

The judiciary in the lead: Aboriginal politics in Canada's
post-*Charter* era

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2013-04-08

25. The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including

(a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and

(b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.

Canadian Charter of Rights and Freedoms

35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

Constitution Act, 1982

Aboriginal groups played an active and, in many ways, unexpected role in the patriation of Canada's constitution in 1982. They participated in the Canadian parliamentary deliberations on the constitution, becoming an example of what Alan Cairns called "Charter Canadians". They also mounted an unusual campaign in the United Kingdom, asserting the importance and continuing relevance of the relationship between aboriginal groups in what is now Canada and the British Crown, and seeking to block patriation undertaken without their consent. While Canada's large aboriginal organizations mostly ended up opposing Prime Minister Pierre Trudeau's patriation package, it nonetheless ended up containing provisions that were important for the subsequent legal and political positions of Indians, Metis, and Inuit in Canada.

When Canada patriated its constitution in 1982, both the constitution and the *Charter of Rights and Freedoms* included within it affirmed the existence of aboriginal rights. Neither document, however, did much to flesh out those rights, translating them into clear obligations on the part of governments. That process largely took place through subsequent court decisions, which have established the legal context in which aboriginal politics in Canada now take place. As such, Canada's judiciary has played a lead role in determining how aboriginal rights actually function.¹ Due to a combination of pre- and post-*Charter* factors, Canada's federal and provincial governments are now largely focused on comprehensive land claims as a mechanism for accommodating the needs and demands of aboriginal groups. This process can be appropriately interpreted as one of moving to a "more consensual, less colonial relationship" between the Canadian state and aboriginal peoples.² At the same time, many practical and theoretical issues persist, including the means through which aboriginal claims linked to group rights can be accommodated under a *Charter* that emphasizes the normative relationship between individuals and the state, tensions between different views of aboriginal nationalism, and the enduring social and economic problems experienced by aboriginals in Canada.³

Set against clashes between provincial premiers and the looming question of Quebecois secession, the aboriginal component in the story of Canada's constitutional patriation may be seen as comparatively minor. That being said, interpretation of the unspecific promises in the *Charter of Rights and Freedoms* and *Constitution Act*

¹For a detailed legal analysis of the character of aboriginal title, see: Slattery, "The Metamorphosis of Aboriginal Title".

²Russell, *Constitutional Odyssey : Can Canadians Become a Sovereign People?*, p.256.

³See: Christie, "A Colonial Reading of Recent Jurisprudence: Sparrow, Delgamuukw and Haida Nation".

ended up being important from the perspective of evolving Canadian jurisprudence, with concrete impacts on aboriginal communities themselves. In the process of patriation, Peter Russell argues that aboriginals “secured constitutional resources” in a way that was largely unintended by the main drafters of the constitution.⁴ These resources were employed and expanded upon subsequently, including through modern land claims agreements that have constitutional status.

1 Patriation and Canada’s aboriginals

Constitutional politics in Canada always involves an interplay between legislatures on one side and the courts on the other. In its own way, patriation itself required Canada’s courts to assess key questions about the legitimate actions of the federal government and the rights of minorities. Through the 1981 *Patriation Reference*, the Supreme Court of Canada paved the way for patriation on Prime Minister Pierre Trudeau’s terms — and for the circumvention of Quebecois objections.⁵ Prompted by three questions posed of the Supreme Court by the governments of Manitoba, Newfoundland, and Quebec, the *Patriation Reference* held that only a “substantial degree” of provincial consent was required for the Canadian parliament to amend the constitution, and that the federal government did have the unilateral authority to request its patriation by the British parliament.⁶ This determination altered the relative balance of power between the provinces and the federal government, opening the way for a patriation deal in the short term but possibly entrenching long-term resentments and institutional barriers to further constitutional reform in the long term. This entrenchment increases the importance of the precise contents of Canada’s patriated constitution, including provisions related to aboriginals, given the legal and political hurdles now standing in the way of amendment.

Canada’s national Indian, Metis, and Inuit organizations were among many interest groups from across Canadian society that participated in hearings of a special Joint Parliamentary Committee established to con-

⁴Russell, *Constitutional Odyssey : Can Canadians Become a Sovereign People?*

⁵See: *ibid.*, p. 119.

⁶Supreme Court of Canada, *Reference re a Resolution to amend the Constitution*, [1981] 1 S.C.R. 753.

duct televised hearings on proposed constitutional amendments.⁷⁸⁹¹⁰ The committee sat through the late fall of 1980 and early winter of 1981 and was comprised of ten senators and fifteen members of parliament.¹¹ Through their engagement with the federal government, these aboriginal groups secured three important promises in January of 1980: an amendment stating that the provisions of the proposed *Charter* could not violate the rights of aboriginal peoples, an amendment to entrench aboriginal and treaty rights, and a new obligation for federal and provincial governments to undertake subsequent meetings with aboriginal leaders on other issues of outstanding constitutional importance.¹² The essence of these promises endured into the final versions of Canada's patriated constitutional documents, serving as part of the basis for future legal decisions and leading to conferences in 1983, 1984, 1985, and 1987.¹³ More intangibly, aboriginal participation in the process of patriation may have helped drive the integration and increased sophistication of previously disunited First Nations, Metis, and Inuit groups, helping them to develop the coherence and political and legal capability that was applied to good effect when arguing subsequent matters before Canada's courts.¹⁴

While aboriginal groups succeeded in making themselves heard in the public deliberations leading up to patriation, other political actors in Canada were concerned about the consequences that could arise from entrenching aboriginal rights in the constitution.¹⁵ Indeed, at a First Ministers' conference in November of 1981, agreement was reached to entirely drop the recognition of aboriginal rights from the constitution. One motivation was concern from the provinces, including about the absence of treaties in British Columbia.¹⁶ It is interesting to note, however, that some provinces previously expressed concern about the *absence* of aboriginal rights in an earlier version of the *Charter*, fearing that the courts might identify them as "undeclared rights"

⁷See: Russell, *Constitutional Odyssey : Can Canadians Become a Sovereign People?*, p.114.

