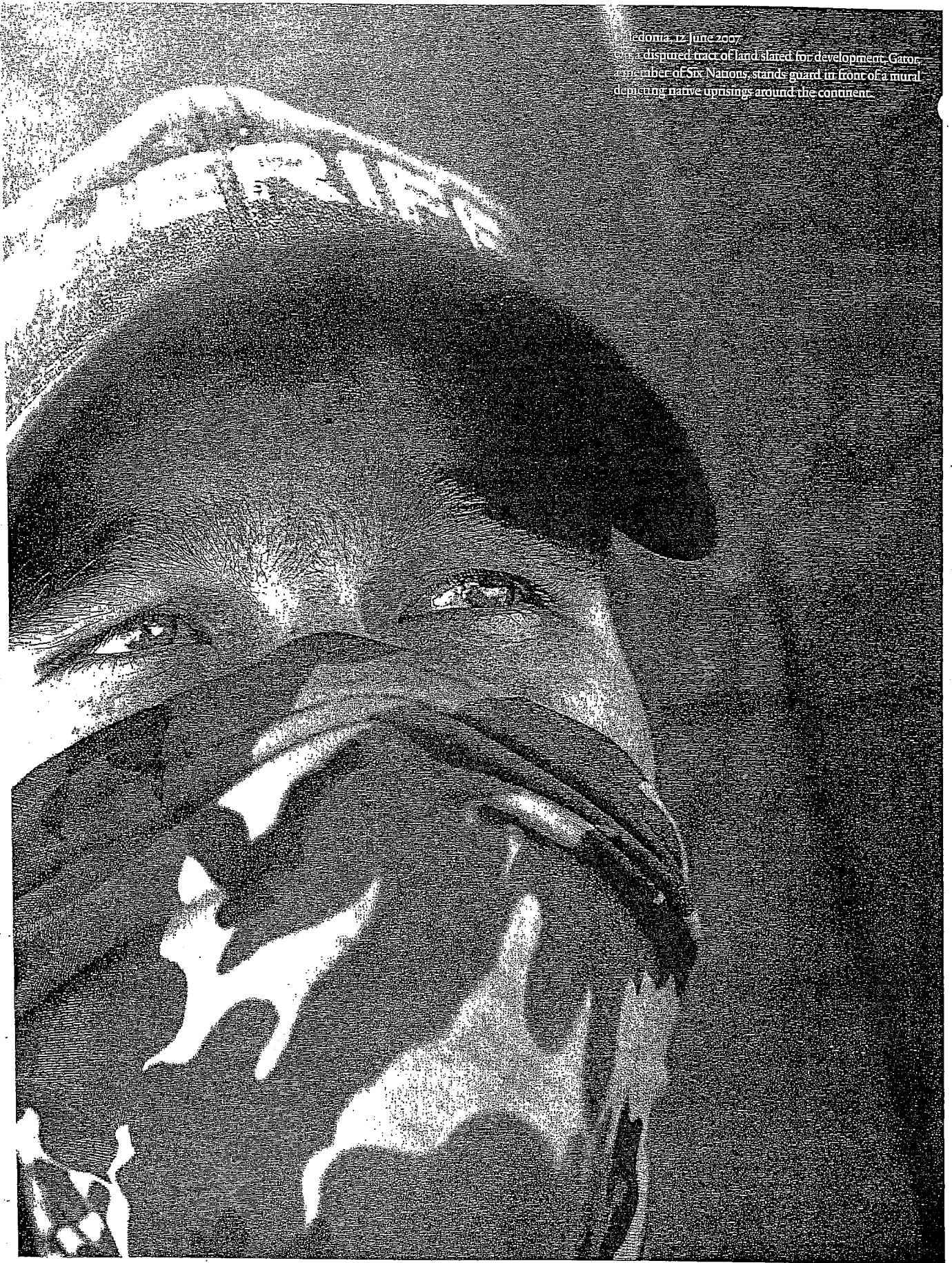


A Betrayal of Trust

Peter Russell draws lessons from
standoffs over Aboriginal land claims
with photographs by Simon Hayter

Medonia, 12 June 2007

On a disputed tract of land slated for development, Garon, a member of Six Nations, stands guard in front of a mural depicting native uprisings around the continent.



The picture comes readily to mind: a group of angry Aboriginal people with clenched fists waving a warrior flag and facing off, on some disputed land, with police or soldiers standing between the Aboriginal demonstrators and equally enraged, non-Aboriginal people on the other side of the barricades. In recent years, our newspapers and television screens have brought us this scene many times: Oka in Quebec; Gustafson Lake in British Columbia; Burnt Church in New Brunswick; Temagami, Ipperwash, Caledonia and Deseronto in Ontario—and many others. The images are familiar and they evoke instant and hot public responses, full of fear, but devoid of understanding about what has brought about these disturbing scenes.

The Aboriginal scholar, John Borrows, calls these standoffs “flashpoint events.” Three conditions produce flashpoint events. First, an Aboriginal people believe that the government, federal or provincial or both, has violated a treaty obligation or an obligation arising out of other Canadian laws. Second, efforts extending over many years, often decades, to resolve the issue through political or legal means have been fruitless. Third, the federal or provincial government authorizes developments to proceed or continue on the land or waters that are at the heart of the dispute. The flashpoint event occurs when members of the Aboriginal community see that the government, without settling the long-standing dispute, is permitting activities to take place that ignore Aboriginal interests in the area and, in effect, deny Aboriginal or treaty rights. Under these conditions, members of the Aboriginal community, often and predominantly its younger members, lose patience and decide to take direct action to stop the activity.

The public react primarily to the images, which are frightening and provocative. For the aroused public, the immediate concern is the restoration of what they call “law and order.” The images convey no information about what lies behind the disturbing scene, about the circumstances that finally led the Aboriginal people to occupy the land or set up the barricade. The news story is all about the immediate conflict. The pressure on government is to restore the peace as quickly as possible and get back to business as usual. But the standoff continues because the Aboriginal people have found that doing business as usual with “the Crown” means continuing to have their rights and interests ignored. Until we non-Aboriginals understand what has gone wrong in our relations with Aboriginal peoples and what we should be doing about it, we are bound to be confronted by these disturbing images.

Let me give a brief account of what led to two standoffs that took place close to Toronto and with which many readers will be familiar: Ipperwash and Caledonia.

The flashpoint at Ipperwash occurred when a group from the Stoney Point reserve on the shores of Lake Huron entered Ipperwash Provincial Park on 5 September 1995, after Labour Day, when the park closed for the season. This turned out to be a very short standoff. The next day, Dudley George, a member of the group “occupying”

the sandy parking lot adjacent to the park, was shot by a member of the Ontario Provincial Police (OPP). Dudley George was the first Aboriginal person, since the 19th century, to be shot in a land rights dispute. What moved Dudley and others from his community to be “occupying” a parking lot beside a closed provincial park in September 1995?

A provincial commission of inquiry was held into the circumstances that led to Dudley George’s tragic death. The first volume of the resulting report gives a full and detailed account of why Dudley and other Stoney-Pointers were in Ipperwash Provincial Park on 5 and 6 September 1995. Here are the main lines of the story.

Stoney Point is one of four reserves established by the Huron Tract Treaty of 1827. Another reserve is at Kettle Point, just south of Stoney Point, on a sandy stretch of the Lake Huron shoreline. The other two are in the Sarnia area. Each of the reserves was about 2,500 acres in size. The Ojibwa or Chippewa peoples, represented by chiefs who signed the treaty, would have exclusive use of these reserve lands, which constituted less than one percent of their traditional lands. In return for the reserves and a small annual payment, European settlement would be permitted on the remaining 2.7 million acres of their lands—virtually all of southwestern Ontario.

The foundation of the Huron Tract Treaty was an earlier, broader treaty: the Covenant entered into at Niagara Falls in 1764 by representatives of the British Crown and 1,500 chiefs and warriors representing the Anishnabek-speaking peoples in the Great Lakes area. This Covenant embodied the promises made by King George III in his Royal Proclamation of 1763. Settlement would proceed only on lands that had been ceded or sold through treaties with legitimate representatives of their Aboriginal owners. The agreement was sealed with the Great Covenant Chain promising that the Anishnabek would not be impoverished or their lands taken from them. The Anishnabek promised, in turn, to be loyal and to support the King in war and peace. The Treaty of Niagara set down the terms on which Aboriginal peoples and British settlers would share the lands and waters of what is now Ontario. Except for a few areas of unceded lands, virtually all of Ontario is subject to treaties based on the Covenant entered into at Niagara in 1764.

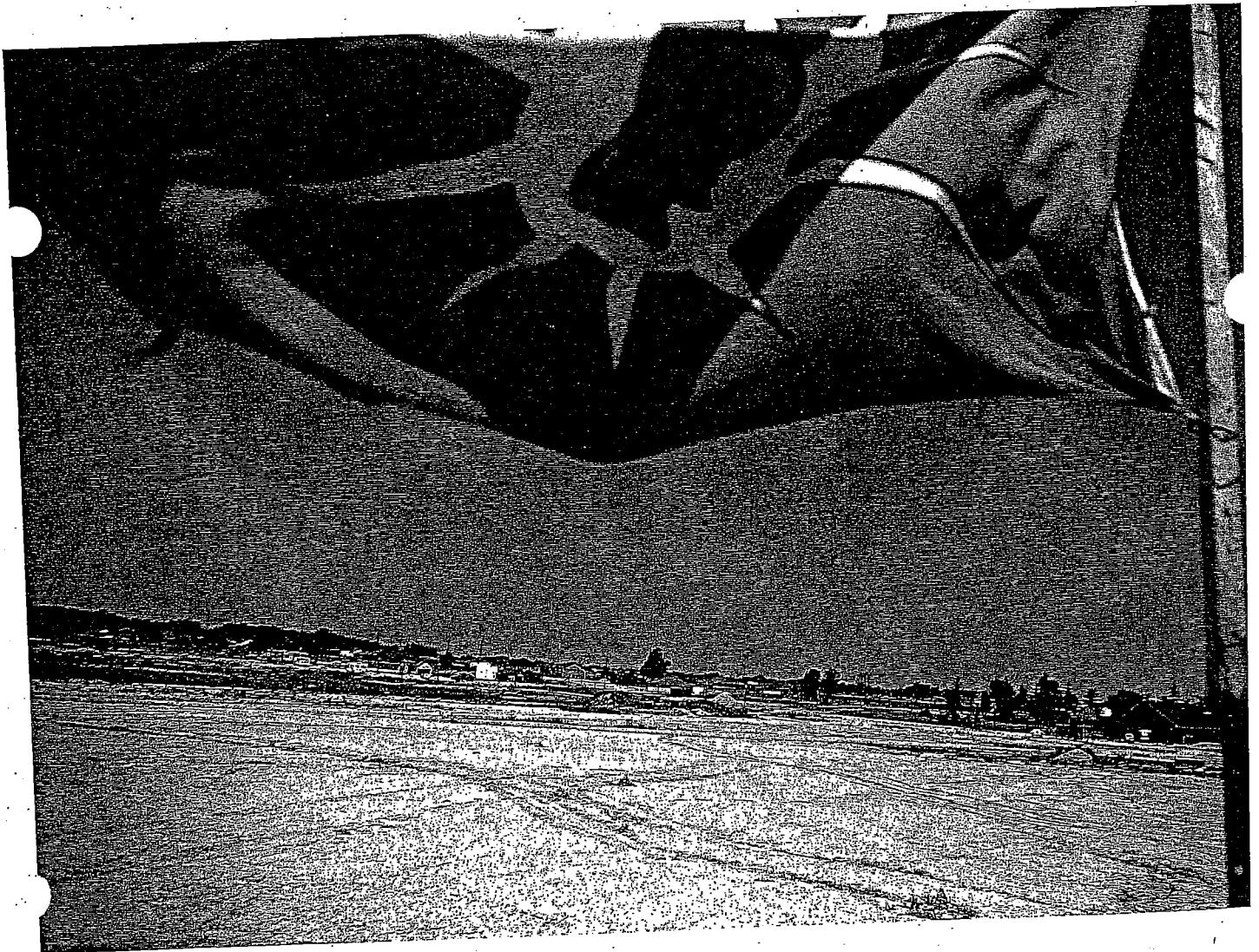
Although there were verbal and, later on, written undertakings in all of these treaties that the Aboriginal people would be free to continue their economic pursuits if they agreed to share with newcomers, British and Canadian authorities regarded off-reserve lands as “surrendered” lands and, as a settler economy developed, left no room for an Aboriginal economy. “Indians,” as the Ojibwa, Mississauga, Odawa, Potawatomie, Delaware and members of other First Nations were called, were confined to their postage-stamp reserves. And on these reserves, they were made subject to legislation, culminating in the Indian Act, that aimed to prepare them for assimilation into settler society.

