

A BRIEF HISTORY of OUR RIGHT to SELF-GOVERNANCE Pre-Contact to Present

by Professor Kent McNeil



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Author's Note: This timeline is descriptive. Critical perspectives on the history and case law involving Indigenous Peoples can be found in the extensive literature on these matters.



Introduction

For thousands of years, the Aboriginal Peoples of what is now Canada organized themselves as sovereign nations, with governmental jurisdiction over their territories and property rights. Those rights — of governance and property — were trampled in the stampede of European settlement, colonization and commercial interests. But they were never lost or extinguished.

Read this brief historic account of the rights inherited by citizens of today's Indigenous Peoples, learn about the erosion of property and governance rights through the dark periods of colonization and marginalization, and ultimately, their affirmation in Canada's constitution and recognition in Canadian law.



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PERIOD 1: PRE-CONTACT

Before the arrival of Europeans in North America, Indigenous Peoples were organized as sovereign nations. They had their own cultures, economies, governments and laws that continued after contact. They were generally in exclusive occupation of more or less defined territories, over which they exercised governmental authority (jurisdiction). Indigenous Peoples also owned the lands and resources within their territories, and so had property rights, subject to responsibilities placed on them by the Creator to care for the land and share it with plants, animals and other life forms, with whom they had reciprocal relationships.

The inherent right of self-government – and the other Aboriginal rights that Indigenous Peoples have in Canadian law today – come from Indigenous practices and laws and the sovereignty Indigenous Peoples exercised before and after contact with Europeans. These rights are inherent because they existed before European colonization and continued after the imposition of Euro-Canadian law. They are communal rights that come from Indigenous Peoples' own laws and from their occupation and use of lands as sovereign nations.

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PERIOD 2: CONTACT to 1700

From European Contact to Peace and Friendship Treaties

The dates of first European contact with Indigenous Peoples are not always known and vary greatly in different parts of Canada. Contact usually had no impact on the pre-existing sovereignty and territorial rights of Indigenous Peoples, who continued to govern themselves and enjoy the same rights to their lands and resources as they did before contact. When Europeans asked if they could establish fur trading posts or settlements, Indigenous Peoples often gave them permission to do so. It is unlikely, however, that Indigenous Peoples intended to give up any of their sovereignty or land rights. Instead, they appear to have been willing to share with the Europeans, in exchange for the benefits of European technology and trade goods.

Apart from Jesuit missionary encounters and French settlements established in the early 17th century in Acadia (now in Nova Scotia and New Brunswick) and along the St. Lawrence River, most contacts between Indigenous Peoples and Europeans were initially commercial in nature. For example, after the Hudson's Bay Company was created by the Rupert's Land Charter in 1670, it established fur trading posts, first on Hudson Bay and James Bay and later in the interior of the continent and on the West Coast. After an initial period of flux between French and British traders, there were periods of peaceful co-existence with mutual reliance between the European traders and the Indigenous traders and host communities who engaged with them. However, the incentives of the fur trade and the introduction of European tools and weapons, as well as exposure to new diseases, affected Indigenous ways of life, including political and diplomatic relations among Indigenous nations themselves.

PERIOD 3: 1700 to 1756

From Early Treaty Relations to 1756

As it became apparent to the Indigenous Peoples that the Europeans intended to stay in North America, they sought to formalize their relationships with the newcomers through treaties of alliance, peace and friendship. Before the arrival of the Europeans, Indigenous Peoples had their own protocols for negotiating treaties among themselves. The Europeans were also accustomed to entering into treaties with other nations. Nation-to-nation treaty relationships were therefore familiar to both sides.

An early example of a treaty of peace and friendship is the Two Row Wampum Treaty entered into by the Haudenosaunee (Iroquois Confederacy) and the British Crown in 1664 at Albany (now in New York State). Under the terms of this treaty, each party acknowledged the sovereign independence of the other and agreed not to interfere with it. The British entered into another peace and friendship treaty at Boston in 1725 with, among other Indigenous Peoples, the Mi'kmaq Nation.

By these treaties, the Indigenous parties retained their complete independence as sovereign nations and ownership of their lands and resources. They did not transfer or cede jurisdiction or land rights to the British Crown. Other treaties in what were then the Thirteen Colonies to the south of Canada may, however, have involved land cessions.



PERIOD 4: 1756 to 1763

The French and Indian War and the Royal Proclamation of 1763

From 1756 to 1763, France and Britain fought a major war, known in North America as the French and Indian War. Britain won, and formally acquired France's North American possessions east of the Mississippi River by the Treaty of Paris of 1763. This included all of French Canada (La Nouvelle France), the extent of which has never been determined.

A few months later, the British Crown issued the Royal Proclamation of 1763. Among other things, this document protected the land rights of the Indigenous nations by prohibiting private persons from settling on or purchasing their lands. The proclamation also created a formal process for transferring Indigenous lands to the Crown. Although the proclamation purportedly applied to the Indigenous nations with whom the Crown was connected and who lived under the Crown's protection, its geographical scope has always been uncertain.

In 1764, Sir William Johnson, the British official responsible for relations with the Indigenous nations of northeastern North America, convened a meeting at Niagara with the leaders of many nations from around the Great Lakes and beyond and explained the Royal Proclamation to them. This led to an agreement, known as the Treaty of Niagara, which affirmed that the Indian nations would remain independent, as provided by the Two Row Wampum Treaty.

The defeat of the French and issuance of the Royal Proclamation of 1763 heralded the beginning of a major shift in British Indian policy. Because the Crown no longer needed the Indigenous nations as allies against the French, it began to assert authority over them and their lands. This process accelerated after the American Revolutionary War and the War of 1812,

during which some Indigenous nations fought alongside the British. Instead of regarding them as independent sovereigns to be interacted with on a nation-to-nation basis, as it had usually done in the past and as promised in the Treaty of Niagara, the Crown began to treat them as subjects who were under the Crown's jurisdiction.



PERIOD 5: 1763 to 1867

From the Royal Proclamation of 1763 to Confederation in 1867

After 1763, treaties between Indigenous nations and the Crown evolved from treaties of peace and friendship into treaties for the acquisition of lands by the Crown. The Crown assumed that it already had sovereignty over the Indigenous nations and their territories in eastern North America and began to negotiate what it regarded as land cession treaties in accordance with the provisions of the Royal Proclamation.

During this period, Indigenous nations were generally left to govern themselves internally in accordance with their own political structures and laws. Their complete independence as sovereign nations was nonetheless reduced as the Crown extended its jurisdiction over them, usually without their consent and often in violation of alliance treaties such as the 1664 Two Row Wampum Treaty and the 1764 Treaty of Niagara.

In 1776, the Thirteen Colonies declared their independence from Britain. The resulting American Revolutionary War ended in 1783 with the Treaty of Versailles, whereby Britain acknowledged the independence of the United States and agreed upon an international boundary that extended from the Atlantic Ocean west to the Lake of the Woods.

After 1783, British North America was geographically confined to the region north of the international boundary. The Crown needed land for British settlers, especially the United Empire Loyalists who fled to Canada from the United States. It therefore began to negotiate land cession treaties

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in what is now southern Ontario. As settlement extended west and north, more treaties were negotiated, including the Robinson-Huron and Robinson-Superior treaties of 1850.

Further west, the Hudson's Bay Company continued to exercise its authority and assert the trade monopoly that the Crown had granted to it by the Rupert's Land Charter of 1670. However, this monopoly was nonetheless challenged by its competitor, the North West Company, which operated out of Montreal, until the two companies merged in 1821 under the banner of the Hudson's Bay Company. In the 1810s, the Red River Settlement was established under the authority of the Hudson's Bay Company at the forks of the Red and Assiniboine rivers where the city of Winnipeg now stands.

Towards the end of the 18th and the beginning of the 19th centuries, the Métis people began to emerge as a distinct nation. They developed a cultural, social and political consciousness and organization separate from First Nations and Europeans. In 1849, they successfully challenged the Hudson Bay Company's fur trade monopoly when Guillaume Sayer, who had been charged with illegally trading furs, was released without any sentence by the Company's court in the Red River Settlement.

Britain and the United States settled their western territorial claims by the Convention of 1818 and the Oregon Boundary Treaty of 1846, which together extended the international boundary along the 49th parallel from the Lake of the Woods to the Salish Sea.

From 1846 until the creation of the colony of British Columbia in 1858, the Hudson's Bay Company exercised governmental authority on behalf of the Crown in the areas of the West Coast that were under the Crown's control. From 1850 to 1854, Governor James Douglas entered into 14 treaties with Indigenous nations on Vancouver Island to acquire some of their lands. These treaties established reserves for these nations and guaranteed their hunting and fishing rights

PERIOD 6: 1867 to 1927

From Confederation to the 1927 Amendment to the *Indian Act*

The *British North America Act, 1867* (now the *Constitution Act, 1867*) created the Dominion of Canada and, by section 91(24), gave the Parliament of Canada exclusive jurisdiction over "Indians, and Lands reserved for the Indians". In the first important judicial decision involving Indian lands in Canada, *St. Catherine's Milling and Lumber Company v. The Queen* (1888), 14 App. Cas. 46, the Privy Council in London, England, decided that, while Parliament has exclusive jurisdiction over Indian lands, the underlying title is held by the provinces. Aboriginal title, described by the Privy Council as "a personal and usufructuary right," is a burden on the provincial Crown's underlying title, which means that the lands are not available as a source of provincial revenue until this burden has been removed. In *Delgamuukw v. British Columbia*, [1997] 3 SCR 1010, the Supreme Court of Canada decided that only the federal government has the constitutional authority to remove this burden because it has exclusive jurisdiction over Aboriginal title.

In *Re Eskimos*, [1939] SCR 104, the Supreme Court decided that the word "Indians" in section 91(24) of the *Constitution Act* includes the Inuit. In *Daniels v. Canada (Indian Affairs and Northern Development)*, [2016] 1 SCR 99, the Court concluded that this term also includes the Métis. However, the Métis are not "Indians" for the purposes of the Natural Resources Transfer Agreements (1930) in the prairie provinces: *R. v. Blais*, [2003] 2 SCR 236.

After the Hudson's Bay Company agreed in 1869 to surrender Rupert's Land back to the Crown and Britain planned to transfer it to Canada, the Red River Métis, who had not been consulted, formed a provisional government under the leadership of Louis Riel.

Negotiations between Métis representatives and the Canadian government led to the creation of the province of Manitoba in 1870. However, many Métis did not end up with the land they had been promised (see *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, [2013] 1 SCR 623), and many of them moved further west where they could continue to pursue their traditional lifestyle. When Canada again began to assert its authority over them and ignored their land rights, the Métis took up arms at Batoche on the South Saskatchewan River in 1885. This second attempt, under the leadership of Louis Riel and Gabriel Dumont, to protect their lands and way of life was crushed by the Canadian army, which was able to quickly move troops and military equipment to the West by way of the newly constructed Canadian Pacific Railway that had reached the Prairies. Riel was unjustly tried for treason, convicted and hung in Regina.

By 1873, the four original Canadian provinces – Nova Scotia, New Brunswick, Quebec and Ontario – had been joined in Confederation by the creation of Manitoba (1870) and the admission of British Columbia (1871) and Prince Edward Island (1873). The provinces of Saskatchewan and Alberta were created out of the Northwest Territories in 1905.

The Parliament of Canada began to enact legislation relating to Indian affairs in 1869. In 1876, this legislation was consolidated and expanded in the first *Indian Act*. Among other things, this Act gave the Canadian government the legal authority to replace traditional Indigenous forms of government with elected chiefs and band councils, with limited, delegated powers set out in the Act. However, traditional governments were not abolished, and they continued to exercise the inherent right of self-government in many communities, sometimes covertly.

From 1871 to 1921, the federal government and Indigenous Peoples entered into 11 numbered treaties in what are now the prairie provinces, northeastern British Columbia, northern Ontario and parts of Yukon and the Northwest Territories. These treaties generally dealt



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with lands, hunting and fishing rights, reserves, annuity payments and other matters. They did not explicitly address the matter of self-government. Nonetheless, the federal government usually applied the *Indian Act*, including the provisions for elected chiefs and band councils, to First Nations who entered into treaties, as well as to non-treaty First Nations in British Columbia and elsewhere.

In British Columbia, the only treaties were the Douglas Treaties on Vancouver Island in the 1850s and Treaty 8 in the northeastern part of the province in 1899. British Columbia refused to sanction any other treaty-making, and even brought pressure on the federal government that resulted in an amendment the *Indian Act* in 1927, making it illegal to raise money or pay lawyers for the purpose of pursuing an Indian claim. This effectively ended the period of historical treaty-making. In most of British Columbia, Indigenous lands were taken and tiny reserves were created without Indigenous consent.

Apart from some subsequent adhesions to earlier treaties, the last treaties entered into during this period were the Williams Treaties in Ontario in 1923.

PERIOD 7: 1927 to 1969

From 1927 to the 1969 White Paper

This was the period during which Canadian authority was extended to the Arctic. Prior to the arrival of the Royal Canadian Mounted Police in the 1920s, the only outsiders the Inuit generally had contact with were Hudson's Bay Company employees and Christian missionaries. It was only after World War II that federal government authority and services were extended beyond the RCMP presence. In the 1950s, Canada relocated some Inuit to the High Arctic, promising an abundance of game and government assistance (which turned out to be grossly inadequate), but that may have been intended to strengthen Canada's claims to sovereignty. The conditions endured by the relocated communities in the early years were deplorable.

