

**Law Foundation of British Columbia**  
**Union of B.C. Indian Chiefs Aboriginal Title Curriculum Project**

**1. Indigenous Peoples definition of Original Title**

Indigenous Peoples' understanding of Aboriginal Title is very different from that recognized by Canadian law. From an Indigenous Perspective, Aboriginal (Original) Title to the Lands, Water and Resources flows from the fact that the Creator placed our Nations upon our territories, together with the traditional laws and responsibilities to care for and protect those territories.

To Indigenous Peoples, Sovereignty is the inherent right and responsibility of Indigenous Nations to care for and protect our traditional lands and resources, to govern ourselves, and to enter into relationships with other Nations of Peoples, guided by our own laws and legal traditions. Indigenous Sovereignty is reflected in the fact that when newcomers first arrived on these lands, Indigenous Nations – with their own laws, territories, economies and societies – were already here. When Indigenous Peoples speak of Aboriginal Title, it is more than an interest in land; Aboriginal Title is an inalienable responsibility given by the Creator that each of us holds internally, and reflects our relationship with the land itself and all other life that we share the land with.

In *Aboriginal Title and Rights Position Paper* (1978) the Union of B.C. Indian Chiefs described Aboriginal Title like this:

The Sovereignty of our Nations comes from the Great Spirit. It is not granted nor subject to the approval of any other Nation. As First Nations we have the sovereign right to jurisdiction rule within our traditional territories. Our lands are a sacred gift. The land is provided for the continued use, benefit and enjoyment of our People and it is our ultimate obligation to the Great Spirit to care for and protect it.

Traditionally, First Nations practised uncontested, supreme and absolute power over our territories, our resources and our lives with the right to govern, to make and enforce laws, to decide citizenship, to wage war or to make peace and to manage our lands, resources and institutions. Aboriginal Title and Rights means we as Indian people hold Title and have the right to maintain our sacred connection to Mother Earth by governing our territories through our own forms of

Government. Our Nations have a natural and rightful place within the family of nations of the world. Our political, legal, social and economic systems developed in accordance with the laws of the Creator since time immemorial and continue to this day.

Our power to govern rests with the people and like our Aboriginal Title and Rights, it comes from within the people and cannot be taken away.<sup>1</sup>

In British Columbia many diverse Indigenous Nations have existed from time before memory. Indigenous Laws, and systems of land ownership, are reflected in each Nation's unique customs, laws and oral traditions:

- Laws taught on the land and waters reflect a living philosophy grounded in principles of respect and the responsibility to conserve resources for future generations (for example, many Indigenous Nations have laws and teachings which guide where, when, and how animals or resources may be harvested);
- Laws that reflect Indigenous Peoples relationships to their traditional lands, the living world and supernatural beings are recorded in songs and stories, carved into masks or totem poles, and performed in dance and through ceremonies;
- Laws are carried forward on the breath and in the words of speakers in Long houses at feasts, in potlatches and traditional gatherings; and
- Laws are unfolded, untangled and upheld in the collective discussion and decision-making processes that Indigenous Peoples follow when making decisions that impact the land.

There are as many different expressions of Indigenous laws about the land as there are Indigenous Nations. These laws are not written into statutes, rules and regulations; they are articulated very differently from any expression of laws in Canadian society. Many people who are not familiar with Indigenous legal systems may fail to recognize Indigenous laws or may mistake them simply as simple stories or legends when they hear them.<sup>2</sup>

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<sup>1</sup> <http://www.ubcic.bc.ca/Resources/atrp.htm>. See also: Delgamuukw.org at <http://www.delgamuukw.org/> ; Gitxsan Chiefs Office at <http://www.gitxsan.com/html/who.htm> ; United Nations Permanent Forum on Indigenous Issues at [http://www.un.org/esa/socdev/unpfi/en/about\\_us.html](http://www.un.org/esa/socdev/unpfi/en/about_us.html) ;

<sup>2</sup> Jo-Anne Fiske, "From Customary Law to Oral Traditions: Discursive Formation of Plural Legalisms in Northern British Columbia, 1857-1993," (1997/1998) 115/116 BC Studies 267 at 285.

Indigenous Peoples' relationship with to their territorial lands is unique from Western concepts of property or relationships with land. Indigenous cultures and societies are intricately tied to land and Indigenous cultures and cannot be understood without this connection. Abstract property notions, such as the ability to sell or alienate land, may be antithetical to Indigenous Peoples' world view. To Indigenous Peoples "Our Land is Our Culture". This principle provides a very different starting point from which to view the land compared to Western notions which consider land as a possession, or a commodity that can be managed and exploited.

Aboriginal Title and Sovereignty are also expressed in diverse Indigenous political, social and cultural traditions, including the Potlatch and other forms of governance and traditional decision-making. The following quotations from Indigenous scholars highlight various Indigenous perspectives:

Aboriginal jurisprudences rely on performance and oral traditions rather than on political assemblies, written words, and documents. They stress the principle of totality and the importance of using a variety of means to disclose the teachings and to display the immanent legal order. They have always been consensual, interactive, and cumulative. They are intimately embedded in Aboriginal heritages, knowledges, and languages. They are intertwined and interpenetrated with worldviews, spirituality, ceremonies, and stories, and with the structure and style of Aboriginal music and art. They reveal robust and diverse legal orders based on a performance culture, a shared kinship stressing human dignity, an ecological integrity that demonstrates how Aboriginal peoples deliberately and communally resolved recurring problems.<sup>3</sup>

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The Indian elders in British Columbia question why they must subject their relationship to the land to a non-Indian court's strict scrutiny; why they must explain their use of the land to obtain "rights" abstractly defined by others. They believe that the Indians have rights to their land because their people go back with the land for thousands of years. What they do not understand is how the Crown acquired its "rights" to their land.<sup>4</sup>

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<sup>3</sup> Sakej Henderson, "Aboriginal Jurisprudence and Rights," in Kerry Wilkins, ed., *Advancing Aboriginal Claims: Visions/Strategies/Directions* (Saskatoon: Purich Publishing Ltd., 2004) at 71.

<sup>4</sup> Louise Mandell, "Native Culture on Trial" in K.E. Mahoney and S. Martin, eds., *Equality and Judicial Neutrality* (Agincourt, Ontario: Carswell Company Limited, 1987)

Ownership, in the Indigenous context, involves understanding Indigenous peoples' profound connection to their homelands. The notion of a "homeland: is not simply lands, but everything around one's world: land, air, water, stars, people, animals, and especially the spirit world. Understanding the balance in one's world takes a long time, and one cannot hope to learn these relationships without being guided by people who possess, and practice, these forms of knowledge. This knowledge is passed on by the oral traditions of the community, and virtually every Indigenous community practices the oral traditions in one form or other. The knowledge gained from the oral traditions shapes one's understanding of the world, it gives the world meaning.<sup>5</sup>

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Each Aboriginal Nation has particular traditions, protocols, and rules concerning stories and the way that stories are to be told for teaching and learning purposes. The types of stories can vary from the sacred to the historical; from the development and perpetuation of the social/political/cultural ways to the personal life experiences and testimonials. ...The power of storywork creates a synergistic effect among the story, the context in which the story is used, the way the story is told, and how one listens to make meaning.<sup>6</sup>

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*"The St'át'imc have lived upon the land since time began. Our history is written upon the land. Our history is passed on from generation to generation, through the stories and legends." ~ St'át'imc elders*

*"Our culture identifies who we are, how we live, what we do, what we believe in, now and in the future, as in the past." ~ Brenda McDonald, T'sk'wáylacw<sup>7</sup>*

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<sup>5</sup> Dale Turner, "Oral Traditions and the Politics of (Mis)Recognition" in Anne Waters, ed., *American Indian Thought: Philosophical Essays* (Malden, MA: Blackwell Publishing, 2004) 230 at 236.

<sup>6</sup> Jo-ann Archibald, *Coyote Learns to Make a Storybasket: The Place of First Nations Stories in Education* (PhD Thesis, Simon Fraser University, 1997) [unpublished].

