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Chapter 20

How First Nations Have Been Transforming Public Policy through the Courts

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Through political action and litigation, Indigenous people have transformed the Canadian constitutional landscape – peacefully, and in a fashion largely unremarked by casual observers (Cairns 2011). Of the many aspects of this transformation, our focus here is on legal developments regarding Aboriginal rights and title and concomitant changes to federal policy. After explaining the jurisprudential starting point in British colonial law, we explore the political context of selected Supreme Court of Canada decisions and their impact on public policy. Although the process is far from complete, the transformation of public policy through Indigenous political activism and the courts is well underway. The goal of many – though not all – Indigenous leaders is to achieve acknowledgement and implementation of the status of Indigenous nations as a third order of government alongside the federal and provincial governments, with constitutional jurisdiction as an Aboriginal and treaty rights recognized and affirmed by s.35 of the *Constitution Act, 1982*. In this chapter, we assess their progress towards this goal.

Policy development in this political context presents a particular challenge to the McConnell (2010) and McConnell *et al* (2020) frameworks for gauging policy success, which presume that governments initiate and then implement policy, with varying degrees of success. Indigenous peoples have resorted to Canadian courts as result of dissatisfaction with existing government policies, inaction on treaties and other undertakings, and insufficient recognition of inherent governance authority and land and resource rights. This chapter demonstrates how, through a succession of court cases, Indigenous leaders have challenged established colonial policies, and successfully created a new landscape for policy development and negotiations between Indigenous nations and federal, provincial, and local governments. These court challenges, reaching back to the early 1970s, along with the impact of the *Constitution Act, 1982*, have been enduring and profound, affecting every policy domain relating to Indigenous peoples. Even so, much has yet to be accomplished for Indigenous nations to achieve recognition as a third order of government and for Indigenous law to be accepted as part of the legal landscape in Canada.

The Beginning

During the age of imperial expansion, European powers competed for global dominance and wealth by trading, pillaging, making war, entering into treaties, and often simply asserting ownership of other nations' land and resources (Seed 1995; Weaver 2003). A legacy of British North America has been a legal tradition that assumes unitary Crown sovereignty and obliterates

the sovereign rights of the original nations (Nichols 2020). For well over a century, this stance provided the underpinning of colonial administration under the *Indian Act* and its predecessor legislation (RCAP Report 1996, 137-332).

Indigenous nations have never shared this European perspective. All over what are now called the Americas, Indigenous nations met European traders, explorers, and sojourners from within the prevailing Indigenous legal framework (Ray 1996; Witgen 2012). They applied the diplomatic protocols in use in their territories at the time of contact. Migrant Europeans tended to comply with these local rules for international relations – until, of course, they did not. Every Indigenous nation experienced a distinctive history of relations with the newcomers, but in general terms these followed a similar pattern. After a period of Indigenous predominance and then reciprocity, the balance of power shifted as Indigenous societies were weakened by new diseases and the arrival of ever-growing numbers of settlers (RCAP Report 1996).

Through all these changes, Indigenous nations defended their territorial rights by every means available: assertion and explanation, petitions, negotiation of treaties, military alliances, and forceful resistance. They took representatives of the Crown at their word, engaging in diplomatic negotiations and visiting European capitals for diplomatic purposes. In the mid-19th century, Anishinaabe in the area north of the Great Lakes responded to incursions by miners through demanding, with reference to the Royal Proclamation of 1763 (discussed below), that treaties be negotiated. The result was the Robinson Treaties of 1850, followed by eleven numbered treaties negotiated after Confederation to formalize relations between the Crown and Indigenous authorities, and bring order to the society being created by immigration (Henderson 2007; Miller 2009). Indigenous nations in British Columbia demanded treaties for similar reasons, beginning in the second half of the nineteenth century as disease and migrants entered their country (Tennant 1990).

There have been multiple peaceful attempts by Indigenous peoples to have their sovereign rights respected. Similar initiatives in the twentieth century prompted a 1927 amendment to the *Indian Act* that prohibited raising funds or paying lawyers to pursue Indian claims.[1] This prohibition, along with other repressive measures, impeded political organization, but did not entirely halt it (Tennant 1982).

By the mid-19th century British colonial law and policy, while acknowledging some Indigenous land rights, had hardened into a denial of Indigenous nations' sovereign rights – and indeed their agency – in British North America. In Canada, the most famous legal decision in this tradition is the *St. Catherine's Milling* case (1888), in which the Judicial Committee of the Privy Council adjudicated a dispute between the federal government and Ontario over the right to issue timber

[1] RSC 1927, c.98, s.141.

licenses on treaty land (McNeil 2019). Although the Indigenous people concerned were neither parties nor witnesses, the judges ruled that "the tenure of the Indians was a personal and usufructuary right, dependent upon the good will of the Sovereign" (*St. Catherine's Milling*, 1888, 54). This was the Privy Council's interpretation of the Royal Proclamation of 1763 – a prerogative instrument issued by the British Crown at the end of the Seven Years War that was supposed to protect pre-existing Indigenous land rights, but instead was construed as the source of limited rights that could be taken away at any time.

Post-World War Two Developments

The *St. Catherine's Milling* reasoning prevailed in Canadian jurisprudence, though not in Indigenous legal or political thought, until the latter half of the twentieth century, when a new social and political basis for dialogue between Indigenous people and the Crown began to form. This change affected both Indigenous people's capacity to achieve their goals and the political context for reaching them.

The global depression of the 1930s, followed by global warfare of the 1940s, transformed popular and elite expectations of both citizenship and the state. The war effort had broken old conventions about the limits to the role of the state in the economy, while the combination of a strengthening labour movement and the prospect of thousands of veterans returning to the labour force stimulated a new conception of citizens' rights that included social and economic security and a larger role for the state (Owram 1986). The overheated wartime economy and booming US demand for Canadian resources provided the necessary fiscal capacity to act on these principles. At the same time, the horrors of the Second World War had begun to shift public opinion and elite assumptions away from race-based discrimination and towards universal citizenship rights (Weaver 1975).

This changed climate was the basis for the Canadian version of the welfare state, and it was to have many implications for Indigenous people, not all of them favourable (eg, Tester and Kulchyski 1994). But the new times also brought political opportunities. Returning Indigenous veterans were unwilling to accept discriminatory treatment, and discrimination was also beginning to be regarded as unacceptable by non-Indigenous veterans and their families, as well as other members of the public. Discriminatory treatment and the impoverished circumstances of 'Indians' were discussed by a series of Parliamentary committees beginning in 1944, leading to major amendments to the *Indian Act* in 1951, including the removal of the prohibition that impeded funded legal action. Indian organizations seized the opportunity to address these committees, putting forth a political program and set of demands for increased self-sufficiency, treaty rights, and full Canadian citizenship. In turn, these ideas were reflected in the report of the Hawthorn Task Force, appointed in 1964 to study Indian conditions. The two-volume Hawthorn Report described what many saw as a reasonable – if not perfect – reflection of Indian conditions

and perspectives. A major recommendation was that Indians should be 'citizens plus' – that is, entitled to full Canadian citizenship rights as well as special rights flowing from their status as 'charter' citizens of Canada. (Cairns 2000; Canada 1966-1967).

