovereign [Royal Proclamation, 1763] ... sufficient for the purpose of the case [interpreting the *BNA Act*] that there has been all along vested in the Crown a substantial and paramount estate [territorial sovereignty], underlying the Indian title, which became a plenum dominium [complete ownership] whenever that title was surrendered or otherwise extinguished.”  
  
*St. Catherines Milling and Lumber Co. v The Queen* (1888)

## Land Surrender Treaties

1. In the Ontario Robinson Treaties of 1850 and the Numbered Treaties, First Nations were promised benefits such as specific lands for their exclusive use (reserves), cash and annuities in return for “surrender” of vast tracts of land.
2. First Nations were promised they could continue their traditional way of life on surrendered lands subject to those lands being “taken up” for other purposes.
3. Government penury, neglect, corruption and First Nation powerlessness left these treaty promises unfulfilled.

## Displacement by Declaration

1. Some areas remained without treaties as Canada merely asserted its territorial sovereignty: the North, most of British Columbia, Quebec and Newfoundland & Labrador.
2. In southern Ontario and Quebec and the Maritimes “peace and friendship” treaties were signed *not* land surrender treaties, thus most land transactions had to comply with the Royal Proclamation, 1763. Most did not.
3. In areas without land surrender treaties, settlement confined First Nations to small portions of their traditional territories using various legal and extralegal means.

# Displacement by Relocation

1. First Peoples have always been subject to relocation first by settlers, who took over the richest hunting and fishing grounds, secondly by settlers illegally squatting on Reserve lands without any effective way to remove them.
2. First Peoples were also displaced by government directions for a number of reasons, economic efficiency in providing education in Residential Schools and supply distribution and Canadian sovereignty in the Far North displaced the Inuit communities in the 1950's.

## Indian Act, 1876+

1. After Confederation in 1867 the federal government was allocated authority over “Indians, and Lands reserved for the Indians” in section 91(24) of *The British North America Act, 1867* (now the *Constitution Act, 1867*).
2. The *Indian Act* was consolidated in 1876, based on colonial and new legislation and focussed on the protection and management of designated reserves held by the federal Crown in trust for First Nations.
3. The Act mandated the registration of “Indians” into Indian Bands and distributed benefits and imposed disabilities on the basis of status as a member of an Indian Band.



## Indian Act, 1876+

4. It imposed trusteeship on the moneys derived from reserve property on the basis that “Indians” were akin to children and could not manage themselves. All reserve lands were held communally, there was no private ownership.
5. It replaced traditional aboriginal government with elected Band Councils with limited powers. It prohibited First Nation religious practices such as potlach and sundance.
6. Government appointed “Indian Agents” to manage the reserves and band moneys. Their approval was required to live on or travel off the reserve (the “pass system”), inherit any personal property or conduct any business with Indians.

## Indian Act, 1876+

7. Indians had no right to vote, outside of Band Council elections. The right to vote in federal elections came in 1960 and provincially in the 1960's.
8. The Act prohibited the hiring of lawyers to advance First Nation claims from 1927-1951 and the policy of non-disclosure to the First Nations continued until 1972.
9. The Indian Act, including the trust provisions but minus the Indian Agents, continues to govern First Nations today.

# Assimilation: Indian Residential Schools

1. From the start, there was an express government policy of assimilation, the only question being the pace:  
“to continue until there is not a single Indian in Canada that has not been absorbed into the body politic and there is no Indian question, and no Indian Department.”  
(Deputy Superintendent Duncan Campbell Scott, 1920)
2. A key element was the Indian Residential Schools, which saw contracting for missionary teachers in boarding schools that First Peoples children were compelled to attend from 1883 to the 1980’s in order to “civilize them.” At its peak in 1927 the Residential Schools held a third of all status Indians.