<sup>7</sup> <http://www.statimc.net/slra/report/part1.pdf>

- Websites which discuss Indigenous Laws (Law Commission of Canada) and specific communities who have articulated portions of their laws or decision making processes on their websites:

St'át'imc Nation: <http://www.statimc.net/>

Gitxsan Chiefs Office: <http://www.gitxsan.com/html/who.htm>

Centre For Indigenous Environmental Resources: <http://www.cier.ca/new-and-noteworthy.aspx?id=196>

Indigenous Bar Association of Canada: Lisa D. Chartrand, *Accommodating Indigenous Legal Traditions* (2005):

<http://www.indigenousbar.ca/pdf/Indigenous%20Legal%20Traditions.pdf>

- Websites that have examples of laws expressed through song, or examples of images carved or otherwise represented which contain an explanation of how these reflect the laws and Title of the People.

U'mista Cultural Centre Society website:

<http://www.umista.org/kwakwakawakw/tribes.php>

[Conference Webcast] Indigenous Law and Legal Systems Conference, January 26 & 27, 2007, University of Toronto Faculty of Law:

<http://www.indigenouslawjournal.org/conferencewebcast.htm>

## **2. Transition: Arrival and Settlement of Newcomers**

Indigenous-Crown relations in Canada are deeply marred by Canada's continued denial of Indigenous Peoples' Aboriginal Title and legal systems. However, this was not the initial relationship between Indigenous Nations and newcomers to these lands. When

newcomers first arrived in North America, they acknowledged the Indigenous political and legal structures that were in place.<sup>8</sup>

International laws in place at the time dictated how settlers could acquire interests in lands occupied by Indigenous Nations. Under their own laws, newcomers could only acquire an interest in Indigenous lands in a limited number of circumstances:

- By conquest, where there was a war and the land was won; or
- By agreement, if Indigenous Peoples voluntarily ceded their interests in the land (i.e., through treaty or sale).<sup>9</sup>

Colonial authorities respected Indigenous Nations not only for their greater population numbers, but for their military, social and political sophistication. In talking about this initial period of contact, the Supreme Court of Canada observed that “both Great Britain and France felt that the Indian nations had sufficient independence and played a large enough role in North America for it to be good policy to maintain relations with them very close to those maintained between sovereign nations”.<sup>10</sup>

These principles were reflected in the *Royal Proclamation, 1763* which required colonial governments to negotiate treaties with Indigenous Nations before newcomers could acquire an interest in Aboriginal Title lands.

#### **Indian Provisions in the Royal Proclamation, 1763**

And We do further strictly enjoin and require all Persons whatever, who have either wilfully or inadvertently seated themselves upon any Lands within the Countries above described, or upon any other Lands, which, not having been ceded to, or purchased by Us, are still reserved to the said Indians as aforesaid, forthwith to remove themselves from such Settlements.<sup>11</sup>

<sup>8</sup> See for example, the Royal Commission on Aboriginal Peoples Final Report, Chapter 9. Available online at: [http://www.ainc-inac.gc.ca/ch/rcap/sg/cg9\\_e.pdf](http://www.ainc-inac.gc.ca/ch/rcap/sg/cg9_e.pdf)

Louise Mandell, “Offerings to an Emerging Future” in Ardith Walkem and Halie Bruce, eds., *Box of Treasures or Empty Box? Twenty Years of Section 35* (Penticton: Theytus Books, 2003); Sharon Venne, *Our Elders Understand Our Rights: Evolving International Law Regarding Indigenous Rights* (Penticton: Theytus Books Ltd., 1998).

<sup>10</sup> *R. v. Sioui*, [1990] 1 S.C.R. 1025 at para. 68 [*Sioui*].

<sup>11</sup> Full Text available online at: [http://www.ainc-inac.gc.ca/ch/rcap/sg/sga4\\_e.html](http://www.ainc-inac.gc.ca/ch/rcap/sg/sga4_e.html)

The *Royal Proclamation, 1763* recognized that Britain's asserted sovereignty did not extinguish Indigenous Peoples' Aboriginal Title. Instead, Aboriginal Title was protected and no Aboriginal Title lands could be taken up or settled by newcomers until the Aboriginal Title had first been addressed. These principles led were reflected in the Pre-Confederation Peace and Friendship Treaties negotiated throughout most of the eastern part of what was to become Canada, the fourteen Douglas Treaties on Vancouver Island, and the Numbered Treaties after confederation.

### **Historic Treaties**

From an Indigenous perspective, these Peace and Friendship Treaties are sacred nation-to-nation agreements which created mutually beneficial relationships between the Crown and Indigenous Nations.<sup>12</sup> The solemn promises to uphold the terms of the treaty for "as long as the sun shines, the grass grows and the rivers flow" means that treaties are living agreements which cannot be extinguished or altered without Indigenous consent. Treaties allowed for the peaceful creation of Canada.<sup>13</sup>

In contrast, Canadian authorities argue that historic treaties represent land surrenders, freeing the land encompassed by the treaties of all Aboriginal Title. From this perspective, treaties are simple land transactions rather than relational agreements that reconcile and define the rights and obligations of treaty partners.

### **[Incongruency – AP respect newcomers – land surrender]**

### **British Columbia: The Douglas Treaties, 1850-1854**

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<sup>12</sup> Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples*, Vol. 1, Looking Forward, Looking Back (Ottawa: Minister of Supply & Services, 1996); John J. Borrows and Leonard I. Rotman, *Aboriginal Legal Issues: Cases, Materials & Commentary*, 2<sup>nd</sup> ed., (Toronto: Lexis Nexis/Butterworth, 2003).

<sup>13</sup> Ibid; James [Sakej] Youngblood Henderson, "Empowering Treaty Federalism", (1994) 58 *Sask. L. Rev* 241; Gordon Christie. "Justifying Principles of Treaty Interpretation." (2000) 26 *Queen's L.J.* 143, available online (QL):

[http://www.lexisnexis.com/ca/legal/results/docview/docview.do?risb=21\\_T1889572065&format=GNBFULL&sort=RELEVANCE&startDocNo=1&resultsUrlKey=29\\_T1889572068&cisb=22\\_T1889572067&treeMax=true&treeWidth=0&csi=281500&docNo=3](http://www.lexisnexis.com/ca/legal/results/docview/docview.do?risb=21_T1889572065&format=GNBFULL&sort=RELEVANCE&startDocNo=1&resultsUrlKey=29_T1889572068&cisb=22_T1889572067&treeMax=true&treeWidth=0&csi=281500&docNo=3). See also: *R. v. Sioui*, [1990] 1 S.C.R. 1025.

In British Columbia colonial governments initially continued to uphold the principles set out in the *Royal Proclamation, 1763* which required the consent of Indigenous Nations prior to settlement on Indigenous lands. From 1850 to 1854, Governor James Douglas negotiated fourteen pre-confederation treaties on Southern and Northern Vancouver Island.

**Map of Douglas Treaties Negotiated on Vancouver Island between 1850-1854:**



To Indigenous Nations, these treaties were not land cession agreements but set out the obligations of each party to allow for their peaceful coexistence then and into the future. As in other parts of Canada, Indigenous population numbers on Vancouver Island at the

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<sup>14</sup> NRCAN Douglas Treaties Map: available online at [http://atlas.nrcan.gc.ca/site/english/maps/historical/indiantreaties/historicaltreaties?mapsize=525+466&scale=2796868.351135&mapxy=-2112187.662654152+606412.4964031532&mode=zoomin&layers=&hidetextbox=&urlappend=%26map\\_scalebar\\_imagecolor%3D255%20255%20255](http://atlas.nrcan.gc.ca/site/english/maps/historical/indiantreaties/historicaltreaties?mapsize=525+466&scale=2796868.351135&mapxy=-2112187.662654152+606412.4964031532&mode=zoomin&layers=&hidetextbox=&urlappend=%26map_scalebar_imagecolor%3D255%20255%20255)

time the Douglas Treaties were entered far outstripped those of the newcomers. Encroachment by newcomers on Aboriginal Title lands without Indigenous Nations consent was causing increasing conflict. Governor James Douglas, faced with the reality that newcomers were in no position to take up or defend lands without first obtaining the consent of Indigenous Nations, negotiated treaties which would allow for peaceful settlement, guaranteeing to the Indigenous Nations the right to carry on their own traditions and to continue to exist governed by their own laws and to continue to make their living from their traditional lands and waters.

