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### A Model of Scholarship

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## A MODEL OF SCHOLARSHIP

MICHAEL JACKSON, Q.C.<sup>†</sup>

It is with respect and appreciation for a great jurist that I join with my colleagues in honouring the contributions of Ken Lysyk in the area of Aboriginal Law and Aboriginal Rights. The first measure of the strength of those contributions is to realize how easily the concepts of Aboriginal Law and Aboriginal Rights roll off the legal tongue. In 2004, it is not only the legal cognoscenti who can engage in a discussion of Aboriginal Title, Aboriginal and Treaty Rights, the justificatory process for Federal and Provincial governmental interference with those rights, the fiduciary obligations of the Crown, and many other concepts that together form the basis for an important body of law and practice. Most Canadian law schools now offer one or more courses in this area of the law and to teach a first year property class without reference to the decision of the Supreme Court of Canada in *Delgamuukw*<sup>1</sup> would be tantamount to studying the history of psychology without reference to Sigmund Freud (and by this I am not drawing any parallels between the Crown's underlying title and the psychoanalytic concept of the sub-conscious mind, although First Nations have difficulty with both). In my first year Criminal Law class, my students study a pivotal judgment of the Supreme Court of Canada in the *Gladue*<sup>2</sup> case, which recognizes the importance of Aboriginal Peoples' concepts and practices of justice and its relationship to the incorporation of restorative justice principles in the *Criminal Code*.<sup>3</sup> In 2004, it would be a highly unusual docket of the Supreme Court of Canada that did not include a number of appeals that address the issues of Aboriginal Rights and Aboriginal Law. However, while for this generation of law students and lawyers, it is natural to see this area of the law as an important part of the knowledge base for the contemporary lawyer, those of us who have been involved in this area for some time know all too well how dramatic the changes have been in terms of legal consciousness of Aboriginal Rights.

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<sup>1</sup> *Delgamuukw v. British Columbia (A.G.)*, [1997] 3 S.C.R. 1010, 66 B.C.L.R. (3d) 285 [*Delgamuukw*].

<sup>2</sup> *R. v. Gladue*, [1999] 1 S.C.R. 688, 171 D.L.R. (4th) 385.

<sup>3</sup> R.S.C. 1985, c. C-46.

Professor Ken Lysyk, the scholar, played a key role in bringing about these changes.

It was in 1972 that I first proposed at U.B.C. Law School that there be a course called 'Native People and the Law'. At that time, one hundred and five years after Confederation, no such course was offered in any Canadian law school. The encouragement given for this initiative is one of the many examples of the vision of Dean Emeritus George Curtis, who encouraged young faculty members to push the borders of legal scholarship in developing new courses that embraced a larger vision of the role of law in promoting progressive social change and the protection of human rights, a vision shared by Professor Lysyk when he later assumed the deanship at U.B.C.

In 1972, when I began putting together the course materials for Canada's first course on Native People and the Law, I started with virtually a blank slate in terms of my own intellectual and legal training. Whatever the much vaunted benefits of an English legal education (including arguing a moot before Lord Denning), a knowledge of the history of Aboriginal Peoples in North America and the dark legacy of colonialism was not among them. In assembling a set of materials designed to educate myself as much as the students, I was struck by several features of the literature and jurisprudence.

First, the historical and legal relationships between First Nations and the Crown were the subject of what in 1742 the great Iroquois statesman, Canasatego, referred to as "pen and ink work".<sup>4</sup> There was a vast record of treaty councils, diplomatic exchanges, royal proclamations, and colonial ordinances that addressed issues of land rights, self-governance, and the intersection between indigenous and colonial laws and legal systems.

Second, and a related feature of my research in assembling these materials, was that the issues of Aboriginal Rights and the legal relationship between the Crown and First Nations were not only the subject of diplomatic and treaty exchanges, but were ones addressed in the highest courts. I read the seminal decisions of Chief Justice Marshall of the U.S. Supreme Court in the 1820s and 1830s in *Johnson v. M'Intosh*<sup>5</sup> and the Cherokee Nation cases culminating in *Worcester v. Georgia*,<sup>6</sup> the 1847 judgment of the New Zealand Supreme Court in *R. v. Symonds*,<sup>7</sup> and a series of Privy Council cases emanating from Canada in the late Nineteenth Century including the *St. Catherine's Milling*

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<sup>4</sup> *Treaty with the Six Nations Indians*, 4 July 1744, (Virginia, Maryland, and the Indians of the Six Nations) reproduced in Alden T. Vaughn, ed., *Early American Indian Documents, 1607-1789*, vol. 2 (Fredrick, Md.: University Publications of America, 1984) at 77.