However, the basis for negotiated progress in First Nations-Crown relations created by these initiatives was shattered in 1969 when Pierre Trudeau's newly-elected government proposed a fresh start in a discussion paper on Indian policy (Canada 1969). The unfortunately labelled "White Paper" ignored most of the Hawthorn findings and recommendations, as well as consultations on the *Indian Act* then underway, proposing instead the termination of special status for Indians, the transfer of responsibilities for them to the provinces, and moth-balling the treaties (Weaver 1975). These proposals shocked Indian leaders and activists, who immediately organized nationally in an atmosphere of anger and mistrust (Cardinal 1969). The National Indian Brotherhood was formed, protests were organized, and the Indian Association of Alberta countered with a "Red Paper," which rejected the government's assimilationist approach and insisted upon treaty rights and federal responsibilities (Indian Association of Alberta 1970). As a result, the White Paper was withdrawn in March 1971 (Canada 1971; Weaver 1975, 187). While these events were unfolding, Lloyd Barber, who had been appointed Indian Claims Commissioner in 1969, and other officials were advocating behind the scenes for the establishment of a process for the negotiation of Indigenous rights (Scholtz 2006).

Resort to the Courts

Around this time, pressure from three crucial court actions, initiated by First Nations to have their land rights acknowledged, came into play. Development pressure on Indigenous lands in the North had been accelerating since the Second World War, fuelled by rising demand for energy and natural resources in southern Canada and the United States. Major energy projects sparked two almost concurrent conflicts over land use.

In late 1968, Dene in the Northwest Territories discovered that preparations were underway to construct a massive pipeline in their territory in the Mackenzie Valley. They united in the Indian Brotherhood of the Northwest Territories and prepared to defend their lands, filing a caveat on the lands to be traversed by the pipeline system. The 1973 decision of the Supreme Court of the Northwest Territories in *Re Paulette* found that the Indian Brotherhood had standing and that their claim of an interest in 400,000 square miles of the NWT was cognizable, regardless of Treaties 8 (1899) and 11 (1923). In its ruling the Supreme Court stated that the land surrender provisions in the written versions of those treaties had never been explained and were probably ineffective (Fumoleau 1973). This decision was overturned on appeal for different reasons. However, given certain factors like the factual findings at trial regarding the treaty provisions, the importance of the Mackenzie Valley pipeline to Canadian energy exports, the urging of the

Indian Claims Commissioner, and sustained Dene opposition, the federal Cabinet moved towards accepting that a process for negotiating land rights should be formulated (Scholtz 2006).[2]

Additional pressure came from a similar conflict in northern Quebec. In April 1971, Robert Bourassa's new Liberal government announced plans for a massive hydro-electric development in Cree and Inuit territories in northern Quebec. After their objections to the project and demands for negotiated land rights were ignored, the Cree and Inuit commenced court action, pointing out that the province had not fulfilled its obligations to negotiate with Indigenous peoples on this land when it received transfers of territory from the federal government in 1898 and 1912. In November 1973, the Quebec Superior Court found in their favour (*Gros-Louis*). Although this decision was reversed by the Quebec Court of Appeal, the province, federal government, and Hydro Quebec commenced negotiations with the Cree and Inuit, resulting in the first modern land claims agreement signed in 1975 (Feit 1983; Nungak 2017).

The third court case was brought by the Nisga'a Nation in British Columbia. Faced with decades of having their assertions of land rights ignored, they sought a declaration that their Aboriginal title had never been extinguished (Foster et al. 2007). If they could get a favourable court decision, they would be in a strong position to negotiate a settlement with the province, which had consistently refused to acknowledge Indigenous land rights (Tennant 1990). In *Calder* (1973), the Supreme Court split three/three on whether extinguishment had occurred legislatively before British Columbia joined Canada in 1871, but four out of seven judges dismissed the action on a technicality.

The decision was nonetheless a victory for the Nisga'a and other Indigenous nations that had not entered into treaties because six of the judges decided that, absent extinguishment, Aboriginal title exists as a legal right enforceable in Canadian courts. After the *Calder* decision, Prime Minister Trudeau reportedly said in reference to First Nations: "Perhaps you had more legal rights than we thought you had when we did the white paper" (Canada 1985, 12). Meeting with Frank Calder and other Nisga'a leaders after the decision, Trudeau committed the Canadian government to negotiations (Calder and Berger 2007, 47).

A broader shift in federal policy soon followed. After substantial internal debate and increasing pressure from Indigenous organizations and the Indian Claims Commissioner, the federal Cabinet decided that negotiation of unresolved land claims was necessary. *The 1973 Statement on the Claims of Indian and Inuit People* announced this reversal and the establishment of the Office of Native Claims to undertake negotiations (Canada 1985, 12).

[2] The pipeline project was put on hold after Justice Thomas Berger recommended that land claims be settled first: Berger 1977. The pipeline has not been built.

Modern Treaties

The Office of Native Claims and its bureaucratic descendants have negotiated twenty-six comprehensive claim agreements since 1975, resolving land rights over millions of hectares in Labrador, Quebec, the three territories, and British Columbia. Together, the agreements confirm Indigenous ownership of 600,000 square kilometers of land and provide for capital transfers of $3.2 billion to compensate Indigenous parties for land rights they have ceded.

The modern treaties have had enormous consequences for the institutions and practice of Canadian governance. Decision-making about major development projects in vast areas of Canada is now subject to mandatory public hearings by panels appointed jointly by sub-national governments and Indigenous authorities. Two new territories, including the majority-Inuit territory of Nunavut, were created by division of the old Northwest Territories, mandated under the 1993 Nunavut Agreement. Indigenous nations own surface and subsurface rights to portions of their original territories and have the capacity to levy land taxes and royalties on development.

