

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





centre for
**FIRST NATIONS
GOVERNANCE**

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The first nine chapters for this publication were prepared for the National Centre for First Nations Governance (NCFNG) by Professor Kent McNeil in March, 2007.

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The *Duty to Consult Aboriginal People* was prepared by NCFNG research staff. NCFNG supports First Nations as they seek to implement effective, independent governance. The Centre delivers nation rebuilding services to First Nation communities across Canada.

NCFNG is an independent service and research organization that is governed and staffed by experienced First Nation professionals.



Introduction

For thousands of years, the aboriginal people of what is now Canada organized themselves as sovereign nations, with what was essentially governmental jurisdiction over their lands, including 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 First Nations, 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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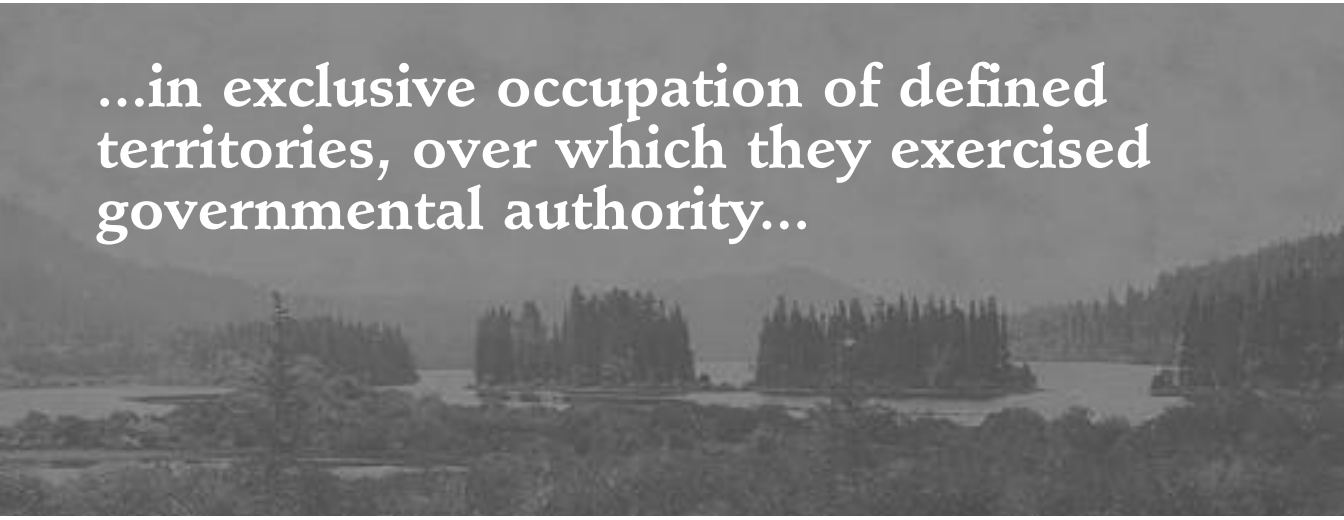
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PRE-CONTACT

Prior to the arrival of Europeans in North America, Aboriginal peoples were organized as sovereign nations. They had their own cultures, economies, governments, and laws. They were generally in exclusive occupation of defined territories, over which they exercised governmental authority (jurisdiction). They 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 the plants and animals who also lived there.

The inherent right of self-government that Aboriginal peoples have today in Canadian law comes from the sovereignty they exercised prior to contact with Europeans. It is inherent because it existed before European colonization and the imposition of Euro-Canadian law. Aboriginal rights to lands and natural resources are also inherent because they pre-date European colonization. They are communal rights that come from occupation and use of the land by Aboriginal peoples as sovereign nations.

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CONTACT to 1700

From European Contact to Peace and Friendship Treaties

The date of first European contact with Aboriginal peoples varied greatly in different parts of Canada, and is not always known. Contact usually had no impact on the pre-existing sovereignty and the territorial rights of the Aboriginal peoples. They continued to govern themselves and to enjoy the same rights to their lands and resources. When Europeans asked if they could establish fur trading posts or settlements, the Aboriginal peoples often gave them permission to do so. It is unlikely, however, that the Aboriginal 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 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 Aboriginal peoples and Europeans were initially commercial. For example, after the Hudson's Bay Company was created by Royal Charter in 1670, it established fur trading posts, first on Hudson and James Bays and later in the interior and on the West Coast. This was a period of generally mutual benefit and co-existence. However, the fur trade and the introduction of European tools and weapons, as well as exposure to new diseases, did affect Aboriginal ways of life and the political and diplomatic relations among the Aboriginal nations themselves.

