ABORIGINAL LAW IN THE CONTEXT OF REGULATORY PROSECUTIONS

Cheryl Sharvit

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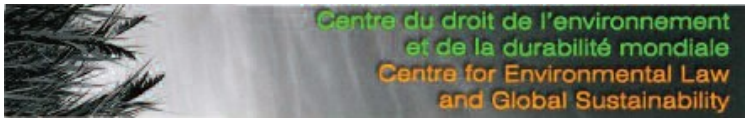

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> The history of the interface of Europeans and the common law with aboriginal peoples is a long one. As might be expected of such a long history, the principles by which the interface has been governed have not always been consistently applied. Yet running through this history, from its earliest beginnings to the present time is a golden thread — the recognition by the common law of the ancestral laws and customs of the aboriginal peoples who occupied the land prior to European settlement. …
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> Most recently in *Mabo*, the Australian High Court, after a masterful review of Commonwealth and American jurisprudence on the subject, concluded that the Crown must be deemed to have taken the territories of Australia subject to existing aboriginal rights in the land, even in the absence of acknowledgment of those rights. As Brennan J. put it at p. 58: "an inhabited territory which became a settled colony was no more a legal desert than it was 'desert uninhabited' …." Once the "fictions" of *terra nullius* are stripped away, "[t]he nature and incidents of native title must be ascertained as a matter of fact by reference to [the] laws and customs" of the indigenous people. …
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> This much is clear: the Crown, upon discovering and occupying a "new" territory, recognized the law and custom of the aboriginal societies it found and the rights in the lands they traditionally occupied that these supported. …
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> … It follows that the Crown in Canada must be taken as having accepted existing native laws and customs and the interests in the land and waters they gave rise to, even though they found no counterpart in the law of England. In so far as an aboriginal people under internal law or custom had used the land and its waters in the past, so it must be regarded as having the continuing right to use them, absent extinguishment or treaty.[1]

R. v. Van der Peet, the case which set out the test for proving an Aboriginal right, like most of the cases in which the law regarding Aboriginal title, Aboriginal rights and Treaty rights has been developed in Canada, was a regulatory prosecution. The defendant, Dorothy Van der Peet, was charged with a *Fisheries Act* offence, as were the defendants in several of the other leading cases on Aboriginal rights.[2] Other cases in which the principles and tests applicable to section 35 of the *Constitution Act, 1982* have been established have stemmed from hunting charges and charges laid for logging without permits.[3] Aboriginal individuals, believing that they were practicing their rights under their own laws as they have always done, found themselves being charged with offences under Crown legislation. They raised their Aboriginal and treaty rights as defences to the charges. Few of the Aboriginal rights, Aboriginal title and treaty rights cases have been brought as civil actions commenced by the Indigenous rights holders.[4]

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[1] *R v Van der Peet*, [1996] 2 SCR 507 [*Van der Peet*] at paras 263, 265, 268 and 269 (emphasis added).

[2] See, for example, *R v Sparrow*, [1990] 1 SCR 1075 [*Sparrow*]; *R v Gladstone*, [1996] 2 SCR 723 [*Gladstone*]; *R v Adams*, [1996] 3 SCR 101; and *R v Côté*, [1996] 3 SCR 139.

[3] See, for example, *R v Sioui*, [1990] 1 SCR 1025; *R v Badger*, [1996] 1 SCR 771 [*Badger*]; *R v Sundown*, [1999] 1 SCR 393; *R v Marshall*; *R v Bernard*, 2005 SCC 43 [*Bernard*]; and *R v Morris*, 2006 SCC 59 [*Morris*].

[4] The most notable cases which have been commenced by Indigenous peoples as civil actions involve Aboriginal title claims: *Calder v Attorney-General of British Columbia*, [1973] SCR 313; *Delgamuukw v*

This paper does not discuss the tests for proof of rights protected under subsection 35(1) and the analysis and tests developed and applied by the courts for determining whether a right protected by subsection 35(1) has been unjustifiably infringed.[5] The paper will address two interrelated issues: are regulatory prosecutions the appropriate forum for working out these issues, and what is the role of Indigenous peoples' laws and legal systems, which, as noted by then Justice McLachlin in the above-quoted excerpts from *Van der Peet*, pre-existed and survived the Crown's assertion of sovereignty over what is now Canada? The paper concludes with a consideration of the role of the courts in bridging the gap between Indigenous and settler legal systems.

INDIGENOUS LAWS AND LEGAL SYSTEMS EXIST AND ARE CONSTITUTIONALLY PROTECTED

While Justice McLachlin was dissenting in *Van der Peet*, since its first decision on section 35 of the *Constitution Act, 1982* in *R. v. Sparrow*, the Supreme Court of Canada has consistently identified as a key principle of Aboriginal law, the requirement to incorporate the Aboriginal perspective,[6] including Indigenous legal systems.[7] In *Van der Peet*, the majority judgment adopted Professor Slaterry's characterization of Aboriginal rights as intersocietal law, and held that reconciliation requires that equal weight be placed on the common law and the Aboriginal perspective, which includes Indigenous peoples' laws.[8] Similarly, in *Delgamuukw*, the Court confirmed that Aboriginal title is sourced in part from pre-existing systems of Aboriginal law.[9] The Court held that Indigenous laws regarding land tenure and land use are relevant in establishing occupation of lands for the purpose of proving Aboriginal title.[10]