Federal negotiating parameters have shifted somewhat in response to policy changes. Much of this has been prompted by judicial decisions, as discussed below. For this reason, and because the circumstances of Indigenous nations vary, modern treaties are not all the same (Abele et al. 2016). For example, treaties negotiated between 1982 and 1995 do not contain self-government provisions because the federal government did not want such provisions to be constitutionally protected, as they would be if included in land claims agreements (s.35(3), *Constitution Act, 1982*). In 1995, the federal government changed its policy and decided to acknowledge that constitutional protection would extend to subsequently-negotiated self-government rights.[3]

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***Constitution Act, 1982*, Sections 25, 35 and 37**

Perhaps the greatest ever mobilization of a Canada-wide Indigenous lobby occurred during the intense four years leading to the patriation of the Canadian Constitution (Manuel and Derrickson 2015). While many expressed disappointment with the results, as history has unfolded, the clauses in the *Constitution Act, 1982* that directly address Indigenous peoples' rights have proven to be remarkably important and consequent on litigation either brought by Indigenous parties or against them when they have exercised their constitutional rights.

As mentioned earlier, s.35 recognized and affirmed existing Aboriginal and treaty rights. In addition, s.25 shielded the rights of the Aboriginal peoples from the Charter, and s.37 mandated a constitutional conference for the purpose of defining Aboriginal and treaty rights. In fact, four such conferences were held in the 1980s, with little progress being made other than additions to

[3] For criticism of the contingent rights approach in this policy, see Manuel and Derrickson 2015: 111.

s.35 clarifying that the rights in modern land claims agreements are treaty rights for the purposes of the section, and guaranteeing s.35 rights to men and women equally (McNeil 1994, 122-126). A subsequent round of negotiations and broad process of public deliberation led to the 1992 Charlottetown Accord, which included affirmation of the inherent right of self-government, recognition of Indigenous governments as a third order, and several other provisions of great consequence to Indigenous peoples' constitutional position. The Accord included other important provisions, such as recognition of Quebec as a distinct society. It was put to a referendum and defeated, damaging Quebec-Canada relations and leaving the task of defining Aboriginal and treaty rights to the courts.

This process was underway. Litigation initiated by the Musqueam Nation resulted in an important Supreme Court decision in 1984. *Guerin v. The Queen* involved a surrender to the Crown of part of the Musqueam Reserve in Vancouver for lease as a golf course. Officials of the federal Department of Indian Affairs negotiated the lease on behalf of the Musqueam but did not reveal the actual terms to them until years later. These terms were so unfavourable that the Court held the Crown had breached the fiduciary obligation it owed the Musqueam Nation and ordered the federal government to pay $10 million in damages. This decision shifted the legal landscape by reining in Crown discretion, and forcing policy makers to abide by legally enforceable standards when making decisions that impact Indigenous peoples' cognizable interests (Reynolds 2020).

R. v. Sparrow, which also involved the Musqueam people, was the first Supreme Court decision to interpret and apply s.35 of the *Constitution Act, 1982.* Ronald Sparrow had been fishing in the Fraser River in the traditional territory of the Musqueam, using a drift net longer than permitted by federal fishery regulations. He admitted the facts but claimed that, as a Musqueam person, he had an Aboriginal right to catch fish for food, societal, and ceremonial purposes. The Supreme Court agreed but held that this constitutional right is not absolute and can be limited by regulations that have a valid legislative purpose, such as conservation, and that respect the Crown's fiduciary obligations. Respect for these obligations requires consultation with the right holders, minimal impairment of the right, and compensation in appropriate circumstances. The case was sent back to the trial court (but never retried) to determine if the regulations infringed the Aboriginal right and could be justified.

Despite allowing for legislative infringement of Aboriginal rights in some instances, *Sparrow* was a win for Indigenous peoples because it limited government discretion even further. The Court ruled that s.35 provides significant constitutional protection for Aboriginal rights (and, by implication, treaty rights), and the ruling gave those rights priority over commercial and sports interests, acknowledged that the rights can have an economic component, and required consultation when infringement of them was contemplated. Consequently, the federal government has had to modify fisheries policy to take account of the Aboriginal fishing rights

that many Indigenous nations possess.[4] As discussed below, the Court has since expanded the application of the consultation requirement, ensuring that Indigenous peoples are policy players whenever government action that might impact their claimed rights is contemplated.

The *Sparrow* decision did not provide guidance on how Aboriginal rights are to be identified because the existence of the Musqueam fishing right was not seriously disputed. The Supreme Court faced the definition issue six years later in *R. v. Van der Peet* (1996), which, together with *R. v. Gladstone* and *R. v. N.T.C. Smokehouse* (decided the same day), involved claims of rights to fish commercially. In *Van der Peet*, the Court created what is known as the 'integral to the distinctive culture test' for Aboriginal rights. Dorothy Van der Peet, a member of the Stó:lō Nation whose territory is along the lower Fraser River in British Columbia, had sold ten salmon caught by her spouse and another relative. Her defence to the charge of selling fish caught under an Indian food fish licence was that she had a s.35 Aboriginal right to sell the salmon. The Court decided that s.35 Aboriginal rights are derived from practices, customs, and traditions integral to the distinctive culture of a particular Indigenous people at the time of first contact with Europeans.[5] As the evidence did not show that exchange of fish for money or other goods had been integral to Stó:lō culture at the time of contact, the Court held that the right had not been established. A similar conclusion was reached regarding the claimed right in the *Smokehouse* case, but in *Gladstone* it was different: the Heiltsuk were able to prove that they had exchanged herring spawn on kelp in commercial quantities prior to contact, and so were able to establish a s.35 right to do so.

Three years later, the Supreme Court was confronted with a claim to a treaty right to catch and trade fish in *R. v. Marshall [No. 1]* (1999). After consideration of the historical record, the Court concluded that the Mi'kmaq, who agreed to trade only at English truck houses (trading posts), have a treaty right to obtain the produce of the sea and forest for that purpose, to the extent required for a "moderate livelihood." Donald Marshall Jr. was accordingly acquitted of the charge of selling 463 pounds of eels. As the treaty right was not limited to this species, the Mi'kmaq began fishing for other seafood, especially lobster. This set off a reaction by other fishers, leading to confrontations that sometimes turned violent. Unfortunately, the federal Department of Fisheries was unprepared for such conflict and, instead of calming the situation and quelling the disturbance, even contributed to it (Coates 2000; Wicken 2004). Disturbingly, the recurrent confrontations and violence in 2020, initiated by non-Indigenous fishers opposed to Mi'kmaw treaty rights, reveal an ongoing failure by the federal government to develop and implement effective public policy to deal with the reality of Indigenous peoples' constitutional fishing rights in Atlantic Canada.

[4] See J. Allain and J.-D. Fréchette, 1993; Canada 2003. For an unsuccessful court challenge to federal policy giving priority to Aboriginal fishing rights, see *R. v. Kapp* (2008).

[5] For application of this test to harvesting of wood for domestic purposes, see *R. v. Sappier; R. v. Gray* (2006).

The Supreme Court also appears to have been taken aback by the reaction to its judgment. On an application to rehear the case, which it dismissed in *R v. Marshall [No. 2]* (1999), the Court took the unprecedented step of issuing a clarification judgment to clearly explain the ways in which the treaty right is limited (Cameron 2009; Wildsmith 2001).

