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The Supreme Court and the Evolution of Indigenous Rights and Title

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Part I: From First Contact to the Constitution Act, 1982

A: Introducing Indigenous Rights and Indigenous Title

Indigenous rights[2] are collective rights that flow from Aboriginal[3] peoples' continued use and occupation of certain areas. They are *inherent rights* that Aboriginal peoples have practiced and enjoyed since before European contact. Because each First Nation has historically functioned as a distinct society, there is no one official overarching definition of these rights; there is thus variation across Aboriginal groups. In general, such rights include those to the land, rights to subsistence resources and activities, the right to self-determination and self-government, and the right to practice one's own culture and customs including language and religion. Aboriginal rights have not been granted from external sources; rather, they are a result of Aboriginal peoples' own occupation of their home territories as well as their ongoing social structures and political and legal systems. As such, Aboriginal rights are separate from rights afforded to non-Aboriginal Canadian citizens under Canadian common law.

Indigenous title refers to the inherent Aboriginal right to land or a territory. The Canadian legal system recognizes Aboriginal title as a *sui generis,* or unique *collective right* to the use of, and jurisdiction over, a group's ancestral territories. As was the case for Aboriginal rights, Aboriginal title is not granted from an external source but is a result of Aboriginal peoples' own occupation of, and relationship to, their home territories and to their ongoing social structures and political and legal

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[1] This paper draws from Chapter 6 of my book *Indigenous Nationals/Canadian Citizens: From First Contact to Canada 150 and Beyond* (Courchene (2018)).
[2] This paragraph and the following one are reproduced from UBC's *Indigenous Foundations* website for Aboriginal rights and Aboriginal title (indigenous foundations.arts.ubc.ca).
[3] Although "Indigenous" has largely replaced "Aboriginal" as the term of choice, thus far "Aboriginal" remains the language of the Canadian Constitution and, therefore, of the Canada's courts. These terms will be employed interchangeably.

systems. As was the case with Aboriginal rights, Aboriginal title is also separate from title afforded to non-Aboriginal Canadian citizens under Canadian common law.

With this definitional forward as prelude, the role of the ensuing analysis is to highlight the significant legal and constitutional signposts in the evolution Indigenous rights and title. As the lecture title indicates, the principal focus will be on the series of dramatic Supreme Court decisions in advancing the understanding and the substance of Indigenous rights and title. However, the relevant story begins much earlier, namely, at the time that is often referred to as "First Contact".

B: European Colonization and the Doctrine of Discovery

Roughly coincident with the first voyage of Columbus, Pope Alexander VI issued the 1493 Papal Bull[4]— *Inter Caetera*—that gave the green light to Columbus and the later Spanish conquistadors to claim ownership of lands in the new world. In effect, this edict sanctified, as it were, Spain's exclusive right to the lands "discovered" by these explorers. In more detail, the Papal Bull effectively stated that any land not inhabited by Christians was available to be "discovered," claimed and exploited by Christian rulers. It was this "Doctrine of Discovery" that became the basis for most of the European claims in the Americas as well as for the foundation for the US western expansion. It is also the case that the Australian concept of *terra nullius* (a Latin expression deriving from Roman law meaning "land belonging to no one") is a variation of the doctrine of discovery. Indeed, it was not until 1992 and the landmark Mabo decision that Australia's High Court rejected the doctrine of *terra nullius* in favour of the common law doctrine that privileged original Indigenous title. More detail on Canada's role in the termination of Australia's *terra nullius* will be elaborated later.

[4] A papal bull is a particular type of decree issued by a Pope of the Catholic Church. It is named after the lead seal (*bulla*) that was appended to the document in order to authenticate it.

What remains surprising is that the Vatican has never repealed the Doctrine of Discovery despite ongoing pressures on Pope Francis from Canada's Indigenous peoples. More surprising still is that over 250 years ago Britain discarded the Doctrine of Discovery as it related to Canada (but not to other British colonies), and in the process laid the groundwork for recognizing Indigenous rights and title in this country. The vehicle for achieving this was King George III's 1763 *Royal Proclamation.* Arguably, this was the most significant event in the Canadian evolution of Indigenous peoples rights and title.

C: The Royal Proclamation (1763)

The Royal Proclamation has been defined as follows:[5]

> The Royal Proclamation is a document that set out guidelines for European settlement of Indigenous territories in what is now North America. The Royal Proclamation was … issued by King George III in 1763 to officially claim British territory in North America after Britain won the Seven Years War. In the Royal Proclamation, ownership over North America is issued to King George. However, *the Royal Proclamation explicitly states that* ***Indigenous title*** *has existed and continues to exist, and that all land would be considered Indigenous land until ceded by treaty.* The Proclamation forbade settlers from claiming land from the Indigenous occupants, unless it has been first bought by the Crown and then sold to the settlers. The Royal Proclamation further sets out that only the Crown can buy land from First Nations.

With some repetition, it is worth noting that Grammond (2013, 68) asserts that the Royal Proclamation has long been considered the principal source of the territorial rights of indigenous peoples. Moreover, the Royal Proclamation has never been repealed, so it remains in effect today. Indeed, by reserving lands not already purchased by the Crown for the Indigenous peoples, the Proclamation thus recognizes the pre-existing Indigenous rights to the lands and that this right could only be extinguished by means of a cession to the Crown (ibid, 70). In this important sense *the Royal Proclamation is the ultimate source of Indigenous land title in Canada.*

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[5] University of British Columbia, Indigenous Foundations website: see http://indigenousfoundations.arts.ubc.ca/home/government-policy/royal-proclamation-1763.html. Emphasis has been added.

