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Aboriginal Title

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Aboriginal Title

What is "title?"

Aboriginal title refers to the inherent Aboriginal right to land or a territory. The Canadian legal system recognizes Aboriginal title as a *sui generis,* or unique collective right to the use of and jurisdiction over a group's ancestral territories. This right is not granted from an external source but is a result of Aboriginal peoples' own occupation of and relationship with their home territories as well as their ongoing social structures and political and legal systems. As such, Aboriginal title and rights are separate from rights afforded to non-Aboriginal Canadian citizens under Canadian common law.

Over time, various court decisions have contributed to this definition of title. Along with defining Aboriginal title in more precise terms, these court decisions have further set parameters to how the Crown may justifiably infringe upon Aboriginal title. Some Aboriginal people do not agree with these definitions, as they consider them to limit the scope of Aboriginal title, making it easier to extinguish. The Union of British Columbia Indian Chiefs (UBCIC) claims that "there remains a significant difference between what Indigenous Peoples see as being our 'Original Title' to the land and its resources, and the Canadian legal notion of 'Aboriginal Title.'"[1]

A history of the Crown & Aboriginal Title

Aboriginal peoples across what is now known as North America have maintained a strong connection to the land since time immemorial. Although there is vast cultural variation between First Nations, most groups maintained similar beliefs and principles that governed their relationship with and responsibility to the land. Most First Nations did not believe that pieces of land could or should be owned by individuals—humans, along with all other living beings, belonged *to* the land. The land provided for humans, and in turn, humans bore a responsibility to respect and care for it. Many Aboriginal peoples understand this as a reciprocal relationship

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- Royal Proclamation, 1763
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- Union of British Columbia Indian Chiefs
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- Constitution Act, 1982 Section 35

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with the land. European settlers arriving in North America brought with them concepts of private property ownership, and the notion that humans could, and should, own land as a step towards "civilization." In 1763 the British Crown issued The Royal Proclamation, a document that recognized Aboriginal title during European settlement of what is now Canada. The Proclamation states that ownership over North America is issued to King George III, but that Aboriginal title exists and can only be extinguished by treaty with the Crown. The Proclamation further specifies that Aboriginal land can only be sold or ceded to the Crown, and not directly to settlers.

From the eighteenth to the early twentieth centuries, Crown representatives and leaders of Aboriginal communities signed treaties throughout most of Canada in an effort to resolve issues of outstanding Aboriginal title. These treaties set out agreements as to the nature and limits of Aboriginal rights and title. Crown representatives interpreted these treaties as a "blanket extinguishment" of Aboriginal title. However, many have argued that at the time the treaties were negotiated, Aboriginal signatories did not understand the treaties as limiting or extinguishing their title. The Supreme Court would later confirm that treaties should be interpreted with the First Nations' interests in mind (*Simon v the Queen* [1985]).

Aboriginal Title in British Columbia

In most of British Columbia, treaties were not negotiated between the government and Aboriginal peoples. (The exceptions are the Douglas treaties on Vancouver Island, the Treaty 8 area in the Peace River region, and the "modern" agreements such as the Nisga'a Final Agreement and the Tsawwassen Treaty.) As Aboriginal leaders and organizations would argue for decades, Aboriginal title was therefore not officially extinguished, and legally they retained ownership and jurisdiction over their territories. The government's stance had to reflect to the Calder decision of 1973, the first court case to acknowledge the continued existence Aboriginal title. The Supreme Court ruled that Aboriginal title had existed, but were divided on whether or not it continued to exist. Determining the potential continued existence of Aboriginal title would be the responsibility of the Crown, although the burden of proof entirely rests on First Nations to prove it exists. In response to this ruling, the federal government developed its comprehensive claims process for dealing with grievances related to Aboriginal claims to land where, in the perspective of the Crown, the question of title had not been addressed through historical treaties. The comprehensive claims process was fundamentally established as a means to extinguish Aboriginal title in exchange for rights and benefits clearly outlined in the settlement itself. This exchange is commonly referred to as achieving "certainty," which is typically achieved either by modifying existing rights, or reaching an agreement to never assert particular rights (non-assertion). The concept of extinguishment has always been controversial as many Aboriginal people believe their rights are inalienable. Many First Nations leaders and community members have helped the government change their approach, but many believe it achieves the same goal—to cede, release, and surrender their rights and title aside from what is explicitly outlined in the settlement.

