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Why

in this day and age, are we negotiating treaties in BC?

For many people, treaties seem like a relic of the past. Weren't treaties signed a long time ago, when Europeans first settled in North America?

In fact they were, in most of the continent. But treaties are unfinished business here in British Columbia. This unfinished business is costing the provincial economy a lot of money because of continuing uncertainty over ownership of millions of acres of land. It's also standing in the way of aboriginal communities regaining the self-sufficiency they once had.

When the early Europeans first began to settle in the eastern part of North America, Britain recognized that those people who were already living here had title to land: the Royal Proclamation of 1763 declared that only the British Crown could acquire lands from First Nations, and only by treaty. In most of Canada that's what happened.

Before Confederation the British Crown had signed major treaties. The new Dominion of Canada continued this policy of making treaties before the west was opened up for settlement. In most of these treaties aboriginal people gave up their title in exchange for land reserves and for the right to hunt and fish on the land they'd given up.

But west of the Rockies, things were different. Between 1850 and 1854 James Douglas, on behalf of the British Crown, negotiated 14 land purchases on Vancouver Island, which are known to this day as the Douglas Treaties. When the mainland was made a colony in 1858, Governor Douglas' superiors in London left him in charge assuming that more treaties would be arranged. But neither Douglas, nor any of his successors made any more treaties. Instead Douglas began setting out reserves for each tribe, which included "their cultivated fields and village sites."

Although no more treaties were made, under Douglas individual aboriginal people who wanted to take up farming could acquire Crown land on the same terms as the settlers. However, soon after Douglas retired the colonial government took away from aboriginal people the right to acquire Crown land, reduced the size of their reserves, denied that they had ever owned the land, and paid no compensation for the loss of traditional lands and resources.

So when the time arrived for the colony of British Columbia to join Confederation in 1871, the new province's policy was set: British Columbia did not recognize aboriginal title, so there was no need for treaties to extinguish it. The new Dominion seemed to have been initially unaware of British Columbia's approach to aboriginal affairs. When it became aware it expressed concern about the legality of British Columbia's policy, but the sea-to-sea railway and other matters were the focus and Canada was unwilling to force the issue.

Over the decades, aboriginal people presented letters and petitions to governments, demonstrated and protested and even met with provincial and federal officials demanding treaties. However, the only one signed in the new province was Treaty 8 in 1899. The treaty, which was extended west of Alberta to take in the northeast corner of British Columbia, was signed with the federal government: the province took no part.

Continually dismissed and ignored, aboriginal peoples' demand for treaties intensified, culminating in the forming of the Allied Tribes of British Columbia in 1916 to work for treaties. During the 1920s the Allied Tribes petitioned Parliament more than once to have their case sent to the Judicial Committee of the Privy Council in London (Canada's highest court at the time). In response, Ottawa amended the *Indian Act* in 1927 to make it illegal to raise funds to pursue land claims and thus prevented land claims activity. The restriction on land claims activity was eventually lifted in 1951.

So,

treaties should have been made yet weren't. Isn't it simply too late in the day to revisit this? Aren't we living in a different reality?

Under section 35 of the *Constitution Act*, 1982, aboriginal rights and treaty rights, both existing and those that may be acquired, are recognized and affirmed. The reality we are faced with is that Canadian law says aboriginal land title, and the rights that go along with it, exist whether or not there is a treaty. But without a treaty there is uncertainty about how and where those rights apply.

The reason that this issue is being dealt with so late in the day is due in part to the *Indian Act's* ban on land claims activity. Not until the 1970s was a First Nation able to ask the Supreme Court of Canada to do what the courts in the United States and New Zealand had done over a century earlier: to rule on the status of aboriginal title as a legal right.



The Evolution of Aboriginal

Calder decision recognizes aboriginal title

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The first of a series of landmark judgments to deal with aboriginal rights was the Supreme Court of Canada's *Calder* decision in 1973. In that case, the Nisga'a of northwestern BC argued that the Crown's underlying title was subject to Nisga'a title to occupy and manage their lands.

The decision was a legal turning point. Six of the seven judges confirmed that aboriginal title is "a legal right derived from the Indians' historic... possession of their tribal lands" and that it existed whether governments recognized it or not. However, the judges then split on whether Nisga'a aboriginal title still existed or had been extinguished by colonial legislation prior to Confederation.





The recognition of aboriginal title in *Calder* as a legal right was sufficient to cause the federal government to establish a land claims process. However, British Columbia refused to participate. As British Columbia held virtually all Crown land in the province, the land claims process was doomed without the province's participation.

