



# Aboriginal Rights and Title



What are Aboriginal Rights and Title?

Aboriginal Rights, which are separate from Treaty Rights, are the practices, customs and traditions unique to First Nations that First Nations participated in prior to contact with Europeans.<sup>1</sup> Aboriginal Rights, such as the right to hunt and fish, are constitutionally protected and can not be extinguished by any government.

Aboriginal Title, which is an Aboriginal Right, is the right to the land itself. Aboriginal Title is a communal right and although the Royal Proclamation states that it can only be given up to the Crown through Treaty negotiations many First Nations maintain that the Treaties are land sharing agreements not land cessions.

Philosophical Understandings of  
Aboriginal Rights

Aboriginal Rights have gone through a growth process since the Royal Proclamation of 1763, “but the nature and extent of Aboriginal Rights, and where they exist, are still very much open to questions.”<sup>2</sup> However, this growth process has not resulted in a common or clear definition of what Aboriginal Rights are. In fact, Aboriginal groups and the Government of Canada continue to dispute even the most basic philosophical understanding of what Aboriginal Rights are based upon. Aboriginal peoples believe that Aboriginal Rights are given to them by the Creator as a result of the relationship that they have with the land.<sup>3</sup> Aboriginal peoples do not see their rights as originating from the Royal Proclamation or as “something granted to them by an alien legal system.”<sup>4</sup> Instead, Aboriginal peoples take the view that the Royal

Proclamation recognizes and affirms Aboriginal Title because it stated that all lands not already owned by the British Crown belonged to Aboriginal peoples. Furthermore, the Royal Proclamation stated that only the Crown could acquire Aboriginal lands legally.<sup>5</sup> Aboriginal peoples see their rights as being inherent, collective and well-defined, encompassing such areas as land ownership, education and the right to self-government.<sup>6</sup> The Government of Canada, though, takes a different view on the nature and content of Aboriginal Rights.

Treaty 4 Elder Dolly Neapetung:

*“The Creator gave us a way of life and language by which we could speak to one another and speak to Him and give meaning to everything around us, to help us understand the world and other people, our relatives...God gave us this land. We own it as people, as a nation.*

- Quoted in Harold Cardinal and Walter Hildebrandt, *Treaty Elders of Saskatchewan*, (Calgary: University of Calgary Press, 2000), 5.

The Government of Canada’s view of Aboriginal Rights is influenced by the fact that there is a “lack of specificity”<sup>7</sup> about what the nature and content of Aboriginal Rights are. Both Canadian law and Section 35 of the Constitution do little to help clarify what exactly Aboriginal Rights are.<sup>8</sup> The stance of the Federal Government in regards to title of the land is that they have the underlying title to all the land in Canada and that this “includes the jurisdiction to govern the land in question.”<sup>9</sup> The Federal Government feels that Aboriginal Title is a property right and a “burden on Crown title.”<sup>10</sup> In the eyes of the Federal Government, Aboriginal peoples do not have



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outright ownership of the land. The Federal Government also sees Aboriginal Rights as common law rights that can be restricted by government legislation at any time if the legislation passes the tests that were laid out in the Sparrow case.<sup>11</sup> Aboriginal peoples and the Federal Government have very differing views on the nature, content and origin of Aboriginal Rights, even at the most basic and philosophical level.

## The Evolution of Aboriginal Rights Through the Courts

Since the Calder decision in 1973, the courts of Canada have had several opportunities to give a clear definition on the origin and content of Aboriginal Rights, but have repeatedly failed to do so.<sup>12</sup> However, the courts have “shaped and defined”<sup>13</sup> Aboriginal Rights over the last thirty years and this has had serious implications for Aboriginal peoples and the Government of Canada.

One of the first cases in Canadian law to attempt to deal with Aboriginal Rights was the St. Catherines Milling case of 1888. The Privy Council of England ruled in this case that Aboriginal Rights were less important than provincial rights, that the Crown could extinguish those rights unilaterally and that title to the land ultimately rested in the Crown’s hands.<sup>14</sup> The Privy Council did believe that a restricted level of Aboriginal Rights existed, that First Nations had usufructory rights, or the right to use an occupancy of the land, which was ultimately “dependant on the goodwill of the Sovereign.”<sup>15</sup> After the St. Catherines Milling case, the Calder case was the next case that dealt with Aboriginal Rights some, 80 years later. This long gap of time between court

cases was because of an amendment to the *Indian Act* that prohibited First Nations from using the courts to press any claims to land.