These principles flow from the law which governed the British Crown in colonial times. The principle of continuity provided that pre-existing rights under local law continued

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British Columbia, [1997] 3 SCR 1010 [*Delgamuukw*]; and *William v. British Columbia*, 2012 BCCA 285 (leave to appeal to the Supreme Court of Canada granted on 24 January 2013. The Lax Kw'alaams pled both Aboriginal title and fishing rights, but the Aboriginal title issues were severed: *Lax Kw'alaams Indian Band v Canada (Attorney General)*, 2006 BCSC 1463. The case was decided on the basis of the Aboriginal rights claims: *Lax Kw'alaams Indian Band v Canada (Attorney General)*, 2011 SCC 56 [*Lax Kw'alaams*].

[5] The leading cases on treaty rights include: *Morris*, *supra* note 3; *R v Marshall*, [1999] 3 SCR 456; and *Badger*, *supra* note 3. The cases setting out the tests and analysis under section 35 in the context of Aboriginal rights include: *Van der Peet*, *supra* note 1; *R v Sappier*, 2006 SCC 54 [*Sappier*]; and *Gladstone*, *supra* note 2. The leading decisions on Aboriginal title are *Delgamuukw*, *supra* note 4; and *R v Marshall*; *Bernard*, *supra* note 3. While this is not an exhaustive list of Supreme Court of Canada jurisprudence on these issues, it is worth noting that all of these cases, other than *Lax Kw'alaams* and *Delgamuukw*, began as regulatory prosecutions.

[6] *Sparrow*, *supra* note 2 at para 69.

[7] *Delgamuukw*, *supra* note 4 at para 147.

[8] *Van der Peet*, *supra* note 1 at paras 42 and 49-50.

[9] *Delgamuukw*, *supra* note 4 at paras 114, 145 and 147.

[10] *Delgamuukw*, *ibid* at para 148.

after the Crown asserted of sovereignty over lands occupied by Indigenous peoples.[11] As noted by the Supreme Court of Canada in *Mitchell*,[12] Aboriginal laws survived the assertion of sovereignty and were absorbed into the common law as rights. Those rights now receive constitutional protection under section 35 of the *Constitution Act, 1982*. In *Campbell*, Justice Williamson of the British Columbia Supreme Court held that section 35 protects the right of Indigenous peoples holding Aboriginal title "to make decisions as to the use of the land and therefore the right to have a political structure for making those decisions …"[13] Where there are treaties, the Indigenous signatories arguably did not surrender their jurisdiction over natural resources.[14]

Chief Justice Finch of British Columbia's Court of Appeal has recently urged judges, the legal profession and society to learn about Indigenous laws and legal systems and make space for the operation of Indigenous legal orders.[15] In his words, "the current legal system must reconcile itself to co-existence with pre-existing Indigenous legal orders."[16] Professor Jeannette Armstrong refers to the recognition Indigenous legal traditions and collaboration between the Crown and Indigenous governments as a shift towards "bio-justice".[17]

Indigenous laws include land tenure systems and rules governing the use land and resources. These Indigenous laws need to be recognized and integrated into resource management in Canada. One result would be fewer prosecutions of Indigenous individuals taking part in traditional resource use practices. What might be labelled and prosecuted as an "offence" when considered from the perspective of Canadian and provincial laws, might, when considered from the Indigenous perspective, be an exercise of an Aboriginal right, in compliance with the Indigenous legal system. The Indigenous legal system is likely to have its own rules for taking care of the lands and resources. Two

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[11] K McNeil, *Common Law Aboriginal Title* (Oxford: Clarendon Press, 1989) at 171-179; M Walters, "British Imperial Constitutional Law and Aboriginal Rights: A Comment on *Delgamuukw v British Columbia*" (1992) 17 Queen's LJ 350 at 407-409; RL Barsh, "Indigenous Rights and the *Lex Loci* in British Imperial Law" in Kerry Wilkins, ed, *Advancing Aboriginal Claims: Visions/Strategies/Directions* (Saskatoon: Purich Publishing, 2004) at 91.

[12] *Mitchell v MNR*, 2001 SCC 33 at para 10.

[13] *Campbell v British Columbia*, 2000 BCSC 1123 at para. 137. This case also held that sections 91 and 92 of the *Constitution Act, 1867*, are only exhaustive as between the provinces and the federal government.

[14] See KL Ladner, "Up the Cree: Fishing for a New Constitutional Order" (2005) 38 Canadian Journal of Political Science 923-953, esp at 924 and 943-944; KL Ladner, "Treaty Federalism: An Indigenous Vision of Canadian Federalisms" in F Rocher & M Smith, eds, *New Trends in Canadian Federalism*, 2d ed (Peterborough: Broadview Press, 2003).

[15] Chief Justice Lance SG Finch, "The Duty to Learn: Taking Account of Indigenous Legal Orders in Practice", prepared for the Continuing Legal Education Society of British Columbia, November 2012.

[16] Finch, *ibid* at para 44.