Despite the federal government's claim processes, the B.C. government refused to cooperate, and issues of outstanding Aboriginal title in B.C. remained. The provincial government did not address these issues until the early 1990s, when resource development in the province declined due to uncertainty over Aboriginal title. A number of First Nations throughout British Columbia had set up roadblocks and other similar protests in desperate attempts to have the government recognize their right to jurisdiction over their territories. These direct actions had come after more than a century of failed petitions and attempts to negotiate with the government.[2] The protests disrupted daily operations within the natural

Important Court Decisions regarding Aboriginal Title:

- *St. Catherine's Milling and Lumber Co. v the Queen* **[1888] was a court case that for years prevailed as the dominant "guide" for Aboriginal title, until the** *Calder* **decision in 1973.** *St. Catherine's Milling* **ruled that title was a usufructory right for Aboriginal people, and existed (and could be extinguished) at the pleasure of the Crown. The** *St Catherine's Milling* **decision claimed that Aboriginal title was granted by the Crown through the Royal Proclamation.**
- *Calder v. British Columbia (Attorney General)* **[1973] was a landmark case. Although the court was evenly split on whether or not Aboriginal title continued to exist, it was unanimously agreed that Nisga'a title** *had* **existed. This significant agreement would pave the way for addressing Aboriginal title in Canada.**
- *R v Guerin* **[1984] established that Aboriginal title was a** *sui generis* **right and the Crown had a fiduciary duty to protect it for Aboriginal peoples.**
- *Delgamuukw v British Columbia* **[1997] has to date been the most comprehensive decision about Aboriginal title.** *Delgamuukw* **set out how the courts will deal with Aboriginal title, by setting a test to determine if Aboriginal title still existed and, if so, how the Crown might justifiably infringe upon it. The Court further ruled that Aboriginal title is different from merely land use and occupation, as it had previously been defined, but also incorporates**

Aboriginal jurisdictional authority over *how* the land is used. Delgamuukw also acknowledged Aboriginal collective ownership of the land that includes a cultural relationship to the land.

resource sector and discouraged businesses from investing in B.C. Motivated primarily by these economic losses, the provincial government created the B.C. Treaty Process (BCTP) in order to finally reach agreements with First Nations over title. The BCTP has been very controversial, and not entirely successful. Many Aboriginal groups have dropped out or refused to participate based on their belief that the process simply extinguishes title in favour of government and big business interests, allowing them to continue developing lands at the expense of Aboriginal peoples, territories and cultures. For these reasons, among many others, the BCTP is often considered to have failed at settling issues of Aboriginal title. The debates are numerous and ongoing.

Aboriginal understandings of title

Legal interpretations and definitions of "Aboriginal title" may differ from Aboriginal understandings of title, which are centuries-old. The Delgamuukw decision of 1997, for example, defines Aboriginal title as a burden on the Crown's underlying title. This means that Aboriginal title can be ceded or transferred only to the Crown. This decision accepts the Crown's underlying title as a given, and did not require the Crown to prove or validate its claim to sovereignty. Some Aboriginal people view this decision as controversial, as it assumes the Crown's sovereignty without questioning its legitimacy.

Some Aboriginal people and legal experts find that Canadian common law, rooted in British common law, carries with it legal notions of private property that are incompatible with Indigenous legal traditions. By defining Aboriginal title using Canadian common law concepts, many have found that the underlying complexities within Aboriginal understandings of title (rooted in a reciprocal relationship to the land) are overlooked or circumscribed. Further, some, such as the UBCIC, have claimed that the emphasis on legal definitions of Aboriginal title detracts focus from on-the-ground experiences of how title may or may not be recognized, and how Aboriginal peoples may assert their title in day-to-day experiences.[3] As a result, some Aboriginal leaders and organizations are uncomfortable accepting court definitions of Aboriginal title, and refuse to resolve issues of Aboriginal title using non-Aboriginal systems such as the B.C. Treaty Process. As lawyer Hamar Foster has stated, "To 'accept' the legal concept of Indian title in B.C. is to accept a claim, not a result, and is quite consistent with rejecting a particular native interpretation of title."[4]

What does Aboriginal Title Mean for Private Property Interests?