### **Sample Text of Douglas Treaty**

#### **Swengwhung Tribe - Victoria Peninsula, South of Colquitz.**

Know all men, we, the chiefs and people of the family of Swengwhung, who have signed our names and made our marks to this deed on the thirtieth day of April, one thousand eight hundred and fifty, do consent to surrender, entirely and for ever, to James Douglas, the agent of the Hudson's Bay Company in Vancouver Island, that is to say, for the Governor, Deputy Governor, and Committee of the same, the whole of the lands situate and lying between the Island of the Dead, in the Arm or Inlet of Camoson, where the Kosampsom lands terminate, extending east to the Fountain Ridge, and following it to its termination on the Straits of De Fuca, in the Bay immediately east of Clover Point, including all the country between that line and the Inlet of Camoson.

The condition of our understanding of this sale is this, that our village sites and enclosed fields are to be kept for our own use, for the use of our children, and for those who may follow after us; and the land shall be properly surveyed, hereafter. It is understood, however, that the land itself, with these small exceptions, becomes the entire property of the white people for ever; it is also understood that we are at liberty to hunt over the unoccupied lands, and to carry on our fisheries as formerly.

We have received, as payment, Seventy-five pounds sterling.<sup>15</sup>

The text of the Douglas Treaties are all similar and very broadly worded. Indigenous Nations and Canadian governments continue to differ as to their actual meaning.

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<sup>15</sup> Douglas Treaty Texts, Available online at [http://www.ainc-inac.gc.ca/pr/trts/doug\\_e.html](http://www.ainc-inac.gc.ca/pr/trts/doug_e.html)

However, despite their differing concepts of land cession and given the historic reality of the times, it is clear newcomers were in no position to ask Indigenous Peoples to give up Aboriginal Title.<sup>16</sup> The historical context of these treaties was described by the British Columbia Court of Appeal in *R. v. White and Bob*:

[I]t was at the time of Douglas particularly important for the maintenance of law and order that Indian rights be respected and interpreted broadly in favour of the Indians, not merely for the due administration of law, but also for the safety of settlers who constituted a minority of, at the most, 1,000 persons, there being 30,000 Indians on Vancouver Island alone, apart from the warlike tribes to the north, who always constituted a raiding threat and against whom the maintenance of friendship with the local Indians afforded a measure of security. ... These being facts of history and notorious, it is reasonable to infer that Parliament had them in mind.<sup>17</sup>

After 1854, no new treaties were negotiated in British Columbia partly because the Colony ran out of money and Indigenous Peoples (now increasingly able to understand what governments were proposing) refused to extinguish their Aboriginal Title to their territories.

Population numbers also started to shift. As more newcomers arrived in North America and began to build permanent settlements, Indigenous numbers began to fall by the introduction of new diseases to which they had no immunity. The era of Peace and Friendship which characterized the early days of Indigenous-Crown relations ended. A new era emerged where newcomers simply began to ignore their own laws and deny the existence of Aboriginal Title and Indigenous sovereignty despite that Indigenous Nations in British Columbia never surrendered Aboriginal Title or obligations to exercise their Sovereignty to care for their lands, waters, and resources. This fact forms the basis of the ongoing “Land Question” in British Columbia over unceded Aboriginal Title lands and

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<sup>16</sup> Differences of opinion as to how they should be interpreted. Indigenous Peoples interpret Historic Treaties as “Peace and Friendship” treaties which set out the agreements that the parties made as to how they would live together in peace into the future. The Canadian government now interprets them as though they were land session agreements where Indigenous Peoples ceded Aboriginal Title to their territories.

<sup>17</sup> *R. v. White and Bob*, [1964] 52 W.W.R. 193 (B.C.C.A.) at 211

resources.<sup>18</sup>

### **The Land Question in British Columbia**

Canada and the Province of British Columbia were built on lands already occupied by Indigenous Nations, and governed by Indigenous laws. Canada and Indigenous Nations now exist on the same land and both claim the right to manage, govern and benefit from Aboriginal Title lands. This is the “**Land Question**”. Canadian governments deny that Aboriginal Title exists and that Indigenous Nations have the jurisdiction and responsibility to make decisions about their Aboriginal Title territories. The modern day Land Question arises because, after a while, newcomers ignored their own laws and simply settled on lands where Indigenous Peoples held Title. The Aboriginal Title to these lands was never dealt with and so continues today.

The history of conflict over the Land Question is reflected in the Union of B.C. Indian Chiefs *Aboriginal Title Implementation Paper*:<sup>19</sup>

As the Original Peoples of this Land, we have never reached any agreement or treaty with Canada concerning the occupation, settlement, sovereignty and jurisdiction that Canada claims over Land to which we hold absolute Original Title. Despite federal and provincial assertions of jurisdiction and sovereignty, our absolute Original Title to the Lands and Resources and our Right of Self-Determination remains strong and unbroken.

Newcomers had to find a way around their own laws which recognized Aboriginal Title and forbade the settlement of Aboriginal Title lands without the consent of Indigenous Nations. Instead of entering treaties (as their own laws required), newcomers simply began to grant interests in Aboriginal Title lands, to exercise authority and pass laws based on several legal arguments which have since been discredited as based on unacceptable racist assumptions. These include:

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<sup>18</sup> See for example, Douglas C. Harris, *Fish, Law and Colonialism: The Legal Capture of Salmon in British Columbia*, (Toronto: University of Toronto Press, 2001)

<sup>19</sup> <http://www.ubcic.bc.ca/Resources/implementation.htm>

- *Terra Nullius*: The Province argued that there was no Aboriginal Title for them to address because Indigenous Peoples were so primitive and uncivilized that they were incapable of holding Title to lands or having laws to govern the land. The doctrine of “*Terra Nullius*” is the claim on the part of newcomers and their governments that land was empty or vacant, and that there were no Aboriginal People capable of holding Aboriginal Title living on the land (therefore they did not have to follow their own laws and enter a treaty to address the lands before settling it). It was not a denial of the fact that Aboriginal People existed, but rather an assertion that Aboriginal People were simply too uncivilized to be able to be considered people capable of holding Aboriginal Title and so the lands could be considered, *terra nullius* - that there are no Indigenous Peoples who hold title to the lands, and they are, legally “empty”.
- Doctrine of Discovery: That Aboriginal Title was simply extinguished when newcomers happened upon the territories inhabited by Indigenous Peoples and governed by Indigenous laws;
- Doctrine of Adverse Possession: That the Province extinguished Aboriginal Title by issuing other interests in the lands and resources;
- Passage of Time: The Province argued, in effect, that Aboriginal Title had died of old age and no longer existed because it was in the past and had been superseded by the Province’s own assertion of Title; and

The underlying assumptions which form the basis of these false legal doctrines are also reflected in the laws and policies Canada began to implement once settlers felt secure in North America. The new goal of Canada’s legislation and legal policy was to remove Indigenous Peoples from the land entirely, and to replace Indigenous laws and governance systems. In 1920, Duncan Campbell Scott, Canada’s Deputy Superintendent General of Indian Affairs, said the goal of these policies was “to continue until there is not a single Indian in Canada that has not been absorbed into the body politic and there is no Indian question, and no Indian department”.<sup>20</sup>

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<sup>20</sup> Duncan Campbell Scott, deputy superintendent general of Indian affairs, testimony before the Special Committee of the House of Commons examining the Indian Act amendments of 1920, National Archives of Canada, Record Group 10, volume 6810, file 470-2-3, volume 7, pp. 55 (L-3) and 63 (N-3).

One of the primary tools by which Canada enacted its policy of denial was through the creation of the *Indian Act*.<sup>21</sup> The *Indian Act* is federal legislation first passed in 1876 to manage and control Indigenous Peoples which quickly replaced early colonial treaty-making policies with assumed jurisdiction and control. Among its provisions, the *Indian Act* allowed for the removal of Indigenous Peoples from their traditional territories to Indian reserves, outlawed Indigenous Nations' traditional forms of governance and property holding systems, and prohibited Indigenous Peoples from leaving reserves without permission from an Indian Agent.