[17] J Armstrong, "The Salishan Inter-Areal Framework", prepared for the Continuing Legal Education Society of British Columbia, November 2012. Dr Armstrong notes that this approach would be consistent with Article 8J of the United Nations Convention on Biodiversity and with the United Nations Declaration on the Rights of Indigenous Peoples.

examples illustrate how the failure to make space for the operation of Indigenous laws and systems has led to charges, prosecutions of Indigenous people, and litigation.

R. v. Morris

In *R. v. Morris*,[18] the accused were charged under British Columbia's *Wildlife Act*. The accused were members of the Tsartlip Band of the Saanich Nation, who are signatories to a treaty entered into with the Crown in 1852. The treaty provided that the Saanich Nation would be "at liberty to hunt over the unoccupied lands; and to carry on our fisheries as formerly." The accused hunted at night with aid of illumination, which was prohibited by the *Wildlife Act* on the basis that such practices are unsafe. The accused hunters were trapped by a decoy operation and charged with offences. Under their Indigenous legal system, hunting at night with the aid of illumination is permitted, and the evidence was that the Indigenous laws governing this practice were effective: the Tsartlip people have engaged in this practice since time immemorial, and there is not one known accident resulting from it.[19]

Three levels of court convicted, and upheld the convictions of, the accused.[20] The Supreme Court of Canada overturned the convictions. There are likely many Indigenous individuals who have been prosecuted for similar offences, and who have not been able to pursue their case all the way to the Supreme Court of Canada. The defendants in *Morris* might have remained convicted of an offence despite having engaged in the exercise of a treaty or Aboriginal right in accordance with their own peoples' laws. The lower courts accepted the assumption underlying the Province's law: that hunting at night with an illuminative device is inherently unsafe.[21] A majority of the Supreme Court of Canada, however, did not accept this assumption, because the evidence established that night hunting with illumination is safe when done in accordance with Tsartlip laws and practices.

The Court concluded that both parties to the treaty shared a common intention that the treaty right to hunt would not include a right to hunt in an unsafe manner;[22] however, the accused did not engage in an unsafe practice, and the Court concluded that they were engaged in the exercise of their treaty right to hunt. The Court therefore found the ban on hunting at night with an illuminating device to be an infringement of the treaty right, and because of the division of powers in the *Constitution Act, 1867*, and section 88 of the *Indian Act*, the provision was therefore inapplicable and the Court set aside the convictions.[23] Had the Province been willing to learn about and make space for the

[18] *Morris*, *supra* note 3.
[19] *Morris*, *ibid* at paras 5, 11, 26.
[20] [1999] BCJ No 3199 (QL); 2002 BCSC 780; and 2004 BCCA 121.
[21] *Morris*, *supra* note 3 at para 11.
[22] *Morris*, *ibid* at para 56.
[23] *Morris*, *ibid* at para 60.

operation of Tsartlip law, there would have been no need for the Indigenous defendants to be charged and prosecuted.[24]

British Columbia v. Okanagan Indian Band

In 1999, the Okanagan Nation issued a permit to one of its member Bands, the Okanagan Indian Band, to log trees in an area in close proximity to the OKIB reserve. The community was in desperate need for housing for its members, and the logs were to be used to build a home for an elder who suffered from health risks because he lived in a house with a leaky roof, no central heating, no plumbing, and no toilet facilities.[25] The Band was in a deficit position and could not get any funding for housing for this elder or anyone else on the reserve in need of housing.[26]

The OKIB carried out the selective harvest of logs under the permit issued by the Okanagan Nation,[27] and the OKIB was charged with cutting, damaging or destroying "Crown timber" without authorization under the provincial forestry legislation. The OKIB were unsuccessful in obtaining access to timber under that legislation.[28] The dispute between Okanagan and British Columbia laws ran much deeper than the conflict between the Okanagan Nation's issuance of permit to cut timber and the Province's prohibition of cutting timber without its authorization. There was, and is, a longstanding dispute between the Okanagan and the Province about the management of the forests and watersheds.[29] For many generations, the Okanagan people managed the watersheds under

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[24] Courts have also held that Indigenous individuals accused of an offence were not exercising an Aboriginal right when they have failed to follow the relevant Indigenous laws. An example of the courts recognizing Indigenous laws in this context is the decision of the Provincial Court of British Columbia in *R v Bruce William Wilson Jr*, 2003 BCPC56. In that case, the evidence was that the individual was not following Gitxsan law, and he was therefore not exercising an Aboriginal right. The accused shot and killed a grizzly bear and two cubs. His defence was that he was exercising an aboriginal right to kill the bears because they were dangerous and a threat to the local community. The evidence at trial demonstrated that his actions were contrary to Gitxsan law, which requires that grizzly bears be treated with respect. The Gitxsan way to deal with a problem bear is to put out an alert to the community and notify the local Fish and Wildlife office in the hope that they could trap and move the bear. Only if this is not successful would the Chief and elders call on a hunter to remove the problem bear, and only an experienced hunter would be called upon for this job. The accused also did not used all of the bear, and this too, was against Gitxsan laws. The judge held that the exercise of the aboriginal right would be subject to Gitxsan law (see paras 18 and 27).

[25] Affidavit of Chief Dan Wilson, filed 30 November 1999 in *British Columbia (Minister of Forests) v Okanagan Indian Band*, SCBC Vernon Registry, No 23911 [*Okanagan* No 23911].

