SHORTCUTS
Essential, accessible knowledge for self-determining First Nations

September 2023

This series is intended to provide high-level and short, easy to read information about some very complex issues. It should not be used as a substitute for expert advice. Links to sources and further reading suggestions are provided for further exploration of the issues.

Aboriginal Title, Consultation and Consent

by Giuseppe Amatulli, Postdoctoral Fellow, RFNG, Carleton University

The duty to consult intertwined with Aboriginal title was at the core of one of the most important recent Aboriginal rights cases in Canada, *Tsilhqot'in Nation v. BC, 2014* (Morellato, 2008, p. 53). The case concerned the issuance of a logging permit (issued by the BC Government in 1983) on land considered by the Tsilhqot'in Nation to be part of their traditional territory. After 15 years of negotiations and no agreement, in 1998 the Nation amended their original claim to include a claim for Aboriginal title to the land. In 2014, the Supreme Court of Canada recognized their Aboriginal title, finding that the Tsilhqot'in occupation was sufficient and exclusive (Tsilhqot'in Nation v. British Columbia, 2014 SCC 44, at para 46-54). Tsilhqot'in marks the end of a process that started a long time ago, with Calder v. BC (1973), where the Supreme Court of Canada first recognized the existence of Indian[1] title. However, the Court in Calder was split when addressing the Nisga'a claim of the existence of their title after centuries of colonial control.

> *'When the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries. This is what Indian title means.' (Calder et al. v. BC, 1973 SCR 313, at page 328).*

The case was dismissed on a technicality (Calder et al. v. BC, 1973 SCR 313, at pages 420-427) but it had two significant outcomes. First, given the recognition of Aboriginal title by some of the Justices, the Canadian Government started negotiating with the Nisga'a to define their rights to land and resources.[2] This resulted in the first modern Treaty in British Columbia.[3] Moreover, the Calder case paved the way for more Aboriginal rights and title cases, among them: Guerin v. The Queen (1984), R. v. Sparrow (1990), Delgamuukw v. British Columbia (1997), and Mikisew Cree v. Canada (2005). The court decisions from these and other rights and title cases brought forward by Indigenous peoples over the decades, have had a significant impact on expanding the recognition of Indigenous rights in Canada and forced governments to revise their policies regarding land rights, access to natural resources, treaty rights, and so on. (George, McNeil, Abele 2022). The following information lays out the current state of the Canadian legal framework related to rights and title.

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[1] The term "Indian" pre-dates the use of "Aboriginal" which is what is now commonly used in Section 35 case law. "Indigenous" is used when referring to all Indigenous peoples – Including Inuit and Metis - within Canada. "Aboriginal" is the legal term used in Canada in reference to Indigenous rights and title (Section 35 of the Canadian Constitution).

[2] https://indigenousfoundations.arts.ubc.ca/calder_case/ (last accessed on March 10th, 2023).

[3] The Nisga'a Treaty came into effect on May 11th, 2000. Available at: https://www.nisgaanation.ca/understanding-treaty (last accessed on March 9th, 2023).