## Assimilation: Indian Residential Schools

3. Children were moved to residential schools where they were housed in deplorable conditions and subject to abuse (including sexual abuse). Teachers “prohibited [them] from speaking their native languages, taught them to reject their cultures and traditions as inferior.”
4. Residential school graduates were rejected by a racist Canadian society and either returned to their reserves as aliens, unable to speak with their parents in their language, or migrated to urban areas as a permanent underclass.
5. Five generations of aboriginal children were trapped in the residential school system. (75,000+ are alive today)

## Assimilation: Indian Residential Schools

6. The consequential destruction of First Nations' culture, social structure and the continuing transmitted cycle of domestic and substance abuse is horrific.
7. These ongoing issues are well documented in the Final Report of the Truth and Reconciliation Commission (2015).
8. Another assimilation effort was to encourage First Nation members relinquish their "Indian" status in return for the right to vote. It was an abject failure: "[b]etween 1867 and 1920, in all of Canada, a mere 250 Indian persons were enfranchised."

1. In 1969 the Federal Government advanced a White Paper, proposing to: remove special status for Indians, repeal the *Indian Act* with the goal of fully assimilating “Indians” into Canadian society.
2. The negative reaction from First Nations and the interested public led to the withdrawal of the White Paper and a resurgence of First Nation advocacy.
3. In *Calder v Attorney-General of British Columbia* (1973), the Supreme Court’s indicated its willingness to consider First Nation land rights.

4. In *Calder* the Nishga First Nation sought a declaration that their aboriginal title has never been lawfully extinguished in British Columbia by conquest or treaty.
5. The Court agreed that the legal basis for aboriginal title was their prior occupation of North America and not “dependent upon the good will of the Sovereign” but the result was a split decision with the Court dismissing the case on a legal technicality.
6. The government position that aboriginal land rights were so vague as to defy court remedies was questionable.

7. The government quickly established commissions to negotiate land claims settlements. The first modern land claim agreement was the 1976 James Bay Cree Agreement in Northern Quebec.
8. The advocacy of First Nation Groups and the interested public eventually led to the entrenchment of Aboriginal Rights in Canada's Constitution in 1982.
9. The process of renewal is ongoing. A small part of that renewal involves the legal system



## Current Situation

1. 500 years ago 100 per cent of Canada was occupied by up to 2,000,000 First Peoples (First Nations and Inuit).

Today, Reserves total 0.3 per cent of the land area of Canada.

2. In 1901 only 107,000 First Peoples and Métis survived as they were ravaged by famine and diseases such as smallpox.

Today, in 2011 First Peoples and Métis were 1.4 Million persons, or 4.3% of Canada's population. They are the fastest growing population in Canada and 50% are under 25.

3. One half of First Nation live in urban areas and the rest live on 2700 Reserves in 617 First Nations with 60% of Reserves having populations under 500, 33% between 500-1,999, and 7% number 2,000+
4. First Peoples trail in every socio-economic category: education, employment, health, housing and infrastructure. In Canada 95% of economic activity is private and 5% is government – on Reserves the ratio is reversed.
5. First Peoples are 3 times more likely to be a victim of violence than other Canadians and are over represented in justice system with 25% of provincial prisoners and 18% of federal prisoners being aboriginal.

6. First Nations on Reserves get only ½ of the funding for government services than other Canadians. AAND's budgets since 1996, have allowed annual inflation increases of 2% - First Peoples population has grown 45% since 1996.
6. Anecdotal evidence to the contrary, waste and corruption on Reserves is for practical purposes - a myth as 98% of Reserve funding is reaching the intended recipients.
6. The Auditor General noted in 2002 that First Nations must file 178 reports, including an external auditor's report, to obtain funding under annual Contribution Agreements.

# Sources of Aboriginal Law Doctrine

1. *indigenous laws themselves* : that have guided First Peoples since time immemorial; these are occasionally recognized in Canadian Courts.
2. *common law aboriginal rights* : customary practices in encounters with indigenous societies; e.g. *doctrine of continuity* that indigenous laws would continue in acquired territories until specifically replaced.
3. *legislative enactments* : primarily the *Indian Act*.
4. *constitutional* : aboriginal rights have been constitutionally protected since 1982

# Canada's Constitution

Canada's constitution is a blend of written instruments, unwritten conventions and vestigial Crown prerogatives.