Section 35 Aboriginal and treaty rights are rights of the Métis and Inuit as well as First Nations. Métis tested the implications of this in *R. v. Powley* (2003). Steve Powley and his son, Roddy, killed a moose for food near Sault Ste. Marie, Ontario, and were charged under provincial law with unlawful hunting. They proved that hunting was integral to the distinctive culture of the Métis in the area prior to 1850 when effective European control was established. The Court decided that this was an appropriate timeframe for determining the existence of Métis Aboriginal rights. The Métis did not exist prior to European contact, the time used for First Nation Aboriginal rights in *Van der Peet*. The Powleys also proved the existence of a present-day Métis community at Sault Ste. Marie, to which they belong. The *Powley* decision has required governments to change their policies regarding the application of fish and game laws to Métis, though the requirement of identifying historical and contemporary Métis communities has become a stumbling block for some Métis claimants. The issue of membership in contemporary Métis communities can also be controversial (Chartrand 2019).[6]

The early Supreme Court decisions in Guerin and Sparrow likely contributed to a change of policy in British Columbia. The New Democratic government of Premier Mike Harcourt, elected in 1991, officially abandoned the province's long-standing position that Aboriginal title did not exist or had been extinguished. This decision, which also reflected the NDP's more conciliatory attitude towards First Nations, led to the creation in 1993 of the British Columbia Treaty Commission by the province, Canada, and the First Nations Summit, a made-in-BC process for resolving Aboriginal title claims through negotiations (Mckee 1996, 30-33).

Unfortunately, the federal and provincial negotiating mandates regarding both Indigenous territory and the inherent right to self-government proved unacceptably narrow for some of the Indigenous nations who had been part of the process to establish the Commission. The Gitxsan and Wet'suwet'en Nations, who had already taken their claim to court in the mid-1980s and been handed a dismissive judgment by the BC Supreme Court in *Delgamuukw* (1991), chose to continue the litigation and appealed their case to the Supreme Court of Canada. In a landmark decision in 1997, the Court overturned the trial judgment and ordered a new trial (the case has not, however, been retried). Nonetheless, in a lengthy judgment, Chief Justice Lamer ruled that Indigenous oral histories are admissible as evidence and must be given the same respect and

[6] Métis land rights have been addressed only in relation to the *Manitoba Act, 1870*: *Manitoba Metis Federation* (2013).

weight as written histories. The Court also provided guidelines on Aboriginal title's nature, content, proof, and constitutional status. Very significantly, the Court decided that Aboriginal title is a property right that enjoys the same legal protection as other property rights, as well as constitutional protection against extinguishment and unjustifiable infringement by, or pursuant to, legislation.

The 1997 *Delgamuukw* decision does not appear to have had much direct impact on the positions of the British Columbia and federal governments in land claims negotiations (Browne 2009; Manuel and Derrickson 2017, 102). The Nisga'a Final Agreement (2000), for example, does not appear to have been modified in the final months of negotiations to take the *Delgamuukw* decision into account – though after almost 25 years of negotiations the Nisga'a themselves appear to have been willing to proceed without significant changes (Rynard 2000; Molloy and Ward 2000, 96-97, 106-107). However, the *Delgamuukw* decision, and more recently the Supreme Court's ruling in *Tsilhqot'in Nation* (2014), have probably fortified the unwillingness of many First Nations to participate in a treaty process that they regard as providing less than they are entitled to in Canadian constitutional law, let alone under their own legal orders (de Costa 2003). Almost half of the First Nations in British Columbia are not participating in the BC treaty process, in part because, unlike the Nisga'a, they are unwilling to give up their title to over 90 percent of their territories, nor do they regard the self-governance provisions in the Nisga'a and other post-1995 land claims agreements as adequate (Manuel and Derrickson 2015).

The *Delgamuukw* decision did not rule on a key issue brought by the Gitxsan and Wet'suwet'en: whether Aboriginal title is limited to specific sites of intensive use as the Crown argued, or if it extends over entire Indigenous territories. In *R. v. Marshall; R. v. Bernard* (2005), on appeal from Nova Scotia and New Brunswick where no treaties involving land have been negotiated, the Supreme Court appeared to take a site-specific approach. However, in *Tsilhqot'in Nation* (2014) it rejected that approach in favour of a territorial concept of Aboriginal title. The case is especially significant because the Court, for the first time, issued a declaration of title derived from the Tsilhqot'in Nation's exclusive occupation of land when the Crown asserted sovereignty in British Columbia in 1846. However, a downside of the judgment for Indigenous peoples is the Court's decision that provincial legislatures as well as Parliament have the constitutional authority to infringe Aboriginal and treaty rights if the infringement can be justified using the *Sparrow* test (Wilkins 2017).

After the 1997 *Delgamuukw* decision, the BC government's position was that Aboriginal title does not exist until proven, and so lands that are neither federal nor privately-owned were considered provincial Crown lands. In other words, despite *Delgamuukw* the province acted as though nothing had changed – it could carry on 'business as usual' and continue granting various rights (eg. mining rights, timber rights, etc.) on lands subject to Aboriginal title claims. With *Delgamuukw* in mind, the Haida Nation challenged this position in an important case that went to

the Supreme Court. In *Haida Nation* (2004), the Court ruled that the province could not ignore unproven Aboriginal title claims and act as though lands it regarded as Crown lands were at its disposal. In the memorable words of Chief Justice McLachlin, "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" (para. 27). In this situation, the Crown owed Indigenous claimants a duty to consult, the depth of which depends on the strength of their claim and the potential impact of the government action on their potential rights. The Crown had to take their concerns seriously and accommodate them by modifying its plans in appropriate circumstances (Newman 2014).

The *Haida Nation* case arose on Haida Gwaii, a non-treaty area where the Haida have a strong Aboriginal title claim. In other parts of Canada, where there are either historical treaties or recent land claims agreements, it was not immediately apparent that, in the eyes of the Court, the Crown would have an equivalent duty to consult. That changed when the Supreme Court handed down its decisions in *Mikisew Cree First Nation* (2005), involving Treaty 8 (1899), and *Quebec (Attorney General)* (2010) and *Beckman* (2010), involving modern treaties (comprehensive land claims agreements) in Quebec and the Yukon. In those cases, the Court decided that the honour of the Crown requires consultation whenever government action could have a negative impact on the Indigenous parties' treaty rights. In a more recent case, *Mikisew Cree First Nation* (2018), the Supreme Court held that no duty to consult arises when legislation is enacted, but if a statute once passed infringes Aboriginal or treaty rights, the infringement will have to be justified.

