THE CONSTITUTIONAL BASIS OF ABORIGINAL RIGHTS

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I. Aboriginal rights before 1982

Aboriginal rights are rights held by aboriginal peoples, not by virtue of Crown grant, legislation or treaty, but "by reason of the fact that aboriginal peoples were once independent, self-governing entities in possession of most of the lands now making up Canada."[1] It is, of course, the presence of aboriginal peoples in North America before the arrival of the Europeans that distinguishes them from other minority groups in Canada, and explains why their rights have special legal status. However, the extent to which those rights had survived European settlement was in considerable doubt until as late as 1973, which was when the Supreme Court of Canada decided the *Calder* case.[2] In that case, six of the seven judges held that the Nishga people of British Columbia possessed aboriginal rights to their lands that had survived European settlement. The actual outcome of the case was inconclusive, because the six judges split evenly on the question whether the rights had been validly extinguished or not. However, the recognition of the rights was significant, and caught the attention of the Government of Canada, which began to negotiate treaties (now called land claims agreements) with First Nations in those parts of the country that were without treaties. That resumed a policy that had been abandoned in the 1920s, when the last numbered treaty was entered into.

Calder was followed in 1984 by the *Guerin* case,[3] where the Supreme Court of Canada recognized the title of the Musqueam Indian Band to land in British Columbia. In that case, Dickson C.J. described aboriginal title as "a legal right derived from the Indians' historic occupation and possession of their tribal lands."[4] In that case, the Band had surrendered its title to the Crown in order to enable the land to be leased to a golf club. The Crown had leased the land to the golf club, but on terms less favourable than those

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1 B. Slattery, "The Constitutional Guarantee of Aboriginal and Treaty Rights" (1983) 8 Queen's L.J. 232, 242.

2 *Calder v. A.G.B.C.* [1973] S.C.R. 313.

3 *Guerin v. The Queen* [1984] 2 S.C.R. 335.

4 *Id.*, 376.

agreed to by the Band. The Court held that the Crown had broken a fiduciary duty owed to the Band, and that the Band was entitled to damages from the Crown. Although this case was decided in 1984, it did not depend on section 35 of the *Constitution Act, 1982*, which was not in force at the time of the surrender and was not relied upon by the Court.

After *Calder* and *Guerin*, we could confidently say that the common law of Canada recognized aboriginal rights, and the courts would grant remedies for breach of those rights. But we also had to say that those rights had little constitutional protection.

Section 91(24) of the *Constitution Act, 1867* granted legislative authority to the Parliament of Canada over "Indians, and lands reserved for the Indians." Obviously, this provision gave law-making authority to Parliament over aboriginal peoples and their lands. Nor did it deny provincial power to enact laws of general application that could apply to aboriginal peoples and their lands. For example, a provincial law restricting the right to practise medicine applied to Indians and on Indian reserves.[5] So did provincial labour laws[6] and traffic laws.[7] However, not all provincial laws could apply of their own force to aboriginal peoples and their lands. The courts held that provincial laws that affected "Indianness" were incompetent to the provinces.[8] This notion was vague, but it would certainly include provincial laws that purported to extinguish or derogate from aboriginal or treaty rights. Thus, section 91(24) did impose some limits on provincial power over aboriginal and treaty rights. Unfortunately, section 88 of the federal *Indian Act* partly removed that protection by providing that provincial laws of general application were applicable to "Indians in the province," thus giving the status of federal law to provincial laws of general application. Treaty rights were expressly exempted from section 88, and Indian lands were not mentioned at all, but section 88 was open to the interpre-

5 *R. v. Hill* (1907) 15 O.L.R. 406 (Ont. C.A.).

6 *Four B Manufacturing v. United Garment Workers* [1980] 1 S.C.R. 1031.

7 *R. v. Francis* [1988] 1 S.C.R. 1025.

