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Clarity and confusion?

The new jurisprudence of aboriginal title

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Executive Summary

The Supreme Court of Canada has revolutionized the jurisprudence of aboriginal rights and title. Various decisions have overturned the doctrine of adverse occupancy, which at one time had been thought to have extinguished aboriginal title in British Columbia (*Delgamukkw*); created a governmental duty to consult First Nations regarding use of land to which they have a claim of aboriginal rights or title (*Haida Nation*); approved a specific claim to aboriginal title (*Tsilhqot'in*); and extended the duty of consultation to First Nations whose aboriginal title was previously thought to have been extinguished by treaty (*Mikisew*). These decisions have created a new range of property rights for First Nations, which they should be able to use to advance their prosperity. However, the new jurisprudence has also set up many barriers to voluntary market transactions by multiplying the number of owners and claimants, and laying down opaque und unpredictable rules for making decisions about lands that are subject to claims of aboriginal title or to treaty rights such as hunting and fishing.

According to the Coase Theorem, it is possible to reach economically efficient outcomes from any initial assignment of property rights as long as low transaction costs make voluntary exchanges possible. But the Supreme Court's jurisprudence has taken no account of transaction costs when it has created new aboriginal property rights. Complicated legal tests and decision-making procedures increase transaction costs by extending the number of participants and the time taken to reach decisions. As transaction costs rise, essential economic projects such as pipelines may be abandoned because they are no longer profitable, as happened to the Mackenzie Valley pipeline proposal. Aboriginal peoples are thus in the paradoxical position of receiving new property rights that they will find difficult to use. This is an unfortunate situation both for them and for the wider Canadian economy.

The ball is in the courts' court. It is recommended that the courts try to resolve this emerging impasse by taking judicial notice of basic economic principles in future decisions. In the *Secession Reference*, the Supreme Court referred to "underlying principles animating the whole of the Constitution, including the principles of federalism, democracy, constitutionalism and

the rule of law, and respect for minorities". Economic efficiency is arguably as important to the welfare of Canadians as these other principles. If the courts cannot take account of it in its aboriginal jurisprudence, governments may have to resort to legal and even constitutional solutions that would be politically difficult to enact.

Introduction

Over the last 40 years, the Supreme Court of Canada has gradually elaborated a new jurisprudence of aboriginal title, parallel to similar developments in Australia, New Zealand, and the United States that have given a common law foundation to indigenous land rights (McHugh, 2011). Law professor Brian Slattery, whose writings have often been cited as authoritative by the Court, calls the new jurisprudence a "remapping" (Slattery, 2000: 196). By whatever name it is known, it constitutes a major change in the law because it has effectively overturned *St. Catherines Milling*, which had guided Canadian law since 1888 ([1888] UKPC 70). The positive side of the new jurisprudence is the recognition that First Nations did possess, and can continue to possess, ownership of land recognizable in common law. This is an important step forward in extending property rights to dispossessed people. But there is also a negative side—lack of clarity about how aboriginal rights and title can fit into Canada's market economy. Without the clarity required to facilitate economic transactions, aboriginal title will not fulfill its promise to First Nations or to other Canadians.

This paper makes no criticism of the substance of the new jurisprudence of aboriginal title; it is the mandate of the Supreme Court to explain and develop the law. But I do offer commentary about the likely economic consequences of the new jurisprudence. From an economic point of view, it is immaterial who holds property rights as long as voluntary transactions are possible to achieve efficient outcomes. But the new jurisprudence has set up many barriers to voluntary transactions by multiplying the number of owners, and laying down opaque und unpredictable rules for making decisions about lands that are subject to claims of aboriginal title. Law creates the framework for the economy; and if judicial decisions appear to have a negative impact, judges as well as other decision-makers in the political system should examine their options for achieving valid legal objectives without imposing deadweight losses upon the Canadian economy.

Historical Background

I cannot address here the question of aboriginal title in Quebec and the Atlantic provinces, where France was the first European sovereign. The story of aboriginal title in Ontario and the western provinces and northern territories begins with the Royal Proclamation of 1763, issued to organize the territories acquired by Britain from France as a result of the Seven Years War. These included what are now southern Quebec and Ontario as well as the American Midwest and Louisiana Purchase.

In keeping with the prevailing economic views of the eighteenth century, the Proclamation was a mercantilist document, designed to confine American colonists to the Atlantic seaboard and keep them integrated into the imperial trading system (Slattery, 1979: 191). That meant reserving for the native population the interior of North America, where white men would go only to conduct the fur trade. At the same time, the British government hoped to regulate and standardize the sale of Indian lands, which had been purchased or otherwise acquired by the colonists in many different ways.

The Proclamation declared the lands west of the Appalachians to be "Hunting Grounds" for "the several Nations or Tribes of Indians, with whom We are connected, and who live under Our Protection". The Indians were not to "be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to or purchased by us, are reserved to them". Colonial governors were enjoined from issuing survey warrants or land patents in the Indian territories. Any white men living in Indian country were called upon "forthwith to remove themselves". Because "great Frauds and Abuses have been committed in purchasing Lands of the Indians, the proclamation forbade any further purchases by private persons. However, "if, at any Time, any of the said Indians should be inclined to dispose of the said lands, the same shall be purchased only for Us, in Our Name, at some publick Meeting or Assembly of the said Indians to be held for that Purpose by the Governor or Commander in Chief of Our Colonies respectively, within which they shall lie" (printed in Slattery, 1979: 366–368).

Behind the Proclamation were certain presumptions (Flanagan, 2000: 121–122):

- Use of terms such as "Possession" and "Lands of the Indians" recognized native ownership.

- That ownership was not in fee simple. It was connected with traditional use of the land ("Hunting Grounds") and could be surrendered only to an agent of the Crown.

- It was a collective ownership that could only be relinquished at a "publick Meeting". The Proclamation did not mention ownership in severalty, even though family ownership of agricultural land was part of the Indian cultures of the eastern United States and Canada.

- Indians were subject to British sovereignty. How else could the Crown have laid down rules regarding their lands without consulting the inhabitants?

During the course of the American Revolution, many refugees entered Canada. As part of resettlement policy, colonial authorities started as early as 1781 to purchase Indian lands on the north shore of the Great Lakes. These were not full-fledged treaties establishing a comprehensive relationship with continuing obligations; they were more like real-estate conveyances. The first comprehensive treaties were the Robinson Huron and Superior Treaties of 1850, which contained an explicit surrender formula: "the said Chiefs and Principal men, on behalf of their respective Tribes or Bands, do hereby fully, freely, and voluntarily surrender, cede, grant, and convey unto Her Majesty, her heirs and successors for ever, all their right, title, and interest to, and in the whole of, the territory above described, save and except the reservations set forth in the schedule hereunto annexed" (Morris, 1979: 305). The formula recognized that the Indians owned something that they could sell to the Crown. Similar language was incorporated into the eleven Numbered Treaties, by which the Crown acquired the Indian title throughout the three prairie provinces, northern Ontario, and the Mackenzie Valley of the Northwest Territories.

Even as this land-acquisition process was under way, litigation arising from Treaty 3 in northern Ontario led to the *St. Catherines Milling* decision. In a dispute between Ontario and Canada over who should control the lands acquired by treaty, the Judicial Committee of the Privy Council described the nature of Indian title in these famous words:

> It was suggested in the course of the argument for the Dominion, that inasmuch as the proclamation recites that the territories thereby reserved for Indians had never "been ceded to or purchased by" the Crown, the entire property of the land remained with them. That inference is, however, at variance with the terms of the [Proclamation],

> which shew that the tenure of the Indians was a personal and usufructuary right, dependent upon the good will of the Sovereign. The lands reserved are expressly stated to be "parts of Our dominions and territories"; and it is declared to be the will and pleasure of the sovereign that, "for the present", they shall be reserved for the use of the Indians, as their hunting grounds, under his protection and dominion. ([1888] UKPC 70: 5-6)

The elucidation was less than successful. Calling the Indian title a "personal" right seemed to suggest it was not a property right, yet the Crown for a century had been purchasing "Indian title". "Usufruct" was also not a very helpful concept. Somewhat like a life estate in English law, a usufruct in Roman law was a right to receive the benefit of land during one's lifetime, but without the right to sell it or leave it to heirs. Again, that did not accurately describe Canadian practice in dealing with Indians. No one had ever asserted that their rights, whatever they were, ended with the death of individuals; and ever since 1781 the Crown had always purchased these rights before opening lands to settlement. One point, however, was clear: the Crown was deemed to hold the underlying title to Indian lands and could dispose of them at "the will and pleasure of the sovereign". Purchase of the Indian title was a benevolent policy according to "the good will of the Sovereign", but in essence the Crown could do as it chose.