By the 20th century, Dudley George’s people, the Stoney-Pointers, and the Kettle Point people were experiencing the full force of this

The flashpoint event occurs when members of the Aboriginal community see that the government, without settling the long-standing dispute, is permitting activities to take place that ignore Aboriginal interests in the area and, in effect, deny Aboriginal or treaty rights.



It is misleading to say that these standoffs are about land claims. The First Nations who participate in these events are not asking for more land. They are asking governments to keep promises made to them about land and resources.



colonialist regime. Now a community of several hundred, they relied entirely on the produce of their small reserves. They were not even allowed to sell firewood in neighbouring towns. In the 1920s, they came under pressure to sell their beachfront property to realtors eyeing its summer cottage potential. In a transaction facilitated in 1927 by a developer's cash-payment to members before a band vote, part of the Kettle Point beachfront was surrendered to the Crown (a.k.a. the Government of Canada) for 15 dollars an acre. The following year, all of the Stoney Point beachfront, with its magnificent sand dunes, was surrendered for 35 dollars an acre. The surrendered lands, of course, were sold for development at several times the amount paid to the people on the truncated reserves. In 1936, the Ontario government paid developers 100 dollars an acre for part of the Stoney Point lakefront to establish Ipperwash Provincial Park.

Some band members at the time questioned the legality of these transactions. But at this time, the Indian Act made it a crime for a lawyer to be an advocate for Indian land issues in the courts. Many years later, when Aboriginal people gained access to the courts, a trial judge ruled that, while the transactions were legally valid, they stank about them the "odour of moral failure." The Ontario Court of Appeal found that the "tainted dealings" might support a case for breach of fiduciary duty against Canada. These decisions were upheld by the Supreme Court of Canada. The Stoney Point people are still awaiting monetary compensation for breach of the Crown's fiduciary obligation.

Being swindled by the federal government was by no means the only difficulty Dudley George's people had to endure. The Ontario government refused again and again a band request to protect their old burial site in Ipperwash Park. On 5 September 1995, Stoney Pointers entered the park to secure their ancestors' burial site.

But the Stoney-Pointers were to suffer an even greater indignity. In 1942, the Government of Canada appropriated the entire Stoney Point reserve for military purposes. The Stoney Point people were squeezed into the Kettle Point reserve, their houses moved or destroyed. This was done under the War Measures Act—against the clearly expressed wishes of the Kettle and Stoney Point people, while their young men, in disproportionately high numbers, were serving in Canada's Armed Forces and despite the availability of other land in the area. In reviewing this appropriation, Judge Sidney Linden, who conducted the Ipperwash Inquiry, comments that what he found so disturbing is "the stark contrast between the ease with which First Nations people gave their loyalty and trust to the government and the ease with which the Government of Canada betrayed that trust."

After the war, the Department of National Defence promised to return the reserve to the Kettle and Stoney Point band as soon as it was no longer needed for military purposes. But despite many, many efforts to get it back, many government promises to return it and parliamentary committee calling for its return, today it still has not been formally returned to the band. By 1993, a group of Stoney-

Pointers that included Dudley George and many members of his family lost patience with the decades of fruitless negotiations and broken promises and began living on their reserve. On 29 July 1995, they drove an old school bus into an empty barracks building, in effect taking back the land reserved for their people by the Huron Tract Treaty of 1827. The caretaker crew of soldiers left peacefully after helping the "occupiers" operate the base equipment.

On the night of 6 September 1995, Dudley George and other Stoney-Pointers were enjoying an evening barbeque in the area alongside the parking lot between the part of their reserve they had recovered and the provincial park. They were in no mood to be pushed around by the police. Suddenly confronted by a phalanx of 30 helmeted police banging truncheons on their shields, the men and boys in the group did not "stand off" but charged at the police, some with sticks. To Kenneth Deane, an OPP sharpshooter hiding in the bush, Dudley's stick looked like a gun. He riddled him with bullets.

The "standoff" near the town of Caledonia also stems from our governments' failure to observe treaty promises. The land in question is part of the land on each side of the Grand River, from its source near Shelbourne to its mouth at Lake Erie, that was first secured by Governor Haldimand through a 1784 treaty with the Mississaugas. This land, known as the Haldimand Tract, was subsequently granted to Iroquois Six Nations peoples led by Joseph Brant, who had fought on the British side in the American Revolutionary War and wanted a safe home in Upper Canada. After the War of 1812, settlers began to flood into Upper Canada, as many as 2,000 of them squatting on the Six Nations Grand River reserve, occupying over a quarter of the reserve, without purchasing it or without the consent of the Iroquois Confederacy. Rather than remove the squatters, the government, under pressure from non-Aboriginal interests, sold off portions of the reserve without the Confederacy's consent. An 1840 parliamentary inquiry concluded that Upper Canada's government "has failed to protect First Nations from widespread theft of their lands, leaving them in poverty."

Like the Stoney Point people, for many years, the Six Nations were banned from our courts. In the late 1970s, the federal government finally established a system for resolving Specific Claims. The Six Nations have submitted 28 formal claims to that process, but not one of them has been resolved yet. One of these unsettled claims pertained to Douglas Creek Estates, land on which governments had recently authorized a 72-house subdivision. This is the land on which members of the Six Nations Confederacy began a protest on 28 February 2006. A standoff on this land continues, as representatives of the Confederacy, the federal and provincial governments negotiate a settlement of the claim, a settlement that might serve as a template for other unsettled claims on the Haldimand Tract lands.

So here are the bare bones of two Aboriginal standoffs. Although each standoff has its own unique features, the 24 such standoffs that the Ipperwash Inquiry Report lists as taking place in Canada since

1974 (half of them in Ontario) all have the qualities of flashpoint events. Having considered the background of two such events, let me suggest some lessons we should take from them.

First, we should note how misleading it is to say that these standoffs are about land claims. The First Nations who participate in these events are not asking for more land, but rather they are asking governments to keep promises made to them about land and resources, and to compensate them for failure to do so.

Second, we should recognize the challenge that the police face when they intervene in these events. In staging the blockade or occupation, the Aboriginal people may indeed breach laws in ways that cause inconvenience and discomfort in the neighbouring non-Aboriginal community. However, they are doing this after federal and provincial governments, over a great many years, have breached their legal obligations to the First Nations, causing grievous harm and suffering in the process, and without taking timely and effective action to right the wrong. Canadian police forces have learned, over the years, that when they intervene in these flashpoint events, they do so primarily as peacekeepers rather than law enforcers. Their job is to prevent violence, calm people down on both sides of the barricades, keep lines of communication open and ensure that all concerned know what is being done at the political level to resolve the issue.

It is what the OPP leadership aimed to do at Ipperwash until a leftist premier let it be known that he wanted "the f---ing Indians" removed from the park. At Caledonia, the OPP have acted as peace officers, but get very little thanks for it. The rule of law requires that we take all of our legal obligations seriously, including those of our governments to First Nations.

Third, what Ontario and all of Canada desperately need now—and have needed for many years—is a fair, effective and timely way of resolving the disputes that underlie these flashpoint events. The Senate Committee on Aboriginal Peoples reported, at the end of 2006, that, of the 1,108 Specific Claims filed across Canada under a process established nearly 30 years ago, only 275 had been resolved. The Ipperwash Inquiry Report reported last May that a final settlement had been reached in only 11 of the 116 claims filed in Ontario. The average time to settlement in Ontario up to now has been 15 years. Not only is the process of settling claims ridiculously slow, it is also grossly unfair: governments have the final say on whether the Aboriginal claim is valid. It is possible today for First Nations to submit their claim for adjudication in our courts. A few do that and have won large settlements. But most First Nations are reluctant to borrow the hundreds or thousands or even millions it might take to litigate their claim through all levels of the court system.

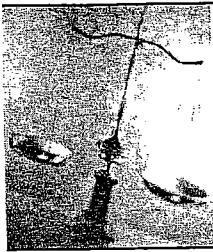
Aboriginal peoples and federal and provincial governments all prefer settling these disputes in a way that is faster, less costly and less adversarial than formal litigation. And now we may be very close to having such a system. Last spring, the then federal minister of Indian Affairs, Jim Prentice, agreed with Aboriginal leaders to introduce federal legislation to establish a new claims settlement process capable

of being fair and effective. Judge Linden's Ipperwash report recommends a claims settlement process for Ontario that would be fair and effective and dovetail with the proposed new federal system. Judge Linden also calls for an Ontario Treaty Commission to work with the parties to establish benchmarks for processing claims and develop less adversarial dispute resolution methods for reaching settlements. A key role of the Ontario Treaty Commission would be to make the claims process accountable and transparent to all Ontarians. Michael Bryant, Ontario's first Minister of Aboriginal Affairs, has pledged to carry out all of Judge Linden's recommendations.

The final and most fundamental lesson to take from events like Ipperwash and Caledonia is the need to fill the education gap about how we who are non-Aboriginal came to share the bounty of this province with the First Nations without accepting the obligations arising from the agreements our governments made with the First Nations. Judge Linden's report calls for a massive program of education, beginning in the elementary schools, about the First Nations of Ontario and their Aboriginal and treaty rights. It is only when there is a broad understanding in Ontario that, as Judge Linden puts it, "we are all treaty people," that we will not tolerate governments that continue to breach their obligations to Aboriginal peoples. Until such an understanding is deep and wide, we will continue to be assaulted by those images of non-Aboriginal and Aboriginal people glaring angrily at one another across the barricades.

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CASE 1

Sparrow v. The Queen,

[1990] 1 S.C.R. 1075

Supreme Court of Canada.

■ Introduction

In this case, although the defendant Mr. Sparrow, of the Musqueam Band in British Columbia, claimed he was only exercising his treaty right to fish for food, he was charged with breaking the rules of the band's fishing licence. Section 35 of the *Constitution Act, 1982* recognized and affirmed "existing Aboriginal and treaty rights of the Aboriginal Peoples of Canada." Though a number of legal issues are involved in this case, it was the first in which the Supreme Court of Canada had to interpret Section 35—specifically, whether regulations governing the rights of non-Aboriginal people to fish for food "extinguished" or merely controlled a constitutionally guaranteed right of Aboriginal Canadians.

■ Facts

The appellant Sparrow was a member of the Musqueam Indian Band in British Columbia. He was charged with fishing with a drift net that was longer than permitted by his band's food fishing licence. The licence set out restrictions that included a 25-fathom length limit. Sparrow was caught using a 45-fathom net. Although he admitted fishing with a net that exceeded the limit under the licence, his defence was that he was exercising an existing Aboriginal right to fish, and that the regulatory restriction on net length under the licence was inconsistent with Section 35(1) of the *Constitution Act, 1982* and therefore of no force or effect.

In Provincial Court, the judge held that a person could not claim an Aboriginal right unless a special treaty, proclamation, or other document supported that right. Since the claim here was based on historical practice, there was no such document, and Sparrow was convicted. His appeal to the County Court was dismissed for the same reasons.

On appeal, the British Columbia Court of Appeal held that the circumstances should have led the lower courts to conclude that Sparrow had been exercising an existing Aboriginal right, and that such a right could continue even though it was subject to regulation. Regulation did not necessarily extinguish the right. The court overturned the conviction because of mistakes of law made by the lower courts and sent the matter back to be retried using the proper legal tests.

Sparrow appealed the Court of Appeal's decision that Section 35 (1) of the *Constitution Act, 1982* protected the Aboriginal right only when it was exercised for procuring food, and that restrictive regulation of the right was permissible whenever reasonably justified for resource conservation or in the public interest. He also appealed the court's failure to find that the net restriction in the band's licence was inconsistent with Section 35(1). The Crown cross-appealed, arguing that the Court of Appeal had been wrong in holding that the Aboriginal right had not been extinguished prior to 1982 (when the *Constitution Act, 1982* was enacted) and that Sparrow therefore had the Aboriginal right to fish for food. The Crown also argued that the Appeal Court had erred in granting Aboriginal rights priority over the rights exercised by others who fished, and that Section 35(1) did not invalidate regulatory legislation designed for resource conservation and management, public health and safety, and other public interests such as the reasonable needs of other user groups. Finally, it argued that, in setting aside Sparrow's conviction, the Court of Appeal had wrongly shifted the burden of proof

to the Crown before the accused had established a *prima facie* case that the net length restriction had unreasonably interfered with his rights regarding food fish harvesting.

■ Issue

Is the net length restriction contained in the band licence issued under *British Columbia Fishery (General) Regulations* and the *Canada Fisheries Act* inconsistent with Section 35(1) of the *Constitution Act, 1982*?

