# INDIGENOUS *RIGHTS,* TITLE, AND THE DUTY TO CONSULT

Summaries of the Supreme Court of Canada rulings that have formed Indigenous rights, title, and the duty to consult

INDIGENOUS CORPORATE TRAINING INC.

# Ways to share this eBook

Here are a few suggestions on how you could share this eBook with colleagues and/or visitors to your office:

- print a copy and leave it on the table in your break room
- pin it to a notice board
- post it to your website internet and intranet
- add it to the reading material in your waiting room
- take a copy with you if you are working remotely or visiting a field office

# Foreword

Hi there, I'm **Bob Joseph**, a certified Master Trainer and founder of **Indigenous Corporate Training Inc**. Through my courses I have been helping organizations, all levels of government, and individuals work more effectively with Indigenous Peoples for over 20 years.

I believe that by sharing knowledge and information through our training, blog and free resources, such as this ebook, we can make the world a better place for Indigenous and non-Indigenous people.

Please note, the materials on our website **www.ictinc.ca** are provided for informational and educational purposes only and do not constitute legal advice. We expect you will learn from our educational materials and obtain legal advice as you need.

For permission to reproduce, please contact us at **info@ictinc.ca**.

# A note on terminology

Canada is in a state of flux in regards to terminology used to reference Indigenous Peoples. I like to think we're at a turning point in moving from "Aboriginal" to "Indigenous" but that remains to be seen.

"Aboriginal" became the appropriate umbrella term in 1982 when the Canadian Constitution was patriated to formally entrench Aboriginal and treaty rights in the supreme law of Canada. However, since then, there is a growing shift among Indigenous Peoples and organizations towards "Indigenous." The federal government currently has adopted a "soft" usage of "Indigenous." But, until the federal government fully adopts "Indigenous" the legal term remains "Aboriginal."

"Indigenous" is the term used by the United Nations to refer to Indigenous populations around the world. Additionally, "Indigenous" is used in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). We are going to be hearing a lot more about UNDRIP in the coming years.

I often refer to a story about Wayne Gretzky and his philosophy when he was playing hockey. He stated something along the lines of, "I'm not worried about where the puck was. I'm not worried about where the puck is. What I am thinking about is where the puck will be in two plays from now and that's where I have to try to get to." That's my advice for people working on Indigenous relations and reconciliation. Start moving to where the puck will be in two plays. A simple action is to start using "Indigenous."

So, with the title of this eBook we're moving to where we think the puck will be in two plays but as we are talking about court cases that define rights and title we continue to use "Aboriginal" as that is the legally recognized term.

# The historical role of the courts

It's important to understand that it is the courts - not federal policy - that have shaped Aboriginal rights, title and the duty to consent to date. The following quote provides some context:

> *"Although modern treaties, statutes and even international treaties shape Aboriginal law, the Courts have traditionally and will continue to influence the legal framework by interpreting the common law, statutes and the the Constitution.*

> *The relative powerlessness and vulnerability of Aboriginal groups until modern times meant that they were not active participants in many court cases affecting their interests.*
>
> http://www.ictinc.ca/blog/21-things-you-may-not-have-known-about-the-indian-act-

> *All the same, Court decisions from the late 19th and early 20th centuries framed important principles about the nature of Indian title in reserves and the Crown/Aboriginal relationship in general. Late 20th century courts have recognized the distinctiveness of Aboriginal societies within Canada, and elaborated on the implications for government policy of Aboriginal and treaty rights.*

> *Cases on government operational decisions, particularly under the Indian Act, have enabled the Courts to expand considerably the content of the Crown's fiduciary duties.*

# The historical role of the courts cont'd

> *The courts generally view Aboriginal Peoples as a seriously disadvantaged group within Canadian society.*

> *The courts will step in to fill what they see as a policy void if Aboriginal Peoples are disadvantaged even further by an absence of government policy.*

> *However, where the Courts attempt to fill in a policy void in response to Indigenous demands, they are ill-equipped to design policy. As a result, the Courts leave many issues unresolved for the government to address (e.g. aftermath of Marshall).*