Fatefully, *St. Catherines Milling* seemed to legitimize the policy followed in British Columbia of acquiring Indian lands without treaty or purchase. This had begun with the integrationist vision of Governor James Douglas, who set aside small reserves for Indians while also granting them the right to vote and to pre-empt public land. After 1864, subsequent governments continued the policy of unilaterally assigning small reserves but withdrew the other rights. After British Columbia entered Confederation in 1871, the Dominion government enlarged some of the reserves but did not insist on following the treaty policy that it had pursued elsewhere (Tennant, 1990). To the extent there was a legal rationale for this unilateral approach, it was based on a theory of implicit extinguishment of aboriginal title through adverse occupancy, as later articulated by Justice Judson in Calder: "In my opinion, in the present case, the sovereign authority elected to exercise complete dominion over the lands in question, adverse to any right of occupancy which the Nishga Tribe might have had, when, by legislation, it opened up such lands for settlement, subject to the reserves of land set aside for Indian occupation" ([1973] S.C.R. 313: 344).

Whether through treaty in Ontario and the prairie provinces or through adverse occupancy in British Columbia, the First Nations lost ownership of land. The land reserves set aside for their use and benefit were owned by the federal Crown under the Indian Act and under § 91(24) of the British North

America Act, 1867. Individual ownership in fee simple was not allowed on Indian reserves, only the diminished property rights of customary holdings, certificates of possession, and leasing (Flanagan, Alcantara, and Le Dressay, 2011). These arrangements protected the reserves against being alienated to outsiders, but also deprived those living on reserve of the benefits of ownership. First Nations became peoples without property.

In modern times, there has been a counter-movement towards recognition of aboriginal ownership. Contemporary agreements in the northern territories and in British Columbia recognize collective aboriginal ownership of settlement lands; they are not reserves owned by the Crown under the Indian Act. They also provide for creating individual ownership in fee simple at the discretion of the First Nation government. And in 2011/12, the federal government seemed on the verge of introducing into Parliament a First Nations Property Ownership Act that would have allowed both collective and individual ownership on existing Indian reserves, again at the discretion of First Nation governments (Curry, 2011). That bill, however, was never introduced, perhaps because of opposition from the Idle No More movement.

In spite of these positive steps toward recognition of ownership rights, the glaring anomaly of British Columbia remains—almost two hundred First Nations whose aboriginal title was taken without compensation, negotiation, or consultation. Efforts to redress that injustice have proceeded in Canada's courts ever since the Calder case of the early 1970s. They have been successful inasmuch as the Supreme Court of Canada recognized the continued existence of aboriginal title in *Delgamuukw* (1997) and made a specific declaration of aboriginal land title in *Tsilhqot'in Nation* (2014). But the Court's jurisprudence of aboriginal rights and title is also creating new problems through lack of clarity—overturning precedents, deferring tough questions to further rounds of litigation, avoiding bright-line rules in favour of vague principles, enlarging the number of decision-makers in land matters, and generally increasing transaction costs. Before investigating these developments further, let us take a brief look at the economic theory of property rights, which will serve as the backdrop for evaluation of the Supreme Court's jurisprudence.

Property Rights

To own property means to possess a bundle of rights over the use of that property. Major "sticks in the bundle" include the right to control the use of the property, including selling or giving it to others; to receive the benefit of the property; and to exclude others from using or enjoying it (Epstein, 2008: 20). In Canadian law, ownership in fee simple includes all of the above, though subject to legal regulation; but of course these rights can also be separated in a variety of ways. A life estate includes enjoyment of the benefits of property but not the right to convey it to others. Ownership of equity shares in a corporation entitles one to certain benefits, but not to control the corporation, except as shareholders voting to elect a board of directors. We conventionally think of property rights as rights to control and enjoy material things such as land and buildings, as well as immaterial things such as patents and copyrights; but property rights are really restraints on the conduct of other people. Ownership of land means that, if necessary, the state will eject and punish trespassers; ownership of copyright means that, if necessary, the state will exact compensation from those who republish an author's work without license.

Property can be owned by groups as well as individuals. I can own a house by myself; my wife and I can own a house together; a group of investors can form a partnership to own a rental property; or a corporation may own a large number of properties. The state can also own property, as occurs with Crown lands and Crown corporations. In contrast to all these forms of true property is common property, or a commons, over which rights of ownership are not exercised by any person or group (Eggertson, 2003: 75). Much of the earth's land was once a commons, but today almost all of it is owned by some person or organization. However, the high seas are still a true commons, owned by no one. States create bodies of international law to regulate behaviour on the high seas, but that is not the same as ownership.

The modern economic theory of property rights focuses on transaction costs in the context of scarcity. If good agricultural land were infinitely available, a farmer would have no transaction costs to protect his land and crop. He could simply plant part of the commons and harvest his crop without worrying about security. But if land is scarce, others may interfere with his use of the land, destroying or stealing his crop, leading him to invest in fences,

guards, and other security measures. At a certain point, it becomes cheaper for the society to create property rights that are enforced by the collectivity, rather than leaving it to the individual. In the technical language of Harold Demsetz, property rights develop "to internalize externalities when the gains of internalization become larger than the cost of internalization" (Demsetz, 1968: 347–348). From an economic point of view, property rights are a question of costs and benefits in specific circumstances, not of natural rights always and everywhere.

As Hayek taught us, economics is all about the efficient use of information (Hayek, 1945). Property rights contribute to efficiency by bringing information and incentives together. If property rights are robust, owners, who are closest to the property and thus better placed to have essential information about its most productive use, also gain the benefits while bearing the risks of their decisions. We would expect this to be more efficient on average than decisions made by third parties without a direct stake in the outcome.

A large international literature shows the importance of property rights in encouraging economic growth and a high standard of living (Gwartney, Lawson, and Hall, 2012: 23–24; Fukuyama, 2011: 468-475; Acemoglu and Robinson, 2012). This is also true for First Nations in the United States (Anderson and Lueck, 1992) as well as Canada, where Flanagan and Beauregard (2013) found that, even after controlling for half a dozen other variables, First Nations with a higher proportion of certificates of possession (CPs) on their reserve land tended to have a higher Community Well-being Index. The effect was particularly marked with respect to quality of housing—logical, because houses are built on land. The certificate of possession is a weaker property right than ownership in fee simple, but it is the best available under the Indian Act to residents of Indian reserves, so it is not surprising that communities making more use of CPs do better overall.

Nobel Prize winner Ronald Coase drew the attention of economists to the importance of transaction costs and the clear definition of property rights (Coase, 1960). In this view, what are often called externalities are actually the result of imperfectly specified property rights (Anderson, 2004). My neighbour's ownership rights allow him to keep a dog, but my ownership rights do not guarantee a right to any particular degree of silence. Without a property right to trade, it is hard for me to bargain with my neighbor about his dog's irritating barking; so instead of bargaining I may have to result to heavy-handed, and probably ineffectual, noise by-law enforcement. But resort to the state is not inevitable, according to this line of thought; it arises from the incomplete specification of property rights, which makes voluntary exchange difficult.

Those who have amplified Coase's article into the so-called Coase theorem argue that the initial endowment of property rights can affect the distribution of wealth and income but is neutral towards economic efficiency as long as transaction costs do not impede exchange (Simmons, 2011: 138–139).