The duty to consult cases have been extremely significant because they have forced the federal and provincial governments to seriously consider Indigenous rights that have not yet been acknowledged by Canadian courts or governments, and treat Indigenous peoples as participants in resource development and other major projects, such as pipelines (Gallagher 2011). If affected Indigenous groups think they have not been adequately consulted, they can take governments to court and, if successful, block projects until adequate consultation takes place.[7] This provides Indigenous nations that have not signed treaties with rights similar to those affirmed in modern treaties, potentially including negotiation of impact benefit agreements that can provide revenue, employment and business opportunities (Newman 2014).

Indigenous Law and Governance

An area where Supreme Court decisions have not had much impact on public policy is with regard to Indigenous law and governance, even though it was disagreement over self-government that resulted in lack of progress during the constitutional talks in the 1980s. It was this lack of

[7] E.g. see *Clyde River* (2017); *Tsleil-Waututh Nation* (2018).

progress that resulted in the matter of Aboriginal and treaty rights being taken to the courts. However, courts appear to be uncomfortable addressing governance issues because they regard them as more political than legal. There is a long history of the courts dealing with distribution of governance authority between Parliament and the provincial legislatures in division-of-powers cases, where the issue is which order of government has legislative authority under the enumerated powers in the *Constitution Act, 1867.* For the courts, it is a different matter trying to determine what governance authority Indigenous peoples have under s.35 of the *Constitution Act, 1982*, which contains no list of powers.

The Supreme Court has often stated that Indigenous law is part of the Indigenous perspective on s.35 rights and must be taken into account.[8] However, one searches in vain for decisions in which the Court has actually applied Indigenous law. Lower court decisions have acknowledged the application of Indigenous law in relation to marriages and adoptions (Zlotkin 1984),[9] but judges have been more reluctant to apply it in other contexts. For example, in *Coastal GasLink Pipeline Ltd.* (2019), a case involving protests and blockades over the construction of a gas pipeline through Wet'suwet'en territory in British Columbia, Justice Church stated: "As a general rule, Indigenous customary laws do not become an effectual part of Canadian common law or Canadian domestic law until there is some means or process by which the Indigenous customary law is recognized as being part of Canadian domestic law, either through incorporation into treaties, court declarations, such as Aboriginal title or rights jurisprudence, or statutory provisions" (para. 127). On the other hand, in *Pastion* (2018) Justice Grammond said that "Indigenous legal traditions are among Canada's legal traditions. They form part of the law of the land."

While acknowledging Indigenous law's existence,[10] Canadian courts are obviously uncertain about how to deal with it and incorporate it into Canada's common law, civil law, and statute law. It remains for Indigenous peoples to take the initiative by exercising the inherent right of self-government that the Canadian government acknowledged in 1995 (Canada 1995), breathing new life into their traditional laws and legislating in areas where those laws do not address current social and economic realities.

With respect to Indigenous governance authority, counsel in *R. v. Sparrow* argued that the Musqueam's Aboriginal right to fish included authority to regulate fishing by Musqueam people. The British Columbia Court of Appeal dismissed that argument, stating that their fishing right

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[8] E.g. see *Delgamuukw* (1997), paras. 114, 126, 145-47, 157; *Mitchell* (2001), para. 10; *Tsilhqot'in Nation* (2014), para. 35; *R v Desautel* (2021) SCC 17, para 86 ("It is for Aboriginal peoples … to define themselves and to choose by what means to make their decisions, according to their own laws, customs and practices").

[9] E.g. see *Connolly* (1867); *Re Adoption of Katie* (1961); *Casimel* (1993).

[10] For examples of the growing literature on Indigenous law, see Law Commission of Canada 2007; Borrows 2010; Hanna 2018.

"cannot be defined as if the Musqueam band had continued to be a self-governing entity, or as if its members were not citizens of Canada and residents of British Columbia" (BCCA, para. 74). While not addressing this issue directly, the Supreme Court stated that "there was from the outset never any doubt that sovereignty and legislative power … vested in the Crown" (*R. v. Sparrow*, SCC, para. 49).[11]

In *Delgamuukw*, the Gitxsan and Wet'suwet'en claimed a right of self-government over their territories, as well as Aboriginal title to their lands. The Supreme Court largely avoided the self-government claim. In two short paragraphs, Chief Justice Lamer explained that this complex matter had not been sufficiently argued by counsel and had been framed in overly broad terms at the trial that had taken place before the Court's decision on *R. v. Pamajewon* (1996), a case involving a claim by two First Nations in Ontario of a right to engage in and regulate gaming on their reserves. In *Pamajewon*, the Supreme Court applied the *Van der Peet* test, which in this context required proof that high stakes gambling had been integral to the distinctive Anishinaabe culture prior to contact with Europeans. As the accused were unable to meet this burden of proof, their convictions of unlawful gaming under the *Criminal Code* of Canada were upheld.

The *Pamajewon* decision has been subjected to severe academic criticism but has not been overruled.[12] However, in *Campbell* (2000) Justice Williamson of the BC Supreme Court found a way to get around it. That case involved an allegation that the self-government provisions of the Nisga'a Final Agreement (2000) are invalid because there is no room for Indigenous governance in the Canadian Constitution. Justice Williamson dismissed that argument, holding instead that the Nisga'a's right of self-government existed prior to Confederation and had not been extinguished by the division of powers in the *Constitution Act, 1867* or at any time since. It was therefore recognized and affirmed by s.35 of the *Constitution Act, 1982*. What the Nisga'a Final Agreement did was acknowledge and define, not create, this right. Justice Williamson found support for this conclusion in a passage from *Delgamuukw* in which Chief Justice Lamer said that Aboriginal title land "is held communally.… Decisions with respect to that land are also made by that community" (*Delgamuukw*, para. 115, Lamer C.J.'s emphasis). Justice Williamson observed that, for the Nisga'a Nation to be able to make communal decisions, a government structure would be necessary.

As mentioned previously, the federal government acknowledged Indigenous peoples' inherent right of self-government as being fulfilled through negotiations, circumscribed by certain conditions (Canada 1997). Recently, Parliament has gone further in *An Act respecting First*

[11] For critical commentary, see Asch and Macklem 1991; Nichols 2020.

[12] For example, Morse (1997) notes that the court did not take Indigenous law into account, rather adopting the view that any rights were "frozen" at the time of contact.