When the provinces of Manitoba, Saskatchewan and Alberta were created, the federal government retained ownership and control of public lands and natural resources (unlike in the other provinces, where most public lands and resources are provincial: *Constitution Act, 1867*, s. 109). This source of discontent in the prairie provinces was removed in 1930, when public lands and resources were transferred to them by the Natural Resources Transfer Agreements (given constitutional force by the *Constitution Act, 1930*). One provision in those agreements (which apply only in the prairie provinces) retained federal ownership and control of Indian reserves. Another provided that provincial game laws would apply to "Indians of the Province" except when they are hunting, trapping and fishing for food, at any time of the year, on unoccupied Crown lands and other lands to which they have a right of access. This provision has been interpreted and applied in several Supreme Court decisions, including *Prince and Myron v. The Queen*, [1964] SCR 81; *The Queen v. Sutherland et al.*, [1980] 2 SCR 451; and *Moosehunter v. The Queen*, [1981] 1 SCR 282. In *R. v. Horseman*, [1990] 1

SCR 901, the Supreme Court decided that the Treaty 8 (1899) right to hunt commercially had been taken away in Alberta by the provision limiting the right to a right to hunt for food; in exchange, the geographical extent of the right was expanded from the treaty area to the whole province and the application of provincial game laws was restricted.

The 1927 prohibition on pursuing land claims (as described in Period 6, above) was removed when the *Indian Act* was amended in 1951. At the same time, section 87 (now section 88) was added to the Act, making provincial laws of general application apply to "Indians", subject to the terms of treaties and other Acts of Parliament, and "except to the extent that such laws are inconsistent with this Act or any order, rule, regulation or by-law made thereunder, and except to the extent that such laws make provision for any matter for which provision is made by or under this Act." Section 88 was applied to protect treaty rights against provincial laws in *Simon v. The Queen*, [1985] 2 SCR 387; *R. v. Sioui*, [1990] 1 SCR 1025; and *R. v. Morris*, [2006] 2 SCR 915. The section does not protect treaty rights against federal laws: *The Queen v. George*, [1966] SCR 267.

In 1960, status Indians were accorded the right to vote in federal elections. In 1969, the federal government issued a policy statement, known as the White Paper, proposing a major shift in its approach to Indian affairs. Among other things, the Indian Act would be repealed, the Department of Indian Affairs would be abolished and general responsibility for Indigenous Peoples would be transferred to the provinces. The White Paper was explicitly intended to assimilate Indigenous people into Canadian society in the name of "equality."

The White Paper was strongly opposed by many First Nations, who responded with their own document, "Citizens Plus" (also known as the Red Paper). They demanded that their treaty rights and inherent Indigenous rights be respected so that their cultures would be maintained. Opposition to the White Paper, which was subsequently retracted, became a rallying point for uniting the Indigenous nations and asserting their rights in the 1970s.

PERIOD 8: 1969 to 1982

From the White Paper to the *Constitution Act, 1982*

Legal assertion of Indigenous land rights was initiated by the Nisga'a Nation in *Calder et al. v. Attorney-General of British Columbia*, [1973] SCR 313. For the first time, the Supreme Court of Canada decided that Aboriginal title is a legal right to land that does not depend on the Royal Proclamation of 1763 (Period 4 above). However, the Court split evenly on whether Aboriginal title had been legislatively extinguished in British Columbia before the province joined Canada in 1871.

The *Calder* decision caused the federal government to reassess the policy of refusing to recognize Indigenous land rights that it had generally followed since the late 1920s. Soon after that court decision, the federal government created a comprehensive land claims policy to deal with Aboriginal title claims and participated in the James Bay and Northern Quebec Agreement (1975), the first modern-day treaty. It also set up a specific claims process to deal with past violations of treaty rights, unlawful taking of reserve lands and other matters. In 2008, this process was revised by the creation of the Specific Claims Tribunal, an adjudicative body.

In another Aboriginal title case, *Hamlet of Baker Lake v. Canada (Indian Affairs and Northern Development)*, [1980] 1 FC 518, the Baker Lake Inuit claimed title to their traditional lands, which were then in the Northwest Territories and are now in Nunavut. Justice Mahoney issued a declaration in their favour, but limited their title to a right to hunt and fish. He also described that right as non-proprietary and subjected it to mining rights granted by the federal government under the Canada Mining Regulations. His characterization of Aboriginal title is inconsistent with the more recent Supreme Court decisions in *Delgamuukw v. British Columbia* (1997) and *Tsilhqot'in Nation v. British*

Columbia, [2014] 2 SCR 256. Also, his decision that the Inuit title is subject to federal mining laws pre-dated inclusion of section 35 in the *Constitution Act, 1982* (discussed in the next paragraph); thereafter, an infringement of this sort would require proof of justification by the Crown (*Delgamuukw*; *Tsilhqot'in Nation*).

In the late 1970s, patriation of the Canadian Constitution and inclusion of the *Charter of Rights and Freedoms* came to dominate the political agenda. Indigenous Peoples were concerned that this process would compromise their nation-to-nation relations with the British Crown and undermine their inherent sovereignty and treaty rights. In November 1980, two chartered trains, dubbed the Constitutional Express, carried close to 1,000 Indigenous protesters from the West Coast to Ottawa, where they peacefully lobbied hard for constitutional recognition of Aboriginal and treaty rights. Indigenous leaders also went to London and began an unsuccessful attempt in the English courts to block patriation. These efforts contributed to the inclusion of section 35 in the *Constitution Act, 1982*, subsection (1) of which provides: "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed." Subsection (2) defines the Aboriginal peoples of Canada as including the "Indian, Inuit and Métis peoples." Explicit inclusion of the Métis was a significant victory for the Métis, as their rights had been consistently ignored in the past (see Period 6, above).

Section 35 is a landmark acknowledgement of the rights of the Indigenous Peoples. It has largely determined the political and legal discourse on Aboriginal and treaty rights since 1982.



PERIOD 9: 1982 to 1992

From the *Constitution Act, 1982*, to the *Charlottetown Accord, 1992*

During the 1980s, four constitutional conferences were held, at which representatives from four national Aboriginal organizations – the Assembly of First Nations, the Inuit Committee on National Issues, the Native Council of Canada, and the Métis National Council – met with the Prime Minister and the 10 provincial premiers to try to agree on the content of the rights that were recognized and affirmed by section 35 of the *Constitution Act, 1982*.

No agreement was reached on the content of these rights, other than to confirm that treaty rights include rights in modern-day land claims agreements (added as section 35(3)) and provide that Aboriginal and treaty rights “are guaranteed equally to male and female persons” (added as section 35(4)). The agendas at these conferences were dominated by the issue of the inherent right of self-government and whether it was recognized and affirmed by section 35(1).

Important legal milestones in the 1980s were the Supreme Court’s decisions in *Guerin v. The Queen*, [1984] 2 SCR 335, on the Crown’s fiduciary obligations in relation to reserve lands; *Simon v. The Queen*, [1985] 2 SCR 387, on the legal status and liberal interpretation of treaties; and *Dick v. The Queen*, [1985] 2 SCR 309, and *Derrickson v. Derrickson*, [1986] 1 SCR 285, on the federal government’s exclusive jurisdiction over “Indians, and Lands reserved for the Indians.”

In 1990, the Supreme Court handed down its first decision involving section 35(1) rights, specifically the Musqueam Nation’s Aboriginal right to fish for food, ceremonial and societal purposes. The Court in *R. v. Sparrow*, [1990] 1 SCR 1075, decided that any Aboriginal rights that had not been extinguished before section 35(1) came into force on

April 17, 1982, were recognized and affirmed and could only be infringed thereafter by or pursuant to legislation that had a valid legislative objective and that respected the Crown’s fiduciary obligations. Respect for these obligations requires that the Crown impair Aboriginal rights no more than necessary when pursuing its legislative objectives, pay compensation in appropriate circumstances, and consult with the Aboriginal people whose rights are at stake. This test for justifiable infringement is known as the *Sparrow* test.

In *R. v. Sioui*, [1990] 1 SCR 1025, the Supreme Court affirmed and applied the principles of treaty interpretation laid down in *Simon v. The Queen* and acknowledged that, prior to the 1763 Treaty of Paris (Period 4 above), the British and French had maintained relations with the Indigenous nations very close to those maintained with independent nations and had entered into treaties of alliance with them. The Court thus accepted the historical situation described above in Period 3.

Another important development in this period was the BC government’s decision in the early 1990s to enter into a modern-day treaty process to resolve Indigenous land rights and other claims, including self-government claims. The BC Treaty Commission was established in 1992 to facilitate this process.

After Elijah Harper, an Ojibway-Cree member of the Manitoba legislature, successfully blocked ratification of the 1990 Meech Lake Accord (which would have acknowledged the special status of Quebec without addressing Indigenous self-government rights), a further attempt to renew the Canadian Constitution was made when the Charlottetown Accord was negotiated in 1992. If accepted, the Accord would have provided for explicit recognition and implementation of the inherent right of Indigenous self-government. However, the Accord failed when it was rejected by a majority of Canadian voters in a referendum held in October 1992. Since then, further elucidation of Aboriginal rights, including the inherent right of self-government, has depended either on court decisions or negotiated agreements.

PERIOD 10: 1992 to 2022

From the 1992 Charlottetown Accord to 2022

Section 35(1) Constitution Act, 1982:

“The **existing** aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.”

The latest period in the development of Aboriginal rights consists mainly of court decisions and negotiated agreements. In addition, important and influential reports have been issued by the Royal Commission on Aboriginal Peoples (1996), the Truth and Reconciliation Commission (2015) and the National Inquiry into Missing and Murdered Indigenous Women and Girls (*Reclaiming Power and Place*, 2019). There has also been development internationally and domestically with the adoption of the United Nations Declaration on the Rights of Indigenous Peoples.

To summarize the most important developments in the past 30 years, this part of the timeline is organized thematically. In addition, brief descriptions, in chronological order, of the most important Aboriginal and treaty rights cases since 1992 are contained in the Appendix that follows (summaries of most of the cases referred to under the thematic headings can be found in the Appendix). Most are Supreme Court of Canada decisions, with a few exceptions, such as the important decisions on the inherent right of self-government in *Campbell v. British Columbia* (2000) and by the Quebec Court of Appeal in *Reference to the Court of Appeal of Quebec in relation with the Act respecting First Nations, Inuit and Métis children, youth and families* (2022).

1. Aboriginal Resource Rights

In *R. v. Sparrow* (1990, Period 9 above), the Supreme Court decided that the Musqueam Nation in British Columbia has an Aboriginal right to fish for food, ceremonial and social purposes that is constitutionally protected by section 35(1) of the *Constitution Act, 1982*. In that case, the Court accepted the existence of the right without laying down a test for establishing

Aboriginal rights (see also *R. v. Nikal*, 1996). In *R. v. Van der Peet* (1996), involving an unsuccessful claim by the Stó:lō Nation in British Columbia of an Aboriginal right to exchange fish for money and other goods, the Court created such a test, which has become known as “the integral to the distinctive culture test.” To meet this test, Indigenous Peoples must prove that the Aboriginal right they claim has its origin in a practice, custom or tradition that was an integral part of their distinctive culture at the time of contact with Europeans.

This test has been applied in many subsequent decisions, such as *R. v. Adams* (1996), *R. v. Côté* (1996) and *R. v. Desautel* (2021). While most of the cases involve fishing and hunting rights, in *R. v. Sappier*; *R. v. Gray* (2006), the Supreme Court found that the Mi’kmaq and Maliseet nations in New Brunswick have an Aboriginal right to harvest wood for domestic purposes, such as building houses and making furniture for personal use. The limitation of the right to domestic purposes in this decision, along with the denial of a right to sell fish in *R. v. Van der Peet* (1996) and *R. v. N.T.C. Smokehouse Ltd.* (1996), reveals the difficulty Indigenous Peoples have in proving Aboriginal rights to harvest resources for commercial purposes. When they have been successful in establishing rights that have a commercial component, the Court has generally limited the right to a specific resource, such as herring spawn on kelp in *R. v. Gladstone* (1996). See also *Lax Kw’alaams Indian Band v. Canada (Attorney General)* (2011). However, in *Ahousaht Indian Band and Nation v. Canada (Attorney General)* (2009-2021), an Aboriginal right to fish for commercial purposes was not limited in this way.



2. Aboriginal Title to Land

Unlike Aboriginal resource rights, which are limited to harvesting a specific resource, Aboriginal title is a right to the land itself. As decided by the Supreme Court in *Delgamuukw v. British Columbia* (1997) and applied in *Tsilhqot’in Nation v. British Columbia* (2014), Aboriginal title is a property right that is constitutionally protected by section 35(1) of the *Constitution Act, 1982*. It amounts to the entire beneficial interest in the land, including surface rights to resources such as standing timber and subsurface rights to minerals and oil and gas. Aboriginal title is a generic interest – it does not vary from one Indigenous people to another. However, it is also *sui generis*, meaning it is unlike other common law and civil law land rights: see *Newfoundland and Labrador (Attorney General) v. Uashaunnuat (Innu of Uashat and of Mani-Utenam)* (2020).

The provincial Crown has the underlying title to Aboriginal title lands, but the Crown’s title has no beneficial content. However, Aboriginal title is inalienable other than by surrender to the Crown and is subject to an inherent limit: the land cannot be used in ways that would substantially reduce its value for future generations (see *Delgamuukw*; *Tsilhqot’in Nation*).