[26] *Ibid*.

[27] Affidavit of Chief Dan Wilson, filed 28 October 1999 in *Okanagan* No 23911, *supra* note 25.

[28] Affidavit of Dan Wilson #7, filed 5 August 2010 in *Okanagan* No 23911, *ibid.*

[29] The Province continued to authorize clearcuts in the watersheds at issue while the litigation was ongoing, leading to further litigation in which Tolko, a logging company given cutting rights by Province, and the Okanagan Indian Band, each sought injunctions against the other: *Tolko Industries Ltd v Okanagan Indian Band*, 2010 BCSC 24.

their laws. Their laws give them the responsibility to take care of the land; when the people were created, "a covenant was made that we, as humans, were required to do things in a certain way and in return we would be looked after."[30]

One of the practices which the Okanagan engaged in under their own laws and systems for managing the use of natural resources was the practice of controlled burns.[31] Based on Okanagan ecological knowledge, controlled burns were used to take care of the forest ecosystem. If a natural burn cycle did not burn an area periodically, overgrowth would prevent understory plants from growing, including berries and medicines used by the Okanagan, and plants relied on by animals and birds. The Okanagan had knowledge about the time of year, and how to read wind cycles and air pressure cycles so that the burns were carried out safely. The Okanagan have not been able to carry out these burns because they are illegal under British Columbia's laws. In addition, also under British Columbia's laws, vast areas of the Okanagan peoples' forests have been clearcut. The Okanagan believe that the clearcutting and replacement of their forests with less diverse tree farms, combined with the prohibition on Okanagan management practices, contributed to the Mountain Pine Beetle epidemic that has in recent years devastated much of their forests and led to an accelerated rate of clear cutting of the forests in order to salvage the economic value of the trees before the beetles reduced their commercial value.[32]

ARE REGULATORY PROSECUTIONS THE APPROPRIATE CONTEXT FOR DEVELOPING ABORIGINAL LAW?

In *Sparrow*, the Court noted that "the trial for a violation of a penal prohibition may not be the most appropriate setting in which to determine the existence of an aboriginal right, and the evidence was not extensive …"[33] Similarly, sixteen years later, in his minority concurring reasons in *Marshall*; *Bernard*, Justice LeBel opined that prosecutions for regulatory offences are not an ideal forum for the development of Aboriginal law.

Justice LeBel noted that in *Delgamuukw*, the Court held that physical occupation is only one source of Aboriginal title; the other source is Indigenous peoples' laws:

> 139 The aboriginal perspective on the occupation of their land can also be gleaned in part, but not exclusively, from pre-sovereignty systems of aboriginal law. The relevant laws consisted of elements of the practices, customs and traditions of aboriginal peoples and might include a land tenure system or laws governing land use.

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[30] Affidavit #1 of Jeannette Armstrong, filed 15 May 2007 in *Okanagan* No 23911, *supra* note 25 at para 18.
[31] *Ibid* at para 29.
[32] *Ibid* at para 30; Affidavit of Fabian Alexis, filed 15 May 2007 in *Okanagan* No 23911, *supra* note 25.
[33] *Sparrow*, *supra* at para 30.

> 140 … anyone considering the degree of occupation sufficient to establish title must be mindful that aboriginal title is ultimately premised upon the notion that the specific land or territory at issue was of central significance to the aboriginal group's culture. Occupation should therefore be proved by evidence not of regular and intensive use of the land but of the traditions and culture of the group that connect it with the land. Thus, intensity of use is related not only to common law notions of possession but also to the aboriginal perspective.

While Justice LeBel concurred with the majority judgment, holding that the Aboriginal title claim had not been made out, he cautioned that the decision ought not to be considered a final pronouncement on Aboriginal title in the area at issue, partly because the nature of the proceedings led to an inadequate record being before the court. Part of what was missing was the Indigenous legal perspective:

> 141 The record in the courts below lacks the evidentiary foundation necessary to make legal findings on the issue of aboriginal title in respect of the cutting sites in Nova Scotia and New Brunswick and, as a result, the respondents in these cases have failed to sufficiently establish their title claim. In the circumstances, I do not wish to suggest that this decision represents a final determination of the issue of aboriginal title rights in Nova Scotia or New Brunswick. A final determination should be made only where there is an adequate evidentiary foundation that fully examines the relevant legal and historical record. The evidentiary problems may reflect the particular way in which these constitutional issues were brought before the courts. (emphasis added)
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> IV. Summary Conviction Proceedings
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> 142 Although many of the aboriginal rights cases that have made their way to this Court began by way of summary conviction proceedings, it is clear to me that we should re-think the appropriateness of litigating aboriginal treaty, rights and title issues in the context of criminal trials. The issues that are determined in the context of these cases have little to do with the criminality of the accused's conduct; rather, the claims would properly be the subject of civil actions for declarations. Procedural and evidentiary difficulties inherent in adjudicating aboriginal claims arise not only out of the rules of evidence, the interpretation of evidence and the impact of the relevant evidentiary burdens, but also out of the scope of appellate review of the trial judge's findings of fact. … In addition, special difficulties come up when dealing with broad title and treaty rights claims that involve geographic areas extending beyond the specific sites relating to the criminal charges.[34] (emphasis added)
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> 143 There is little doubt that the legal issues to be determined in the context of aboriginal rights claims are much larger than the criminal charge itself and that the criminal process is inadequate and inappropriate for dealing with such claims …

[34] This problem has arisen in the Okanagan litigation discussed above, wherein the Province has attempted to confine the litigation to the cutblock where the logging took place and the stop work order was issued, rather than the watershed area within which the cutblock was located. The Case Management Judge rejected an application by the Province to confine the evidence that the Okanagan could put before the Court to evidence of use and occupation of the cutblock: *HMTQ v Chief Jules et al*, 2005 BCSC 1312 at paras 30-52.