⁸See also: Sanders, "The Indian Lobby".

⁹Smiley, "A Dangerous Deed: The Constitution Act, 1982", p.81.

¹⁰These hearings were extensive, incorporating evidence from hundreds of individuals and groups across hundreds of hours. Non-aboriginal groups that secured significant constitutional changes through this process included the disabled and women.

¹¹Russell, *Constitutional Odyssey : Can Canadians Become a Sovereign People?*, p.113.

¹²Romanow, Whyte, and Leeson, *Canada... Notwithstanding: The Making of the Constitution 1976-1982*, p.121-2.

¹³See: Russell, *Constitutional Odyssey : Can Canadians Become a Sovereign People?*, p.131.

¹⁴Russell argues that "one of the strategic aims of the *Indian Act* was to break up Indian tribes into small reserve-based bands". (p. 264) Engagement with the patriation process and subsequent constitutional deliberations may be considered a very partial reversal of this effect.

¹⁵Romanow, Whyte, and Leeson, *Canada... Notwithstanding: The Making of the Constitution 1976-1982*, p. 268.

¹⁶*Ibid.*, p. 209.

causing “provincial authority [to] be affected in unforeseen ways”.¹⁷ There was also confusion about the precise aims of aboriginal groups, particularly given their parallel attempt to assert their rights through the courts and legislature of the United Kingdom.¹⁸

In addition to engaging with Canada’s deliberative process on patriation, aboriginal groups took their case directly to the government of the United Kingdom.¹⁹²⁰ This parallel campaign embodied many of the special characteristics of the relationship between aboriginal groups and the British colonial government and its Canadian successor. Aboriginal groups called attention to the promises of the *Royal Proclamation of 1763*: a document that recognized the existence of “several Nations or Tribes of Indians with whom We are connected, and who live under our [the Crown’s] Protection” and who “should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to or purchased by Us, are reserved to them, or any of them, as their Hunting Grounds”.²¹ The proclamation specifically asserted the perpetual character of this connection, bolstering the argument that the agreement between the British sovereign and aboriginal groups incorporated a mutual respect for sovereignty which endures in a government-to-government level of dialogue.

Canadian aboriginal groups asserted that this special relationship with the British Crown endured, and that the British government was therefore obliged to consult with them before accepting a request from the Canadian parliament to patriate the constitution.²² This argument was considered seriously by both the British courts and legislature. Lord Alfred Denning of the British Court of Appeal considered the arguments brought by Alberta’s Indian association, prompting the government of Margaret Thatcher to delay the second reading of the Canada Bill in the British House of Commons.²³²⁴ Denning ultimately decided that responsibility for

¹⁷Romanow, Whyte, and Leeson, *Canada... Notwithstanding: The Making of the Constitution 1976-1982*, p. 77.

¹⁸*Ibid.*, p. 212-3.

¹⁹See: Russell, *Constitutional Odyssey : Can Canadians Become a Sovereign People?*, p. 117.

²⁰See also: Sanders, “The Indian Lobby”, p. 305, 311, 317, 321.

²¹King George III, *Royal Proclamation, 1763*, <http://www.specific-claims-law.com/specific-claims-background/12-royal-proclamation-1763>.

²²See also: Russell, *Constitutional Odyssey : Can Canadians Become a Sovereign People?*, p. 177.

²³Denning, *The Queen v. The Secretary of State for Foreign and Commonwealth Affairs, Ex Parte: The Indian Association of Alberta, Union of New Brunswick Indians, Union of Nova Scotian Indians*, <http://www.mandellpinder.com/pdf/cases/R-v-Sec-of-State-1981-4-CNLR-86.pdf>.

²⁴See: Sanders, “The Indian Lobby”, p. 322.

the promises in treaties had passed from the British to the Canadian government, eliminating the need for the British to act on Canadian aboriginal objections to patriation.

The British Parliament also granted substantial consideration to the claims made by Canadian aboriginal groups. Thirty hours in the House of Commons were devoted to debating the Canada Bill, and twenty-seven of them ended up being devoted to “Indian matters”.²⁵ Similarly, over 80 percent of the debate in the House of Lords was devoted to aboriginal rights. In the end, both houses of parliament gave their approval for patriation and Queen Elizabeth II went to Ottawa to grant royal assent to the legislation bringing the power to amend Canada’s constitution home.

Evaluating the importance of the ‘London strategy’ is not straightforward. Douglas Sanders describes how the strategy cost approximately \$4.5 million, ended up weakening section 34 of the *Constitution Act*, and antagonized Canada’s federal government.²⁶ At the same time, it can be argued that the groups that participated in the process of patriation “acquired a stake in the Constitution which rivals that of provincial governments and throws into question a process of constitutional change monopolized by federal and provincial government leaders”.²⁷ It’s probably impossible to know what sort of stake aboriginal groups could have secured if they had foregone their appeals to the British courts and legislature, but it is at least conceivable that these efforts highlighted the legitimate role and special legal status of aboriginal groups in Canadian constitutional discussions and helped to equip them with the skills and unity necessary for further engagement after patriation.

Back in Canada, the First Ministers’ decision to strike protections of aboriginal rights from the constitution was reversed “through public agitation”.^{28,29} In a concession to the concerns of provincial premiers including Alberta’s Peter Lougheed, the final version of the *Constitution Act, 1982* asserted that: “The *existing* aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed” (emphasis added).^{30,31} In the end, most of Canada’s aboriginal groups opposed the patriation package on the basis that it

²⁵ See: Sanders, “The Indian Lobby”, p. 323.

²⁶ See: *ibid.*, p. 325.

²⁷ Russell, *Constitutional Odyssey: Can Canadians Become a Sovereign People?*, p.115.

²⁸ *Ibid.*, p. 122.

²⁹ Johnston, “Aboriginal Rights and the Constitution: A Story Within A Story?”, p.135.

³⁰ Sanders, “The Indian Lobby”, p. 321.