8 For an account of the Indianness cases, see Peter W. Hogg, *Constitutional Law of Canada* (5th ed. supplemented), sec. 27.2(b).

tation that provincial law could derogate from at least some kinds of aboriginal rights.[9]

Aboriginal and treaty rights were certainly vulnerable to *federal* laws. The doctrine of parliamentary sovereignty, when applied to laws enacted under section 91(24), meant that aboriginal rights could always be extinguished or modified by Parliament. As was the case with private property generally, there was no constitutional requirement of compensation or prior consent or even consultation as a precondition to legislative expropriation. Even Indian treaty rights, although recognized by section 88 of the *Indian Act*, and protected from derogation by provincial law by section 88,[10] could be extinguished by federal law without compensation, consent or consultation. And, of course, aboriginal or treaty rights could be extinguished or modified by constitutional amendment—and the representatives of aboriginal peoples had no right to participate in the process of constitutional amendment.

II. *Constitution Act, 1982*

The *Constitution Act, 1982* supplied the constitutional protection that was lacking at common law. As enacted in 1982, section 35 provided:

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

(2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.

This provision emerged late in the process of drafting the *Constitution Act, 1982*. It was not in the October 1980 version of the bill. It was in the April 1981 version, but without the word "existing." The entire provision was then dropped from the November 5, 1981 version, which was the first version of the bill to achieve the agreement of most of the provinces. The omission attracted severe

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9 For an account of s. 88, see Hogg, previous note, sec. 27.3.

10 *R. v. White and Bob* (1965) 52 D.L.R. (2d) 481n (S.C.C.); *Simon v. The Queen* [1985] 2 S.C.R. 387.

criticism, and later in November the first ministers agreed to restore it, but with the addition of the word "existing."

If the legislative history suggested less than total enthusiasm by the first ministers for the constitutional protection of aboriginal and treaty rights, the drafting also gave cause for concern. Section 35 was not in the Charter of Rights, which consisted of sections 1-34 of the *Constitution Act, 1982*. Whereas section 1 "guarantees" the rights set out in the Charter, section 35 merely "recognized and affirmed" aboriginal and treaty rights. When the phrase "recognized and affirmed" was read with the word "existing," which had been added at the last moment, the language was open to the interpretation that the status of aboriginal and treaty rights had not been changed by their recognition and affirmation in the Constitution. Thus section 35 did not provide an unambiguous answer to the big question, which was: are aboriginal and treaty rights still vulnerable to legislative extinguishment? That answer did come, however, eight years later, when the Supreme Court of Canada decided *R. v. Sparrow* (1990).[11] That case, which will be discussed later in this paper, interpreted the equivocal language of section 35 as providing a constitutional guarantee for aboriginal and treaty rights. They were no longer vulnerable to legislative extinguishment.

The *Constitution Act, 1982* did include, in the Charter of Rights, a provision dealing with aboriginal peoples. Section 25 provided that the Charter of Rights was not to be construed as abrogating or derogating from their aboriginal or treaty rights. The point of section 25 was to allay the concern that the equality guarantee of section 15 could be construed as invalidating rights that were limited to aboriginal peoples. In effect, section 25 says that aboriginal and treaty rights take priority over Charter rights. This provided a benign explanation for the exclusion of section 35 from the Charter of Rights. Of course, the exclusion of section 35 from the Charter of Rights also had the effect of rendering the override clause of section 33 inapplicable to aboriginal or treaty rights. (Section 1 of the Charter of Rights, allowing reasonable limits to the rights, also had no application to section 35 rights, but, as we shall see later in this

11 [1990] 1 S.C.R. 1075.

paper, the Supreme Court of Canada in the *Sparrow* case incorporated a similar qualification into aboriginal and treaty rights.)

The *Constitution Act, 1982*, by Part V, enacted new amending procedures that enabled the Constitution of Canada to be amended by the Parliament and Legislatures, acting in various combinations, depending on the kind of amendment. No role was accorded to the representatives of First Nations in these new procedures. Indeed, section 35 itself could be repealed or amended by the seven-fifty formula of section 38, a procedure that required the cooperative action of the two Houses of Parliament and the Legislative Assemblies of seven provinces representing 50 per cent of the population. That was a difficult combination to achieve, to be sure, but it could be achieved without the consent or consultation of the aboriginal peoples who were the holders of the section 35 rights.

