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Aboriginal Peoples'[1] Legal Rights to Natural Resources (Forests) in British Columbia

Introduction

After France surrendered (or ceded) its lands in what is now Canada to the British, the British issued the Royal Proclamation of 1763, which said, in part, that:

1. Aboriginal Peoples retain possession of all lands not ceded to, or purchased by, the Crown;

2. Only the Crown could purchase lands from Aboriginal Peoples;

3. British subjects were forbidden from settling on Aboriginal lands; and

4. Before establishing settlements on Aboriginal Peoples' lands, the Crown had to purchase them in a public assembly of Aboriginal Peoples, and only with their consent.

British and Aboriginal Peoples signed treaties in most of Canada, except BC. To justify settling Aboriginal lands without purchase or cession, European colonizers insisted that because Aboriginal Peoples were "primitive" or "uncivilized" there were no laws, governments or organized societies requiring their respect.

In the 1970s Canadian courts recognized that Aboriginal Peoples with organized societies and legal systems were here before the Europeans. In 1973 the Supreme Court of Canada (SCC), in a case called *Calder*, said Aboriginal Peoples' legal and political systems could no longer be ignored and Aboriginal Title could no longer be removed by the Crown.

Until 1982, however, the federal government could still pass laws wiping out, or extinguishing, Aboriginal Title and Rights, as long as those laws were clear in their

[1] For the purposes of this Fact Sheet, there is no distinction between the terms Aboriginal Peoples, First Nations and Indigenous Peoples. The Fact Sheet does not discuss Treaty Rights or the rights of Métis people.

intent to do so. Then, in 1982, Canada made changes to the *Constitution Act, 1867* (the Constitution). One change, section 35(1), reflected a renewed commitment to deal honourably with Aboriginal Peoples. It read: "The existing Aboriginal and treaty rights of the Aboriginal people of Canada are hereby recognized and affirmed." This wording raised two questions: 1) what "existing Aboriginal rights" receive constitutional protection; and 2) what does it mean to "recognize and affirm" these rights?

What is Aboriginal Title?

Aboriginal Peoples understand their relationship with their traditional territories differently than the courts do. The courts have considered the concept of Title with respect to protecting "Aboriginal Rights" in the Constitution, and have said it is an Aboriginal Right for the purpose of s. 35(1). Yet from an Aboriginal perspective, such Rights are often viewed as being rooted in Title.

In a case called Del*gamuukw*, the SCC said that to establish Title, an Aboriginal People must demonstrate:

1. That it occupied the lands in question at the time when the Crown asserted sovereignty over them;

2. That its occupation was exclusive; and

3. That it has maintained a "substantial connection" to these lands.

Aboriginal Title is:

1. A proprietary interest;

2. A right to the exclusive use and occupation of the lands in question, including the resources on them;

3. A right to decide how these lands and resources are used; and

4. An economic right.

The court said Title includes the right to exclusive use of forest resources, the right to decide how forested lands are used and the right to earn money from forests, as long

all of these are compatible with the way Aboriginal Peoples have historically used these resources.

Aboriginal Rights to Forest Resources

In a case called *Van der Peet*, the SCC said that to establish a Right, Aboriginal Peoples must show that the questioned activity is a custom, practice or tradition that is a "central and defining feature" of their culture and that this custom, practice or tradition was central and defining prior to the Europeans' arrival.

In BC, Aboriginal Rights concerning forest resources are likely because before the Europeans arrived, many Aboriginal Peoples had cultures in which resources from forests were central and defining features.

Aboriginal Peoples' Rights and Reliance on Natural Resources by non-Aboriginal People

To Aboriginal Peoples, lands and resources are important not only economically, but culturally and spiritually. This worldview collides with BC and Canada's resource management practices, which are based on the idea that, generally, natural resources should be used for profit. The issue is about how these Rights interact with the province's use of lands and resources and with the public's goals and needs regarding them. This brings up two constitutional issues, one relating to ownership and the other, to the government's law-making powers.

Ownership issues arising from Aboriginal Title under Section 109 of the Constitution

The Constitution sets out the division of property rights and legislative powers between the federal government and the provinces. Section 109 says the provinces, as a general rule, own the lands and resources within their boundaries. It also says that the provinces' property interests are subject to "any interest other than that of the Province." The courts have decided that Aboriginal Title is one such interest. Although the Crown has not entered into treaties with most of BC's Aboriginal Peoples, much of its lands and resources have been disposed of, even though it is reasonable to assume Aboriginal Title still exists. This means there is uncertainty about the province's interest in lands and resources and, accordingly, uncertainty about the dispositions it has made and continues to make.