Issues of outstanding Aboriginal title does not mean that private property will be expropriated, or that homeowners will be evicted from their homes. Many Aboriginal leaders have consistently stated that this is not their desire. Many have emphasized that their goal is to resolve an inequitable system that has marginalized Aboriginal peoples in their own homelands in order for non-Aboriginal interests to profit off Aboriginal territories.[5]

The Delagmuukw decision affirmed that the Crown holds underlying title to lands, and Aboriginal title represents a burden on this underlying title. This means that the Crown has the responsibility to negotiate terms with the Aboriginal title-holders should a third party have interest in the land. Many First Nations have entered into agreements directly with third party interests in order to create an equitable relationship between business and local Aboriginal peoples. The cases Haida Nation v. British Columbia and Taku River Tlingit First Nation v. British Columbia have further determined that the Crown has a responsibility to consult and accommodate First Nations peoples even if existing Aboriginal title to the lands has not yet been proven in court—an act that many laud as another positive step towards the recognition of Aboriginal title.

By Erin Hanson.

Recommended Resources:

Foster, Hamar, Heather Raven and Jeremy Webber, eds. *Let Right Be Done: Aboriginal Title, the Calder Case, and the Future of Indigenous Rights.* Vancouver: UBC Press, 2007.

Foster, Hamar, "Letting Go The Bone: The Idea of Indian Title in British Columbia, 1849-1927," in Foster and McLaren, eds.*, Essays in the History of Canadian Law, Vol. VI: British Columbia and the Yukon.* Toronto: University of Toronto and the Osgoode Society, 1995: 28-86.

----- "We Are Not O'Meara's Children: Law, Lawyers and the First Campaign for Aboriginal Title in British Columbia, 1908-1928" in *Let Right Be Done*, above, at 61-84.

----- "Forgotten Arguments: Aboriginal Title and Sovereignty in Canada" *Jurisdiction Act Cases*" (1992), 21 *Manitoba Law Journal,* 343.
Hurley, Marcy C. "Aboriginal Title: The Supreme Court of Canada Decision in *Delgamuukw v. British Columbia.*" Ottawa: Parliament of Canada Library, Law and Government Decision, 2000. Available online: http://www2.parl.gc.ca/content/lop/researchpublications/bp459-e.htm
McNeil, Kent. "The Meaning of Aboriginal Title." In Michael Asch, ed. *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality, and Respect for Difference.* Vancouver: UBC Press, 1997. 135-154.
Raibmon, Paige, "Unmaking native Space: A genealogy of Indian Policy, Settler Practice, and the Microtechniques of Dispossession" in Alexandra Harmon, ed. *The Power of Promises: Rethinking Indian Treaties in the Pacific Northwest*. Seattle: University of Washington Press, 2008: 56-85.
Tennant, Paul, *Aboriginal People and Politics: The Indian Land Question in British Columbia, 1849-1989* Vancouver: UBC Press, 1990.
Union of British Columbia Indian Chiefs. *Stolen Lands, Broken Promises: Researching the Indian Land Question in British Columbia.* (2nd ed.) Vancouver: UBCIC, 2005.
------ "Aboriginal Title and Rights Position Paper." Vancouver: UBCIC, 1985. Available online: http://www.ubcic.bc.ca/Resources/implementation.htm
----- "Aboriginal Title Implementation." http://www.ubcic.bc.ca/Resources/implementation.htm
----- "'Certainty:' Canada's Struggle to Extinguish Aboriginal Title." http://www.ubcic.bc.ca/Resources/certainty.htm
----- "Two World Views in Law." http://www.ubcic.bc.ca/Resources/Educators/Two_World_Views.htm

Endnotes

1 Union of British Columbia Indian Chiefs, "Aboriginal Title Implementation." http://www.ubcic.bc.ca/Resources/implementation.htm

2 See, for example, Paul Tennant. *Aboriginal People and Politics: The Indian Land Question in British Columbia 1849-1989.* **(Vancouver: UBC Press), 1990.**

3 UBCIC

4 Aboriginal Rights Coalition of British Columbia, *What Have You Heard?* **Victoria, 1991. 7.**

5 *Ibid***.**

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