1700 to 1763

From Early Treaty Relations to 1763

As it became apparent to the Aboriginal peoples that the Europeans intended to stay in North America, they sought to formalize their relationships with the newcomers by treaties of alliance, or peace and friendship. Before the arrival of the Europeans, Aboriginal 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). By that 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 Aboriginal peoples, the Mi'kmaq Nation.

By these treaties, the Aboriginal 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.



The French and Indian War and the Royal Proclamation of 1763

From 1754 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 Aboriginal peoples by prohibiting private persons from settling on or purchasing their lands. The Proclamation also created a formal process for transfer of Aboriginal lands to the Crown. Although the Proclamation purportedly applied to the Indian nations with whom the Crown was connected and who lived under the Crown's protection, its geographical scope has always been uncertain.

The defeat of the French and issuance of the Royal Proclamation heralded a major shift in British Indian policy. Because the Crown no longer needed the Aboriginal nations as allies against the French, it began to assert authority over them and their lands. Instead of regarding them as independent sovereigns to be dealt with on a nation-to-nation basis, as it had usually done in the past, the Crown began to treat them as subjects who were under the Crown's jurisdiction.

1763 to 1867

From the Royal Proclamation of 1763 to Confederation in 1867

After 1763, treaties between the Aboriginal 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 Aboriginal 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, the Aboriginal 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 peace and friendship treaties such as the 1664 Two-Row-Wampum Treaty.

In 1776, the Thirteen Colonies declared their independence from Britain. The resulting American Revolutionary War terminated in 1783 with the Treaty of Paris, whereby Britain acknowledged the independence of the United States and agreed upon the present international boundary from the Atlantic Ocean 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. For this purpose, it began to negotiate land cession treaties 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, Britain and the United States settled their 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 Strait of Georgia.



From 1849 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 treaties with some of the Aboriginal nations on Vancouver Island for acquisition of some of their lands. These treaties established reserves for these nations and guaranteed their hunting and fishing rights.

During this period, the Aboriginal nations were generally left to govern themselves internally in accordance with their own political structures and laws...

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), the Privy Council in London, England, decided that, while Parliament has exclusive jurisdiction over Indian lands, the underlying title to them 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. The lands are not available as a source of provincial revenue until this burden has been removed. In 1997 in *Delgamuukw v. British Columbia*, 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 1939, in *Re Term “Indians”*, the Supreme Court decided that the term “Indians” in section 91(24) includes the Inuit. The Court has not yet decided whether this term also includes the Métis, an issue it explicitly left open in 2003 in *R. v. Blais* (below).

By 1873, the four original Canadian provinces – Nova Scotia, New Brunswick, Quebec, and Ontario – had been joined by the admission of British Columbia (1871) and Prince Edward Island (1873). Rupert’s Land and the North-Western Territory to the north and west of Quebec and Ontario were also added to Canada in 1870, and the province of Manitoba was created out of them in the same year after the Métis insisted that their cultural, political, and land rights be respected.

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 legislation gave the Canadian government the legal authority to replace traditional Aboriginal 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 continued to exercise the inherent right of self-government in many communities, sometimes covertly.



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From 1871 to 1921, the federal government and the Aboriginal peoples entered into eleven numbered treaties in what are now the Prairie Provinces, north-eastern British Columbia, northern Ontario, and parts of the Yukon and North-West Territories. These treaties generally dealt 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 councils, to Aboriginal peoples who entered into treaties.

Apart from some adhesions to earlier treaties, the last treaties entered into during this period were the Williams Treaties in Ontario in 1923. In British Columbia, the only treaties were the Douglas Treaties on Vancouver Island in the 1850s and Treaty 8 in the north-eastern 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 to the *Indian Act* in 1927, making it illegal to raise money or pay lawyers for the purpose of pursuing an Indian claim. That effectively ended the period of historic treaty-making. In most of British Columbia, Aboriginal lands were taken and tiny reserves were created without Aboriginal consent.