In addition, the provision that the First Nations can cede land only to Britain (and by extension, later to Canada as the embodiment of the Crown) leads to the "nation-to-crown" or "nation-to-nation" characteristic of the later treaties and to the manner in which most of the First Nations tend to view their relationship with Canada. Given this role as the guarantor of Indian land title, and the fact that this is embraced in section 25 of the *Constitution Act, 1982* (elaborated later), the Royal Proclamation is often viewed as the "Indian Bill of Rights" and/or the "Indian Magna Carta".

Part 2: *The Constitution Act, 1982* and the *Canadian Charter of Rights and Freedoms*

Other than assigning jurisdiction over Indians to the federal government, the *Constitution Act, 1867* was largely silent in terms of provisions relating to Indigenous Peoples. However, this was anything but the case for the *Constitution Act, 1982* and the associated *Canadian Charter of Rights and Freedoms*. From s.25 of the Charter:

> The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate from any aboriginal treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including
>
> (a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763, and
>
> (b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.

Section 35 of the *Constitution Act, 1982* (relating to the rights of Aboriginal Peoples) reads:

> 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.
>
> 3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.
>
> 4) Notwithstanding any other provision of this Act, the Aboriginal and treaty rights referred to in subsection (1) are guaranteed to male and female persons.

These articles of the *Constitution Act 1982* are dramatic game changers. Not

only did Sections 25 and 35 enshrine existing Aboriginal rights (e.g., those flowing from the Royal Proclamation) but they now are to apply prospectively in the sense that new and enshrined Aboriginal rights and title will flow from future land-claim agreements or from Supreme Court decisions. In this context, it is important to remember that, prior to the Charter, Indigenous rights and title were viewed as limited to the reserves and as such were subject to parliamentary oversight – hence the 1969 Trudeau/Chrétien White paper and its attempt to convert reserve lands into private property as part of the larger vision of enfranchisement and the elimination of reserves. As will be evident in what follows, it is increasingly the courts, not our parliaments, that are now defining (actually redefining) the rights of Aboriginal peoples within the Canadian constitutional framework. The remainder of this paper will focus on some of the major Supreme Court of Canada cases that have significantly enhanced Indigenous rights and title.

Part II: Recent Path-Breaking Supreme Court Decisions

A: Calder (1973): The Existence of Indigenous Title

In 1969, Frank Arthur Calder and the Nisga'a Nation Tribal Council brought an action against the British Columbia government for a declaration that aboriginal title to certain lands in the province had never been lawfully extinguished. The Supreme Court of Canada's 1973 Calder decision was of immense importance for the evolution of Aboriginal land title not only in Canada but in Australia and New Zealand as well. To lend perspective here it is important to recall the prevailing view of Aboriginal title. From Godlewska and Webber (2007, 1]:

> Just four years prior to Calder, the Canadian prime minister, Pierre Elliot Trudeau, had categorically rejected the notion that Aboriginal peoples had rights different from those accorded to other Canadian citizens. [i.e., the 1969 Trudeau/Chrétien White Paper]. The government did not recognize Aboriginal title and, as a result, saw no need to enter into further treaties with Aboriginal peoples.

The Calder decision completely overturned this view. From the Indigenous Foundations website: [6]

> In 1967, Frank Calder and other Nisga'a elders sued the provincial government of British Columbia, declaring that Nisga'a title to their lands had never been lawfully extinguished through treaty or by any other means. While both the BC Supreme Court and the Court of Appeal rejected the claim, the Nisga'a appealed to the Supreme Court of Canada for recognition of their Aboriginal title to their traditional, ancestral and unceded lands. … What the Supreme Court concluded was groundbreaking. …While the [lower courts] had denied the existence of Aboriginal title, the Supreme Court ruled in 1973 that Aboriginal title had indeed existed at the time of the Royal Proclamation of 1763**.** The Supreme Court's 1973 decision was the first time that the Canadian legal system acknowledged the existence of Aboriginal title to land and that such title existed outside of, and was not simply derived from, colonial law. While the Nisga'a did not win their case and the ruling did not settle their land question, it did pave the way for the federal government's comprehensive land claims process, which sets up a process for Aboriginal groups to claim title to their territory. … As a landmark case, the Calder decision continues to be cited in modern Aboriginal land claims across Canada, as well as internationally in Australia and New Zealand.

A more straightforward view expressed in this decision is that based on the common law concept of prior occupation, namely, that "when the settlers came, the Indians were already there, organized into societies and occupying land as their forefathers had done for centuries – this is what Indian title means".The impact of Calder in Canada was immediate and far-reaching. Again from Godlewska and Webber (2007, 6-7):

> Prime Minister Pierre Elliott Trudeau "warmly embraced" the proposal by the Yukon Native Brotherhood for the negotiation of land claims in the Yukon, which was presented just two weeks after Calder. … And less than seven months after Calder was handed down, a new federal policy for the settlement of "comprehensive claims" – claims founded on Aboriginal title – was announced by then minister of Indian Affairs and Northern Development, Jean Chrétien. As expressed in a booklet later prepared by the Department of Indian Affairs and Northern Development, "Canada would now negotiate settlements with Aboriginal groups where rights of traditional use and occupancy

[6] http://indigenousfoundations.arts.ubc.ca/home/land-ri/calder-case.html

> had been neither extinguished by treaty nor superseded by law. Thus, the federal government began the long process of negotiating comprehensive settlements of Aboriginal title, eventually concluding modern-day treaties in northern Québec, the Yukon, the former Northwest Territories (including Nunavut), and, ultimately, with the Nisga'a nation itself.

Beyond this, the Calder decision was a major force behind the Australian High Court's 1982 Mabo decision (i.e., the overturning of *terra nullius)*.

This was and is the Calder legacy.

