May 2004 Cheryl Sharvit - Through EAGLE (Environmental-Aboriginal Guardianship through Law & Educ)

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

Introduction

Over 150 years after the British Crown asserted sovereignty over the lands now known as British Columbia[1], and over 130 years after Confederation[2], Aboriginal land issues are far from settled in most of the province. Many of the Aboriginal law cases that have been decided by, and that are currently before the Supreme Court of Canada, have originated in British Columbia, and these cases often involve issues related to natural resources. This paper reviews the historical and contemporary context that has led to this situation, and provides a summary of the current state of Aboriginal Rights law.[3]

Before Europeans "discovered" what is now known as British Columbia and Canada, Aboriginal Peoples[4] lived on these lands and were socially and politically organized, having their own forms of laws and land and resource ownership. Aboriginal Peoples sustained themselves from the land for millennia and most saw themselves as "stewards" or caretakers of the lands, responsible for maintaining the integrity and well being of the lands so that future generations could continue to sustain themselves.

When Europeans first arrived, they relied on Aboriginal Peoples' expertise and knowledge of their territories in order to survive. The newcomers needed help in obtaining food, they needed trading partners (e.g., the fur trade), and in many instances, they needed allies in their wars with other European nations. Relationships between the Europeans and Aboriginal Peoples were for the most part based on mutual respect and power, and can best be described as nation-to-nation.

Aboriginal legal systems generally do not include the concept of individual ownership as in European (and Canadian) law. In allowing Europeans to live in their territories and

[1] The trial judge in *Delgamuukw* found as a fact that the Crown asserted sovereignty over British Columbia in 1846, the date of the Oregon Boundary Treaty. The Supreme Court of Canada upheld that finding, as the parties did not dispute it.

[2] British Columbia entered Confederation in 1871.

[3] A good introduction to these issues is found in Chapter 1, "Aboriginal Title" in J. Borrows and L. Rotman, *Aboriginal Legal Issues: Cases, Materials & Commentary* (Butterworths: Toronto, 1990).

[4] For the purpose of this paper, there is no distinction between the terms Aboriginal Peoples, First Nations and Indigenous Peoples. The paper does not discuss Treaty Rights or the Rights of Métis people.

share their resources, Aboriginal Peoples did not contemplate that those with whom they shared would later claim "ownership" to the exclusion of Aboriginal Peoples.

During colonial times, international and imperial laws[5] governed Europeans' interactions with Aboriginal Peoples. These laws were based on the "doctrine of Aboriginal Rights", or the "doctrine of continuity". Under this doctrine, when a European Nation asserted sovereignty over lands that were already inhabited by Aboriginal Peoples, the Europeans did not become the owners of those lands. Aboriginal Peoples were entitled to remain in possession of their lands, under their own laws and customs. The European power asserting sovereignty did however gain an exclusive right under international law as against other European nations to acquire or purchase lands from the Aboriginal Peoples. The governments of the colonies were forbidden to grant to settlers Aboriginal lands unless they first had been purchased by the Crown.

After France ceded its lands in what is now Canada to the British, the British issued the Royal Proclamation of 1763, which instructed colonial governors and subjects as follows:

- Aboriginal Peoples were to retain possession of all lands that had not been ceded to or purchased by the Crown (thereby recognizing that the Crown's assertion of sovereignty did not give it ownership of Aboriginal lands);
- no one other than the Crown could purchase lands from Aboriginal Peoples;
- British subjects were forbidden from settling any Aboriginal lands; and
- before any settlements could be established on Aboriginal Peoples' lands, the Crown had to purchase Aboriginal lands (with Aboriginal consent) in a public assembly of the Aboriginal People.

In accordance with imperial law and the Royal Proclamation, treaties were concluded with Aboriginal Peoples across most of Canada, but with the exception of Treaty 8 in the northeast and the Douglas Treaties on Vancouver Island, treaties were not concluded in British Columbia. From the European perspective, the Aboriginal Title in the lands covered by these treaties was purchased.[6]

In the mid 19th century, smallpox epidemics killed large numbers of Aboriginal Peoples in British Columbia.[7] European populations were growing at the same time, as many

[5] Imperial law resulted from customs followed by the British Crown and Aboriginal Peoples in their dealings with each other in the seventeenth and eighteenth centuries. See B. Slattery, "Making Sense of Aboriginal Rights" (2000) 79 Can Bar Rev 196. Imperial law is also referred to as "colonial law". Imperial law applied automatically when the Crown acquired a colony.