³¹ The importance of this qualifier was eventually rejected by the Supreme Court, in the *Sparrow* decision, which held that “[t]he

failed to recognize their inherent sovereignty and did not include an obligation to consult with them on future amendments affecting their constitutional rights. Aboriginal groups also objected to the absence of specific enforcement provisions for aboriginal rights, as well as the lack of any specific acknowledgment of a right to self-government.³²³³ These shortcomings could be especially significant given the challenge of amending Canada's constitution, as demonstrated by the subsequent Meech Lake and Charlottetown attempts.

Aboriginal demands for further meetings with the federal government to discuss their constitutional rights were realized in 1983, 1984, 1985, and 1987. The *Constitution Act, 1982* obligated the federal government to hold a conference with aboriginals within a year of passage in order to proceed with identifying and defining their rights. This conference took place in March of 1983, and produced the first amendment to the patriated constitution.³⁴³⁵ This amendment was subsequently ratified by all provinces except Quebec — a demonstration of ongoing resentment and hostility deriving from the way in which Quebec was circumvented through the patriation process. The newly added section 35(3) clarified that rights granted through new and existing treaties would have constitutional status. This included the limited self-government rights granted to the Cree and Inuit of northern Quebec during the 1970s.³⁶³⁷ At the meeting, it was also agreed that consultation with aboriginal representatives would be necessary prior to subsequent constitutional amendments affecting their rights and that aboriginal and treaty rights “are guaranteed equally to male and female persons”.³⁸

Further conferences took place in the following years, largely focused on aboriginal self-government.³⁹ Through the course of these meetings, some differences of opinion about the appropriate character of self-

phrase ‘existing aboriginal rights’ must be interpreted flexibly so as to permit their evolution over time”.

³²Romanow, Whyte, and Leeson, *Canada... Notwithstanding: The Making of the Constitution 1976-1982*, p.268.

³³Arguably, the lack of specific such mechanisms is not of great legal significance. Section 52 of the *Constitution Act* held that “any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect”.

³⁴See: Romanow, Whyte, and Leeson, *Canada... Notwithstanding: The Making of the Constitution 1976-1982*, p.269.

³⁵Russell, *Constitutional Odyssey : Can Canadians Become a Sovereign People?*, p. 130.

³⁶*Ibid.*, p. 130.

³⁷For an interesting discussion of some of these developments, which also relate to questions about aboriginals and resource development, see: Richardson, *Strangers Devour the Land*.

³⁸See also a report prepared for the Institute of Intergovernmental Relations: Schwartz, *First Principles: Constitutional Reform with Respect to Aboriginal Peoples of Canada 1982-1984*, <http://law.umanitoba.ca/bryanschwartz/images/stories/Books/firstprinciples/01FP-Intro.pdf>.

³⁹These included the 1984 Federal-Provincial Conference of First Ministers on Aboriginal Constitutional Matters (March 8–9), 1985 First Ministers’ Conference on Aboriginal Constitutional Matters (April 2–3), and 1987 First Ministers’ Conference on Aboriginal Constitutional Matters (March 26–27).

government became more clearly defined and articulated; the federal government and many provinces were willing to accept self-government rights contingent upon negotiation with federal and provincial governments, whereas aboriginals were more likely to see these rights as prior to Canadian law, given that aboriginal sovereignty was never relinquished in the span between European contact and the present.⁴⁰ A wide range of self-government options were discussed, “ranging from ‘nationhood’ to local school boards”.⁴¹ Matters discussed included fiscal arrangements, the relationship between the federal-provincial division of powers and responsibilities toward aboriginals, the participatory rights of aboriginals in future constitutional amendment processes, and modern land claims agreements.

2 Sparrow, Delgamuukw, and other judgments

In the decades following patriation, the courts produced important precedents that gave new substantive meaning to aboriginal rights and title. Important Supreme Court of Canada precedents include *Guerin v. The Queen* (1984)⁴², *R. v. Sparrow* (1990)⁴³, and *Delgamuukw v. British Columbia* (1997)⁴⁴. The precedents do not necessarily ‘pull in a single direction’ in terms of providing unequivocal guidance on the status of aboriginal rights under Canada’s constitution. In particular, the ‘*Van der Peet* trilogy’ of decisions expressed an ossified conception of aboriginal rights when compared with decisions like *Sparrow*. Despite the lack of a single clear legal and intellectual progression, each precedent provided important elaboration on the practical applicability of the promises in the constitution and the ways in which Canadian governments are constrained by it. By filling in what the constitution left unstated, the courts played a substantial role in establishing the contemporary character of aboriginal rights in Canada.

The 1984 *Guerin* decision was probably the first important post-patriation Supreme Court decision relat-

⁴⁰Russell, *Constitutional Odyssey : Can Canadians Become a Sovereign People?*, p. 131.

⁴¹Schwartz, *First Principles: Constitutional Reform with Respect to Aboriginal Peoples of Canada 1982-1984*, p. v.

⁴²Supreme Court of Canada, *Guerin v. The Queen*, [1984] 2 SCR 335, <http://www.canlii.org/en/ca/scc/doc/1984/1984canlii25/1984canlii25.html>.

⁴³Supreme Court of Canada, *R. v. Sparrow*, [1990] 1 SCR 1075, <http://www.canlii.org/en/ca/scc/doc/1990/1990canlii104/1990canlii104.html>.

⁴⁴Supreme Court of Canada, *Delgamuukw v. British Columbia*, [1997] 3 SCR 1010, <http://www.canlii.org/en/ca/scc/doc/1997/1997canlii302/1997canlii302.html>.

ing to aboriginal rights. The case concerned a 1958 deal made by the federal government on behalf of the Vancouver-area Musqueam band, regarding the lease of 162 acres of reserve land to the Shaughnessy Heights Golf Club. In 1970, the band learned more about the terms of the original deal and objected that they had not been properly informed initially. In addition to upholding the lower court's order of compensation, the Supreme Court held that the Crown "withheld pertinent information from both the Band and an appraiser assessing the adequacy of the proposed rent" and that "the Crown is under an obligation to deal with the land on the Indians' behalf when the interest is surrendered".⁴⁵ It also held that "[t]he fiduciary relationship between the Crown and the Indians has its roots in the concept of aboriginal, native or Indian title". The decision emphasizes the "fiduciary duty" borne by the Crown in relation to aboriginals, a concept that was important in subsequent decisions.