In 1980, a group of Inuit in the Baker Lake region of the Northwest Territories took the government to court in order to get a declaration that a tract of land belonged to them.<sup>16</sup> The result of this trial was the establishment of a test to determine whether First Nations or Inuit held Aboriginal Title to a particular area of land.<sup>17</sup> These tests were adopted by the Federal Government and meant that First Nations and Inuit had to pass the “Baker Lake Test” in order for a Aboriginal Title claim to be accepted and negotiated. Under the Baker Lake test, First Nations and Inuit had to meet several criteria including the following:

- that their ancestors were part of an organized society and that they continue to be part of one to this day;
- that they had exclusive occupation over a specific territory, which they claim Aboriginal Title to;
- and they also had to prove that, at the time Europeans claimed sovereignty, it was “an established fact”<sup>18</sup> that they occupied the specific tract of land they were claiming.

In 1985, the Guerin ruling stated that Aboriginal Rights were unique or “*sui generis*” because using general property law descriptions were “somewhat inappropriate.”<sup>19</sup>

The Sparrow case of 1990 ruled that Aboriginal Rights were constitutionally protected, that those rights could only be extinguished with First Nations consent, that Aboriginal Rights could only be limited with justifiable reasons and that Aboriginal Rights had to be interpreted in a “generous and liberal manner.”<sup>20</sup>



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Various other cases, such as the Gladstone and Marshall cases, have also looked at the issue of Aboriginal Rights and have attempted to give a clearer definition of them.

The most important decision concerning Aboriginal Rights and Title came in 1997 when the Delgamuukw decision was handed down by the Supreme Court of Canada. The Delgamuukw decision though, also shows how divisive the opinions are on the origin and content of Aboriginal Rights and Title. In the 1980s the Gitskan and Wet'suwet'en went to court to prove that, since they had never concluded a Treaty with the Crown, they still possessed Aboriginal Title to their traditional lands.<sup>21</sup> In 1997, the Supreme Court acknowledged that Aboriginal Title still exists in British Columbia and that "this right includes the right to the land itself, not just the right to use the land for traditional purposes."<sup>22</sup> The Supreme Court also stated that First Nations not only had the right to harvest traditional resources, but also stated that they could use "resources for contemporary purposes."<sup>23</sup> The Delgamuukw decision also declared that oral history should be accepted as a legitimate form of testimony. The Supreme Court also outlined the tests that Aboriginal groups had to pass in order to prove they possessed Aboriginal Title to the land they occupied.<sup>24</sup> The tests laid out in Delgamuukw are far less severe than what was required previously from the Baker Lake case, but the burden still lies solely on the Aboriginal group to prove that they have Aboriginal Title to the land. Aboriginal groups have to demonstrate that they had "exclusive use and occupancy and, perhaps, continual use and occupancy"<sup>25</sup> since Europeans claimed sovereignty in North America in order to claim they maintain Aboriginal title to the land.

## End Notes

- <sup>1</sup> British Columbia Treaty Commission. *Aboriginal Rights*. <<http://www.bctreaty.net/files/aboriginal-rights.html>>
- <sup>2</sup> Tom Molloy. *The World is Our Witness: The Historic Journey of the Nisga'a into Canada*. (Calgary: Fifth House Ltd, 2000) 111.
- <sup>3</sup> Michael Asch and Norman Zlotkin "Affirming Aboriginal Title: A New Basis for Comprehensive Land Claims." In *Aboriginal and Treaty Rights: Essays on Law, Equality and Respect for Differences*. Michael Asch ed. (Vancouver: UBC Press, 1997) 215.
- <sup>4</sup> Ibid.
- <sup>5</sup> Molloy 217.
- <sup>6</sup> Asch and Zlotkin 215.
- <sup>7</sup> Asch and Zlotkin 212.
- <sup>8</sup> Ibid.
- <sup>9</sup> Ibid.
- <sup>10</sup> Ibid.
- <sup>11</sup> Asch 213.
- <sup>12</sup> Kent McNeil. "The Meaning of Aboriginal Title." In *Aboriginal and Treaty Rights: Essays on Law, Equality and Respect for Differences*. Michael Asch ed. (Vancouver: UBC Press, 1997) 135.
- <sup>13</sup> Ken Coates. *The Marshall Decision and Native Rights*. (Montreal: McGill-Queen's University Press, 2000) 81.
- <sup>14</sup> Jim R. Miller. "Great White Father Knows Best: Oka and the Land Claims Process." In *Out of the Background: Readings On Canadian Native History*. Ken Coates and Robin Fisher ed. (Toronto: Irwin Publishing, 1998) 378.
- <sup>15</sup> Miller 377.
- <sup>16</sup> Ray, Arthur J. *I Have Lived Here Since the World Began: An Illustrated History of Canada's Native People*. (Toronto: Lester Publishing Ltd. and Key Porter Books, 1996) 348.
- <sup>17</sup> Molloy 118.
- <sup>18</sup> Molloy 119.
- <sup>19</sup> McNeil 143.
- <sup>20</sup> Coates 89.
- <sup>21</sup> Coates 90.
- <sup>22</sup> Molloy 96.
- <sup>23</sup> Coates 91.
- <sup>24</sup> Molloy 97.
- <sup>25</sup> Coates 91.