It is a *federal constitution* that divides legislative and executive authority between provinces and the federal government under the *Constitution Act, 1867*. In terms of First Peoples, some major powers include:

- Federal Government's s 91 powers especially s 91 (24) "Indians, and Land reserved for the Indians"
- Provincial Government's s 92 powers such as s 92 (13) Property and Civil Rights in the Province and s 109 where Provinces own land



## Why Aboriginal Rights?

1. Common law tradition of aboriginal rights, exemplified by the *Royal Proclamation, 1763* and treaties.
2. Minority group rights have always existed in Canada.
3. Since WWII, there was an international movement to decolonize subject peoples – and in Canada the treatment of indigenous peoples was colonial in origin.
4. Parliamentary Hearings in 1980-81 saw a broad consensus that Canada's First Peoples, as the original occupants, merited special treatment.

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

(2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.

(3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.

(4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

Section 37 set Constitutional Conferences to define aboriginal rights but those meetings failed to reach agreement.



25. The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including
- (a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and
  - (b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.

To date, the Supreme Court has not ruled definitely on this interface between these competing human rights regimes.

52. (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

- Consistent with common law traditions, there are no substantive remedies for breaches of constitutional rights, including aboriginal rights, aside from s. 24 for Charter Rights
- The only court remedy is a declaration as to the constitutional interpretation of a law or striking parts of the law for being unconstitutional.

1. The Court's role in Canadian society has changed, they now rule on the constitutionality of legislation, before 1982 *parliamentary sovereignty* allowed legislatures unrestricted freedom within their jurisdiction.
2. The Supreme Court of Canada has ruled infrequently on aboriginal rights (~8% of Constitutional cases) and done so mostly in general language that did not decide the actual results (*obiter dicta*).
3. The Supreme Court decisions have been fact specific decisions but have guided lower courts and governments.

## Scope of Protection: *R v Sparrow* (1990)

1. The wording “existing aboriginal and treaty rights” in section 35(1) meant those common law aboriginal and treaty rights in existence on April 17, 1982 were protected and any extinguished rights were not revived.
2. Aboriginal right can only be extinguished when federal legislation exhibits a plain and clear intention to do so.
3. Aboriginal rights are not absolute and the words “recognized and affirmed” in section 35 (1) was interpreted to mean legislation affecting aboriginal rights would be valid if that legislation met a *justificatory* test.

### First Part: Did the legislation infringe an aboriginal right?

- a) Is the limitation unreasonable?
- b) Does the regulation impose undue hardship?
- c) Does the regulation deny to the holders of the right their preferred means of exercising that right?

If yes to *any question* an infringement of an aboriginal right exists.  
Proving this was responsibility of the claimant and is a low burden.

Second Part: To be a valid infringement of aboriginal rights the government must show that:

1. There is a *valid legislative objective for the legislation as a public interest* test was inadequate to override rights.

and

2. The legislation is consistent with the *honour of the Crown* and the *fiduciary relationship* between the Crown and aboriginal peoples.

This is a high burden to overcome.

In *Sparrow* (1990), the *honour of the Crown* was variously described as:

- a) “. . . treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indians”; and
- b) “...fairness to the Indians is a governing consideration” and “no appearance of ‘sharp dealing’ should be sanctioned [by the courts]”.

*Manitoba Metis* (2013), described this as “the principle that servants of the Crown must conduct themselves with honour when acting on behalf of the sovereign.”

In *Sparrow* (1990), the *fiduciary relationship* was described as:

The Government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples. The relationship between the Government and aboriginals is trust-like, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship.

The fiduciary concept has its origins in *Guerin*.



## Fiduciary Relationship: *Guerin v The Queen* (1984)

1. In *Guerin*, the Musqueam First Nation surrendered reserve lands in 1957 to the Crown for use as a golf club. The terms of the Crown lease were different than what the Musqueam approved and they sued in 1975.
2. The Supreme Court said, that First People's interest in land arose from their historical occupancy, and did "not depend on treaty, executive order or legislative enactment," ( i.e. The Royal Proclamation, 1763) as the British assertion of sovereignty left the First Nations' claims to occupancy, possession and presumptive title unaffected within their territory (*continuity doctrine*)

3. The Crown's monopoly on land acquisitions from First Peoples, was the source of the Crown's obligation as the *surrender requirement* was intended to "interpose the Crown between the Indians and [private parties] ... to prevent the Indians from being exploited."
4. This unilateral historical undertaking "conferred upon the Crown a discretion to decide for itself where the Indians' best interests really lie" and made the Crown liable as a *fiduciary* for the beneficiary First Nation.

