

CRRF facts about...

Leading Aboriginal Rights Cases

Introduction

On April 17, 1982 the Constitution Act, 1982 became part of the Canadian Constitution. One of the provisions, section 35, states that "the existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed." This was a significant statement. Although the Canadian Constitution has long recognized the collective rights of religious and linguistic minorities, never before in Canadian history had it been made so clear that the Indian, Inuit and Métis peoples also had constitutional rights that the federal and provincial governments must respect.

In fact, for many decades before 1982, Canadians seemed to have forgotten that from the first moments of contact between European explorers, traders and settlers, the rights of the Aboriginal peoples to control their lands and to enter into solemn agreements called treaties had been a cornerstone of their relationship. Referring to that long period of forgetfulness, the Supreme Court noted in the landmark Sparrow Case that "for many years the rights of the

Indians to their Aboriginal lands – certainly as legal rights – were virtually ignored" and that "by the late 1960s, aboriginal claims were not even recognized by the federal government as having any legal status."

This has now changed, thanks in part to the court rulings that have given shape to the rights referred to in section 35. However, section 35 did not create Aboriginal and treaty rights, it merely recognized and affirmed their existence. These rights have their origin in the many centuries of mutual accommodation between Aboriginal and non-Aboriginal societies and are reflected in the special historical relationship between the "Crown" (the government as symbolically represented by the person of the monarch) and Aboriginal peoples. That special relationship is also reflected in the treaties that are discussed in *CRRF Facts About... Leading Treaty Rights Cases*, and in concepts such as the fiduciary obligation that will be discussed below.

Leading Cases

- St. Catherine's Milling and Lumber Co. v. The Queen (1888)
- Reference re: Term "Indians" (1939)
- Calder v. Attorney-General of British Columbia (1973)
- Guerin v. The Queen (1984)
- Sparrow v. The Queen (1990)
- Sioui v. The Queen (1990)
- Van der Peet v. The Queen (1996)
- Delgamuukw v. British Columbia (1998)

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Historical Context

When Europeans came to North America they brought with them their own notions of social and political organization. For example, in British legal theory the Crown was the supreme political authority as well as the ultimate owner of all land. All rights and titles to land held by British subjects were therefore less than absolute and capable of being taken back by the Crown under certain circumstances. When done forcibly, it was known as "expropriation". When done voluntarily, it was referred to as "surrender".

In other contexts, such as the Indian Act and its colonial precedents (discussed in *CRRF Facts About... The*

Indian Act) the newcomers attempted to impose their ideas on Aboriginal peoples. However, when it came to dealings involving land, the fact that Aboriginal peoples were already organized in their own self-governing societies and occupying and using the land forced the newcomers to adapt their preconceived notions to the reality before them.

Despite the claims of the British Crown to be the absolute political authority and landowner in Canada, Aboriginal peoples did not necessarily see themselves as

Crown subjects like British citizens. Instead, they were nations in their own right, and as such were British allies, trading partners and sometimes enemies. In the *1990 Sioui Case*, the Supreme Court of Canada recognized this, noting that "both Great Britain and France felt that Indian nations had sufficient independence and played a large enough role in North America for it to be good policy to maintain relations with them very close to those maintained between sovereign nations."

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This meant that British legal theory had to be adapted. In 1763 King George III issued a Royal Proclamation guaranteeing protection for the lands of the Aboriginal nations and tribes

with which the British Crown was connected. If Aboriginal peoples wished to dispose of their land, it could only be through a voluntary cession or "surrender" to the Crown. The Crown would then act on their behalf and carry out the sale or lease of their land on terms favourable to them. In short, the Crown guaranteed Aboriginal peoples that their land would be taken from them neither by force nor by fraud.

Following this, the Crown entered into a series of treaties under which it purported

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to purchase the traditional territories of Aboriginal peoples in exchange for Crown protection and treaty benefits. The Royal Proclamation of 1763 was a milestone in relations between Aboriginal and non-Aboriginal peoples and was later referred to by one Supreme Court judge as the Indian Bill of Rights and by another as being analogous to the Magna Carta.

The Crown promises in the Royal Proclamation were discussed in the **1888 *St. Catherine's Milling Case***. This case involved a vast area of land that both the federal and Ontario governments claimed following the signing of Treaty Three with the Anishnabeg (Ojibway) of north-western Ontario. Ultimately the dispute between the two governments was taken to the Privy Council in England – at that time Canada's highest appeal tribunal.

The ***St. Catherine's Milling Case*** is important because it attempted to clarify the nature of the title held by Aboriginal people in their traditional land. Despite its impact on their rights, however, Aboriginal peoples were not represented when the case was argued and the Privy

Council ended up interpreting the Royal Proclamation of 1763 on the basis of European ways of thinking.

Thus, it was simply assumed that the British Crown had title and sovereignty over the traditional territory of the Aboriginal peoples even before the actual treaty was signed. Aboriginal title was

described not as a constitutional right, but rather as a "burden" on the underlying Crown title whose existence was "dependent on the good will of the Sovereign." Moreover, from this Euro-centric viewpoint the Privy Council conceived of Aboriginal title as a mere right to occupy and use the land, rather than as a legal right of ownership.