1827 to 1969

From 1927 to the 1969 White Paper

The prohibition on pursuing land claims was removed when the *Indian Act* was amended in 1951. In 1960, status Indian 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 Aboriginal peoples would be transferred to the provinces. The White Paper was explicitly intended to assimilate Aboriginal peoples into Canadian society in the name of “equality”.

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

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1969 to 1982

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

Legal assertion of Aboriginal land rights was initiated by the Nisga'a Nation in *Calder v. Attorney-General of British Columbia*, decided by the Supreme Court of Canada in 1973. For the first time, the Court decided that Aboriginal title is a legal right to land that does not depend on the Royal Proclamation of 1763. However, the Court split evenly on whether Aboriginal title had been legislatively extinguished in British Columbia prior to the province joining Canada in 1871.

The *Calder* decision caused the federal government to reassess the policy of refusing to recognize Aboriginal land rights that it had generally followed since the late 1920s. Soon after that court decision it created the 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 to be negotiated. It also set up a specific claims process to deal with past violations of treaty rights, unlawful taking of reserve lands, and other matters.

When patriation of the Canadian Constitution and inclusion of the *Charter of Rights and Freedoms* came to dominate the political agenda in the late 1970s, Aboriginal leaders lobbied for constitutional recognition of Aboriginal and treaty rights. This was accomplished by the inclusion of section 35(1) in the *Constitution Act, 1982*, which reads: "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed." Section 35(2) defines the Aboriginal peoples of Canada as including the "Indian, Inuit and Métis peoples".

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

Articles of a Treaty made and entered as aforesaid on the 25th day of August and on the 28th day of said month respectively and now first set on the 7th day of September in the year of Our Lord one thousand eight hundred and seventy four between Her Most Gracious Majesty the Queen of Great Britain in Ireland by Her Commissioners, the Honourable Alexander Barron Lieutenant Governor of the Province of Quebec and the Honourable James M'Kay and the Honourable William Joseph Christie of the one part and the Chiefs and Council of the said Indians of the other

Section 35(1)
Constitution Act, 1982:

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

Whereas the Indians inhabiting the said country have pursuant to an agreement made by the said Commissioners, been convened at meetings at Fort Carlton, Fort Pitt and Battle River to deliberate upon certain matters of importance to them, and to obtain the consent thereof of Her Majesty, and that they may know and be assured of what allowances they are to count upon and receive from Her Majesty's bounty and benevolence;

And Whereas the said Indians have requested and desired that Her Majesty's said Commissioners should be authorized to make such arrangements and to make a treaty and arrange with them, so that there may be peace and good will between them and Her Majesty, and that they may know and be assured of what allowances they are to count upon and receive from Her Majesty's bounty and benevolence;

And Whereas the Indians of the said tract duly convened in Council, as aforesaid, and being requested by Her Majesty's said Commissioners to name certain Chiefs and headmen who should be authorized on their behalf to conduct such negotiations and sign any treaty to be founded thereon, and to become responsible to Her Majesty for their faithful performance by their respective Bands of such obligations as shall be assumed by them, the said Indians have thereupon named ~~the following persons~~ for that purpose, that is to say:— representing the Indians who make the Treaty at Carlton, ~~and~~ ~~representing~~ the several Chiefs and councillors who have subscribed hereto, and representing the Indians who make the Treaty at Fort Pitt: the several Chiefs and councillors who have subscribed hereto

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 ten 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 to 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) on the Crown’s fiduciary obligations in relation to reserve lands, *Simon v. The Queen* (1985) on the legal status and liberal interpretation of treaties, and *Dick v. The Queen* (1985) and *Derrickson v. Derrickson* (1986) 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 sections 35(1) rights, specifically the Musqueam Nation’s Aboriginal right to fish for food, ceremonial, and societal purposes. The Court 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.

Also in 1990, in *R. v. Sioui* the Supreme Court affirmed and applied the principles of treaty interpretation laid down in *Simon v. The Queen* (above), and acknowledged that prior to the 1763 Treaty of Paris (above, Period 4) the British and French had maintained relations with the Aboriginal 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 decision of the government of British Columbia in the early 1990s to enter into a modern-day treaty process for the resolution of Aboriginal land rights and other claims, including self-government claims. The British Columbia Treaty Commission was established in 1992 to facilitate this process.

After the failure of the Meech Lake Accord in 1990, 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 self-government. However, the Accord failed when it was rejected by a majority of Canadian voters in a referendum held in October, 1992. As a result, further elucidation of Aboriginal rights, including the inherent right of self-government, would depend either on court decisions or negotiated agreements.