> *Recently, the Supreme Court has signalled the need for accommodation by both Aboriginal and non-Aboriginal to define their respective places within a coherent Canadian sovereignty and society." [1]*

[1] Aboriginal Policy: Legal & Constitutional Framework

# Why are there Aboriginal rights?

*Because they are enshrined in the Canadian Constitution Act, 1982*

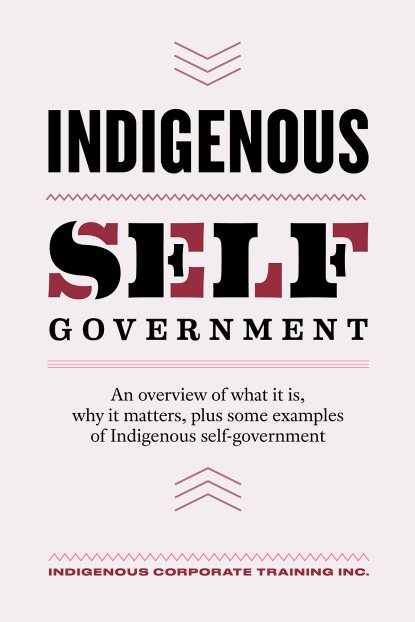
> *"The doctrine of Aboriginal rights exists... because of one simple fact: when Europeans arrived in North America, Aboriginal peoples were already here, living in communities on the land, and participating in distinctive cultures, as they had done for centuries. It is this fact, and this fact above all others, which separates Aboriginal peoples from all other minority groups in Canadian society and which mandates their special legal status."*
>
> R. v. Van der Peet, para 30.

# Why are there Aboriginal rights? *cont'd*

Aboriginal rights, title and the duty to consult are mighty topics that have been evolving ever since 1763 when King George III issued the Royal Proclamation, albeit with a gap between 1876 and 1951 when the Indian Act's punitive policies restricted movement of Indigenous Peoples as well as their access to lawyers. After the 1951 amendments to the ***Indian Act***, the courts were inundated with cases by Indigenous Peoples who finally had recourse to address their pent up frustrations regarding ownership of property, rights and title, and right to self-govern. The logjam of court cases finally began to move in 1973 with the *Calder* decision. We go into more detail on the *Calder* case further on.

The *Canadian Constitution Act* was patriated in 1982, to include, **section 35**, which includes a commitment to recognizing Aboriginal treaty rights. The repatriated Constitution set the stage for the Supreme Court of Canada to begin to weigh in on issues related to Aboriginal rights and title.The underlying belief was that once treaty and Aboriginal rights were recognized in the Constitution as "constitutional rights" that recognition provided a legal status protecting Aboriginal rights and title. In reality, the burden fell upon Aboriginal Peoples to define, through litigation, the nature and quality of those rights - the law began driving political will.

# Download our eBook on Indigenous Self-Government.




Click here to download

# Some basic bullets on Aboriginal rights

So, what does all of this mean in terms of Aboriginal rights? Here's a snapshot of the basics:

- "Aboriginal rights exist in law;
- Aboriginal rights are distinct and different from the rights of other Canadians;
- They include Aboriginal title, which is a unique communally held property right;
- Aboriginal rights take priority over the rights of others, subject only to the needs of conservation; The scope of Aboriginal title and rights depends on specific facts relating to the Aboriginal group and its historical relationship to the land in question.
- The legal and constitutional status of Aboriginal people derives not from their race but from the fact they are the descendants of the peoples and governing societies that were resident in North America long before settlers arrived;
- Aboriginal rights and title cannot be extinguished by simple legislation because they are protected by the Constitution Act, 1982.
- Government has a duty to consult and possibly accommodate Aboriginal interests even where title has not been proven; and
- Government has continuing duty to consult, and perhaps accommodate, where treaty rights might be adversely affected." [2]

[2] Why Treaties - A legal perspective

# Calder, 1973

*The Calder decision recognizes Aboriginal title.*

***Calder v. Attorney General of British Columbia - Supreme Court of Canada, 1973***

For many years, the Government of Canada refused even to entertain the concept of Aboriginal title. That policy mountain moved in 1973, shortly after the release of the Supreme Court of Canada's landmark decision in *Calder v. Attorney General of British Columbia*.