B: Guerin (1984):[7] The Honour of the Crown (Fiduciary Responsibility)

Chief Delbert Guerin of British Columbia's Musqueam Indian Band sued the federal crown in 1975 for breach of trust concerning 163 acres of reserve land that had been leased to the Shaughnessy Golf Club in the late 1950s. The Musqueam band had been told that they would profit from the 75-year lease, with rents being adjusted to fair market rates every decade. Unbeknownst to the band, however, the deal was re-negotiated to allow the golf club to only pay what amounted to 10% of the fair market rent for the land. The case was initially won in the lower courts but then lost on appeal. Guerin then appealed to the Supreme Court. In 1984 the Supreme Court of Canada ruled that the federal government, as trustee of the lands, had not provided the band with all the necessary information and had not leased the land on terms favourable to the band. Chief Justice Brian Dickson described First Nations' interests in their lands as a "pre-existing legal right not created by the Royal Proclamation…the Indian Act…or any other executive order or legislative provision." The ruling was especially significant because it recognized pre-existing Aboriginal rights both on reserves and outside reserves. It also confirmed that the federal government has a "fiduciary responsibility" for aboriginal people – that is, a responsibility to safeguard Indigenous interests.

Relatedly, the "Indigenous Foundations" website entry for "Guerin" notes

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[7] This paragraph draws from web.uvic.ca/clayoquot/files/volume2/V.B.1.pdf

that the Indian Act specifies that reserves are held by the Crown "for the use and benefit of the respective bands for which they are set apart," and that "the Governor in Council may determine whether any purpose for which lands in a reserve are used or are to be used is for the *use and benefit of the band*"[4] (emphasis added). The government demonstrated it did not act in Musqueam's best interest by not consulting them about the revised terms of the lease.

At this juncture, it is convenient to introduce a concept that is playing an increasingly important role in aboriginal-government relations – the "Honour of the Crown." From John Ralston Saul's *The Comeback (2014, 33):*

> "What is the Honour of the Crown? It is the obligation of the state to act ethically in its dealings with the people. Not just legally or legalistically. But ethically. The Honour of the Crown is the obligation of the state to act with respect to the citizen." As this relates to the First Nations, it is essential to note that their "treaties were signed not by the government but by the Crown, and therefore by the state, in the name of the people. And while our obligations [to Aboriginals] are legal, they are first of all ethical."

C: Sioui (1990): Treaties should be Liberally Construed by the Courts

Four Huron Indians (Conrad, Régent, Georges and Hugues Sioui) were convicted by a lower Court of cutting down trees, camping and making fires in places not thus designated in Jacques-Cartier park, contrary to Quebec park regulations. The respondents alleged that they were practicing certain ancestral customs and religious rites that were the subject of a treaty between the Hurons and the British, a treaty that brings s. 88 of the *Indian Act* into play and exempts them from compliance with the regulations. The treaty that the respondents rely on is a 1760 document signed by General Murray. This document guaranteed the Hurons, in exchange for their surrender, British protection and the free exercise of their religion, customs and trade with the English.

The Supreme Court of Canada reversed the lower court's decision, not only by recognizing the validity of the 1760 treaty but more importantly by asserting that

"treaties and statutes relating to Indians should be liberally construed and uncertainties resolved in favour of the Indians." Specifically, the court introduced into Canadian jurisprudence a principle adopted from a 19th-century ruling in the United States that such treaties "must therefore be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians."

D: *Sparrow (1990*): When is Infringement of Aboriginal Rights Acceptable?

Ronald Edward Sparrow, a Musqueam Band Indian, was convicted of fishing with a longer drift net than that permitted by the band's license under British Columbia's Fisheries Act. He based his appeal on grounds that this was inconsistent with the existing aboriginal and treaty rights under section 35 of the *Constitution Act, 1982.* In overturning his conviction, the Supreme Court ruled that despite nearly a century of governmental regulations and restrictions on the Musqueam people's right to fish, their aboriginal right to fish had not been extinguished. Short of a valid reason to infringe on this right (e.g., a necessary measure of conservation) the Court concluded, drawing on the words of Section 35(1), that the "existing Aboriginal and treaty rights … are hereby recognized and affirmed." *Moreover, the SCC noted that aboriginal and treaty rights are capable of evolving over time and must be interpreted in a generous and liberal manner and that governments may regulate existing aboriginal rights only for a compelling and substantial objective such as conservation and/or management of resources.*

Further along these lines, the SCC added: "Section 35(1) does not promise immunity from government regulation in contemporary society but it does hold the Crown to a substantive promise. The government is required to bear the burden of justifying any legislation that has some negative effect on any aboriginal right protected under s. 35(1)."

The Sparrow Test

As the "Sparrow Case" entry under Indigenousfoundations.arts.ubc.ca notes,

this decision has led to the "Sparrow test", which seeks first to define whether or not a right has been infringed upon. A government activity might infringe upon a right if it:

- Imposes undue hardship on the First Nation;
- Is considered by the court to be unreasonable; or
- Prevents the right-holder from exercising that right;

The *Sparrow Test* then outlines what might justify an infringement upon an Aboriginal right. An infringement might be justified if:

- The infringement serves a "valid legislative objective." (For example, the court suggested a valid legislative objective would be conservation of natural resources.);
- There has been as little infringement as possible in order to effect the desired result;"
- Fair compensation was provided: and
- Aboriginal groups were consulted, or, "at the least… informed."

The Supreme Court also acknowledged that other considerations may be taken into account, depending on the circumstances of the infringement.

Finally readers will note that *Sparrow* confirms and extends *Guerin* in that Canada's fiduciary responsibility for aboriginal people includes a responsibility to safeguard Indigenous interests.