[6] Aboriginal Peoples generally did not believe they were surrendering or selling their Aboriginal Title or their interests in the lands and resources. Many Aboriginal legal systems do not allow Aboriginal Title to be sold.

[7] See Robert Boyd, *The Coming of the Spirit of Pestilence: Introduced Infectious Diseases and Population Decline among Northwest Coast Indians, 1774-1874* (Seattle: University of Washington Press, 1999), Chapters 6 and 7.

came to British Columbia in search of gold, resulting in the Europeans outnumbering Aboriginal Peoples.[8] While the Europeans became more powerful, the relationship was still a nation to nation relationship in BC and Canada. In 1832, the Chief Justice of the United States, Chief Justice Marshall, described the relationship as follows: "This relation was that of a nation claiming and receiving the protection of one more powerful: not that of individuals abandoning their national character, and submitting as subjects to the laws of a master." [9]

Until 1859, it was the practice of Governor Douglas to continue to enter into treaties to purchase lands from Aboriginal Peoples before allowing settlement.[10] In 1861, after the colony had run out of funds for purchasing lands, Governor Douglas asked the British government for funds and was refused.[11] The colony then began to grant lands without first purchasing the native interest.

To justify the taking and settling of Aboriginal lands without purchase or cession, colonial and later Canadian governments maintained that Canada was uninhabited or vacant land when Europeans arrived (*terra nullius*). The European colonizers asserted that Aboriginal Peoples were "primitive" or "uncivilized", and because their laws and governments differed from those of the Europeans, the colonizers believed that they did not have to respect Aboriginal Peoples' laws or governments, and could treat the lands as if they were empty.[12] Another justification for not entering into treaties was

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[8] See *Calder* v. *Attorney General of British Columbia*, [1973] SCR 313 at 327-328.

[9] *Worcester* v. *State of Georgia*, 31 U.S. (6 Pet) 515 at 555, 8 L.Ed. 483 at 499 (U.S. 1832). *Worcester* is one of a series of similar cases decided by the United States Supreme Court while John Marshall was Chief Justice. He was Chief Justice from 1801 until his death in 1835. The other decisions include *Johnson* v. *M'Intosh*, 21 US (8 Wheat.) 543, 5 L.Ed. 681, (1823) and *Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1 (1831). These decisions have influenced the courts of countries with a similar history of colonization, including Canada and Australia. Imperial law and the doctrine of Aboriginal Rights applied equally in the United States after the American Revolution as in Canada and so the principles that emerged from these cases have been adopted by the Supreme Court of Canada.

[10] James Douglas was a fur trader and the chief factor of the Hudson's Bay Company (HBC) in the mid 1800s. In 1843, the HBC built Fort Victoria and placed it under Douglas' direction. In 1849, the British declared Vancouver Island to be a colony, and placed it under the authority of the HBC and Douglas. In 1851, Douglas became the governor of the Colony of Vancouver Island, while remaining chief factor of the HBC. In 1858, he became the governor of British Columbia. Douglas was directed to purchase lands from the Aboriginal Peoples, leading to the "Douglas Treaties". Douglas remained governor of Vancouver Island until 1863, and governor of British Columbia until 1864.

[11] *Calder* v. *Attorney General of British Columbia*, [1973] S.C.R. 313 at 329-331.

[12] See Catherine Bell and Michael Asch, "Challenging Assumptions: The Impact of Precedent in Aboriginal Rights Litigation", in Michael Asch, ed., *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality and Respect for Difference* (Vancouver: UBC Press, 1997) at 45-47; and Royal Commission on Aboriginal Peoples, *Renewal, a Twenty Year Commitment* (Canada: Ministry of Supply and Services Canada, 1996) Vol. 5, p. 141.

that Aboriginal Title was extinguished when the Colony placed Aboriginal Peoples on reserves.[13]

In the late 1800s and early 1900s, British Columbia's Aboriginal Peoples petitioned the British and Canadian governments in efforts to have Aboriginal Title recognized and to settle the land and resource issues between Aboriginal Peoples and the Crown.[14]

From 1927 to 1951, it was illegal under Canadian law for Aboriginal Peoples to hire lawyers to pursue claims against the government regarding their Aboriginal Title and Rights.