Aboriginal title can be established by proving exclusive occupation of the claimed land at the time of Crown assertion of sovereignty, which in British Columbia, for example, has been taken to be 1846. Indigenous oral histories have to be admitted as evidence, both in Aboriginal rights and Aboriginal title cases, and given weight equal to written histories (see *R. v. Van der Peet* (1996) and *Delgamuukw*). Indigenous law is a source of Aboriginal title and can be used as evidence of exclusive occupation (see *Delgamuukw*). This occupation can be territorial and is not limited to specific sites (see *Tsilhqot’in Nation*, reinterpreting *R. v. Marshall*; *R. v. Bernard* (2005)). Where two or more Indigenous Peoples occupied the same land amicably, they can have joint title (see *Delgamuukw*).

3. Aboriginal Rights and International Borders

In *Mitchell v. M.N.R.* (2001), the Supreme Court, applying the *Van der Peet* test (1996), decided that the Mohawks of Akwesasne had not proven an Aboriginal right to bring goods duty free across the border from New York State into Canada. However, two judges, concurring in result, decided that such a right would be incompatible with Canadian sovereignty and the Crown's control of its international borders.

In *R. v. Desautel* (2021), the Supreme Court decided that “aboriginal peoples of Canada” in section 35(1) of the *Constitution Act, 1982*, means the peoples who were here before European colonization. Consequently, an Indigenous people whose territory extended into what is now Canada but who are now located in the United States can have an Aboriginal right to hunt in Canada. Also, in this case the right was not lost, even though not exercised for 80 years. Because Mr. Desautel did not claim an Aboriginal right to enter Canada for the purpose of exercising his right to hunt, the Court did not have to address the sovereign incompatibility issue.

4. Treaty Rights

Treaty cases, such as *R. v. Badger* (1996) and *R. v. Marshall* (1999), have confirmed the principles laid down in earlier cases, especially *Simon v. The Queen* (1985) and *R. v. Sioui* (1990) (Period 9 above). Treaties have to be interpreted liberally and generously and ambiguities must be resolved in favour of the Indigenous parties. Treaties are solemn agreements that engage the honour of the Crown. Treaty making, interpretation and implementation all involve the integrity of the Crown and sharp dealing will not be tolerated. Historical and bilateral cultural contexts need to be taken into account to determine the common intention of the parties.

Accordingly, in *R. v. Marshall* the Supreme Court decided that a 1760-61

treaty in which the Mi'kmaq of Nova Scotia agreed to trade only at truck houses (trading posts) established by the British included an implicit Mi'kmaq right to acquire fish and game for the purposes of trade in order to obtain a moderate livelihood. Treaty cases also confirm that the methods used by Indigenous Peoples to exercise their treaty rights can evolve. For example, a right to hunt using torches at night can be exercised by using electric lamps and rifles (*R. v. Morris* (2006)) and a right to build lean-tos for expeditionary hunting can evolve into a right to build log cabins (*R. v. Sundown* (1999)).

In *Restoule v. Canada (Attorney General)* (2021), the Ontario Court of Appeal decided that the honour of the Crown requires it to increase the amount of annuity payments if the value of the resources removed from the Anishinaabe treaty territories is sufficient for the Crown to do so, as provided by the terms of the Robinson treaties (1850, Period 5 above).

5. Modern Land Claims Agreements

As mentioned earlier (Period 8 above), after the *Calder* decision in 1973 the federal government created the comprehensive claims policy. This has led to modern-day land claims agreements in northern Quebec, the Northwest Territories, Yukon, Nunavut, and Labrador. One land claims agreement in British Columbia, with the Nisga'a Nation (2000), has also been negotiated under this policy. The rights in these agreements are protected as treaty rights by section 35(1) of the *Constitution Act, 1982*, as clarified by section 35(3), which was added by constitutional amendment in 1983 (Period 9 above).

The Nunavut Agreement (1993) was accompanied by a federal statute, the *Nunavut Act* (1993, implemented 1999), which created the new territory of Nunavut with a public government similar to those in Yukon and the Northwest Territories. Because the Inuit comprise about 85 per cent of the population of Nunavut, they exercise *de facto* self-government.

In British Columbia, the BC Treaty Commission was established in 1992 to facilitate the negotiation of land claims agreements (Period 9 above). Negotiation of these modern-day treaties has been painfully slow. To date, only seven such treaties have been finalized, covering a small portion of the province. Many First Nations are not in the treaty process. Some, such as the Tsilhqot'in Nation, have chosen instead to seek acknowledgment of their Aboriginal rights and title in Canadian courts (*Tsilhqot'in Nation v. British Columbia* (2014)).

These modern-day treaties are extremely complex documents running to hundreds of pages and typically covering such matters as land rights, resource harvesting rights, environmental protection and, since 1995, Indigenous governance. Prior to 1995, the federal government would negotiate limited self-government agreements, but was unwilling to include governance rights in land claims agreements (no doubt because it did not want them to enjoy constitutional protection), but that policy was changed in that year. For more on Indigenous governance, see 11. *The Inherent Right of Self-government*, below.

6. Métis Rights

In *R. v. Powley* (2003), the Supreme Court applied the *Van der Peet* (1996) test to a Métis claim of an Aboriginal right to hunt for food, with certain modifications to take account of the different history and circumstances of the Métis people. Because the Métis did not exist prior to contact with Europeans, the Court modified the time frame for applying the integral to the distinctive culture test from contact to the time of effective European control in the region of the claimed right. In the Sault Ste. Marie area of Ontario where the Powleys had been hunting, the Court decided that this was just prior to 1850. In addition, to establish a Métis Aboriginal right, it is necessary to prove the existence of a rights-holding Métis community both at the time of effective European control and in the present-day. As the Powleys were able to meet that burden and prove their membership in the contemporary Métis community, the Court found that they have an Aboriginal



right to hunt for food protected by section 35 of the *Constitution Act, 1982*.

Subsequent to the *Powley* decision, several Métis Aboriginal rights claims have failed due to the difficulty of proving the existence of an historic Métis community in the region where the right is claimed. Whether the Métis have Aboriginal title anywhere in Canada is also uncertain.

In addition to their Aboriginal rights, the Métis were accorded statutory land rights when the province of Manitoba was created in 1870. Sections 31 and 32 of the Manitoba Act, 1870 were supposed to provide a land base for the Métis. Instead, due to government incompetence and delay, many of the Métis either did not receive or lost the land to which they were entitled. In *Manitoba Metis Federation Inc. v. Canada (Attorney General)* (2013), the Supreme Court issued a declaration that the honour of the Crown had not been lived up to in the implementation of section 31 of the *Manitoba Act*.

In Alberta (*Aboriginal Affairs and Northern Development*) v. *Cunningham* (2011), the Supreme Court rejected a Charter challenge to the constitutional validity of a provision of the Alberta *Metis Settlements Act* that provides that status Indians cannot be members of a Metis settlement. As mentioned earlier (Period 6 above), in *Daniels v. Canada* (2016) the Supreme Court decided that the Métis are “Indians” within the meaning of that term in section 91(24) of the *Constitution Act, 1867*, and so are under federal jurisdiction. In *Gif Lake Métis Settlement v. Alberta (Aboriginal Relations)*, 2019 ABCA 134, the Alberta Court of Appeal held that the Supreme Court’s decision in *Daniels* did not make provisions of the *Metis Settlements Act* unconstitutional.

7. Fiduciary Obligations

The Supreme Court first decided that the federal government owes fiduciary obligations to First Nations in the context of the surrender of reserve lands in 1984 in the *Guerin* case (Period 9 above). This holding was affirmed and applied in *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)* (1995).

Since then, the Supreme Court has found that the Crown owes fiduciary obligations in other contexts as well. In *Wewaykum Indian Band v. Canada* (2002), the Court decided that the Crown owes fiduciary obligations in the context of the creation of reserves but found that these obligations had been met in that case. Justice Binnie, for the Court, said that the existence of a fiduciary relationship “depends on identification of a cognizable Indian interest, and the Crown’s undertaking of discretionary control in relation thereto.” More recently, in *Williams Lake Indian Band v. Canada (Aboriginal Affairs and Northern Development)* (2018), the Supreme Court upheld the decision of the Specific Claims Tribunal that the Crown had breached its fiduciary obligations by not protecting the village lands of that First Nation from pre-emption by settlers. In another recent case involving breach of the Crown’s fiduciary obligations, *Southwind v. Canada* (2021), the Supreme Court decided that the Lac Seul First Nation in Ontario is entitled to equitable compensation for the flooding of part of their reserve caused by the construction of a hydroelectric dam.

8. The Duty to Consult

In *R. v. Sparrow* (1990, Period 9 above), the Supreme Court decided that the Crown should consult with affected Indigenous Peoples before infringing their Aboriginal rights (see 9. *Infringement of Aboriginal and Treaty Rights*, below). This duty has been affirmed in relation to Aboriginal title in *Delgamuukw v. British Columbia* (1997) and *Tsilhqot’in Nation v. British Columbia* (2014).

Where Aboriginal rights and/or title are claimed but have not yet been acknowledged by a court decision or land claims agreement, the Supreme Court decided in *Haida Nation v. British Columbia (Minister of Forests)* (2004) that the Crown owes a duty to consult while planning and before undertaking any project or activity that could have a negative impact on the claimed rights. In appropriate circumstances, the Crown must accommodate the claimed rights before proceeding. The depth of the duty depends on the strength of the claim and the extent of the negative impact. However, the consultation requirement does not give Indigenous Peoples a veto over resource development on their lands. See also *Taku River Tlingit First Nation v. British Columbia* (2004), decided the same day.

Many cases since have involved the issue of whether a duty to consult exists and, if so, whether it and the duty to accommodate have been met. For examples, see *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council* (2010); *West Moberly First Nations v. British Columbia* (2011); *Ktunaxa Nation v. British Columbia* (2017); *Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.* (2017); and *Coldwater First Nation v. Canada* (2020).

The Crown also has a duty to consult when taking up treaty lands. In *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)* (2005), the Crown proposed to construct a winter road in Wood Buffalo National Park in northern Alberta. Although the Crown has the authority to take up lands for “settlement, mining, lumbering, trading or other purposes” in the Treaty 8 area where the park is located, the Supreme Court decided that it first must consult with the Mikisew Cree whose treaty hunting and trapping rights would be impacted. In *Yahey v. British Columbia* (2021), the BC Supreme Court decided that the province had unjustifiably infringed the Blueberry River First Nations’ Treaty 8 right to hunt, trap and fish by taking up lands to such an extent that there were no longer sufficient lands left for the First Nation to meaningfully exercise their rights. The court applied the direction of the Supreme Court in *Grassy Narrows v. Ontario (Natural Resources)* (2014).

The duty to consult also applies in the context of modern land claims

agreements: e.g., see *Beckman v. Little Salmon/Carmacks First Nation* (2010); *Quebec v. Moses* (2010); *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.* (2017); and *First Nation of Nacho Nyak Dun v. Yukon* (2017).

In a recent case, *Mikisew Cree First Nation v. Canada (Governor General in Council)* (2018), the Supreme Court decided that the Crown’s duty to consult is limited to the context of executive action; it does not apply to the legislative process, including the development of legislation before its introduction into Parliament. However, if the effect of legislation once enacted would be to infringe Aboriginal or treaty rights, its application in that context could be challenged (see 9. *Infringement of Aboriginal and Treaty Rights*, below).

9. Infringement of Aboriginal and Treaty Rights

Since Aboriginal and treaty rights received constitutional protection in 1982, they can no longer be extinguished without consent, even by Parliament (see *R. v. Van der Peet* (1996) and *Mitchell v. M.N.R.* (2001)). However, in *R. v. Sparrow* (1990, Period 9 above), the Supreme Court ruled that they can still be legislatively infringed, as long as the infringement can be justified by a test the Court laid down. The test requires that the federal government prove, first, a valid legislative objective for the infringement, such as conservation, and second, that the honour of the Crown and the trust relationship with the Indigenous Peoples have been respected. To meet the second requirement, the government must prove that the right is being infringed as little as possible to meet the legislative objective, that the Indigenous Peoples affected have been consulted, and that fair compensation is available.

In *R. v. Badger* (1996) and *R. v. Marshall* (1999), the Supreme Court decided that the Sparrow justifiable infringement test also applies to treaty rights. However, in neither of those cases did the Crown try to prove justification. In fact, in cases involving infringement of Aboriginal

and treaty rights, the Crown has almost always failed to prove justification (for examples, see *R. v. Sappier*; *R. v. Gray* (2006); *Yahey v. British Columbia* (2021); compare *Ahousaht Indian Band and Nation v. Canada* (2021)).

In *R. v. Morris* (2006), the Supreme Court decided that the provinces lack the constitutional authority to infringe treaty rights. This was because these rights were within the core of Parliament’s exclusive jurisdiction over “Indians, and Lands reserved for the Indians” (*Constitution Act, 1867*, s. 91(24)), and so were protected by the division-of-powers doctrine of interjurisdictional immunity, which prevents provincial laws from impairing the core of federal jurisdiction over certain matters, including Indigenous Peoples and their lands. This should have meant that the provinces cannot infringe Aboriginal rights either, as the Court held in *Delgamuukw v. British Columbia* (1997) that these rights are also within the core of this federal jurisdiction. However, in *Tsilhqot’in Nation v. British Columbia* (2014), the Court changed its mind and said the doctrine of interjurisdictional immunity no longer applies to protect Aboriginal rights, including title, from provincial laws. In *Grassy Narrows v. Ontario (Natural Resources)* (2014), the Court applied this new understanding of the law to treaty rights. In the Court’s opinion, Aboriginal and treaty rights are sufficiently protected by section 35(1) of the *Constitution Act, 1982*, and so the interjurisdictional immunity division-of-powers’ protection is no longer necessary.