<sup>5</sup> 21 U.S. (8 Wheat.) 543, 5 L. Ed. 681 (1823).

<sup>6</sup> 31 U.S. (6 Pet.) 515, 8 L. Ed. 483 (1832).

<sup>7</sup> [1847] N.Z.P.C.C. 387 (S.C.).

case.<sup>8</sup> Building upon the British Colonial practice of treaty making, I read the history of Canadian treaty making in the post-confederation era in the so-called numbered treaties, which according to their English text at least surrendered Aboriginal Title in Manitoba, Saskatchewan, Alberta, and the eastern part of British Columbia and the Western Arctic. That period of historical treaty making ended in the 1920s. At that point, I discovered that the rich historical and jurisprudential record of Aboriginal and treaty rights began to run dry. It was as if there had been a legal eclipse of a whole body of law.

There were several causes of this legal eclipse. Most obvious was the 1927 amendment to the *Indian Act*<sup>9</sup> that was passed following an unsuccessful attempt by the allied tribes of British Columbia to get the Federal Government to recognize that British Columbia's refusal to acknowledge the existence of Aboriginal Title in the Province was contrary to principles of the common law and the provisions of the Royal Proclamation of 1763.<sup>10</sup> The amendment made it an offence to solicit or receive funds from any Indian for the purpose of prosecuting an Indian claim. The amendment was premised on the proposition that since there was no such thing as Indian title in British Columbia, Indians should be protected from those lawyers who would erroneously and mischievously advance a case on the basis that such a concept existed in law. That amendment remained in force until 1951. It effectively chilled any legal initiatives to advance the Indian land claim movement in the courts of British Columbia until the Nisga'a initiated their historic case in the late 1960s. The other source for the eclipse was that Canadian Indian policy became increasingly committed to the politics and practice of assimilation, most clearly reflected in a statement by the Deputy Superintendent General of Indian Affairs in Ottawa, Duncan Campbell Scott, that "the happiest future for the Indian race is absorption into the general population . . . ."<sup>11</sup> He also stated that "Our objective is to continue until there is not a single Indian in Canada that has not been absorbed into the body politic and there is no Indian question, and no Indian Department."<sup>12</sup> In this vision, there was no room for Aboriginal Rights, and treaty rights were to be regarded as a vestige of the past, not a basis for future relationships. The strength and pervasiveness of this

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<sup>8</sup> *St. Catherine's Milling and Lumber Company v. The Queen*, [1888] 14 A.C. 46, 2 C.N.L.C. 541 (P.C.) [*St. Catherine's Milling*].

<sup>9</sup> R.S.C. 1927, c. 98, s. 141.

<sup>10</sup> George R., Proclamation, 7 October 1763 (3 Geo. III), reprinted in R.S.C. 1985, App. II, No. 1.

<sup>11</sup> Arthur J. Ray, *I Have Lived Here Since The World Began: An Illustrated History of Canada's Native People* (Toronto: Lester Publishing, 1996) at 229.

<sup>12</sup> Paul Tennant, *Aboriginal Peoples and Politics: The Indian Land Question in British Columbia, 1849-1989*, (Vancouver: University of British Columbia Press, 1990) at 92.

ideology and its deadening impact on both the public and legal imagination is nowhere better revealed than in a speech by Prime Minister Pierre Elliot Trudeau in Vancouver in 1969, over 40 years after Duncan Campbell Scott's statement, when, in defending his government's White Paper<sup>13</sup> which would eliminate any separate Indian status under the *Indian Act*,<sup>14</sup> he stated:

It's inconceivable ... that in a given society one section of the society have a treaty with the other section of the society. We must be all equal under the laws and we must not sign treaties amongst ourselves and many of these treaties, indeed, would have less and less significance in the future ... . I don't think that we should encourage the Indians to feel that their treaties should last forever within Canada ... . They should become Canadians as all other Canadians ... .<sup>15</sup>

As to the claims in British Columbia to recognize and restore Aboriginal Rights, Prime Minister Trudeau famously asserted "... our answer – it may not be the right one and may not be one which is accepted ... – our answer is 'no'."<sup>16</sup>

At the time I was preparing my materials for my course in 1972, this was the last word from the Federal government. It provided powerful reinforcement for many in the legal profession to view my course in Aboriginal Rights as a legal oxymoron.