Nations, Inuit and Métis children, youth and families,[13] s.8 of which states the following: "The purpose of this Act is to (a) affirm the inherent right of self-government, which includes jurisdiction in relation to child and family services." This legislation was prompted by the Canadian Human Rights Tribunal's decision in *First Nations Child and Family Caring Society of Canada* (2016), which outlined that the Canadian government had systematically discriminated against First Nation children in the provision of child welfare services (Bezanson 2018). This revealed the impact quasi-judicial decisions can have on public policy regarding Indigenous peoples. The statute goes on to state in s.18(1): "The inherent right of self-government recognized and affirmed by section 35 of the *Constitution Act, 1982* includes jurisdiction in relation to child and family services, including legislative authority in relation to those services and authority to administer and enforce laws made under that legislative authority." While this legislative acknowledgement of the right of self-government should have been unnecessary, given that the right is inherent and constitutionally protected (Metallic 2018), the fact that Parliament has affirmed that the right exists and has constitutional status under s.35 does provide the courts with statutory authority to enforce the right – something they appear to be hesitant to do so on their own initiative (see *R. v. Pamajewon* (1996); *Delgamuukw* (1997), paras. 170-171).

Another important development, which is beyond the scope of this chapter, is the Trudeau government's unqualified 2016 endorsement of and promise to implement the *United Nations Declaration on the Rights of Indigenous Peoples*, adopted by the UN General Assembly on 13 September 2007. Statutes enacted by British Columbia and the Parliament of Canada are designed to make BC and Canadian law consistent with the Declaration.[14] Although Canada's acceptance of the Declaration appears not to have been motivated by court decisions, its adoption and legislative endorsement represent major policy shifts, the consequences of which are hard to predict.

Conclusions

Supreme Court of Canada decisions have been instrumental in motivating governments to change public policy to take account of Indigenous rights, as defined by the Court. Prominent examples are *Calder* (1973) in relation to Aboriginal title, *Guerin* (1984) on the Crown's fiduciary obligations, and *Haida Nation* (2004) and *Mikisew Cree* (2005) on the duty to consult. These cases were initiated by Indigenous nations with the goal of forcing governments to respect their rights and enter into negotiations to settle their just claims. Nonetheless, governments do not always react positively to court decisions, often interpreting them narrowly and showing

[13] SC 2019, c.24 (in force as of 1 Jan. 2020).

[14] *Declaration on the Rights of Indigenous Peoples Act*, SBC 2019, c.44; *United Nations Declaration on the Rights of Indigenous Peoples Act*, SC 2021, c.14.

reluctance to modify some government policies, as shown by the land claims negotiations after *Delgamuukw*.

On the whole, however, Indigenous peoples have been remarkably successful in achieving some of their legal and political goals through court action: transforming the discourse, creating new venues for challenging government policies, and establishing their constitutional rights. Supreme Court decisions have forced governments to revise their policies regarding land rights, access to natural resources, treaty rights, involvement of Indigenous peoples in decision-making through consultation, and so on. These court decisions have significantly shaped – and will continue to shape – the development and remaking of polices pertaining to Indigenous peoples.

However, neither the Court nor the Canadian government has questioned Crown assertion of sovereignty. In Eastern Canada, reliance continues to be placed on cession of sovereignty by France to Britain with the Treaty of Utrecht in 1713 and the Treaty of Paris in 1763, which was the Privy Council's understanding in the *St. Catherine's Milling* case in 1888. The rest of Canada is regarded as having been acquired by 'settlement', an original means of acquisition that ignores the existence of Indigenous nations and relies on the discredited doctrine of discovery.[15] In the *Haida Nation* decision in 2004, the Court acknowledged the pre-existing sovereignty of the Indigenous nations,[16] and yet in 2014 in *Tsilhqot'in Nation* it reaffirmed that Crown sovereignty in British Columbia dated from the 1846 Oregon Boundary Treaty between Britain and the United States, a bilateral international treaty that took no account of Indigenous sovereignty. These contradictions continue to plague the jurisprudence and need to be addressed politically for Indigenous and Crown sovereignty to be reconciled – a sentiment echoed by Chief Justice McLachlin in *Haida Nation.*[17] The reality of Indigenous sovereignty can no longer be ignored.

Our assessment of the impact of court decisions on Canadian public policy in relation to Indigenous rights challenges the McConnell (2010, 2020) frameworks which inform this collection. As we noted in our introduction, this is not the typical situation of appraising how well a policy has been implemented by a government. Rather, our discussion has focused on part of a longer-term effort to undo and remake framework policies which damaged Indigenous peoples across Canada, gain standing and affirm rights that political authorities have to deal with, and lay the groundwork for additional assertion of Indigenous rights and policies in negotiations with governments. Using McConnell's typology, the succession of Supreme Court victories by Indigenous peoples should be viewed as a long-overdue "process success". On the other hand, the extent to which Indigenous rights have been recognized and self-governance achieved on the

[15] In *Guerin* (1984), page 378, and *R. v. Sparrow* (1990), para. 49, the Supreme Court relied explicitly upon *Johnson v. M'Intosh* (1823), in which the US Supreme Court applied the discovery doctrine. See Miller 2010.
[16] See also *Manitoba Metis Federation* (2013), para. 67, and *Mikisew Cree First Nation* (2018), para. 21.
[17] See Hoehn 2012; Nichols 2020.

"program" and "political" dimensions might be categorized as somewhere between a "conflicted" success and "resilient" success, given the ongoing foot-dragging and resistance on the part of the federal and provincial governments to fully embrace and factor these rights into policy and legislation. More generally, the analysis in this chapter points to the long-term horizons involved: Indigenous peoples and a succession of leaders have steadily argued for well over a hundred years for recognition of their prior societies and governance traditions, for agreements negotiated with Europeans and settlers to be honoured, and for use and control of their traditional lands and resources. Our assessment shows that, looking forward, realizing the potential of the "process success" will require similar determination on the part of Indigenous peoples in the decades ahead.

References

Court Cases

Beckman v. Little Salmon/Carmacks First Nation (2010) 3 SCR 103.

Calder v. Attorney General of British Columbia (1973) SCR 313.

Campbell v. British Columbia (Attorney General) (2000) 4 CNLR 1.

Casimel v. Insurance Corporation of British Columbia (1993) 106 DLR (4th) 720.

Clyde River (Hamlet) v. Petroleum Geo-Services Inc. (2017) 1 SCR 1069.

Coastal GasLink Pipeline Ltd. v. Huson, (2019) BCSC 2264.

Connolly v. Woolrich (1967) 17 RJRQ 75 (QSC); *Johnstone v. Connolly* (1969) 17 RJRQ 266 (QQB).

Delgamuukw v. British Columbia (1991) 79 DLR (4th) 185 (BCSC); (1993) 104 DLR (4th) 470 (BCCA); (1997) 3 SCR 1010.

First Nations Child and Family Services Caring Society of Canada v. Canada (Attorney General) (2016) CHRT 2, (2016) 2 CNLR 270.

Gros-Louis c. La Société de Développement de la Baie James (1974) Que PR 38 (QSC), reversed *Société de Développement de la Baie James c. Kanatewat* (1975) Que CA 166, leave to appeal dismissed (1975) 1 SCR 48.