1992 to PRESENT

From the Charlottetown Accord to Present

The latest period in the development of Aboriginal rights consists mainly of court decisions and negotiated agreements. In addition, in 1996 the Royal Commission on Aboriginal Peoples released its monumental Report, which is the most in-depth study of Aboriginal issues ever undertaken. But while the Report has been cited several times by the Supreme Court, it does not appear to have had much of an impact on government policy.

Brief descriptions of the most important court cases since 1992 follow, in chronological order. With the exception of *Campbell v. British Columbia*, these are all Supreme Court of Canada decisions.

Blueberry River Indian Band v. Canada (1995): The Court applied *Guerin v. The Queen* (above) and held the Crown liable for breach of its fiduciary obligations because it failed to retain the mineral rights when it sold surrendered reserve land. But the Court also said that the Crown's fiduciary obligations have to be formulated so as to respect the decisionmaking authority of Indian bands.

R. v. Badger (1996): The Court reaffirmed the principles of treaty interpretation from *Simon v. The Queen* and *R. v. Sioui* (above), and decided that the Natural Resources Transfer Agreements (1930) modified but did not replace Indian hunting, trapping, and fishing rights. Also, the *Sparrow* test (above) for justifiable infringement of Aboriginal rights also applies to treaty rights.

R. v. Van der Peet (1996): 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 Sto:lo 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. Gladstone (1996): 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. But the Court decided that, unlike the right to fish for food, ceremonial, and societal purposes in *R. v. Sparrow*, the priority given to commercial Aboriginal rights over sport and other commercial fishing is not absolute. Regional and economic fairness and the historic participation of others in the fishery can be taken into account by the federal government in distributing the available catch.

R. v. Pamajewon (1996): In the only case so far where the Supreme Court has dealt directly with the inherent right of self-government, claims by two Anishnabe First Nations in Ontario to such a right in relation to gambling on their reserves were rejected. The Court assumed that section 35(1) of the *Constitution Act, 1982*, includes self-government claims, but held that those 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.

R. v. Adams and R. v. Côté (1996): 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): This case, brought by the Gitksan and Wet'suwet'en Nations, is the first case since *Calder v. Attorney-General of British Columbia* (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.

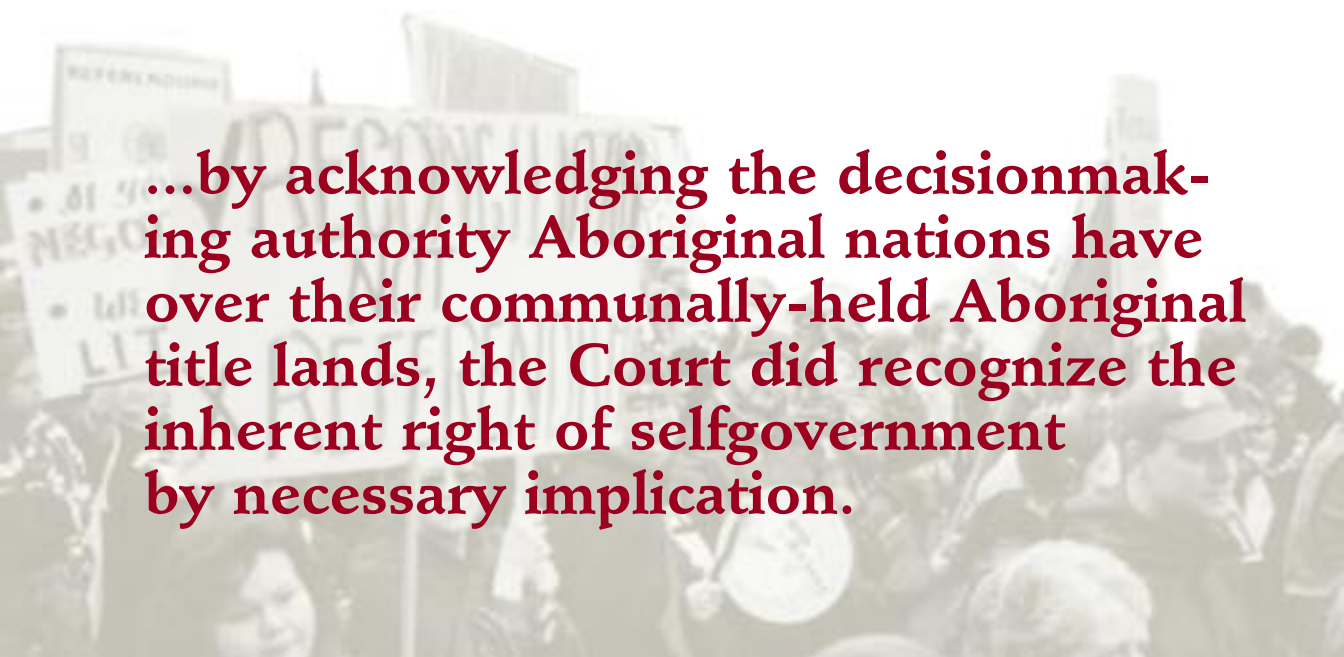
Aboriginal title is a property right, entitling the holders to exclusive possession and use of land and the resources on and under it, including trees, minerals, oil and gas. It has several *sui generis* or unique features: its source in occupation of land prior to Crown assertion of sovereignty and in Aboriginal 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 Aboriginal law, and needs to be evaluated in accordance with the way of life of the people in question. Two or more Aboriginal 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 (above), as elaborated on by *R. v. Gladstone* (above).