In the 1970s Canadian courts began to recognize that Aboriginal Peoples with organized societies and legal systems occupied Canada prior to Europeans. In 1973, the Supreme Court of Canada, in the *Calder* case, confirmed that Aboriginal Title survived the Crown's assertion of sovereignty. Canadian law now rejects the assertion of *terra nullius* and recognizes that although Aboriginal Peoples' legal and political systems differ from those of European nations, they cannot be ignored.[15]

While Aboriginal Rights and Title survived the Crown's assertion of sovereignty, until 1982, the federal government could pass legislation that extinguished Aboriginal Title and Rights, so long as the legislation was clear in its intent to do so. Federal and provincial governments generally failed to recognize or protect Aboriginal Rights and Title in land and resource dispositions. British Columbia took the position that Aboriginal Title had been extinguished throughout the province until the Court in *Delgamuukw*[16] rejected that argument and held that the provinces have always lacked the constitutional capacity to extinguish Aboriginal Title and Rights.

In 1982, Canada repatriated its Constitution and made some amendments. One of those amendments, s. 35(1) of the *Constitution Act, 1982*, embodied a renewed commitment on the part of Canada to deal honourably with Aboriginal Peoples. That section reads: "The existing Aboriginal and treaty rights of the Aboriginal people of

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[13] See *Calder* at pp. 334-336. Reserves were established by British Columbia unilaterally, and then by the McKenna-McBride Commission in British Columbia. The Commission was established to settle differences between British Columbia and Canada respecting Aboriginal lands. The Commission's recommendations resulted in the establishment or confirmation of reserves. Aboriginal Peoples did not agree to the establishment of these reserves. See T. R. Berger, *A Long and Terrible Shadow: White Values, Native Rights in the Americas* (Vancouver: Douglas & McIntyre, 1992) at pp. 145-149; See also W. Duff, *The Indian History of British Columbia* (Victoria: 1997, Royal British Columbia Museum) pp.91-98; and R.H. Bartlett, Indian Reserves and Aboriginal Lands in Canada: A Homeland (Saskatoon: University of Saskatchewan Law Centre, 1990) at pp. 15-18 and 35-39.

[14] See Wilson Duff, *The Indian History of British Columbia: The Impact of the White Man* (Victoria: Royal British Columbia Museum, 1997) pp. 91-98

[15] *R.* v. *Van der Peet*, [1996] 2 S.C.R. 507 at paras. 268-275.

[16] *Delgamuukw* v. *British Columbia*, [1997] 3 S.C.R. 1010.

Canada are hereby recognized and affirmed." The constitution is the supreme law of Canada, which means that, to the extent that any other law does not conform to a provision in the Constitution, it is not valid. A law which is inconsistent with the recognition and affirmation of existing Aboriginal Rights is invalid, or of no force and effect.

Two questions flow from the wording of s. 35(1): 1) what are the "existing Aboriginal Rights" that receive constitutional protection; and 2) what does it mean to "recognize and affirm" these Rights in the Constitution (i.e., what sort of protection does the Constitution afford these Rights)?

What is Aboriginal Title?

In *Van der Peet*, the Supreme Court of Canada held that Aboriginal Rights represent the intersection of Aboriginal and Canadian laws, and must be understandable to both legal regimes. Within Canadian law, the term "Aboriginal Title" has a certain definition. Aboriginal Peoples' understanding of their relationship with their traditional territories may differ considerably from Canadian courts' understanding of Aboriginal Title.

For Aboriginal Peoples, their Title can only be understood with reference to their own laws and to their relationships with their territories.[17] Their concepts of Aboriginal Title are often much broader than the concept in Canadian law, incorporating spirituality and self determination: the right of a People to determine their own future. In most Aboriginal societies, Title is understood as much in terms of responsibility, or stewardship, as it is in terms of entitlement[18].