Guerin v. The Queen (1984) 2 SCR 335.

Haida Nation v. British Columbia (Minister of Forests) (2004) 3 SCR 511.

Johnson v. M'Intosh, 8 Wheat (21 US) 543 (1823).

Manitoba Metis Federation Inc. v. Canada (Attorney General) (2013) 1 SRC 623.

Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage) (2005) 3 SCR 388.

Mikisew Cree First Nation v. Canada (Governor General in Council) (2018) 2 SCR 765.

Mitchell v. M.N.R. (2001) 1 SCR 911.

Pastion v. Dene Tha' First Nation (2018) 4 FCR 467.

Quebec (Attorney General) v. Moses (2010) 1 SCR 557.

R. v. Desautel (2021) SCC 17.

R. v. Gladstone (1996) 2 SCR 723.

R. v. Kapp (2008) 2 SCR 483.

R. v. Marshall [No. 1] (1999) 3 SCR 456.

R v. Marshall [No. 2] (1999) 3 SCR 533.

R. v. Marshall; R. v. Bernard (2005) 2 SCR 220.

R. v. N.T.C. Smokehouse (1996) 2 SCR 672.

R. v. Pamajewon (1996) 2 SCR 821.

R. v. Powley (2003) 2 SCR 207.

R. v. Sappier; R. v. Gray (2006) 2 SCR 686.

R. v. Sparrow (1986) 36 DLR (4th) 246 (BCCA); (1990) 1 SCR 1075.

R. v. Van der Peet (1996) 2 SCR 507.

Re Adoption of Katie (1961) 32 DLR (2d) 686 (NWTTC).

Re Paulette et al. and Registrar of Titles (No. 2) (1973) 42 DLR (3d) 8 (NWTSC), reversed (1975) 63 DLR (3d) 1 (NWTCA), reversal affirmed (1977) 2 SCR 628.

St. Catherine's Milling and Lumber Company v. The Queen (1888) 14 App Cas 46.

Tsilhqot'in Nation v. British Columbia (2014) 2 SCR 257.

Tsleil-Waututh Nation v. Canada (Attorney General) (2019) 2 FCR 3 (Fed CA), leave to appeal dismissed, 2019 CanLII 37489 (SCC).

Other Sources

Abele, F., S. Irlbacher-Fox and J. Gladstone (eds). 2016. "Special Issue on Modern Treaty Implementation." *Northern Public Affairs* 6 (2) *http://www.northernpublicaffairs.ca/index/volume-6-special-issue-2-special-issue-on-modern-treaty-implementation-research/*

Allain, J., and J.-D. Fréchette. 1993. "The Aboriginal Fisheries and the *Sparrow* Decision." Governemnt of Canada. http://www.publications.gc.ca/Collection-R/LoPBdP/BP/bp341-e.htm

Asch, M., and P. Macklem. 1991. "Aboriginal Rights and Canadian Sovereignty: An Essay on *R v Sparrow*." *Alberta Law Review* 29 (2): pp. 498-517.

Berger, T.R. 1977. *Northern Frontier, Northern Homeland: The Report of the Mackenzie Valley Pipeline Inquiry.* Ottawa: Minister of Supply and Services Canada.

Bezanson, K. 2018. "*Caring Society v Canada*: Neoliberalism, Social Reproduction, and Indigenous Child Welfare." *Journal of Law and Social Policy* 28 (1): pp. 152-173.

Borrows, J. 2010. *Canada's Indigenous Constitution*. Toronto: University of Toronto Press.

Browne, M. 2009. "The Promise of *Delgamuukw* and the Reality of Treaty Negotiations in British Columbia." In *Aboriginal Law Since Delgamuukw*, edited by M. Morellato: pp. 465-505. Aurora: Canada Law Book.

Cairns, A.C. 2000. *Citizens Plus: Aboriginal Peoples and the Canadian State.* Vancouver: UBC Press.

Cairns, A., 2011. "Preface." In *Resource Rulers: Fortune and Folly on Canada's Road to Resources,* edited by B. Gallagher, pp. vii-xi. Waterloo ON: Bill Gallagher.

Calder, F., and T. Berger. 2007. "Frank Calder and Thomas Berger: A Conversation." In *Let Right Be Done: Aboriginal Title, the* Calder *Case, and the Future of Indigenous Rights*, edited by H. Foster, H. Raven, and J. Webber, pp. 37-53. Vancouver: UBC Press.

Cameron, A.M. 2009. *Power Without Law: The Supreme Court of Canada, the Marshall Decisions, and the Failure of Judicial Activism.* Montreal & Kingston: McGill-Queen's University Press.

Canada. 1966-1967. *A Survey of the Contemporary Indians of Canada: Economic, Political, Educational Needs and Policies (Hawthorn Report).* Ottawa: Queen's Printer.

Canada. 1969. “Statement of the Government of Canada on Indian Policy [White Paper]”. Government of Canada. https://www.aadnc-aandc.gc.ca/eng/1100100010189/1100100010191.

Canada. 1971. “The Unfinished Tapestry – Indian Policy in Canada.” Ottawa: Department of Indian Affairs and Northern Development. March 17. http://publications.gc.ca/site/eng/9.852496/publication.html

Canada. 1985. *Living Treaties: Lasting Agreements. Report of the Task Force to Review Comprehensive Claims Policy.* Ottawa: Department of Indian Affairs and Northern Development.

Canada. 1997. *Gathering Strength: Canada’s Aboriginal Action Plan*. Ottawa: Services Canada.

Canada. 2003. *Strengthening Our Relationship – The Aboriginal Fisheries Strategy and Beyond – October 2003.* Ottawa: Fisheries and Oceans Canada. https://www.dfo-mpo.gc.ca/fisheries-peches/aboriginal-autochtones/afs/afsoct03-eng.html.

Cardinal, H. 1969. *The Unjust Society*. Vancouver: Douglas & McIntyre.

Chartrand, L. 2019. “The Constitutional Determination of a Métis Rights-Bearing Community: Reorienting the *Powley* Test.” In *Renewing Relationships: Indigenous Peoples and Canada*, edited by K. Drake and B.L. Gunn, pp. 169-92. Saskatoon: University of Saskatchewan Native Law Centre.

Coates, K.S. 2000. *The Marshall Decision and Native Rights.* Montreal & Kingston: McGill-Queen’s University Press.

de Costa, R. 2003. “Treaties in British Columbia: The Search for a New Relationship.” *International Journal of Canadian Studies* (27): pp. 173-196.