5. This *fiduciary relationship* was a unique trust-like relationship as it did not fit into the traditional categories of agency or trusteeship.
6. *Wewaykum Indian Band v Canada* (2002) limited government's fiduciary duties to the "specific interests of aboriginal peoples" that reflect the the high degree of discretionary control assumed by the Crown i.e. land.
7. *Alberta v Elder Advocates of Alberta Society* (2011) limited the Crown' fiduciary duties to the aboriginal context except in extraordinary special circumstances.

### *R v Van der Peet* (1996)

1. To be an aboriginal right “an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right,” being practised in a current form that relates to the original practice prior to European contact.
2. The practice, custom or tradition is not something that is true of every human society or incidental or occasional to that society, but instead “the defining and central attributes of the aboriginal society in question.”

3. *R v Sappier; R v Gray* (2006) clarified *Van der Peet* in saying the traditional practice “need not be distinct; it need only be distinctive” and “is really an inquiry into the pre-contact way of life” of a First Nation.
4. First Nation rights to hunt, fish or harvest for food or ceremony take priority over non-aboriginal rights.
5. In *Gladstone* (1996) commercial exercise of aboriginal rights, require proof of trade at the time of contact. The priority is limited to the modern equivalent of a moderate livelihood and thereafter split equally with non-aboriginal persons.

1. First Nations *claim* their traditional practices and Courts will transform that into a “proprietary aboriginal right” that is communally held by that specific First Nation.
2. This gives the Courts considerable flexibility in deciding what the *claimed aboriginal right* is.
3. The focus on the date of contact to define aboriginal rights leads to expensive and time consuming court cases with historians, ethnographical experts etc.

### *R v Adams* (1996)

1. Aboriginal rights are not dependent on establishing aboriginal title. The core right can extend to ancillary rights.
2. Land based practices that qualify as aboriginal rights under *Van Der Peet* can form site-specific aboriginal rights on Crown lands.
3. Legislation with an unstructured discretionary administrative regime that risks infringing aboriginal rights in a substantial number of cases will be invalid.

## *Delgamuukw v British Columbia* (1997)

1. Constitutional common law aboriginal title is a unique fusion of common law and aboriginal legal systems.
2. The unique character of aboriginal title involves:
  - the lands were *inalienable* and could not be sold to any person other than the Crown;
  - the *source* of aboriginal title is the prior occupation by aboriginal peoples;
  - occupation would at common law be proof of possession giving rise to title and *aboriginal title* arose from the exclusive possession of First Peoples before the assertion of Canadian sovereignty.



3. Aboriginal title is owned *communally* as a collective right of First Nation members. That First Nation has exclusive rights over and control of their aboriginal title lands (including subsurface rights) provided that any use was not irreconcilable to that First Nation's attachment to the land.
4. The *Sparrow* justificatory test applies to restrictions on aboriginal title but the compelling legislative purposes were broadened to include general economic development subject to finding a justification in particular circumstances.

## Aboriginal Title: *Tsilhqot'in Nation* (2014)

1. The result in *Delgamuukw* was to return the matter to trial because of the Trial Court's exclusion of aboriginal oral history. Until *Tsilhqot'in* in 2014 there were no court declarations of aboriginal title, but *Delgamuukw* led to several land claim settlements.
2. In *Tsilhqot'in Nation v British Columbia* the Court awarded a declaration of aboriginal title to a semi-nomadic First Nation thus clarifying a territorial approach to aboriginal title.
3. British Columbia would own the lands, subject to *Tsilhqot'in Nation's* aboriginal title, with legislative authority over it.

4. The *Tsilhqot'in Nation* would for all purposes be the exclusive owner of their land and any legislated encroachment had to meet the *Sparrow* justification.
5. The Court also ruled that *interjurisdictional immunity* would not apply to aboriginal title lands, as aboriginal rights constrained both federal and provincial governments.
6. In *Grassy Narrows First Nation v Ontario* (2014) the Court ruled that that *interjurisdictional immunity* did not apply to surrendered lands under a Treaty.