The Courts have considered the meaning and nature of Aboriginal Title within the protection of "Aboriginal Rights" in the Constitution. Canadian courts have held that Aboriginal Title is a form of Aboriginal Rights for the purpose of s. 35(1). In contrast, from the Aboriginal perspective Aboriginal Rights are often viewed as flowing from Title.

The leading Canadian case on Aboriginal Title is *Delgamuukw*, a 1997 decision of the Supreme Court of Canada. This decision lays out the test for proof of Aboriginal Title

[17] See J. Borrows and L. Rotman, note 3 above.

[18] See O. Lyons, "Traditional Native Philosophies Relating to Aboriginal Rights" and F. Plain, "A Treatise on the Rights of the Aboriginal Peoples of the Continent of North America" in M. Boldt and J.A. Long, *The Quest for Justice: Aboriginal Peoples and Aboriginal Rights* (Toronto: University of Toronto Press, 1985) at 19-23 and 31-40. N. Lyon, "Canadian Law Meets the Seventh Generation" (1993) 19 Queen's L. J. 350; M. Asch and N. Zlotkin, "Affirming Aboriginal Title: A New Basis for Comprehensive Claims Negotiations" in M. Asch, ed., *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality, and Respect for Difference* (Vancouver: UBC Press, 1997) at 214-218; and T. R. Berger, *The Report of the Mackenzie Valley Pipeline Inquiry: Northern Frontier Northern Homeland* (Vancouver: Douglas and M136-145.cIntyre, 1988) at

in the Canadian courts, and the content of Aboriginal Title as protected in the constitution of Canada.

With respect to proof of Aboriginal Title the court in *Delgamuukw* held that to establish Aboriginal Title, an Aboriginal People must demonstrate:

- that it occupied the lands in question at the time when the Crown asserted sovereignty over those lands (for British Columbia, the courts have held that the relevant date is 1846);
- that its occupation was exclusive (the concept of exclusivity encompasses the right to exclude others, even if in fact others were not prevented from occupying the lands, and also allows for "joint exclusivity", or shared Title); and
- maintenance of a "substantial connection" to the lands, to the present.

Aboriginal Title is:

- a proprietary interest;
- a right to the exclusive use and occupation of the lands in question, including the resources;
- a right to decide to what uses the lands and resources are put; and
- an economic right.

The court qualified Aboriginal Title by articulating its "ultimate limit": Aboriginal Peoples may not put the lands to a use which is incompatible with the historic relationship of the people to the land. The relationship is not to be severed.

It can be seen then, that as an exclusive, proprietary interest, Aboriginal Title includes the right to exclusive use of forest resources, the right to determine to what use forested lands are put (e.g., for forestry, for hunting, or for stream regulation to support fisheries), and the right to derive revenue from the forests. Given the ultimate limit, however, an Aboriginal People would not be exercising its Aboriginal Title if, for example, it were to clear-cut its hunting grounds.

Aboriginal Rights to Forest Resources

Canadian courts distinguish between Aboriginal Title and Aboriginal Rights to carry on certain activities that are important to Aboriginal Peoples' cultures and societies. Such Rights may be tied to certain lands, or involve land and resource use, though the Aboriginal People holding the Right may not have Aboriginal Title to the lands in question.

In *Van der Peet*, the Supreme Court of Canada identified the following test for proof of Aboriginal Rights:

- To establish an Aboriginal Right, Aboriginal Peoples must demonstrate that the activity in question is carried out pursuant to a custom, practice or tradition

that is centrally significant to the Aboriginal culture, something that "makes the society what it is." It must be a "central and defining feature."

- The custom, practice or tradition must have been central to the Aboriginal culture at the time of contact with Europeans.[19]

While Aboriginal Rights are founded in pre-contact customs, practices and traditions, the courts have rejected a "frozen rights approach" -- Aboriginal Rights must be interpreted flexibly and allowed to evolve over time. Thus, for example, an Aboriginal Right to hunt can be carried out today using motorized vehicles, though at contact it would have been carried out on foot.