E: *Delgamuukw*[8] (1997): Aboriginal Title/Oral History

In 1984 the Gitxsan Nation and the Wet'suwet'en Nation launched a claim for 133 individual territories amounting to 58,000 square kilometres of northwestern British Columbia. The lower courts dismissed the claim, setting the stage for the important 1997 Supreme Court Delgamuukw decision:

From the Canadian Encyclopedia entry for Delgamuukw (emphasis added:)

> The Delgamuukw case (1997) concerned the definition, the content and the extent of aboriginal title. The Supreme Court observed that aboriginal title constituted an ancestral right protected by Section

[8] Delgamuukw is the native name for Earl Muldon of the Gitxsan First Nation,

> 35(1) of The Constitution Act, 1982. Aboriginal title is a right relating to land *sui generis*, held communally and distinct from other ancestral rights. Aboriginal title is, therefore, in substance, a right to territory and encompasses exclusive use and occupation. The native people concerned must tender evidence of the existence of aboriginal title in respect of the following requirements: "(i) they must have occupied the territory before the declaration of sovereignty; (ii) if present occupation is invoked as evidence of occupation before sovereignty, there must be a continuity between present occupation and occupation before the declaration of sovereignty; (iii) at the time of declaration of sovereignty, this occupation must have been exclusive." *It is not necessary to prove a perfect continuity; the demonstration of a substantial maintenance of the bond between the people concerned and the territory is sufficient. In this respect the Supreme Court held that oral evidence could be admitted as proof***.** The court also ruled that aboriginal lands could not be used in a manner that was inconsistent with aboriginal title: if aboriginals wished to use the lands in ways that aboriginal title did not permit, then the lands must be surrendered. Aboriginal title cannot be transferred to anyone other than the Crown[9].

Beyond the main thrust of this quotation what is of major importance here is, as implied by the italicized section in the above quote, that the courts must be willing to rely on oral history, including traditional stories and songs, in a way that until this point in time they had not. The Delgamuukw decision underpins the path-breaking Tsilhqot'in decision elaborated later.

F: *Haida Nation (2004): The Duty to Consult and Accommodate*

In 1999 the British Columbia government unilaterally issued licenses to the Weyerhauser Company to harvest trees in the designated area of Haida Gwai. The Haida claimed an aboriginal-nation right to harvest red cedar in this area and brought a suit against British Columbia requesting that the transfer to Weyerhauser be set aside. The Court sided with the Haida Nation and in the process elaborated on the "duty to consult" and the "honour of the crown". Chief Justice McLachlin, writing for a unanimous court, ruled as follows:[10]

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[9] This provision was contained in the 1763 *Royal Proclamation*

[10] https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2189/index.do. Readers are encouraged to read the Chief Justice's excellent analysis of the duty to consult and

> The government's duty to consult with Aboriginal peoples and accommodate their interests is grounded in the honour of the Crown. The honour of the Crown is always at stake in its dealings with Aboriginal peoples:[16]
>
> Where the Crown has assumed discretionary control over specific Aboriginal interests, the honour of the Crown gives rise to a fiduciary duty…the duty's fulfillment requires that the Crown act with reference to the Aboriginal group's best interest in exercising discretionary control over the specific Aboriginal interest at stake.[18]
>
> The Crown, acting honourably, cannot cavalierly run roughshod over Aboriginal interests where claims affecting these interests are being seriously pursued in the process of treaty negotiation and proof. It must respect these potential, but yet unproven, interests. [27]
>
> Neither the authorities nor practical considerations support the view that a duty to consult and, if appropriate, accommodate arises only upon final determination of the scope and content of the right. [27]
>
> When precisely does a 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[35]
>
> However, the duty to consult and accommodate, as discussed above, flows from the Crown's assumption of sovereignty over lands and resources formerly held by the Aboriginal group. This theory provides no support for an obligation on third parties to consult or accommodate…. the ultimate legal responsibility for consultation and accommodation rests with the Crown. The honour of the Crown cannot be delegated. [53]
>
> The fact that third parties are under no duty to consult or accommodate Aboriginal concerns does not mean that they can never be liable to Aboriginal peoples. If they act negligently in circumstances where they owe Aboriginal peoples a duty of care, or if they breach contracts with Aboriginal peoples or deal with them dishonestly, they may be held legally liable. But they cannot be held liable for failing to discharge the Crown's duty to consult and accommodate. [56]

Finally, but hardly exhaustively:

> The Province of British Columbia argues that any duty to consult or accommodate rests solely with the federal government. I (i.e. the Chief Justice) cannot accept this argument. The Province's argument rests on s.109 of the

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accommodate since only brief snippets are reproduced below. The bracketed number at the end of the quotes indicates the paragraph number of the SCC decision.

> *Constitution Act, 1867* , which provides that all Lands, Mines, Minerals, and Royalties belonging to the several Provinces of Canada . . . at the Union . . . shall belong to the several Provinces." … The answer to this argument is that … the duty to consult and accommodate here at issue is grounded in the assertion of Crown sovereignty which pre-dated the Union. It follows that the Province took the lands subject to this duty. It cannot therefore claim that s. 35 deprives it of powers it would otherwise have enjoyed. As stated in *St. Catherine's Milling and Lumber Co. v. The Queen* (1888), 14 App. Cas. 46 (P.C.), lands in the Province are "available to [the Province] as a source of revenue whenever the estate of the Crown is disencumbered of the Indian title" (p. 59). There is therefore no foundation to the Province's argument on this point. [57-59]

Sébastien Grammond (2013, 315) notes that the duty to consult and accommodate has transformed native law. In particular, "the focus of judicial inquiry has shifted away from the proof of aboriginal rights, which is less and less contested, to the actual measures deployed by governments to consult and accommodate the native peoples"; as a result, "indigenous peoples are now routinely involved in the planning stage of many natural resource development projects."

But there was more to come…

G: Tsilhqot'in Nation Decision (2014): A Game Changer!