Still the question remained: had aboriginal title been extinguished before British Columbia joined Confederation, or not?

Three court decisions since the *Calder* case have addressed this question.

Sparrow decision recognizes aboriginal right to fish

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In the Supreme Court of Canada's *Sparrow* decision in 1990, the Court took the same approach as those judges in *Calder* who said that the Nisga'a still had title. They said that unless legislation had a "clear and plain intention" to extinguish aboriginal rights, it did not have that effect.

Applying this test to fisheries legislation, the Court concluded that a century of detailed regulations had not extinguished the Musqueam people's aboriginal right to fish for food and ceremonial purposes. This case, however, dealt with fishing rights, not rights in land.

Delgamuukw decision confirms aboriginal title exists

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Then came the *Delgamuukw* judgment by the Supreme Court of Canada in December 1997. The decision confirmed that aboriginal title does exist in British Columbia, that it's a right to the land itself — not just the right to hunt, fish or gather — and that when dealing with Crown land, the government must consult with and may have to compensate First Nations whose rights may be affected. However, there was no decision as to whether the plaintiffs have aboriginal title to the lands they claimed. The court said the issue could not be decided without a new trial.

For more information on the Delgamuukw decision, please refer to our brochure [The Layperson's Guide to Delgamuukw](#)

*The Marshall and Bernard decision sets limits on
aboriginal title*

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In July 2005, the Supreme Court of Canada handed down its verdict on the *Marshall and Bernard* appeals. At issue was whether the Mi'kmaq of Nova Scotia and New Brunswick needed prior authorization from provincial authorities to harvest timber. The Mi'kmaq, argued that they had either — or both — a treaty and an aboriginal right to log timber for commercial purposes without permission. The Mi'kmaq based their argument on the terms of a friendship treaty signed with the British in 1760–61, and on a right to log associated with aboriginal title.

The court unanimously dismissed the claim to both treaty and aboriginal rights. It found that although the treaty protected the Mi'kmaq rights to sell certain products, including some wood products, this right did not extend to commercial logging. The court said that while rights are not frozen in time, the protected right must be a logical evolution of the activity carried on at the time of treaty-making. Treaties protect traditional activities expressed in a modern way and in a modern context. New and different activities are not protected.

The court adopted strict proof of aboriginal title. It stated that any claim to aboriginal title would depend on the specific facts relating to the aboriginal group and its historical relationship to the land in question. Traditional practices must translate into a modern legal right, and it is the task of the court to consider any proper limitations on the modern exercise of those rights. As with the treaty right, an aboriginal practice cannot be transformed into a different modern right.

The court further stated that aboriginal title would require evidence of exclusive and regular use of land for hunting, fishing or resource exploitation. Seasonal hunting and fishing in a particular area amounted to hunting or fishing rights only, not aboriginal title. However, the court did not rule out the possibility that nomadic and semi-nomadic peoples could prove aboriginal title. The court also emphasized that there must be continuity between the persons asserting the modern right and a pre-sovereignty group.

Court denies request for declaration of Tsilhqo'tin title

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In *Tsilhqo'tin Nation v. British Columbia* in the BC Supreme Court, Justice Vickers denied the request for a declaration of aboriginal title and dismissed the claim for damages.

The case concerned the claim by the Xeni Gwet'in to aboriginal title to the remote Nemiah Valley northwest of Williams Lake. Justice Vickers, in his non-binding opinion, did find that the Tsilhqo'tin did establish aboriginal title to almost half of the territory they claimed. But he had to dismiss the claim given the all-or-nothing nature of their pleadings.

Central among the issues was whether the nature of the use and occupation of the Nemiah Valley by the ancestors of the Xeni Gwet'in at the time the British Crown asserted sovereignty over it was sufficiently regular and exclusive to meet the legal standard for aboriginal title at common law for all or part of the territory claimed by the Xeni Gwet'in.

There is no doubt the judgement will have an impact on treaty negotiations. The extent of that impact remains unclear and the full implications may not be known for some time.

Court denies commercial right to fish salmon

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In *Lax Kw'alaams Indian Band v. Canada and BC*, in the BC Supreme Court, Madame Justice Satanove ruled the band had not proved an aboriginal right to fish all species within its traditional territory for commercial purposes.

The court heard there were no oral histories or historical records containing evidence of large scale, regular trading in fish, other than eulachon. In her ruling, Justice Satanove cited considerable evidence given at trial that showed the Coast Tsimshian did regularly trade in eulachon and eulachon grease.