In the *Calder* case, the Nisga'a Tribal Council asked the courts to support their claim that Aboriginal title had never been extinguished in the Nass Valley, near Prince Rupert.

Although the Supreme Court of Canada ultimately ruled against the **Nisga'a** on a technicality, the case is historic because for the first time, Canada's highest court ruled that Aboriginal title was rooted in the "long-time occupation, possession and use" of traditional territories. As such, Aboriginal title existed at the time of original contact with Europeans, and at the time of formal assertion of British sovereignty in 1846. (By the Treaty of Oregon, the United States gave up control of Vancouver Island to Britain in 1846.)

Shortly after the *Calder* decision, the Canadian government agreed to begin negotiating with the Nisga'a on their "Land Question", and with northern Aboriginal Peoples on treaties to define their rights to land and resources.

# Guerin, 1984

*The Guerin decision is significant because it recognized pre-existing Aboriginal rights both on and off-reserve.*

***Guerin v. The Queen - Supreme Court of Canada, 1984***

In 1955, the Musqueam First Nation approved a surrender "in trust" of some of its reserve land in the city of Vancouver, for the purpose of a lease to the Shaughnessy Golf and Country Club. The lease transaction had been discussed in detail with the band and band consent had been given based on those discussions. The Crown subsequently concluded a lease on terms substantially different and less advantageous to the Musqueam. The true terms of the lease were not disclosed to the Band until 1970.

In *Guerin v. The Queen*, 1984, the judgment of Chief Justice Brian Dickson extended Calder to describe Aboriginal interest in land as a

> *"pre-existing legal right not created by the Royal Proclamation... the Indian Act... or any other executive order or legislative provision."*

The Supreme Court ruled that the federal government had a "fiduciary responsibility" for Indians and lands reserved for Indians - that is, a responsibility to safeguard their interests. This duty placed the government under a legal obligation to manage Indigenous lands as a prudent person would when dealing with his/her own property. The Court held the government had breached this fiduciary duty and awarded damages of $10 million to the Musqueam First Nation.

# Sparrow, 1990

*The Sparrow decision recognizes Aboriginal rights.*

***R. v. Sparrow - Supreme Court of Canada, 1990***

The 1990 Supreme Court Decision in *R. v. Sparrow* was the first Supreme Court of Canada decision which applied **section 35**, of the *Constitution Act, 1982* which states "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed."

In the foundational *Sparrow* ruling, the Supreme Court ruled that First Nations have an **Aboriginal right**, as defined in the Constitution, to **fish** for food, social and ceremonial purposes and that right takes priority over all others, after conservation.

In *Sparrow*, a member of the **Musqueam** First Nation appealed his conviction on a charge of fishing with a longer drift net than permitted by the terms of the Band's fishing license under the Fisheries Act. He based his appeal on the argument that the restriction on net length was invalid because it was inconsistent with section 35 of the *Constitution Act*, 1982 – the section of the Act that recognizes and affirms existing Aboriginal and treaty rights.

# Sparrow *cont'd*

***R. v. Sparrow - Supreme Court of Canada, 1990 cont'd***

The *Sparrow* case was the first opportunity for the Supreme Court of Canada to interpret what **section 35** actually meant. In overturning Sparrow's conviction, the Court ruled that the *Constitution Act* provides "a strong measure of protection" for Aboriginal rights, and that any proposed government regulations that infringe on the exercise of those rights must be constitutionally justified.

The two-part *Sparrow* test for determining whether an infringement can be justified is:

(i) the government must be acting pursuant to a valid legislative object; and

(ii) the government's actions must be consistent with its fiduciary duty toward Aboriginal Peoples.

If a valid legislative object is established, assessment of whether the government's actions are consistent with that fiduciary duty between the Crown and Aboriginal Peoples requires that three questions be addressed:

(i) Has there been as "little infringement as possible" in order to achieve the intended result?