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* (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 discuss this claim. However, by acknowledging the decision-making authority Aboriginal nations have over their communally-held Aboriginal title lands, the Court did recognize the inherent right of self-government by necessary implication (see *Campbell v. British Columbia*, below).



...by acknowledging the decisionmaking authority Aboriginal nations have over their communally-held Aboriginal title lands, the Court did recognize the inherent right of selfgovernment by necessary implication.

Corbiere v. Canada (Minister of Indian and Northern Affairs) (1999):

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): 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 Crown promise in 1760-61 to establish truck houses (trading posts) necessarily implied a Mi'kmaq right to acquire natural products, such as fish, for trade. Like Aboriginal rights, treaty rights are subject to justifiable infringement, by application of the *Sparrow* test (above), as elaborated on by *R. v. Gladstone* (above).

Campbell v. British Columbia (Attorney General) (2000): The self-government provisions of the Nisga'a Treaty (initialed in 1998) are constitutionally valid because Aboriginal nations have an inherent right of self-government that is protected by section 35 of the *Constitution Act*, 1982. To exercise the decision-making authority over Aboriginal title lands accepted by the Supreme Court in *Delgamuukw* (above), Aboriginal nations require political structures that are governmental in nature. Although *Campbell* was only a trial court decision of the British Columbia Supreme Court, it was not appealed and so is current law.

It is the strongest judicial endorsement so far of the inherent right of self-government.

Mitchell v. M.N.R. (2001): The Mohawk Nation of Akwesasne was unable to meet the *Van der Peet* test (above) for proving an Aboriginal right to bring goods from New York State into Canada for the purpose of trade. Justice Binnie added that such a right would be incompatible with Crown sovereignty, specifically in relation to 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): Fiduciary obligations arise when the Crown exercises discretionary authority over specific Aboriginal interests. In this case, the Crown owed fiduciary obligations in the context of reserve creation, but those obligations had been met.

R. v. Powley (2003): The Métis can prove their Aboriginal rights using the *Van der Peet* test (above), with this 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 a 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 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. This is the first Supreme Court decision on the Aboriginal rights of the Métis.

R. v. Blais (2003): The Métis are not “Indians” for the purposes of the Natural Resources Transfer Agreements (1930) in the Prairie Provinces, and so their hunting, fishing, and trapping rights are not protected against provincial laws by those Agreements.

Haida Nation v. British Columbia (Minister of Forests) (2004): 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 Aboriginal peoples who make these claims and accommodate their interests in appropriate circumstances (in this case, before granting Tree Farm Licences to harvest timber). 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 upon 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 above).

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

R. v. Marshall; R. v. Bernard (2005): 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* (above), a majority of the Court did not discuss the relevance of Aboriginal 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* (above) were entered into in 1760-61.

Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage) (2005): Treaty 8 (1899) contains a provision guaranteeing the hunting, trapping, and fishing rights of the Aboriginal 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, 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 by the project. 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): The Mi'kmaq and Maliseet Nations in New Brunswick have an Aboriginal right, in accordance with the *Van der Peet* test (above), 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 of domestic purposes.