■ Held

Appeal and **cross-appeal** dismissed. Order for a new trial affirmed.

■ Judicial Reasoning

Section 35(1) of the *Constitution Act, 1982* provides, "The existing Aboriginal and treaty rights of the Aboriginal Peoples of Canada are hereby recognized and affirmed." The meaning of "existing" Aboriginal rights and the content and scope of the Musqueam right to fish need to be examined first, followed by the meaning of "recognized and affirmed," and a consideration of the impact of Section 35(1) on Parliament's regulatory power.

The rights to which Section 35 applies are those that existed when the *Constitution Act, 1982* came into effect. Existing Aboriginal rights cannot be seen as limited by any regulations imposed before 1982: In other words, they are not frozen in time. "Existing" means "unextinguished" rather than exercisable at a certain point in history, and must be given a flexible interpretation to allow the evolution of Aboriginal rights.

What is the Aboriginal right at stake in this case? Evidence shows that the Musqueam have lived in the area as an organized society since long before the arrival of Europeans, and that fishing for salmon was, and still is, central to their lives. The Aboriginal right to fish is not in dispute; rather, the Crown argues that this right was extinguished by progressive and detailed restrictions imposed on it by regulations under the *Fisheries Act* that comprised a complete code (including the necessity of a licence), which was necessarily inconsistent with the continued enjoyment of the right.

The Crown's argument, however, confuses regulation with extinguishment. They are not the same. Simply controlling a right, even in great detail, does not necessarily extinguish it. The test for extinguishment is that "*the Sovereign's intention must be clear and plain if it is to extinguish the right.*" There is nothing in the *Fisheries Act* or its regulations demonstrating such an intention. The required permits were simply a way of controlling the fisheries, not of defining Aboriginal rights. The Crown has thus failed to discharge its onus of proving the extinguishment of the right in this case.

It is necessary next to consider the scope of the existing right to fish. The evidence given by anthropologists indicates that the salmon fishery has always represented a fundamental and distinctive part of the Musqueam culture. Its role has involved not only food but also ceremonial and social facets. This historical right may be exercised in a contemporary manner. The appellant argued that this extends to a right to a commercial fishery. However, since this argument was not advanced in the courts below, it will not be addressed in this court, whose reasons will be confined to recognizing and affirming the existing Aboriginal right to fish for food, ceremonial, and social purposes.

The impact of Section 35(1) on the regulatory power of Parliament and the outcome of this appeal must be determined next. [*The court then engaged in a lengthy examination of the*

history of Aboriginal rights and the development of the relationship between the Government of Canada and First Nations Peoples.] In summary,

[i]t is clear, then, that section 35(1) ... represents the culmination of a long and difficult struggle in both the political forum and the courts for the constitutional recognition of Aboriginal rights. The strong representations of Native associations and other groups concerned with the welfare of Canada's Aboriginal Peoples made the adoption of section 35(1) possible and it is important to note that the provision applies to Indians, the Inuit and the Métis. Section 35(1), at the least, provides a solid constitutional base upon which subsequent negotiations can take place. It also affords Aboriginal Peoples constitutional protection against provincial legislative power.

The approach for interpreting the meaning of Section 35(1) follows general principles of constitutional interpretation, principles relating specifically to Aboriginal rights and the purposes behind the Section itself. It is important, in sketching a framework for interpreting "recognized and affirmed," to give appropriate weight to the *constitutional* nature of the words. The nature of the Section suggests that it be interpreted in a **purposive** way. Its purpose of affirming Aboriginal rights demands a generous and liberal interpretation. A general guiding principle that can be extracted from previous cases, e.g., *Guerin v. The Queen*, [1984] 2 S.C.R. 335, is that the government has a **fiduciary** responsibility to Aboriginal Peoples and should act accordingly. Their relationship is based on trust rather than adversarialism. Contemporary rights must be interpreted in light of the nature of this historical relationship.

The constitutional nature of existing rights does not mean that any law or regulation affecting them will automatically be of no force or effect by operation of Section 52 of the *Constitution Act, 1982*. Similar to the effect of the "Oakes test," under Section 1 of the *Canadian Charter of Rights and Freedoms* regarding *Charter* violations, legislation that has an impact on the exercise of Aboriginal rights will, nevertheless, be valid if it meets a test for justifying such interference. Rights that are recognized and affirmed are not, however, absolute. They continue subject to the right of Parliament under Section 91(24) of the *Constitution Act, 1867* to legislate with regard to Aboriginal Peoples, but that parliamentary power must now be read as subject to Section 35(1). This means that the government's powers of regulation are subject to *justification* when they infringe upon or deny existing Aboriginal rights. Two extreme positions would have, on the one hand, Aboriginal rights guaranteed in their original form, unrestricted by subsequent regulation and, on the other hand, Aboriginal rights defined as a patchwork comprising all the legislative limitations imposed over the years. These two extremes must be rejected in favour of a scheme that requires justification of government regulatory interference with existing rights. The government bears the burden of demonstrating such justification.

Turning to the case at hand, it is necessary to set out, the test first, for *prima facie* interference with an existing Aboriginal right and, second, for the justification of such interference. To determine whether the fishing rights in this case have been interfered with—constituting a *prima facie* infringement of Section 35(1)—several questions must be answered:

1. Is the limitation *unreasonable*?
2. Does the regulation impose *undue hardship*?
3. Does the regulation deny right holders their preferred means of exercising the right?

The onus of proving a *prima facie* infringement lies on the person(s) challenging the legislation.

If a *prima facie* infringement is found, the next stage is to determine whether the interference is justified. Justification analysis involves asking first whether there is a valid legislative objective. Objectives designed to preserve Section 35(1) rights by conserving and managing the resource in question would be valid; as would those aimed at preventing the exercise of Aboriginal rights that would harm the general populace or Aboriginal Peoples themselves, as well as any other compelling and substantial objectives. The value of conservation purposes for government legislation has been recognized for a long time. Moreover, resource management is consistent with traditional Aboriginal beliefs and practices, and with the maintenance and enhancement of their rights. The constitutional character of the Musqueam rights means that, in any system of priorities, after valid conservation measures have been put in place, the band's Aboriginal food fishing rights must be the next priority. The second question involved in justification analysis concerns the relationship between the government and Aboriginal Peoples, and how the legislation affects their trust relationship and the fiduciary responsibility of the government.

Thus the constitutional entitlement in Section 35(1) requires the Crown to ensure its regulations are consistent with that allocation of priorities—not to undermine Parliament's overall conservation powers and responsibilities, but rather to guarantee that conservation and allocation plans treat Aboriginal Peoples in a way that ensures their rights are taken seriously.

The justification analysis process should also consider other questions, depending on the circumstances, for example, whether there has been *as little infringement as possible* to arrive at the desired result; whether, when **expropriation** is involved, there is fair compensation; and whether Aboriginal groups have been consulted about the conservation measures being implemented.

The last task is to apply these principles to the case at hand. The Court of Appeal was correct in finding that there were insufficient findings of fact at trial to warrant an **acquittal** of the appellant. A retrial must be ordered, which would allow the trial court to make the necessary findings of fact according to the tests set out above. Initially, the appellant would bear the burden of showing that the net length restriction was a *prima facie* infringement of the Aboriginal right to fish for food. Assuming such an infringement were found, the onus would shift to the Crown to demonstrate that the regulation imposing the restriction was justifiable. Here, the Crown would have to show that there was no unconstitutional objective behind the regulation, such as allocating more of the resource to users who rank below the Musqueam, and that the regulation was necessary to accomplish the needed limitation.

■ Questions and Activities

Knowledge/Understanding

1. Identify the various statutes and judicial precedents (cases) applied in arguing the case. Briefly describe the purpose for which each was used by either the prosecution or defence.
2. In deciding constitutional issues the courts are frequently confronted with the task of balancing the rights of the individual against the rights of society. Explain how this balancing function was demonstrated in the *Sparrow* case and support your answer with reference to the judicial reasoning above.

Thinking/Inquiry

1. Although *Sparrow* was considered a triumph for Aboriginal rights, it was also considered only a first step toward legal recognition and protection of Aboriginal Peoples' historic rights to lands and resources. There are still many steps remaining before their journey comes to an end.

- (a) Evaluate the accuracy of the statements above. Support your opinion.
 - (b) Suggest measures that the Canadian governments could implement to address Aboriginal issues effectively and expediently.
2. "One aspect of access to justice is the requirement for cultural sensitivity in the administration of justice and the provision of justice-related services. Treatment with fairness, dignity, and respect by a powerful institution is the *sine qua non* of justice. It is the symbolic core of the concept of justice."

(Source: Currie, A. and George Kiefl. *Ethnocultural Groups and the Justice System in Canada: A Review of the Issues*. Ottawa: Department of Justice Canada, 1994.)

- (a) Would you agree that part of the problem confronting Aboriginal communities stems from racism in the justice system in Canada? Be prepared to defend your position in a class discussion.
 - (b) Locate a newspaper article involving an Aboriginal issue or dispute. Summarize its contents and read it to the class.
- Jurisweb:** http://www.crr.ca/EN/MediaCentre/FactSheets/eMedCen_FacShtRacismInJusticeSys.htm

Application

1. Before *Sparrow* the courts adopted a rather strict interpretation and approach to Aboriginal treaty rights and land claims. In other words, Aboriginal rights were considered "frozen in time." Select specific quotes from the judicial reasoning in *Sparrow*, above, that show a more liberal and progressive interpretation in the application of Section 35(1) of the *Constitution Act, 1982*.
2. In *Taku River Tlingit First Nations v. Tulsequah Chief Mine Project* (B.C. Court of Appeal, 2002) the court stated:

... decisions of the Supreme Court of Canada have referred to the importance of s.35(1) of the *Constitution Act, 1982*, in providing a foundation for the negotiation and settlement of Aboriginal land claims. To say, as the (Provincial) Crown does here, that establishment of the Aboriginal rights or title in court proceedings is required before consultation is required, would effectively end any prospect of meaningful negotiation of Aboriginal land claims.

In a 1-page essay, evaluate this statement. Do you agree or disagree?

Communication

1. Read the following excerpts from a press release by the legal counsel for the Musqueam Indian Band after the *Sparrow* decision.
 - (a) Discuss the extent to which the Musqueam Indian Band interpreted the *Sparrow* decision as a landmark constitutional case in the advancement of Aboriginal rights.
 - (b) Draft a press release on behalf of the federal or provincial government conveying its own positions on the court's decision.
2. Construct a judicial pyramid identifying the following courts from bottom to top: B.C. Provincial Court, B.C. County Court, B.C. Court of Appeal, Supreme Court of Canada. Record at the appropriate judicial level on the pyramid:
 - (a) The legal issues to be decided in the *Sparrow* case
 - (b) Whether the accused (*Sparrow*) was convicted or acquitted, or the appeal dismissed or upheld

PRESS RELEASE: MAY 31, 1990

The band has supported Mr. Sparrow's case through the entire court system since its commencement in 1984. ... We feel that the decision confirms our belief and stated position over countless years that our Aboriginal right to fish, hunt, possess lands etc. have never been surrendered or extinguished. ...

We see this decision as protecting our Aboriginal right to fish in our traditional territory. ... As we read the case, section 35 of the *Constitution* embodies a trust-like responsibility toward Aboriginal people in Canada. ... If the Government of Canada wishes to regulate Aboriginal fishing rights it can only do so in a way, which does not offend our Aboriginal rights. ... With today's decision we hope that both the Federal and Provincial Governments will have a better understanding of our Constitutional Right and will adhere closely to them. The Musqueam Indian Band has not wanted to take this and other cases such as the *Guerin* case through the court system but has been forced to because of the attitudes of the governments towards us. Today's decision, however, reinforces our faith in the court system. ... Even though the Musqueam Indian Band has won a major court victory today, it wants the public to know that it intends to use the fisheries resource responsibly and does not intend to treat government officials in the same way that these officials have treated the band over the past several years. ...

As the Supreme Court stated " ... for the Musqueam, the salmon fishery has always constituted an integral part of their distinctive culture. The right to do so may be exercised in a contemporary manner ... s.35 ... affords Aboriginal peoples constitutional protection against provincial legislative power." ... Perhaps with this decision in hand both governments will sit down with Aboriginal peoples across Canada and make a sincere attempt to settle all of our differences without delay.

(Source: Currie, A. and George Kiefl. *Ethnocultural Groups and the Justice System in Canada: A Review of the Issues*. Ottawa: Department of Justice Canada, 1994.)

Jurisweb: Use these websites as resources for research into Aboriginal law cases, treaty rights, and other issues relating to Aboriginal Canadians.