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Following this rather cursory treatment of Aboriginal land rights, Canada entered into the period described by the Supreme Court when

Aboriginal rights were overlooked by governments. From 1896 on, official Canadian policy was to populate Canada with immigrants while forcing Aboriginal peoples to assimilate into mainstream society. During this time First Nations were subject to repressive measures

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under the Indian Act that hindered them from maintaining their languages, cultures and traditional governments. In fact, from 1927 until 1951 it was a crime for anyone to be paid to assist Indians to advance their land claims.

During this same period the Métis people, who had helped create the province of Manitoba in 1870, found themselves relegated to the margins of western Canada's economic and social development due to the federal government's refusal to provide them with a collective land base in accordance with the objectives of the Manitoba Act. Even today, the federal government continues to deny constitutional responsibility for the Métis as an Aboriginal people. In the same way, the federal government left the Inuit largely in the hands of the churches and missionary societies until the 1939 Supreme Court ruling in Reference re: Indians that Inuit were a federal constitutional responsibility.

During this period Aboriginal peoples were not idle in attempting to uphold their rights. In the early twentieth century organizations like the League of Indians of Canada were formed to advance First Nation perspectives and grievances, but were hampered by internal divisions and Canada's reluctance to release band funds to assist First Nations' delegates to meet. In 1913 the

Nisga'a people of British Columbia petitioned the Privy Council to recognize their rights to their traditional territory. In 1927 a number of west coast First Nations made similar arguments to a special Parliamentary committee which denied that British Columbia First Nations had any form of Aboriginal title.

In Ontario, the Haudenosaunee (Iroquois Confederacy) resisted the attempts of the federal government to replace their hereditary form of government. Throughout the 1920s they petitioned Parliament, the Privy Council and the British Colonial Office without success to recognize their status as allies and not as Crown subjects and

tried to have the League of Nations examine their complaints about Canada's treatment of them.

Contemporary Context

After so long a period during which the contributions, rights and historical relationship between the Crown and Aboriginal peoples were almost completely forgotten, it was perhaps not surprising in 1969 when the federal government issued a White Paper proposing to end both the special status of Indians and the treaty relationship. Shortly after the White Paper was withdrawn in the face of a massive outcry by First Nations, the long period of national forgetfulness came to an end with the Supreme Court decision in the *1973 Calder Case*. This

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case was advanced by the Nisga'a people who had not ceased to press for recognition of their land rights. Both the federal and provincial governments argued that the Nisga'a had no rights to the land they had been occupying for thousands of years. A majority of the Supreme Court agreed with the First Nation that the legal concept of Aboriginal title at the heart of the Royal Proclamation of 1763 was not a mere historical curiosity. Where the Court disagreed was on the question of whether the Crown still had an obligation to deal with it in British Columbia. Nonetheless, Canada immediately changed its policy regarding Aboriginal title and began negotiations with the Nisga'a that culminated in the signing of the Nisga'a Treaty in the year 2000.

Prior to 1982, little thought had been given by the federal government to how it was managing Indian reserve land. That changed in 1984 with the Supreme Court decision in *Guerin v. the Queen*. In the 1950s a Vancouver golf club became interested in acquiring part of the Musqueam reserve. Since the Indian Act forbids direct land dealings with Indians, the club approached the Department of Indian Affairs for a lease.

Although the land involved was very valuable, the Department failed to negotiate an adequate price or to obtain reasonable concessions from the golf club. Moreover, the Department also failed to follow the Band's instructions and, when pressed by the Musqueam for details of the lease, deliberately withheld information from them. Frustrated, the

Musqueam took the Department to court where the federal government argued that it had no legal responsibility whatsoever for the poor job it had done on their behalf.

The Supreme Court easily disposed of this argument. It ruled that when the federal government acts on behalf of Aboriginal peoples in situations where they cannot legally act for themselves and are therefore vulnerable to the government's discretionary power, it takes on a responsibility in law to act in their best interests and to perform the task adequately. In short, it has what is referred to as a fiduciary responsibility based on the promise of protection of their lands that it assumed in the Royal Proclamation of 1763 and which it re-affirmed in the surrender provisions of the Indian Act.

In *Guerin* the Court also clarified the nature and origin of the title that Aboriginal peoples have to their lands. It is not – as the Privy Council had implied in *St. Catherine's Milling* – a simple privilege that was granted in the Royal Proclamation of 1763. Rather, it is a true legal right arising from the occupation of the lands by Aboriginal peoples before the arrival of Europeans. The Royal Proclamation of 1763 did not create Aboriginal title, it merely reflected it.