10. The Honour of the Crown and Reconciliation

The honour of the Crown is involved in all its dealings with Indigenous Peoples (see *R. v. Sparrow* (1990), *R. v. Badger* (1996), and *R. v. Marshall* (1999), as well as 5. *Treaty Rights*, above). The Supreme Court has repeatedly linked the honour of the Crown and the need for reconciliation.

In *R. v. Van der Peet* (1996), Chief Justice Lamer said the purpose underlying section 35 in the *Constitution Act, 1982* is “the protection and reconciliation of the interests which arise from the fact that prior to the arrival of Europeans in North America aboriginal peoples lived on the land

in distinctive societies.” Reconciliation, the Chief Justice said, has to take into account, and give equal weight to, both the Indigenous and the common law perspectives. However, in *R. v. Gladstone* (1996), he also said that limitations on Aboriginal rights that have as their objective the furtherance of important interests of Canadians as a whole can be a necessary part of reconciliation (Justice McLachlin expressed concerns with this approach in her dissent in *Van der Peet*, 1996). In *Delgamuukw v. British Columbia* (1997), addressing Aboriginal title, Chief Justice Lamer affirmed the understanding of reconciliation that he had expressed in *Van der Peet* and *Gladstone*. See also *Tsilhqot’in Nation v. British Columbia* (2014). Reconciliation, it seems, can apply to the disadvantage as well as to the advantage of Indigenous Peoples.

Subsequent to these cases, the Supreme Court has applied the concept of reconciliation in various contexts where the emphasis has been more on the need for the Crown to act honourably. In *Haida Nation v. British Columbia* (2004), Chief Justice McLachlin said that, for reconciliation to be achieved, the Crown has to act honourably and consult with Indigenous Peoples and accommodate their interests when it plans actions that might have a negative impact on their claimed rights. Reconciliation, she said, is not a final remedy; instead, it is a process that flows from “the Crown’s duty of honourable dealing toward Aboriginal peoples, which arises in turn from the Crown’s assertion of sovereignty over an Aboriginal people and *de facto* control of land and resources that were formerly in the control of that people.”

In *Mikisew Cree First Nation v. Canada* (2005), the Supreme Court extended the concepts of the honour of the Crown and the duty to consult articulated in *Haida Nation* and applied them to the Crown’s taking up of treaty lands. Justice Binnie said that treaty making is an important step towards reconciliation, but it is only part of an ongoing process; consultation, in accordance with the honour of the Crown, “is key to achievement of the overall objective of the modern law of treaty and aboriginal rights, namely reconciliation.” In *Beckman v. Little Salmon/Carmacks First Nation* (2010), the Supreme Court used the need

for reconciliation as a reason to find that the Crown has an ongoing obligation to consult when it takes up lands under modern-day treaties.

In *Manitoba Metis Federation Inc. v. Canada* (2013), the Supreme Court once again applied the concept of reconciliation, in this case by issuing a declaration that Canada had not acted honourably in implementing a section in the *Manitoba Act, 1870*, that provided for distribution of land to the children of the Métis heads of family in the province. In *Southwind v. Canada* (2021), the Court relied upon the honour of the Crown and reconciliation in determining the basis on which equitable compensation should be paid to a First Nation for breach of the Crown’s fiduciary obligations in the context of flooding their reserve caused by the construction of a hydroelectric dam. Justice Karakatsanis, for the majority, said that “reconciliation ... is the overarching goal of the fiduciary duty itself, based in the honour of the Crown.” In *Anderson v. Alberta* (2022), the Supreme Court found reconciliation and access to justice to be relevant to determining when advance costs orders should be awarded to Indigenous litigants.

11. The Inherent Right of Self-government

During the four constitutional conferences on Aboriginal and treaty rights in the 1980s, Indigenous leaders contended that the inherent right of self-government, while already recognized and affirmed by section 35(1) of the *Constitution Act, 1982*, should be explicitly acknowledged in the Constitution. This would have happened if the Charlottetown Accord had been accepted in the referendum (Period 9 above).

With the failure of the Charlottetown Accord in 1992, the inherent right of self-government has been relegated to the political realm and to the courts. Politically, the federal government acknowledged the existence of the inherent right of self-government in 1995, but took the position that its content had to be negotiated. As a result, land claims agreements entered into after 1995 have included governance provisions. These provisions have been judicially treated both as expressions of the inherent right and



as delegated authority (see *Campbell v. British Columbia* (2000); *Sga'nism Sim'augit (Chief Mountain) v. Canada (Attorney General)*, 2013 BCCA 49; and *Dickson v. Vuntut Gwitchin First Nation* (2021)).

Judicial opinion on the inherent right of self-government at the Supreme Court level starts with *R. v. Pamajewon* (1996). In that case, the Court assumed, without deciding, that section 35(1) includes a right of self-government, but decided that the *Van der Peet* integral to the distinctive culture test applies in this context. The Court took a narrow approach to the definition of the claimed right, saying it could not be a general right to govern activities on reserves, but had to relate directly to the activity in question. Because the accused failed to prove that high-stakes gambling was integral to Anishinaabe culture at the time of contact with Europeans, they were unable to establish a right of self-government in relation to gambling.

In *Delgamuukw v. British Columbia* (1997), the Gitksan and Wet'suwet'en Nations claimed a right of self-government over their territories as well as Aboriginal title to the land. The Supreme Court declined to provide any guidance on self-government rights, as the claim had been framed in general terms and so was inconsistent with the specific approach taken in *Pamajewon*. In addition, the self-government claim had not been adequately argued, and so Chief Justice Lamer said the Court did not have a sufficient basis for addressing it. He decided nonetheless that Aboriginal title is communal and that Indigenous nations have

decision-making authority over their title lands (this was affirmed in *Tsilhqot'in Nation v. British Columbia* (2014)). In *Campbell v. British Columbia* (2000), Justice Williamson concluded from this that Indigenous nations must have governance authority over their Aboriginal title lands because a community needs some form of government to make collective decisions.

The strongest judicial affirmation of the inherent right of self-government so far came from the Quebec Court of Appeal on February 10, 2022. In *Reference to the Court of Appeal of Quebec in relation with the Act respecting First Nations, Inuit and Métis children, youth and families* (1922), the Quebec Attorney General challenged the constitutional validity of a federal statute designed to acknowledge and provide guidelines for Indigenous jurisdiction over family matters. Among other things, the Act acknowledged that Indigenous Peoples have an inherent right of self-government over family and other matters. The Court of Appeal upheld the constitutional validity of the Act, with the exception of two sections that would have given Indigenous family laws explicit paramountcy over provincial laws. Significantly, the Court decided that, in affirming the inherent right of self-government, the statute did not create a new right but simply acknowledged the existence of a right that was already an Aboriginal right in section 35(1) of the *Constitution Act, 1982*. Moreover, the Court of Appeal held that the right of self-government over family matters is a generic right. This case is on appeal to the Supreme Court of Canada.

In *Haida Nation v. British Columbia* (2004), the Supreme Court acknowledged the pre-existing sovereignty of Indigenous Peoples for the first time. This was affirmed by the Court in *Manitoba Metis Federation Inc. v. Canada* (2013) and *Mikisew Cree First Nation v. Canada* (2018). The implications of this for the inherent right of self-government and Indigenous law have not yet been explored by the Court.

12. Indigenous Law

Judicial acknowledgement of Indigenous law goes all the way back to Confederation. In *Connolly v. Woolrich* (1867), 17 RJRQ 75, Justice Monk of the Quebec Superior Court acknowledged the validity of a marriage between a Euro-Canadian man and a Cree woman in accordance with Cree law, and decided that the marriage had legal effect in Quebec. Since then, several cases have acknowledged and applied Indigenous marriage and adoption laws: for examples, see *R. v. Nan-E-Quis-A-Ka* (1889), 1 Terr. LR 211 (NWTSC); *R. v. Bear's Shin Bone* (1899), 4 Terr. LR 173 (NWTSC); *Re Noah Estate* (1961), 32 DLR (2d) 185 (NWTSC); and *Casimel v. Insurance Corp. of British Columbia* [1994] 2 CNLR 22 (BCCA). In a recent case, *Beaver v. Hill* (2018), it has been alleged that Haudenosaunee family law displaces Ontario law, but a decision on this issue has not been reached.

The Supreme Court has also acknowledged the general existence of Indigenous law without specifically applying it. For example, in *Delgamuukw v. British Columbia* (1997), Chief Justice Lamer said that the relationship between the common law and Indigenous law is a source of Aboriginal title, and Indigenous law can be part of the evidence used to prove exclusive occupation of land. In *Mitchell v. M.N.R.* (2001), Chief Justice McLachlin said that Indigenous interests and laws are presumed to have continued after the Crown assertion of sovereignty. Again, in *Tsilhqot'in Nation v. British Columbia* (2014), she said that the Indigenous perspective on occupation of land depends in part on Indigenous laws.

In contexts other than family law, lower courts have been divided on the application of Indigenous law. For example, in *Coastal GasLink Pipeline Ltd. v. Huson* (2019), Justice Church expressed the opinion that, for Indigenous laws to be part of Canadian domestic law they would need to be recognized by incorporation into treaties, statutes or court declarations. This approach can be contrasted with the opinion of Justice Grammond in *Pastion v. Dene Tha' First Nation* (2018) that

“Indigenous legal traditions are among Canada’s legal traditions. They form part of the law of the land.” In *R. v. Ippak*, 2018 NUCA 3, Justice Berger (concurring in result with the majority) observed that “aboriginal legal principles and perspectives on criminal law and on the application of the Charter must be taken into account in pursuit of the objective of mutually enriching and harmonizing Canadian and Indigenous legal orders.” See also *Reference to the Court of Appeal of Quebec in relation with the Act respecting First Nations, Inuit and Métis children, youth and families* (2022), acknowledging the inherent right of Indigenous Peoples to make laws in relation to family matters.

13. The UN Declaration on the Rights of Indigenous Peoples

The United Nations Declaration on the Rights of Indigenous Peoples was adopted by the UN General Assembly on September 13, 2007, with a few abstentions and four countries – Australia, Canada, New Zealand and the United States – voting against. These four settler states have since changed their minds and endorsed the Declaration. In 2010, the Conservative government of Stephen Harper gave it qualified Canadian support, but it was only in 2016 that Justin Trudeau’s Liberal government endorsed the Declaration without qualification and promised to implement it in accordance with Canada’s Constitution. In 2021, Parliament enacted legislation in which it undertook to make Canadian law consistent with the Declaration: *United Nations Declaration on the Rights of Indigenous Peoples Act*, SC 2021, c. 14. The province of British Columbia has enacted similar legislation: *Declaration on the Rights of Indigenous Peoples Act*, SBC 2019, c. 44.

The Declaration’s 46 Articles outline what the United Nations regards as “the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world” (Art. 43). The Preamble affirms “that indigenous peoples are equal to all other peoples” and recognizes “the urgent need to respect and promote the rights of indigenous peoples affirmed in treaties.” A key right acknowledged in the Declaration is the

right to self-determination, by virtue of which Indigenous Peoples “freely determine their political status and freely pursue their economic, social and cultural development” (Art. 3).

Several of the provisions require “free, prior and informed consent” before governments take action affecting Indigenous Peoples and their rights (e.g., Art. 10 and 29(2)). Art. 32(2) provides that “States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.” Where lands, territories and resources that Indigenous Peoples traditionally owned, occupied or used have been taken, used or damaged “without their free, prior and informed consent,” they have “the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation” (Art. 28(1)).

These are just some of the Declaration’s provisions acknowledging the rights of the Indigenous Peoples. As space does not allow us to examine all the provisions, readers are encouraged to consult the Declaration itself, online at:



https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf.

There are many unresolved questions about the extent to which Canadian law is consistent with the Declaration. For example, is the scope of the Canadian duty of consult, which does not provide Indigenous Peoples with a veto over resource development on their lands (see 8. *The Duty to Consult*, above), consistent with the requirement of free, prior and informed consent? Is justifiable infringement of Aboriginal and treaty rights consistent with the Declaration’s acknowledgement of these kinds of rights? While Article

46(2) states that the rights in the Declaration are subject to limitations “determined by law” that are “non-discriminatory and strictly necessary solely for the purpose of securing due recognition and respect for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society,” it remains to be seen whether Canadian courts will use this provision to uphold justifiable infringement (see 9. *Infringement of Aboriginal and Treaty Rights*, above).

The Declaration is not a legal document that can be enforced directly in Canadian courts. Nonetheless, judges have begun to take account of the Declaration’s provisions and use them to support decisions involving the rights and governance authority of the Indigenous Peoples (see *Pastion v. Dene Tha’ First Nation* (2018); *Thomas and Saik’uz First Nation v. Rio Tinto Alcan Inc.* (2022); and *Reference to the Court of Appeal of Quebec in relation with the Act respecting First Nations, Inuit and Métis children, youth and families* (2022)). No doubt this trend will continue.