R. v. Morris (2006): The Tsartlip Band of the Saanich Nation on Vancouver Island has a treaty right to hunt for food at night using lights, as long as that 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* (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.



The Duty to Consult and Accommodate

Section 35 of the *Constitution Act* (1982) protects aboriginal and treaty rights, but, as we have seen, the proof of aboriginal rights or title can be a difficult and lengthy process, and the negotiation of a treaty can also be a difficult and lengthy process. These two processes are closely related and often times they are going on at the same time. This is because the ability of a First Nation to negotiate a treaty will depend on persuading government that there is a credible claim to aboriginal title.

During the period of proof and/or negotiation, which will certainly take years and may take decades, the First Nation is in a difficult situation. It is not yet able to invoke a proved aboriginal right or title, and it does not have a treaty. And yet logging or mining activities, or other forms of development, on land claimed by the First Nation, may diminish the value of the resource.

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Does Section 35 provide any interim protection for aboriginal interests that are still unproved or under negotiation? The Supreme Court of Canada has answered this question in the affirmative. Section 35 not only guarantees existing aboriginal and treaty rights, it also imposes on government the duty to engage in various processes even before an aboriginal or treaty right is established.

Section 35 gives constitutional protection to a special relationship between the Crown and aboriginal peoples under which the honour of the Crown must govern all dealings. The hon-

our of the Crown entails a duty to negotiate aboriginal claims with First Nations. And, while aboriginal claims are unresolved, the honour of the Crown entails a duty to consult, and if necessary accommodate the interests of, the aboriginal people, before authorizing action that could diminish the value of the land or resources that they claim.

***Haida Nation v. B.C.* [2004] 3 S.C.R. 511:** The duty to consult and accommodate was established in *Haida Nation v. British Columbia* (2004). In that case, the government of British Columbia had issued a licence to the Weyerhaeuser Company authorizing the company to cut trees on provincial Crown land in the Queen Charlotte Islands. The Queen Charlotte Islands are the traditional homeland of the Haida people. The Islands were the subject of a land claim by the Haida Nation which had been accepted for negotiation, but had not been resolved at the time of the issue of the licence. The cutting of trees on the claimed land would have the effect of depriving the Haida people

Because the province was aware of the Haida claim at the time of issuing the licence, it was under a duty to consult with the Haida before issuing the licence. Not having done so, the Crown was in breach of Section 35, and the licence was invalid.

of some of the benefit of their land if and when their title was established. The Supreme Court of Canada held that, in these circumstances, Section 35 obliged the Crown to consult with the Haida people, and, if necessary, accommodate their concerns. The extent of consultation and accommodation “is proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed.” In this case, a prelimi-

nary assessment indicated that there was a prima facie case for aboriginal title and a strong prima facie case for an aboriginal right to harvest the red cedar growing on the Islands. The logging contemplated by the company's licence, which included old-growth red cedar, would have an adverse effect on the claimed right. Because the province was aware of the Haida claim at the time of issuing the licence, it was under a duty to consult with the Haida before issuing the licence. Not having done so, the Crown was in breach of s. 35, and the licence was invalid.

The duty to consult will lead to a duty to accommodate where the consultations indicate that the Crown should modify its proposed action in order to accommodate aboriginal concerns. In this case, since the required consultation never took place, the Court did not have to decide whether consultation would have given rise to a duty to accommodate. But the Court suggested that the circumstances of the case “may well require significant accommodation to preserve the Haida interest pending resolution of their claims.”

The Court stated that the duty to consult does not extend to a private party like the Weyerhaeuser Company. The honour of the Crown imposed obligations only on the Crown. The Court accordingly rejected the argument that the Weyerhaeuser Company was under a constitutional duty to consult (although the terms of its licence imposed a contractual obligation to engage in some consultations with the Haida).

The Court also found that the duty to consult extends to the Crown in right of the provincial government. It is the Crown in right of Canada (the federal government) that has the primary responsibility for aboriginal affairs, matching the federal legislative grant over “Indians, and lands

reserved for the Indians” in s. 91(24). Obviously, in the appropriate case, the federal government would be under a duty to consult. But in this case it was provincial Crown land that was the subject of the aboriginal claim, and it was the action of the provincial government in licensing the cutting of trees that potentially impaired the value of the claim. The Court held that the public lands of the province were subject to aboriginal interests, and the duty to consult extended to the Crown in right of the province.