Also protected as Aboriginal Rights are rights that are "incidental", meaning they are necessary in order for a centrally significant custom, practice or tradition to be effective, or where they ensure the continuity of a Right. For example, s. 35(1) protects activities carried out in order to teach younger generations how to exercise Aboriginal Rights, and may protect habitat necessary to support Aboriginal Rights. If an Aboriginal People has a Right to use old growth red cedar trees to build poles, canoes and houses, they may have a Right to a supply of old growth red cedar into the future.

In British Columbia, Aboriginal Rights with respect to forestry resources are likely, because prior to contact, many of the Aboriginal Peoples on these lands had cultures in which resources derived from the forests were a central and defining feature. Trees themselves were used for houses, medicine, poles, hats, masks, baskets and boxes, among other things. Hunting was carried out in the forests. Fishing was and continues to be important to British Columbia's First Nations. Salmon in particular, was and is an important source of food and trade, and depends on healthy streams. Those streams in turn are dependent on healthy forests.

The Interplay of Aboriginal Peoples' Rights and the Reliance on Natural Resources by Non-Aboriginal People

To Aboriginal Peoples, lands and resources are important not only for economic reasons, but for cultural and spiritual reasons as well. This worldview collides with British Columbia's and Canada's resource management regimes, which are based on the premise that generally, natural resources should be harvested in order to earn profits and provide revenue to governments. British Columbia's economy is highly resource dependant, and the forests have been an important source of income and provincial revenue.

Above we discussed the source and content of Aboriginal Title and Rights. Given differing worldviews and differing objectives with respect to lands and resources, the question arises, how do these Rights interact with the Province's use and disposition of

[19] This date is determined as a matter of fact, according to evidence of first contact.

lands and resources, or with the public's goals and needs regarding lands and resources?

There are two constitutional issues here. The first relates to ownership, and the second to the exercise of governmental law making powers.

Ownership Issues Arising from Aboriginal Title (s. 109 of the *Constitution Act, 1867*)

When the colonies joined to form Canada, they created a federal system of provincial governments and a federal government. The *Constitution Act, 1867*, sets out the division of property rights and legislative powers between the federal government and the provinces.

Under s. 109, as a general rule, the provinces own the lands and resources within a province's boundaries.[20] Section 109 also incorporates the doctrine of continuity in that the provinces' property interests are subject to "any interest other than that of the Province." The courts have held that Aboriginal Title is such an interest. The *St. Catherine's Milling* case held that when the Ojibway People entered into Treaty No. 3, Ontario gained a full, unencumbered title to the lands and forest resources within the province covered by the treaty.[21] Ontario therefore gained the right to derive revenues from the forest resources. Prior to the treaty, the lands and resources subject to Aboriginal Title were not available to the Province as a source of revenue. Under the division of legislative powers, only the federal government is capable of acquiring the Aboriginal interest by entering into a treaty.

As discussed earlier in this paper, the Crown has not entered into treaties with most of British Columbia's Aboriginal Peoples. Nonetheless, much of the lands and resources in the province have been disposed of, as if the provincial interest were unencumbered. It is reasonable to assume that Aboriginal Title continues to exist in the province. There is therefore uncertainty with respect to the Province's interest in lands and resources, and accordingly uncertainty with respect to the dispositions it has made and continues to make. Sooner or later the courts will most likely have to decide whether land and resource dispositions in the Province were made unconstitutionally, and will also have to decide what remedies are appropriate in such circumstances.

The Protection of Aboriginal Rights and Title under Section 35 - a balancing of interests

[20] Some lands within the provinces are federal property. Examples include armed forces bases and national parks.

[21] *St. Catherine's Milling and Lumber Co.* v. *The Queen* (1888), 14 App. Cas. 46 (J.C.P.C.). This is a decision of Britain's Privy Council, which served as Canada's highest court from 1867 to 1949. Aboriginal Peoples were not participants in this case, which decided that the Ojibway People who signed Treaty No. 3 thereby ceded their Aboriginal Title. The Privy Council held that when the Ojibway entered the Treaty, the Province, and not the federal government, gained the full beneficial interest in the lands and resources.