Indian Reserves are lands set aside for Indigenous Peoples that Canada holds in trust. They are not owned by Indigenous People. Reserves represented only a small portion of Indigenous Peoples' traditional Aboriginal Title territories. Indigenous People were forced onto reserve land. Under the guise of protecting reserve lands from erosion and exploitation, management of reserve lands was carried out by the Department of Indian and Northern Affairs. Traditional forms of land governance, such as the potlatch, were replaced by the Band Council system operating under the authority of the Minister.

To prevent Indigenous Nations from pursuing their collective Aboriginal Title, Indigenous Peoples were prohibited from leaving reserve lands and, by 1927, it was illegal to hire lawyers to pursue Aboriginal Title claims in court.<sup>22</sup> At the same time, other ways that Indigenous Peoples relied on the land were also criminalized. For example, Indigenous Peoples were arrested for hunting, fishing, and other activities on the land that their ancestors had exercised since time immemorial.

Even after reserves were established and Indigenous People forced to move onto them, there were further newcomer demands for land. In many cases, already small reserve lands were "cut off" and these lands were taken. These "cut off" lands form the basis of

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<sup>21</sup> Royal Commission on Aboriginal Peoples, Volume 1, *Looking Forward Looking Back Part Two: False Assumptions and a Failed Relationship*, online at: [http://www.ainc-inac.gc.ca/ch/rcap/sg/sgm9\\_e.html](http://www.ainc-inac.gc.ca/ch/rcap/sg/sgm9_e.html)

<sup>22</sup> For a fuller discussion about the *Indian Act* and its various provisions see: Royal Commission on Aboriginal Peoples, Vol. 1, *Looking Forward Looking Back*, Ch. 9. Available online at: [http://www.ainc-inac.gc.ca/ch/rcap/sg/sgm9\\_e.html](http://www.ainc-inac.gc.ca/ch/rcap/sg/sgm9_e.html)

“specific claims” today. Specific claims differ from “Land claims” insofar as they involve only those lands taken from the reserves set aside under Canadian law for the use and benefit of Indians. In contrast “Land claims” involve a struggle for recognition of traditional Aboriginal Title lands in their entirety, not simply small portions of reserve lands.

### **Federal Responsibility**

The responsibility to make decisions about “Indians, and Lands reserved for the Indians” is exclusively a federal power under section 91(24) of the *Constitution Act, 1867*.<sup>23</sup> Jurisdiction of all other lands and resources were granted to the Provinces under section 109 “subject to any trusts in respect thereof or any interest other than that of the Crown.” These provisions form the basis of the earliest Canadian case dealing with Aboriginal Title.

*St. Catherine’s Milling and Lumber Company v. The Queen*<sup>24</sup> involved a dispute between the province of Ontario and the Federal government about which level of government had the right to grant interests in the trees. At the core of the dispute were differing interpretations over the division of powers set out in the *Constitution Act, 1867*, and who controlled the lands and resources after treaty. Canada argued that s. 91(24) should be interpreted to mean that these lands fell within the federal government’s exclusive jurisdiction and that only Canada had the authority to administer and grant interests in these lands. Ontario argued that, under s. 109, once Aboriginal Title had been extinguished through treaty, the provinces had jurisdiction to grant interests in the land and resources. The Judicial Privy Council, then the highest court of appeal, confirmed that the provinces do not have an interest in Aboriginal Title lands until the Aboriginal Title had first been addressed through treaty or some other mechanism. However, since the lands in question fell within lands surrendered under Treaty # 3, Aboriginal Title had been extinguished and Canada’s s. 91(24) jurisdiction only extended to lands set aside as Indian reserves after treaty. While Indigenous Nations may have had a continued interest in the lands before the treaty, once Aboriginal Title had been extinguished the lands fell

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<sup>23</sup> *Constitution Act, 1867* R.S.C. 1985, App. II, No. 5.

<sup>24</sup> (1888), 14 App. Cas. 46 (P.C.) [*St. Catherine’s Milling*].

entirely to the province. This interpretation of Aboriginal Title would underpin Canadian and provincial policy and law for the next 80 years.

It is important to note that the Indigenous Nations interpretation of Treaty #3 was not considered in this dispute. The idea that Aboriginal Title had been extinguished by treaty was based entirely on the arguments formulated by Canada and the province of Ontario which ignored the spirit and intent of the treaty. The JPC's interpretation of the division of powers set out in the *Constitution Act, 1867* would have far reaching effects across Canada.

The result of the history where Indigenous People could only surrender their Aboriginal Title to the federal crown is that the federal government maintains a fiduciary duty to safeguard Indigenous Peoples' interest in Lands. A fiduciary relationship is one where one party has a duty to care for and protect the interests of the other party. The fiduciary relationship has been explained in this way:

A fiduciary relationship is one in which one party (the beneficiary/Aboriginal Peoples) places trust and confidence in another (the fiduciary/the Crown), and is justified in expecting the other to act in his or her best interests. Examples include lawyer and client; doctor and patient/ and, the Crown and Aboriginal Peoples.

The Crown, as fiduciary, must:

- Exercise its powers as the Aboriginal Peoples would, and subject to any conditions imposed by the Aboriginal Peoples;
- Act according to a high standard of honesty, integrity, and utmost loyalty;
- Act in a trust-like versus adversarial manner;
- Not benefit from the relationship;
- Where they profit from a breach of their duties, surrender any profits to the Aboriginal Peoples; and
- Ensure that Aboriginal Peoples are not exploited in any dealings related to our Lands.<sup>25</sup>

In giving primary responsibilities for relationships with Indigenous People and the protection of Indigenous lands to the federal government under s. 91(24), Canada's

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<sup>25</sup> *Eagle* {Consultation materials – cite}cite

constitution obligates the federal government to address Aboriginal Title and protect the interests of Indigenous Peoples.

When British Columbia entered the Canadian Confederation, all of its interests in the lands and resources, and jurisdiction to make decisions about these resources, were subject to s. 109 of the *Constitution Act*, 1867. The Provinces were only given powers to make decisions about areas of lands and resources where these lands did not have other interests already existing on them. Section 109 of the *Constitution Act*, 1867 reads:

All lands, Mines, Minerals, and Royalties belonging to the several Provinces...shall belong to the several Provinces...in which the same are situate or arise, subject to any Trust existing in respect thereof, and to any Interest other than that of the Province in the same.

Where Aboriginal Title exists, this is a pre-existing interest, and would limit or restrict any ownership or jurisdiction that the Province claimed to Aboriginal Title lands.

Professor Kent McNeil argues that the legal result of the operation of Section 109 and the continuation of Aboriginal Title is that “[t]he nature of the underlying title the provincial Crown has by virtue of s. 109 is therefore determined negatively: it amounts to whatever interest remains after the Aboriginal title that burdens it has been subtracted.”<sup>26</sup>

### **Period of Denial**

In B.C., Indigenous Nations continued to press for legal recognition of their Aboriginal Title until the *Indian Act* prohibitions of 1927 made it illegal for Indigenous Nations to organize or pursue their legal claims.<sup>27</sup> Throughout this period, Canada and British Columbia simply continued to ignore the existence of Aboriginal Title and granted interests to Aboriginal Title lands without the consent of the Indigenous Nations.

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<sup>26</sup> McNeil (2006) at para. 27.

<sup>27</sup> See for example: 1911 Declaration of the Lillooet Tribe, available online at: <http://www.statimc.net/tribe/declaration.htm>; 1910 Declaration of the Interior Tribes of B.C., available online at: [http://www.skeetchestn.ca/NewWeb/sir\\_wilferd\\_laurie.htm](http://www.skeetchestn.ca/NewWeb/sir_wilferd_laurie.htm); Chronology of Events surrounding Nisga’a actions pursuant to their Aboriginal Title, available online at: [http://www.ainc-inac.gc.ca/pr/agr/nsga/chronology\\_e.html](http://www.ainc-inac.gc.ca/pr/agr/nsga/chronology_e.html); Speech of David McKay, spokesperson for the Nisga’a Nation cited in *Calder v. AG BC*, [1973] SCR 313.