(ii) In a case of expropriation, has fair compensation been paid?

(iii) Has the particular Aboriginal People been consulted?

# Sparrow *cont'd*

***R. v. Sparrow - Supreme Court of Canada, 1990 cont'd***

The *Sparrow* justification test applies beyond Aboriginal rights, to include treaty rights and Aboriginal title as well.

The Court further ruled that:

- Aboriginal and treaty rights are capable of evolving over time and must be interpreted in a generous and liberal manner.
- Governments may regulate existing Aboriginal rights only for a compelling and substantial objective, such as the conservation and management of resources.
- After conservation goals are met, Aboriginal Peoples must be given priority to fish for food over other user groups.

The *Sparrow* case remains one of the most important Supreme Court decisions pertaining to Aboriginal rights. The decision provides substantive meaning to section 35. *Sparrow* sends a strong message to all parties concerned that when dealing with the rights of Aboriginal people, their rights are to be taken seriously, sensitively and in such a manner as to maintain the honour of the Crown in its fiduciary relationship with them.

# Delgamuukw and Gisday'way, 1997

*The Delgamuukw and Gisday'way decision confirms Aboriginal title exists.*

***Delgamuukw v. British Columbia; Supreme Court of Canada, 1984-1997***

The three commonly called Delgamuuk cases are a critical part of the constitutional puzzle of Aboriginal rights and title for British Columbia and all of Canada.

In 1984, 35 Gitxsan and 13 Wet'suwet'en Hereditary Chiefs asked the Supreme Court of British Columbia to recognize their ownership of 57,000 square kilometres of land in north-western B.C., to confirm their right to govern their traditional territories, and to award compensation for loss of their lands and resources. The Gitxsan and Wet'suwet'en elected to proceed with trial by judge alone (rather than by judge and jury) and submitted an enormous body of oral and written evidence[3] regarding the nature and duration of their use and occupation of their traditional lands.

In his Reasons for Judgment released in 1991, Chief Justice McEachern left open the possibility that Aboriginal rights may arise through the use and occupation of specific lands for Aboriginal purposes for an indefinite (and lengthy) period prior to British sovereignty. However, he ruled that in any event the Crown had extinguished any such Aboriginal rights by its imposition of complete dominion over the Colonial territory prior to joining Confederation in 1871. The Gitxsan and Wet'suwet'en appealed.

In 1993, the B.C. Court of Appeal reversed much of the lower court's decision and ruled instead that the Gitxsan and Wet'suwet'en peoples do have "unextinguished non-exclusive Aboriginal rights, other than a right of ownership," to much of their traditional territory. In addition, the appeal court Justices strongly recommended that the scope and content of those rights would best be defined through negotiation rather than litigation. The British Columbia government appealed to the Supreme Court of Canada.

# Delgamuuk and Gisday'way *cont'd*

***Delgamuukw v. British Columbia; Supreme Court of Canada, 1984-1997 cont'd***

The Court didn't declare Delgamuukw the winner, but sent the parties back to a lower court because of errors in how the case was brought forward. *Delgamuukw* established Aboriginal title as an encumbrance on the Crown's ultimate title that contains an inescapable economic component: driving a Crown duty of consultation that can include financial compensation for infringement of rights and title, and that can mean the full consent of an Aboriginal Nation whose core **usage rights** (such as hunting and fishing) are at stake.

On December 11, 1997, a unanimous Supreme Court of Canada handed down its much- studied *Delgamuukw* judgment, providing some important definition and description of Aboriginal title, affirming the legal validity of Aboriginal oral history, and clarifying the nature of the Crown's duties of consultation and accommodation in the context of infringement of Aboriginal rights.

This landmark ruling confirmed the existence of Aboriginal rights and title and provided a test to prove them:

1. the land must have been occupied before sovereignty,
2. there must be a continuity between pre-sovereignty and modern times (but not an unbroken chain)
3. at the time of sovereignty, the occupancy must have been exclusive (but it could have been jointly exclusive by more than one party or tribe).

If these are established, then Aboriginal title exists.