However, given the abundance of salmon on the northwest coast and the ease of catching them, fish were not a commercial trade item. The case is significant because it increases the evidentiary burden on First Nations in establishing an aboriginal right to a commercial fishery.

What

do these legal decisions really mean?

Since the early 1970s, through these and other cases, aboriginal rights have slowly evolved and been defined through the Canadian courts.

The courts have confirmed that aboriginal title still exists in BC but they have not indicated where it exists. To resolve this situation the governments and First Nations have two options: either negotiate land, resource, governance and jurisdiction issues through the treaty process or go to court and have aboriginal rights and title decided on a case-by-case, right-by-right basis.

The following two cases provide broad guidelines for the negotiation and definition of aboriginal title in BC.

Honour of the Crown

*Haida Nation vs. British Columbia and Taku River
Tlingit First Nation vs. British Columbia*

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In November 2004, the Supreme Court of Canada established a general framework for the duty to consult and accommodate First Nations in British Columbia. The court ruled in *Haida* and *Taku* that government has a duty to consult and possibly accommodate aboriginal interests even where title has not been proven.

This duty arises from the need to deal with aboriginal rights in the interim prior to those rights being addressed through a treaty or court decision. Government cannot run roughshod over aboriginal interests. And First Nations do not have a veto over what can be done with land pending final proof of claim. The consultative process must be fair and honourable, but at the end of the day, government is entitled to make decisions even in the absence of consensus.

Furthermore, the court put to rest the notion of extinguishment of aboriginal rights and finality in agreements. Instead, the goal of treaty making is to reconcile aboriginal rights with other rights and interests, and that it is not a process to replace or extinguish rights. The courts stated, “Reconciliation is not a final legal remedy in the usual sense.” It said “just settlements” and “honourable agreements” are the expected outcomes.

Mikisew Cree First Nation

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In November 2005, the Supreme Court of Canada extended the Crown's obligation to consult and accommodate aboriginal interests — established in *Haida* and *Taku* — to include existing treaty rights.

In *Mikisew Cree First Nation v. Canada*, the court unanimously ruled that the federal government had not properly consulted the First Nation before approving the construction of a road through traditional lands in Wood Buffalo National Park. The Mikisew Cree argued the road impaired their traditional trapping and fishing rights granted in Treaty 8 (1899).

The court stated that governments must consider modern-day tensions between First Nations and governments. The level of consultation required will depend on the potential impact on the rights in question. However, consultation will not always lead to accommodation, and accommodation may or may not result in agreement.

This court decision confirms that the overall goal of reconciliation between the Crown and First Nations does not end with the signing of a treaty and there is a continuing duty to consult, and perhaps accommodate, in circumstances where treaty rights might be adversely affected.

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BC Supreme Court decisions give First Nations, no matter what the status of their treaty negotiations, compelling reasons to resolve their territorial issues. The court rulings note that where there are competing claims to territory, a prima facie case for aboriginal title may not be established or may be weakened. On the other hand, the court rulings suggest agreements among First Nations strengthen claims to aboriginal title and rights and, ultimately, the ability to conclude treaties.

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Final Agreement encroached on their land claim. The court noted the balance of convenience rests with the First Nation ratifying a final agreement and the non-derogation language included in treaties is recognition that a final treaty does not limit the claim of another First Nation to land or resources agreed to in the treaty.

The BC Supreme Court in *Hupacasath First Nation v. British Columbia (Minister of Forests)* and *Cook v. The Minister of Aboriginal Relations and Reconciliation*, 2007 ruled that a prima facie case for aboriginal title may not be established or may be weakened where there are competing claims to territory.

All

All of these landmark judgments together confirm that:

- > Aboriginal rights exist in law;
- > Aboriginal rights are distinct and different from the rights of other Canadians;
- > They include aboriginal title, which is a unique communally held property right;
- > Aboriginal rights take priority over the rights of others, subject only to the needs of conservation;
- > The scope of aboriginal title and rights depends on specific facts relating to the aboriginal group and its historical relationship to the land in question.
- > The legal and constitutional status of aboriginal people derives not from their race but from the fact they are the descendants of the peoples and governing societies that were resident in North America long before settlers arrived;

- > Aboriginal rights and title cannot be extinguished by simple legislation because they are protected by the *Constitution Act*, 1982.
- > Government has a duty to consult and possibly accommodate aboriginal interests even where title has not been proven; and
- > Government has continuing duty to consult, and perhaps accommodate, where treaty rights might be adversely affected.



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