What the *Constitution Act, 1982* did do, however, by section 37, was to provide for a constitutional conference to be convened within one year of the coming into force of the Act. The agenda for the conference was to include "constitutional matters that directly affect the aboriginal peoples of Canada, including the identification and definition of the rights of those peoples to be included in the Constitution of Canada." The persons to be invited to the conference consisted of the first ministers of Canada and the provinces, as usual, but also the first ministers of the territories (who had not in the past been included in first ministers' meetings), and representatives of the aboriginal peoples of Canada.

The conference mandated by section 37 was indeed convened in March 1983, and it agreed upon several amendments to the *Constitution Act, 1982*, which were duly passed by the appropriate legislative bodies and proclaimed in force.[12] Two new subsections were added to section 35. New subsection (3) made clear that "treaty rights" included rights in modern land claims agreements that exist now "or may be so acquired." That last phrase went some distance to undermine the word "existing" in subsection (1). New subsection (4) made clear that aboriginal and treaty rights were "guaranteed equally to male and female persons." The word "guaranteed"

[12] Constitution Amendment Proclamation, 1983, SI/84-102.

went a considerable distance to strengthen the phrase "recognized and affirmed" in subsection (1). These two changes may have been unnecessary, but the choice of language showed that the aboriginal negotiators had been very adept in surreptitiously shoring up the deficiencies in the original language of section 35.

Another amendment that was agreed to in the March 1983 conference was to replace section 37, which was now spent by the holding of the March 1983 conference, with a new section 37.1. New section 37.1 called for "at least two" additional constitutional conferences to be convened to continue the discussions of "constitutional matters that directly affect the aboriginal peoples of Canada." As with old section 37, representatives of the aboriginal peoples were to be included in the conference. (These conferences were in fact held in 1985 and 1987, and they attempted to agree on language that would expressly recognize a right of aboriginal self-government. Unfortunately, no agreement was achieved.)

The final amendment that was agreed to in the March 1983 conference was the addition of a new section 35.1 to the *Constitution Act, 1982*. Section 35.1 declares that federal and provincial governments are "committed to the principle" that, before any amendment is made to section 91(24) or to section 35 or to section 25, a constitutional conference will be convened to which representatives of the aboriginal peoples of Canada will be invited to participate in discussions of the proposed amendment. Through section 35.1, aboriginal peoples have gained entry to the constitutional amendment process. And, of course, they were the dominant negotiators at the table when the Charlottetown Accord of 1992 proposed an elaborate set of provisions to recognize "the inherent right of self-government" and a process for defining it in detail through self-government agreements. These self-government measures would have been a great step forward for aboriginal rights. Unfortunately, the Charlottetown Accord tried to deal with many other constitutional issues as well, thus providing something for everyone to be unhappy about, and it was defeated in the referendum that was held to ratify it in 1992.

III. THE *SPARROW* CASE

The next (and perhaps most important) piece of the puzzle was added by the decision of the Supreme Court of Canada in *R. v. Sparrow* (1990).[13] In that case, a member of the Musqueam Indian Band was charged with the offence of fishing with a drift net that was longer than allowed by regulations made under the federal *Fisheries Act*. The Supreme Court of Canada decided that the defendant was exercising an aboriginal right to fish. Did that protect the defendant from the charge? That question required the Court for the first time to address those troubling words in section 35 that seemed to withhold full constitutional protection from aboriginal and treaty rights. Those rights, it will be recalled, were not guaranteed, but merely "recognized and affirmed." The Court held that this phrase should be interpreted according to the principle that treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indians. The phrase should be read as incorporating the fiduciary obligation that government owes to the aboriginal peoples. From these two premises, the Court concluded that the phrase should be interpreted as a constitutional guarantee of aboriginal and treaty rights. As a constitutional guarantee, the phrase had the effect of nullifying legislation that purported to abridge the aboriginal and treaty rights that were recognized and affirmed by section 35.