In a world of zero transaction costs, owners would engage in mutually beneficial exchanges to achieve the most efficient use of resources. Real-world transaction costs, of course, will never be zero, but economic theory suggests that policy-makers should seek to minimize them if they wish to promote economic efficiency.

However, the Supreme Court's new jurisprudence has multiplied transaction costs in the course of recognizing aboriginal title to land and resources. The recognition of aboriginal title is in itself a good thing, because it addresses and partially redresses the confiscation of native property rights. But it has also increased transaction costs by creating uncertainty over ownership, multiplying the number of decision-makers, and extending the complexity and duration of decision-making processes. Recognition of aboriginal title is potentially of enormous economic benefit to First Nations, but the value is reduced to the extent that transaction costs impede putting that title to work.

Supreme Court Decisions

The Supreme Court's 1973 *Calder* decision was the starting point of the new jurisprudence ([1973] S.C.R. 313). *Calder* concerned the claim of the Nisga'a people for recognition of aboriginal title. All members of the Court agreed that the Nisga'a had possessed aboriginal title before British sovereignty, that is, had actually owned the land on which they lived. Three of seven justices also agreed that Nisga'a aboriginal title still existed, that it had not been extinguished by British Columbia's course of dealing with native people.

In a strict legal sense, the Nisga'a lost the *Calder* case, but the discussion of aboriginal title had a huge political impact. Prime Minister Pierre Trudeau said: "Perhaps you have more legal rights than I thought you had when we did the White Paper" (Allen, 2013: 19), and his Liberal government established the so-called comprehensive claims process for negotiating modern-day treaties. That led in time to land-claims agreements with Indian and Inuit communities in Labrador, northern Quebec, Nunavut, the Northwest Territories, and Yukon, as well as the Nisga'a in British Columbia. Unlike nineteenth-century treaties, these agreements are highly detailed documents, hundreds or even thousands of pages in length. They create considerable clarity about who has surface and subsurface ownership, as well as fishing, hunting, and other harvesting rights. They also set up processes for ongoing consultation and settling disputes. They recognized aboriginal title and gave it a legal shape that facilitated transactions within Canada's market economy.

Canada also gave constitutional recognition to aboriginal rights, presumably including aboriginal title, in Section 35 of the Constitution Act, 1982: "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed". The inclusion, however, was primarily a political step undertaken to get aboriginal support for the Canadian Charter of Rights and Freedoms and other measures included in the Constitution Act. There was little agreement, or even serious discussion, about what the words of Section 35 might mean. It was left to the courts to put flesh on this legal skeleton.

An important step was the Supreme Court's 1990 *Sparrow* decision, which concerned, not ownership of land as such, but the right to fish for salmon in British Columbia ([1990] 1 S.C.R. 1075). The Court held that there

was still an existing aboriginal right to fish for food and for related social and ceremonial activities that had not been extinguished by regulation. The "honour of the Crown"—a phrase destined to assume ever greater importance—meant that extinguishment of an aboriginal right would have had to be explicitly stated in legislation; it could not occur as an implicit consequence of regulation. And now that the right had been given constitutional status by § 35, regulation would have to be justifiable, that is, demonstrably necessary in the eyes of impartial third parties (judges), not merely imposed by the fiat of administrators. The Court laid down a multi-stage process for determining when regulation would be justifiable, rather similar to its test for determining when abridgment of Charter rights was justifiable. But in a pattern that would later often recur, the Court did not apply the test itself; it called for a new trial to determine whether the regulation on the length of drift nets used in the aboriginal food fishery was really necessary.

One can see many similarities in the Court's 1997 *Delgamuukw* decision, in which the issue was ownership of land (aboriginal title) rather than the exercise of specific aboriginal rights such as hunting and fishing (3 S.C.R. 1010). The court defined aboriginal title as a burden on the Crown's underlying title, which had crystallized in 1846 when Britain assumed sovereignty over what is now British Columbia. The provincial Crown's control over the use of land for the last century had not extinguished aboriginal title, because it could only be extinguished by an explicit action of the sovereign power (now the Parliament of Canada). Thus, aboriginal title still existed in British Columbia. But the Court did not grant the petition of the Gitksan and Wet'suwet'en Nations to recognize their specific aboriginal title; as in *Sparrow*, that would have to be determined in another trial where the proper historical facts could be adduced. Gitksan Chief Herb George said in frustration: "Twenty-four years working on *Delgamuukw*, and when I go home, nothing has changed". Prominent lawyer and provincial civil servant Mel Smith observed that the decision "undermined everything but changed nothing" (Flanagan, 2000: 127, 132).

In its 2005 *Haida Nation* decision ([2004] 3 S.C.R. 511), the Court elaborated upon the concept of consultation, which had been more briefly mentioned in *Delgamuukw*. The Court held that the honour of the Crown required government to consult with a First Nation before taking or permitting action that might affect aboriginal rights or title. The basic idea is certainly plausible. It does seem dishonourable for government to chip away at the value of land by allowing, say, forestry and mining projects without consulting the people whose claim would be affected. However, the "spectrum" approach to consultation propounded by the Court in *Haida Nation* is unpredictable. It requires authorities to gauge the level of consultation required in light of the plausibility of the claim, the degree and type of impact, and many related factors, so that it becomes very difficult to say in advance what level of consultation is adequate.

The next year, *Mikisew Cree* extended the Court's new consultation framework beyond lands subject to claim of aboriginal title to lands already surrendered by treaty. In *Mikisew* ([2005] 3 S.C.R. 388, 2005 SCC 69), the federal Department of the Environment had wished to build a winter road across an Indian reserve in northern Alberta. When the First Nation objected, the Department announced without further consultation that it would reroute the road to go around the edge of the reserve. But the *Mikisew* people were still not happy because of the impact the road might have on wildlife harvesting off the reserve. According to Treaty 8, they had the right to hunt, fish, and trap on land surrendered to the Crown except on "such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes" (Canada, 1899). The issue was of great practical importance, because similar provisions exist in many other treaties. According to the Court, the honour of the Crown required government to consult with a First Nation before exercising its option to "take up" land for other purposes, because hunting and trapping were existing treaty rights protected by § 35 of the Constitution Act, 1982. In effect, this decision reversed the century-old presumption that governments could make unilateral decisions about the use of Crown land previously acquired through land-surrender treaties.

The most recent major decision is *Tsilhqot'in Nation* (2014 SCC 44), in which for the first time the Court recognized a First Nation's aboriginal title to a specific tract of land in British Columbia—about 1,700 square kilometres, part of the larger Tsilhqot'in "traditional territory". In a sense, this is progress, but it shows the limits of the judicial process. There are about 200 First Nations in British Columbia, most of whom have some sort of land claim based on unextinguished aboriginal title. The Court's methodology for recognizing aboriginal title requires examination of detailed historical evidence of land use before, during, and after the crucial year of 1846, when Britain assumed sovereignty over British Columbia. At this rate, it will take decades, if not centuries, of further litigation before certainty over ownership can be achieved in the province. Moreover, even if all claims could be settled, the Court's theory of aboriginal title creates many uncertainties, as will be shown in the next section.

Clarity and Confusion

In each case, the Court's decisions have tended to increase rather than reduce complexity. They have overturned pre-existing administrative practices, invited further litigation, multiplied the number of decision-makers, and failed to lay down clear guidelines for resolving disputes arising under the new jurisprudence. Instead of bright lines of clear authority, the court is creating shadowy and overlapping fields of jurisdiction.