Appendix

Selected Indigenous rights cases from 1995 to March 2022

The cases summarized here are, for the most part, important cases relating to Aboriginal and treaty rights, especially in relation to land, natural resources and inherent governance rights, as well as the Crown's obligations towards Indigenous Peoples and other constitutional matters. Cases involving statutory matters, such as the application of the Indian Act and the Criminal Code, are generally not included.

Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development), [1995] 4 SCR 344: The Court applied *Guerin v. The Queen* (Period 9 above) and held the Crown liable for breach of its fiduciary obligations because it failed to retain the mineral rights for the First Nation when it sold surrendered reserve land. The Court also said that the Crown's fiduciary obligations have to be formulated so as to respect the decision-making authority of Indian bands.

R. v. Badger, [1996] 1 SCR 771: The Court reaffirmed the principles of treaty interpretation from *Simon v. The Queen* and *R. v. Sioui* (Period 9 above) and decided that the Natural Resources Transfer Agreements (NRTA, 1930) modified but did not replace treaty rights to hunt, trap, and fish. Also, the *Sparrow* test (Period 9 above) for justifiable infringement of Aboriginal rights also applies to treaty rights in the context of the NRTA.

R. v. Nikal, [1996] 1 SCR 1013: The accused member of the Wet'suwet'en Nation was charged under the federal *Fisheries Act* with fishing without a licence. His defence that he was fishing in waters that are part of an Indian reserve and governed by a band bylaw was dismissed because the reserve did not include the land to the middle of the Bulkley River (see also *R. v. Lewis*, [1996] 1 SCR 921) and the First

Nation had not been granted an exclusive fishery in that part of the river. However, the defendant had established an Aboriginal right to fish for food and ceremonial purposes. The requirement of a licence to fish did not, in and of itself, infringe this right, but the conditions attached to the licence, such as restrictions on times and place of fishing and gear used, infringed this right and had not been justified by the Crown. Since the conditions were not severable from the licence, the licence requirement was invalid and the accused was acquitted.

R. v. Van der Peet, [1996] 2 SCR 507: The Court created the test for proof of Aboriginal rights apart from title (the *Van der Peet* test). In order to establish an Aboriginal right in relation to a particular activity, Aboriginal claimants have to prove that the activity relates to a practice, custom, or tradition that was integral to their distinctive culture prior to contact with Europeans. In this case, the Stó:lō Nation in British Columbia was unable to establish an Aboriginal right to trade fish for money and other goods because, although they had traded fish prior to European contact, this trade had not been sufficiently important to be integral to their distinctive culture.

R. v. N.T.C. Smokehouse Ltd., [1996] 2 SCR 672: The Supreme Court upheld the conviction of a fish processor for illegally purchasing and selling fish caught under the authority of an Indian food fish licence. The fish had been caught and sold to the processor by members of the Sheshaht and Opetchesaht bands in British Columbia. The processor claimed the sellers had an Aboriginal right to catch and sell the fish and argued that the prohibitions on sale were constitutionally inapplicable. The Court applied the *Van der Peet* test and decided that the processor had not proven that exchange of fish for money or other goods had been an integral part of the distinctive cultures of the Indigenous Peoples in question at the time of contact with Europeans.

R. v. Gladstone, [1996] 2 SCR 723: The Heiltsuk Nation in British Columbia proved by application of the *Van der Peet* test that they have an Aboriginal right to take and sell herring spawn on kelp in commercial

quantities. However, the Court decided that, unlike the right to fish for food, ceremonial, and societal purposes in *R. v. Sparrow* (Period 9 above), the priority given to commercial Aboriginal rights over sport and other commercial fishing is not absolute. Regional and economic fairness and the historical participation of others in the fishery can be taken into account by the federal government in distributing the available catch.

***R. v. Pamajewon*, [1996] 2 SCR 821:** In the only case so far where the Supreme Court has dealt directly with the inherent right of self-government, claims by two Anishinaabe First Nations in Ontario to such a right in relation to gambling on their reserves were rejected. The Court assumed, without deciding, that section 35(1) of the *Constitution Act, 1982* includes self-government claims, but held that these claims have to meet the *Van der Peet* test and be in relation to the specific activity over which the right of self-government is asserted. On the evidence, the accused failed to prove that high-stakes gambling had been integral to the distinctive culture of the Anishinaabe at the time of contact with Europeans.

***R. v. Adams*, [1996] 3 SCR 101, and *R. v. Côté*, [1996] 3 SCR 139:** Aboriginal rights in Quebec have the same basis as in the rest of Canada and are not affected by French law. Aboriginal rights to fish for food were upheld, following the *Van der Peet* test. These rights are site-specific, and do not depend on proof of Aboriginal title.

***Delgamuukw v. British Columbia*, [1997] 3 SCR 1010:** This case, brought by the Gitksan and Wet'suwet'en Nations, was the first case since *Calder et al. v. Attorney-General of British Columbia* (1973, Period 8 above) in which the Supreme Court has dealt with an Aboriginal title claim. The case was sent back to trial (but never retried) due to errors made by the trial judge. The Court nonetheless laid down fundamental principles regarding the nature, content, proof, infringement, and extinguishment of Aboriginal title.

Aboriginal title is a property right, entitling the holders to exclusive possession and use of land and the resources on and under it,

including trees, minerals, oil and gas. It has several *sui generis* or unique features: its source in occupation of land prior to Crown assertion of sovereignty and in Indigenous law; its inalienability, other than by surrender to the Crown; its communal nature; and its inherent limit. The inherent limit prevents the land from being used in ways that are incompatible with the attachment to the land that forms the basis for the Aboriginal title.

Aboriginal title can be established by proof that the land was exclusively occupied at the time of Crown assertion of sovereignty. Occupation can be proven by both physical presence and Indigenous law, and needs to be evaluated in accordance with the way of life of the people in question. Two or more Indigenous nations can have joint title where they were in exclusive occupation together. Oral histories can be relied upon as evidence and have to be admitted and accorded the same respect as written documents.

Aboriginal title is one of the Aboriginal rights recognized and affirmed by section 35(1) of the *Constitution Act, 1982*. As such, it can only be infringed by or pursuant to legislation that meets the *Sparrow* test for justifiable infringement (Period 9 above), as elaborated on in *R. v. Gladstone* (1996).

Aboriginal title is under exclusive federal jurisdiction because it comes within the scope of “Lands reserved for the Indians” in section 91(24) of the *Constitution Act, 1867* (Period 6 above). For this reason, the provinces have lacked the constitutional authority to extinguish it ever since Confederation.

The *Delgamuukw* case also involved a claim to a right of self-government, but the Supreme Court declined to address this claim. However, by acknowledging the decision-making authority Aboriginal nations have over their communally-held Aboriginal title lands, the Court did appear to recognize the inherent right of self-government by necessary implication (see *Campbell v. British Columbia*, 2000).

***R. v. Sundown*, [1999] 1 SCR 393:** Mr. Sundown, a member of a Cree Nation that entered into Treaty 6 (1876), was accused of violating Saskatchewan laws by cutting down trees and building a log cabin in a

provincial park. The Supreme Court decided that, given the Cree's expeditionary method of hunting, building a shelter was reasonably incidental to their treaty hunting right. Building a cabin was a natural evolution of this incidental right, which originally would have involved construction of a lean-to shelter. As the accused was exercising his constitutional right to hunt when he built the cabin, he was acquitted.

***Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203:** A provision of the *Indian Act* denying off-reserve members the right to vote in band council elections was struck down because it violated equality rights protected by section 15(1) of the *Canadian Charter of Rights and Freedoms*. The Court also suggested that, if an Aboriginal nation could prove an Aboriginal right to choose its own leaders, that right would take precedence over the election provisions in the *Indian Act*.

***R. v. Marshall*, [1999] 3 SCR 456, [1999] 3 SCR 533:** The Court affirmed and applied the principles of treaty interpretation from earlier cases and held that oral agreements are as much a part of a treaty as the written terms. The historical and cultural contexts have to be taken into account in ascertaining what constitutes the treaty. In this case, a Mi'kmaq promise in a 1760-61 treaty to trade only at truck houses (trading posts) established by the British necessarily implied a right to acquire natural products, such as fish, for trade in order to obtain a moderate livelihood. Like Aboriginal rights, treaty rights are subject to justifiable infringement, by application of the *Sparrow* test (Period 9 above), as elaborated on in *R. v. Gladstone* (1996).

***Chippewas of Sarnia Band v. Canada (Attorney General)* (2000), 51 OR (3d) 641:** The Chippewas entered into a treaty with the Crown in the 1820s, surrendering a large part of their territory but retaining four reserves. Fifteen years later, part of one of these reserves was sold to a private speculator. The Ontario Court of Appeal decided that the sale was invalid, but declined to exercise its discretion to set aside a subsequent Crown grant of the land. The Court also applied the

equitable *bona fide* purchaser for value without notice rule to uphold the titles of the current non-Indigenous landowners.

***Campbell v. British Columbia (Attorney General)*, [2000] 4 CNLR 1 (BCSC):** The self-government provisions of the Nisga'a Final Agreement (ratified 2000) are constitutionally valid because Indigenous nations have an inherent right of self-government that is protected by section 35(1) of the *Constitution Act, 1982*. To exercise the decision-making authority over Aboriginal title lands accepted by the Supreme Court in *Delgamuukw v. British Columbia* (1997), Indigenous nations require political structures that are governmental in nature. In *House of Sga'nisim v. Canada*, [2012] 2 CNLR 82 (BCSC), Justice Smith followed this aspect of *Campbell* out of comity (respectful acceptance) but decided nonetheless that the governance provisions of the Nisga'a Final Agreement, the validity of which was challenged in these cases, could also be upheld as delegated authority. Justice Smith's decision was upheld on appeal on the latter basis, without addressing the inherent right issue: *Sga'nism Sim'augit (Chief Mountain) v. Canada* (2013), leave to appeal refused, [2013] SCCA No. 144. See also *Dickson v. Vuntut Gwitchin First Nation* (2021).

***Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911:** The Mohawk Nation of Akwesasne was unable to meet the *Van der Peet* test (1996) for proving an Aboriginal right to bring goods duty free from New York State into Canada for the purpose of trade. Justice Binnie, concurring in result, added that such a right would be incompatible with Crown sovereignty, specifically control of Canada's borders. But he said this does not exclude the potential existence of an Aboriginal right of self-government within Canada. However, the majority of the Court did not discuss these issues of sovereign incompatibility and internal self-government.

***Wewaykum Indian Band v. Canada*, [2002] 4 SCR 245:** Fiduciary obligations arise when the Crown exercises discretionary control over specific Aboriginal interests. In this case, the Crown owed fiduciary obligations in the context of reserve creation, but these obligations had been met. In any case, any claims for breach of fiduciary obligations were

barred by limitation statutes and laches (an equitable doctrine barring some claims that are not brought in a timely manner).

***R. v. Powley*, [2003] 2 SCR 207:** The Métis can prove their Aboriginal rights using the *Van der Peet* test (1996), with the following modification: they have to prove that the relevant practice, custom, or tradition was integral to their distinctive culture at the time of effective European control rather than at the time of contact with Europeans. They also have to prove that there was an historic Métis community at the place in question at that time (in this case, the Sault Ste. Marie area in 1850), and that there is a present-day Métis community there with a connection to the historic community. These requirements were met, and so a Métis Aboriginal right to hunt for food in the Sault Ste. Marie area was established. As the accused were able to prove that they are members of this contemporary Métis community, they are beneficiaries of this right and were acquitted. This is the first Supreme Court decision on the Aboriginal rights of the Métis.

***R. v. Blais*, [2003] 2 SCR 236:** The Métis are not “Indians” for the purposes of the Natural Resources Transfer Agreements (1930) in the prairie provinces (see Period 7, above), and so their hunting, trapping, and fishing rights are not protected against provincial laws by those agreements.

***Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 SCR 511:** The Crown cannot disregard Aboriginal title and rights claims that have not yet been established by a judicial decision or a land claims agreement. The honour of the Crown obliges it to consult with Indigenous Peoples who make these claims and accommodate their interests in appropriate circumstances (in this case, before granting or renewing tree farm licences to harvest timber on Haida Gwaii). The extent of the duty to consult and accommodate depends on the strength of the claim and the potential impact of the Crown’s actions on it. Also, the Court said that “treaties serve to reconcile pre-existing Aboriginal sovereignty with assumed Crown sovereignty,”

thereby acknowledging that Aboriginal nations were sovereign prior to European colonization (see Period 1 above).

***Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] 3 SCR 550:** The Court applied *Haida Nation* but found that consultation with the Taku River Tlingit First Nation had been sufficient in relation to construction of an access road to a mining site.

***R. v. Marshall; R. v. Bernard*, [2005] 2 SCR 220:** The Mi’kmaq in Nova Scotia and New Brunswick were unable to prove Aboriginal title to sites where they had cut logs for commercial purposes. The Court decided that, to establish Aboriginal title, they had to prove exclusive physical occupation of the specific sites where the cutting had taken place. Exclusivity could be proven by showing that they were in control of the sites and could have excluded others had they chosen to do so. Unlike in *Delgamuukw v. British Columbia* (1997), the Court did not discuss the relevance of Indigenous law to proof of exclusive occupation. The Mi’kmaq were also unable to prove a treaty right to harvest logs for commercial purposes, as trade in logs had not been engaged in when the treaties relied on in *R. v. Marshall* (1999) were entered into in 1760-61.

***Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] 3 SCR 388:** Treaty 8 (1899) contains a provision guaranteeing the hunting, trapping, and fishing rights of the Indigenous parties, except on lands “taken up from time to time for settlement, mining, lumbering, trading or other purposes.” The Court held that, in taking up land for construction of a winter road in Wood Buffalo National Park in northern Alberta, the honour of the Crown required the Canadian government to consult with and accommodate the interests of the Mikisew Cree whose hunting and trapping rights would be affected. This important decision extended the duty to consult by making it a procedural requirement where treaty rights are concerned.

***R. v. Sappier; R. v. Gray*, [2006] 2 SCR 686:** The Mi’kmaq and Maliseet Nations in New Brunswick have an Aboriginal right, in

accordance with the *Van der Peet* test (1996), to harvest wood for domestic purposes such as building houses and making furniture for personal use. The Court rejected the notion that the test's integral requirement means that the practice, custom, or tradition must be a core aspect of their identity or a defining feature of their cultures so that their societies would be fundamentally altered without it. Instead, it is sufficient if the practice of harvesting wood was undertaken for survival purposes, as in this case. The Court found it unnecessary to decide whether there is also a treaty right to harvest wood for domestic purposes.

***R. v. Morris*, [2006] 2 SCR 915:** The Tsartlip Band of the Saanich Nation on Vancouver Island has a treaty right (Period 5 above) to hunt for food at night using lights, as long as this is done safely. This right can be exercised using modern equipment, such as rifles and electric lamps. Treaty rights are within the core of federal jurisdiction over “Indians, and Lands reserved for the Indians” in section 91(24) of the *Constitution Act, 1867* (Period 6 above), and so provincial laws cannot apply of their own force to infringe treaty rights to hunt for food. Nor can provincial laws of general application be referentially incorporated into federal law by section 88 of the Indian Act so as to infringe treaty rights, as section 88 explicitly subjects the application of provincial laws to treaties. In *Tsilhqot'in Nation v. British Columbia* (2014) and *Grassy Narrows v. Ontario (Natural Resources)* (2014), the Supreme Court decided that, to the extent that *R. v. Morris* held that Aboriginal and treaty rights are within the core of federal jurisdiction and therefore protected by the doctrine of interjurisdictional immunity, it should no longer be followed.

***Canada (Attorney General) v. Lameman*, [2008] 1 SCR 372:** The plaintiffs are descendants of Papaschase Band that adhered to Treaty 6 in 1877. Some of the band members took “scrip” (a certificate exchangeable for land that was issued to Métis in the prairie provinces) in 1886, and the band's reserve lands were surrendered to the Crown in 1889. The remaining members joined the Enoch Band but continued to be entitled to the money from the sale of the reserve lands that the

Crown held in trust. The plaintiffs alleged that the Crown had breached its treaty obligations by not providing sufficient reserve land and not providing farm implements and food during periods of famine. They also alleged that the consequences of taking scrip had not been explained and that the *Indian Act* requirements for surrender of reserve lands had not been followed. Breach of fiduciary duty for mismanaging the proceeds of sale of the reserve lands was also alleged. The Supreme Court decided that all the claims, except the claim for an accounting of the money received from sale of the reserve lands, were barred by the Alberta statute of limitations. The Court did not address the constitutional issues involved in the application of the provincial statute to the claims because notice of a constitutional question had not been given to the attorneys general of Canada and the provinces, as would have been required if constitutional issues had been raised.

***Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, [2010] 2 SCR 650:** A 2007 agreement between BC Hydro and Alcan to purchase hydro-electricity generated by a dam built in the Carrier Sekani territory in the 1950s did not trigger the Crown's duty to consult because the agreement did not have a new adverse impact on the Carrier Sekani's claimed Aboriginal rights. Where past, rather than current or proposed action, had an adverse impact, there is no present duty to consult. In that situation, the process should involve negotiation over compensation for construction of the dam without proper consultation at the time it was proposed and built. See also *Thomas and Saik'uz First Nation v Rio Tinto Alcan Inc.* (2022), involving the same dam.

***Quebec (Attorney General) v. Moses*, [2010] 1 SCR 557:** A company proposed to open a mine in an area subject to the James Bay and Northern Quebec Agreement (JBNQA) that had been entered into by the governments of Canada and Quebec with the Grand Council of the Crees (of Quebec) and the Northern Quebec Inuit Association in 1975. The question before the Court was whether, given the adverse impact the mine would likely have on fish habitat, the *Canadian Environmental Assessment Act* applied. The Court held that application of the Act was not excluded by

the JBNQA, but the review procedure under the Act had to be applied so as to fully respect the duty of the Crown to consult the Indigenous parties regarding the potential impact of the project on their treaty rights, in accordance with *Haida Nation v. British Columbia* (2004), *Taku River Tlingit First Nation v. British Columbia* (2004), and *Mikisew Cree First Nation v. Canada* (2005).

***NIL/TU,O Child and Family Services Society v. B.C. Government and Service Employees' Union*, [2010] 2 SCR 696:** The NIL/TU,O Child and Family Services Society is a First Nation organization that provides child and family services to seven First Nations in British Columbia. The B.C. Government and Service Employees' Union applied to the B.C. Labour Relations Board for certification as the bargaining agent for NIL/TU,O's employees. NIL/TU,O opposed provincial certification, arguing that its labour relations come under federal jurisdiction over "Indians" (*Constitution Act, 1867*, s. 91(24)). The Supreme Court decided that child welfare is presumptively under provincial jurisdiction. Applying a functional test, the majority held that the nature, operations and activities of NIL/TU,O are essentially in relation to child and family services and are not sufficiently federal to rebut the presumption of provincial jurisdiction. As the case could be decided on this basis, it was not necessary to decide whether child and family services are within the core of federal jurisdiction. The concurring minority thought the issue of the core of federal jurisdiction had to be addressed and that the functional test applied to determine whether the activities of NIL/TU,O are within that core. The minority judges were of the opinion that the child and family services in question are not within the core and so the provincial legislation applied. The entire Court therefore agreed that the certification under the BC legislation should be upheld.

***Communications, Energy and Paperworkers Union of Canada v. Native Child and Family Services of Toronto*, [2010] 2 SCR 737:** Native Child and Family Services of Toronto provides child and family services to Indigenous families in Toronto. The Union applied to the

Canada Industrial Relations Board for certification as the bargaining agent for most of the organization's employees. The Supreme Court *applied* *NIL/TU,O Child and Family Services Society v. B.C. Government and Service Employees' Union* (2010) and decided that the activities of the organization come under provincial jurisdiction and so the Union could not be certified under federal law.

***Beckman v. Little Salmon/Carmacks First Nation*, [2010] 3 SCR 103:** A land claims agreement entered into by Little Salmon/Carmacks, Canada, and the Yukon Government in 1997 provides for continuing hunting and fishing rights, subject to Yukon's power to take up lands for agriculture and other purposes. In 2004, the Yukon Government approved a grant of 65 hectares of land to a Yukon resident for agricultural purposes. The Supreme Court held that, even where a modern-day treaty makes some provision for consultation, the broad duty to consult arising from the honour of the Crown continues. The Yukon Government therefore had a duty to consult before making the grant, but on the facts in this case the duty had been met.

***West Moberly First Nations v. British Columbia (Chief Inspector of Mines)*, 2011 BCCA 247:** British Columbia issued amended permits to a coal company, authorizing it to extend exploratory work for mining within the traditional territory of the West Moberly First Nations, parties to Treaty 8 (1899). The petitioners alleged that the work would negatively impact their treaty right to hunt caribou and that they had not been adequately consulted. The province argued that judicial review was not the proper procedure for challenging the permits, but the BC Court of Appeal disagreed, citing *Beckman v. Little Salmon/Carmacks First Nation* (2010) in support. The court also decided that the trial judge was entitled to take into account the impact of past decline of the caribou herd. *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council* (2010) was distinguishable on the facts, as the challenged Crown action in that case would not have any new adverse impact on the claimed rights. The potential impact of expanded mining, if the exploratory work authorized by the permits recommended it, could also be considered. The court held that the

consultation engaged in by the government officials had not been meaningful and reasonable, in part because they failed to understand or appreciate the nature of the constitutional hunting rights of the petitioners. The court “stayed” the permits (put them on hold) and ordered that the parties engage in meaningful consultation in accordance with the court’s reasons.

***Alberta (Aboriginal Affairs and Northern Development) v. Cunningham*, [2011] 2 SCR 670:**

The claimants, who were members of a Métis settlement in Alberta, registered as status Indians under the *Indian Act* to get medical benefits. As a result, their membership in the Métis settlement was revoked, as the *Alberta Metis Settlements Act* does not permit status Indians to be members of a Métis settlement. The claimants argued that this denial of membership is unconstitutional because it violates the *Charter of Rights and Freedoms’* guarantees of equality (s. 15(1)), freedom of association (s. 2(d)), and liberty (s. 7). The Supreme Court upheld the constitutionality of the challenged statutory provision and dismissed the claim. The *Metis Settlements Act*, including the challenged provision, is ameliorative legislation intended to benefit the Métis people of Alberta by preserving and enhancing their identity, culture, and self government through the establishment of a land base for them. It qualifies under section 15(2) of the *Charter* as a law “that has as its object the amelioration of conditions of disadvantaged individuals or groups” and so does not offend the equality rights guarantee in section 15(1). Nor is section 7 violated, as it had not been shown that any impact on the claimants’ liberty was contrary to fundamental justice, as is required by that section. The section 2(d) argument was not dealt with because the Court found there was not an adequate basis in the record to assess that claim.

***Lax Kw’alaams Indian Band v. Canada (Attorney General)*, [2011] 3 SCR 535:**

The Lax Kw’alaams and other First Nations claimed an Aboriginal right to harvest all species of fish commercially from their traditional waters between the estuaries of the Nass and lower Skeena rivers in British Columbia. The evidence revealed that, although the

plaintiffs engaged in some pre-contact exchange of various species of fish and other seafood, the only product from the sea that they traded commercially as an integral part of their distinctive culture was the grease from eulachon, a smelt like species. The Supreme Court held that commercial trade in eulachon grease could not be a basis for a broader right to trade any species of fish. There was a lack of continuity and proportionality between a commercial practice of trading eulachon grease and trading other fish. This decision, along with *R. v. Van der Peet* (1996), demonstrates the difficulty Indigenous Peoples have in establishing Aboriginal commercial rights beyond specific and limited species. See also *R. v. Gladstone* (1996, herring spawn on kelp) and *R. v. Sappier; R. v. Gray* (2006, harvesting wood for domestic purposes, but not for trade or sale). Compare *Ahousaht Indian Band and Nation v. Canada (Attorney General)* (2011-2018).

***Manitoba Metis Federation Inc. v. Canada (Attorney General)*, [2013] 1 SCR 623:**

The *Manitoba Act, 1870* contains two provisions (ss. 31 and 32) that were supposed to ensure that the Métis had a land base in the province created by the statute. Section 31 provided that 1,400,000 acres of land in the province be distributed among the children of the Métis heads of family. The government of Canada was not only extremely slow in fulfilling this obligation, but also substituted the issuance of scrip (a piece of paper, exchangeable for land, that became marketable) for grants of land. As a result, many of the Métis children either did not receive or lost the land they were entitled to. The Supreme Court did not find that the Crown owed fiduciary obligations to the Métis in this context, but did find that the honour of the Crown had not been lived up to, and issued a declaration to that effect.

***Behn v. Moulton Contracting Ltd.*, [2013] 2 SCR 227:**

This case involved a private tort action brought by a forestry company against individuals of the Fort Nelson First Nation who had blocked the company’s access to logging sites. The defendants alleged that the company’s provincial timber harvesting licences were void because they had been issued in violation of their Treaty 8 rights and the Crown’s duty to consult. The Supreme Court

held that, while Aboriginal and treaty rights are generally collective, individuals may be able to assert them in appropriate circumstances. However, in this case the evidence did not reveal that the First Nation had authorized the defendants to challenge the validity of the licences. Moreover, it was an abuse of process for the defendants to challenge the licences' validity at this late stage. Instead, the First Nation or authorized individuals should have challenged the licences' legality when the Crown granted them. The company's motion to strike the defences based on treaty rights and the duty to consult was granted.

***Sga'nism Sim'augit (Chief Mountain) v. Canada (Attorney General)*, 2013 BCCA 49:** Like *Campbell v. British Columbia* (2000), this case involved a challenge to the constitutional validity of the self-government provisions in the Nisga'a Final Agreement (2000). The trial judge followed *Campbell* out of comity, acknowledging that the Nisga'a Nation has an inherent right of self-government that is defined by the Agreement, but also decided that these provisions could be upheld as constitutionally-valid delegated authority. The BC Court of Appeal found that the governance provisions are valid as delegated authority without addressing the inherent right issue.

***Tsilhqot'in Nation v. British Columbia*, [2014] 2 SCR 256:** The Tsilhqot'in Nation sought a declaration of their Aboriginal title to and other Aboriginal rights over a portion of their traditional territory west of Williams Lake in British Columbia. After a lengthy trial, Justice Vickers of the BC Supreme Court found that the nation's Aboriginal rights to hunt, fish, gather, and capture wild horses had been established. He also found that they had met the *Delgamuukw* test (1997) for title (exclusive occupation at the time of Crown assertion of sovereignty in 1846) for part of the claim area, but he declined to issue a declaration of title because of a defect in the pleadings (the area over which title had been proven was not the whole claim area). The BC Court of Appeal was willing to overlook that defect, but decided that Justice Vickers had applied the wrong test: the test for Aboriginal title is site-specific (see *R. v. Marshall*; *R. v. Bernard*, 2005), and not territorial

as Justice Vickers thought.