1. *Interjurisdictional immunity* says levels of government cannot legislate outside of their constitutional powers.
2. What does this removal of inter-jurisdictional immunity mean, for example:
  - for provincial legislation on *Indian Act* reserves?
  - for the 50% of First Nations living off reserve?
3. The *Oceans Act* (1996) was the first statute to claim ownership by Canada of the ocean and seabed but section 2.1 said ownership may be qualified by aboriginal title.

# Treaty Rights

1. Treaty Rights are protected by s. 35 (1) of the *Constitution*.
2. A *treaty* is a sacred agreement between Canada and a First Nation and their descendants in perpetuity *Sioui* (1990). They are unique agreements above personal contracts and below international treaties. Some First Nations disagree.
3. Treaty rights depend on the interpretation of the particular treaty and as special agreements - they have special rules called the *canons of construction*.

## Treaty Interpretation: R v Marshall (1998)

- The goal of treaty interpretation is to choose from possible interpretations of common intention, the one that best reconciles the interests of both parties at the time.
- Treaties should be liberally construed and ambiguities resolved in favour of the aboriginal signatories.
- The court must be sensitive to the unique cultural and linguistic differences between the parties.
- The integrity and honour of the Crown is presumed.

## Treaty Interpretation: R v Marshall (1998)

- Words in the treaty are given the sense which they would naturally have held for the parties at the time.
- Technical or contractual interpretation is not allowed.
- While construing the language generously, courts cannot alter the terms of the treaty by exceeding what “is possible on the language” or realistic.
- Treaty rights are not frozen. They must reflect modern practices that relate to traditional ones and are reasonably incidental to the core treaty right in its modern context.

# Treaty Issues

1. Governments will look to the written text of the treaty. First Nation evidence by way of oral histories as to the treaty terms has had mixed success.
2. Governments look at Treaties as providing a certainty of rights while many First Nations look at Treaties as the basis for a flexible ongoing relationship.
3. Breaches of Treaty can result in compensation in damages, an exception in rights litigation, but these will be limited by limitation acts.



4. In circumstances of conservation, Aboriginal treaty harvesting rights for food or ceremony have priority over non-aboriginal harvesters, and recreational harvesters (*Simon*), as these low-scale harvests are self-limiting.
5. Commercial scale aboriginal harvesting rights, dealt with in *Marshall No. 1* (1998) interpreting the *Mi'kmaq Treaties of 1760-61*), require proof of aboriginal trade at the time of contact in the harvest items. The preferential treatment of the aboriginal commercial harvest is limited to the modern equivalent of subsistence: a moderate livelihood.

1. Federal legislation can limit aboriginal rights, including Treaty rights, if that legislation meets the *Sparrow* justification.
2. Provincial legislation can limit aboriginal rights, including Treaty Rights, if that legislation meets the *Sparrow* justification *but* section 88 of the Indian Act provides:

88. Subject to the terms of any treaty ...., all laws of general application ....in force in any province are applicable to and in respect of Indians in the province, except to the extent that those laws are inconsistent with this Act..., or with any order, rule, regulation or law of a band made under those Acts, and except to the extent that those provincial laws make provision for any matter [governed by the the *Indian Act*].

3. Unpaid benefits, treaty-land entitlement issues, reserve dealings, medical services, educational provisions etc. are constant Treaty issues.
4. A breach of treaty claim may entitle the First Nation to damages, but those damage claims are limited by limitation periods *Canada (Attorney General) v Lameman*, (2008). Usually, recovery is limited to the 10 years before a lawsuit.
5. Court Declarations as to the constitutionality of government's actions are not so limited but, while they are generally respected and lead to a negotiated settlement they do not have a compensatory aspect.

1. Canada's constitution is the only constitution in the world that recognizes the rights of descendants from the intermarriage of aboriginal and non-aboriginal persons.
2. The Court said in *R v Powley* (2003) that Métis Rights arose between the contact date and a *pre-control date* when Europeans achieved political and legal control in an area.
3. Alberta has 8 Métis Settlements pursuant to the *Métis Settlements Act* (MSA) which establishes limited self-government, provides collective Métis title and one-half of the mineral royalties. These are the only Métis treaties.