The Honour of the Crown

The phrase "honour of the Crown" runs like a red thread though the Supreme Court's decisions on aboriginal rights and title. It has an older history in British law, but its use in the context of aboriginal rights is a relatively new invention. It first started to take on major importance in the *Badger* decision ([1996] 1 S.C.R. 771), where Justice Cory wrote:

> [T]he honour of the Crown is always at stake in its dealing with Indian people. Interpretations of treaties and statutory provisions which have an impact upon treaty or aboriginal rights must be approached in a manner which maintains the integrity of the Crown. It is always assumed that the Crown intends to fulfil its promises. No appearance of "sharp dealing" will be sanctioned. (¶ 41)

Over the next ten years, the honour of the Crown assumed ever greater significance. Here are some excerpts from Chief Justice McLachlin's majority opinion in *Haida Nation* ([2004] 3 S.C.R. 511):

> The government's duty to consult with Aboriginal peoples and accommodate their interests is grounded in the honour of the Crown. The honour of the Crown is always at stake in its dealings with Aboriginal peoples … It is not a mere incantation, but rather a core precept that finds its application in concrete practices… . (¶ 16)

> The historical roots of the principle of the honour of the Crown suggest that it must be understood generously in order to reflect the underlying realities from which it stems. In all its dealings with Aboriginal peoples, from the assertion of sovereignty to the resolution of claims and the implementation of treaties, the Crown must act honourably … . (¶ 17)
>
> The honour of the Crown gives rise to different duties in different circumstances. Where the Crown has assumed discretionary control over specific Aboriginal interests, the honour of the Crown gives rise to a fiduciary duty … . (¶ 18)
>
> The honour of the Crown also infuses the processes of treaty making and treaty interpretation. In making and applying treaties, the Crown must act with honour and integrity, avoiding even the appearance of "sharp dealing" … . (¶ 19)
>
> Where treaties remain to be concluded, the honour of the Crown requires negotiations leading to a just settlement of Aboriginal claims … It is a corollary of § 35 that the Crown act honourably in defining the rights it guarantees and in reconciling them with other rights and interests. (¶ 20)
>
> Honourable negotiation implies a duty to consult with Aboriginal claimants and conclude an honourable agreement reflecting the claimants' inherent rights. (¶ 26)
>
> 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. (¶ 27)

As expounded here by Chief Justice McLachlin, the honour of the Crown is a master principle governing all aspects of the dealings between Canada and aboriginal people. It applies to consultation before treaties, the negotiation of treaties, the interpretation of treaties, and the administration of Indian assets, such as land reserves, set aside by treaties. It is common ground that the representatives of the Crown should not lie and cheat in negotiating treaties, and that they should keep solemn promises made in treaties. But the implications of the honour of the Crown, as expounded by the Supreme Court, go far beyond such obvious conclusions.

An example is the Supreme Court's decision in the *Manitoba Metis Federation* case ([2013] 1 S.C.R. 623), which involved the distribution of 1.4 million acres of land to "the children of the Half-breed heads of families"

under § 31 of the Manitoba Act, 1870, plus a number of other issues related to lands claimed by the early Metis residents of Manitoba. Even though it had not been argued at trial or appeal, the majority of the Court found that the honour of the Crown required the government to act with diligence in fulfilling the provisions of § 31, because it was a promise with constitutional status, made to an aboriginal people. The Court held further that the government's diligence was unsatisfactory because it had taken 11 years to distribute the 1.4 million acres to approximately 6,000 Metis children. The Court did not find an intent to swindle the Metis, rather a pattern of "repeated mistakes and inaction" that allowed matters to drag on too long.

Consider, however, what it was like to administer a large land grant in Manitoba in the 1870s. Civil government had to be established before anything could be done. The land newly acquired from the Hudson's Bay Company had to be surveyed before it could be distributed. The Metis, many of whom were absent from Red River for long periods while trading or hunting, had to be enumerated in a census. All this had to be done before the age of the typewriter, or even a rail link to Manitoba, let alone the modern conveniences of telephone and Internet. Administrative mistakes were made, indeed, but most were explicable and all were rectified (Flanagan, 1991). The Court seemed oblivious to the irony that, whereas the land was distributed in eleven years, it took the modern judicial process 37 years to reach a conclusion, from the first statement of claim in 1976 to the Supreme Court's decision in 2013. And the Supreme Court's decision was not really final. It was only a declaratory judgment that the administrative processes of the 1870s did not live up to the honour of the Crown. The Court did not impose a remedy, leaving its decision to become another talking point in the ongoing negotiations between Ottawa and the Metis.

In practice, the honour of the Crown has become an ill-defined standard in which present-day courts use contemporary standards to review the actions of past decision-makers, who acted in a long-vanished world subject to imperatives and constraints that are difficult to understand today. It is an attempt to achieve what the American economist Thomas Sowell calls "cosmic justice", imposing burdens on living people who have done nothing wrong in order to rectify injustices allegedly suffered by those who are no longer alive (Sowell, 1999).

This anachronistic approach is a source of considerable uncertainty in aboriginal jurisprudence. No one can say when the courts may next invoke the honour of the Crown to overturn areas of law that had been considered settled for years, decades, even centuries. Two momentous examples will be discussed below—the decisions that aboriginal rights and title still exist in British Columbia, and that the Crown has a duty to consult with aboriginal people before making decisions about Crown lands subject to claim.

Aboriginal Rights

In *Delgamuukw* ([1997]. 3 S.C.R. 1010), the Court distinguished at some length between aboriginal title and aboriginal rights. Aboriginal title is "*a right to the land* itself" (¶ 140, emphasis in original), *sui generis* in law, but similar in principle to ownership in fee simple in Canadian law. Aboriginal rights, in contrast, are broader in scope. They include cultural practices, such as songs, dances, and ceremonies not intrinsically tied to land. But they can also consist of "site-specific" activities, "which, out of necessity, take place on land and indeed, might be intimately related to a certain piece of land" (¶ 138). Examples include fishing, hunting, and trapping; picking berries and cutting timber; and performance of religious ceremonies at sacred places.

In the economic theory of property rights, some of these would amount to a right to share in, or perhaps even to monopolize, a common pool resource. No one "owns" the wild salmon in the Pacific Ocean. The aboriginal right to fish for food offers a constitutional guarantee of the right to participate in the annual salmon fishery and, indeed, as interpreted in *Sparrow*, offers "top priority to Indian food fishing" after conservation ([1990] 1 S.C.R. 1075). After *Sparrow*, government can still allocate salmon to different fishers and regulate the fishery; but it has to put the interests of aboriginal fishers first and be able to justify any restriction on their activities. Because *Sparrow* was decided by the Supreme Court of Canada, the same principles apply to aboriginal fisheries everywhere in the country.

The right to perform ceremonies at sacred places, on the other hand, is not the same as sharing in a common-pool resource because consumption is not rivalrous. It is more like an easement on the title of the landowner—usually, though not always, the Crown. A certain group of people have the right, at certain times of the year, to enter certain lands and act in certain ways for defined purposes (Ross, 2005). Hunting, in further contrast, has characteristics of both an easement and of a share in a common-pool resource. As an easement, it entails the right to enter Crown land and carry out certain activities there; but since the supply of game is finite and consumption is rivalrous, hunting also involves questions of resource allocation.

These issues are as old as Canada. Prior to 1982, they were dealt with by administrative regulation within a provincially legislated framework, sometimes affected by international treaties about wildlife conservation. As is generally true under the rule of law, the courts played a role in interpreting legislative language and exercising judicial review over administrative actions, but they had to respect parliamentary sovereignty. After 1982, now that aboriginal rights are constitutionally protected, the decision-making process is significantly different. The courts' first duty is to protect these rights, and to strike down not only administrative actions, but also legislation, that infringes upon such rights.

The result has been a proliferation of hunting and fishing cases, as pre-existing schemes of regulation are attacked for not giving sufficient weight to aboriginal interests. Sometimes the old regulatory framework is upheld, sometimes it is overturned. Often, overturning brings more confusion than clarity, because courts are better at diagnosing past cases of injustice than of elaborating new general rules of conduct (Horowitz, 1977). Canadian judges are aware of the limitations of the judicial process, and they know they lack the kind of information that legislatures can gather or that parties can bring to the table in negotiations. When they nullify a previous regulatory scheme, they typically lay down some broad general principles for the future, leaving many blanks to be filled in by lower courts. They may also urge the legislature to pass a new statute, or the government to negotiate a new settlement with the aboriginal parties. But such outcomes are easier to visualize than to achieve, so that the real-world result is often more uncertainty leading to further litigation.

