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Aboriginal Rights in Canada: The Historical and Constitutional Context

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Aboriginal Rights in Canada: The Historical and Constitutional Context[†]

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European Colonization of Canada

French Canada: Acadia and La Nouvelle France.

English Canada: Newfoundland & Labrador, Hudson's Bay Company territory (Rupert's Land), British Columbia, the North.

[†] Editor's note: The following is a reproduction of presentation slides that accompanied the author's talk. A narrative or prose style text of the presentation was not available for publication. The information contained in the present format is naturally somewhat limited, but it still provides a great deal of valuable information and useful context for the subject.

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European Practice

Among themselves: European nations, including France and England, denied sovereignty to Aboriginal peoples.

Vis-à-vis Aboriginal peoples: European nations entered into treaties with Aboriginal peoples as if they were sovereign.

Albany Treaty, 1664

- E.g., after acquiring New York from the Dutch, England entered into a treaty with the Haudenosaunee, or Five (later Six) Nations of the Iroquois Confederacy.
- Known as the Two-Row Wampum Treaty, by this agreement the English and the Haudenosaunee acknowledged one another's independence.

Maritime Treaties

- Britain acquired Acadia by cession from France by the Treaty of Utrecht, 1713.

- In 1725, 1752, and 1760-61, Britain entered into peace, friendship, and commercial treaties with the Mi'kmaq and other nations.

Treaty of Paris, 1763

After the fall of Quebec City in 1759 and the capitulation of Montreal in 1760, France ceded La Nouvelle France to Britain by the Treaty of Paris, which ended the Seven Years War.

Royal Proclamation of 1763

Shortly thereafter, King George III issued a Royal Proclamation that was intended to reassure the Aboriginal nations in former French Canada and elsewhere in North America of the Crown's intention to protect their land rights.

Proclamation's Main Provisions

In addition to providing for the governance of the Crown`s new colony of Quebec, the Proclamation stated:

- All unceded Indian lands were reserved for their exclusive possession.
- No colonial governors could authorize surveys or make grants of these lands.

Proclamation`s Terms, continued

- No settlers could settle on or purchase Indian lands.
- If the Indian nations wanted to sell any of their lands, they could only do so to the Crown at an assembly called for that purpose.

Land Surrenders

- The Royal Proclamation provided a process for acquisition of Indian lands by land surrender treaties.
- In Canada, this process began in what is now southern Ontario, and accelerated after the influx of United Empire Loyalists following the American Revolution.

Historic Treaties

- As European settlement pushed north and west, the Crown entered into treaties with Aboriginal nations to acquire lands for the settlers.
- E.g., in 1850 the Robinson Treaties were signed to acquire large tracts of land east and north of Lake Huron, and north and west of Lake Superior.

Confederation, 1867

- When Nova Scotia, New Brunswick, and the province of Canada united to form the Dominion of Canada in 1867, the *BNA Act* divided legislative authority between the Canadian Parliament and the 4 provinces.
- Section 91(24) gave the federal government exclusive jurisdiction over "Indians, and Lands reserved for the Indians."

The *Indian Act*, 1876

- In 1876, the Parliament of Canada exercised its s. 91(24) authority by enacting the *Indian Act*.

- I'm going to skip over this because it is part of Douglas Sanderson's presentation.

Canada Expands Westward

- In 1870, the Crown transferred Rupert's Land and the North-Western Territory to Canada.

- In the same year, the Canadian Parliament created the province of Manitoba following the uprising in the Red River Settlement in 1869-70.

Manitoba Act, 1870

- S. 31 provided that 1,4000,000 acres of land were to be set aside for the Métis in the new province to settle their claims to Indian title.
- The meaning and effect of this provision is currently before the Supreme Court.
- In actual fact, the Métis lost most of the land that they had been promised, and many of them moved further west.

The Numbered Treaties

- In order to open up the West for settlement, the Canadian Government entered into 7 numbered treaties from 1871 to 1877.
- These treaties, covering north-western Ontario and most of the Prairies, provided for surrender of Indian lands in return for reserves, hunting and fishing rights, annuities, and assistance in agriculture.

Numbered Treaties in the North

- Between 1899 and 1921, four more numbered treaties were signed in what became northern Ontario, Manitoba, Alberta and Saskatchewan.

- These treaties were intended to open up these areas for resource development, especially mining.

Constitutional Treaty Rights

- The the numbered treaties – especially the provisions relating to hunting and fishing rights – have resulted in many court cases.
- Since 1982, these rights have been constitutionally protected by s. 35 of the *Constitution Act, 1982* (discussed later).
- However, this does not mean these rights cannot be infringed.