What was the effect of that other troubling word in section 35, namely, "existing"? Section 35 only guaranteed "existing aboriginal and treaty rights." The Court in *Sparrow* held that "existing" meant "unextinguished."[14] Aboriginal and treaty rights that had been validly extinguished before 1982 were not protected by section 35. However, while the Court acknowledged that before 1982 the Parliament of Canada could extinguish aboriginal and treaty rights by statute, the Court said that a federal statute would not be

13 [1990] 1 S.C.R. 1075.

14 *Id.*, 1091.

interpreted as producing that result unless the intention to extinguish was "clear and plain." Although the *Fisheries Act* and regulations prohibited fishing except under a statutory licence, and closely regulated licensed fishing, the Court held that this did not demonstrate a clear and plain intention to extinguish aboriginal rights to fish. Nor was the regulatory regime held to be a partial extinguishment of aboriginal rights. So interpreted, the word "existing" was not such a severe limitation on aboriginal and treaty rights as had been feared before the decision.

Charter rights are subject to section 1, which authorizes "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." Because section 35 is not part of the Charter of Rights, it is not subject to section 1. However, the Court in *Sparrow* held that the section 35 rights were not absolute. The section 35 rights could also be limited by statute if the statute pursued a "compelling and substantial purpose," and infringed the aboriginal right no more than was necessary to achieve the purpose. The standard of justification indicated by the Court was very similar to the standard which had been constructed by the Court for justification under section 1 of the Charter. In the *Sparrow* case itself, the Court held that it did not have enough evidence to determine whether the net-length restriction in the fisheries regulations would satisfy the standard of justification. The Court ordered a new trial for the purpose of determining the issue of justification. If the regulation passed the standard of justification, then the aboriginal right would have been validly limited, and the defendant would be convicted as charged. But if the regulation could not be shown to serve a compelling purpose, or if it derogated more severely from the aboriginal right than was necessary to accomplish the purpose, then the regulation would be invalid for inconsistency with section 35 and the defendant would be entitled to be acquitted.[15]

After the decision in *Sparrow*, it was finally clear that aboriginal rights were constitutionally protected.

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[15] The same standard of justification enables derogation from treaty rights: *R. v. Badger* [1996] 1 S.C.R. 771.

IV. Definition and proof of aboriginal rights

Although aboriginal rights had been recognized and enforced in *Guerin* and given constitutional protection in *Sparrow*, the Supreme Court of Canada had made no real attempt to define their characteristics, contenting itself by noting that aboriginal rights were "unique" or "sui juris."[16] It was not until *R. v. Van der Peet* (1996)[17] that the Court provided the much-needed definition of the aboriginal rights that were now guaranteed. In that case, Lamer C.J., speaking for the majority of the Court, said that "in order to be an aboriginal right an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group asserting the right."[18] In order for a practice to be "integral," the practice must be "of central significance" to the aboriginal society: it must be a "defining characteristic" of the society, "one of the things that made the culture of the society distinctive."[19] The practice must have developed before "contact," that is, "before the arrival of Europeans in North America."[20] However, the practice could evolve over the years as the result of contact, for example, the bone hook could be replaced by the steel hook, the bow and arrow by the gun, and so on, but a practice that had evolved into modern forms must trace its origins back to the pre-contact period. Contemporary practices that had developed "solely as a response to European influences" did not qualify.[21]

In *Van der Peet*, the aboriginal defendant had been convicted of selling fish that she had caught under the authority of an Indian food-fish licence. The licence, which had been issued under the federal *Fisheries Act*, restricted the holder to fishing for food; the sale of fish caught under the licence was prohibited by regulations

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16 *Guerin v. The Queen* [1984] 2 S.C.R. 335, 342; *R. v. Sparrow* [1990] 1 S.C.R. 1075, 1112.

17 [1996] 2 S.C.R. 507.