Samuel LaSelva discusses the societal impact of *Sparrow* — a 1990 case prompted by a single fisherman's use of a net of illegal length.⁴⁶⁴⁷ The *Sparrow* precedent "requires government, courts, and indeed all Canadians... [to] be sensitive to the aboriginal perspective itself on the meaning of... [aboriginal] rights".⁴⁸⁴⁹ The court held that governments must take the rights of aboriginals seriously if they are to uphold the honour of the Crown. The decision also placed the question of Musqueam salmon fishing within the broader context of contemporary Canadian society; as aboriginal rights have evolved since the initial time of European contact, so too has evolved an obligation for aboriginal people to apply their rights in a way that "show[s] due regard for the interests of all".⁵⁰

The *Sparrow* case clarified and gave meaning to section 35 of the *Constitution Act, 1982*. The unanimous decision of the court — written by Chief Justice Brian Dickson and Justice Gerard La Forest — held that the fisher was exercising an inherent aboriginal right and that this right was protected by section 35. Further,

⁴⁵Supreme Court of Canada, *Guerin v. The Queen*, [1984] 2 SCR 335.

⁴⁶LaSelva, *The moral foundations of Canadian federalism : paradoxes, achievements, and tragedies of nationhood*, Accessible electronically through the University of Toronto library at: <http://site.ebrary.com.myaccess.library.utoronto.ca/lib/utoronto/docDetail.action?docID=10135146>.

⁴⁷LaSelva also identifies a logical connection between *Sparrow* and the 1832 United States Supreme Court decision *Worcester v. Georgia*. (p.141)

⁴⁸LaSelva, *The moral foundations of Canadian federalism : paradoxes, achievements, and tragedies of nationhood*, p. 141.

⁴⁹Supreme Court of Canada, *R. v. Sparrow*, [1990] 1 SCR 1075.

⁵⁰LaSelva, *The moral foundations of Canadian federalism : paradoxes, achievements, and tragedies of nationhood*, p. 142.

the court established a doctrine for considering claims that aboriginal rights have been extinguished by the promulgation of government policies. For such extinguishment to occur, the intent of the government to do so must be “clear and plain”.⁵¹ Rights cannot simply be extinguished through a pattern of disregard. The court found that governments must exercise restraint in interfering with aboriginal rights, but explicitly confirmed that there are cases in which this can be done legitimately. In order to meet the strict standard of justification required to infringe upon an unextinguished aboriginal right, there must be a “valid legislative purpose” and Aboriginal interests must be given “top priority” in the courts allocation of priorities.⁵² The case has been cited in subsequent decisions as an important precedent regarding the legitimate and illegitimate restriction of aboriginal rights by governments.

Darlene Johnston also considers the importance of *Sparrow*, placing it within the context of the aboriginal policies of the time. Johnston argues that section 35 of the *Constitution Act, 1982* “represents a remarkable reversal of the group-destructive policy which the federal government had pursued for more than a century”.⁵³ Johnston objects strongly to the approach toward aboriginal policy described in Trudeau’s 1969 white paper, describing it as a “scheme to bring [aboriginal people] into Canadian society as undifferentiated individuals, stripped of... collective rights”.⁵⁴⁵⁵ In her view, the *Sparrow* case provided an opportunity for the Supreme Court to explore the scope of section 35, and determine the strength of the promises it makes to aboriginal people. She identifies the references in the judgment to the special trust relationship that exists between the Crown and aboriginals, but goes on to discuss how problematic this relationship has been in practice. She concludes that the scope of the scrutiny required to justify interference in aboriginal rights is “disturbingly uneven” — an assessment that probably accords well with the instability of future court decisions on aboriginal rights.⁵⁶

Peter Russell describes the “roller-coaster ride” experienced by aboriginals as subsequent judicial inter-

⁵¹ Supreme Court of Canada, *R. v. Sparrow*, [1990] 1 SCR 1075.

⁵² Macklem, *Indigenous Difference and the Constitution of Canada*, p. 58.

⁵³ Johnston, “Aboriginal Rights and the Constitution: A Story Within A Story?”, p. 134.

⁵⁴ *Ibid.*, p. 135.

⁵⁵ Government of Canada, *Statement of the Government of Canada on Indian policy*, <http://www.aadnc-aandc.gc.ca/eng/1100100010189/1100100010191>.

⁵⁶ Johnston, “Aboriginal Rights and the Constitution: A Story Within A Story?”, p. 138.

pretations of their rights have emerged in Canada.⁵⁷ The so-called ‘*Van der Peet* trilogy’ of Supreme Court precedents consists of *R. v. Van der Peet*⁵⁸, *R. v. Gladstone*⁵⁹, and *R. v. N.T.C. Smokehouse Ltd.*⁶⁰. These established a “frozen rights” doctrine, in which aboriginal rights were restricted to a bundle of activities that were being undertaken at the time of first contact with Europeans and which are now deemed “integral to the distinctive culture of an Aboriginal people”.⁶¹⁶² This sits awkwardly with the recognition in *Sparrow* that the rights and obligations of aboriginals evolve along with society as a whole. In the same year, *R. v. Badger* restricted the rights of Cree Indians living under Treaty No. 8 to hunt, fish, and trap.⁶³ Russell argues that this decision “seemed to drain much of the meaning from the Crown’s fiduciary obligation”.⁶⁴

The 1997 *Delgamuukw* case further established the substantive and contemporary legal importance of aboriginal title, “giving a wide interpretation” of its scope.⁶⁵⁶⁶ It established that aboriginal title exists in British Columbia (despite the absence of treaties at the time of British colonization) and that aboriginal title applies to the land itself, not only to uses like hunting, fishing, and gathering.⁶⁷ This was held to include the exploitation of sub-surface minerals: a ‘modernized’ interpretation of aboriginal rights more in keeping with *Sparrow* than with the *Van der Peet* trilogy.⁶⁸ The decision re-affirmed the inalienable quality of aboriginal title, linked to the sovereign-to-sovereign character of the relationship between aboriginals and the British Crown, determined that aboriginal title existed before the assertion of British sovereignty, and found that aboriginal title is held

⁵⁷Russell, *Constitutional Odyssey : Can Canadians Become a Sovereign People?*, p. 262.