British Columbia

- B.C. joined Confederation in 1871.
- In the 1850s, a few Indian treaties had been negotiated by Governor James Douglas.
- These treaties relate only to portions of southern Vancouver Island.
- After joining Canada, B.C. refused to consider any more treaties. Canada gave in to B.C., though Treaty 8 covers part of B.C.

Land Rights in B.C.

- Aboriginal nations in B.C. protested against the taking of their lands without treaties.
- In the early 1920s, Aboriginal nations contemplated going to court to have their land rights acknowledged.
- In 1927, the Canadian Parliament made it illegal to raise money or pay lawyers to pursue Indian claims (repealed in 1951).

The *Calder* Case, 1973

- In the late 1960s, the Nisga`a Nation finally brought a land claim to court in B.C.
- The case was decided on appeal by the Supreme Court of Canada in 1973.
- The Court dismissed the action because the Nisga`a had not obtained the Lieutenant-Governor's permission to sue the province.

Calder Case, continued

- Nonetheless, 6 of the 7 judges held that there is such a thing as Aboriginal title to land in the province.
- But these judges split evenly – 3 to 3 – on whether this title had been extinguished by legislation in B.C. prior to Confederation.
- Nonetheless, *Calder* is regarded as a major victory for the Aboriginal nations.

Comprehensive Land Claims

- For one thing, the decision prompted Canada to begin negotiating modern-day treaties for the surrender of Aboriginal title.
- This is known as the comprehensive land claims policy.
- The first such modern-day treaty is the James Bay and Northern Quebec Agreement (1975).

Modern Treaties in B.C.

- B.C. continued to refuse to acknowledge the existence of Aboriginal title after *Calder*. It alleged that any such title had been extinguished.
- B.C. finally relented in 1991, and agreed to set up the B.C. Treaty Commission to facilitate the negotiation of treaties in the province.

The Nisga`a Treaty

- The first modern-day treaty in B.C. was finalized in 1998 and ratified in 2000.

- Unlike the historic treaties, the Nisga`a Treaty and other modern-day treaties are extremely complex documents that deal with many issues, including lands and resources and sometimes self-government.

Other Aboriginal Title Cases

- Negotiation of land claims is one possibility, but some Aboriginal nations have chosen to go to court.
- E.g., the Gitksan and Wet`suwet`en in central B.C. brought a claim for Aboriginal title and a right to self-government that resulted in a landmark Supreme Court judgment in 1997.

Delgamuukw v. British Columbia

- In this case, the SCC declined to make a final decision, even though the case had been in the courts for about 10 years.
- However, the Court did provide a fairly comprehensive definition of Aboriginal title, and explained how it can be proven.
- The Court also explained the impact of s. 35 of the *Constitution Act, 1982*.

Constitution Act, 1982, s. 35

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

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

S. 35 Aboriginal & Treaty Rights

- For the first time, Aboriginal and treaty rights received broad constitutional protection.

- Aboriginal title, as defined by the Supreme Court in *Delgamuukw*, is one category of Aboriginal rights recognized by s. 35.

Nature of Aboriginal Title

Aboriginal title is a proprietary interest, not a mere licence to use and occupy the land. It can "compete on an equal footing with other proprietary interests": *Delgamuukw*, Lamer C.J.

Content of Aboriginal Title

"[F]irst, aboriginal title encompasses the right to exclusive use and occupation of the land held pursuant to that title for a variety of purposes, which need not be aspects of those aboriginal practices, customs and traditions which are integral to distinctive aboriginal cultures; and second, that those protected uses must not be irreconcilable with the nature of the group's attachment to that land." *Delgamuukw*, Lamer C.J.

Sui Generis Aspects of Aboriginal Title

1. Source: Aboriginal title "arises from the prior occupation of Canada by Aboriginal peoples." This occupation has legal consequences because: (1) in the common law, "the physical fact of occupation ... is proof of possession in law," and (2) if the occupation was pursuant to Aboriginal law, there would be "a second source for aboriginal title – the relationship between common law and pre-existing systems of aboriginal law." *Delgamuukw*, Lamer C.J.

Sui Generis Aspects, continued

2. Inalienability: Aboriginal title cannot be sold or conveyed to private persons or corporations. It can only be surrendered to the Crown. *Delgamuukw*, Lamer C.J.
3. Communal nature: "Aboriginal title cannot be held by individual aboriginal persons; it is a collective right to land held by all members of an aboriginal nation. Decisions with respect to that land are also made by that community." *Delgamuukw*, Lamer C.J.