The Constitution embodies the fundamental principles of Canadian society. We noted above that s. 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?

This question was first considered by the Supreme Court of Canada in the *Sparrow* case. The Court held that s. 35(1) was a "solemn promise" to Aboriginal Peoples; the mistreatment of Aboriginal Peoples and the failure to recognize their legitimate Rights was not to continue:

> *Section 35 calls for a just settlement for Aboriginal peoples. It renounces the old rules of the game under which the Crown established courts of law and denied those courts the authority to question sovereign claims made by the Crown.*[22]

In *Van der Peet*, the Supreme Court of Canada elaborated on the purposes underlying s. 35: the recognition and acknowledgement of the prior occupation of Canada by distinctive Aboriginal societies, and the reconciliation of that prior occupation with the Crown's assertion of sovereignty. Section 35 thus seeks to ensure the continuity of Aboriginal cultures and relationships with lands and resources that have existed for millennia, while also acknowledging that the Crown asserted sovereignty over the same lands and that non-Aboriginal people now live in Canada, and also rely on Canada's lands and resources. The Court held in *Sparrow* that while Aboriginal Rights must be protected, they are not "absolute". That is, in a conflict between Aboriginal Rights and the non-constitutional interests of non-Aboriginal people, Aboriginal Rights will not always prevail.

The Court established a test that seeks to honour Aboriginal Title and Rights while giving governments the ability to pursue and authorize activities that are necessary to achieve "compelling and substantial" objectives. The "*Sparrow* test", which allows governments to infringe Aboriginal Rights where the infringement is "justified", is as follows:

- The first step in the analysis seeks to determine whether the Aboriginal People can establish an Aboriginal Right or Title. The tests for proving Aboriginal Title and Aboriginal Rights are discussed above.
- The second question asks whether the Title or Right was "existing" in 1982. In this context, as discussed above, the Court notes that prior to 1982, Aboriginal Rights could be extinguished by federal legislation that demonstrated a clear and plain intent to do so.
- If the Rights were in existence in 1982, they continue to exist, and the inquiry turns to an examination of whether the Title or Rights have been infringed.

[22] *R.* v. *Sparrow*, [1990] 1 S.C.R. 1075 at 1106, quoting from B. Slattery, "Understanding Aboriginal Rights" (1987), 66 Can. Bar Rev. 727 at 782.

- ❖ If there is an infringement, the court asks whether the government can "justify" the infringement. An inconsistency with the constitution will only be found where the infringement is not justified.

We turn now to a discussion of the third and fourth steps in the *Sparrow* test.

What constitutes an infringement of Aboriginal Title or Aboriginal Rights?

The courts in this context refer to "*prima facie*" infringement. The term "*prima facie*" means, "on its face". In short, any interference with, or limitation upon, the exercise of Aboriginal Title or Aboriginal Rights constitutes a *prima facie* infringement. In *Sparrow*, in the context of an Aboriginal Right to fish, the Court asked the following questions as examples of what would constitute a *prima facie* infringement:

> *First, is the limitation unreasonable? Second, does the regulation impose undue hardship? Third, does the regulation deny to the holders of the right their preferred means of exercising the right?*

If, for example, an Aboriginal People has a Right to log cedar trees for use in building houses, an infringement might arise from several circumstances, including: a) a law that forbids the harvesting of trees without a licence; b) a law that requires Aboriginal People to pay more than a nominal fee in order to harvest cedar; c) a law or decision authorizing the clear-cutting of lands from which the Aboriginal People have traditionally harvested, and wish to continue to harvest cedar.

In the context of Aboriginal Title, the courts have not elaborated on what will constitute a *prima facie* infringement, but given the content of Aboriginal Title, discussed above, any interference with the Aboriginal Peoples' exclusive use and occupancy (i.e., use and occupancy of the lands and resources without the consent of the Aboriginal People), and any decision that purports to override the Aboriginal Peoples' decisions with respect to the use to which the lands and resources are to be put, may qualify. Because Aboriginal Title is a Right to exclusive use and occupation, a licence issued to a forestry company purporting to give the company exclusive rights to harvest trees may also be an infringement.