<http://www.gov.bc.ca/tno/popt/landmark>

<http://www.musqueam.bc.ca/Rights.html>

<http://www.crr.ca/EN/MediaCentre/FactSheets/FactAboutCases.pdf>

<http://www.AdmiraltyLaw.com>

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WHY TREATIES?

Why, in this day and age,
are we negotiating treaties
in BC?

*For many people,
treaties seem like a relic
of the past. Weren't
treaties signed a long
time ago, when
Europeans first settled in
North America?*

In fact they were, in most of the continent. But treaties are unfinished business here in British Columbia. This unfinished business is costing the provincial economy a lot of money because of continuing uncertainty over ownership of millions of acres of land. It's also standing in the way of aboriginal communities regaining the self-sufficiency they once had.

When the early Europeans first began to settle in the eastern part of North America, Britain recognized that those people who were already living here had title to land: the Royal Proclamation of 1763 declared that only the British Crown could acquire lands from First Nations, and only by treaty.

In most of Canada, that's what happened. Before Confederation the British Crown had signed major treaties. The new Dominion of Canada continued this policy of making treaties before the west was opened up for settlement. In most of these treaties, aboriginal people gave up their title in exchange for land reserves and for the right to hunt and fish on the land they'd given up.

But west of the Rockies, things were different. Between 1850 and 1854 James Douglas, on behalf of the British Crown, negotiated 14 land purchases on Vancouver Island, which are known to this day as the Douglas Treaties. When the mainland was made a colony in 1858, Governor Douglas' superiors in London left him in charge assuming that more treaties would be arranged. But neither Douglas, nor any of his successors made any more treaties. Instead Douglas began setting out reserves for each tribe, which included "their cultivated fields and village sites."

Although no more treaties were made, under Douglas individual aboriginal people who wanted to take up farming could acquire Crown land on the same terms as the settlers. However, soon after Douglas retired the colonial government took away from aboriginal people the right to acquire Crown land, reduced the size of their reserves, denied that they had ever owned the land, and paid no compensation for the loss of traditional lands and resources.

So when the time arrived for the colony of British Columbia to join Confederation in 1871, the new province's policy was set: British Columbia did not recognize aboriginal title, so there was no need for treaties to extinguish it. The new Dominion seemed to have been initially unaware of British Columbia's approach to aboriginal affairs. When it became aware it expressed concern about the legality of British Columbia's policy, but the sea-to-sea railway and other matters were the focus and Canada was unwilling to force the issue.

Over the decades, aboriginal people presented letters and petitions to governments, demonstrated and protested and even met with provincial and federal officials demanding treaties. However, the only one signed in the new province was Treaty 8 in 1899. The treaty, which was extended west of Alberta to take in the northeast corner of British Columbia, was signed with the federal government: the province took no part.

Continually dismissed and ignored, aboriginal peoples' demand for treaties intensified, culminating in the forming of the Allied Tribes of British Columbia in 1916 to work for treaties. During the 1920's the Allied Tribes petitioned Parliament more than once to have their case sent to the Judicial Committee of the Privy Council in London (Canada's highest court at the time). In response, Ottawa amended the Indian Act in 1927 to make it illegal to raise funds to pursue land claims and thus prevented land claims activity.

The restriction on land claims activity was eventually lifted in 1951 and First Nations people quickly learned to use lawsuits, rallies, road and rail blockades to bring attention to their cause to try to regain some of what they had lost.

However, it would take more than 40 years before both the federal and provincial governments agreed to sit down with First Nations in BC and negotiate treaties.

So treaties should have been made yet weren't. But isn't it simply too late in the day to revisit this? Aren't we living in a different reality?

Under section 35 of the *Constitution Act*, 1982, aboriginal rights and treaty rights, both existing and those that may be acquired, are recognized and affirmed. The reality we are faced with is that Canadian law says aboriginal land title, and the rights that go along with it, exist whether or not there is a treaty. But without a treaty there is uncertainty about how and where those rights apply.

The reason that this issue is being dealt with so late in the day is due in part to the Indian Act's ban on land claims activity. Not until the 1970s was a First Nation able to ask the Supreme Court of Canada to do what the courts in the United States and New Zealand had done over a century earlier: to rule on the status of aboriginal title as a legal right.

The first of a series of landmark judgments to deal with aboriginal rights was the Supreme Court of Canada's *Calder* decision in 1973. In that case, the Nisga'a of northwestern BC argued that the Crown's underlying title was subject to Nisga'a title to occupy and manage their lands.

The decision was a legal turning point. Six of the seven judges confirmed that aboriginal title is "a legal right derived from the Indians' historic... possession of their tribal lands" and that it existed whether governments recognized it or not. However, the judges then split on whether Nisga'a aboriginal title still existed or had been extinguished by colonial legislation prior to Confederation.

The recognition of aboriginal title in *Calder* as a legal right was sufficient to cause the federal government to establish a land claims process. However, British Columbia refused to participate. As British Columbia held virtually all Crown land in the province, the land claims process was doomed without the province's participation.

Still the question remained: had aboriginal title been extinguished before British Columbia joined Confederation, or not?

Two court decisions since the *Calder* case have addressed this question. In the Supreme Court of Canada's *Sparrow* decision in 1990, the Court took the same approach as those judges in *Calder* who said that the Nisga'a still had title. They said that unless legislation had a "clear and plain intention" to extinguish aboriginal rights, it did not have that effect.

Applying this test to fisheries legislation, the Court concluded that a century of detailed regulations had not extinguished the Musqueam people's aboriginal right to fish for food and ceremonial purposes. This case however dealt with fishing rights, not rights in land.

Then came the Delgamuukw judgment by the Supreme Court of Canada in December 1997. The decision confirmed that aboriginal title does exist in British Columbia, that it's a right to the land itself—not just the right to hunt, fish or gather—and that when dealing with Crown land, the government must consult with and may have to compensate First Nations whose rights may be affected. Everyone involved in the treaty process recognized the decision would have major impacts on the negotiations.

What do all these legal decisions really mean?

Since the early 1970's, through these and other cases, aboriginal rights have slowly evolved and been defined through the Canadian courts. Current Canadian law has confirmed that:

- aboriginal rights exist in law;
- aboriginal rights are distinct and different from the rights of other Canadians;
- they include aboriginal title which is a unique communally held property right;
- aboriginal rights take priority over the rights of others subject only to the needs of conservation;
- the legal and constitutional status of aboriginal people derives not from their race but from the fact they are the descendants of the peoples and governing societies that were resident in North America long before settlers arrived; and

■ aboriginal rights and title cannot be extinguished by simple legislation because they are protected by the *Constitution Act, 1982*.

So the courts have confirmed that aboriginal title still exists in BC but they have not indicated where it exists. To resolve this situation the governments and First Nations have two options: either negotiate land, resource, governance and jurisdiction issues through the treaty process or go to court and have aboriginal rights and title decided on a case-by-case, right-by-right basis.



BC Treaty
Commission

DELGAMUUKW

A Lay Person's Guide to DELGAMUUKW

The Supreme Court of Canada decision in the Delgamuukw case in late 1997 was widely seen as a turning point for treaty negotiations. The decision confirmed aboriginal title does exist in British Columbia, that it's a right to the land itself — not just the right to hunt, fish or gather — and that when dealing with Crown land, the government must consult with and may have to compensate First Nations whose rights are affected. Everyone involved in treaty negotiations recognized the decision could have major impacts on policies, positions and mandates.

Soon after the court's decision, the Principals in the BC treaty process — the governments of Canada and BC and the First Nations Summit — began a review of the treaty process to reflect the direction given by the Supreme Court. It was also an opportunity to review the effectiveness of the five-year-old treaty process. The Treaty Commission chaired the meetings among the Principles during the winter of 1998/99 and put forward its views and an analysis of obstacles it observed that needed to be addressed.

The Treaty Commission pointed out that treaty negotiations begin with mutual recognition. When a First Nation sits down at the treaty table, it recognizes there is some legitimacy to the claims of title, ownership and jurisdiction by Canada and BC. Similarly, Canada and BC recognize there is some legitimacy to the claims of title, ownership and jurisdiction by the First Nation. The challenge is giving that recognition practical expression.

The parties, having recognized each other's titles, must balance their

interests and allow time for the negotiations to unfold and the new relationship to develop. The discussion is continuing over whether this will be accomplished through interim measures agreements, through completed sections of treaties that will be given early implementation or some other means. Providing some treaty benefits early in the negotiations will help to promote confidence in the treaty process among First Nations.

The Treaty Commission also reminded the parties that treaty negotiations are a voluntary political process — it's a choice. The treaty process was set up as a voluntary process based on political negotiations, not legal interpretations.

And finally, the Treaty Commission has urged the parties to be more flexible and creative at the negotiating tables — to find ways of reflecting the direction the court has given through their respective mandates. In any negotiation, if the parties don't see their interests being fairly and effectively considered, they are going to look for other options. That may happen. The parties at each negotiating table must find ways of reaching consensus on new approaches.

The Treaty Commission developed this lay person's guide to answer some questions you may have about the Supreme Court decision. In doing so, we relied on assistance from two distinguished professors specializing in aboriginal law, Hamar Foster of the University of Victoria and Patrick Macklem of the University of Toronto.

What started the lawsuit?

The Gitxsan Nation and the Wet'suwet'en Nation started the lawsuit in 1984. There was a federal land claims process available at the time, but it was slow, and the Province — which holds underlying title to the Crown land in the area — would not participate. So the First Nations went to court.

What did they claim?

Their claim covered 133 individual territories, amounting to 58,000 square kilometres of northwestern British Columbia. They claimed both ownership of the land and jurisdiction. That is, wherever provincial laws conflicted with tribal laws in the territory, tribal law would prevail.

Who was the claim against?

The main defendant was the Province of British Columbia, as the owner of the lands in question. Other First Nations, business and resource associations were later allowed to take part, arguing on both sides of the case.

What were the main arguments in response to the claims?

BC's main defence at trial was that all aboriginal land rights in BC were extinguished by laws of the colonial government before it became part of Canada in 1871, when authority to pass laws in relation to Indians was transferred to Canada. In the Court of Appeal, BC changed its position and argued that aboriginal land rights had not been extinguished. However, the Court of Appeal appointed special counsel to make the extinguishment argument and unanimously decided that there had been no blanket extinguishment of aboriginal interests in land by the colonial government. In the Supreme Court of Canada, BC's main argument

was that aboriginal title was primarily a collection of aboriginal rights to engage in traditional activities.

What did the Supreme Court of Canada decide?

There was no decision as to whether the Gitxsan and Wet'suwet'en have aboriginal title to the lands they claimed. The court said that this issue could not be decided without a new trial. One reason was a technical one, having to do with the way the claim was stated. Another was that the original trial judge had not given enough consideration to the oral histories presented by the First Nations.

Will there be another trial?

It will be up to the Gitxsan and Wet'suwet'en to decide whether to negotiate an agreement or to begin again with another lawsuit. The first trial lasted three years and the appeals took another six years.

Why is the case so important?

Even though the actual land claim was not decided, the case has enormous significance for BC because the judges went on to make a number of statements about aboriginal rights and title that indicate how the courts will approach these cases in the future.

What is aboriginal title?

The court said that aboriginal title is a right to the land itself. Until this decision, no Canadian court had so directly addressed the definition of aboriginal title. Other cases had dealt with aboriginal rights in terms of the right to use the land for traditional purposes such as hunting. Aboriginal title is a property right that goes much further than aboriginal rights of usage.

Permitted uses of aboriginal lands

are no longer limited to traditional practices. For example, mining could be a permitted use, even if mining was never a part of the First Nation's traditional culture.

In many ways, aboriginal title is just like ordinary land ownership. The owner can exclude others from the property, extract resources from it, use it for business or pleasure.

But there are important differences, too.

- Aboriginal title is a communal right. An individual cannot hold aboriginal title. This means that decisions about land must be made by the community as a whole.

- Because aboriginal title is based on a First Nation's relationship with the land, these lands cannot be used for a purpose inconsistent with that continuing relationship. For example, if the people's culture was based on hunting, their aboriginal title lands could not be paved over or strip-mined if that would destroy their cultural relationship to the land.

- Aboriginal title lands can be sold only to the federal government.

- Aboriginal title has the additional protection of being a constitutional right. No government can unduly interfere with aboriginal title unless the interference meets strict constitutional tests of justification.

Except for these limitations, aboriginal title holders can use their lands as they wish.

What is the difference between aboriginal title and ordinary land ownership?

The following chart shows the major differences established by the Delgamuukw decision between aboriginal title and the familiar kind of land ownership that is registered in the Land Titles office.