A good example is the Supreme Court's *Powley* decision ([2003] 2 S.C.R. 207), which upheld a "site specific" right of members of the Metis community near Sault Ste. Marie, Ontario, to hunt moose for food without following regulations that would be binding on other hunters. But this did not signal the general emancipation of all Metis from hunting regulations everywhere in Canada: "To support a site specific aboriginal rights claim, an identifiable Métis community with some degree of continuity and stability must be established through evidence of shared customs, traditions, and collective identity, as well as demographic evidence". As with Indian claims to aboriginal title, each claim of Metis hunting rights has to be adjudicated on a "case-by-case basis" (one of the Court's favourite phrases). One has to establish whether an identifiable Metis community has existed over time in that area, whether the specific claimants belong to it, and the boundaries within which hunting traditionally took place. "In the longer term", opined the Court, "a combination of negotiation and judicial settlement will more clearly define the contours of the Métis right to hunt". Maybe that's true, but in the shorter term the result has been more uncertainty.

Aboriginal Title

In its 1997 *Delgamuukw* decision ([1997]. 3 S.C.R. 1010), the Supreme Court of Canada held that aboriginal title in British Columbia, that is, ownership of land based on occupancy prior to the 1846 proclamation of British sovereignty, had never been extinguished (except for the northeast part of the province ceded in Treaty 8, as well as a few bits of Vancouver Island). Bootstrapping up from *Sparrow*, the Court held that extinguishment of aboriginal title required a legislative act showing clearing intent. British Columbia had never passed such an act prior to joining Canada in 1871, and after 1871 only the Parliament

of Canada could have done so, but never did. In effect, the Court overturned the doctrine of adverse occupancy upheld in *Calder* less than 25 years before.

The *Delgamuukw* decision introduced considerable uncertainty into the ownership of land in British Columbia. For more than a century, it had been assumed by all economic actors that the provincial government had the underlying title to Crown land and could sell it to private citizens or grant licenses and tenures. Now provincial title was under a double cloud. Aboriginal title still existed, but the Court did not define its extent. It did not grant title to the plaintiffs; rather, it sent the matter back for a new trial after laying down some guidelines about the historical evidence required to justify a present-day award of title. That gap gave rise to the doctrine of consultation (discussed below), which has become so important.

In *Tsilhqot'in Nation* (2014 SCC 44), the Supreme Court for the first time did make a declaration of title, which some observers greeted as a step towards clarity (Cullen, 2014). At least ownership of this tract of land had now been defined as aboriginal. In principle, business investors don't care whom they deal with as long they know who the owner is. A logging lease or a mineral exploration permit is what it is, whether issued by a provincial government or an aboriginal nation. Yet *Tsilhqot'in Nation* is a long way from cutting the Gordian knot of confusion.

As Gordon Gibson has recently pointed out, it is unclear precisely who will have the power to administer the Tsilhqot'in lands. The case was launched by a single Indian Act band, but the Court awarded title to the Tsilhqot'in Nation, which is an alliance of bands. It remains to be seen how decisions about the lands will actually be made (Gibson, 2015: 32).

Tsilhqot'in Nation applied only to one claim. It takes decades of research to compile the information about historical occupancy necessary to prove a claim to aboriginal title, and more decades to fight through a court hearing and the various levels of appeal. At the rate at which the process works, it will be centuries before Canadian courts can deal with all the title claims in British Columbia. About 60 claims were already in the BC Treaties process; but by making this declaration, the Supreme Court may have encouraged claimants to forego the path of negotiation in favour of litigation, even though the Court has said many times that negotiation is the better path for these types of claims.

Moreover, the Court has construed aboriginal title in such a way as to create further uncertainty. Although stating that aboriginal title is similar to ownership in fee simple inasmuch as it allows owners to exclude others and to enjoy the benefits of the asset, it has also emphasized that aboriginal title is *sui generis*, that is, unique. It has specified four limiting factors that together increase uncertainty in economic decision-making, reduce economic value, increase the number of decision-makers, and limit the decision-making authority of aboriginal nations as owners.

1 Aboriginal title inalienable except to the Crown

First is the condition, going back to the Royal Proclamation of 1763, that aboriginal title is inalienable except to the Crown ([1997]. 3 S.C.R. 1010, ¶ 113). This reduces the value of their land to aboriginal owners by setting up the Crown as a monopoly purchaser. Other owners can maximize the value of their land by seeking competitive bids, but not aboriginal nations. There are alternatives, of course, but they are not as attractive economically. An aboriginal nation could surrender some of its land to the Crown, which in turn could sell it to a non-sovereign purchaser. This is a cumbersome three-cornered procedure guaranteed to increase time and expense as the Crown tries to bullet-proof itself from later being sued as in *Guerin* for breach of fiduciary duty ([1984] 2 S.C.R. 335). Or—much more likely to happen—an aboriginal nation can enter into a lease agreement with a would-be developer. This may be adequate for certain purposes, but in general a lease is not worth as much as a purchase because it runs for a stipulated time, after which it expires without guarantee of renewal. Leases give rise to many disputes over terms as well as conflicts in renewal negotiations. Outright purchase would often be a superior option for minimizing transaction costs, but the Court's doctrine does not allow outright purchase.

2 Aboriginal title collective

Then there is a double condition, expressed in Tsilhqot'in Nation in a single paragraph:

> Aboriginal title, however, comes with an important restriction—it is collective title held not only for the present generation but for all succeeding generations. This means it cannot be alienated except to the Crown or encumbered in ways that would prevent future generations of the group from using and enjoying it. Nor can the land be developed or misused in a way that would substantially deprive future generations of the benefit of the land. Some changes—even permanent changes–to the land may be possible. Whether a particular use is irreconcilable with the ability of succeeding generations to benefit from the land will be a matter to be determined when the issue arises. (2014 SCC 44, para 74)

Defining aboriginal title as collective raises important questions for the future. Will this allow First Nations whose aboriginal title is recognized by the courts to create titles in fee simple for their members, as the Nisga'a have done? Certainly not all, but some First Nations may wish to do so. Individual title has indisputable advantages over collective title for many purposes. Individual owners can act more quickly, and can tailor their decisions more carefully to their specific interests, than can collectivities, which must make decisions

either through delegated management or through cumbersome political processes. Moreover, defining aboriginal title as inherently collective overlooks the reality of individual property rights among pre-contact aboriginal peoples (Anderson, 1992; Flanagan, Alcantara, and Le Dressay, 2011). Depending on their culture, aboriginal peoples had individually and family-owned gardens, farms, berry patches, fishing stations, trap lines, and hunting grounds. Individually owned property is the main vehicle of the Canadian economy; will First Nations people have access to it under the doctrine of aboriginal title? That question will have to be answered at some point.

3 Aboriginal title permanent

Also problematic is the condition that land held under aboriginal title may not be "encumbered in ways that would prevent future generations of the group from using and enjoying it". This is hardly an objective, bright-line criterion. What if the government of a First Nation signs a long-term lease agreement for a developer to build a residential complex, or a shopping centre, or a golf course? Such deals, which are common now on Indian reserves, bring badly needed revenue to First Nations, but they also dedicate land in ways that often cannot be easily reversed. Does that "prevent future generations of the group from using and enjoying" the land? In *Delgamuukw*, former Chief Justice Lamer construed the issue in cultural terms:

> [I]f occupation is established with reference to the use of the land as a hunting ground, then the group that successfully claims aboriginal title to that land may not use it in such a fashion as to destroy its value for such a use (e.g., by strip mining it). Similarly, if a group claims a special bond with the land because of its ceremonial or cultural significance, it may not use the land in such a way as to destroy that relationship (e.g., by developing it in such a way that the bond is destroyed, perhaps by turning it into a parking lot). ([1997]. 3 S.C.R. 1010, para. 128)

Aboriginal communities, like all communities, often experience heated internal debate over projects of economic development. One faction may want to affirm traditional cultural values, while another may prefer the higher material standard of living that comes from greater participation in the Canadian economy. On existing Indian reserves, such debates are settled by referendum or a vote at a general meeting (Indian Act, 1985, s. 39). But this additional condition on aboriginal title may allow a losing faction to turn to the courts, arguing that the proposed economic use of land is incompatible with aboriginal identity and will prevent future generations from enjoying the land. This means more disputes to be resolved by third parties whose lack of stake in the matter may give them a certain objectivity but who are also insulated from having to live with the consequences of their decisions. More conflict, more delay, more uncertainty.