⁵⁸Supreme Court of Canada, *R. v. Van der Peet*, [1996] 2 SCR 507, <http://www.canlii.org/en/ca/scc/doc/1996/1996canlii216/1996canlii216.html>.

⁵⁹Supreme Court of Canada, *R. v. Gladstone*, [1996] 2 S.C.R. 723, <http://www.canlii.org/en/ca/scc/doc/1996/1996canlii160/1996canlii160.html>.

⁶⁰Supreme Court of Canada, *R. v. N.T.C. Smokehouse Ltd.* <http://scc.lexum.org/decisia-scc-csc/scc-csc/scc-csc/en/1408/1/document.do>.

⁶¹Russell, *Constitutional Odyssey : Can Canadians Become a Sovereign People?*, p.263.

⁶²See also: Macklem, *Indigenous Difference and the Constitution of Canada*, p. 58–9.

⁶³Supreme Court of Canada, *R. v. Badger*, [1996] 1 S.C.R. 771, <http://www.canlii.org/en/ca/scc/doc/1996/1996canlii236/1996canlii236.html>.

⁶⁴Russell, *Constitutional Odyssey : Can Canadians Become a Sovereign People?*, p.263.

⁶⁵*Ibid.*, p. 263.

⁶⁶See also: McNeil, “Self-Government and the Inalienability of Aboriginal Title”.

⁶⁷British Columbia Treaty Commission, *A Lay Person’s Guide to Delgamuukw*, http://www.bctreaty.net/files_3/pdf_documents/delgamuukw.pdf.

⁶⁸Supreme Court of Canada, *Delgamuukw v. British Columbia*, [1997] 3 SCR 1010, <http://www.canlii.org/en/ca/scc/doc/1997/1997canlii302/1997canlii302.html>.

communally by the population of aboriginal nations.⁶⁹

The case concerned 133 individual territories amounting to 58,000 square kilometres, claimed by the Gitksan Nation and the Wet'suwet'en Nation.⁷⁰ At the time, a federal land claim process was in operation, but it was deemed to be too slow by these petitioners. At issue was the assertion by the aboriginal groups that in cases where tribal laws conflicted with provincial laws, tribal laws should prevail. The case did not decide the matter of the land claim itself, but did involve significant determinations from the court about the nature of aboriginal rights and title. Centrally, this included the assertion that aboriginal title is a right to the land itself. Chief Justice Lamer explained the reasoning behind the decision, saying:

Separating federal jurisdiction over Indians from jurisdiction over their lands would have an unfortunate result — the government vested with primary constitutional responsibility for securing the welfare of Canada's aboriginal peoples would find itself unable to safeguard one of the most central of native interests — their interest in their lands.⁷¹⁷²

Delgamuukw also provided guidance on the appropriate scope of consultation, and reiterated the requirement that such consultation be conducted “in good faith” by the Crown. In the closing of the judgment, Chief Justice Lamer noted that “this litigation has been both long and expensive, not only in economic but in human terms as well” and suggests that settlement of the matter outside the courts, with the Crown negotiating in good faith, may be preferable to further litigation.⁷³

3 Comprehensive land claims

The progression toward a focus on comprehensive land claims precedes patriation. One important driver was the 1973 *Calder v. British Columbia (Attorney General)* decision.⁷⁴⁷⁵ Here, the Supreme Court of Canada recognized the native title rights of the Nisga'a people, prompting the Trudeau government to launch a process

⁶⁹Rendell, “Aboriginal title is enshrined in s.35(1) of the Constitution Act, 1982 and gives rise to a host of obligations aimed at reconciling the pre-existence of aboriginal peoples with the sovereignty of the Crown and the rest of Canada.”

⁷⁰British Columbia Treaty Commission, *A Lay Person's Guide to Delgamuukw*, p. 2.

⁷¹Supreme Court of Canada, *Delgamuukw v. British Columbia*, [1997] 3 SCR 1010.

⁷²See also: Macklem, *Indigenous Difference and the Constitution of Canada*, p. 274, 280.

⁷³Supreme Court of Canada, *Delgamuukw v. British Columbia*, [1997] 3 SCR 1010.

⁷⁴Supreme Court of Canada, *Calder et al. v. Attorney-General of British Columbia*, [1973] SCR 313, <http://www.canlii.org/en/ca/scc/doc/1973/1973canlii4/1973canlii4.html>.

⁷⁵For an extensive discussion of *Calder*, see: *Ler Right Be Done: Aboriginal Title, the Calder Case, and the Future of Indigenous Rights*.

for creating modern treaties.⁷⁶⁷⁷⁷⁸⁷⁹ Under subsequent governments, that process was interwoven with the emergence of further court decisions, as described above, as well as with additional parliamentary developments. The final report of the Royal Commission on Aboriginal Peoples in 1996 examined in detail the many failures of the Canadian government to take aboriginal rights seriously, including in terms of the *Indian Act*, residential schools, the relocation of aboriginal communities, and the treatment of aboriginal veterans.⁸⁰⁸¹⁸² The commission also asserted that treaties between the Canadian government and aboriginal groups are “nation-to-nation”, “sacred and eternal”, and “part of the Canadian constitution”. Furthermore, “fulfilment of the treaties is fundamental to Canada’s honour”.⁸³ Among its recommendations, the commission called for “[t]he federal government [to] establish a process for making new treaties to replace the existing comprehensive claims policy, based on the following principles:

1. The blanket extinguishment of Aboriginal land rights is not an option.
2. Recognition of rights of governance is an integral component of new treaty relationships.
3. The treaty-making process is available to all Aboriginal nations, including Indian, Inuit and Metis nations.
4. Treaty nations that are parties to peace and friendship treaties that did not purport to address land and resource issues have access to the treaty-making process to complete their treaty relationships with the Crown.”⁸⁴

In its official response to the commission’s report, the government reiterated its previously-stated position that it was prepared to accept “the inherent right to self-government” without litigation, as one of the existing

⁷⁶Russell, *Constitutional Odyssey : Can Canadians Become a Sovereign People?*, p.260.