The 1997 ***Delgamuukw* and *Gisday'way*** court case carries significant implications for the history of Canada and for the idea of history itself. It also is the first time we see the doctrine of the duty to consult emerge in Canadian law. Since then there have been more than hundreds of cases trying determine the scope of the duty to consult. It is, simply put, "the reason we all consult or do aboriginal consultation."

# Powley, 2003

*Provides Métis recognition of their extinct existence and protects their collective rights.*

***R. v. Powley, Supreme Court of Canada, 2003***

The *Powley* case is the most significant decision relating to **Métis** people in Canada to date. Unlike Status Indians, whose identity is determined by the provisions of the ***Indian Act***, there was no legal definition of who was a Métis person until this Supreme Court of Canada decision.

What began as a case over a father and son charged of unlawfully hunting a moose without a license in Ontario ended in the Supreme Court of Canada addressing whether Métis communities can possess Aboriginal rights pursuant to section 35(1) of the *Constitution Act, 1982* and who can possess those rights. What came from the decision was the "Powley Test" determining the identity of individuals who are Métis.

In a unanimous decision, the Supreme Court of Canada affirmed that section 35(1) promises to the Métis recognition of their distinct existence and protects their existing collective Aboriginal rights, including the right to hunt for food.

Read: **Harry Daniels - The Man Who Put Métis in the Constitution**

# Powley, 2003 *cont'd*

***R. v. Powley, Supreme Court of Canada, 2003 cont'd***

The court held that Métis does not include all individuals with mixed Indian and European heritage. Instead, the court identified three broad factors for inclusion as a Métis person:

1. Self-identification - The individual must self-identify as a member of a Métis community and that identification must have an ongoing connection to an historic Métis community.

2. Ancestral Connection - There is no minimum "blood quantum" requirement, but Métis rightsholders must have some proof of an ancestral connection (by birth, adoption, or other means) to the historic Métis community whose collective rights they are exercising.

3. Community Acceptance - There must be proof of acceptance of the individual by the modern Métis community. Membership in a Métis political organization may be relevant but the membership requirements of the organization and its role in the Métis community must also be put into evidence. There must be documented proof and a fair process for community acceptance.

[1] R. v. Powley, 2003 SCC 43

# Haida, 2004

*The Haida decision established the duty to consult & accommodate.*

***Haida Nation v. British Columbia (Minister of Forests) - Supreme Court of Canada, 2004***

The *Haida* case is significant because a unanimous Supreme Court of Canada set out the basic principles applicable to the duty to consult.

The Council of the Haida Nation brought an action against the Provincial Crown and Weyerhaeuser Company Limited for not properly consulting with the Haida Nation when renewing a tree farm licence on Haida Gwaii.

Tree Farm Licence 39, issued to Weyerhaeuser, contained several areas of old growth red **cedar** – a culturally significant tree used for totem poles, canoes, and log houses. The Haida Nation wanted large areas of old growth forest protected from clear cutting and its potential detrimental effects on land, watershed, fish, and wildlife.

By a unanimous (7-0) decision delivered by Chief Justice McLachlin, the Supreme Court of Canada went a long way toward providing the clarity and direction arising from *Delgamuuk* decision and the Court of Appeal decisions in *Haida Nation* and *Taku River Tlingit*.

The strongly worded judgment makes two issues very clear. First, both orders of government have an inescapable Constitutional duty to consult and accommodate Aboriginal communities, in a manner that is meaningful, timely and reflective of the "honour of the Crown", regarding potential infringement on an Aboriginal right or title. Second, that duty rests with the Crown; it cannot be delegated to and does not otherwise extend to third parties (i.e. to industry).

# Taku, 2004

*Clarifies the duties of consultation and accommodation with respect to government decisions.*

***Taku River Tlingit First Nation v. British Columbia (Project Assessment Director) - Supreme Court of Canada, 2004***

The unanimous decision in the *Taku* case provided much needed clarification of the duties of consultation and accommodation in respect of government decisions, which may impact asserted Aboriginal rights.