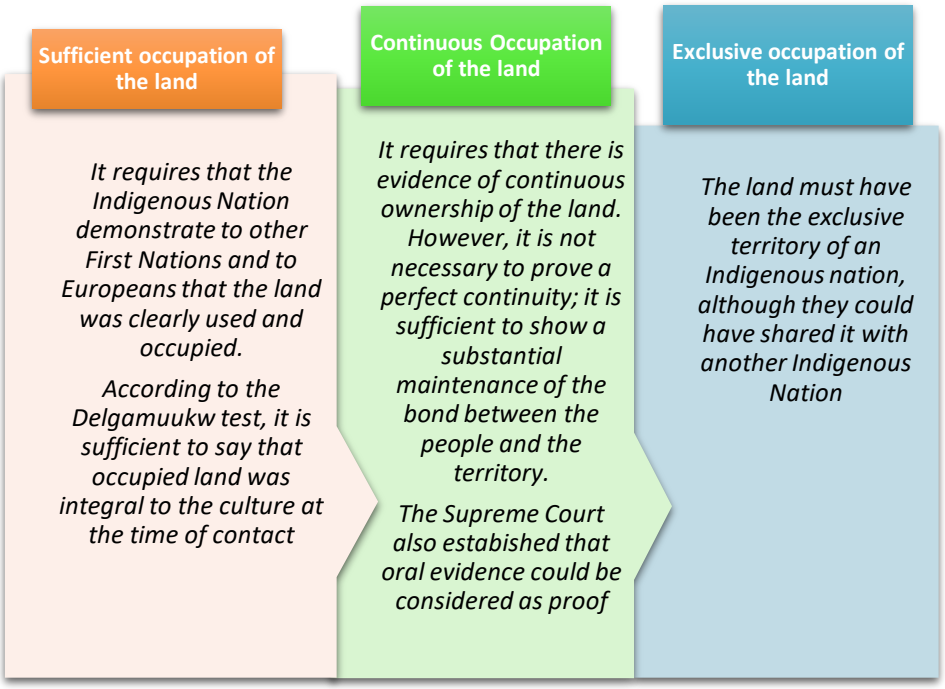
What is Aboriginal title and how is it proven?

Aboriginal title recognizes several inherent rights of Indigenous peoples, including the right to control how the land is used. By establishing Aboriginal title, Aboriginal rights that have existed since long before Canada assumed sovereignty, are translated into equivalent modern legal rights (Milne, 2017)[4] recognized within Canada's legal framework. It is understood that Aboriginal title is sui generis[5], and its recognition in Canadian law stems from the historic relationship the Crown has with Indigenous peoples.

> *Aboriginal title is an Inherent right of Canadian Indigenous peoples. It has always existed; it was not created by the 1763 Royal Declaration (although its existence was recognized in it) nor by the 1867 Indian Act (Guerin v. The Queen, [1984] 2 SCR 335, pp. 379-387).*

Legal recognition of Aboriginal title is based on Indigenous peoples' occupation of their territories prior to the assertion of sovereignty by the British Crown. In *Delgamuukw v. BC,* the Court decided that a "territorial use-based approach" was necessary to establish Aboriginal title. According to the so-called Delgamuukw Test, proof of occupation has the following three characteristics:

- Use and occupation of the land at the time of assertion of sovereignty; or
- If present occupation is relied on as proof of occupation pre-sovereignty, demonstrated continuity between present and pre-sovereignty occupation;
- exclusive historic occupation (Delgamuukw v. British Columbia [1997] 3 SCR 1010, at paras. 193-200).



[4] Available at: https://canliiconnects.org/en/summaries/45546 (last accessed on March 9th, 2023).

[5] Sui generis is a Latin expression that translates to *"of its own kind."* It refers to things that not like anything else.

In this framework, Aboriginal title has three main features:

- It is a collective title that future generations are entitled to enjoy; thus, it cannot be alienated (i.e., sold or transferred to someone else) (Tsilhqot'in Nation v. British Columbia, 2014 SCC 44, at paras 72-74).
- The right of the title holders to choose how the land and its resources are used.
- As it finds its source in "pre-existing systems of Aboriginal Law", it is an inherent right found within the meaning of Section 35(1) of the 1982 Constitution (Morellato, 2008, pp. 65–66).