4 Doctrine on governmental infringment on Aboriginal title

Then there is the Court's doctrine of infringement, which would allow governments to override aboriginal title for economic development projects deemed essential. Former Chief Justice Lamer said in Delgamuukw:

> In my opinion, the development of agriculture, forestry, mining, and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations to support those aims, are the kinds of objectives that are consistent with this purpose and, in principle, can justify the infringement of aboriginal title. Whether a particular measure or government act can be explained by reference to one of those objectives, however, is ultimately a question of fact that will have to be examined on a case-by-case basis. ([1997]. 3 S.C.R. 1010, para. 165)

In this paragraph, Lamer refers to how government infringement of aboriginal title might be "explained", but elsewhere he talks about "justification". In other words, government will have to prove to the satisfaction of an impartial third party—the court system—that its plans for economic development are really necessary. As in the *Sparrow* test for infringement of aboriginal rights, it would be a multistage analysis patterned after the test for abridgment of Charter rights.

Such an approach leaves aboriginal title open to government incursion, for it does not distinguish public from private purposes. Chief Justice Lamer's list of potential justifications lumps infrastructure (public) together with industries such as forestry and agriculture (private) or even "the settlement of foreign populations". This is reminiscent of the American Supreme Court's *Kelo* decision (545 U.S. 469, 2005)), which has been heavily criticized by proponents of property rights because it allowed a city government to exercise the power of eminent domain to promote private economic development (Institute for Justice, n.d.).

Lamer's infringement doctrine is rather like the concept of expropriation, which operates elsewhere in the Canadian economy (Milke, 2012), except that it is governed neither by legislation nor by judicial precedent. Precedents may arise in the future now that the Supreme Court has started to recognize specific claims to aboriginal title; but up to this point disputes over use of "traditional territories" have been handled under the rubric of "consultation", given that aboriginal title to defined territories had not yet been recognized. Once a concrete jurisprudence of infringement arises, the only thing that is clear is that it will proceed "on a case-by-case basis", because no general principles yet exist to guide it. More uncertainty.

The question also inevitably arises: what will happen to existing private property rights created by the Crown in British Columbia, either fee simple or leasehold (Bains, 2014: 3)? The BC Treaty process always assumed that private property rights would be protected and that land deeded to First Nations as part of an agreement would come from Crown land. It is unclear whether that will always be true in future cases of aboriginal title awarded by the courts. Judicial recognition of aboriginal title is based upon historical evidence of occupancy and use, and it certainly seems possible that pieces of land intensively used by First Nations in the past might now be in the hands of private owners, or at least subject to leases or licenses granted by the Crown to private holders. Maybe the courts will keep such private owners whole and order the Crown to pay compensation to the First Nation; but to this, as to many other questions, we simply don't know the answer.

In the wake of *Tsilhqot'in Nation*, the Gitksan issued eviction notices to enterprises operating in their "traditional territory", including forestry companies, sport fishermen, and the CN Railway. They also organized an eight-hour blockade of the CN mainline running through Terrace to Prince Rupert, though the effort seemed more a piece of symbolism than a real attempt to block traffic (Coppin, 2014). If this or similar attempts end up in the courts, answers may emerge to questions about the status of private property rights conferred by the Crown on lands subject to claim of aboriginal title.

Consultation

Below are a few representative quotations from Chief Justice McLachlin's majority opinion in *Haida Nation* ([2004] 3 S.C.R. 511) regarding consultation with First Nations with potential claims to aboriginal title:

> Knowledge of a credible but unproven claim suffices to trigger a duty to consult and accommodate. The content of the duty, however, varies with the circumstances … A dubious or peripheral claim may attract a mere duty of notice, while a stronger claim may attract more stringent duties. (¶ 37)

> Precisely what is required of the government may vary with the strength of the claim and the circumstances. But at a minimum, it must be consistent with the honour of the Crown. (¶ 38)

> The content of the duty to consult and accommodate varies with the circumstances. Precisely what duties arise in different situations will be defined as the case law in this emerging area develops. In general terms,

> however, it may be asserted that the scope of the duty is proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed. (¶ 39)
>
> At one end of the spectrum lie cases where the claim to title is weak, the Aboriginal right limited, or the potential for infringement minor. In such cases, the only duty on the Crown may be to give notice, disclose information, and discuss any issues raised in response to the notice … At the other end of the spectrum lie cases where a strong *prima facie* case for the claim is established, the right and potential infringement is of high significance to the Aboriginal peoples, and the risk of non-compensable damage is high. In such cases deep consultation, aimed at finding a satisfactory interim solution, may be required. While precise requirements will vary with the circumstances, the consultation required at this stage may entail the opportunity to make submissions for consideration, formal participation in the decision-making process, and provision of written reasons to show that Aboriginal concerns were considered and to reveal the impact they had on the decision. This list is neither exhaustive, nor mandatory for every case … Between these two extremes of the spectrum just described, will lie other situations. Every case must be approached individually. Each must also be approached flexibly, since the level of consultation required may change as the process goes on and new information comes to light. (¶ 43–45)

Wording like this, emphasizing the phrase "vary with the circumstances", is an invitation to more litigation and judicial second-guessing because no one can possibly know in advance how the spectrum analysis will play out in specific cases. Indeed, Chief Justice McLachlin was quite aware of the problem, writing:

> This case is the first of its kind to reach this Court. Our task is the modest one of establishing a general framework for the duty to consult and accommodate, where indicated, before Aboriginal title or rights claims have been decided. As this framework is applied, courts, in the age-old tradition of the common law, will be called on to fill in the details of the duty to consult and accommodate. (¶ 11)

Many thorny questions arose out *Haida Nation*. Does the duty to consult grant First Nations a veto? Should there be consultation with individuals or only with community representatives? How should consultation be carried out when both a First Nation and a Metis group claim rights upon the same territory? What level of impact triggers the duty to consult? Is consultation only prospective or can it be used to address past grievances? To what extent

can governments delegate the duty of consultation to local governments, tribunals, regulatory commissions, or corporations? Does the duty to consult cover only the administration of lands, or does it extend to the passage of legislation affecting First Nations (Newman, 2014)?

Lower courts have gradually answered these questions, with occasional appeals to the Supreme Court to provide guidance on particularly thorny issues. Government and industry are trying to adapt to the new legal regime, learning how to consult so that projects such as mines and oil wells can still go ahead. However, it is difficult to know what is really happening on the ground because negotiations are treated as confidential.

Consultation with multiple First Nations is particularly difficult because the duty to consult was never formulated with complex, multiple consultations in mind. Courts are not legislatures; the principles that they lay down in deciding particular cases arise from the facts before them, and the cases that gave rise to the duty to consult involved individual projects affecting the traditional territory of a single First Nation.

Consider for example, a long pipeline, such as the Northern Gateway, which would cross the traditional territories of dozens of First Nations in Alberta and British Columbia. A useful pipeline has to transit all of these territories; one holdout threatens to make the whole pipeline fail. The same difficulty could arise with highways, railways, and power lines. In any large group of actors, there will always be some who see the world in different terms and will oppose what others see as the common good. Resistance from holdouts may eventually be overcome, but the delay and added expense may cause the whole project to fail.