	Ordinary Land Ownership	Aboriginal Title
Who can own land?	An individual or a group	A common group; there are no individual rights to aboriginal title
Can the owner sell the land?	Yes	May be sold only to the federal Crown
What limits are there on land use?	Zoning, and other provincial and municipal laws	Use must not impair traditional use of the land by future generations
What laws protect the land?	Common law and provincial statutes	Common law and the Canadian constitution

So where does aboriginal title exist in BC?

Nobody knows yet. It will have to be either agreed on through a treaty process or decided by the courts on a case-by-case basis. If First Nations decide to go to court to establish title to lands, they will have to prove that they occupied the land to the exclusion of others before 1846, the year Britain declared sovereignty over the area that became British Columbia. Then they have to prove some degree of continuity from that occupation until today.

The Delgamuukw case does say that courts must be willing to rely on oral history, including traditional stories and songs, in a way that until now they have not. However, it is still far from clear exactly what level of proof will be enough to establish a claim of aboriginal title.

Will the decision affect private property?

The Gitksan and Wet'suwet'en made no claim to private lands, so the court did not directly address this question.

However, the court's decision clearly suggests that there are private lands in BC that are subject to aboriginal title, or at least were wrongly sold. This is because the court confirmed that the province had no authority to extinguish aboriginal title after union with Canada in 1871, yet the province has been

selling land to private interests since 1849. Still, the remedy for First Nations is more likely to be the payment of compensation than any adjustment to private ownership.

How will aboriginal title affect the Province's title to Crown lands?

This is a difficult question and one that cannot be answered with any certainty right now.

The court does indicate that the Province will still have a limited right to deal with Crown land that is subject to aboriginal title, for example by granting resource tenures. The limits on that right are expressed in a two-pronged test:

It would have to be for a purpose that is compelling and substantial. (The court gives agriculture, forestry, mining, environmental protection and economic development as possible examples, which would have to be examined on a case-by-case basis);

The government's action must be consistent with the special relationship between the Crown and aboriginal peoples, which is a relationship of trust.

This means that the Province will need to consult with First Nations before granting any interest in aboriginal lands to others. Whether this means that a First Nation's consent would be required will depend on the circumstances. Consent would likely be required for provincial laws regulating hunting and fishing on aboriginal lands.

Cash compensation will be another factor. First Nations are entitled to share in the economic benefits derived from their lands.

The general principle seems to be that any infringement by the Crown on aboriginal title has to be for a purpose that promotes the reconciliation of the two cultures.

However, other statements in the

decision raise serious doubts about whether provincial laws relating to mining, forestry and other land uses can directly apply to aboriginal title lands. This is one of the most uncertain aspects of the decision and will require further guidance from the courts.

Will I still be able to hike and camp or pick berries on Crown lands that are subject to aboriginal title?

Once it is established that particular lands are aboriginal title lands, the owners naturally will be able to regulate access to those lands. If these regulations conflict with provincial or federal laws, it is not yet clear which law will apply.

Will First Nations be able to use the courts to stop activities on lands they are claiming?

Yes, just as they could before Delgamuukw. It might be somewhat easier now that the court has defined aboriginal title and the requirements for its proof. But there are still strict requirements. A court will not make this kind of order unless it is satisfied that the First Nation's interest in the land will have been irreparably harmed by the activity and that the balance of convenience between all of the parties to the lawsuit favours stopping the activity.

Another way that First Nations can prevent this kind of harm is by negotiating interim measures agreements within the treaty process. Under these agreements, First Nations and the provincial and federal government agree on how land will be used while a treaty is being negotiated, and how the benefits will be shared.

Why did the Supreme Court give special rights to aboriginal people?

In one sense, aboriginal title is not a special right at all. It is simply a

matter of recognizing property rights that until now have been wrongfully ignored. To continue to deny First Nations their property rights would be to deny the equality of all Canadians before the law.

But it is true that aboriginal peoples have a unique constitutional status in Canada. The Supreme Court of Canada explained it this way, in an earlier case:

When Europeans arrived in North America, aboriginal peoples were already here, living in communities on the land and participating in distinctive cultures as they had done for centuries. It is this fact and this fact above all others, which separates aboriginal peoples from all other minority groups in Canadian society and that mandates their special legal, and now constitutional status.

The concept of aboriginal title was not invented by the Supreme Court. It is consistent with approaches developed in New Zealand, Australia and the United States, and in the last century by the Privy Council, which was then the highest court in the British Empire. It also is in many respects a natural evolution of the earlier aboriginal rights cases decided by Canadian courts since 1973.

Can government pass laws to extinguish (wipe out) aboriginal title?

No. In Canada the constitution is the highest authority in the land, not Parliament. Parliament can, in certain circumstances, pass laws that conflict with constitutional rights, but only in ways that can meet a strict test of justification set down by the courts. A law to extinguish aboriginal title would be unlikely to meet that test.

Also, the clause in the constitution that permits governments to override certain constitutional rights does not apply to aboriginal rights. Aboriginal title is an aboriginal right.

These issues could cause a lot of conflict between aboriginal and non-aboriginal people. Did the Supreme Court talk about how these conflicts can be worked out?

Yes. The court strongly urges the parties to negotiate rather than litigate. The Chief Justice says at the end of his judgment:

Finally, this litigation has been both long and expensive, not only in economic but in human terms as well. By ordering a new trial, I do not necessarily encourage the parties to proceed to litigation and to settle their dispute through the courts.

The Crown, he says, is under a moral, if not a legal, duty to enter into and conduct negotiations with First Nations in good faith.

Litigation of aboriginal claims can be not only costly but divisive of communities and entirely unpredictable in their result. And although it will continue to be necessary to resort to the courts for the answers to certain questions, litigation is limited in what it can accomplish. It cannot address the problems of economic and social development that are so critical to aboriginal communities. Negotiated settlements on the other hand, can achieve constructive and creative results that enhance communities and resolve conflict.

The court's decision concludes with these words:

Ultimately, it is through negotiated settlements, with good faith and give and take on both sides, reinforced by judgments of this Court, that we will achieve... "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.



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BC Treaty
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after DELGAMUUKW

After DELGAMUUKW: The LEGAL and POLITICAL LANDSCAPE

The Supreme Court of Canada decision in late 1997 was widely seen as a turning point for treaty negotiations. The decision confirmed that aboriginal title does exist in BC, that it's a right to the land itself — not just the right to hunt or fish — and that when dealing with Crown land, the government must consult with and may have to compensate First Nations whose titles are affected. Everyone involved in treaty negotiations recognized that the decision could have major impacts on policies, on positions and on mandates. It's still too early to know what its full impact will be.

> THE DELGAMUUKW DECISION

The decision strongly favours negotiation as the way to resolve conflicting claims to the land. There are complex issues at stake, the court said, and the negotiating table is the place to resolve them — not the courtroom. Treaties can settle who owns what land, who has rights on the land and who manages the land.

The Supreme Court told us aboriginal title exists in BC and is:

- a right to exclusive use and occupation of land;
- a constitutionally protected right; and
- a burden on Crown title.

But it did not say where in BC aboriginal title exists. That would have to be proven in each case. Depending on the history of a particular First Nation and its use and occupation of its traditional territory, this may or may not be easy to do. The Supreme Court also said that aboriginal title can be infringed by BC or Canada, for certain limited purposes.

One result of the decision is enough uncertainty on all sides to make treaty negotiations a more attractive option than litigation.

> THE TRIPARTITE REVIEW

A review of the treaty process was undertaken by the three Principals in the wake of the *Delgamuukw* decision. The First Nations Summit and the governments of BC and Canada set out, in a series of meetings, to exchange views on the meaning of the decision and to see if they could find ways to improve the treaty negotiation process. The Treaty Commission in its 1998 annual report described the review process as "at a standstill." It urged the Principals to resume the review process and invigorate treaty negotiations.

The Principals did continue the review in the autumn and in an intensive round of meetings developed a series of recommendations which are being considered and adopted as agreed.

The focus of the review has been to find ways to accelerate negotiations around land, resources, cash and the financial components of treaties. First Nations who are borrowing large sums of money to finance their treaty talks have become frustrated. As negotiations drag on, they see the resources in their territories being depleted or alienated and they fear there will be little left with which to meet their treaty expectations. They are seeking assurance that treaties will leave them better off than they now are. *Delgamuukw* and its confirmation of aboriginal title heightened First Nations' expectations that their concerns would be addressed. Resolving

issues around land and resources sooner rather than later will restore confidence in the treaty process.

The Treaty Commission's role in the review

The Treaty Commission played an active role in this review. The Chief Commissioner chaired the meetings and Commissioners attended as observers. As issues arose that needed further analysis, the Treaty Commission undertook to produce working papers, including recommendations, for consideration by the Principals.

At the request of the Principals, the Treaty Commission identified and described certain obstacles to the completion of treaties and suggested ways of surmounting those obstacles. For example:

- The *Delgamuukw* decision made it clear that treaty negotiations must find a way to reconcile aboriginal title with Crown title. A statement of mutual recognition is a starting point.

The governments of Canada and BC and the First Nations Summit have agreed to a statement on aboriginal title.

The parties agree to the negotiation of treaties respecting the following principles:

1. The parties recognize that Aboriginal title exists as a right protected under section 35 of the Constitution Act, 1982.

2. Where Aboriginal title exists in British Columbia, it is a legal interest in the land and is a burden on Crown title.

3. Aboriginal title must be understood from both the common law and Aboriginal perspective.

4. As acknowledged by the Supreme Court of Canada, Aboriginal people derive their Aboriginal title from their historic occupation, use and

possession of their tribal lands.

5. The parties agree that it is in their best interest that Aboriginal and Crown interests be reconciled through honourable, respectful and good faith negotiations.

- Interim protection measures are a practical step. If a First Nation has an interest in a parcel of land, then it makes sense to allow that First Nation to share in the benefits from the land while negotiations proceed to define exactly where and how that title will be recognized. When that doesn't happen and First Nations watch loaded logging trucks rolling past the offices where they sit negotiating — then litigation may loom as a more attractive option.

- It's important to successful negotiations that the First Nation has a clear vision of what it wants and needs from a treaty. The treaty process, and particularly its funding arrangements, does not provide for those who need to stand back from active negotiations in order to develop their treaty visions or to build their capacity to negotiate or implement a treaty. A recent initiative will provide some assistance to First Nations. The federal government has committed \$15 million over three years towards First Nation capacity building in British Columbia. The provincial government has also contributed \$2 million for the 1999-2000 fiscal year. The focus of the funding is on building capacity for lands and resource negotiations and consultations.

> SUPPORTING LARGER INITIATIVES

Could negotiations progress more efficiently if they were undertaken by larger groupings of First Nations? First Nations in the past have rejected the idea of provincial or regional negotiations because they wish to

maintain the autonomy of their own negotiations. But the Treaty Commission has continued to look for ways to encourage more efficient and effective negotiations. In recent months, a group of more than 20 First Nations, mostly on Vancouver Island, has come together as the First Nations Treaty Negotiation Alliance to develop a common set of negotiating principles. The Treaty Commission has supported this initiative and is chairing a round of meetings involving chief negotiators from Canada and BC and representatives of the First Nations. The Treaty Commission has also prepared a working paper setting out other approaches that could generate efficiencies for all parties.

> THE NISGA'A TREATY

The first modern treaty in British Columbia was signed in August 1998 at New Aiyansh. Although not part of the BC treaty process (it was in negotiation long before the establishment of the Treaty Commission), the Nisga'a agreement proved that treaties can be achieved. It was celebrated by many as the culmination of the work of generations of Nisga'a negotiators and the fulfillment of a people's aspirations. But the celebration was not unanimous. Some First Nations people felt that the treaty left the Nisga'a with too little land. Some non-aboriginal people felt that the treaty is too costly for Canada and BC to bear. In many ways, the Nisga'a treaty served as a lightning rod for concerns about treaties themselves and about the negotiation process.

Public debate

A rigorous public debate developed around the issue of whether a referendum should be used to gauge public opinion. The

Treaty Commission publicly opposed this use of a referendum for several reasons, including these:

- The governments had already agreed with the Nisga'a on a ratification process that did not include a referendum. To change the rules at the end of the game would undermine the integrity of the process and be inconsistent with the honour of the Crown.

- A referendum cannot accurately reflect public opinion on a complex issue. Most people are likely to find at least one item in a treaty with which they disagree. Since people generally feel more strongly about those issues they disagree with, they will tend to vote 'No', even where most of them agree with most of what is in a treaty.

- Some people have argued that treaties should be settled by a one-time cash payment to each aboriginal person. The *Delgamuukw* decision makes it clear that this is not an option. The reason is aboriginal title. Aboriginal title is found in many parts of the world and it is older than property systems based on common law or civil law. One of the unique characteristics of aboriginal title is that it is held by groups and not by individuals. So when the Supreme Court of Canada confirmed that aboriginal title exists in BC it was clear that governments would have to settle claims with First Nations — the holders of that title — and not with individual members.