Justice LeBel suggested that prosecutions be put on hold while title and rights issues are litigated in the civil courts:

> 144 The question of aboriginal title and access to resources in New Brunswick and Nova Scotia is a complex issue that is of great importance to all the residents and communities of the provinces. The determination of these issues deserves careful consideration, and all interested parties should have the opportunity to participate in any litigation or negotiations. Accordingly, when issues of aboriginal title or other aboriginal rights claims arise in the context of summary conviction proceedings, it may be most beneficial to all concerned to seek a temporary stay of the charges so that the aboriginal claim can be properly litigated in the civil courts. Once the aboriginal rights claim to the area in question is settled, the Crown could decide whether or not to proceed with the criminal charges.

While summary conviction proceedings may not be the appropriate forum for determinations of Aboriginal title and rights and treaty rights, civil proceedings have thus far not proved to be a great alternative. In the meantime, prosecutions continue.

CIVIL ACTIONS: RISKS AND DIFFICULTIES

While full evidence can be expected to be put before the court in a civil lawsuit, and the Indigenous Nation's laws can be put before the court, civil law suits are expensive and take many years to litigate, and, thus far, most civil cases brought by Indigenous peoples in Canada to prove their title and rights have been decided at least in part on pleadings or other technical issues.

Technicalities and Pleadings Issues

Only a few Aboriginal title and rights cases have proceeded by way of civil action. Of those which have proceeded in this manner, most have been decided at least in part on the basis of a pleadings issue or other technicality.

In *Calder*, three judges of the Supreme Court of Canada held that Aboriginal title had been extinguished, three held that the Nisga'a continued to hold unextinguished Aboriginal title, and the seventh and deciding judge dismissed the case on a technicality because the Nisga'a did not obtain a fiat from the Province to proceed with the case.

Initially, the *Delgamuukw* litigation was brought by individual Gitksan and Wet'suwet'en Houses; on appeal, the claims were amalgamated into two collective claims, one by each nation. The Supreme Court of Canada concluded that the Respondents suffered prejudice because the Gitsksan and Wet'suwet'en did not amend their pleadings, and it therefore

ordered a new trial rather than applying the tests it set out for proof of Aboriginal title to the facts.[35]

At trial, the *Tsilhqot'in* case was decided on a pleadings issue. The trial judge concluded that the wording of the declaration in the Tsilhqot'in Statement of Claim advanced an "all-or-nothing" claim. Because the trial judge found that the evidence established Aboriginal title to only part of the area claimed, he held that he could not issue any declaration of Aboriginal title.[36]

In the *Lax Kw'alaams*[37] case, the Statement of Claim was focused on a right to a commercial fishery. Part way through the trial, the Lax Kw'alaams sought as alternative relief, declarations of lesser rights, including a right to fish for subsistence purposes. The Supreme Court of Canada held that the defendants "must be left in no doubt about precisely what is claimed."[38]

Costs

Around the same time that the defendants in the *Bernard* and *Marshall* cases were logging without provincial authorization on the east coast, in British Columbia, the Okanagan, Neskonlith, Adams Lake and Splats'in (Spallumcheen) Bands engaged in logging under permits issued by their respective Nations (the Okanagan Nation Alliance and the Secwepemc or Shuswap Nation Tribal Council), rather than under permits issued by the Province. The Province issued stop work orders under its forestry legislation, seized the logs, obtained injunctions against the Okanagan and Secwepemc, and brought proceedings to enforce the stop work orders. The Okanagan and Secwepemc raised Aboriginal title and rights in defence, and the summary proceedings were converted into civil trial proceedings in 2000; the courts were of the view that discovery and cross-examinations were required in order to properly determine the scope of Okanagan and Secwepemc aboriginal title.[39]

An Aboriginal title and rights trial can be prohibitively expensive as it involves a factual inquiry spanning many years, and many witnesses including experts and oral history witnesses.[40] The Okanagan and Secwepemc could not afford an Aboriginal title trial and so they sought, and were granted, an order requiring the Crown to pay costs in advance of

[35] *Delgamuukw*, *supra* note 4 at paras 76-77.
[36] *Tsilhqot'in Nation v British Columbia*, 2007 BCSC 1700 at paras 120-129 [*Tsilhqot'in*].
[37] *Lax Kw'alaams*, *supra* note 4.
[38] *Lax Kw'alaams*, *ibid* at para 45.
[39] *British Columbia (Minister of Forests) v Okanagan Indian Band*, 2000 BCSC 1135 [*Okanagan* 2000]; *British Columbia (Minister of Forests) v Jules*, 2001 BCCA 647.
[40] See for example, *Tsilhqot'in Nation v British Columbia*, 2006 BCCA 2.