A second problem is strategic. When many actors are involved in negotiating a bargain, everyone is tempted to hang back, waiting to see what others get, then raise the ante with new demands. This type of *n*-person Prisoner's Dilemma can drive costs so high that a project becomes uneconomic. In the wider economy, the government can use its power of expropriation to grant an easement for a utility corridor or even compel purchase of land with appropriate compensation; but such legislation, which exists in all jurisdictions, does not apply to the constitutionally entrenched aboriginal title of First Nations. The Supreme Court has repeatedly said that the duty to consult does not confer a right of veto upon First Nations and that governments can intervene to empower major economic development projects on aboriginal land. But such action would be fraught with difficulties, to say the least, because there are no legal guidelines for it. It might become a doomsday weapon that would bring political destruction upon the government that attempted to deploy it. In 2005, the Mackenzie Valley pipeline, which had been delayed for 30 years by the Berger inquiry and various land claims negotiations in the Northwest Territories, was finally ready to go forward, after TransCanada Pipelines offered the NWT native groups a one-third ownership share. But the Dene

Tha', a group of seven bands in northwestern Alberta, were still opposed, and got a ruling from the Federal Court that, in light of *Haida Nation* and *Mikisew Cree*, they had not been adequately consulted (2006 FC 1354). While the government was working through the consequences of this new delay, discoveries of shale gas across North America caused the price of natural gas to fall dramatically, and TransCanada withdrew from the project even though it received federal cabinet approval in 2011. In this instance, the demand for further consultation may have forestalled construction of a costly white elephant. Nonetheless, the saga illustrates that big projects are time-sensitive and can be rendered uneconomic by postponement. The duty to consult does not grant First Nations a veto in law, but the delays involved in consultation may approximate a veto in economic reality.

Conclusion

The Supreme Court's new jurisprudence of aboriginal title is a welcome attempt to restore aboriginal property rights that should never have been disregarded so cavalierly. Yet in carving out this new area of law, the Court has attempted to right historical wrongs without giving much consideration to economic efficiency. The result is a new set of property rights encumbered with such high transaction costs that they impede, rather than facilitate, economic activity.

Major examples of increased transaction costs

- All of the decisions rest on the doctrine of the "honour of the Crown", which is nowhere mentioned in the Canadian Constitution. This judicially created doctrine is an invitation to historical anachronism and makes the outcome of litigation hard to predict, illustrated by the number of times that the Supreme Court has overturned the decisions of lower courts on issues of aboriginal property rights.

- *Sparrow* applied only to fishing rights but its logic may legitimize aboriginal easements on property owned by the Crown and owned or leased in the private sector: fishing, hunting, trapping, picking berries, visiting sacred sites, conducting ceremonies. Every easement consumes resources in negotiating the practical details and enforcing the negotiated agreements. In effect, each easement enlarges the number of decision-makers who share control of designated tracts of land.

- *Delgamuukw* cast a shadow of uncertainty over the Crown's title to all public land in British Columbia by holding that aboriginal title still exists. *Tsilhqot'in Nation* reduced the uncertainty in a single instance by recognizing the aboriginal title of one First Nation to a particular tract of land. However, this invites future litigation by other claimants, who may see it as an alternative to working through the BC Treaty process. The cloud of uncertainty still hovers over most land in British Columbia.

- As propounded in *Delgamuukw* and *Tsilhqot'in Nation*, aboriginal title is *sui generis* and therefore difficult to interpret. It is limited in several ways (inalienability except to the Crown, collective nature, permanence, and governmental infringement) that are unique in Canadian property law, which means precedents to guide understanding are scarce.

- The extremely long delays and uncertainty surrounding aboriginal title have led the Court toward another new creation, the doctrine of consultation and accommodation, couched in such enigmatic terms—the spectrum analysis—as to invite a further cascade of litigation.

- Due to the way it came before the Court, the doctrine of consultation was framed to consider only a single First Nation and a single project. It thus gives considerable power to each of the dozens of First Nations and Metis communities that might be involved in consultations over "long, thin" infrastructure projects: pipelines, electricity corridors, railways, and roads. There is no legal veto—the Court has been clear about that—but the power to impede may come close to a veto in practice.

- In the *Mikisew* decision, the Court extended its consultation jurisprudence, originally designed for lands under claim of aboriginal title, to lands where aboriginal title had long ago been surrendered by treaty. This undermined the Crown's control of public lands in Ontario and the three prairie provinces, introducing new layers of uncertainty through multiplication of the number of decision-makers and of protected rights.

The Supreme Court's new jurisprudence of aboriginal title is now contributing to the blocking or delay of numerous major resource projects, including the export of liquid natural gas, construction of oil pipelines, and the "Ring of Fire" mining concept in Ontario. (Of course, other jurisdictional and environmental issues are also involved in all these projects.) Some may ultimately be built, but the delays are costly. At the very least, the Court's new jurisprudence has made project approval more, rather than less, difficult.

This is not a problem with a simple solution. In a polity based on constitutionalism and the rule of law, the decisions of the highest court cannot be ignored or wished away. In a practical sense, the Constitution, as Charles Evans Hughes famously said, is what the judges say it is.

Possible avenues out of the growing impasse

One is the ultimate option of extinguishment of aboriginal title through sovereign enactment, which the Supreme Court was careful to leave open in its *Delgamuukw* opinion. But the sovereign is bound by the Constitution, and § 35 of the Constitution Act, 1982, entrenches "existing aboriginal and treaty

rights". It would thus take a constitutional amendment to impose a settlement of claims to aboriginal title in British Columbia, and it is far from clear what the appropriate amending formula would be. Would each First Nation have to agree to the settlement, since the rights of each are at stake? The only safe prediction is that it would touch off a litigation bonanza beyond anything we have yet seen, so that a federal government would resort to such an initiative only in an extreme emergency.

It is also possible to create processes to clarify and structure consultation, establishing regular procedures and criteria for decision-making. The provinces have been attempting to do this through both legislation and regulation (Newman, 2014), but not without controversy. First Nations have attacked Alberta's legislation about consultation, saying they were not sufficiently consulted before its enactment (Klinkenberg, 2014). Such arguments will ultimately be settled in court. Parliament also did something similar through its omnibus bills C-38 and C-45, which streamlined the hearings procedure of the National Energy Board. But the result was further conflict, as these bills became major issues for the Idle No More movement and remain controversial among those who oppose construction, expansion, or reversal of pipelines.

Finally, the members of the judiciary could start to pay some attention to economic efficiency. In other areas of jurisprudence, the Court has not hesitated to import fundamental values. For example, it spoke in the *Secession Reference* of "underlying principles animating the whole of the Constitution, including the principles of federalism, democracy, constitutionalism and the rule of law, and respect for minorities" ([1998] 2 S.C.R. 217). Extensive research shows that these desirable values are best protected in regimes based on widely distributed property rights and a market economy (Acemoglu and Robinson, 2012). Nothing prevents the justices of the Supreme Court, or of any Canadian court, of paying some attention to these basic facts when they render decisions. The justices could make more effort to seek clarity and bright lines in their judgments rather than opting for remedies that invite further litigation. They could try to avoid increasing the number of claimants and decision-makers, while laying down more bright-line rules rather than opaque principles whose application is impossible to predict in advance. Coates and Newman (2014) have recently suggested that provincial governments might accelerate this process by submitting reference questions to provincial courts of appeal.

Canadian courts, with the Supreme Court in the lead, are creating a new jurisprudence of aboriginal title. Because it is based on § 35 of the Constitution Act, 1982, the new jurisprudence has constitutional status, and it is thus impossible for Parliament or the provincial legislatures to make amendments. The ball is in the courts' court. If they don't start giving some consideration to the economic implications of their judgments, the growth of Canada's resource industries could be seriously impeded.

References

Acemoglu, Daron, and James Robinson (2012). *Why Nations Fail: The Origins of Power, Prosperity, and Poverty*. Crown Publishers.

