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Aboriginal rights are based in history

Before Europeans arrived in North America, various areas were home to First Nations along the coast and inland. Aboriginal rights stem from this prior occupancy; they are the rights held as a result of longstanding use and occupancy of the land.

Under the law, the unique legal and constitutional status of First Nations derives from the fact that they are the descendants of the people that were resident in North America long before Europeans arrived.

As early as the 18th century, Britain recognized that First Nations had claims to the land and major treaties were signed across Canada as settlement moved west. Until recently, the only treaties ever signed in British Columbia (B.C.) were the Douglas Treaties on Vancouver Island and Treaty 8, which was extended across the prairies and into northeastern B.C. By the time B.C. joined Confederation in 1871, the province's Aboriginal policy was set: the B.C. Government did not recognize Aboriginal title; therefore, they argued, there was no need to negotiate treaties in order to extinguish it.

In the 21st century, the first modern treaty in B.C. came into effect - the Nisga'a Treaty. The last step needed to give legal effect to the Nisga'a Treaty took place on April 13, 2000, when Parliament passed the *Nisga'a Final Agreement Act*. The Nisga'a Treaty sets out and describes in detail how the rights of Nisga'a citizens will be exercised. Any Aboriginal rights of the Nisga'a are modified to become rights set out in the Treaty.

Aboriginal rights exist in law

In the early 1970s, successive court cases confirmed the existence of Aboriginal rights. In 1982, Canada's supreme law, the *Canadian Constitution*, was amended to recognize and affirm existing Aboriginal rights. It is important to note that this change to the *Constitution* did not create or define any new Aboriginal rights - rather, it recognized and affirmed already existing Aboriginal rights, without spelling out what those rights were or where they may exist. The Crown has not been able to extinguish Aboriginal rights since 1982 B when Aboriginal rights were given constitutional protection.

Over the past 30 years, Aboriginal rights are slowly being defined through the Canadian courts. For example, in 1990 the Supreme Court of Canada concluded in the *Sparrow* decision that the Musqueam Indian Band had an existing Aboriginal right to fish. This is just one example of an Aboriginal right. So far, Canadian law has confirmed that Aboriginal rights:



- exist in law;
- may range from rights not intimately tied to a specific area of land, to site-specific rights, to Aboriginal title, which is a right to exclusive use and occupancy of land;
- are site, fact and group-specific; and,
- are not absolute and may be justifiably infringed by the Crown

Aboriginal title is a unique property right

A number of court decisions from the Supreme Court of Canada have also made references to Aboriginal title. These court decisions have made important distinctions between Aboriginal title and other forms of individual property ownership. The most important decision on Aboriginal title is the 1997 *Delgamuukw* decision from the Supreme Court of Canada. In that case, the Court said that:

- Aboriginal title is a communal right;
- Aboriginal title, like other types of Aboriginal rights, is protected under *s.35 of the Constitution Act, 1982*;
- Aboriginal title lands can only be surrendered to the federal Crown;
- Aboriginal title lands must not be put to a use which is irreconcilable with the nature of the group's attachment to the land; and,
- In order for the Crown to justify an infringement of Aboriginal title, it must demonstrate a compelling and substantive legislative objective, it must have consulted with the Aboriginal group prior to acting and, in some cases, compensation may be required.

The treaty process is critical to resolving uncertainty around Aboriginal rights

The issue of First Nations' claims to land in B.C. remains outstanding. Resolution will either be negotiated and agreed upon by Canada, B.C. and First Nations through the treaties, or it will be decided by the courts on a case-by-case basis. To date, Court decisions have not resulted in a clear definition of Aboriginal rights. Courts have repeatedly stated that claims to Aboriginal rights and title are better settled through negotiation than through court cases.

Modern treaties will set out the negotiated treaty rights of Aboriginal groups. Each of the parties to the treaties B the First Nation, B.C., and Canada B will fully understand their respective rights and responsibilities.

Timeline

Aboriginal Rights and the Land Claims Issue in B.C.

1760 The area that will become B.C. is home to Aboriginal people in more than 30 tribal groups and many hundreds of communities.

1763 Britain's *Royal Proclamation of 1763* reserves lands for the Indians until they are ceded or purchased by the Crown.

1849 Vancouver Island is made a colony with the Hudson's Bay Company in charge of land and settlement. James Douglas, chief Hudson's Bay official in the colony, becomes Governor.

1850-54 Governor James Douglas enters into treaties with fourteen First

Nation communities on Vancouver Island, creating what are now known as the Douglas Treaties.

1871 B.C. joins Canada and signs the Terms of Union. These state that the federal government will assume responsibility for First Nations and B.C. will retain authority over land and resources.

1876 The first *Indian Act* consolidates all laws relating to registered Indians.

1884 The federal government outlaws the potlatch, the major social, economic and political institution of Pacific north coast First Nations.

1899 Treaty 8 is extended into northeastern B.C. It is the last treaty to be concluded in the province until the Nisga'a Treaty in 2000.

1906-15 Several First Nations, in an effort to advance their land claims, meet with governments in Victoria, Ottawa, and London, England. First Nations groups form the Allied Tribes of B.C. to pursue legal cases on Aboriginal rights.

1921 The Judicial Committee of the Privy Council, the highest court of Canada, rules that Aboriginal title is a pre-existing right that "must be presumed to have continued unless the contrary is established."

1929 Laws which prevented First Nations from retaining legal counsel to pursue land claims are repealed.

1951 Parliament repeals laws prohibiting potlatch and land claims activity.

1960 Registered Indians are granted the right to vote in federal elections. Prior to 1960, First Nations people were required to give up their Indian status to be considered Canadian citizens under the law.

1973-76 In the *Calder* case, the Supreme Court of Canada rules that the Nisga'a held title to their traditional lands before B.C. was created. The court splits evenly on whether Nisga'a still have title. The federal government adopts a comprehensive land claims policy; negotiations begin with the Nisga'a Tribal Council.

1982 The *Canadian Constitution*, section 35, affirms existing Aboriginal and treaty rights.

1990 The B.C. Government agrees to negotiate land claims.

1990-93 B.C., Canada and the First Nations Summit establish the B.C. Treaty Commission (BCTC) process and the 31-member Treaty Negotiation Advisory Committee is formed to provide the governments of B.C. and Canada with advice on draft negotiated agreements and the impacts on various sector interests.

1993-94 The BCTC begins the treaty negotiation process and initial meetings are held with 42 First Nations whose statements-of-intent to negotiate are accepted by the BCTC.

1996 Canada, B.C. and the Nisga'a Tribal Council sign an agreement-in-principle.

1997 In the *Delgamuukw* case, the Supreme Court of Canada provides its first comprehensive statements about Aboriginal title, and also sets out a test to determine Aboriginal title.

1995-99 Over 70% of B.C.'s First Nations are negotiating treaties with the Governments of Canada and B.C.

1999 The Sechelt Agreement-in-Principle is signed, the first in the modern BCTC process.

2000 The Nisga'a Final Agreement, negotiated outside the BCTC process, is passed by the Senate, having been ratified in the House of Commons, the B.C. provincial legislature and by the Nisga'a people.

Want to know more?

More information on is available on the Indian and Northern Affairs Website and through a series of published fact sheets. For more information or to arrange for a guest speaker, contact:

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