Protecting Aboriginal Rights and Title under Section 35 of the Constitution

Section 35(1) of the *Constitution Act, 1982* "recognizes and affirms" Aboriginal Rights, including Aboriginal Title. But what does it mean to "recognize and affirm" a Right?

In the *Sparrow* case, the SCC said s. 35(1) was a "solemn promise" to Aboriginal Peoples and that the mistreatment of Aboriginal Peoples and the failure to recognize their legitimate Rights must stop.

In another important case, *Van der Peet*, the SCC said the purpose behind s. 35 was recognizing and acknowledging that distinctive Aboriginal societies were here before the Europeans and that this must be reconciled with the Crown's actions. Section 35 seeks to ensure Aboriginal cultures and their relationship with lands and resources continues, while also acknowledging that the Crown asserted sovereignty over these same lands and that non-Aboriginal people also rely on them. In *Sparrow* the court said that while Aboriginal Rights must be protected, they are not "absolute"; that is, where Aboriginal Rights and the non-constitutional interests of others conflict, Aboriginal Rights will not always win.

The "*Sparrow* test," which allows governments to infringe Aboriginal Rights when "justified," outlines the following process to determine whether the Aboriginal People can establish a Right or Title:

1. Determine whether the Title or Right was "existing" in 1982;
2. If it was existing in 1982, it continues to exist, and the inquiry turns to examining whether the Title or Right has been infringed; and
3. If infringed, the court asks whether the government can "justify" it. If not, an inconsistency with the Constitution will be found.

What constitutes an infringement of Aboriginal Title or Aboriginal Rights?

Here, the courts refer to "*prima facie*" infringements. "P*rima facie*" means, "on its face." In short, any interference with, or limitation upon, the exercise of Aboriginal Title or Rights is a *prima facie* infringement. In *Sparrow* the Court asked the following questions regarding *prima facie* infringements: Is the limitation unreasonable? If it is

not unreasonable, then does it impose an undue hardship or does it deny to the holders of the right their preferred means of exercising it?

The courts have yet to say what *prima facie* infringements of Aboriginal title are.

How can government justify an infringement of Aboriginal Title and Rights?

Here the courts developed another test: the government must show it was following a valid legislative objective "compelling and substantial" enough to justify the infringement. While the government must be expected to pursue objectives in the public interest, those interests, unlike Aboriginal Title and Rights, are normally not constitutionally protected which means that Aboriginal Title and Rights have priority.

To justify an infringement, the government must show that in pursuing the "valid objective":

1. The act or law infringing on Aboriginal Title or Rights was necessary;

2. The decision reflects the priority of Aboriginal Title and Rights by giving them priority both in the decision-making process and in the actual decision;

3. The government chose the means that inflicted the most minimal infringement possible in order to effect the desired result;

4. Fair compensation is available; and

5. The government consulted with the Aboriginal People before making the decision.

Should Aboriginal Peoples be Required to Prove Aboriginal Rights and Title?

In BC the courts have considered cases in which Aboriginal Peoples say their Aboriginal Title and/or Rights will be affected by a proposed resource development or land use, but where the government's defence to allowing the development is that these Rights are unproven. In such cases the courts have said government must "consult and accommodate" the cultural and economic interests of Aboriginal Peoples.

Conclusion

Title to much of BC's lands and resources remains disputed. Unlike provinces in the rest of Canada, few treaties have been signed in BC, yet resources such as old growth forests are diminishing, leading to a sense of urgency on the part of Aboriginal Peoples concerned about the future of their lands and resources, and pressure on governments by industry to allow development. While the federal and provincial governments are negotiating treaties with some Aboriginal Peoples in BC., the province continues disposing of lands and resources subject to those negotiations. And while the Courts play a key role in the process, they have also emphasized that the "land question" is best addressed through negotiation not litigation. To be fruitful, those negotiations must be undertaken in good faith, and should be based on recognizing and affirming Aboriginal Title and Rights.

About the Scow Institute

The Scow Institute is a non-partisan organization that is dedicated to addressing public misconceptions about various issues relating to Aboriginal people and Aboriginal rights. For additional information, please visit our website at **www.scowinstitute.ca.**