the trial and in any event of the cause.[41] The Supreme Court of Canada set out a new test for advance or interim costs orders in public interest litigation as follows: 1) the party seeking costs genuinely cannot afford to pay for the litigation, and no other realistic option exists for bringing the issues to trial; 2) the claim to be adjudicated is *prima facie* meritorious; and 3) the issues raised transcend the individual interests of the particular litigant, are of public importance, and have not been resolved in previous cases.[42]

Because of the third requirement, advance cost orders are not available for most Indigenous peoples with unresolved Aboriginal title and rights claims, either as a defence to a regulatory prosecution, or in a civil lawsuit. Unless the Indigenous peoples can show that their case is a test case in which an unresolved legal issue is raised, the case will not qualify.[43] The Tsilhqot'in Nation was already part way through its Aboriginal title and rights trial when the British Columbia Court of Appeal granted the advance costs award to the Okanagan and Secwepemc. The Tsilqhot'in were granted an advance costs order as well, based on the test set out in the *Okanagan* case.[44]

The Crown was then able to rely in part on the *Tsilhqot'in* case as a basis for denying to the Okanagan and Secwepmec the ability to prove their Aboriginal title in their cases under their cost order. The Secwepemc case was stayed pending the outcome of the Okanagan case.[45] In 2007, after the Supreme Court of Canada affirmed that the Mi'kmaq and Maliseet have an aboriginal right to harvest timber for domestic purposes,[46] the Province admitted that the Okanagan have this same right. Though the Okanagan and Secwepemc never pled this kind of right, the Province successfully applied to defer the Aboriginal title issues in the Okanagan case, to be heard only if necessary after a decision on whether the Province could justify the infringement of the admitted right, and after the outcome of the *Tsilhqot'in* litigation.[47] The Okanagan have thus far been deprived the ability to defend themselves on the basis of their title and laws.

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[41] *Okanagan* 2000, *supra* note 39; *British Columbia (Minister of Forests) v Okanagan Indian Band*, 2001 BCCA 647; *British Columbia (Minister of Forests) v Okanagan Indian Band*, 2003 SCC 71 [*Okanagan* 2003].

[42] *Okanagan* 2003, *ibid*.

[43] *Hagwilget Indian Band v Canada (Minister of Indian Affairs and Northern Development)*, 2008 FC 574.While granting an advance costs award, the Court suggested at paragraph 19 that if the legal issues were not unique, had been resolved in another case, or were likely to be resolved in another case "at an early date", it would not have made the order.

[44] *Xeni Gwet'in First Nations v British Columbia*, 2002 BCCA 434.

[45] *HTMQ v Chief Ronnie Jules et al*, 2005 BCSC 1312; *HMTQ v Chief Ronnie Jules et al*, Oral Reasons issued 5 April 2006.

[46] *Sappier*, *supra* note 5; *R. v. Gray*, 2006 SCC 54.

[47] *British Columbia (Minister of Forests) v Okanagan Indian Band*, 2008 BCCA 107.

WHERE TO FROM HERE?

The courts have called upon the parties to negotiate reconciliation.[48] The closing paragraph of Chief Justice Lamer's decision in *Delgamuukw* was as follows:

> 186 Finally, this litigation has been both long and expensive, not only in economic but in human terms as well. By ordering a new trial, I do not necessarily encourage the parties to proceed to litigation and to settle their dispute through the courts. As was said in *Sparrow*, at p. 1105, s. 35(1) "provides a solid constitutional base upon which subsequent negotiations can take place". … Moreover, the Crown is under a moral, if not a legal, duty to enter into and conduct those negotiations in good faith. Ultimately, it is through negotiated settlements, with good faith and give and take on all sides, reinforced by the judgments of this Court, that we will achieve what I stated in *Van der Peet*, *supra*, at para. 31, to be a basic purpose of s. 35(1) — "the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown". Let us face it, we are all here to stay.

In *R. v. Marshall*, the Court noted that accommodation of treaty rights is best achieved through consultation and negotiation.[49] In *Haida*, the Court once again called on the parties to engage in negotiations to resolve the outstanding issues between Indigenous peoples and the Crown:

> 20 Where treaties remain to be concluded, the honour of the Crown requires negotiations leading to a just settlement of Aboriginal claims: *R. v. Sparrow*, [1990] 1 S.C.R. 1075, at pp. 1105-6. Treaties serve to reconcile pre-existing Aboriginal sovereignty with assumed Crown sovereignty, and to define Aboriginal rights guaranteed by s. 35 of the *Constitution Act, 1982*. Section 35 represents a promise of rights recognition, and "[i]t is always assumed that the Crown intends to fulfil its promises" (*Badger*, *supra*, at para. 41). <u>This promise is realized and sovereignty claims reconciled through the process of honourable negotiation.</u> It is a corollary of s. 35 that the Crown act honourably in defining the rights it guarantees and in reconciling them with other rights and interests. This, in turn, implies a duty to consult and, if appropriate, accommodate. (emphasis added)
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> 25 Put simply, Canada's Aboriginal peoples were here when Europeans came, and were never conquered. Many bands reconciled their claims with the sovereignty of the Crown through negotiated treaties. Others, notably in British Columbia, have yet to do so. The potential rights embedded in these claims are protected by s. 35 of the *Constitution Act, 1982*. The honour of the Crown requires that these rights be determined, recognized and respected. This, in turn, requires the Crown, acting honourably, to participate in processes of negotiation. While this process continues, the honour of the Crown may require it to consult and, where indicated, accommodate Aboriginal interests.