1. In *Manitoba Métis Federation Inc v Canada (Attorney General)*(2013), the Manitoba Métis were claiming Métis title in the Red River Settlement from the 1880s. They failed because the trial court found as a fact that Métis People did not hold land communally.
2. They succeeded in getting a Court declaration, which was not subject to the limitation acts, saying that the *Manitoba Act* was a *constitutional promise* to them where the government had failed to uphold the *honour of the Crown* by not properly delivering land grants.

## *Daniels* Case (2014)

1. In *Canada (Indian Affairs) v. Daniels* (2014) the Federal Court of Appeal ruled that Métis people were included in the traditional definition of Indians as “savages.” Leave to appeal to the Supreme Court of Canada has been granted.
2. The *Daniels* case is significant for First Nations, given the experience with Bill C-31, as there are ~500,000 Métis that may apply for status and benefits under the *Indian Act*.

# Aboriginal Sovereignty

1. Some First Peoples claim aboriginal sovereignty. Canada's current policy (1995) only acknowledges an "inherent right to self-government" within the constitutional framework of Canada.

2. The Supreme Court has not ruled on this.

*R v Pamajewon* (1997) - A claim was read down from aboriginal sovereignty to a an aboriginal right to gamble.

*Mitchell v MNR* (2001) – insufficient evidence to claim the right. In dissent Justice Binnie argued that Canadian sovereignty would be incompatible with the claimed right to pass across borders.

# The Crown's Duty to Consult and Accommodate

Properly speaking, the Crown's duty to consult and accommodate aboriginal peoples when their interests are affected is a subset of the Crown's obligation to all of its subjects that Crown actions are applied in a procedurally fair manner (natural justice) and with due recompense.

For example:

1. expropriation of land – proper purpose and a compensatory obligation
2. Charter Rights to a fair trial - Crown disclosure

Aboriginal rights are no different.



# The Crown's Duty to Consult and Accommodate

1. First outlined in *Haida* (2004), and *Taku River* (2004), and expanded to treaty circumstances in *Mikisew* (2005), the duty to consult and accommodate is grounded in the *honour of the Crown* and can arise before claims of aboriginal rights or title are proven.
2. Once the Crown becomes aware of potential impacts to First Nation interests it is required to consult with that First Nation and negotiate in good faith in order to accommodate the concerns of the First Nation.
3. A good faith effort is required on both parties but there is no requirement to agree.

4. The depth of negotiation required, depends upon a preliminary assessment of the First Nation claim, along a spectrum from a weak interest and minimal impacts to circumstances where the claim was strong and the impacts significant.
5. The Crown was solely responsible for the decision and if it failed to consult appropriately it would be responsible to the First Nation for a breach of the duty to consult.
6. The honour of the Crown infuses all aspects of treaties and may supplement both modern and historical treaties in requiring consultation.

1. The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) (2007) is not international law but is a strong declaration as to what the emerging international standards are.
2. Canada initially rejected signing UNDRIP but finally endorsed the UNDRIP on November 12, 2010 with a qualified Statement of Support saying that the UNDRIP was an aspirational document that is non-legally binding and that it “does not reflect customary international law nor change Canadian laws”.

3. In *Canada (Human Rights Commission) v Canada (Attorney General)* (2012), the Federal Court said:

The [Supreme] Court has held that in interpreting Canadian law, Parliament will be presumed to act in compliance with its international obligations. As a consequence, where there is more than one possible interpretation of a provision in domestic legislation, tribunals and courts will seek to avoid an interpretation that would put Canada in breach of its international obligations. Parliament will also be presumed to respect the values and principles enshrined in international law, both customary and conventional

1. Two legally binding international instruments in the aboriginal context e.g. “free prior informed consent”, are the Charter of the Organization of American States (OAS) (art. 106) and the American Convention on Human Rights (American Convention) (art. 33).
2. Although Canada has not acceded to the American Convention, it is a party to the OAS, and as such it is subject to the jurisdiction of the Inter-American Commission on Human Rights (IACHR).
3. First Nations have had recourse to IACHR.



# Questions