Following the *Guerin Case* the federal government revised its procedures for dealing with Indian reserve lands. However, it gave little thought to Aboriginal rights to traditional Indian lands and continued, for example, to

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enforce federal fishing regulations against Indians outside their reserve boundaries. In 1984 the federal government and the Musqueam again found themselves in court when Ronald Sparrow was convicted of fishing outside the reserve with a net larger than what was allowed under the Musqueam fishing license. He argued that he was not bound by the federal restrictions because they unduly interfered with the Musqueam right to fish under section 35 of the Constitution Act, 1982.

In 1990 the Supreme Court overturned his conviction in *Sparrow v. the Queen*, making it clear that section 35 imposes limits on government power to make laws that limit or infringe Aboriginal rights. Government must have a valid reason (such as conservation) for passing such a law, must respect its fiduciary obligation by properly allocating the resource between Aboriginal peoples and other Canadians, and may be required to minimize the infringement, pay compensation and consult with Aboriginal peoples regarding how the right is to be respected. Since none of these things had been done, the Court sent the matter back for a retrial.

The *Sparrow Case* is important because the Court set out a test for proving Aboriginal rights. Activities covered by section 35, such as hunting or fishing, for example, must be integral to the distinctive culture of the Aboriginal group claiming the right, be grounded in practices that arose prior to contact with Europeans, and not have been abandoned or have been extinguished by the actions of government prior to 1982. Once Aboriginal rights are proven, however, they may be exercised in a modern form using contemporary means such as firearms, powerboats and ski-doo.

In the *1996 Van der Peet Case*, the Court examined the broader constitutional purpose behind section 35, and concluded that "the Aboriginal rights recognized and affirmed by section 35(1) must be directed towards the reconciliation of the pre-existence of Aboriginal societies with the sovereignty of the Crown." In this context, and given that Aboriginal peoples maintained an oral system of transmitting knowledge between generations, the Court urged lower courts to place less emphasis on written sources of information when assessing Aboriginal rights claims. Otherwise, Aboriginal peoples would be deprived of their ability to prove their

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rights in the courts maintained by the Crown.

The Court returned to this theme in *Delgamuukw v. British Columbia* where a retrial was ordered partly because the trial judge had not properly assessed the oral evidence presented by the Gitksan and Wet'suwet'en peoples. Frustrated by the long delays in having their land rights addressed, they had sought a court declaration that they were the owners and the governing authority over their traditional lands.

They based much of their case on the testimony of their elders as to the nature and history of their society, the extent of their territories, and how they used their land and resources. Once again, the Supreme Court emphasized the importance to Aboriginal peoples of their oral traditions and called upon lower courts to give oral evidence more respect. Often it is the only form of proof available to Aboriginal peoples, especially with regard to their practices and traditions prior to the arrival of Europeans.

Building on its decision in the *Guerin Case*, the Court noted that Aboriginal title is more than the mere ability to use the land, it is a right to the land itself. Any infringements by government of Aboriginal rights and title must therefore be justified and ought in certain circumstances to be compensated. However, in keeping with the theme of reconciliation,

the Court noted that Aboriginal societies exist within the broader context of the Canadian state. Activities such as agriculture, settlement, economic development, conservation and the like may be justifiable, so long as Aboriginal peoples have some say in how such things are done within their traditional territories.

According to the Court, Aboriginal title allows Aboriginal peoples to use their lands in contemporary ways so long as they do not destroy its usefulness for future generations of their own people. Finally, because Aboriginal title is one among many Aboriginal rights, even where Aboriginal peoples cannot prove title, they may still be able to prove the existence of rights either across all of their traditional lands or in specific sites such as fishing stations where particular Aboriginal practices occurred.

In its concluding observations, the Supreme Court in *Delgamuukw* noted its preference to see Aboriginal peoples and governments in Canada negotiate rather than litigate Aboriginal rights. The Court also emphasized that any such negotiations must be conducted in good faith. Enlarging on its statement in the *Van der Peet Case*, the Court observed that this is the only way to bring about the reconciliation of pre-existing Aboriginal societies with Crown sovereignty. "Let's face it", said the Court, "we are all here to stay."

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Useful Sources of Further Information

Websites

Bill Henderson's Virtual Law Office: www.bloorstreet.com/lawoff.htm

Indian Claims Commission: www.indianclaims.ca

Indian and Northern Affairs Canada: www.inac.gc.ca

Indigenous Bar Association: www.indigenousbar.ca

Supreme Court of Canada: www.droit.umontreal.ca

Native Links: www.johnco.com

Printed Materials

J.R. Miller, *Skyscrapers Hide the Heavens: A History of Indian-White Relations in Canada* (Toronto: University of Toronto Press, 1989)

Olive Dickason, *Canada's First Nations: A History of the Founding Peoples from Earliest Times* (Toronto: McLelland and Stewart Inc., 1992)

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

Bradford Morse, ed., *Aboriginal Peoples and the Law: Indian, Metis and Inuit Rights in Canada* (Ottawa: Carleton University Press, 1989)

Brian Titley, *A Narrow Vision: Duncan Campbell Scott and the Administration of Indian Affairs* (Vancouver: University of British Columbia Press, 1986)