Applying ***Haida Nation***, the Court ruled that the Crown owed a duty to consult meaningfully with the Taku River Tlingit First Nation (TRTFN) regarding the decision to re-open the Tulsequah Chief Mine, and to permit Redfern Resources Ltd. (the mine operator) to build a 160 kilometre access road through a portion of their traditional territory.

However, the Supreme Court also found that the duty of consultation was met by TRTFN's extensive involvement in the three and a half year review process conducted under B.C.'s Environmental Assessment Act.

# Tsilhqot'in, 2014

*Tsilhqot'in took the test to prove title and applied it.*

***Tsilhqot'in Nation v. British Columbia - Supreme Court of Canada, 2014***

The Supreme Court of Canada's *Tsilhqot'in Decision reverberated* through First Nation communities, leaders, resource developers, provincial and federal governments, lawyers, consultants – basically every First Nation and every person involved in resource development in Canada. It is a complex decision and well beyond the comprehension of most lay people.

The *Tsilhqot'in* decision is one of the most important the Supreme Court has decided in the last decade as it relates to Aboriginal rights and title to traditional territories and non-Treaty lands. It is a complex decision but it strengthened Aboriginal Peoples right to their traditional territories through broader application of title than the federal or provincial governments have been willing to recognize.

The court also placed a greater onus on the Crown to ensure that proper consultation occurs under a strengthened duty to consult and accommodate with Aboriginal Peoples. By using the phrase "fiduciary duty" the court is suggesting a greater Crown obligation in consultation. Companies will need to be further aware of the risk that past authorizations (ie. permits) that weren't provided with proper consultation may now be open to challenge from First Nations.

The court didn't establish a requirement for Aboriginal consent to Crown decisions, but it did make clear that the purpose of consultation is to try to achieve consent, not merely to go through the motions. Again the court recommending in strong terms that negotiation is the preferred method of working through these types of issues.

# Tsilhqot'in *cont'd*

***Tsilhqot'in Nation v. British Columbia - Supreme Court of Canada, 2014 cont'd***

There are scholarly and legal discussions about whether the *Tsilhqot'in* decision changes the law or only provides for a broader application of the law around consultation and accommodation.

How we view this decision is that of all the Aboriginal rights and title cases that the federal and provincial governments could have chosen to put their full resources behind, they felt this case was the strongest and had the best chance of limiting or clarifying their obligations and providing a narrower interpretation of rights to traditional territories. Instead, what occurred was another in a line of cases from the Supreme Court of Canada siding in favour of Aboriginal Peoples broader rights to traditional territories.

It confirms our belief that for greater certainty in development that governments and companies should be building better consultation and accommodation relationships with Indigenous Peoples that would provide surety for projects instead of risking further court interpretations.

# Non-treaty or treaty – what is the difference?

*Moving from non-treaty cases to those involving treaties*

All the previous cases have their roots in British Columbia. It may appear that we have a bias towards legal decisions from the West Coast, but that is not the case. Unlike the rest of Canada, where treaties had been entered into between First Nations and Canada, B.C. was relatively untouched.

There are a few exceptions in the far northeast section of the province and southern Vancouver Island's Douglas Treaties. It is this significant difference that led First Nations in B.C., and both the federal and provincial governments, to seek clarification from the Supreme Court of Canada as to the parties' respective rights, title, and obligations. These types of rights, titles, and obligations were generally laid out in the established treaties.

Any court action brought by a First Nation under a treaty would be specific to that treaty, unlike in B.C., where the disputes, upon reaching the Supreme Court of Canada had country-wide application.

Instead of a bias towards B.C. case law, we have included only those B.C. cases that have significance towards all Indigenous Peoples. With the legal principles having been established through case law with its origins in B.C., other Indigenous Peoples began to apply these principles to their historic treaties. The following three cases are significant to Indigenous Peoples in Canada and originated outside of B.C.

# Mikiswew, 2005

*Confirmed the duty to consult exists in the post-treaty context.*

***Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage) - Supreme Court of Canada, 2005***

The Supreme Court of Canada confirmed that the duty to consult also exists in the post-treaty context in the 2005 case of *Mikisew Cree First Nation* v. *Canada* (Minister of Canadian Heritage). The Court held that even though governments have a power to exercise their treaty rights, those rights are subject to a duty to consult in situations where the exercise of those treaty rights would have an adverse effect on Aboriginal treaty rights.