This means that those who want to use the land must seek and obtain the consent of the Aboriginal title holders (Morellato, 2008, p. 20). Governments acting in right of the Crown have a duty to consult and accommodate any time they are considering an action that could adversely affect an Indigenous group and its Aboriginal rights and title (see related *Shortcuts* article *'On the duty to consult and accommodate'*), as established in Haida and according to the Haida spectrum (Tsilhqot'in Nation v. British Columbia, 2014 SCC 44, at para. 71). As the Court affirmed: "Once title is established, the Crown cannot proceed with development of title land not consented to by the title-holding group unless it has discharged its duty to consult, and the development is justified pursuant to Section 35 of the 1982 Constitution Act." (Tsilhqot'in Nation v. British Columbia, 2014 SCC 44, at para. 91) [6]

The 'Sparrow test' is used to decide whether the government can justify infringement where there are existing title and rights. (R. v. Sparrow, [1990] 1 SCR 1075). Infringement may be justified if:

- The action/decision serves "valid legislative objectives" and government action is consistent with its fiduciary responsibilities to Aboriginal peoples;
- there is as little infringement as possible;
- fair compensation is provided; and
- the affected Aboriginal people were consulted.

Although the Sparrow case represents a fundamental step in the affirmation of Indigenous rights in the Canadian context, it also confirms that such rights are not absolute, and possible breaches can be justified (R. v. Sparrow, [1990] 1 SCR 1075, at para. 58).

[6] As established in Tsilhqot'in, in those cases where the Crown might need to proceed without consent, three conditions must be met:

- the incursion must be necessary to achieve the government's goal (rational connection);
- the government must go no further than necessary to achieve it (minimal impairment);
- the benefits that may be expected to flow from that goal are not outweighed by adverse effects on the Aboriginal interest (proportionality of impact). (Tsilhqot'in Nation v. British Columbia, 2014 SCC 44, at para. 87).

Read More:

Morellato, M. (2008). The Crown's Constitutional Duty to Consult and Accommodate Aboriginal and Treaty Rights. https://fngovernance.org/?s=The+Crown's+Constitutional+Duty+to+Consult+and+Accommodate+Aboriginal+and+Treaty+Right

Satsan (Herb George), Kent McNeil, Frances Abele How First Nations Have Been Transforming Public Policy through the Courts; E. Lindquist, M. Howlett, G. Skogstad, G. Tellier, P. 't Hart. eds Policy Success in Canada: Cases, Learning, Challenges. Oxford University Press 2022 p. 395-415

Slattery, Brian. "The Nature of Aboriginal Title." Lippert, Owen, ed. Beyond the Nass Valley: National Implications of the Supreme Court's Delgamuukw Decision. Vancouver, BC: Fraser Institute, 2000. p. 11-33. ISBN: 0889752060 https://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1264&context=scholarly_works (last accessed July 17, 2023)

ICTC, (2019). Indigenous Rights, Title, and The Duty to Consult. https://www.ictinc.ca/blog/aboriginal-rights-title-and-the-duty-to-consult-a-primer (last accessed July 19, 2023).

Calder v. Attorney-General of British Columbia [1973]. https://indigenousfoundations.arts.ubc.ca/calder_case/ (last accessed July 19, 2023).

Understanding the Treaty. https://www.nisgaanation.ca/understanding-treaty (last accessed July 19, 2023).

The Mabo case. https://aiatsis.gov.au/explore/mabo-case (last accessed July 19, 2023).

Case Brief: Tsilhqot'in Nation v. British Columbia, 2014 SCC 44. https://canliiconnects.org/en/summaries/45546 (last accessed July 19, 2023).

Tsilhqot'in Nation v. British Columbia (2014 SCC 44). https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/14246/index.do (last accessed July 19, 2023).

Mikisew Cree v. Canada (2005 SCC 69). https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2251/index.do (last accessed July 19, 2023).

Haida Nation v. British Columbia (2004 SCC 73). https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2189/index.do (last accessed July 19, 2023).

Delgamuukw v. British Columbia [1997] (3 SCR 1010). https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1569/index.do (last accessed July 19, 2023).

Guerin v. The Queen, [1984] (2 SCR 335). https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2495/index.do (last accessed July 19, 2023).

Calder et al. v. British Columbia (1973 SCR 313). https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/5113/index.do (last accessed July 19, 2023).