After the provisions making it illegal for Indigenous Nations to pursue their Aboriginal Title were lifted, Indigenous Nations throughout British Columbia began to reinvigorate their political and legal calls for recognition of their Aboriginal Title. Politically, organized opposition against governments continued denial of Aboriginal Title was solidified in 1969 when the federal government released its *Statement of the Government of Canada on Indian Policy*. Known as the White Paper, the federal government's new policy proposed to further transform Indigenous-Crown relations by doing away with the *Indian Act* and terminating Canada's fiduciary obligations to Indigenous Peoples. Instead, Indians were to be assimilated and treated as just another group in a new multicultural Canada.

Canada's attempt to ignore Aboriginal Title and to fully legally assimilate Indigenous Peoples into Canada once and for all sparked widespread organized resistance across the country. In B.C., Indigenous response to the White Paper led to the formation of the Union of B.C. Indian Chiefs.<sup>28</sup> Indigenous Peoples were very determined that the separate existence of Indigenous Nations (with their own cultures, languages, legal and governance systems, and Aboriginal Title to the lands and resources) should be recognized, not obliterated. At the same time, the Nisga'a Nation was pursuing its land claim in court, culminating in the 1973 Supreme Court of Canada *Calder* decision.

***Calder v. Attorney General of British Columbia:*<sup>29</sup>**

After many years of the denial of Aboriginal Title and futile efforts on the part of Indigenous Nations to have Aboriginal Title recognized, the Nisga'a people brought a court case claiming Aboriginal Title to the Nass watershed. For the first time in Canadian history, the Supreme Court of Canada affirmed that Aboriginal Title exists. However, the judges on the Court disagreed about whether or not Aboriginal Title had been extinguished by the assertion of Canadian sovereignty and the fact that the province had issued interests in the lands to third parties.

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<sup>28</sup> See for example: <http://www.ubcic.bc.ca/about/history.htm>

<sup>29</sup> [1973] S.C.R. 313 [*Calder*].

In *Calder*, Justice Judson said that Aboriginal Title exists because, before the newcomers arrived, Indigenous Nations were already here: "...the fact is that when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries."<sup>30</sup>

After many years of outright denial of the existence of Aboriginal Title, the decision in *Calder* caused governments to start to address Aboriginal Title. *Calder* affirmed the fact that the Land Question was still alive in British Columbia, and raised doubts about the province's legal authority to issue interests in Aboriginal Title lands.

In response to the "uncertainty" of Crown sovereignty flowing from *Calder*, the federal government created the 1973 "Comprehensive Claims Policy" to address Aboriginal Title not covered by treaty or any other legal arrangement. The policy was amended in 1996, but its goal remains to establish legal certainty by recognizing Indigenous land interests to a minimal land base in exchange for Indigenous Peoples' consent to the extinguishment of Aboriginal Title to the whole of their territories.<sup>31</sup>

Not surprisingly, many Indigenous Nations in British Columbia have refused to negotiate modern land agreements because the process requires Indigenous Nations to extinguish their Aboriginal Title rather than recognition of Indigenous sovereignty and legal jurisdiction over Aboriginal Title territories.

Although *Calder* left open the question of whether Aboriginal Title had been extinguished by the assertion of Crown sovereignty, Indigenous Peoples would continue to fight politically and in the courts for recognition of their Aboriginal Title and Rights. Canada continued to ignore Aboriginal Title, Indigenous Peoples continued to be criminalized for practicing their Aboriginal rights, and the Department of Indian Affairs continued to control Indigenous Peoples.

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<sup>30</sup> *Calder* at 328.

<sup>31</sup> See generally: RCAP, Vol. 2, Restructuring the Relationship; [http://www.ainc-inac.gc.ca/ps/clm/gbn/index1\\_e.html](http://www.ainc-inac.gc.ca/ps/clm/gbn/index1_e.html)

## **Constitutional Recognition - s. 35(1) of the *Constitution Act, 1982***

In the late 1970's Canada began efforts to formally patriate its Constitution from Britain. Prior to that time, because of its history as a British colony, the Canadian Constitution remained a British statute (called the *British North America Act, 1867*). The BNA basically set out the self-governance rights of Canada as a British colony. Although Canada's colonial status basically ended with the passage of the *Statute of Westminster* in 1931, and Britain abolished appeals to the Judicial Committee of the Privy Council in 1949 thereby making the Supreme Court of Canada the highest court of appeal, major constitutional changes still required the consent of the British Parliament.

Canada proposed to patriate its Constitution and introduce fundamental changes so that Canadian governments and courts were the decision makers with the highest powers. Initially, Indigenous Nations were excluded from constitutional talks between the federal and provincial governments. Given its continued denial of Aboriginal Title, Indigenous Peoples did not trust that Canada would uphold its obligations deal honourably with Indigenous Nations and feared that Canadian governments would simply override and ignore the rights of Indigenous Peoples. Indigenous Peoples from across Canada collectively organized to insist that Canada's new constitution must place limits on the ability of Canadian governments to interfere with Aboriginal Title, Rights and Treaty Rights.

The result of these intensive lobbying efforts was the inclusion within Canada's constitution (*Constitution Act, 1982*) of **Section 35** which promises:

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

Section 35 constitutionally protects Aboriginal Title, Rights and Treaty rights, and means that Indigenous Peoples can challenge government actions where they threaten or infringe those rights. In its operation, s. 35 has had a significant impact on the recognition of Aboriginal Title and has increased recognition of the need for legal

recognition of distinct legal and political space for Indigenous Nations in the Canadian legal landscape.

The first major judicial discussion of Aboriginal Title after the *Constitution Act, 1982* was the Supreme Court of Canada decision in *Guerin v. The Queen*.<sup>32</sup> Although this case involved a dispute over the management of reserve lands, the Court also addressed broader issues relating to the fiduciary obligations of the federal government and the existence of Aboriginal Title.

The SCC said that “the fiduciary relationship between the Crown and the Indians has its roots in the concept of aboriginal, native or Indian title.” Because Canada took unto itself the responsibility to act on behalf of Indians any sale or lease of lands having been surrendered for that purpose, the “surrender requirement, and the responsibility it entails, are the source of a distinct fiduciary obligations owed by the Crown to the Indians.”

With respect to the existence of Aboriginal Title, the Court held that:

The Indians' interest in their land is a pre-existing legal right not created by the Royal Proclamation of 1763, by s. 18(1) of the Indian Act, or by any other executive order or legislative provision. The nature of the Indians' interest is best characterized by its inalienability, coupled with the fact that the Crown is under an obligation to deal with the land on the Indians' behalf when the interest is surrendered.

Relying on *Calder*, the Court said that the existence of Aboriginal Title was a “legal right derived from the Indians’ historic occupation and possession of their tribal lands...” The inalienability of Aboriginal Title lands except to the Crown gives rise to a *sui generis* interest in the land and fiduciary relationship with the Canada.

Nevertheless, in *R. v. Van der Peet*, a case dealing with the Aboriginal Right to sell fish, the Supreme Court of Canada held that Aboriginal Title was a distinct subcategory of Aboriginal Rights under s. 35(1) of the *Constitution Act, 1982*.<sup>33</sup> The Court held that:

Aboriginal rights arise from the prior occupation of land, but they also arise from the prior social organization and distinctive cultures of aboriginal peoples on that land. In considering whether a claim to an aboriginal right has been made out, courts must look both at the

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<sup>32</sup> [1984] 2 SCR 335 [*Guerin*].

<sup>33</sup> *R. v. Van der Peet*, [1996] S.C.J. No. 77 [*Van der Peet*].

relationship of an aboriginal claimant to the land and at the practices, customs and traditions arising from the claimant's distinctive culture and society. Courts must not focus so entirely on the relationship of aboriginal peoples with the land that they lose sight of the other factors relevant to the identification and definition of aboriginal rights.<sup>34</sup>

This interpretation of Aboriginal Title differs significantly from that of Indigenous Peoples conception that Aboriginal Rights flow from Aboriginal Title and cannot be separated from the land.