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

Here again, the courts have identified an analysis, or "test" to determine whether an infringement is justified.

First, to justify an infringement, the government must point to a valid legislative objective which it was in pursuit of when the Aboriginal Right was infringed. Only an objective that is sufficiently "compelling and substantial" to justify an infringement of constitutionally protected Aboriginal Rights will qualify as valid. In *Sparrow*, where the Court considered an Aboriginal Right to fish for food, social and ceremonial purposes, it held that conservation would be a valid legislative objective. In *Delgamuukw*, the

Supreme Court of Canada suggested that in the context of Aboriginal Title cases, valid objectives, depending on the circumstances, can include: conservation; the pursuit of economic and regional fairness; recognition of the historical reliance upon resources by non-Aboriginal groups; the development of agriculture, forestry, mining and hydroelectric power; and general economic development.

The crux of the test thus focuses on how government pursues those objectives, and it is at this stage of the analysis that legislation or government action will normally stand or fall. While governments must be expected to pursue objectives in the public interest, it must be recalled, that those interests, unlike Aboriginal Title and Rights are normally not constitutionally protected. For this reason, Aboriginal Title and Rights must be given priority, though this will not always mean that Aboriginal Peoples get to use resources and lands to the complete exclusion of others. In other words, the "justification analysis" seeks to allow a balancing or harmonization of interests, while at the same time, recognizing the priority of constitutionally protected Aboriginal Rights over non-constitutional interests.

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

- the act or law that infringes upon Aboriginal Title or Aboriginal Rights was necessary to achieve the valid objective;
- the decision reflects the priority of Aboriginal Title and Rights by giving priority to the Rights of the Aboriginal Peoples both in the process of decision making, and in the actual decision;
- in pursuing the valid objective, government chose the means that inflict the most minimal infringement possible in order to effect the desired result (i.e., no less intrusive methods of achieving its objective were available or known to the decision maker);
- fair compensation is available; and
- government consulted with the Aboriginal People before making the decision.

Should Aboriginal Peoples be required to prove Aboriginal Rights and Title?

When Aboriginal Title has been asserted in the BC, the Province has disputed these claims. The Courts have therefore had to consider situations in which Aboriginal Peoples assert that they have Aboriginal Title and/or Aboriginal Rights that will be affected by a proposed resource development or land use, but where the government's defence to allowing the development to proceed without minimizing its impact on the Aboriginal People is that the Rights are not proven yet.

In this context, the courts have imposed duties to "consult and accommodate" the cultural and economic interests of Aboriginal Peoples, prior to proof of Rights.

The two leading cases in this area are the decisions of the British Columbia Court of Appeal in the *Taku*[23] and *Haida*[24] cases. Both of these cases were heard by the Supreme Court of Canada in the spring of 2004, and a decision is pending. In *Taku* and *Haida*, the Province argued that it did not owe any legally enforceable duties to consult with Aboriginal Peoples and accommodate Aboriginal Rights and Title that have not been proven in court. The Court of Appeal held in both cases, that the Province does owe a legally enforceable duty to consult with Aboriginal Peoples prior to proof of Aboriginal Rights and Title.

While there is a duty to consult and accommodate, this does not mean that Aboriginal Peoples can assert Rights or Title and thereby prevent governments from authorizing land and resource developments. As noted above, even in the face of proven Rights, the government is entitled to balance interests, to a certain extent. However, the B.C. Court of Appeal held that the province's position is inconsistent with the guiding principles of s. 35(1) of the Constitution Act, 1982, as set out in *Sparrow*.

The Court of Appeal therefore laid down the following rules and guidelines:

- Governments and government decision makers may not ignore Aboriginal Peoples' claims to Aboriginal Title and Rights in situations where the government is aware of evidence that supports the assertion (i.e., the assertion is not "obviously false and baseless").
- Government must consult and accommodate Aboriginal Peoples about reasonably asserted Aboriginal Rights and Title where, if those Rights were proved, the decision may result in an infringement.
- The duty requires governments to consult "in good faith and to seek workable accommodations between the Aboriginal interests of the [Aboriginal] people, on the one hand, and the short term and long term objectives of the Crown … to manage [the forest resources] in accordance with the public interest, both Aboriginal and non-Aboriginal, on the other hand."
- The scope of the consultation, and the strength of the obligation to seek an accommodation, is proportional to the potential soundness of the claim for Aboriginal Title and Aboriginal Rights.