18 *Id.*, para. 45.

19 *Id.*, para. 55.

20 *Id.*, paras. 60-62.

21 *Id.*, para. 73.

made under the Act. The question for decision was whether the defendant had an aboriginal right to sell fish. The Court found that the exchange of fish did occur in the society of the Sto:lo people before contact with Europeans, but it was incidental to their practice of fishing for food. It was not an "integral" part of the Sto:lo culture. It was only after contact that the Sto:lo people had begun fishing to supply a market, a market that was created by European demand for the fish. Therefore, the aboriginal defendant was unsuccessful in establishing an aboriginal right to sell fish, and was properly convicted.[22]

The *Van der Peet* definition of aboriginal rights is based on the existence of an aboriginal practice before "contact," meaning before the arrival of Europeans. This time frame does not work for Métis rights, because Métis people, who originated in the intermarriage of French Canadian men and Indian women during the fur trade period, did not exist before contact. Lamer C.J. in *Van der Peet* acknowledged this difficulty, and left open the question whether the time frame would need to be modified for the purpose of identifying Métis rights.[23] The alternative would be to hold that the Métis had no aboriginal rights. A possible later time would be the time of assertion of European sovereignty, which, as we shall see, is the time at which aboriginal occupation of land must be established in order to establish aboriginal title. However, that is not what the Court decided. In *R. v. Powley* (2003),[24] the Court held that, for Métis claimants of aboriginal rights, the focus on European contact had to be moved forward, not to the time of European sovereignty, but to "the time of effective European control."[25] Apart from this shift in the time frame, the same *Van der Peet* definition was to be used to identify Métis rights.

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22 Accord, *R. v. N.T.C. Smokehouse* [1996] 2 S.C.R. 672 (no aboriginal right to sell fish); *R. v. Gladstone* [1996] 2 S.C.R. 723 (aboriginal right to sell herring spawn on kelp); *R. v. Adams* [1996] 3 S.C.R. 101 (aboriginal right to fish for food); *R. v. Côté* [1996] 3 S.C.R. 169; *Mitchell v. M.N.R.* [2001] 1 S.C.R. 911 (no aboriginal right to trade across what is now the international border).

23 [1996] 2 S.C.R. 507, para. 67.

24 [2003] 2 S.C.R. 207.

25 *Id.*, para. 18.

In *Powley*, two Métis claimed an aboriginal right to hunt for food in the Sault Ste. Marie area of Ontario. The Court found that effective control of the Upper Great Lakes area had passed from the Indian and Métis people to the European settlers in approximately 1850. By that time, a distinctive Métis community had become established in Sault Ste. Marie. The assertion of Crown sovereignty over the area would have been in 1763, when the Treaty of Paris ceded jurisdiction from the French to the British Crown. The Métis community was not established that early. However, once the date of effective control became the benchmark, the Métis practice of hunting for food was by that time integral to the culture of an established Métis community, and it had continued to the present time. The Métis claimants were members of the modern community, they traced their ancestry back to the pre-control community, and they were entitled to the aboriginal right of hunting for food in the area.

Aboriginal title, which is the right to exclusive occupation of land, is of course a species of aboriginal right. In *Delgamuukw v. British Columbia* (1997),[26] the Supreme Court confirmed that essentially the same *Van der Peet* test is used to establish aboriginal title as is used to establish more limited rights. It is based on the historic occupation of the land by an aboriginal people. However, the point of time at which aboriginal occupation of the land must be proved is not the "European contact" test of *Van der Peet*, nor the "European control" test of *Powley*. In *Delgamuukw*, the Court said that "European sovereignty" was the point of time for the crystallization of aboriginal title. The Court's reasoning was that the Crown's underlying title to all land in Canada did not derive from the time of contact. It only came into existence when sovereignty was assumed by the Crown. Since aboriginal title had long been recognized as a burden on the Crown's underlying title, it came into being at the same time as the Crown title, that is, on the assertion of Crown sovereignty over a territory. So far as the common law was concerned, "aboriginal title crystallized at the time sovereignty

[26] [1997] 3 S.C.R. 1010.

was asserted."[27] In British Columbia, that was 1846, when the Oregon Boundary Treaty was entered into.