⁷⁷See also: Borrows, *Drawing Out Law: A Spirit’s Guide*, p.25.

⁷⁸See also: Macklem, *Indigenous Difference and the Constitution of Canada*, p.269.

⁷⁹The *Calder* judgment held that aboriginal title as a legal right is “rooted not solely in any European declaration or body of law, but in the First Nations historic occupation and possession of their lands”. Rendell, “Aboriginal title is enshrined in s.35(1) of the Constitution Act, 1982 and gives rise to a host of obligations aimed at reconciling the pre-existence of aboriginal peoples with the sovereignty of the Crown and the rest of Canada.”

⁸⁰Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples*, [http : / / www . collectionscanada . gc . ca / webarchives / 20071124130113 / http : / / www . ainc - inac . gc . ca / ch / rcap / sg / sgm8_e . html](http://www.collectionscanada.gc.ca/webarchives/20071124130113/http://www.ainc-inac.gc.ca/ch/rcap/sg/sgm8_e.html).

⁸¹See also: Borrows, “Seven Generations, Seven Teachings: Ending the Indian Act”.

⁸²See also: Borrows, *Drawing Out Law: A Spirit’s Guide*.

⁸³Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples*, [http : / / www . collectionscanada . gc . ca / webarchives / 20071124125834 / http : / / www . ainc - inac . gc . ca / ch / rcap / sg / shm2_e . html](http://www.collectionscanada.gc.ca/webarchives/20071124125834/http://www.ainc-inac.gc.ca/ch/rcap/sg/shm2_e.html).

⁸⁴*Ibid.*, [http : / / www . collectionscanada . gc . ca / webarchives / 20071124130154 / http : / / www . ainc - inac . gc . ca / ch / rcap / sg / ska5a1_e . html](http://www.collectionscanada.gc.ca/webarchives/20071124130154/http://www.ainc-inac.gc.ca/ch/rcap/sg/ska5a1_e.html).

rights protected by section 35 of the *Constitution Act, 1982*.⁸⁵

In many cases, aboriginal groups see considerable appeal in the delegation of authorities over matters like policing, education, and internal governance which is possible through comprehensive land claims processes. More radical variants of aboriginal nationalism also exist. In *Peace, Power, Righteousness: An Indigenous Manifesto*, Taiaiake Alfred rejects the notion that it is appropriate for aboriginal groups to engage with the colonial government and legal system in a way that legitimizes them:

All land claims in Canada, including those at issue in the BC treaty process, arise from the mistaken premise that Canada owns the land it is situated on. In fact, where indigenous people have not surrendered ownership, legal title to “Crown” land does not exist — it is a fiction of Canadian (colonial) law. To assert the validity of Crown title to land that the indigenous population has not surrendered by treaty is to accept the racist assumptions of earlier centuries.⁸⁶⁸⁷

In some respects, Alfred’s argument is unanswerable. A strong case can be made that the imposition of Britain’s imperial will over the aboriginal peoples of North America was unjust and not consented to. At the same time, the notion that this invalidates any subsequent legal or political authority runs insurmountably into the obstacle that this authority remains in practical effect. As stated in the conclusion of the *Delgamuukw* decision: “Let us face it, we are all here to stay.”⁸⁸ While it may be philosophically objectionable to do so, securing recognition of past abuses through colonial courts and achieving a measure of remedy for them likely offers the best practical opportunities for mitigating the consequences of those injustices.⁸⁹

There are clear tensions between a vision of aboriginal rights that focuses on group rights justified historically and the *Charter*-entrenched view of rights as a largely-individual matter between particular Canadians and government.⁹⁰⁹¹ Some visions of aboriginal nationalism emphasize the need for aboriginals to “develop solutions for themselves... within their own cultural frameworks”, potentially going so far as to effectively opt-out of the Canadian state.⁹² At the same time, it may not be the case that all aboriginal people would see

⁸⁵Russell, *Constitutional Odyssey : Can Canadians Become a Sovereign People?*, p.257.

⁸⁶From: “Righteousness” Alfred, *Peace, Power, Righteousness: An Indigenous Manifesto*.

⁸⁷See also: Macklem, *Indigenous Difference and the Constitution of Canada*, p. 73.

⁸⁸Supreme Court of Canada, *Delgamuukw v. British Columbia*, [1997] 3 SCR 1010.

⁸⁹For an extended comparative examination of the role of courts in aboriginal decolonization, see: Russell, “My People’s Courts as Agents of Indigenous Decolonisation?”

⁹⁰For discussion of the importance of culture in the context of aboriginal rights, see: Macklem, *Indigenous Difference and the Constitution of Canada*.

⁹¹Also: Alfred, *Peace, Power, Righteousness: An Indigenous Manifesto*.

⁹²*Ibid.*, p. 29.

the rights that they value effectively protected by such governments. Aboriginal people may have internalized the individual rights dialogue that has been prevalent in Western political thought since the Enlightenment, and may not be universally desirous of more communitarian forms of government that downplay the importance of rights interpreted in that way. Aboriginal societies decolonized in this way may also face questions about legitimacy. It can be difficult enough to justify why a democratic government with a mandate periodically established via general elections can legitimately constrain the choices of individuals; it may be harder still to justify the legitimacy of a government whose authority derives from the fact that the ancestors of those currently under its authority have a particular ancestry, or have occupied a particular place for an extended span of time. There are also practical issues associated with aboriginal self-government. Alan Cairns highlights how aboriginal groups in Canada largely consist of 5,000–7,000 individuals, which raises the question of their degree of capability when compared with other sovereign governments.⁹³ Governments in which there is “no central or coercive authority” and where individuals are “free to dissent from, and remain unaffected by” collective decisions, as proposed by Taiaiake Alfred, may have problems with addressing problems at a global scale, such as climate change.⁹⁴ Nor does such a vision of aboriginal self-government offer a clear mechanism for addressing the needs of “marginalized urban Aboriginals”, who Alan Cairns identifies as 45 percent of Canada’s total aboriginal population.⁹⁵ Particularly when it comes to small, isolated communities in northern Canada, an additional layer of federalism in which self-governing aboriginal groups are added in among provinces and municipalities may introduce new costs and inefficiencies. Nonetheless, such an approach may offer the best prospects for overcoming the harmful legacy of colonialism without introducing serious new problems.