In interpreting s. 35, the Supreme Court has said that its purposes are to:

- Ensure that Indigenous Peoples survive as unique Peoples with their own cultures and traditions;
- Address the history of injustice perpetrated against Indigenous Peoples through the denial of Aboriginal Title, Rights and Treaty Rights; and
- Reconcile the fact that Indigenous societies were here, and continue to exist, with the assertion of Canadian Crown Sovereignty (*Van der Peet*,<sup>35</sup> *Delgamuukw v. B.C.*;<sup>36</sup>)
- In *R. v. Sappier and Gray*<sup>37</sup> the Supreme Court of Canada said that the purposes of s. 35 include to protect the “cultural security and continuity” of Indigenous societies.

*Van der Peet* discussed the existence of Aboriginal Title in the context of s. 35 (1) Aboriginal Rights. *Guerin* dealt with Indigenous Peoples interests in reserve lands and the federal government’s duty to protect those lands. In *Calder* the Supreme Court of Canada acknowledged the existence of Aboriginal Title grounded in Indigenous Peoples prior occupation, possession and use of their land, but had split on the question of whether the Nisga’a’s Aboriginal Title had been extinguished by the assertion of Crown sovereignty. This issue was revisited by the Supreme Court of Canada in the 1997 *Delgamuukw* case.

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<sup>34</sup> *Van der Peet* at para. 74.

<sup>35</sup> [1996] 4 C.N.L.R. 177 (S.C.C.) [*Van der Peet*].

<sup>36</sup> [1997] 3 S.C.R. 1010 [*Delgamuukw*].

<sup>37</sup> *R. v. Sappier; R. v. Gray*, 2006 S.C.C. 54, para. 33.

### *Delgamuukw v. British Columbia*

In 1986, Gitksan and Wet'suwet'en Nations brought an action against the province of British Columbia in the groundbreaking case, a court case asking for recognition of their Aboriginal Title to their traditional territories based on their traditional laws and systems of governing and managing their territories<sup>38</sup> (*Delgamuukw v. British Columbia*<sup>39</sup>). In their response, the Province claimed that Aboriginal Title did not exist, or that if it had ever existed it had been extinguished.

In 1997 the Supreme Court of Canada (the "SCC") released its landmark decision in *Delgamuukw v. British Columbia*. The SCC ruled for the first time that Aboriginal Title continues to exist, was not extinguished by the assertion of Canadian sovereignty or Provincial laws, and is protected by section 35(1) of the *Constitution Act, 1982*.<sup>40</sup> The SCC also set out a number of principles about what Aboriginal Title means, how Aboriginal Peoples can prove Aboriginal Title, and what governments need to do when they make decisions that infringe Aboriginal Title and Rights.

The SCC said that Aboriginal Peoples can use their oral history to prove Aboriginal Title. This is important because Aboriginal Peoples come from oral traditions where Aboriginal Peoples' connections to their lands and their laws about their traditional territories are transmitted across generations through story, song, dance and ceremonies in the Feast Hall, not the written word. At trial, the Gitksan and Wet'suwet'en Nations introduced their oral traditions (the Gitksan "adaawk" and the Wet'suwet'en "kungax") as evidence to show their ownership and jurisdiction to their lands. The lower court rejected this evidence, saying that it was unreliable. The SCC said the trial judge erred by not fairly

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<sup>38</sup> [If we are interested in making comments about the racism that subsists in the denial of Aboriginal Title and the way it is reflected in some court cases] Initial decision (the McEachern decision) was a loss for the Gitksan Wet'suwet'en, and the court seemed to accept a "terra nullius" theory that the Indigenous Peoples did not hold title because they were not sufficiently civilized or organized to have governance systems in place to actually hold Title to the land. The lives of Indigenous Peoples was "nasty, brutish, and short".

<sup>39</sup> [1997] 3 S.C.R. 1010 [Delgamuukw].

<sup>40</sup> [1997] 3 S.C.R. 1010

assessing and giving proper weight to the Aboriginal oral tradition evidence since it is often the only evidence Aboriginal Peoples' have to prove their Aboriginal Title and Rights.

The SCC set out a three part test for proving Aboriginal Title. First, an Aboriginal group has to show that they occupied an area before the British asserted sovereignty. In B.C. this would be before 1846. To prove pre-sovereignty occupation, Aboriginal Peoples can rely on their oral history and their traditional use of the territory (for example, hunting, fishing, gathering, village sites, etc.).

Second, because Aboriginal Peoples Title and jurisdiction may have been interrupted by colonial settlement, an Aboriginal group can prove occupation by showing a connection between the present day and pre-sovereignty times. To prove continuity, the Aboriginal group must show that their people continued to use the land (for example, that they continued to hunt, fish, trap, gather berries or medicines, engaged in spiritual practices and other activities on the land).

Third, an Aboriginal group must show that they exclusively used, occupied and possessed the lands they claim Aboriginal Title over. This would include being able to show that they controlled the lands through their own laws or systems of governance which granted or denied other people use of their traditional territory or access resources on their traditional lands and waters. Exclusive use and occupation does not mean no other Aboriginal group was allowed to use the area, but that one group was recognized as the owners and others needed permission to enter on the land and take resources (e.g. hunting or fishing etc.). So for example, an Aboriginal group could show certain areas were jointly used with another group for hunting because the two groups had entered into an inter-tribal agreement or protocol based on one group's recognized ownership and jurisdiction over the lands or waters.

The SCC said Aboriginal Title and Rights are constitutionally protected by section 35(1) of the *Constitution Act, 1982*. Aboriginal Peoples have a right to decide which uses Aboriginal Title lands may be used as long as those uses preserve their connection to the land. If the Aboriginal group wants to use the land in a way that destroys that connection, they must first surrender the land to the government. For example, the SCC said an Aboriginal group cannot turn a traditional hunting ground into a mall or parking lot. If an Aboriginal Nation does want to develop Aboriginal Title land for non-traditional purposes, they must surrender the land to the government first.

Aboriginal Title is a burden on Crown title. Aboriginal Title and Rights are not absolute. The SCC said government can pass laws and make decisions about lands and resources that infringe Aboriginal Title and Rights but they must justify their actions by showing the courts why the law or decision should be allowed. The SCC set out a two part “justification test” that governments must pass if they want to infringe Aboriginal Title. First, government must show that the law or decision was passed for a compelling and substantial legislative objective. For example, a law or regulation to develop agricultural lands, forestry, mining or hydroelectric power which adversely impacts Aboriginal Title and Rights may be held by the courts to be valid if government can show it is in the best interests of society as a whole. The SCC said that laws or regulations which deal with the general economic development of the interior, protects the environment or endangered species, is required to build infrastructure or support the settlement of lands by new Canadians, may be deemed in the best interests of society and can infringe or displace Aboriginal Title and Rights.

Next, government must uphold the honour of the Crown in all its dealings with and on behalf of Aboriginal Nations. Government’s have a fiduciary duty to act in the best interests of Aboriginal Nations. The SCC said that when government wants to infringe constitutionally protected Aboriginal Title or Rights it must show that Aboriginal interests were taken into account and given a priority in the government’s decision-making process. To determine if government has fulfilled its fiduciary duty and acted honourably with respect to Aboriginal Title and Rights, the Courts will look at the

legislation or decision to see if government has consulted in good faith with the Aboriginal Nation whose interests will be impacted, that government has taken into account and accommodated Aboriginal Title and Rights, and have impaired these rights as little as possible.

The Supreme Court of Canada's decision in the *Delgamuukw* case was the first instance where the unanimous Supreme Court agreed that Aboriginal Title exists and had not been extinguished, nor could it ever be extinguished by provinces as Indigenous lands are under exclusive federal jurisdiction.

**What is Aboriginal Title?** The Supreme Court of Canada said that Aboriginal Title protects the relationship between Indigenous Peoples and their territories, it is more than the right to practice specific activities (such as hunting and fishing) on the land, it is a right to the land itself.

Aboriginal Title includes:

- The right to make decisions about the land, and to decide to what uses Aboriginal Title lands can be put;
- Economic component that evolves to reflect modern relationships between the People and their land and evolving economies;
- Aboriginal Title is a collective interest in the land which is held by Aboriginal Nations and not by individual communities or individual Indigenous persons; and
- Aboriginal title is "*sui generis*" from all other types of property interests. (*Sui generis* is a legal term that refers to the fact that something is unique or different).