The Mikisew Cree First Nation objected to a proposal to re-establish a winter road through Wood Buffalo National Park for winter access from four communities in the Northwest Territories to the highway in Alberta on the grounds that it would infringe on their hunting and trapping rights under Treaty 8.

The Court found that Parks Canada had not consulted directly with the Mikisew Cree about the road or about mitigating the impacts of the road on their treaty rights until after important routing decisions had been made despite having provided a standard information package about the road to the Mikisew Cree and having invited them to informational open houses along with the general public.

# Mikiswew *cont'd*

***Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage) - Supreme Court of Canada, 2005 cont'd***

The Crown was found to have failed to demonstrate an intention of substantially addressing Aboriginal concerns through a meaningful process of consultation. The court found that because the taking of the land for the road adversely affected the Mikisew Cree's treaty right to hunt and trap, Parks Canada was required to consult with the Mikisew Cree before making important decisions.

The Court held that the impacts on the hunting and trapping rights were fairly minor, and that as a result, the lower end of the consultation spectrum was engaged. The Crown was required to provide notice to the Mikisew Cree and to engage directly with them. This engagement was to include the provision of information about the project, addressing what the Crown knew to be the Mikisew Cree's interests and what the Crown anticipated might be the potential adverse impact on those interests.

# Mikiswew *cont'd*

***Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage) - Supreme Court of Canada, 2005 cont'd***

The Crown was also to solicit and listen carefully to the Mikisew Cree's concerns, and attempt to minimize adverse impacts on its treaty rights. In conclusion the Court stated:

> *"It is true, as the Minister argues, that there is some reciprocal onus on the Mikisew to carry their end of the consultation, to make their concerns known, to respond to the government's attempt to meet their concerns and suggestions, and to try to reach some mutually satisfactory solution. In this case, however, consultation never reached that stage. It never got off the ground. Had the consultation process gone ahead, it would not have given the Mikisew a veto over the alignment of the road. As emphasized in Haida Nation, consultation will not always lead to accommodation, and accommodation may or may not result in an agreement. There could, however, be changes in the road alignment or construction that would go a long way towards satisfying the Mikisew objections. We do not know, and the Minister cannot know in the absence of consultation, what such changes might be."*

[1] Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage), 2005 SCC 69

# R. v. Marshall; R. v. Bernard, 2005

*This case is important because it confirms Aboriginal interests are a burden on the Crown's underlying title.*

***R. v. Marshall; R. V. Bernard - Supreme Court of Canada, 2005***

The *Royal Proclamation* of 1763 was a demonstration of Britain's acknowledgement that "any lands that had not been ceded to or purchased by" the Crown were reserved to "the several Nations or Tribes of Indians with whom We are connected, and who live under our protection." Many misunderstandings, disputes and grievances about those early treaties have erupted over the years, usually arising from Aboriginal efforts to enforce the treaties. Much of the conflict has been rooted in the fundamental differences between the Aboriginal tradition of communal land rights and responsibilities and the European tradition of private land ownership.

The concept of 'usufructuary right in land", or the right to use property belonging to another, has been used repeatedly by the Supreme Court of Canada to explain how Aboriginal title can remain **unextinguished** and alive under the weight of Crown sovereignty. Usage rights are shared between the legal title holder and the usufruct.