The Tsilhqot'in Nation is comprised of six *Indian Act* bands representing roughly 3,000 status Indians. The band members have used the traditional Tsilhqot'in Lands for sustenance for hundreds of years, including for fishing, ceremonial events and the gathering of roots, berries and plants to prepare traditional medicines essential for the maintenance of their way of life. In the early 1980s British Columbia granted forestry and cutting privileges to Carrier Lumber Company on Tsilhqot'in lands. When they were unable to revoke these permits, the Tsilhqot'in Nation issued a declaration that specifically prohibited certain resource development. The lower court found that the Tsilhqot'in held certain aboriginal rights over the land even though they did not have aboriginal title. The Appeal Court disagreed.

In[11] a watershed decision the Supreme Court of Canada ("SCC") allowed the Tsilhqot'in Nation's appeal and, *for the first time in Canadian history, granted a declaration of Aboriginal title*. In doing so, the Court i) confirmed that the doctrine of terra nullius (that no one owned the land prior to Europeans asserting sovereignty) has never applied to Canada, ii) affirmed the territorial nature of Aboriginal title, and iii) rejected the legal test advanced by Canada and the provinces based on "small spots" or site-specific occupation. In overturning the Court of Appeal's prior ruling that proof of Aboriginal title requires intensive use of definite tracts of land, it also declared that British Columbia breached its duty to consult the Tsilhqot'in with regard to its forestry authorizations. This case significantly alters the legal landscape in Canada relating to land and resource entitlements and their governance.

In more detail, the June 2014 Supreme Court unanimous decision held that Tsilhqot'in did indeed have aboriginal title to the Tsilhqot'in land—in effect exclusive control over land-use decisions. The SCC dealt with both the test for Aboriginal title and the rights that flow from it. In terms of the test for title, *Duhaime Law Notes* elaborates as follows (italics added):

> The Supreme Court of Canada found that the lower court judge had correctly found that the Tsilhqot'in had established aboriginal title to some of the claimed area. The [Supreme] Court rejected the restrictive approach to aboriginal title set by the Court of Appeal, holding instead that *title flows from "sufficient occupation" namely, sufficient and continuous use of the land, together with exclusive occupation.* In making that determination, courts will be required to look to First Nations culture and practices, with a view to comparing them with what is required in common law to establish title based on occupation. Moreover, with respect to occupation of land, the legal analysis is no longer limited to specific sites of settlement but now extends to land regularly used for hunting, fishing, gathering or for exploitation of natural resources over which the First Nation exercised control at the time of the assertion of European sovereignty in respect of the land in question. In this case, the lower court had found that there

[11] This paragraph is from the Mandell Pinder legal team: see http://www.mandellpinder.com/tsilhqotin-nation-v-british-columbia-2014-scc-44-case-summary/

> was evidence that parts of the Tsilhqot'in Land were regularly used by the Tsilhqot'in, supporting a finding of "sufficient occupation". Exclusivity of land use in this case was proven by the fact that 200 years ago the Tsilhqot'in repelled others from their land and demanded permission from outsiders who wished to pass over it. Continuity was established by proof of the fact that up to 1999, the land was occupied by the Tsilhqot'in.[12]

In terms of the rights that flow from aboriginal title, *Duhaime Law Notes* reflects as follows:

> The implications of this Supreme Court decision are potentially enormous. As Chief Justice Beverly McLachlin noted in her ruling, "this is not merely a right of first refusal with respect to Crown land management or usage plans … rather it is a right to proactively use and manage the land." Bill Gallagher, a former treaty rights negotiator, noted that the First Nations that have not ceded their territory "have been massively empowered by this ruling … and their expectations have just increased exponentially."[13] He further notes that much of the unexploited resources lie in the traditional territories of the most disadvantaged communities in the country.

One should note, however, that this ruling applies only to *unceded territory*: those First Nations that have treaties are not affected by this judgment since the essence of a treaty was to cede claim to all territory except that "reserved" to them.[14] Hence the full impact will be felt in provinces like British Columbia and Quebec where there are few treaties. This is especially the case since the recent series of court rulings makes it much easier for First Nations to claim control over their traditional lands. Once aboriginal title is established, the government can only go against a First Nation's wishes if it proves that it is justified to do under the Constitution.

Arguably the most prominent of those that view Tsilhqotin as ushering in a dramatic reorientation in Aboriginal-Canada relations, especially as it relates to renewable and non-renewable resource development, are Swain and Baillie (2015) and Swain (2016). Given that aboriginal title now flows from sufficient, exclusive and

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[12] http//www.duhaimelaw.com/2014/07/01.
[13] Cited from http//www.cbc.ca/news/aboriginal/supreme-court-s-tsilhqot-in-first-nation-ruling-a-game-changer-for-all-1.2689140.
[14] Obviously, they retain full control over the land associated with their reserves.

continuous occupation of land since pre-contact time, the Crown is left with a fiduciary duty and the right to encroach only if some broader public interest justifies it. The holders of Aboriginal title have otherwise full discretion about the use and benefits of this land. Swain refers to this as "fee simple plus" because it is not only a collective title but as well one that can be surrendered only to the Crown and that cannot be "developed or misused in a way that would substantially deprive future generations of the benefit of the land" [at para. 74 of the SCC decision]. Hence, governments and others seeking to use the land must obtain the consent of the Aboriginal titleholders. If consent is withheld, the government's only recourse is to justify its actions pursuant to the Sparrow test (elaborated earlier).

In other words, there has arguably been a huge tilting of the negotiating table in favour of First Nations for resource project revenues and jobs. Hence Ottawa now has to work toward developing a land-use regime consistent with the recent Supreme Court decisions. Phrased differently, Swain's contribution is to emphasize that the recent Supreme Court decisions are creating a new legal/constitutional reality for Ottawa, the provinces and Aboriginals, one that needs equally creative institutional/governance models that can accommodate this new emerging reality.