On appeal, the Supreme Court issued a declaration of title over the area where Justice Vickers found that the requisite exclusive occupation had been established. In doing so, the Court took a territorial approach. It also decided that the standard for proving Aboriginal title is less than the standard for proving adverse possession. It affirmed the Court's decision in *Delgamuukw v. British Columbia* (1997) that Aboriginal title entails the entire beneficial interest in the land, so the Crown's underlying title has no beneficial content whatsoever.

The Court also said that properly drafted provincial legislation could infringe Aboriginal title if justified under the *Sparrow* test (1990, Period 9 above), even though Parliament has exclusive jurisdiction over "Indians, and Lands reserved for the Indians" (*Constitution Act, 1867*, s. 91(24)). In so doing, the Court decided that Aboriginal rights are no longer within the core of that federal jurisdiction and so are not protected against provincial laws by the doctrine of interjurisdictional immunity (see *Delgamuukw* and *R. v. Morris*, 2006), where the Court had come to the opposite conclusion).

***Grassy Narrows First Nation v. Ontario (Natural Resources)*, [2014] 2 SCR 447:** The Grassy Narrows First Nation (GNFN) is descended from Ojibway parties to Treaty 3 (1873) in northwestern Ontario. The Treaty provides that the Indigenous parties have the "right to pursue their avocations of hunting and fishing throughout the tract surrendered ..., saving and excepting such tracts as may, from time to time, be required or taken up for settlement, mining, lumbering or other purposes by Her said Government of the Dominion of Canada, or by any of the subjects thereof duly authorized therefor by the said Government." The GNFN argued that this provision meant that lands could not be taken up by the government of Ontario without the authorization of the Canadian government. The Supreme Court disagreed. In the *St. Catherine's Milling and Lumber* case (1888, Period 6 above), the Privy Council held that the lands surrendered by Treaty 3 that are within Ontario belong to the Crown in right of the province. The Court in *Grassy Narrows* said that this meant the province could take up lands without the participation of the Canadian government.

Treaty 3 was with the Crown, not just with Canada, so both the province and Canada are bound by and benefit from it. The doctrine of interjurisdictional immunity does not apply to prevent the province from infringing treaty rights, if the infringement can be justified in accordance with the *Sparrow* case (1990), as decided in *Tsilhqot'in Nation v. British Columbia* (2014). However, before taking up lands, the province must consult with First Nations whose treaty rights will be negatively affected, as held in *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)* (2005).

***Daniels v. Canada (Indian Affairs and Northern Development)*, [2016] 1 SCR 99:** The Supreme Court finally addressed the outstanding issue of whether the Métis are “Indians” within the meaning of that term in section 91(24) of the *Constitution Act, 1867* (“Indians, and Lands reserved for the Indians”), and decided that they are. This means that the Métis, like First Nations and Inuit, are under federal jurisdiction. However, due to the Supreme Court’s rejection of the doctrine of interjurisdictional immunity in relation to section 91(24) in *Tsilhqot'in Nation v. British Columbia* (2014) and *Grassy Narrows v. Ontario (Natural Resources)* (2014), the Aboriginal rights of the Métis can be infringed by provincial legislation if the infringement can be justified.

***Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations)*, [2017] 2 SCR 386:** A private company, Glacier Resorts, proposed to construct a ski resort in the East Kootenays in an area the Ktunaxa Nation claims as part of its traditional territory. After consultation with the Ktunaxa and the Shuswap, the provincial minister approved the project. The Shuswap were satisfied with this decision, but the Ktunaxa were not because they thought the project would cause the Grizzly Bear Spirit, Kławta Tuktułakʔis, to leave the region, thereby impairing an essential aspect of their spiritual beliefs. The Ktunaxa commenced an action for judicial review of the minister’s decision, claiming inadequate consultation and violation of their freedom of religion under section 2(a) of the *Charter of Rights and*

Freedoms. The Supreme Court decided that the minister’s decision that the Crown’s duty to consult had been met, as required by section 35(1) of the *Constitution Act, 1982* (see *Haida Nation v. British Columbia*, 2004), was reasonable. A majority of the Court also decided that the Ktunaxa’s freedom of religion had not been violated because their freedom to hold and manifest their spiritual beliefs would not be impaired by the minister’s decision.

***Clyde River (Hamlet) v. Petroleum Geo Services Inc.*, [2017] 1 SCR 1069:** A group of companies (the proponents) applied to the National Energy Board (NEB), a federal statutory body, for approval of seismic testing for oil and gas off the east coast of Baffin Island in Nunavut. The Inuit of Clyde River have treaty rights under the *Nunavut Land Claims Agreement* (1993) to harvest marine mammals in the waters where the testing would take place. After consultation with the Inuit communities concerned, the NEB approved the project. The Hamlet of Clyde River brought an application for judicial review, asserting their opposition to the seismic testing and claiming inadequate consultation. The Supreme Court decided that the consultation and proposed accommodation measures were inadequate, given the cultural significance of the marine mammals to the Inuit, their importance as a source of food and of materials for clothing, and the potential risks of the seismic testing for the treaty rights. The Court quashed the NEB’s authorization of the seismic testing.

***Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.*, [2017] 1 SCR 1099:** Enbridge proposed changes to, including increasing the flow of, its pipeline in southern Ontario that crosses the traditional territory of the Chippewas of the Thames First Nation. The Chippewas claim Aboriginal title, Aboriginal harvesting rights, and treaty rights in the area. The National Energy Board (NEB), a federal statutory body, approved the project, after hearing the concerns of the Chippewas and other Indigenous groups and taking them into account. The Chippewas appealed this decision to the Federal Court of Appeal, alleging inadequate consultation and accommodation. That court decided that the Chippewas had been given an adequate opportunity to participate in the

decision-making process, that the impact on their claimed rights would be minimal, and that the NEB had imposed appropriate mitigation measures on Enbridge. The Supreme Court affirmed this decision. The Court decided that a statutory body, such as the NEB, acts for the Crown and is subject to the Crown's duty to consult. As long as that body has the statutory powers necessary to fulfil the constitutional duty to consult and meets that obligation adequately, the Crown's duty to consult will be met, as it was in this case.

***First Nation of Nacho Nyak Dun v. Yukon*, [2017] 2 SCR 576:** The plaintiff First Nations entered into Final Agreements (modern-day treaties) with Yukon and Canada to implement the Yukon Umbrella Final Agreement (YUFA). The Agreement established a land use process that was adopted in the Final Agreements. Yukon and the First Nations participated in a lengthy process to develop a land use plan for the Peel watershed, after which an independent commission released a final recommended land use plan. Yukon then adopted a final plan with substantial changes to increase development of the region. The First Nations challenged this plan by way of judicial review. The Supreme Court quashed Yukon's final plan because, under the Final Agreements, Yukon lacked the authority to make such extensive changes. Although the Final Agreements authorize Yukon to make modifications to a final recommended plan, these modifications can only be partial or minor. The Court wrote that "Yukon can only depart from positions it has taken earlier in the process in good faith and in accordance with the honour of the Crown" and that the effect of quashing Yukon's final plan "was to return the parties to the stage in the land use plan approval process where Yukon could 'approve, reject or modify' the Final Recommended Plan after consultation."

***Ahousaht Indian Band and Nation v. Canada (Attorney General)*, 2009 BCSC 1494, 2011 BCCA 237, 2011 SCC 56, [2011] 3 SCR 535, 2013 BCCA 300, 2018 BCSC 633, 2021 BCCA 155:** The Ahousaht and four other nations of the Nuu-chah-nulth people on the west coast of Vancouver Island claimed an Aboriginal right to catch and sell any

species of fish commercially. At trial, Justice Garson decided that they have an Aboriginal right to catch and sell any species of fish and that this right was being infringed by federal fisheries laws. The BC Court of Appeal affirmed this decision, but excluded geoduck clams from the right. In a subsequent trial, the issue was whether the infringements were justified. Justice Humphries decided that some infringements were unjustified, but at the same time she redefined and limited the right to fish commercially. The BC Court of Appeal held that she should not have redefined the right, and modified aspects of her judgment regarding infringement and justification with respect to specific species of fish.

***Beaver v. Hill*, 2018 ONCA 816:** Ms. Beaver applied to court for custody of the child of her relationship with Mr. Hill and for spousal and child support. They are both Haudenosaunee from the Six Nations. Mr. Hill challenged the jurisdiction of the Ontario Superior Court of Justice and the applicability of relevant provincial family law legislation, claiming that he had an Aboriginal and treaty right to have the matter resolved through Haudenosaunee governance processes and law. The Ontario Court of Appeal held that the Superior Court has jurisdiction to try the matter, but noted that the claim that Haudenosaunee procedure and law displaced the provincial legislation raised an important constitutional issue that would need to be addressed at trial. The Court of Appeal also decided that Mr. Hill had standing to raise the constitutional issue. There is no final decision in the case, as it has been bogged down in what one appeal judge described as "a procedural morass".

***Williams Lake Indian Band v. Canada (Aboriginal Affairs and Northern Development)*, [2018] 1 SCR 83:** The Williams Lake Indian Band filed a claim with the Specific Claims Tribunal for compensation for the loss of their village lands near Williams Lake, BC, that had been illegally pre-empted by settlers. The Tribunal decided that the Crown had breached its fiduciary obligations to the Band in relation to the village lands both before and after British Columbia joined Confederation in 1871. Canada applied for judicial review. A majority of the Supreme Court of Canada decided that the Tribunal had acted reasonably in reaching its deci-

sion, and upheld the Tribunal’s order that Canada pay compensation, with the amount to be determined in subsequent proceedings.

***Mikisew Cree First Nation v. Canada (Governor General in Council)*, [2018] 2 SCR 765:** Omnibus legislation that would alter environmental protection was introduced in Parliament in 2012. The Mikisew Cree applied to the Federal Court for judicial review, arguing that they should have been consulted during the development of the legislation because it could have a negative impact on their Treaty 8 rights to hunt, trap and fish (see *Mikisew Cree v. Canada (Minister of Canadian Heritage)*, 2005). The Supreme Court decided that the Federal Court, a statutory court whose jurisdiction is defined by the *Federal Court Act*, lacked jurisdiction to hear the application. The Court also decided that the Crown’s duty to consult is limited to the context of executive action. It does not apply to the legislative process, including the development of legislation before its introduction into Parliament. Application of the duty to consult to the legislative process would interfere with parliamentary sovereignty, parliamentary privilege, and the separation of powers between the legislative, executive, and judicial branches of government. However, if the effect of legislation once enacted would be to infringe Aboriginal or treaty rights, it could be challenged in accordance with the *Sparrow* decision (1990).

***Pastion v. Dene Tha’ First Nation*, 2018 FC 648:** This case involved an application for judicial review of a decision by the Dene Tha’ First Nation’s Election Appeal Board (EAB), upholding the election of chief. The plaintiff, who lost the election, alleged that one of the candidates had not been qualified to run for chief because he was not ordinarily resident on one of the Nation’s reserves, and that the votes received by that candidate were more than the difference between his own votes and those obtained by the victor. The EAB decided that the ineligibility challenge should have been made earlier and that, in any case, the outcome of the election would not have been different if that candidate had not been permitted to run. Significantly, on judicial review by the Federal Court, Justice Grammond stated that “Indigenous legal

traditions are among Canada’s legal traditions. They form part of the law of the land.” Moreover, he noted that courts should pay deference to Indigenous decision-makers when reviewing their decisions. As he found the decision of the EAB to be reasonable, he dismissed the application for judicial review.

***Coastal GasLink Pipeline Ltd. v. Huson*, 2019 BCSC 2264:** The plaintiff company obtained government permits to construct a natural gas pipeline from near Dawson Creek, BC, to a liquefied natural gas export facility to be built near Kitimat on the coast. The defendants were members of the Wet’suwet’en Nation and their supporters who oppose construction of the pipeline through Wet’suwet’en territory. They were blocking an access road to a construction site. The plaintiff sought an interlocutory injunction against the defendants. The defendants asserted that they were acting to prevent violations of Wet’suwet’en law. The BC Supreme Court granted the interlocutory injunction. Justice Church stated that, “[a]s a general rule, Indigenous customary laws do not become an effectual part of Canadian common law or Canadian domestic law until there is some means or process by which the Indigenous customary law is recognized as being part of Canadian domestic law, either through incorporation into treaties, court declarations, such as Aboriginal title or rights jurisprudence or statutory provisions.” She found that there was insufficient evidence of the “Indigenous legal perspective”, and concluded that the requirements for granting the injunction had been met.

***Newfoundland and Labrador (Attorney General) v. Uashaunnuat (Innu of Uashat and of Mani Utenam)*, 2020 SCC 4:** Two Innu First Nations started an action against two mining companies in the Quebec Superior Court. They alleged that they have Aboriginal title and other Aboriginal rights in the area of the mines, which are located in Quebec and Labrador. The sole issue before the Supreme Court was whether the Quebec Superior Court has jurisdiction to decide the Innu’s Aboriginal title claim, given that it extends into Labrador. A majority of the Supreme Court held that the Superior Court does have jurisdiction because, given the *sui generis* nature of Aboriginal title, it is not a “real right” within the meaning of that

term in Art. 3152 of the *Civil Code of Québec*. However, it appears that the action will not proceed to trial because the parties settled.