Who is to be the judge of whether the Crown’s consultation and accommodation were sufficient in the unique circumstances of any given case? The Court said that the Crown’s actions were reviewable by the courts under general principles of judicial review. While pure questions of law were reviewable on a standard of correctness, the existence and extent of a duty to consult or accommodate would typically be inextricably entwined with assessments of fact. In such a case, reasonableness would be the standard of review. “Reasonable efforts” on the part of government to inform itself, to consult, and to accommodate, were all that were called for.

In *Haida Nation*, the Supreme Court of Canada, while indicating that the precise nature of the consultation and accommodation that was required would depend on the circumstances of the case, emphasized that the duties of consultation and accommodation did not involve a duty to agree with the aboriginal people. In the absence of a proved aboriginal right, or a treaty right, the aboriginal people did not have a veto over the development of land in which they claimed an interest.

Taku River Tlingit First Nation v. British Columbia [2004] 3 S.C.R.

550: In the companion case to *Haida, Taku River Tlingit First Nation v. British Columbia* (2004), a mining company applied to the British Columbia government for permission to reopen an old mine in an area that was the subject of an unresolved land claim by the Taku River Tlingit First Nation. This application triggered a statutory environmental assessment process, which ended with approval of the application to reopen the mine. The First nation objected to the outcome. The Supreme Court of Canada held that this was a case where there were duties to consult and accommodate: there was a prima facie case for the aboriginal claim, and the reopening of the mine was potentially harmful to the claim. However, the Crown's duty had been discharged in this case. The environmental assessment took three and a half years. The First Nation was included in

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the process. Its concerns were fully explained and were listened to in good faith and the ultimate approval contained measures to address the concerns. Although those measures did not satisfy the First Nation, the process fulfilled the province's duties of consultation and accommodation. Meaningful consultation did not require agreement, and accommodation required only a reasonable balance between the aboriginal concerns and competing considerations.

***Mikisew Cree First Nation v. Canada* [2005] 3 S.C.R. 388:**

The Haida Nation duty to consult was an interim protection measure, designed to safeguard aboriginal interests while rights were in dispute or a treaty was under negotiation. One might assume that the duty would fall away once a treaty had been entered into, and the rights of the parties were spelled out in writing. But the Supreme Court of Canada has held otherwise. In *Mikisew Cree First Nation v. Canada* (2005), the federal government proposed to build a road in a national park on federal Crown land in northern Alberta. The route of the road was through the traditional hunting grounds of the Mikisew Cree First Nation, which objected to the project for that reason. The road proposal was all within the Treaty 8 area of northern Alberta. Under Treaty 8, entered into in 1899, the aboriginal people who lived in the territory had surrendered the entire area of the federal Crown. In return, the aboriginal people were promised reserves and some other benefits.

The proposed road involved an exercise of the Crown’s right to take up land under this clause in the treaty. But, was taking up land under the treaty subject to a constitutional duty of consultation?

Treaty 8 gave to the aboriginal signatories (which included the ancestors of the Mikisew Cree) the right to hunt, trap and fish throughout the surrendered territory “saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes.”

The proposed road involved an exercise of the Crown’s right to take up land under this clause in the treaty. But was taking up land under the treaty subject to a constitutional duty of consultation?

It was true, of course, that land taken up for development would have the effect of diminishing the area available to aboriginal people for hunting, trapping and fishing, but that was what was agreed to in 1899. The Supreme Court of Canada held, however, that “treaty making is an important stage in the long process of reconciliation [of aboriginal and non-aboriginal peoples], but it is only a stage;” and Treaty 8 was “not the complete discharge of the duty arising from the honour of the Crown.” Where the exercise of treaty rights by the Crown could have an “adverse impact” on aboriginal people, the honour of the Crown required consultation with the affected people.

In “appropriate” cases (not defined), the duty of consultation would lead to a duty to accommodate the aboriginal interest, although it did not require that aboriginal consent be obtained. In this case, the diminution of the Mikisew Cree’s hunting and trapping rights in their traditional territory was a clear consequence of the proposed road. That adverse impact triggered the duties of consultation and accommodation. The discussions that had taken place between park officials and the Mikisew Cree were not sufficient to satisfy those duties.

The Court quashed the minister’s decision to approve the road project and sent the project back for reconsideration in accordance with the Court’s reasons.



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