Sui Generis Aspects, Continued

4. Inherent limit: "Lands held pursuant to aboriginal title cannot be used in a manner that is irreconcilable with the nature of the attachment to the land which forms the basis of the group's claim to aboriginal title." *Delgamuukw*, Lamer C.J.

Proof of Aboriginal Title

"In order to make out a claim for aboriginal title, the aboriginal group asserting title must satisfy the following criteria: (i) the land must have been occupied prior to sovereignty, (ii) if present occupation is relied on as proof of occupation pre-sovereignty, there must be a continuity between present and pre-sovereignty occupation, and (iii) at sovereignty, that occupation must have been exclusive." *Delgamuukw*, Lamer C.J.

Aboriginal Rights Apart from Title

- All Aboriginal rights apart from title, it seems, must be proven by what is known as the *Van der Peet* test, as modified by *R. v. Powley* (SCC 2003) where Métis rights are concerned.

- These rights can include harvesting resources such as fish, game and wood for personal and community use, commercial fishing rights, and probably self-government rights.

The *Van der Peet* Test

- In *R. v. Van der Peet* (1996), the Lamer CJ laid down the test for proof of s. 35 Aboriginal rights, apart from title.

- S. 35's purpose is to reconcile the pre-existence of distinctive Aboriginal societies with Crown sovereignty. So "in order to be an aboriginal right an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right."

Time Frame for Application of the "Integral" Test

Indian and Inuit Rights: Claimants must prove that the practice, custom or tradition was integral to the distinctive culture of their Aboriginal nation or group at the time of contact with Europeans. *Van der Peet,* Lamer C.J.

Métis Rights: Proof is required that the practice, custom or tradition was integral to the distinctive culture of that Métis community at the time of effective European control: *Powley* (SCC, 2003).

Unproven Aboriginal Rights and Title: The Duty to Consult

- In my opinion, the most important recent development in Aboriginal rights jurisprudence is the imposition on governments of a duty to consult with Aboriginal claimants where Aboriginal rights and title have not yet been proven.

- In *Haida Nation v. B.C.* (2004), the SCC held that he duty to consult, and to accommodate unproven Aboriginal claims in appropriate circumstances, stems from the honour of the Crown.

Duty to Consult, continued

"The Crown, acting honourably, cannot cavalierly run roughshod over aboriginal interests where claims reflecting these interests are being seriously pursued in the process of treaty negotiation and proof. It must respect these potential, but yet unproven, interests." *Haida Nation*, McLachlin C.J.

Duty to Consult, continued

When does the duty to consult arise?

"The foundation of the duty in the Crown's honour, and the goal of reconciliation, suggest that the duty arises when the Crown has knowledge, real or constructive, of the potential existence of the aboriginal right or title and contemplates conduct that might adversely affect it." *Haida Nation*, McLachlin C.J.

Duty to Consult, continued

Scope and content of the duty:

"The content of the duty to consult and accommodate varies with the circumstances.... In general terms, ... it may be asserted that the scope of the duty is proportionate to a preliminary assessment of the strength of the case supporting the existence of right or title, and to the seriousness of the potentially adverse effect upon the right claimed." *Haida Nation*, McLachlin C.J.

Duty to Consult, continued

The duty to accommodate:

"Where a strong *prima facie* case exists for the claim, and the consequences of the government's proposed decision may adversely affect it in a significant way, addressing the aboriginal concerns may require taking steps to avoid irreparable harm or to minimize the effects of infringement, pending final resolution of the underlying claim." *Haida Nation*, McLachlin C.J.

The Duty to Consult in Treaty Areas

In 2005, the Supreme Court extended the duty to consult to contexts where the Crown relies on the "taking up" clause in the numbered treaties to remove lands from the scope of treaty hunting and fishing rights: *Mikisew Cree First Nation v. Canada* (SCC 2005).

The Duty to Consult in Treaty Areas, continued

"The honour of the Crown infuses every treaty right and the performance of every treaty obligation. Treaty 8 therefore gives rise to Mikisew procedural rights (e.g. consultation) as well as substantive rights (e.g. hunting, fishing and trapping rights)." *Mikisew Cree,* Binnie J.

The Duty to Consult in Treaty Areas, continued

- The *Mikisew Cree* decision is significant in treaty areas across Canada, including Ontario.
- It means that provincial governments have to consult before engaging in any resource development on treaty lands.
- It has also had an impact on modern-day treaties, as governments have to consult when their actions will affect those treaty nations as well.