Without disagreeing with the foregoing analysis, allow me offer a somewhat different perspective on Tsilhqot'in. In effect, Tsilhqot'in *changes the landlord* – from the province to the Indigenous nation. In other words the Indigenous nation now has title. As long as the Indigenous nation does not have self-government it may still tend to inhibit development. As will become evident in Chapters 8 and 9, however, if Indigenous nations have both self-government and a property-rights regime they become very interested in economic development. Lacking both of these implies, among other things, that the benefits of ownership will likely flow to the provincial government rather than to the Indigenous nation. It is hardly surprising that this might lead to Indigenous peoples embracing an anti-development perspective. What the courts are telling Canadians is that the original transfer of landlord rights over resources to the provinces in areas that comprised the traditional territory of Indigenous peoples was wrong and needs to be righted.

Lest one think that the legal/constitutional driven evolution has reached its end, welcome to another dramatic Supreme Court game-changer – the Daniels decision.

H: Daniels, *(2016): Métis and Non-Status Indians; Another Game Changer*

The Congress of Aboriginal Peoples (CAP)[15] is an umbrella group that represents the Métis and non-Status Indians. In 1999, the CAP and several individual Métis and non-status Indians took the federal government to federal court alleging discrimination because they are not treated as "Indians" under section 91(24) of the Constitution Act, 1867, namely "Indians and Lands reserved for Indians". It is surprising that it took so long for this lawsuit to appear since as I have long argued[16] (and I presume others have as well) that the federal government has tended to interpret section 91(24) as "Indians **on** Lands reserved for Indians", thereby implicitly if not explicitly relegating responsibility for off-reserve Indians to the provinces. The Métis, off-reserve and non-status Indians argued that they are entitled to some or all of the same rights and benefits as status First Nations members who live on reserves. These benefits could include: access to the same health, education and other benefits Ottawa offers status Indians, e.g., being able to hunt, trap, fish and gather on public land; and the ability to negotiate and enter treaties with the federal government. For its part the federal government argued that there is insufficient evidence to prove that the Métis are historically considered "Indians." It also argued that the term "non-status Indian" is not a legal term and that all legal obligations of the Canadian government to Métis or other Native Canadians have been met.

In January of 2013 the Federal Court ruled that the roughly 450,000 Métis and 215,000 non-status Indians in Canada are indeed "Indians" under the provisions of the Constitution and, therefore, they fall under federal jurisdiction. The financial implications of this would be staggering since this new category of

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[15] CAP is in the process of changing its name to the Indigenous Peoples' Assembly of Canada.

[16] For example, Courchene and Powell (1992).

"Indians" would dramatically increase the number of Aboriginals covered by the current definition.

Not surprisingly, the federal government appealed this decision. Both the Métis National Council and the Congress of Aboriginal Peoples (CAP) hailed the Federal Court of Appeal's 2014 decision to uphold the lower court ruling that the federal government has jurisdiction (via s.91(24)) over Métis and non-status Indians. However, in making its unanimous ruling the Court of Appeal said that non-status Indians were, unlike the Métis, not a distinct group of peoples and that their rights were already included with their existing bands.

Both sides appealed this latter part of the decision, Ottawa for reasons elaborated above, and the non-status and off-reserve Indians for fear that leaving their futures in the hands of their respective bands effectively erodes the larger decision that they fall under federal jurisdiction. In November of 2014 the Supreme Court accepted to hear these appeals.

Writing for the unanimous court, Justice Rosalie Abella viewed the Supreme Court's role in this case as one of ruling on three declarations that were sought by the plaintiffs when the litigation was launched in 1999, namely:

> 1. That Métis and non-status Indians are "Indians" under s.91(24)[17]:
>
> 2. That the federal Crown owes a fiduciary duty to Métis and non-status Indians; and
>
> 3. That Métis and non-status Indians have the right to be consulted and negotiated with, in good faith, by the federal government on a

[17] To recall, s.91(24) reads as follows:… it is hereby declared that ... the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated…(24) Indians, and Lands reserved for the Indians

> collective basis through representatives of their choice, respecting all their rights, interests and needs as Aboriginal peoples.

In paragraph 50 of its decision, the SCC notes: "The first declaration should ... be granted as requested. Non-status Indians and Métis are "Indians" under s.91(24) and it is the federal government to whom they can turn." The SCC recognizes that this ruling redresses the uncertain position that the Métis and non-status Indians often found themselves. From paragraphs 13 and 14 of the decision:

> Both the federal government and the provincial governments have denied having legislative authority over non-status Indians and Métis. As the trial judge found, when Métis and non-status Indians have asked the federal government to assume legislative authority over them, it tended to respond that it was precluded from doing so by s.91(24). And when Métis and non-status Indians turned to provincial governments, they were often refused on the basis that the issue was a federal one. This results in these Indigenous communities being in a jurisdictional wasteland with significant and obvious disadvantaging consequences.

The SCC concluded that Métis and Non-Status Indians are indeed "Indians" under s.91(24).

In an earlier SCC case (R. v. Powley, 2003)[18] the Court agreed on the following three-fold definition for the Métis:

1. Self-identification as Métis;
2. An ancestral connection to an historic Métis community; and

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[18] *R. v. Powley* was the first major Aboriginal rights case concerning Métis peoples. The *Powley* decision resulted in "the Powley Test," which laid out a set of criteria to not only define what might constitute a Métis right, but also who is entitled to those rights. Although the *Powley* decision defined Métis rights as they relate to hunting, many legal experts and Métis leaders view the *Powley* case as potentially instrumental in the future of recognizing Métis rights. (Reproduced from the Powley entry of UBC's Indigenous Foundations website).