Court challenges

The BC Liberal Party challenged the Nisga'a Final Agreement in a lawsuit filed in the fall of 1998. In general terms, the party argues that the Nisga'a Final Agreement is unconstitutional. The BC Fisheries Survival Coalition has also challenged the Treaty in court.

The BC Supreme Court ruled in the spring of 1999 that the applications were premature. They would have to wait until the treaty becomes law before they could be heard. The Nisga'a Final Agreement was expected to be introduced for debate in Parliament in October 1999.

Ratification

The treaty was ratified by the members of the Nisga'a Nation, and then by the BC legislature, after lengthy debate — the longest in the legislature's history — and after the imposition of closure. Canada is expected to ratify the treaty during the fall sitting of the Parliament.

> SECHLT: THE FIRST AGREEMENT IN PRINCIPLE

In April 1999 the Sechelt Indian Band became the first to sign an agreement in principle negotiated through the BC treaty process.

Far less controversy and debate surrounded the signing of the Sechelt agreement than had marked the Nisga'a signing. The high level of public acceptance may be due, at least in part, to the long experience the First Nation and its neighbours have had with Sechelt self-governance which has existed since 1986. Another factor may be the openness with which the negotiation process was conducted and the involvement of the local community. For example, the local mayor was a member of BC's negotiating team and reported regularly to his constituents.

> "GOOD FAITH BARGAINING" AND THE GITANYOW CASE

The Chief Justice of Canada said in the *Delgamuukw* case that the Crown "is under a moral, if not a legal, duty to enter into and conduct those negotiations in good faith." In the Gitanyow case that went to the

BC Supreme Court this year, the Court was asked to take this statement a step further and declare that the duty is indeed a legal one.

The Gitanyow Hereditary Chiefs are neighbours of the Nisga'a. Part of the lands covered by the Nisga'a treaty are considered by the Gitanyow to be part of their traditional territory. They say that by signing the Nisga'a treaty while continuing to negotiate the Gitanyow treaty, the governments of Canada and BC are negotiating in bad faith.

The Gitanyow Hereditary Chiefs have asked the BC Supreme Court to declare that:

1. the governments of Canada and BC are legally bound to negotiate a treaty with them in good faith; and
2. the governments have breached that duty.

The second part of the application was put off until after the first could be determined.

The Court ruled on the first question that, having entered into the treaty negotiation process, the governments — both BC and Canada — are legally bound to negotiate in good faith and could be supervised by the courts. However, the court clarified that the process is voluntary and so there is no legal duty to enter into negotiations or to actually conclude a treaty.

That decision is being appealed by Canada and BC but the appeal has not yet been heard.

Canada agreed in court that as a matter of honour it must — and will — conduct its negotiations with First Nations in good faith. But it also took the position that the treaty process is not subject to supervision by the courts.

The Province agreed that it is not permitted to enter into negotiations "in bad faith", but it argues that the BC treaty process is a unique regime:

the parties enter it voluntarily and in doing so, agree on the role that each will play. It said that supervision of the process is to be by the Treaty Commission and the courts should not interfere.

In making its ruling, the Court did not define what is meant by "good faith" in treaty negotiations. The Treaty Commission, at the request of the Principals, has prepared a preliminary analysis of what "good faith" might mean in the context of voluntary political negotiations and offered some options for enforcing such a standard.

The court has yet to decide whether the signing of the Nisga'a treaty would be contrary to the Crown's duty to negotiate in good faith. The parties have agreed to place this part of the action in abeyance and in early June 1999 agreed to resume active treaty negotiations on an accelerated basis.

INTERIM MEASURES

Even if treaty negotiations can be accelerated as is hoped, they still take time. Meanwhile, trees are still being cut, ore is being mined and fish are being caught. First Nations, who are taking on substantial debt to negotiate treaties, are increasingly frustrated that they are not sharing enough in the benefits of those resources in their traditional territories.

Interim measures are a tool for ensuring continuing economic development in the province while respecting First Nations' aboriginal rights and title while treaties are being concluded.

The BC Claims Task Force made it clear that interim measures could take many forms. Land use moratoriums and "set-asides"

were just one option.

Over the past several years, as negotiations proceed and frustrations and expectations rise, the need for interim measures that protect First Nations' interests in land has become more pressing.

In confirming the existence of aboriginal title, the *Delgamuukw* decision underscored the importance of effective interim measures and escalated First Nations' demands for a role in any government dealings with resources within their traditional territories.

In that decision, the Supreme Court of Canada described a continuum that would range from mere consultation at one end, to the requirement of consent by the First Nation at the other. What's required in any given situation will depend on the nature of the First Nation's right and the activity that is being contemplated by government. Interim measures can take many different shapes.

The Treaty Commission has seen an increase in the political will of public governments to address land-related interim measures. Some examples of interim measures agreements concluded during the past year:

- The provincial government and the Tsawwassen First Nation concluded a protocol over the Roberts Bank backup lands in Delta, freeing 1,085 hectares for farmers and holding 769 hectares aside for possible consideration in treaty negotiations. Tsawwassen also received \$1million as part of the agreement.

- The Snuneymuxw First Nation has an agreement with the Department of National Defence and Canada Lands Corporation that reserves about 86 hectares of land until

December 31, 2000 or until a treaty is concluded in an area known as old Camp Nanaimo. The First Nation also has an agreement with the Department of National Defence and the Canada Forest Service that gives it an opportunity to develop its forest management expertise through co-management of forest resources on lands within the Nanaimo rifle range.

There is a need for more such examples in the near future, if First Nations are to continue to put their faith in the negotiation process.

The Treaty Commission sometimes is asked to facilitate discussions among the parties on interim measures issues and has been active at a number of these negotiations throughout the province. Political will, compromise and creative solutions are required to resolve these issues and they can be difficult. Land and resources are fundamental to the BC economy. They are also at the heart of First Nations' views around aboriginal rights and title. Ultimately, these sometimes competing interests will be reconciled in comprehensive treaty negotiations.

Meanwhile, the Treaty Commission continues to encourage the parties in their negotiations so that economic development can continue, First Nation rights and title are respected and the parties can build on the relationships that will form the basis of the treaty.

Among the solutions now being offered by the two governments are treaty-related measures. These measures may protect Crown lands for treaty settlements, provide for land purchases from willing sellers, widen First Nation participation in land and resource management and provide for First Nation economic development.



Why Treaties?

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A legal perspective

Why

in this day and age, are we negotiating treaties in BC?

For many people, treaties seem like a relic of the past. Weren't treaties signed a long time ago, when Europeans first settled in North America?

In fact they were, in most of the continent. But treaties are unfinished business here in British Columbia. This unfinished business is costing the provincial economy a lot of money because of continuing uncertainty over ownership of millions of acres of land. It's also standing in the way of aboriginal communities regaining the self-sufficiency they once had.

When the early Europeans first began to settle in the eastern part of North America, Britain recognized that those people who were already living here had title to land: the Royal Proclamation of 1763 declared that only the British Crown could acquire lands from First Nations, and only by treaty. In most of Canada that's what happened.

Before Confederation the British Crown had signed major treaties. The new Dominion of Canada continued this policy of making treaties before the west was opened up for settlement. In most of these treaties aboriginal people gave up their title in exchange for land reserves and for the right to hunt and fish on the land they'd given up.

But west of the Rockies, things were different. Between 1850 and 1854 James Douglas, on behalf of the British Crown, negotiated 14 land purchases on Vancouver Island, which are known to this day as the Douglas Treaties. When the mainland was made a colony in 1858, Governor Douglas' superiors in London left him in charge assuming that more treaties would be arranged. But neither Douglas, nor any of his successors made any more treaties. Instead Douglas began setting out reserves for each tribe, which included "their cultivated fields and village sites."

Although no more treaties were made, under Douglas individual aboriginal people who wanted to take up farming could acquire Crown land on the same terms as the settlers. However, soon after Douglas retired the colonial government took away from aboriginal people the right to acquire Crown land, reduced the size of their reserves, denied that they had ever owned the land, and paid no compensation for the loss of traditional lands and resources.

So when the time arrived for the colony of British Columbia to join Confederation in 1871, the new province's policy was set: British Columbia did not recognize aboriginal title, so there was no need for treaties to extinguish it. The new Dominion seemed to have been initially unaware of British Columbia's approach to aboriginal affairs. When it became aware it expressed concern about the legality of British Columbia's policy, but the sea-to-sea railway and other matters were the focus and Canada was unwilling to force the issue.

Over the decades, aboriginal people presented letters and petitions to governments, demonstrated and protested and even met with provincial and federal officials demanding treaties. However, the only one signed in the new province was Treaty 8 in 1899. The treaty, which was extended west of Alberta to take in the northeast corner of British Columbia, was signed with the federal government: the province took no part.

Continually dismissed and ignored, aboriginal peoples' demand for treaties intensified, culminating in the forming of the Allied Tribes of British Columbia in 1916 to work for treaties. During the 1920s the Allied Tribes petitioned Parliament more than once to have their case sent to the Judicial Committee of the Privy Council in London (Canada's highest court at the time). In response, Ottawa amended the *Indian Act* in 1927 to make it illegal to raise funds to pursue land claims and thus prevented land claims activity. The restriction on land claims activity was eventually lifted in 1951.

So,

treaties should have been made yet weren't. Isn't it simply too late in the day to revisit this? Aren't we living in a different reality?

Under section 35 of the *Constitution Act*, 1982, aboriginal rights and treaty rights, both existing and those that may be acquired, are recognized and affirmed. The reality we are faced with is that Canadian law says aboriginal land title and the rights that go along with it, exist whether or not there is a treaty. But without a treaty there is uncertainty about how and where those rights apply.

The reason that this issue is being dealt with so late in the day is due in part to the *Indian Act's* ban on land claims activity. Not until the 1970s was a First Nation able to ask the Supreme Court of Canada to do what the courts in the United States and New Zealand had done over a century earlier: to rule on the status of aboriginal title as a legal right.



Rights in British Columbia

The recognition of aboriginal title in *Calder* as a legal right was sufficient to cause the federal government to establish a land claims process. However, British Columbia refused to participate. As British Columbia held virtually all Crown land in the province, the land claims process was doomed without the province's participation.

Still the question remained: had aboriginal title been extinguished before British Columbia joined Confederation, or not?

Three court decisions since the *Calder* case have addressed this question.

Sparrow decision recognizes aboriginal right to fish

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In the Supreme Court of Canada's *Sparrow* decision in 1990, the Court took the same approach as those judges in *Calder* who said that the Nisga'a still had title. They said that unless legislation had a "clear and plain intention" to extinguish aboriginal rights, it did not have that effect.

Applying this test to fisheries legislation, the Court concluded that a century of detailed regulations had not extinguished the Musqueam people's aboriginal right to fish for food and ceremonial purposes. This case, however, dealt with fishing rights, not rights in land.

Delgamuukw decision confirms aboriginal title exists

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Then came the *Delgamuukw* judgment by the Supreme Court of Canada in December 1997. The decision confirmed that aboriginal title does exist in British Columbia, that it's a right to the land itself — not just the right to hunt, fish or gather — and that when dealing with Crown land, the government must consult with and may have to compensate First Nations whose rights may be affected. However, there was no decision as to whether the plaintiffs have aboriginal title to the lands they claimed. The court said the issue could not be decided without a new trial.

For more information on the Delgamuukw decision, please refer to our brochure The Layperson's Guide to Delgamuukw

*The Marshall and Bernard decision sets limits on
aboriginal title*

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In July 2005, the Supreme Court of Canada handed down its verdict on the *Marshall and Bernard* appeals. At issue was whether the Mi'kmaq of Nova Scotia and New Brunswick needed prior authorization from provincial authorities to harvest timber. The Mi'kmaq, argued that they had either — or both — a treaty and an aboriginal right to log timber for commercial purposes without permission. The Mi'kmaq based their argument on the terms of a friendship treaty signed with the British in 1760–61, and on a right to log associated with aboriginal title.

The court unanimously dismissed the claim to both treaty and aboriginal rights. It found that although the treaty protected the Mi'kmaq rights to sell certain products, including some wood products, this right did not extend to commercial logging. The court said that while rights are not frozen in time, the protected right must be a logical evolution of the activity carried on at the time of treaty-making. Treaties protect traditional activities expressed in a modern way and in a modern context. New and different activities are not protected.

The court adopted strict proof of aboriginal title. It stated that any claim to aboriginal title would depend on the specific facts relating to the aboriginal group and its historical relationship to the land in question. Traditional practices must translate into a modern legal right, and it is the task of the court to consider any proper limitations on the modern exercise of those rights. As with the treaty right, an aboriginal practice cannot be transformed into a different modern right.