# R. v. Marshall; R. v. Bernard *cont'd*

***R. v. Marshall; R. V. Bernard - Supreme Court of Canada, 2005 cont'd***

For example, see Justice Lebel's Reasons for Judgment in the companion cases of *R. v. Marshall; R. v. Bernard*, heard by the Supreme Court of Canada in 2005:

> *"Nomadic peoples and their modes of occupancy of land cannot be ignored when defining the concept of aboriginal title to land in Canada … To ignore their particular relationship to the land is to adopt the view that prior to the assertion of Crown sovereignty Canada was not occupied. Such an approach is clearly unacceptable and incongruent with the Crown's recognition that Aboriginal Peoples were in possession of the land when the Crown asserted sovereignty. Aboriginal title reflects this fact of prior use and occupation of the land together with the relationship of Aboriginal Peoples to the land and the customary laws of ownership. This aboriginal interest in the land is a burden on the Crown's underlying title.*
>
> *This qualification or burden on the Crown's title has been characterized as a usufructuary right. The concept of a community usufruct over land was first discussed by this Court in St. Catherine's Milling and Lumber Co. v The Queen (1887), 13 S.C.R. 577. Chief Justice Ritchie used this concept to explain the relationship between Crown and aboriginal interests in land. The usufruct concept is useful because it is premised on a right of property that is divided between an owner and a usufructuary. A usufructuary title to all unsurrendered lands is understood to protect Aboriginal Peoples in the absolute use and enjoyment of their lands." [1]*

[1] R. v. Marshall; R. v. Bernard, [2005] 2 S.C.R. 220, 2005 SCC 43

# Rio Tinto, 2010

*This case confirmed the Haida Nation test of when the duty to consult arises.*

***Rio Tinto Alcan Inc. v. British Columbia (Chief Inspector of Mines) - Supreme Court of Canada, 2010***

In the 1950s, the government of B.C authorized the building of a dam and reservoir that altered the flow of the Nechako River without consulting the First Nations of the Carrier Sekani Tribal Council affected by this project.

Excess power generated from the dam has been sold by Rio Tinto Alcan to BC Hydro under Energy Purchase Agreements ("EPAs"). Since the initial EPA in 1961, there have been regular renewals of these agreements. At the time of the 2007 EPA, the First Nations asserted to the BC Utilities Commission (the "Commission") that these agreements should be subject to consultation under section 35 of the *Constitution Act, 1982*.

The Commission accepted that it had the power to consider the adequacy of consultation with Aboriginal Peoples, but found that there was no need for consultation in this case as the 2007 EPA would not adversely affect any Aboriginal interest. The adverse affects of Aboriginal interest occurred in the 1950s with the construction of the dam.

# Rio Tinto *cont'd*

***Rio Tinto Alcan Inc. v. British Columbia (Chief Inspector of Mines) - Supreme Court of Canada, 2010 cont'd***

The Supreme Court of Canada held that it was within the powers of the Commission to determine whether the duty to consult had been met and continued by following the Court's ruling in *Haida Nation*'s test of when does the duty to consult arise by outlining the three elements of that test:

1. The Crown must have real or constructive knowledge of a potential Aboriginal claim or right. Potential being the key; it is not proof that the claim will succeed.

2. There must be Crown conduct or a Crown decision. This conduct or decision include government exercise of statutory powers or to decisions or conduct which have an immediate impact on lands and resources and extends to "strategic, higher level decisions" that may have an impact on Aboriginal claims and rights.

3. There must be a possibility that the Crown conduct may affect the Aboriginal claim or right. There must be shown a causal relationship between the conduct and the potential for future adverse impacts on the claim or right. Past wrongs and speculative impacts are not sufficient.

# Rio Tinto *cont'd*

***Rio Tinto Alcan Inc. v. British Columbia (Chief Inspector of Mines) - Supreme Court of Canada, 2010 cont'd***

The Court further stated that the duty to consult is confined to the adverse impacts flowing from the specific Crown proposal at issue – not to larger adverse impacts of the projects of which it is a part. Where the resource has long since been altered and the present government conduct or decision does not have any further impact on the resource, the issue is not consultation, but negotiation about compensation for the failure to have been properly consulted in the past.

The Court upheld the Commission's ruling that the duty to consult did not arise because the 2007 EPA would not adversely affect any Aboriginal interest. The failure to consult on the initial project was an underlying infringement, but did not affect this 2007 EPA.

INDIGENOUS CORPORATE TRAINING INC.

# Contact Us!

Indigenous Corporate Training Inc. has been providing Indigenous relations training for over 20 years. Visit our website **www.ictinc.ca** to learn about our courses and other free resources.

Click to learn more