3. Acceptance by the modern Métis community.

In the SCC's view the third criterion — community acceptance — raises particular concerns in the context of this case (i.e., in the Daniels case):

> The criteria in *Powley* were developed specifically for purposes of applying s.35, which is about protecting historic community-held rights. That is why acceptance by the community was found to be, for purposes of who is included as Métis under s.35, a prerequisite to holding those rights. Section 91(24) serves a very different constitutional purpose. It is about the federal government's relationship with Canada's Aboriginal peoples. This includes people who may no longer be accepted by their communities because they were separated from them as a result, for example, of government policies such as Indian Residential Schools. *There is no principled reason for presumptively and arbitrarily excluding them from Parliament's protective authority on the basis of a "community acceptance" test.*
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> Finally, in terms of the other two declarations to be addressed by the SCC, namely, if Métis and non-status Indian people do fall under s.91(24) then i) does Canada have a fiduciary duty towards those people and ii) does Canada have a duty to negotiate with them? The Court declined to rule on these, because they would merely be re-stating law that is already settled, namely that *existing case law from the Court establishes that Aboriginal peoples do have a fiduciary relationship with the Crown and that the Crown has a duty to negotiate with Aboriginal people when their rights are affected by a Crown decision*.

The Court was also clear that its ruling does not make all provincial legislation relating to Métis and non-status Indians invalid unless it touches on the core of the federal powers. Indeed, whenever constitutionally admissible, the courts are to allow the operation of laws enacted by both levels of government.

The final SCC decision selected for elaboration is unique in that encompasses two separate but related cases that were tabled on the same day (July 27, 2017).

I: The Chippewas and the Clyde River SCC Cases

The focus of both of these SCC cases relates to the "duty to consult". The issue in the first case (the Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.) had to do with the fact that that the federal government delegated the duty to consult

to the National Energy Board. On the appropriateness of this delegation the SCC reflected as follows:[19]

> The Crown may indeed rely on steps taken by an administrative body to fulfill its duty to consult so long as the agency possesses the statutory powers to do what the duty to consult requires in the particular circumstances, and so long as it is made clear to the affected Indigenous group that the Crown is so relying. However, if the agency's statutory powers are insufficient in the circumstances or if the agency does not provide adequate consultation and accommodation, the Crown must provide further avenues for meaningful consultation and accommodation prior to project approval. Otherwise, a regulatory decision made on the basis of inadequate consultation will not satisfy constitutional standards and should be quashed.

The SCC concluded that the NEB did indeed satisfy the duty to consult (loc.cit):

> The NEB's statutory powers under s. 58 of the *National Energy Board Act* were capable of satisfying the Crown's constitutional obligations in this case. Furthermore, the process undertaken by the NEB in this case was sufficient to satisfy the Crown's duty to consult. First, the NEB provided the Chippewas with an adequate opportunity to participate in the decision-making process. Second, the NEB sufficiently assessed the potential impacts on the rights of Indigenous groups and found that the risk of negative consequences was minimal and could be mitigated. Third, in order to mitigate potential risks, the NEB provided appropriate accommodation through the imposition of conditions on Enbridge.

The rationale for doubling up these cases arises because the SCC rules against the adequacy of the NEB's role in the Clyde River case. The issue in this case was that the proponent (Petroleum Geo-Services Inc.) applied to the NEB to conduct offshore seismic testing for oil and gas in Nunavut. The Inuit of Clyde River opposed the testing because it could negatively affect their treaty rights, alleging that the duty to consult had not been fulfilled. The NEB granted the requested authorization. It concluded that the proponents made sufficient efforts to consult with Aboriginal groups and that Aboriginal groups had an adequate opportunity to participate in the NEB's process. The case eventually ended up in the Supreme Court where the decision was reversed because the "duty to Consult" was deemed to be inadequate. In the SCC words:

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[19] Source: https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/16744/index.do

> While the Crown may rely on the NEB's process to fulfill its duty to consult, the consultation and accommodation efforts in this case were inadequate and fell short in several respects. First, the inquiry was misdirected. The consultative inquiry is not properly into environmental effects *per se*. Rather, it inquires into the impact on the right itself. No consideration was given in the NEB's environmental assessment to the source of the Inuit's treaty rights, nor to the impact of the proposed testing on those rights. Second, although the Crown relies on the processes of the NEB as fulfilling its duty to consult, that was not made clear to the Inuit. Finally, and most importantly, the process provided by the NEB did not fulfill the Crown's duty to conduct the deep consultation that was required here. Limited opportunities for participation and consultation were made available. There were no oral hearings and there was no participant funding. While these procedural safeguards are not always necessary, their absence in this case significantly impaired the quality of consultation. As well, the proponents eventually responded to questions raised during the environmental assessment process in the form of a practically inaccessible document months after the questions were asked. There was no mutual understanding on the core issues — the potential impact on treaty rights, and possible accommodations. As well, the changes made to the project as a result of consultation were insignificant concessions in light of the potential impairment of the Inuit's treaty rights. Therefore, the Crown breached its duty to consult in respect of the proposed testing.[20]

There is one further issue concerning the duty to consult that was addressed in the Chippewas case that arguably will have an influence well beyond these court

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[20] As this paper was in its final editing stage, the Federal Court of Appeal overturned Ottawa's approval of the Trans Mountain Pipeline expansion. Stueck and Bailey (2018, A4) report as follows:

> On August 30, the Federal Court of Appeal quashed Ottawa's approval of the project, citing shortcomings in the government's duty to consult with First Nations and a decision by the National Energy Board to exclude project-related tanker traffic from its review. … By not including project-related shipping, the board failed to consider its obligations under that legislation to mitigate any impact with respect to southern resident killer whales, the court said.

Ottawa remains committed to the Trans Mountain pipeline and presumably will attempt to rectify the shortfalls in the NEB's duty to consult with the relevant First Nations.

cases. This is the SCC statement at paragraph 41 of the Chippewas case, namely that:

> "The duty to consult is not triggered by historical impacts. It is not the vehicle to address historical grievances".