The court further stated that aboriginal title would require evidence of exclusive and regular use of land for hunting, fishing or resource exploitation. Seasonal hunting and fishing in a particular area amounted to hunting or fishing rights only, not aboriginal title. However, the court did not rule out the possibility that nomadic and semi-nomadic peoples could prove aboriginal title. The court also emphasized that there must be continuity between the persons asserting the modern right and a pre-sovereignty group.

Court denies request for declaration of Tsilhqo'tin title

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In *Tsilhqo'tin Nation v. British Columbia* in the BC Supreme Court, Justice Vickers denied the request for a declaration of aboriginal title and dismissed the claim for damages.

The case concerned the claim by the Xeni Gwet'in to aboriginal title to the remote Nemiah Valley northwest of Williams Lake. Justice Vickers, in his non-binding opinion, did find that the Tsilhqo'tin did establish aboriginal title to almost half of the territory they claimed. But he had to dismiss the claim given the all-or-nothing nature of their pleadings.

Central among the issues was whether the nature of the use and occupation of the Nemiah Valley by the ancestors of the Xeni Gwet'in at the time the British Crown asserted sovereignty over it was sufficiently regular and exclusive to meet the legal standard for aboriginal title at common law for all or part of the territory claimed by the Xeni Gwet'in.

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There is no doubt the judgement will have an impact on treaty negotiations. The extent of that impact remains unclear and the full implications may not be known for some time.

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The court heard there were no oral histories or historical records containing evidence of large scale, regular trading in fish, other than eulachon. In her ruling, Justice Satanove cited considerable evidence given at trial that showed the Coast Tsimshian did regularly trade in eulachon and eulachon grease.

However, given the abundance of salmon on the northwest coast and the ease of catching them, fish were not a commercial trade item. The case is significant because it increases the evidentiary burden on First Nations in establishing an aboriginal right to a commercial fishery.

What

do these legal decisions really mean?

Since the early 1970s, through these and other cases, aboriginal rights have slowly evolved and been defined through the Canadian courts.

The courts have confirmed that aboriginal title still exists in BC but they have not indicated where it exists. To resolve this situation the governments and First Nations have two options: either negotiate land, resource, governance and jurisdiction issues through the treaty process or go to court and have aboriginal rights and title decided on a case-by-case, right-by-right basis.

The following two cases provide broad guidelines for the negotiation and definition of aboriginal title in BC.

Honour of the Crown

*Haida Nation vs. British Columbia and Taku River
Tlingit First Nation vs. British Columbia*

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In November 2004, the Supreme Court of Canada established a general framework for the duty to consult and accommodate First Nations in British Columbia. The court ruled in *Haida* and *Taku* that government has a duty to consult and possibly accommodate aboriginal interests even where title has not been proven.

This duty arises from the need to deal with aboriginal rights in the interim prior to those rights being addressed through a treaty or court decision. Government cannot run roughshod over aboriginal interests. And First Nations do not have a veto over what can be done with land pending final proof of claim. The consultative process must be fair and honourable, but at the end of the day, government is entitled to make decisions even in the absence of consensus.

Furthermore, the court put to rest the notion of extinguishment of aboriginal rights and finality in agreements. Instead, the goal of treaty making is to reconcile aboriginal rights with other rights and interests, and that it is not a process to replace or extinguish rights. The courts stated, "Reconciliation is not a final legal remedy in the usual sense." It said "just settlements" and "honourable agreements" are the expected outcomes.

[illegible]

In *Mikisew Cree First Nation v. Canada*, the court unanimously ruled that the federal government had not properly consulted the First Nation before approving the construction of a road through traditional lands in Wood Buffalo National Park. The Mikisew Cree argued the road impaired their traditional trapping and fishing rights granted in Treaty 8 (1899).

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[illegible]

BC Supreme Court decisions give First Nations, no matter what the status of their treaty negotiations, compelling reasons to resolve their territorial issues. The court rulings note that where there are competing claims to territory, a prima facie case for aboriginal title may not be established or may be weakened. On the other hand, the court rulings suggest agreements among First Nations strengthen claims to aboriginal title and rights and, ultimately, the ability to conclude treaties.

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Final Agreement encroached on their land claim. The court noted the balance of convenience rests with the First Nation ratifying a final agreement and the non-derogation language included in treaties is recognition that a final treaty does not limit the claim of another First Nation to land or resources agreed to in the treaty.

The BC Supreme Court in *Hupacasath First Nation v. British Columbia (Minister of Forests)* and *Cook v. The Minister of Aboriginal Relations and Reconciliation*, 2007 ruled that a prima facie case for aboriginal title may not be established or may be weakened where there are competing claims to territory.

All

*All of these landmark judgments
together confirm that:*

- > Aboriginal rights exist in law;
- > Aboriginal rights are distinct and different from the rights of other Canadians;
- > They include aboriginal title, which is a unique communally held property right;
- > Aboriginal rights take priority over the rights of others, subject only to the needs of conservation;
- > The scope of aboriginal title and rights depends on specific facts relating to the aboriginal group and its historical relationship to the land in question;
- > The legal and constitutional status of aboriginal people derives not from their race but from the fact they are the descendants of the peoples and governing societies that were resident in North America long before settlers arrived.

- > Aboriginal rights and title cannot be extinguished by simple legislation because they are protected by the *Constitution Act*, 1982.
- > Government has a duty to consult and possibly accommodate aboriginal interests even where title has not been proven; and
- > Government has continuing duty to consult, and perhaps accommodate, where treaty rights might be adversely affected.



Tsilhqot'in Nation v British Columbia and Canada



Summary of the Tsilhqot'in Aboriginal Title Case (William Case) Decision

On June 26, 2014, the Supreme Court of Canada rendered a historic judgment in the Tsilhqot'in Nation's Aboriginal title case. All 8 judges agreed with this decision.

Aboriginal title declared – for the first time in Canada

The Court declared Aboriginal title to approximately 1900 km² of the Claim Area, including Xení (Nemiah Valley) and much of the surrounding area, stretching north into Tachelach'ed (Brittany Triangle) and along the Tsilhqox (Chilko River).

Aboriginal title lands are shown in dark green on the map at the back of this document.

This is the **first time in Canadian history** that a court has declared Aboriginal title to lands outside of a reserve.

The Court rejected the “postage stamp” view of Aboriginal title once and for all. Aboriginal title is not restricted to small, intensively used sites. Aboriginal title extends to all the territory that a First Nation *regularly* and *exclusively* used when the Crown asserted sovereignty. This means ownership is of areas that were used regularly and only by the Tsilhqot'in at the time the Canadian government staked its claim.

Aboriginal title is the right to control the land

The Court confirmed that Aboriginal title gives the Tsilhqot'in the right to control the land. These lands can be managed according to Tsilhqot'in laws and governance.

Aboriginal title also means the Tsilhqot'in have the right to the economic benefits of the land and its resources.

Aboriginal title is the "right to choose" how these lands will be used. The Tsilhqot'in people can proactively use and manage these lands for traditional activities *and* modern purposes.

The only limit on the ways that Aboriginal title lands can be used is that they cannot be developed in a way that deprives future generations of the control and benefit of the land.

Protections from government jurisdiction

The Court confirmed that both the Province and Canada has some element of jurisdiction in exceptional circumstances.

However, the government must first seek the **consent** of the Tsilhqot'in people before interfering with Tsilhqot'in Aboriginal title lands.

If the government cannot obtain consent, then it cannot interfere with Tsilhqot'in Aboriginal title unless it can *justify* this infringement. The Court indicated that infringements of Aboriginal title will "not be lightly

justified". This means it will be very difficult for the government to show that it has a good enough reason to step in and use the title land.

In this appeal, the Court confirmed that the clear cut forestry proposed for the Claim Area was not justified. This means that the government was wrong to propose logging in the Claim Area.

The Forest Act does not apply to Tsilhqot'in Aboriginal title lands

The Court held that the *Forest Act* does not apply to Tsilhqot'in Aboriginal title lands, because the statute itself says that it regulates "Crown timber". The *Forest Act* is the legislation that authorizes the government and forestry companies to harvest timber.

Because the timber on Tsilhqot'in Aboriginal title lands belongs to the Tsilhqot'in, and not the Crown, the *Forest Act* does not apply as currently drafted. This means that the Province cannot authorize forestry companies to harvest timber on Tsilhqot'in Aboriginal title lands.

Tsilhqot'in Aboriginal rights to the entire Claim Area

The proven Tsilhqot'in Aboriginal rights to hunt, trap and trade were not at issue before the Supreme Court of Canada. **These rights were confirmed by the B.C. Court of Appeal in 2012.**

Accordingly, the Tsilhqot'in people continue to hold proven Aboriginal rights to hunt, trap and trade throughout the

entire Claim Area (the light and dark green areas on the attached map).

What does this judgment mean for other First Nations?

First Nations across Canada are celebrating this victory.

The Assembly of First Nations called it a "game changer". This judgment of the Supreme Court of Canada sweeps away the excuses and justifications used by the Government to deny real recognition of Aboriginal title in Canada.

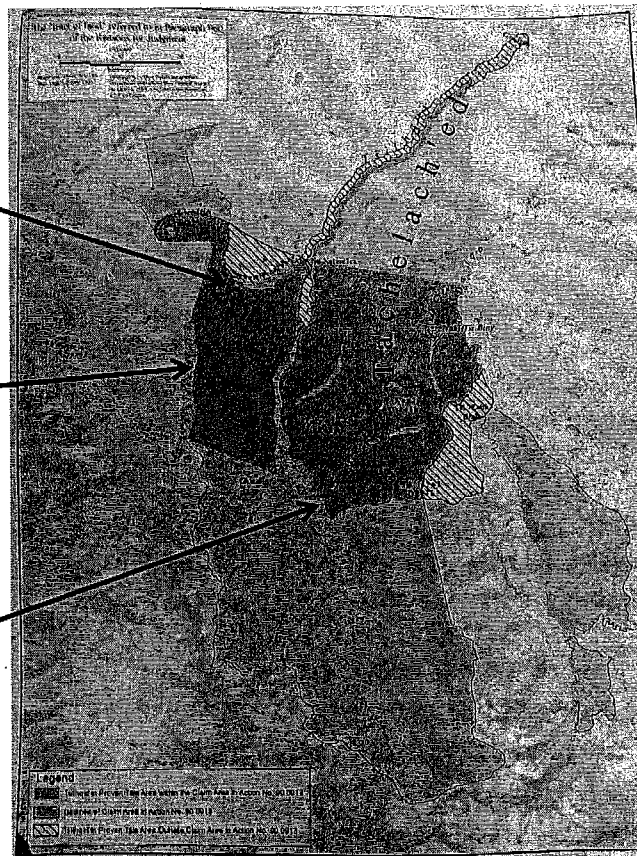
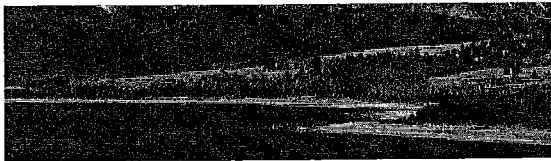
We can expect First Nations to assert much greater control over their traditional territories. We can expect a greater expectation of First Nations' consent before major projects proceed.

There is a lot of work to be done. But the Tsilhqot'in people, by defending our culture and land, have delivered a major victory for all First Nations and their supporters.

Sechanalhyagh! (Thank you to all)

Proven Tsilhqot'in Rights & Title Area:

Dark green is proven Rights & Title and Light Green is proven Rights





Posted by Mandell Pinder LLP

In a watershed decision released today, the Supreme Court of Canada ("SCC") allowed the Tsilhqot'in Nation's appeal and, for the first time in Canadian history, granted a declaration of Aboriginal title. In doing so, the Court confirmed that the doctrine of terra nullius (that no one owned the land prior to Europeans asserting sovereignty) has never applied to Canada, affirmed the territorial nature of Aboriginal title, and rejected the legal test advanced by Canada and the provinces based on "small spots" or site-specific occupation. The SCC overturned the Court of Appeal's prior ruling that proof of Aboriginal title requires intensive use of definite tracts of land and it also granted a declaration that British Columbia breached its duty to consult the Tsilhqot'in with regard to its forestry authorizations. This case significantly alters the legal landscape in Canada relating to land and resource entitlements and their governance.

The SCC definitively concluded that the trial judge was correct in finding that the Tsilhqot'in had established title to 1,750 square kilometres of land, located approximately 100 kilometres southwest of Williams Lake. The Court reaffirmed and clarified the test it had previously established in *Delgamuukw* for proof of Aboriginal title, underscoring that the three criteria of occupation: sufficiency, continuity (where present occupation is relied upon), and exclusivity were established by the evidence in this case.