[48] See *Van der Peet*, *supra* note 1 at para 313.
[49] *R v Marshall*, [1999] 3 SCR 533 at para 22.

Justice Vickers, the trial judge in *Tsilhqot'in*, expected the parties to negotiate, and attempted to facilitate those negotiations by making findings about Tsiljhqot'in Aboriginal title:[50]

> [1136] Over the years, British Columbia has either denied the existence of Aboriginal title and rights or established policy that Aboriginal title and rights could only be addressed or considered at treaty negotiations. At all material times, British Columbia has refused to acknowledge title and rights during the process of consultation. Consequently, the pleas of the Tsilhqot'in people have been ignored.
>
> …
>
> [1375] I have come to see the Court's role as one step in the process of reconciliation. For that reason, I have taken the opportunity to decide issues that did not need to be decided. For example, I have been unable to make a declaration of Tsilhqot'in Aboriginal title. However, I have expressed an opinion that the parties are free to use in the negotiations that must follow.
>
> [1376] What is clear to me is that the impoverished view of Aboriginal title advanced by Canada and British Columbia, characterized by the plaintiff as a "postage stamp" approach to title, cannot be allowed to pervade and inhibit genuine negotiations.

The parties have not succeeded in negotiations. In British Columbia, where most Indigenous nations have never entered into treaty with the Crown, the British Columbia Treaty Commission Process, a tri-partite process, was commenced in 1993. Government mandates and policies for treaty negotiations have not changed since, despite developments in the law. Sixty First Nation groups have entered the BCTC process, representing 110 of British Columbia's 203 First Nations; only two final agreements have been ratified in the twenty year history of this process.

Crown positions often fail to comply with the jurisprudence, making a negotiated resolution difficult to achieve. For example, for many years, British Columbia sought to advance its position, supported by various legal arguments, that Aboriginal title had been extinguished throughout the Province. These arguments were put to rest by the Supreme Court of Canada in *Delgamuukw*, where the Court held that Aboriginal title had not been extinguished and continued to exist in British Columbia.[51]

In response to the *Delgamuukw* decision, rather than acknowledge that Aboriginal title continues to exist and engage in negotiations based on recognition, the Province took the position that everything the Court said about Aboriginal title was *obiter*, and that as no Indigenous people had actually proven Aboriginal title and received a court declaration, nothing on the ground had changed. It would not recognize Aboriginal title and would not negotiate based on recognition, or even consult with Indigenous people before impacting their interests, unless an Indigenous Nation proved its Aboriginal title and

[50] *Tsilhqot'in*, *supra* note 36. See also paras 506, 961 and 1349.
[51] *Delgamuukw*, *supra* note 4 at para 172-186.

rights in court. This eventually led to the *Haida* case, in which the Supreme Court of Canada rejected the Crown's position that until Aboriginal title is proven, the Crown has no obligations.[52]

The Province's current theory, rejected as "impoverished" at trial in the *Tsilhqot'in* case,[53] but successful on appeal,[54] is scheduled to be heard by the Supreme Court of Canada later this year. This theory limits Aboriginal title to individual small sites, such as villages, fishing rocks, hunting blinds and buffalo jumps. It is an approach to Aboriginal title that ignores Indigenous peoples' laws despite *Delgamuukw's* requirement to give weight to those laws. It is also an approach that implicitly adopts stereotypes about Indigenous peoples that the Supreme Court of Canada rejected almost 30 years ago.[55] This position is not conducive to a negotiated resolution.

JUDICIAL OVERSIGHT OF RIGHTS IMPLEMENTATION AND NEGOTIATIONS

As in Canada, much of the early treaty rights case law in the United States involved defences to prosecutions.[56] In 1968, several tribes brought a civil action against the State of Oregon for failure to protect Indigenous peoples' right to fish under treaty.[57] Judge Belloni held that the treaty fishing right guaranteed to the tribes a fair share of the fish harvest, and that Oregon was required to protect the treaty fishing right. Judge Belloni retained jurisdiction to grant further or amended relief, and supervised allocation decisions for 12 years.[58] Eventually, this decision led to a negotiated salmon management plan under which the fishery became co-managed by Oregon and the tribes.[59]

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[52] *Haida Nation v British Columbia*, 2004 SCC 73 at paras 8-10, 28-31 [*Haida*].

[53] *Tsilhqot'in*, *supra* note 36 at para 1376.

[54] *Tsilhqot'in Nation v British Columbia*, 2012 BCCA 285 at para 221.

[55] *Simon v The Queen*, [1985] 2 SCR 387 at para 21. In that case, the court below had held that as savages, the indigenous signatories to the treaty in issue lacked the capacity to enter into a treaty. Limiting Aboriginal title to small pieces of land fails to recognize that Indigenous peoples existed as organized societies prior to contact and the Crown's assertion of sovereignty, fails to recognize the Indigenous sovereignty pre-existed Crown sovereignty (*Haida* at para 20), and fails to incorporate and give weight to the Indigenous perspective.