To prove the existence of Aboriginal Title, Indigenous People have to show:

- The historic use and occupation of territories by Indigenous Peoples when the Crown asserted sovereignty over those lands (for B.C., this is 1846)<sup>41</sup>;
- That Indigenous Peoples exclusively occupied territory; and

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<sup>41</sup> Would have to explain about what it means that the Crown asserted sovereignty. As well, what are ways that Indigenous Peoples could show that they "occupied" a territory?  
Is there room here for a criticism of the fact that Indigenous Peoples have to "prove" title when the Crown's title to the lands is not questioned by the Courts?

- The Indigenous Peoples' relationship with their lands. This can include the fact that Indigenous Peoples have their own laws for protecting or making decisions about the lands. For example, in *Delgamuukw*, the Gitksan and Wet'suwet'en introduced evidence of their *adaawk* and *kungax*, their oral traditions detailing governance and relationships with certain territories to demonstrate that they have Aboriginal Title and to show their own laws about the land.

(However the range of uses is subject to the limitation that they must not be irreconcilable with the nature of the attachment to the land which forms the basis of the particular group's aboriginal title.<sup>42</sup>)

The Supreme Court listed examples of the limitations to what Indigenous Peoples could do with their Aboriginal Title lands as including not being able to strip mine a hunting ground because that would destroy the traditional relationship between the land and the people. Aboriginal Title is "inalienable" other than to the federal Crown. This means that Aboriginal Title cannot be sold, bought or traded with any other party other than with the federal Crown, and Provinces cannot extinguish Aboriginal Title.

The Supreme Court also addressed how government decisions about land and resources must account for Aboriginal Title:

"There is always a duty of consultation. Whether the Aboriginal group has been consulted is relevant to determining whether the infringement of Aboriginal title is justified... The nature and scope of the duty of consultation will vary with the circumstances. In occasional cases, when the breach is less serious or relatively minor, it will be no more than a duty to discuss important decisions that will be taken with respect to lands held pursuant to Aboriginal title. Of course, even in these rare cases, it will be significantly deeper than mere consultation. Some cases may even require the full consent of an Aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to Aboriginal lands."

In discussing the process of consultation, the Supreme Court of Canada proposed this as a way that Canadian government decisions could reconcile the assertion of Canadian sovereignty with the continuing existence of Aboriginal Title.

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<sup>42</sup> *Delgamuukw*, at para 111.

An important element of the *Delgamuukw* decision was that it recognized how important Aboriginal Title lands are to the continued cultural survival of Indigenous Nations, and included Indigenous Peoples' rights to make decisions about their lands. Recognition of Indigenous legal systems is embodied in this decision because Indigenous Peoples make decisions about the land within a framework of laws and legal systems. Aboriginal Title is a communal interest held by Indigenous Nations and according to the collective laws of those Nations. The Supreme Court of Canada said that if an Indigenous Nation "had laws in relation to land, those laws would be relevant to establishing the occupation of lands which are the subject of a claim for aboriginal title. Relevant laws might include, but are not limited to, a land tenure system or laws governing land use."<sup>43</sup>

"Unlike fee simple lands, Aboriginal title lands are vested in communities that have laws predating Crown sovereignty. Such communities have the legal personality necessary for them to have real property rights that are defined and protected externally by the common law, but that are governed internally by continuing Aboriginal law. Moreover, Aboriginal law is not frozen at the time of sovereignty. ...Aboriginal communities have decision-making authority that is governmental in nature, the exercise of which enables them to change their internal land laws. Aboriginal title is therefore more than a proprietary interests. It has a jurisdictional quality that removes it from common law estates in land and makes it truly *sui generis*."<sup>44</sup>

Aboriginal Title includes the Indigenous laws which controlled the territory and protected the land. The existence of Indigenous laws is equally part of the definition of Aboriginal Title.

**Consultation and Accommodation/Reconciliation:** Consultation Law – *Haida* and *Taku* and other consultation cases – and how this impacts upon the decisions that the Crown makes to authorize uses of lands or resources that might impact Aboriginal Title?]

***R. v. Marshall and Bernard***.<sup>45</sup>

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<sup>43</sup> *Delgamuukw*, at para. 148.

<sup>44</sup> McNeil, Kent. "Aboriginal Title and the Supreme Court: What's Happening?" (2006), 69 Sask. L. Rev. 282 at para. 23 (Quicklaw) [McNeil, 2006].

<sup>45</sup> [2005] S.C.J. No 44 [*Marshall*]

In *Marshall and Bernard* the Supreme Court of Canada clarified the test for proving Aboriginal Title. At issue was whether the Mi'kmaq had a right to harvest trees for commercial purposes on unoccupied Crown lands without provincial authorization in the provinces of Nova Scotia and New Brunswick based on their Aboriginal Title.

In *Bernard*, a Mi'kmaq was charged with unlawful possession of logs he was taking to a sawmill in contravention of the New Brunswick *Crown Lands and Forest Acts*. In *Marshall*, 35 members of the Mi'kmaq Nation in Nova Scotia were charged under the *Crown Lands Act* for cutting timber on Crown lands without provincial authorization. The cases were consolidated on appeal to the Supreme Court of Canada and the Mi'kmaq argued in both cases that they had a right to log pursuant to their 1760-61 treaties or Aboriginal Title.

The Court rejected the Mi'kmaq's argument that they had a modern treaty right to harvest trees based on a trade clause in the 1760 and 1761 treaties entered between the Mi'kmaq and the British Crown. Although the SCC had found in an earlier case (*Marshall 1* and *Marshall 2*) that a trade clause granted the Mi'kmaq a right to engage in traditional activities so as to obtain a moderate livelihood from the land and sea (in *Marshall 1* and *2*, to fish and sell eels), the Court held that this was not a general right to any traditional activity the Mi'kmaq engaged in, but was limited to those products the Mi'kmaq traded with Europeans at the time the treaty was entered. There was insufficient evidence to show that the Mi'kmaq had traditionally traded wood products with the British to support a claim that modern commercial logging was a logical evolution of an earlier trade right.<sup>46</sup>

In determining the Mi'kmaq's claim for Aboriginal Title, the Court reviewed the lower courts application of the test for proving Aboriginal Title set out in *Delgamuukw*. At trial, the lower court applied a strict test for proof of Aboriginal Title requiring evidence of "regular and exclusive use of the cutting sites in question"<sup>47</sup> before the Crown asserted sovereignty. The Courts of Appeal applied a "looser" test, holding that "it was enough to show that the Mi'kmaq had used and occupied an area near the cutting site... This

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<sup>46</sup> *Marshall* at para. 35.

<sup>47</sup> *Marshall* at para. 41.

proximity permitted the inference that the cutting site would have been within the range of seasonal use and occupation by the Mi'kmaq.”<sup>48</sup> The SCC held that proof of Aboriginal Title “is established by aboriginal practices that indicate possession similar to that associated with title at common law”<sup>49</sup> and requires proof of “exclusive” “pre-sovereignty” “physical occupation” of the land by the Mi'kmaq.<sup>50</sup>

The Court listed several examples that might be used to show that Aboriginal People “occupied” the land prior to the assertion of sovereignty, including “the existence of dwellings, cultivation of fields, and regular use of parts of the lands for “hunting, fishing or otherwise exploiting its resources”<sup>51</sup> and said that:

“It follows from the requirement of exclusive occupation that exploiting the land, rivers or seaside for hunting, fishing or other resources may translate into aboriginal title to the land if the activity was sufficiently regular and exclusive to comport with title at common law. However, more typically, seasonal hunting and fishing rights exercised in a particular area will translate to a hunting or fishing right.”<sup>52</sup>

Aboriginal Title does not flow from occasional entry or use of the land.<sup>53</sup> Rather, as per *Delgamuukw*, exclusive occupation means “the intention and capacity to retain exclusive control” and regular use of the land. The ability to exclude others from using the land might be considered as part of the necessity for showing proof of Aboriginal Title. This could include whether the Indigenous People were able to demonstrate that they had effective control of land, and could have excluded other people from the territory. “Shared exclusivity may result in joint title”, while “non-exclusive occupation may establish rights “short of title.”

Evidence of “overt acts of exclusion” is not required as it may difficult for Indigenous Nations to produce such evidence dating back hundreds of years ago when there was no

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<sup>48</sup> *Marshall* at para. 43.