It is not clear to me just what might be at stake here. Might it mean that the claim of a lack of "free prior and informed consent"(FPIC) associated with the Numbered Treaties is not a reason to redress these oft-cited historical grievances?

Part 4: The SCC Decisions: Implications and Reflections

One wonders whether the architects of *The Constitution Act, 1982* had any premonition of what the interaction among i) the Royal Proclamation, ii) sections 35(1) – 35(4)) of *The Constitution Act, 1982*, and iii) s.91(24) of the original BNA Act would lead to in the hands of the legal system and, in particular, the Supreme Court of Canada. By any definition, the results as they relate to Aboriginal rights and land title claims have been truly remarkable. While these achievements are in the first instance due to the perseverance and creativity of the First Nations themselves, it is also the case that achieving these goals was aided and abetted by outside forces. For example, on the international front there is the 25-year evolution in the United Nations from the creation in 1982 of the Working Group on Indigenous Populations through to the 2007 *United Nations Declaration on the Rights of Indigenous Peoples.*

i) *Daniels*

These factors notwithstanding, the key player behind the achievement of Aboriginal rights and title was the SCC and its series of path-breaking decisions. Phrased differently, Ottawa enshrined the principles and the Supreme Court turned these principles into rights and powers. Note that while the lower courts were clearly essential in this process, the imprimatur of the Supreme Court of Canada was required because most, if not all, of the above decisions were precedent-breaking and only the SCC can set precedent, i.e., overturn existing precedent.

In terms of the potential consequences of the SCC decisions, the focus here will be limited to the two cases that are referred to above as "game changers" – namely the Tsilhqot'in and Daniels decisions. Turning first to the latter, the numerical implications are clearly dramatic and the institutional implications are, at the very least, likely to be delicate, even disruptive. In terms of the former, from column 3 of Table 1 of chapter 2 of my forthcoming book (*Indigenous Nationals/Canadian Citizens*) the status Indian population on and off the reserves in 2013 was 919,745, while that of non-status Indians was 213,900 and that of the Métis was 418,830 for an overall total of 1,552,025 Indigenous citizens. In turn, the sheer numbers suggest that the role and stature of IPAC (i.e., the Indigenous Peoples' Assembly of Canada) will surely increase both in absolute terms and in relation to the Assembly of First Nations.

Beyond this shift in the relative positioning of these two peak Aboriginal institutions, the major implication of the Daniels case may well be financial – what is Ottawa's likely fiduciary responsibility for and to IPAC? Currently non-status Indians and Métis are taxable as are status Indians off reserve whereas this is not the case for on-reserve status Indians. At the very least it will be difficult for Ottawa to continue to privilege only status Indians when it comes to areas like health, education, funding, etc. Failure on Ottawa's part to treat IPAC members similar to AFN members will surely trigger further resort to the courts that almost certainly will find their way to the Supreme Court.

ii) *Tsilhqot'in*

Whereas the Daniels decision has major implications for intra-Aboriginal relations as well as overall Aboriginal-Government relations, the Tsilhqot'in ruling has the potential to reverberate throughout Canada's renewable and non-renewable surface and subsurface resource sectors. As noted above, this is especially the case where there are no reserves (e.g., in BC, Quebec and the Atlantic provinces) since First Nations may be able to claim surface and subsurface title and rights over their

traditional territory and, therefore, be able to exert more influence over resource decisions including those relating to revenue allocation, including royalties.

Beyond the revenue issue, there seems to be much concern that Tsilhqot'in model will slow down major resource projects. This is a theme in the paper by Swain and Baillie (2015). Perhaps it will. However, the on-going reality is that not much gets done now on the resource front. Indeed, I think that a case can be made that once surface and subsurface rights are clarified, resource projects will be expedited. To be sure, and as noted above, the impact of Tsilhqot'in will be to shift the resource landlord from the province to the Indigenous nation. However, the implicit corporate view is that Aboriginals are steadfastly against resource development. I do not believe this is the case. What is true is *that under the current regime* (where royalties from resource development/extraction on what Aboriginals believe are their traditional territories end up in provincial coffers and where they have little or no say in the development process) *Aboriginal peoples are indeed likely to attempt to stall resource projects, often by playing the environmental card.* However, under the Aboriginal Land Claims Agreements in Yukon, for example, where the First Nations have self-government and have embraced taxation and property rights, they are not anti-development. The underlying issue here may well be whether it was appropriate for Ottawa to allocate to the respective provinces the surface and sub-surface rights over all the territory in the province, including the traditional territory of the First peoples. This is where Tsilhqot'in may lead us. Indeed, whereas the typical cleavage has been between the resource-sector interests and the provinces on the one hand and the Indigenous nations on the other, under Tsilhqot'in the cleavage will likely be between the Indigenous Nations and the resource interest and the province or provinces on the other hand.

The underlying thesis of Harry Swain's 2016 paper is that the recent and ongoing pace of events is rapidly passing Ottawa by. The challenges arising from Tsilhqot'in, and Daniels, as well as the UNDRIP principle of "free, prior and informed consent", are landing on governments that have little in the way of existing policies

or frameworks to accommodate or incorporate them. Swain reflects on the current situation as follows:

> There is a huge job for Parliament, hitherto ignored, in the defining details of a land use regime consistent with Supreme Court decisions, and possibly with UNDRIP. We don't have time to leave it to the courts. We are where we are because the respectful dialogue between Parliament and the Court has not taken place, with the result that the law in this area is increasingly judge-driven. We need to rebalance judicial and legislative roles in Canadian democracy in some areas if we are to maintain legitimacy.

Swain's conclusion to his paper seems most apt as a conclusion to this MacGregor Lecture, namely, that "At the moment, we are distinctly not on the road to Peace, 0rder, and Good Government."

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