SUFFICIENT AND EXCLUSIVE OCCUPATION

The SCC reasoned that Aboriginal title was not limited to village sites but also extends to lands that are used for hunting, fishing, trapping, foraging and other cultural purposes or practices. Aboriginal title may also extend "beyond physically occupied sites, to surrounding lands over which a Nation has effective control." The SCC endorsed further examples of Aboriginal occupation sufficient to ground title including "warning off trespassers," "cutting trees," "fishing in tracts of water" and "perambulation."

Further, the SCC affirmed the importance not only of the common law perspective but also of the Aboriginal perspective on title including Aboriginal laws, practices, customs and traditions relating to indigenous land tenure and use. The principle of occupation, reasoned the SCC, "must also reflect the way of life of Aboriginal people, including those who were nomadic or semi-nomadic."

The SCC reasoned that the criterion of exclusivity may be established by proof of keeping others out, requiring permission for access to the land, the existence of trespass laws, treaties made with other Aboriginal groups, or even a lack of challenges to occupancy showing the Nation's intention and capacity to control its lands.

WHAT RIGHTS DOES ABORIGINAL TITLE CONFER?

The Court reasoned that Aboriginal title holders have the "right to the benefits associated with the land – to use it, enjoy it and profit from its economic development" such that "the Crown does not retain a beneficial interest in Aboriginal title land." Expanding on its reasons in *Delgamuukw*, the SCC concluded Aboriginal title confers possession and ownership rights including:

- the right to decide how the land will be used;
- the right to the economic benefits of the land; and

- the right to pro-actively use and manage the land.

These are “not merely rights of first refusal.” Indeed, the Court recommended that “governments and individuals proposing to use or exploit land, whether before or after a declaration of Aboriginal title, can avoid a charge of infringement or failure to adequately consult by obtaining the consent of the interested Aboriginal group.”

The SCC also reasoned that “the right to control the land conferred by Aboriginal title means that governments and others seeking to use the land must obtain the consent of the Aboriginal title holders.” If consent is not provided, the “government’s only recourse is to establish that the proposed incursion on the land is justified under s. 35 of the *Constitution Act, 1982*.”

JUSTIFICATION ANALYSIS

The Court clarified the justification analysis it set out in *Sparrow, Gladstone and Delgamuukw*. The Court reasoned that the Crown’s burden of demonstrating a “compelling and substantial” legislative objective must be considered from the Aboriginal perspective as well as from the perspective of the broader public in a manner that furthers the goal of reconciliation between the Crown and Aboriginal peoples. Further, the Crown must also “go on to show that the proposed incursion on Aboriginal title is consistent with the Crown’s fiduciary duty towards Aboriginal people.” The SCC reasoned that the Crown’s fiduciary duty means that: (1) incursions on Aboriginal title cannot be justified if they would substantially deprive future generations of the benefit of the land; and (2) the fiduciary duty infuses an obligation of proportionality into the justification process that is inherent in the reconciliation process. Implicit in the Crown’s fiduciary duty is the requirement that the infringement be necessary to achieve the government’s goal that the benefits not be outweighed by the adverse effects on the Aboriginal interest, and that the government go no further than necessary to achieve its goal.

The SCC warned that if governments do not meet their obligations to justify infringements to Aboriginal title, and do not act consistent with their fiduciary duties, project approvals may be unraveled, and legislation may fall. The message is that governments that don’t justify their actions act at their peril. The Court offered the following example:

If the Crown begins a project without consent prior to Aboriginal title being established, it may be required to cancel the project upon establishment of the title if continuation of the project would be unjustifiably infringing. Similarly, if legislation was validly enacted before title was established, such legislation may be rendered inapplicable going forward to the extent it unjustifiably infringes Aboriginal title.

IMPACTS OF PROVINCIAL LEGISLATION

In light of its declaration of Aboriginal title, and based on the *Forest Act*’s definition of “Crown timber” and “Crown lands” not including timber on Aboriginal title lands, the SCC found that the *Forest Act* did not apply to the Tsilhqot’in’s Aboriginal title lands. The SCC concluded that “the legislature intended the *Forest Act* to apply to land under claims for Aboriginal title up to the time title is confirmed by agreement or court order.” However, once Aboriginal title is proven, the beneficial interest in the land, including its resources, belongs to the Aboriginal title holder.

On the question of whether provinces can legislate in relation to Aboriginal title and rights, or whether this amounts to an interference with a core area of federal jurisdiction under s. 91(24), the SCC held that the doctrine of inter-jurisdictional immunity did not apply.

The SCC reasoned that the inter-jurisdictional issue in this case was not one of competing provincial and federal powers but, rather, of addressing the tension between the rights of Aboriginal title holders to use their lands as they choose, and the authority of the Province to regulate land use. The SCC concluded that the guarantee of Aboriginal rights in s. 35 of the *Constitution Act, 1982* operates as a limit on both federal and provincial legislative powers; therefore, the proper way to curtail interferences with Aboriginal rights and to ensure respect from Crown governments, is to require that all infringements, both federal and provincial, are justified.

MOVING FORWARD

This case provides First Nations with significantly improved opportunities to advance their Aboriginal title and rights in a manner that reflects their vision, values and perspectives. The SCC's decision essentially requires that the Crown and industry meaningfully engage with Aboriginal title holders when proposing to make decisions or conduct business on their territories. This engagement can no longer be limited to "small spots" but must be achieved with a view to tangibly addressing the incidents of title affirmed by this case; namely, the right of enjoyment and occupancy of title land; the right to possess title land; the right to economic benefits of title land; and the right to pro-actively use and manage title land. In this light, as the Court emphasized at para. 97 of its decision, the Crown and industry would be well advised to "avoid a charge of infringement or failure to adequately consult by obtaining the consent of the interested Aboriginal group."

Pragmatically speaking, this case provides sound guidance for effective and balanced consultation and accommodation discussions regarding decisions taken on Indigenous lands. The principles and laws affirmed in this case, once honoured and implemented, ought to re-invigorate negotiations in relation to the outstanding land question in British Columbia. Opportunities abound.

We acknowledge, with much gratitude and respect the vision, courage and leadership of the Tsilhqot'in people in advancing this case.

<http://www.mandellpinder.com/tsilhqotin-nation-v-british-columbia-2014-scc-44-case-summary/>

TOP FIVE 2014

Each year at OJEN's Toronto Summer Law Institute, a judge from the Court of Appeal for Ontario identifies five cases that are of significance in the educational setting. This summary, based on these comments and observations, is appropriate for discussion and debate in the classroom setting.

TSILHQOT'IN NATION v BRITISH COLUMBIA, **2012 SCC 47, [2012] 2 SCR 584**

Date Released: June 26, 2014

<https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/14246/index.do>

Facts

In the process of colonizing Canada the British Government, or Crown, entered into legal agreements with many of the diverse groups of Native people who had long been established here. These agreements, called **treaties**, set out the terms whereby Indigenous peoples gave up their claim to their traditional lands in exchange for reservations of land and other promises. While this happened throughout most of Canada, for the most part, it did not happen in British Columbia. The Tsilhqot'in Nation, a semi-nomadic Indigenous group, is one of hundreds of Indigenous groups in British Columbia with unresolved land claims.

In 1983, the Province of British Columbia granted a commercial logging licence on land considered by the Tsilhqot'in to be part of their traditional territory. In order to try to prevent this logging from happening, a claim was made for **Aboriginal title** to the land at issue on behalf of all Tsilhqot'in people. Aboriginal title is the concept that an Aboriginal group's rights to their traditional

lands survived the European settlement and remain valid unless they have been legally surrendered through a treaty or another formal legal process. Title claims require the group making the claim to show that their ancestors occupied the land in question prior to European assertion of sovereignty. In other words, they would need to establish that the land was under the group's control before it was claimed as new territory of a colonial state. The federal and provincial governments opposed the title claim.

Procedural History

The British Columbia Supreme Court determined that to prove their title claim, occupation could be established by showing regular and exclusive use of sites or territory within the claim area. After considering the evidence presented, the Court ruled that the Tsilhqot'in had established title not only to village sites and areas maintained for the harvesting of roots and berries, but to larger territories which their ancestors used regularly and exclusively for hunting, fishing and other activities. The governments appealed.



The British Columbia Court of Appeal applied a narrower test for Aboriginal title: site-specific occupation. This Court held that, to prove sufficient occupation for title to land, an Aboriginal group must prove that its ancestors intensively used a definite tract of land with reasonably defined boundaries at the time of European sovereignty. Based on this formulation, the Court of Appeal held that the Tsilhqot'in claim to Aboriginal title had not been established. The Tsilhqot'in appealed to the Supreme Court of Canada (SCC).

Issues

1. How should Canadian courts define "occupation" of land for the purpose of assessing claims for Aboriginal title?
2. If Aboriginal title is established, what rights and responsibilities does it confer to the Crown and the Aboriginal group in question?
3. Under what circumstances, if any, could these rights and responsibilities be limited?

Decision

A unanimous SCC allowed the appeal and granted a declaration of Aboriginal title over the area requested.

Ratio

The SCC clarified the test for establishing Aboriginal title by laying out more specific rules for defining "occupation" of land. Chief Justice McLachlin, writing for the unanimous SCC, determined that to make a successful

claim for Aboriginal title, the Aboriginal group has the burden of meeting three criteria. The occupation must be:

- 1) **Sufficient**, meaning a strong presence that displays acts that demonstrate the land in question belonged to, was controlled by, or was under the exclusive guardianship of the claimant group.
- 2) **Continuous**, meaning that the present occupation must be rooted in pre-sovereignty times; and
- 3) **Exclusive**, meaning the Aboriginal group had the intention and capacity to retain exclusive control over the lands.

The SCC also ruled that in cases where Aboriginal title is claimed, the Crown has a duty to consult in good faith with potential claimant groups and seek consent for the use of the land even before title is proven in the courts. Furthermore, where the government's proposed use of the land is likely to have a negative impact on the group's use of it in the future, the government may be required to accommodate the claimants.

Reasons

The SCC found that the trial judge appropriately applied the correct legal test to the evidence, and affirmed the trial judge's decision to grant Aboriginal title to the Tsilhqot'in. Although their population was small, the Tsilhqot'in regularly used the land, satisfying the "sufficient occupation" requirement. They were able to meet the



**TSILHQOT'IN NATION
v BRITISH COLUMBIA**



TOP FIVE 2014

"continuous occupation" requirement by showing that Tsilhqot'in people had maintained a presence over time in the same or nearby areas. Exclusivity was established by evidence that prior to sovereignty, the Tsilhqot'in actively worked to keep others from occupying the land they considered to be their own and demanded permission from outsiders who wished to use the land.

According to the SCC, to have Aboriginal title means that the Indigenous group has the exclusive right to decide how the land is used and the right to benefit from those uses. But, Aboriginal title is collective, meaning it is held not only for the present generation but also for all succeeding generations. Therefore, the land cannot be developed or misused in a way that would substantially deprive future generations of the benefit of the land. Chief Justice McLachlin noted, however, that this limitation on the use of land does not prevent the land from being used in modern ways. In other words, an Aboriginal group can decide to use title land in modern ways if these uses still protect the benefit of the land for future generations.

Finally, the Court clarified that while Aboriginal title means that the Crown must normally obtain consent from the title holder to use title land, there are some conditions under which Aboriginal title can be overridden. Specifically, the government must show:

- 1) That it met its obligation to consult and accommodate the Aboriginal group;
- 2) That its actions were backed by a compelling and substantial objective; and
- 3) That its action is consistent with the duty to respect the collective nature of Aboriginal title and to act balance the adverse effects on the Aboriginal interest.

The result is a balance that preserves the Aboriginal right while permitting effective regulation by the province. The SCC found that in this case, the province failed to consult the Tsilhqot'in or accommodate their interests in issuing commercial licenses affecting the land. The government therefore breached its legal duty of care to the Tsilhqot'in people.



DISCUSSION

1. What is a treaty?
2. What is Aboriginal title?
3. How should disputes among the individuals of the group that holds Aboriginal title be settled? What if members of the group disagree about how to use the land?
4. What are some potential benefits and drawbacks to modern uses of land, like mining or pipelines, and traditional uses, like hunting and fishing?
5. Only 200 of the 400 members of the Tsilhqot'in Nation live on the lands in question. Should band members who live elsewhere participate in the decisions about the land's use? What about sharing in the profits from the land?
6. Métis peoples trace their descent from mixed ancestry of First Nations and Europeans. If Aboriginal title requires proof of occupation prior to the settlement of Europeans, does this mean that Métis peoples can never establish Aboriginal title?

Would this be fair? Explain.