The proof of aboriginal rights, whatever the historic date stipulated for their recognition today, is a serious problem for aboriginal claimants. In *Delgamuukw*, for example, the trial judge held that the claimants had not established their exclusive occupation in 1846, because he rejected as unreliable much of the oral evidence that was tendered with respect to the aboriginal occupation of the claimed land at the time of the assumption of European sovereignty 150 years ago. However, the Supreme Court of Canada pointed out that aboriginal societies did not keep written records at the time of European sovereignty (or contact or control). Their account of the past inevitably would be kept through "oral histories"—stories handed down from generation to generation in oral form. To be sure, oral history is hearsay, but the rules of evidence in aboriginal cases had to be adapted to the realities of pre-sovereignty aboriginal societies. The Court held that the factual findings at trial could not stand, and that a new trial was required in which oral histories would be admitted and given appropriate weight.

V. Duty to consult aboriginal people

Section 35 protects aboriginal and treaty rights, but, as we have seen, the proof of an aboriginal right (or title) can be a difficult and lengthy process, and the negotiation of a treaty (land claims agreement) can also be a difficult and lengthy process. Indeed, the two processes are closely related and are often going on at the same time. This is because the ability of a First Nation to negotiate a treaty will depend on persuading government that there is a credible claim to aboriginal title. During the period of proof and/or negotiation, which will certainly take years and may take decades, the First Nation is in an awkward situation. It is not yet able to invoke a proved aboriginal right or title, and it does not have a treaty. And yet logging or mining activities, or other forms of development, on land claimed by the First Nation, may diminish the value of the resource. Does

[27] *Id.*, para. 145.

section 35 provide any interim protection for aboriginal interests that are still unproved or under negotiation? The Supreme Court of Canada has answered this question yes. Section 35 not only guarantees existing aboriginal and treaty rights, it also imposes on government the duty to engage in various processes even before an aboriginal or treaty right is established. Section 35 gives constitutional protection to a special relationship between the Crown and aboriginal peoples under which the honour of the Crown must govern all dealings. The honour of the Crown entails a duty to negotiate aboriginal claims with First Nations.[28] And, while aboriginal claims are unresolved, the honour of the Crown entails a duty to consult, and if necessary accommodate the interests of, the aboriginal people, before authorizing action that could diminish the value of the land or resources that they claim.

The duty to consult and accommodate is a remarkable extension of the protection of aboriginal rights. It was established in *Haida Nation v. British Columbia* (2004).[29] In that case, the government of British Columbia had issued a licence to the Weyerhaeuser Company authorizing the company to cut trees on provincial Crown land in the Queen Charlotte Islands. The Queen Charlotte Islands were the traditional homeland of the Haida people. The Islands were the subject of a land claim by the Haida Nation, which had been accepted for negotiation but had not been resolved at the time of the issue of the licence. The cutting of trees on the claimed land would have the effect of depriving the Haida people of some of the benefit of their land if and when their title was established. The Court held that, in these circumstances, section 35 obliged the Crown to consult with the Haida people, and, if necessary, accommodate their concerns. The extent of consultation and accommodation "is proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed."[30] In this case, a preliminary assessment indicated that

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28 *Haida Nation v. B.C.* [2004] 3 S.C.R. 511, para. 20.

29 Previous note.

30 *Id.*, para. 39.

there was a prima facie case for aboriginal title and a strong prima facie case for an aboriginal right to harvest the red cedar growing on the Islands. The logging contemplated by the company's licence, which included old-growth red cedar, would have an adverse effect on the claimed right. Since the province was aware of the Haida claim at the time of issuing the licence, it was under a duty to consult with the Haida before issuing the licence. Not having done so, the Crown was in breach of section 35, and the licence was invalid.