Allen, Edward (2013). Reflections on the 40th Anniversary of the *Calder* Decision. *Northern Public Affairs* (September): 14–21. <http://www.northernpublicaffairs.ca/index/wp-content/uploads/2014/03/Allen.pdf>.

Anderson, Terry L. (1992). *Property Rights and Indian Economies*. Rowman & Littlefield.

Anderson, Terry L. (2004). Donning Coase-Coloured Glasses: A Property Rights View of Natural Resource Economics. *Australian Journal of Agricultural and Resource Economics* 3: 445–462.

Anderson, Terry, and Dean Lueck (1992). Land Tenure and Agricultural Productivity on Indian Reservations. *Journal of Law and Economics* 35: 427–454.

Bains, Ravina (2014). National Implications for Resource Development from Supreme Court Ruling. *The Quarterly* (Fraser Institute), Fall: 2–3.

Calder et al. v. Attorney-General of British Columbia, [1973] S.C.R. 313.

Canada (1899). *Treaty 8*. <http://www.aadnc-aandc.gc.ca/eng/1100100028813/1100100028853#chp4>.

Coase, Ronald (1960). The Problem of Social Cost. *Journal of Law and Economics* 3: 1–44.

Coates, Kenneth, and Dwight G. Newman (2014). *The End Is Not Nigh: Reason over Alarmism in Analyzing the Tsilhqot'in Decision*. Macdonald-Laurier Institute (September). <http://www.macdonaldlaurier.ca/files/pdf/MLITheEndIsNotNigh.pdf>.

Coppin, Rhiannon (2014, August 6). Gitxsan First Nation says CN Rail blockade Was Just the Start of Fight over Land. *CBC News*. <http://www.cbc.ca/news/canada/british-columbia/gitxsan-first-nation-says-cn-rail-blockade-was-just-the-start-of-fight-over-land-1.2729188>.

Cullen, Nathan (2014, June 26). Cullen Welcomes Supreme Court Ruling on Tsilhqot'in First Nation Title Claim. News release. <http://www.nathancullen.com/news/article/cullen_welcomes_supreme_court_ruling_on_tsilhqotin_first_nation_title_claim>.

Curry, Bill (2011, December 14). Ottawa Proposes First Nations Property Ownership. *Globe and Mail*.

Delgamuukw v. British Columbia, [1997]. 3 S.C.R. 1010.

Dene Tha' First Nation v. Minister of Environment et al., 2006 FC 1354.

Demsetz, Harold (1968). Toward a Theory of Property Rights. *American Economic Review* 57: 347–359.

Eggertsson, Thráinn (2003). Open Access vs. Common Property. In Terry L. Anderson and Fred S. McChesney, eds., *Property Rights: Cooperation, Conflict, and Law* (Princeton University Press): 73–89.

Epstein, Richard A. (2008). *Supreme Neglect: How to Revive Constitutional Protection for Private Property*. Oxford University Press.

Flanagan, Thomas (1991). *Metis Lands in Manitoba*. University of Calgary Press.

Flanagan, Tom (2000). *First Nations? Second Thoughts*. McGill-Queen's University Press.

Flanagan, Tom, Christopher Alcantara, and André Le Dressay (2011). *Beyond the Indian Act: Restoring Aboriginal Property Rights.* McGill-Queen's University Press.

Flanagan, Tom, and Katrine Beauregard (2013). *The Wealth of First Nations: An Exploratory Study*. Fraser Institute.

Fukuyama, Francis (2011). *The Origins of Political Order: From Prehuman Times to the French Revolution*. Farrar, Strauss and Giroux.

Gibson, Gordon (2015). The Tsilhqot'in Decision and the Future of British Columbia: An Exchange between Ken Coates and Gordon Gibson. *Inroads* 36: 24–38.

Guerin v. The Queen, [1984] 2 S.C.R. 335.

Gwartney, James, Robert Lawson, and Joshua Hall (2012). *Economic Freedom of the World: 2012 Annual Report*. Fraser Institute.

Haida Nation v. British Columbia (Minister of Forests), [2004] 3 S.C.R. 511.

Hayek, Friedrich (1945). The Use of Knowledge in Society. *American Economic Review* 35: 519–530.

Horowitz, Donald L. (1977). *The Courts and Social Policy*. Brookings.

Indian Act, R.S.C., 1985, c. I-5.

Institute for Justice (n.d.). Kelo v. New London*: Lawsuit Challenging Eminent Domain Abuse in New London, Connecticut*. <http://www.ij.org/kelo>.

Kelo v. City of New London, 545 U.S. 469 (2005).

Klinkenberg, Marty (2014, August 28). First Nations Chiefs Boycott Alberta Government over Consultation Plan. *Edmonton Journal*. <http://ecocidealert.com/?p=7138> as August 30, 2014.

Manitoba Metis Federation Inc. v. Canada (Attorney General), [2013] 1 S.C.R. 623.

McHugh, Paul (2011). *Aboriginal Title: The Modern Jurisprudence of Tribal Land Rights*. Oxford University Press.

Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage), [2005] 3 S.C.R. 388, 2005 SCC 69.

Milke, Mark (2012). *Stealth Confiscation: How Governments Regulate, Freeze and Devalue Private Property—without Compensation*. Fraser Institute.

Morris, Alexander (1979). *The Treaties of Canada with the Indians*. Coles reprint.

Newman, Dwight G. (2014). *Revisiting the Duty to Consult Aboriginal Peoples*. Purich Publishing.

Reference re Secession of Quebec, [1998] 2 S.C.R. 217.

R. v. Badger, [1996] 1 S.C.R. 771.

R. v. Powley, [2003] 2 S.C.R. 207, 2003 SCC 43.

R. v. Sparrow, [1990] 1 S.C.R. 1075.

Ross, Michael Lee (2005). *First Nations Sacred Sites in Canada's Courts*. University of British Columbia Press.

Simmons, Randy T. (2011). *Beyond Politics: The Roots of Government Failure*. The Independent Institute.

Slattery, Brian (1979). The Land Rights of Indigenous Canadian Peoples, as Affected by the Crown's Acquisition of Their Territories. Ph.D dissertation, Oxford University.

Slattery, Brian (2000). Making Sense of Aboriginal and Treaty Rights. *Canadian Bar Review* 79: 196–124.

St. Catherines Milling and Lumber Company v The Queen, [1888] UKPC 70.

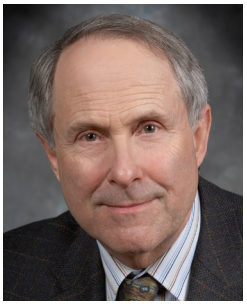
Sowell, Thomas (1999). *The Quest for Cosmic Justice*. Simon and Schuster.

Taku River Tlingit First Nation v. British Columbia (Project Assessment Director), [2004] SCC 74.

Tennant, Paul (1990). *Aboriginal Peoples and Politics: The Indian Land Question in British Columbia, 1849–1989*. University of British Columbia Press.

Tsilhqot'in Nation v. British Columbia, 2014 SCC 44.

About the Author



Tom Flanagan

Tom Flanagan received his B.A. from Notre Dame and his M.A. and Ph.D.. from Duke University. He taught political science at the University of Calgary from 1968 until retirement in 2013. Dr. Flanagan is now Professor Emeritus of Political Science and Distinguished Fellow, School of Public Policy, University of Calgary, as well as the Chair, Aboriginal Futures, at the Frontier Centre for Public Policy. He is the author of many books and articles on topics such as Louis Riel and Metis history, aboriginal rights and land claims, Canadian political parties, political campaigning, and applications of game theory to politics. His books have won six prizes, including the Donner-Canadian Prize for best book of the year in Canadian public policy. He was elected to the Royal Society of Canada in 1996. Dr. Flanagan has also been a frequent expert witness in litigation over aboriginal and treaty land claims. In the political realm, he managed Stephen Harper's campaigns for leadership of the Canadian Alliance and the Conservative Party of Canada, the 2004 Conservative national campaign, and the 2012 Wildrose Alberta provincial campaign.

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