Feit, H.A. 1983. “Negotiating Recognition of Aboriginal Rights: History, Strategies and Reactions to the James Bay and Northern Quebec Agreement*.”* In *Aborigines, Land and Land Rights,* edited by N. Petersen and M.Langton, pp. 416-438. Canberra: Institute of Aboriginal Studies.

Foster, H., H. Raven, and J. Webber (eds). 2007. *Let Right Be Done: Aboriginal Title, the* Calder *Case, and the Future of Indigenous Rights*. Vancouver: UBC Press.

Fumoleau, R. 1973. *As Long as this Land Shall Last: A History of Treaty 8 and Treaty 11, 1870-1939.* Toronto: McClelland and Stewart.

Gallagher, B. 2011. *Resource Rulers: Fortune and Folly on Canada’s Road to Resources.* Waterloo ON: Bill Gallagher.

Hanna, A. 2018. “Spaces for Sharing: Searching for Indigenous Law on the Canadian Legal Landscape.” *UBC Law Review* 51 (1): pp. 105-159.

Henderson. J. (S.) Y. 2007. *Treaty Rights in the Constitution of Canada.* Toronto: Thomson Carswell.

Hoehn, F. 2012. *Reconciling Sovereignties: Aboriginal Nations and Canada.* Saskatoon: University of Saskatchewan Native Law Centre.

Indian Association of Alberta. 1970. “Citizens Plus.” Indian Chiefs of Alberta. June. Online: http://caid.ca/RedPaper1970.pdf.

Law Commission of Canada (ed). 2007. *Indigenous Legal Traditions*. Vancouver: UBC Press.

Manuel, A., and R.M. Derrickson. 2015. *Unsettling Canada: A National Wake-up Call*. Toronto: Between the Lines.

Manuel, A., and R.M. Derrickson. 2017. *The Reconciliation Manifesto: Recovering the Land, Rebuilding the Economy*. Toronto: Lorimer.

McKee, C. 1996. *Treaty Talks in British Columbia: Negotiating a Mutually Beneficial Future.* Vancouver: UBC Press.

McNeil, K. 1994. “The Decolonization of Canada: Moving Toward Recognition of Aboriginal Governments.” *Western Legal History* 7 (1): pp. 113-141.

McNeil, K. 2019. *Flawed Precedent: The* St. Catherine’s *Case and Aboriginal Title.* Vancouver: UBC Press.

Metallic, N.W. 2018. “A Human Right to Self-Government over First Nation Child and Family Services and Beyond: Implications of the *Caring Society* Case.” *Journal of Law and Social Policy* 28 (2): pp. 4-41.

Miller, J.R. 2009. *Compact, Contract, Covenant: Aboriginal Treaty-Making in Canada.* Toronto: University of Toronto Press.

Miller, R.J., J. Ruru, L. Behrendt, and T. Lindberg. 2010. *Discovering Indigenous Lands: The Doctrine of Discovery in the English Colonies.* Oxford: Oxford University Press.

Molloy, T., and D. Ward. 2000. *The World Is Our Witness: The Historic Journey of the Nisga’a into Canada.* Calgary: Fifth House.

Morse, B. 1997. “Permafrost Rights: Aboriginal Self-Government and the Supreme Court in *R. v. Pamajewon.*” *McGill Law Journal* 42 (4): pp. 1011-1042.

Newman, D.G. 2014. *Revisiting the Duty to Consult Aboriginal Peoples.* Saskatoon: Purich Publishing.

Nichols, J.B.D. 2020. *Reconciliation without Recollection? An Investigation of the Foundations of Aboriginal Law in Canada.* Toronto: University of Toronto Press.

Nungak, Z. 2017. *Wrestling with Colonialism on Steroids: Quebec Inuit Fight for their Homeland.* Montréal: Véhicule Press.

Owran, D. 1986. *The Government Generation: Canadian Intellectuals and the State 1900–1945*. Toronto: University of Toronto Press.

Ray, A.J. 1996. *I Have Lived Here Since the World Began: An Illustrated History of Canada's Native Peoples.* Toronto: Lester Publishing.

Reynard, P. 2000. "'Welcome In, But Check Your Rights at the Door': The James Bay and Nisga'a Agreements in Canada." *Canadian Journal of Political Science* 33 (2): pp. 211-243.

Reynolds, J. 2020. *From Wardship to Rights: The* Guerin *Case and Aboriginal Law.* Vancouver: UBC Press.

Royal Commission on Aboriginal Peoples. 1996. *Report of the Royal Commission on Aboriginal Peoples*, vol. 1, *Looking Forward, Looking Back*. Ottawa: Supply and Services Canada.

Scholtz, C. 2013. *Negotiating Claims: The Emergence of Indigenous Land Claim Negotiation Policies in Australia, Canada, New Zealand, and the United States*. New York: Routledge.

Seed, P. 1995. *Ceremonies of Possession in Europe's Conquest of the New World 1492-1640.* Cambridge: Cambridge University Press.

Tennant, P. 1982. "Native Indian Political Organization in British Columbia, 1900-1969: A Response to Internal Colonialism." *BC Studies* 55 (Autumn): pp. 3-47.

Tennant, P. 1990. *Aboriginal Peoples and Politics: The Indian Land Question in British Columbia, 1849-1989.* Vancouver: UBC Press.

Tester, F., and P. Kulchyski. 1994. *Tammamiit (Mistakes): Inuit Relocation in the Eastern Arctic 1936-1963.* Vancouver: UBC Press.

UN General Assembly. 2007. "United Nations Declaration on the Rights of Indigenous Peoples." United Nations General Assembly. October 2. https://undocs.org/A/RES/61/295

Weaver, J.C. 2003. *The Great Land Rush: The Making of the Modern World 1650-1900.* Montreal & Kingston: McGill-Queen's University Press.

Weaver, S.M. 1975. *Making Canadian Indian Policy: The Hidden Agenda 1968-1970.* Toronto: University of Toronto Press.

Wicken, W.C. 2004. *Mi'kmaq Treaties on Trial: History, Land, and Donald Marshall Junior.* Toronto: University of Toronto Press.

Wildsmith, B.H. 2001. "Vindicating Mi'kmaq Rights: The Struggle Before, After, and During Marshall." *Windsor Yearbook of Access to Justice* 19: pp. 203-240.

Wilkins, K. 2017. "Life Among the Ruins: Section 91(24) After *Tsilhqot'in* and *Grassy Narrows.*" *Alberta Law Review* 55 (1): pp. 91-125.

Witgen, M. 2012. *An Infinity of Nations: How the Native New World Shaped Early North America.* Philadelphia: University of Pennsylvania Press.

Zlotkin, N.K. 1984. "Judicial Recognition of Aboriginal Customary Law in Canada: Selected Marriage and Adoption Cases." *Canadian Native Law Reporter* 4: pp. 1-17.

Endnotes