The duty to consult, which applies to the Crown in right of Canada and to the Crown in right of the province (but not private parties), will lead to a further duty to accommodate where the consultations indicate that the Crown should modify its proposed action in order to accommodate aboriginal concerns. In *Haida Nation*, since the required consultation never took place, the Court did not have to decide whether consultation would have given rise to a duty to accommodate. But the Court suggested that the circumstances of the case "may well require significant accommodation to preserve the Haida interest pending resolution of their claims."[31]

In *Haida Nation*, the Supreme Court of Canada, while indicating that the precise nature of the consultation and accommodation that was required would depend on the circumstances of the case, emphasized that the duties of consultation and accommodation did not involve a duty to *agree* with the aboriginal people.[32] In the absence of a proved aboriginal right (or a treaty right), the aboriginal people did not have a veto over the development of land in which they claimed an interest. In the companion case of *Taku River Tlingit First Nation v. British Columbia* (2004),[33] a mining company applied to the British Columbia government for permission to reopen an old mine in an area that was the subject of an unresolved land claim by the Taku River Tlingit First Nation. This application triggered a statutory environmental assessment process, which ended with approval of the application to reopen the mine. The First Nation objected to the outcome. The Supreme Court

31 *Id.*, para. 77.

32 *Id.*, paras. 10, 42, 48, 49.

33 [2004] 3 S.C.R. 550.

held that this was a case where there was a duty to consult and accommodate: there was a prima facie case for the aboriginal claim, and the reopening of the mine was potentially harmful to the claim. However, the Crown's duty had been discharged in this case. The environmental assessment took three and a half years. The First Nation was included in the process. Its concerns were fully explained and were listened to in good faith, and the ultimate approval contained measures to address the concerns. Although those measures did not satisfy the First Nation, the process fulfilled the province's duty of consultation and accommodation. Meaningful consultation did not require agreement, and accommodation required only a reasonable balance between the aboriginal concerns and competing considerations.[34]

The *Haida Nation* duty to consult and accommodate was an interim protection measure, designed to safeguard aboriginal interests while rights were in dispute or a treaty was under negotiation. One might assume that the duty would fall away once a treaty had been entered into, and the rights of the parties were spelled out in writing. But the Supreme Court of Canada has held otherwise. In *Mikisew Cree First Nation v. Canada* (2005),[35] the federal government proposed to build a road in a national park on federal Crown land in northern Alberta. The route of the road was through the traditional hunting grounds of the Mikisew Cree First Nation, which objected to the project for that reason. The road proposal was all within the Treaty 8 area of northern Alberta. Under Treaty 8, entered into in 1899, the aboriginal people who lived in the territory had surrendered the entire area to the federal Crown. In return, the aboriginal people were promised reserves and some other benefits.

Treaty 8 gave to the aboriginal signatories (which included the ancestors of the Mikisew Cree) the right to hunt, trap and fish throughout the surrendered territory "saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes." The proposed road involved an exercise of the Crown's right to take up land

34 *Id.*, para. 2.

35 [2005] 3 S.C.R. 388.

under this clause. Was taking up land under the Treaty subject to a constitutional duty of consultation? It was true, of course, that land taken up for development would have the effect of diminishing the area available to aboriginal people for hunting, trapping and fishing, but that was what was agreed to in 1899. The Supreme Court of Canada held, however, that "treaty making is an important stage in the long process of reconciliation [of aboriginal and non-aboriginal peoples], but it is only a stage"; and Treaty 8 was "not the complete discharge of the duty arising from the honour of the Crown."[36] Where the exercise of treaty rights by the Crown could have an "adverse impact" on aboriginal people, the honour of the Crown required consultation with the affected people.[37] In "appropriate" cases (not defined), the duty of consultation would lead to a duty to accommodate the aboriginal interests, although it did not require that aboriginal consent be obtained. In this case, the diminution of the Mikisew Cree's hunting and trapping rights in their traditional territory was a clear consequence of the proposed road. That adverse impact triggered the duty of consultation and accommodation. The discussions that had taken place between park officials and the Mikisew Cree were not sufficient to satisfy that duty. The Court quashed the minister's decision to approve the road project and sent the project back for reconsideration in accordance with the Court's reasons.