The examples of Nunavut and the Nisga’a Treaty in British Columbia help to ground these discussions in actual experience.

⁹³ Cairns, *Citizens Plus: Aboriginal Peoples and the Canadian State*.

⁹⁴ Alfred, *Peace, Power, Righteousness: An Indigenous Manifesto*, p. 49.

⁹⁵ Cairns, *Citizens Plus: Aboriginal Peoples and the Canadian State*.

3.1 Nunavut

Described by Peter Russell as a “spectacular development”, the creation of Nunavut⁹⁶ granted ownership over 350,000 square kilometres of land, along with self-government and other provisions, in exchange for the agreement of the Inuit in the region to surrender native title.⁹⁷ In July 1993, Canada’s parliament passed the *Nunavut Act* and the *Nunavut Land Claims Agreement Act*, providing for the establishment of a new territory out of land formerly included in the Northwest Territories in April of 1999. As a modern treaty, the agreement with the Inuit holds constitutional status under section 35 of the amended *Constitution Act*.⁹⁸ The agreement establishes a Nunavut Government and Legislature with jurisdiction in many fields of policy.

The process of creating Nunavut began with negotiations between the Inuit Tapiriit Kanatami and the federal government in 1976, and involved a 1982 plebiscite on division held throughout the Northwest Territories.⁹⁹ The plebiscite was approved by 56% to 44%. In 1992, the land claims agreement was finalized and submitted to the public for another referendum. This time, it was approved by 69% of the population of Nunavut. The legislation to create the new territory was then passed by Canada’s parliament. It is interesting to note that the structure of government adopted in Nunavut largely mirrors that of the government of Canada, and the government of the United Kingdom before it, albeit with the absence of political parties and a greater emphasis on decentralized authority.¹⁰⁰ With a population of about 30,000 spread across an area larger than any other Canadian province or territory, Nunavut surely experiences particular governance challenges.

All told, the creation of Nunavut represents an important step in the unravelling of the colonial relationship between the Canadian government and aboriginal groups, as well as a precedent and template for future comprehensive agreements. The creation of Nunavut is also a hybrid and demonstration of many Canadian modes of political legitimation, including the largely elite-driven process of constitutional patriation, government-to-government negotiations between the Canadian state and aboriginal groups, and referenda as a way of establishing popular consent for major decisions.

⁹⁶‘Our land’ in Inuktitut

⁹⁷Russell, *Constitutional Odyssey : Can Canadians Become a Sovereign People?*, p.258.

⁹⁸Ibid., p.258.

⁹⁹Abele and Dickerson, “The 1982 Plebiscite on Division of the Northwest Territories: Regional Government and Federal Policy”.

¹⁰⁰Russell, *Constitutional Odyssey : Can Canadians Become a Sovereign People?*, p.258–9.

3.2 Nisga'a Final Agreement

In May 1999, representatives from the Nisga'a First Nation, the province of British Columbia, and federal government signed the *Nisga'a Final Agreement* — a modern treaty granting land and a significant measure of self-government to the aboriginal people of the Nass Valley.¹⁰¹¹⁰² The treaty creates two levels of self-government: Nisga'a Lisims Government, constituting the nation as a whole and empowered to make laws in areas including citizenship, culture, land, employment, social services, health services, child and family services, and education, and Nisga'a Village Governments, empowered to make laws concerning local matters. Under the treaty, the Nisga'a Nation is “granted in fee simple the surface and subsurface rights to 1,992 square kilometres of land, and shall be able to create and transfer interests in these lands.”¹⁰³ The agreement also involves a capital payment of \$190 million, along with other payments totalling \$312 million. The *Nisga'a Final Agreement* was the first modern treaty in Canada incorporating both land and self-government which has formal constitutional status in its entirety.¹⁰⁴ In some cases, the treaty specifically provides that Nisga'a law shall prevail over that of British Columbia and Canada, specifically when it “concerns matters essential to their collective life and identity” such as citizenship, language, and culture.¹⁰⁵ The treaty also involves elements of hybrid governance: for instance, the timber extraction and forest management rules adopted on Nisga'a land must meet or exceed those of the province of British Columbia.¹⁰⁶

Patrick Macklem raises the possibility that the *Nisga'a Treaty* leaves important questions unanswered about the status of aboriginal governments within Canadian federalism. He argues that the agreement “challenge[s] two fundamental structural features of government in Canada” — the presumption that all legislative authority is divided between federal and provincial governments, and the paramouncy of federal law in the event of an inconsistency with provincial law.¹⁰⁷ It may be that at some future point Canada's courts will be called upon to interpret the agreement in light of the status of section 35 of the constitution.

¹⁰¹ *Nisga'a Final Agreement*, <http://www.nnkn.ca/files/u28/nis-eng.pdf>.

¹⁰² See: Macklem, *Indigenous Difference and the Constitution of Canada*, p. 281–5.

¹⁰³ Sanders, ““We Intend to Live Here Forever:” A Primer on the Nisga'a Treaty”, p. 111.

¹⁰⁴ Russell, *Constitutional Odyssey : Can Canadians Become a Sovereign People?*, p. 260.

¹⁰⁵ *Ibid.*, p. 261.

¹⁰⁶ Sanders, ““We Intend to Live Here Forever:” A Primer on the Nisga'a Treaty”, p. 111.