<sup>49</sup> *Marshall* at para. 54.

<sup>50</sup> *Marshall* at para. 55-57.

<sup>51</sup> *Marshall* at para. 56.

<sup>52</sup> *Marshall* at para. 58.

<sup>53</sup> *Marshall* at para. 59.

written history.<sup>54</sup> However, a “demonstration of effective control of the land by the group, from which a reasonable inference can be drawn that it could have excluded others had it chosen to do so” is sufficient.

On the question of whether “nomadic or semi-nomadic peoples” could ever make out a claim for Aboriginal Title, the SCC said that although “not every nomadic passage or use will ground title to the land,” *Delgamuukw* contemplated that “physical occupation” sufficient to ground title to land may be established by “regular use of definite tracts of land for hunting, fishing or otherwise exploiting its resources.”<sup>55</sup> Less intensive uses of the land “may give rise to different rights” short of title.<sup>56</sup>

Indigenous People must also prove continuity “in the sense of showing the group’s descent from the pre-sovereignty group whose practices are relied on for the right.”<sup>57</sup> In all these matters, Indigenous Peoples can rely on their oral histories as evidence “provided it meets the requisite standards of usefulness and reasonable reliability.”<sup>58</sup>

In *Marshall* and *Bernard*, the SCC found insufficient evidence to support an Aboriginal Title claim by the Mi’kmaq and upheld the lower courts assessment of the evidence. Although the Mi’kmaq were “moderately nomadic”, there was no evidence to demonstrate that they exclusively occupied or controlled sites in question. At best, the Mi’kmaq may have made “occasional forays” to the areas where the cutting occurred to hunt and fish, but the Mi’kmaq had failed to show they exercised exclusive control over the land, and a common law right of Aboriginal Title could not be supported.

To the extent the *Marshall* decision rests almost entirely on proof of exclusive use and occupation, and requires regular use of the land to establish Aboriginal Title, the Courts conclusions fail to recognize Indigenous laws and legal traditions with respect to land which may dictate other ways of caring for and protecting the land. The Court recognized the need to take into account the aboriginal perspective, saying that:

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<sup>54</sup> *Marshall* at para. 64.

<sup>55</sup> *Marshall* at para. 66.

<sup>56</sup> *Marshall* at para. 70.

<sup>57</sup> *Marshall* at paras. 67 and 70.

<sup>58</sup> *Marshall* at para. 70.

In my view, aboriginal conceptions of territoriality, land-use and property should be used to modify and adapt the traditional common law concepts of property in order to develop an occupancy standard that incorporates both the aboriginal and common law approaches. Otherwise, we might be implicitly accepting the position that aboriginal peoples had no rights in land prior to the assertion of Crown sovereignty because their views of property or land use do not fit within Euro-centric conceptions of property rights.<sup>59</sup>

However, at para. 77, the Court said:

[T]he task of the court is to sensitively assess the evidence and then find the equivalent modern common law right. The common law right to title is commensurate with exclusionary rights of control. That is what it means and has always meant. If the ancient aboriginal practices do not indicate that type of control, then title is not the appropriate right. To confer title in the absence of evidence of sufficiently regular and exclusive pre-sovereignty occupation, would transform the ancient right into a new and different right. It would also obliterate the distinction that this Court has consistently made between lesser aboriginal rights like the right to fish and the highest aboriginal right, the right to title to the land: *Adams, Côté*.

Aboriginal laws thus have been reduced to the “Aboriginal perspective”, and Aboriginal Title to a subset of Aboriginal Rights and only to certain areas where they can prove exclusive use and occupation. This conflicts with the broad conception of Aboriginal Title which Indigenous Peoples hold.

One issue which has come to the forefront in recent Aboriginal Title litigation is the extent of Aboriginal Title lands. Indigenous Peoples believe (and have argued forcefully in court) that Aboriginal Title extends to include the entirety of their traditional territories. The province, on the other hand, has claimed that Aboriginal Title applies to only very specific areas or tracts of land. These are the issues currently before the Supreme Court of B.C. in the *William/Xeni v. British Columbia* case.

If Aboriginal People only periodically visit, or seasonably visit an area, this may not be sufficient to show the degree of occupation necessary to establish Aboriginal Title.

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<sup>59</sup> *Marshall* at para. 127.

## **Recognition of Indigenous Oral Traditions**

One of the important parts of the decision was its decision of Indigenous oral traditions and laws. McEachern rejected the evidence offered by the Indigenous Peoples, finding that it was not credible and could not be relied upon. Instead, he relied heavily upon “written records” (ie., the journals of trader Brown). Prior to this time, Canadian courts had relied heavily on written information as the strongest evidence or proof in court cases. This situation put Indigenous Peoples in a very poor position, as most of Indigenous Peoples evidence is contained within the oral tradition. The Supreme Court said that Indigenous Peoples oral traditions are a valid form of evidence in courts and must be respected and treated on an equal footing with other forms of evidence (i.e., written evidence, or the evidence of “experts”)

Canadian governments are still allowed to take actions which may infringe or impact upon Aboriginal Title lands. However, they have to be able to justify those infringements (set out the test; consider to what degree this whole discussion should be included here) One possibility for a graphic or interactive inclusion on the webpage is to go through the various steps that are included, both in proof and in justification for infringements)

After the decision in *Delgamuukw* the recognition of Aboriginal Title remains an outstanding issue. The Province has followed a policy of issuing interests in the lands and resources, and has said that Indigenous Peoples have to prove the existence of their Aboriginal Title in court before the Province will acknowledge it. The only other option is that the Province will agree to negotiate recognition in modern land claims.

For many Indigenous Peoples these two options are unacceptable. Proving Aboriginal Title in court is a process that takes many years and millions of dollars. Negotiating a modern land claim in a process that requires extinguishment of a Nation’s Aboriginal Title in exchange for a limited area of “treaty settlement lands” is equally unacceptable to many Indigenous Peoples.

**Into the Future:** Recovery of Indigenous Laws and Recognition of Indigenous Laws about the lands.

## Indigenous Laws

Under Canadian common law, the doctrine of Continuity says that where there were pre-existing Indigenous laws these survived the arrival of the newcomer societies and their assertion of sovereignty:

European settlement did not terminate the interests of aboriginal peoples arising from their historical occupation and use of the land. To the contrary, aboriginal interests and customary laws were presumed to survive the assertion of sovereignty, and were absorbed into the common law as rights...<sup>60</sup>

Justice Williamson, in *Campbell v. British Columbia (Ministry of Attorney General)* recognized that Indigenous laws continue to form part of the fabric of the Canadian legal system: “recognition by the courts that most aboriginal persons accept the legitimacy of an evolving customary or traditional law, just as most Canadians accept the legitimacy of common and statutory law.”<sup>61</sup>

In *Van der Peet* the Supreme Court of Canada cited the Australia High Court in *Mabo*'s discussion of Indigenous laws:

Native title has its origin in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the Indigenous inhabitants of a territory. The nature and incidents of native title must be ascertained as a matter of fact by reference to those laws and customs ...

This position is the same as that being adopted here. "Traditional laws" and "traditional customs" are those things passed down, and arising, from the pre-existing culture and customs of aboriginal peoples. The very meaning of the word "tradition" -- that which is "handed down [from ancestors] to posterity", The Concise Oxford Dictionary (9th ed. 1995), -- implies these origins for the customs and laws that the Australian High Court in *Mabo* is asserting to be relevant for the determination of the existence of aboriginal title. To base aboriginal title in traditional laws and customs, as was done in *Mabo*, is, therefore, to base that title

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<sup>60</sup> *Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911, para. 8

<sup>61</sup> *Campbell v. British Columbia (Attorney General)*, [2000] B.C.J. No. 1525 (QL) (B.C.S.C.) at para. 105 [*Campbell*].

in the pre-existing societies of aboriginal peoples. This is the same basis as that asserted here for aboriginal rights.<sup>62</sup>

Aboriginal Title and Rights, from a Canadian legal perspective, are “inter-societal” laws that incorporate both Indigenous and Canadian common law<sup>63</sup>

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<sup>62</sup> *Van der Peet*, at para. 40.

<sup>63</sup> *Ibid.* at 198-200.