Mikisew Cree is a striking extension of the duty to consult and accommodate. The purpose of Treaty 8 and the other numbered treaties was to provide certainty in the rights of the Crown and the aboriginal peoples so as to open up land for settlement and development. Obviously, the new duty is an important unwritten qualification to the treaty language, and the duty is sufficiently vague and open-ended to make compliance difficult. Since non-compliance will invalidate a decision by the Crown, the certainty that is the goal of treaty-making is diminished by the *Mikisew Cree* deci-

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36 *Id.*, para 54. Binnie J. for the Court added (para. 56) that "the 1899 negotiations were the first step in a long journey that is unlikely to end any time soon."

37 An adverse impact did not include one that was "remote or unsubstantial": *Id.*, para. 55.

sion. The Court did not discuss the value of certainty, but it obviously preferred to view treaties as a stage in a long process of reconciliation rather than the final step in that process. And the Court did make clear that "any administrative inconvenience incidental to managing the process" is irrelevant.[38] Modern comprehensive treaties (land claims agreements) tend to emphasize the goal of certainty. They are much more detailed than the old numbered treaties, and they provide for consultation and dispute resolution processes. However, based on *Mikisew Cree*, it is likely that some residue of the honour of the Crown will impose additional unwritten obligations on the Crown in its implementation of the treaties.

VI. Conclusion

I venture the conclusion that no area of Canadian law has been so transformed in such a short period of time as the law of aboriginal rights. Rights that were undefined and barely recognized in 1973, and were in any case vulnerable to legislative and constitutional extinguishment, have in the short space of little more than 30 years become powerful, constitutionally-protected rights. This process was started by the decisions of the Supreme Court of Canada in the *Calder* and *Guerin* cases. It moved forward with the enactment of the *Constitution Act, 1982*, which stated in section 35 that "existing" aboriginal and treaty rights were "recognized and affirmed." This tentative language was taken by an active Supreme Court in *Sparrow* and converted into a constitutional guarantee of aboriginal rights. The indeterminacy of the rights was tackled by the Court in *Van der Peet*, which provided a definition that was judicially enforceable. The definition was refined in *Powley* to accommodate Métis rights and in *Delgamuukw* to accommodate aboriginal title. And, in *Delgamuukw*, new rules of evidence were announced to recognize the reality that societies that lacked written records when the white man arrived had to be permitted to prove their claims by oral histories. The final development is the judicial creation in *Haida*

[38] *Id.*, para. 50.

Nation of a duty of consultation, which provides interim protection for the lands, forests and fishing grounds that are claimed by aboriginal peoples, even before any aboriginal right has been established in court.

By the standards of constitutional lawyers, this has been a wild ride! Although it appears as a series of extraordinary victories for aboriginal people, the fact is that the only truly enduring settlement of aboriginal claims is the treaty. Many parts of the country have treaties, although the old treaties are so brief and vague that they are not much of an improvement on aboriginal rights. The modern treaty-making process, which leads to modern land claims agreements and self-government agreements, is well under way in many parts of the country. Only a treaty can properly structure a rational scheme of cooperative governance for federal, provincial and aboriginal governments to control, preserve and manage the resources on aboriginal and adjacent lands. The enormous detail of the thick volume that contains a typical modern land claims agreement testifies to the impossibility of regulating aboriginal rights through litigation. As well, only a treaty can provide the basis for aboriginal self-government, including the taxing powers and funding entitlements that will make the aboriginal government a true partner with the federal and provincial governments. This is where the real advances for aboriginal rights will come from: by converting them into treaty rights, which are agreed to by all parties, which are sufficiently detailed to provide guides to action, which provide for the cooperation of all three levels of government in the management of the resources, and which provide self-government powers and stable financing for the aboriginal level of government.