***Coldwater First Nation v. Canada (Attorney General)*, 2020 FCA**

34: The Trans Mountain Pipeline transports crude oil from Edmonton to the Lower Mainland in British Columbia. The National Energy Board (NEB) recommended acceptance of a proposal to twin the pipeline, after which the Governor in Council (GC) approved the project. Several First Nations challenged the GC's decision by requesting judicial review. In *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2018 FCA 153, the Federal Court of Appeal decided that the NEB erred in excluding tanker traffic from the scope of the project, rendering its recommendation unreliable. Also, the court held that Canada had not adequately fulfilled its duty to consult with First Nations. The order-in-council approving the project was quashed and the matter returned to the GC for prompt redetermination. After further consultation with First Nations, the GC once again approved the project. Coldwater and three other First Nations again applied for judicial review. On this second application, the Federal Court of Appeal decided that the standard of review of the GC's approval was reasonableness rather than correctness because the scope of the duty to consult was not in issue. After examining the consultation process and considering the applicants' arguments, it decided that the GC's decision to approve the project was reasonable. The application for judicial review was therefore dismissed. The Supreme Court of Canada refused leave to appeal.

***R. v. Desautel*, 2021 SCC 17:** Richard Desautel, a member of the Lakes Tribe of the Colville Confederated Tribes in Washington State in the United States, entered Canada legally and shot an elk near Castlegar, BC. The Lakes Tribe is a successor of the Sinixt people, whose traditional territory includes the place where the elk was killed. The main issue in the case was whether the members of an Indigenous group resident in the United States can have an Aboriginal right to hunt in their traditional territory in Canada, even though they aren't

citizens of Canada and do not live in Canada. The Supreme Court of Canada decided that "aboriginal peoples of Canada" in section 35(1) of the *Constitution Act, 1982* does include peoples with traditional territory in Canada who, after the creation of the international border, have lived in the United States for generations. Their Aboriginal right to hunt in Canada was not lost, even though it had not been exercised for many years.

***Dickson v. Vuntut Gwitchin First Nation*, 2021 YKCA 5:** The plaintiff is a member of the Vuntut Gwitchin First Nation (VGFN). The VGFN's constitution provides that members of the VGFN Council must reside on the Nation's Settlement Land, which the plaintiff does not. She lives and works in Whitehorse, where her son needs to be near the full-service hospital. She wanted to run for Council and challenged the residency requirement on the basis that it violates her equality rights in section 15(1) of the *Charter of Rights and Freedoms*. The Yukon Court of Appeal decided that the *Charter* applies to the residency requirement, as it is a "law" within the meaning of section 32 of the *Charter*. The residency requirement infringed the plaintiff's section 15(1) rights by discriminating against her because she does not live on the settlement land (*Corbiere v. Canada*, 1999). It was unnecessary to decide whether the infringement could be justified under section 1 of the *Charter* because section 25 shielded the residency requirement from section 15(1). The residency requirement was therefore upheld. The court discussed but left unresolved the issue of whether the VGFN's governance authority is inherent or derived from the VGFN's self-government agreement and the *Yukon First Nations Self-Government Act*, S.C. 1994, c. 35. This case is currently on appeal to the Supreme Court of Canada.

***Southwind v. Canada*, 2021 SCC 28:** In the 1920s, a hydroelectric dam was built at the outlet of Lac Seul in northwestern Ontario, raising the level of the lake by about three metres. This caused extensive, permanent flooding to the Lac Seul First Nation's (LSFN) reserve that had been set aside pursuant to Treaty 3 (1873), destroying homes, gardens, haylands, wild rice fields, and grave sites. The LSFN did not consent to this unlawful destruction and only received inadequate compensation years later. The

LSFN brought an action in the Federal Court seeking compensation for breach of the Crown's fiduciary, treaty, and *Indian Act* obligations. The trial judge decided that the Crown had breached its fiduciary obligations and awarded equitable damages based on the value of the land in the 1920s, excluding its value for hydroelectricity generation. An appeal to the Supreme Court on the quantum of damages was successful. The Court sent the case back to the Federal Court to determine equitable compensation based on the value of the land for hydroelectricity generation.

***Restoule v. Canada (Attorney General)*, 2018 ONSC 7701, 2020 ONSC 3932, 2021 ONCA 779:** In 1850, the Anishinaabe entered into the Robinson-Superior and Robinson-Huron treaties with the Crown. Among other things, those treaties provided for payment by the Crown of annuities, the amount of which was to be increased if the value of the revenue the Crown received from the ceded territories permitted it. Only one increase in the annuities was ever made, in 1875. The plaintiff First Nations claimed that, given the value of the resources taken from the land since 1850, the annuity payments should have been increased over time. The trial judge agreed and decided that the Crown had to engage in a consultative process to determine the revenues it had received from the lands, and then pay an increased "fair share" amount if the revenues would permit it without the Crown incurring loss. The trial judge also decided that Crown immunity and limitations statutes did not bar the claims. The Ontario Court of Appeal decided that it did not need to address Crown immunity, as it rejected the trial judge's opinion that the Crown owed fiduciary obligations in implementing the annuity augmentation clause. The Court of Appeal upheld the trial judge's decision on limitations, and substantially affirmed her decision on the issue of the increase in the annuities, while replacing her "fair share" approach with a ruling that "the honour of the Crown obliges the Crown to increase the annuities as part of its duty to diligently implement the Treaties." The amount of compensation to be paid has yet to be determined.

***Yahey v. British Columbia*, 2021 BCSC 1287:** The ancestors of the Blueberry River First Nations (BRFN) adhered to Treaty 8 in 1900. The treaty provides that they have continuing hunting, trapping and fishing rights throughout the treaty territory, except on lands taken up for settlement, mining, lumbering, trading, or other purposes. The province of British Columbia has been taking up lands for industrial purposes for many years, significantly diminishing the area available for the BRFN to exercise their treaty rights. The BC Supreme Court held that the province had infringed the treaty rights by taking up lands to such an extent that there were no longer sufficient lands left for the BRFN to meaningfully exercise their treaty rights. The province had not justified the infringement, nor had it responded to the BRFN's concerns, as required by the honour of the Crown and its fiduciary obligations. The court declared that the "Province may not continue to authorize activities that breach the promises included in the Treaty, including the Province's honourable and fiduciary obligations associated with the Treaty, or that unjustifiably infringe Blueberry's exercise of its treaty rights." The court also declared that the parties must act diligently to establish enforcement mechanisms so the cumulative impact of industrial development on the treaty rights can be assessed and managed and to ensure the constitutional rights of the BRFN are respected. This decision was not appealed.

***Saugeen First Nation v. The Attorney General of Canada*, 2021 ONSC 4181:** The Saugeen First Nation and the Chippewas of Nawash Unceded First Nation claim that the Crown breached their treaty rights by not protecting their lands on the Bruce Peninsula in what is now Ontario from encroachment by settlers. The trial judge agreed and also found that the honour of the Crown had been breached in negotiation of one of the plaintiffs' treaties and that the plaintiffs have continuing harvesting rights on surrendered lands not put to incompatible use. The plaintiffs also claim that they have Aboriginal title to the lakebed surrounding and south of the Bruce Peninsula. The judge dismissed this claim, finding that the test for Aboriginal title had not been met and that such a right would be incompatible with Crown sovereignty and the public right of navigation. This case is currently on appeal to the Ontario Court of Appeal.

Thomas and Saik'uz First Nation v Rio Tinto Alcan Inc., 2022

BCSC 15: In 1952, the Aluminum Company of Canada, with authorization from British Columbia, built a hydroelectric dam on the Nechako River, diverting a large part of the flow (see also *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010, involving the same dam). The plaintiff First Nations claim Aboriginal rights and title in the Nechako watershed. They were not consulted and did not consent to construction of the dam, which has negatively impacted their fishing rights and their way of life. They brought this action against Rio Tinto, the successor of the Aluminum Company of Canada, for nuisance and interference with their riparian rights (rights of access to and use of water from waterways). Justice Kent made a number of findings in the plaintiffs' favour: that they met the requirements for Aboriginal title to their reserves bordering the Nechako and its tributaries (though, because other First Nations had overlapping claims, he did not issue a declaration of title); that they have Aboriginal rights to fish for food, societal, and ceremonial purposes in the Nechako River system; that the dam has had huge negative impacts on their fisheries and communities; that their Aboriginal fishing rights are a sufficient basis for a nuisance action in appropriate circumstances; and that the honour of the Crown imposes an obligation on the provincial and federal governments to protect their constitutional fishing rights. He also questioned how the Crown could have acquired sovereignty over and underlying title to Indigenous lands, simply by assertion: "Some argue, in my view correctly, that the whole construct is simply a legal fiction to justify the *de facto* seizure and control of the land and resources formerly owned by the original inhabitants of what is now Canada." However, he thought he had to acknowledge the reality of Crown sovereignty and follow precedents of the Supreme Court of Canada, even though they relied on the discredited doctrine of discovery. At the end of the day, he declined to find, due to inadequate evidence, that the plaintiffs have Aboriginal title to submerged lands adjacent to their reserves or that they have riparian rights. Moreover, their tort claim in nuisance was dismissed because the company had statutory authority from the province to construct the dam. Justice Kent did not

think that the doctrine of "constitutional inapplicability" applied to the nuisance claim against the company: "If actions authorized by government (whether through unconstitutional legislation, licences, or agreements, or a combination of all of these) result in harm to the plaintiffs' rights, only government must answer for that." As the plaintiffs had not claimed damages against the federal or provincial governments, the only remedy granted by the court was a declaration that those governments have a constitutional obligation to protect the plaintiffs' fishing rights, which they had not done. Justice Kent thought that, for this obligation to be met, the flow of the river had to be modified, but given his lack of expertise in regard to this matter, he did not give directions on what needed to be done to meet the obligation, nor was he willing to retain supervisory jurisdiction over implementation of a new flow regime for the river.

***Reference to the Court of Appeal of Quebec in relation with the Act respecting First Nations, Inuit and Métis children, youth and families*, Quebec CA, 2022 QCCA 185, English summary at <https://courdappel-quebec.ca/en/judgments/details/reference-to-the-court-of-appeal-of-quebec-in-relation-with-the-act-respecting-first-nations-inuit/>:** In this reference, the Attorney General of Quebec challenged the constitutionality of the federal *Act respecting First Nations, Inuit and Métis children, youth and families*, S.C. 2019, c. 24, which came into force on 1 January 2020. This statute acknowledges that the Aboriginal peoples of Canada have an inherent right of self-government, which includes jurisdiction over child and family services, that is recognized and affirmed by section 35(1) of the *Constitution Act, 1982*. The Court of Appeal rejected Quebec's contention that this federal statute is beyond the jurisdiction of Parliament. The Act's pith and substance, the court said, is to ensure the well-being of Indigenous children, and this is clearly within Parliament's jurisdiction over "Indians" in section 91(24) of the *Constitution Act, 1867*. The Court also decided that the Act does not amend the Constitution by acknowledging the inherent right of self-government because that right is already an Aboriginal right within section 35(1). Moreover, at least in relation to child and family services, this right is generic. The constitutional validity of the

Act was therefore upheld, with the exception of two provisions. Section 21, which provides that legislation in relation to child and family services enacted by an Indigenous governing body has “the force of law as federal law”, was held to be unconstitutional because it purports to apply the doctrine of federal paramountcy to Indigenous laws enacted under the inherent right of self-government. Likewise, subsection 22(3), which also attempts to give Indigenous laws in relation child and family services absolute priority over provincial laws, is *ultra vires* and therefore invalid. However, for provincial laws to override Indigenous child and family services laws, the province would have to justify this under the *Sparrow* (1990) test because it would amount to an infringement of the Indigenous right of self-government that is protected by section 35(1). This means that, in the absence of justifiable infringement, the constitutional status of this right makes Indigenous laws paramount over provincial laws relating to child and family services. It would appear to follow from this that Indigenous laws in other areas as well could also be paramount to provincial laws. This decision is on appeal to the Supreme Court.

Anderson v. Alberta, 2022 SCC 6: The Beaver Lake Cree Nation, a Treaty 6 (1876) First Nation in Alberta, commenced an action alleging that the taking up of treaty lands by the province for resource and industrial development has compromised the First Nation’s ability to pursue its traditional way of life (see also *Yahey v. British Columbia*, 2021). In the current action, the plaintiffs seek an advance costs order to finance the litigation. The case management judge granted advance costs, but the Alberta Court of Appeal overturned that decision because, in its opinion, the First Nation did not meet the advance costs requirement of impecuniosity because it had sufficient financial resources to fund the litigation, but chose to use them for other pressing needs of the community. Impecuniosity, along with a *prima facie* case and a matter of public interest, is an essential requirement for an advance costs order. The Supreme Court unanimously allowed the appeal, but sent the matter back to the Court of Queen’s Bench to decide if the test for impecuniosity the Court laid down could be met.

The Supreme Court ruled that an advance costs application can be successful even though a First Nation has funds that it chooses to use for other pressing community needs such as housing, clean water, health, education, and social services. However, evidence has to be presented of those pressing needs, the resources needed to meet them, the First Nation’s assets and income, and the estimated cost of the litigation. The case management judge made her decision on an inadequate factual basis, which is why the matter was sent back to the lower court. The Supreme Court stressed that judges, in exercising their discretion in deciding whether to issue advance costs orders, should respect Indigenous self-government and the perspective of First Nations in establishing priorities for their communities. Additionally, court decisions should promote reconciliation and take account of the need for access to justice.



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