[56] See Michael C Blumm & Jane G Steadman, "Indian Treaty Fishing Rights and Habitat Protection: The Martinez Decision Supplies a Resounding Judicial Reaffirmation" (2009) 49 Nat Resources J 653 at 665 and footnote 61.

[57] *Sohappy v Smith*, 302 FSupp 899 (DOr 1969) (commonly referred to as the "Belloni" decision).

[58] Blumm & Steadman, *supra* note 56 at 666 and footnote 68.

[59] See M Blumm & B Swift, "The Indian Treaty Piscary Profit and Habitat Protection in the Pacific Northwest: A Property Rights Approach" (1998) 69 U Colo L Rev 407 at 460-462; and M Wood, "The Tribal Property Right to Wildlife Capital (Part I): Applying Principles of Sovereignty to Protect Imperiled Wildlife Populations, (2000) 37 Idaho L Rev 1 at 16-17.

In *United States v. State of Washington*, a case commonly referred to as the "Boldt" decision,[60] the federal government and Western Washington Tribes commenced a lawsuit alleging that Washington State was not honouring the Tribes' Treaty fishing rights. Judge Boldt held that the Tribes were entitled to half of the total salmon catch and should be responsible for regulating the Indian fishery off-reservation, with the state having the power over Indian off-reservation fishing only for the purpose of conservation.[61] Judge Boldt held that Washington's regulations were invalid because they favoured non-tribal fisheries. Washington argued that it was imposing restrictions for the sake of conservation and to stop overharvesting by the tribes, but Judge Boldt found an absence of "any credible evidence showing any instance, remote or recent, when a definitively identified member of any plaintiff tribe exercised his off-reservation treaty rights by any conduct or means detrimental to the perpetuation of any species of anadromous fish."[62] The decision led to controversy and confrontation, and Judge Boldt retained jurisdiction in order to assist the parties in resolving problems and disputes arising from his decision, and to ensure that Washington complied.[63]

In Canada, courts have retained jurisdiction in duty to consult cases, giving the parties leave to apply to the court for further directions;[64] giving the Indigenous party leave to bring the matter back before the court if they are of the view that consultation and accommodation are inadequate, including liberty to re-apply to quash the decision or approval in question;[65] and ordering mediation, allowing the Indigenous party to seek further directions from the Court if mediation fails.[66] As noted above, most prosecutions of Indigenous resource harvesters would be unnecessary if space was made for the operation of Indigenous legal systems. While prosecutions of Indigenous resource harvesters are brought on the basis that there is a need to conserve the resource, the real

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[60] *United States v State of Washington*, 384 FSupp 312, (WD Wash 1974) [Boldt], aff'd, 520 F2d 676 (9th Cir 1975), cer denied, 423 US 1086 (1976).

[61] Such regulations had to be "reasonable and necessary to the perpetuation of a particular run or species of fish." Boldt, *ibid* at 342.

[62] Boldt, *ibid* at 338, fn 26.

[63] Boldt, *ibid* at 347. The Boldt decision resulted in further litigation, including a clarification that the Treaty right guaranteed no more than was necessary to provide a moderate living, up to 50% of the catch. See, e.g., *Washington v Fishing Vessel Ass'n*, 443 US 658 (1979) at 686-687.

[64] *Haida Nation v British Columbia (Minister of Forests)*, 2002 BCCA 147 at paras 58-62. *Homalco Indian Band v British Columbia (Minister of Agriculture, Food and Fisheries)*, 2005 BCSC 283 at para 127 [*Homalco*]; *Heiltsuk Tribal Council v British Columbia (Minister of Sustainable Resource Management)*, 2003 BCSC 1422 at para 129.

[65] *Homalco*, *ibid*; *Gitxsan and other First Nations v British Columbia (Minister of Forests)*, 2002 BCSC 1701; *Gitanyow First Nation v British Columbia (Minister of Forests)*, 2004 BCSC 1734.

[66] *Hupacasath First Nation v British Columbia (Minister of Forests)*, 2005 BCSC 1712; *Ke-Kin-Is-Uqs v British Columbia (Minister of Forests)*, 2008 BCSC 1505. The Crown was ordered to pay for the costs of the mediator. Smith J. provided the parties with direction as to what would be discussed at the mediation, including, for example, ways of including Hupacasath in discussions regarding environmental, wildlife and watershed protection on the lands in issue, and accommodation from resources on Crown lands for the impact of the decision in issue on the Hupacasath.

threats to the resource are usually the result of the operation of federal and provincial laws.[67] Judicial oversight of negotiations between the Crown and Indigenous peoples regarding their treaty rights, Aboriginal title and Aboriginal rights, with specific direction to the Crown to make space for Indigenous legal systems in the management of natural resources, might be one way to move the parties towards reconciliation.

[67] See *William v British Columbia*, 2012 BCCA 285 at paras 290-343, in which the British Columbia Court of Appeal upheld the trial judge's conclusions that British Columbia's forestry legislation unjustifiably infringes Tsilhqot'in rights to hunt and trap, by directly impacting wildlife, reducing species diversity and populations, and destroying their habitat, including through the removal of coarse woody debris, soil compaction, changes to hydrology and the resulting slow regeneration of the forests.