¹⁰⁷ Macklem, *Indigenous Difference and the Constitution of Canada*, p. 282.

Douglas Sanders discusses the public reaction to the *Nisga'a Treaty*, and the arguments made in support and opposition.¹⁰⁸ Among the former are the claim that the treaty helps move Canada way from the paternalism of the *Indian Act*, that it settles the Nisga'a land claim in a way that leaves most of the Nass Valley “under the dominant legal system”, that it creates greater investment certainty for natural resource extraction in British Columbia, and that the new Nisga'a government is “recognized and integrated into the constitutional system of Canada”.¹⁰⁹ Criticism — which he argues has been led by non-aboriginals — has asserted that granting self-government to the Nisga'a is a form of racial privilege, that the treaty should have been subjected to a general public referendum, and that the agreement risks establishing non-Nisga'a residents in Nisga'a territory as “second-class citizens”.¹¹⁰ Sanders discusses four court challenges raised against the treaty, and their dismissal based partly on section 25 of the *Constitution Act*. This development highlights the interwoven nature of treaties, legislation, and court decisions concerning aboriginal rights and title in Canada. In the end, Sanders concludes that the objections to the *Nisga'a Final Agreement* are misguided, and that the agreement is essentially a logical culmination of “the constitutional amendments of 1982 and three decades of Supreme Court of Canada decisions”.¹¹¹

4 Implications

One important consequence of the manner of Canada's constitutional patriation is the difficulty of making further amendments to the constitution. This is the dual consequence of the amending formula adopted (which requires provincial unanimity in a number of important areas) and the hostility in Quebec toward a constitution that was imposed in spite of their objections. As Donald Smiley explains: “The Constitution Act, 1982 *restricts* the powers of the Legislature and government of Quebec and was brought into being by a procedure that was *opposed* by that Legislature and government”.¹¹² Rather than beginning a new era of generally-consensual

¹⁰⁸Sanders, ““We Intend to Live Here Forever.” A Primer on the Nisga'a Treaty”.

¹⁰⁹*Ibid.*, p. 104.

¹¹⁰*Ibid.*, p. 104–105.

¹¹¹*Ibid.*, p. 128.

¹¹²Smiley, “A Dangerous Deed: The Constitution Act, 1982”, p. 75.

constitutional refinement, the events of 1982 were largely a one-off. This has significantly restricted the scope of what Canada's federal government can do on constitutional matters. It has also passed off a great deal of responsibility for interpreting the constitution and *Charter* to the courts.

In democratic societies, divisions can arise between the opinions of jurists about politically contentious matters and those of the population as a whole. For instance, there may be cases in which the rights of minorities like homosexuals are granted significantly more respect by judges than public opinion might support. Arguably, this tension is a reflection of an important disagreement about the core feature of democracy. In one view, democracy is a mechanism through which the will of the population at large is transferred into law and policy. Under this view, the ultimate test of the appropriateness of government action is the support of the population at large. In an alternative conception, the main purpose of democracy is the safeguarding of rights borne by individuals and groups, quite possibly in the face of hostility from the population at large. This is probably closer to Trudeau's constitutional vision, centred around individual Canadians as the bearers of rights including "basic political freedoms, due process of law, protection against discrimination, mobility throughout the country, education in English or French, and communication with government in either language anywhere in Canada".¹¹³ These two conceptions can yield very different assessments of the legitimacy of judicial decisions on minority rights.

Aboriginal politics and law combine some of the most practical and immediate considerations associated with government, such as health and poverty, with some of the most abstract questions of democratic legitimacy and political theory.¹¹⁴ On the one hand, courts and legislatures must make decisions in the context of the continuing poverty, deprivation, and discrimination experienced by aboriginal people in Canada. The Royal Commission on Aboriginal Peoples found that: "[a]boriginal people are over-represented among clients of remedial services such as health care, social services and the justice system (policing, courts and jails)" and that "[h]igh and rising rates of poverty and unemployment increase the need for welfare, housing subsidies and other payments to individuals".¹¹⁵ On the other hand, policy must be formulated in a manner that re-

¹¹³Russell, *Constitutional Odyssey : Can Canadians Become a Sovereign People?*, p.111.

¹¹⁴See: Borrows, "Seven Generations, Seven Teachings: Ending the Indian Act", p. 23.

¹¹⁵Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples*.

spects treaties, other constitutional documents, legal precedents, public opinion, and different views about the appropriate character and general desirability of aboriginal self-government. It must also be formulated in light of the deep questions that connect to legitimate government — namely, the nature of the good life and the political structures that can help bring it about. The patriation of Canada’s constitution in 1982 created important opportunities to clarify and modernize aboriginal politics and law in Canada, but did little to clarify precisely what the consequences would be. Those consequences have largely arisen from the interpretation of the courts in landmark precedents, accompanied by a transition toward emphasizing modern treaties as a mechanism for upholding the Crown’s obligations toward aboriginals.

Looking ahead, it is possible to speculate about some of the future areas of contention in the field. The tension between economic development and environmental protection may be particularly important. Whether in the context of oil sands development in Alberta or mineral development in Northern Ontario, opportunities exist to convert natural resources into large quantities of monetary wealth. At the same time, these large projects create environmental threats and damage both in the immediate vicinity and for people across generations and around the world. As John Borrows identifies: “Individuals and entire communities can be eaten-up by those possessed by unrestrained appetites”.¹¹⁶ As a group with important recognized constitutional rights, aboriginals may be well-placed to play a meaningful role in disagreements between those who privilege short-term economic considerations strongly over environmental and ethical concerns and others who highlight the inappropriateness (or even illegality) of pursuing a resource development agenda that imposes potentially serious and irreversible harm on others, including defenceless members of future generations. The legal and political competition between these groups may play an important role in determining the shape of economic development in Canada in coming decades. Alongside the continuing process of formulating modern treaties and institutionalizing self-government, this may prove a central question in aboriginal politics and law in the 21st century.

¹¹⁶Borrows, “Seven Generations, Seven Teachings: Ending the Indian Act”, p. 13.

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