These pre-proof duties are meant to encourage good faith negotiations and avoid the necessity of settling all disputes between Aboriginal Peoples and the Crown through the court system. The Court of Appeal thus stated in *Haida*:

> *If the Crown can ignore or override aboriginal title or aboriginal rights until such time as the title or rights are confirmed by treaty or by judgment of a competent court, then by placing impediments on the treaty process the Crown can force every claimant of aboriginal title or rights into court and on to judgment before conceding that any*

[23] *Taku River Tlingit First Nation* v. *Ringstad*, 2002 BCCA 59.
[24] *Haida Nation* v. *B.C. and Weyerhaeuser*, 2002 BCCA 147; and *Haida Nation* v. *B.C. and Weyerhaeuser*, 2002 BCCA 462.

> *effective recognition should be given to the claimed Aboriginal title or rights, even on an interim basis*.

In the *Haida* case, the forest licensee, Weyerhaeuser, was also declared to have a duty to consult and accommodate the Haida. This duty was imposed on Weyerhaeuser because the Court chose to leave Weyerhaeuser's tree farm licence in place, even though the Court found that the licence is legally defective (because the Crown failed to consult with the Haida prior to issuing the replacement licence).

This case is an example of the courts' attempts to balance interests. The Haida, on the one hand, have a strong case of Aboriginal Title to Haida Gwaii and Aboriginal Rights to forest resources. The Province, though aware of the claim and of a lot of evidence in support of the claim, did not consult, and did not accommodate the Haida's interests in its decision. The replacement licence was issued in violation of the Crown's legally enforceable duty and so could be quashed, as is the normal course.[25]

However, Weyerhaeuser argued that the economic consequences, to it and to others, would be severe should their licence be declared invalid. The court thus exercised its discretion to refuse the remedy that would normally follow. Instead, the Court held, that because Weyerhaeuser gets to hold on to its licence, at least for the time being, it must also consult and accommodate the Haida. The decision is a practical one. Before the replacement, it may have been possible for the Crown to consult and accommodate the Haida without Weyerhaeuser's cooperation, but now, since Weyerhaeuser's rights to log and manage the forests remain in place, its cooperation is necessary.

Conclusion

Title to much of the lands and resources in British Columbia remains in dispute. Unlike the rest of Canada, few treaties have been concluded in British Columbia despite Aboriginal Peoples' historical and continuing efforts to seek resolution of the "land question" and recognition of their Title and Rights. At the same time, 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 of what remains. While the federal and provincial governments have entered into treaty negotiations with some Aboriginal Peoples in British Columbia, [26] the province continues to dispose of lands and resources subject to those negotiations.

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[25] In the *Taku* decision, for example, the British Columbia Court of Appeal overturned the decision to approve the construction of a road, and directed the Ministers to reconsider and make a new decision after proper consultation.

[26] The federal and provincial governments' approach to "certainty" requires the "extinguishment" or "cession" of Aboriginal Title, and for this reason there are Aboriginal Peoples who refuse to engage in the process. The governments' "certainty" requirements are arguably inconsistent with "recognition and affirmation" of Aboriginal Title and Rights.

This paper has introduced some of the constitutional questions arising from this situation. The constitutional limit on the province's proprietary interests in lands and resources provides that British Columbia is not entitled to dispose of or derive revenue from lands and resources that remain encumbered by Aboriginal Title. In 1982, Canada's Constitution was amended to "recognize and affirm" Aboriginal Peoples' Rights. While not guaranteeing absolute protection of Aboriginal Title and Rights, this provision does limit governments' ability to infringe upon Title and Rights.

While the Courts play an integral role in the process, they have emphasized in their judgments that the "land question" in British Columbia is best addressed through negotiation, rather than litigation. The role of the courts is to provide the principles to guide negotiations. To be fruitful, those negotiations must be undertaken in good faith, and should be premised on the recognition and affirmation of 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.**