The legal eclipse of Aboriginal Rights discourse was not, however, total. Between 1927 and 1972, many issues came before the courts arising not only from the interpretation of specific clauses of historical treaties but also addressing the distinct legal status of Canadian Indians in the scheme of Canadian Confederation. As a result, I discovered there were a significant number of cases dealing with specific provisions of the *Indian Act* and, in particular, the issue of the application of provincial laws to Indians and on Indian reserves. These cases turned on the proper interpretation of section 91(24) of the *BNA Act, 1867* and specific provisions of the *Indian Act*. Although the concerted political efforts of Aboriginal Peoples to pursue land claims, particularly in British Columbia, had been thwarted by the amendments to the *Indian Act*, the struggle to achieve a just settlement in British Columbia had never gone away. Aboriginal peoples in formulating

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<sup>13</sup> Canada, Minister of Indian Affairs and Northern Development, *Statement of the Government of Canada on Indian Policy*, (Ottawa: Queen's Printer, 1969); see Sally M. Weaver, *Making Canadian Indian Policy: The Hidden Agenda, 1969-70* (Toronto: University of Toronto Press, 1981).

<sup>14</sup> *Supra* note 9.

<sup>15</sup> Prime Minister Trudeau, "Remarks on Aboriginal and Treaty Rights" (speech, 8 August 1969) in Peter A. Cumming & Neil H. Mickenberg, eds., *Native Rights in Canada*, 2nd ed. (Toronto: Indian-Eskimo Association of Canada, 1972) at 331.

<sup>16</sup> *Ibid.* at 332.

their own proposals for such a just settlement were anxious for knowledge of the experience of other jurisdictions, particularly the United States where, in the post Second World War period, the U.S. Government had established an Indian Claims Commission with distinct heads of jurisdiction to deal with historical claims based upon Aboriginal and treaty rights. In 1971, the same year I assembled my course materials, an historic piece of legislation was passed by the U.S. Congress in the form of the *Alaska Native Claims Settlement Act*,<sup>17</sup> which represented in terms of money and land the largest settlement in the history of the United States. While generous in terms of its historical counterparts like the Indian Claims Commission process, it was based upon the termination of any distinct Aboriginal or Indian status.

When developing a set of course materials in any other area of the law, professors usually have the luxury of any number of leading texts that have synthesized and expounded upon the leading cases and the relevant legislation. While in the United States such texts existed, in Canada, the legal eclipse of Aboriginal Rights in the Twentieth Century was sadly reflected in the fact that until 1970 there was no textbook on Aboriginal Rights. In 1970, the first edition of *Native Rights in Canada*<sup>18</sup> was published. It was researched and written primarily by my former colleague, Professor Doug Saunders. Notably, one of the members of the research committee for the first edition was Mr. Ian Binnie, now Mr. Justice Binnie of the Supreme Court of Canada, and one of the two research associates was Professor Lysyk. The following year, a more comprehensive second edition of *Native Rights in Canada* was published under different authorship and Professor Lysyk wrote one of the chapters on the United States Indian Claims Commission.<sup>19</sup> That was my first encounter with his writing in this field. In some twenty pages, it gave me and my students a clear window into the history of the American experience with Indian land claims and identified the strengths and, perhaps more importantly, the limitations of the claims commission model based solely upon financial compensation.

The chapter in *Native Rights in Canada* was not, however, Professor Lysyk's first contribution to the modern literature on Aboriginal Rights and Aboriginal Law. I very quickly discovered his earlier contributions as I struggled to understand the complexities and inconsistencies of the body of jurisprudence that dealt with the scope of federal jurisdiction under section 91(24) in relation to Indians and lands reserved for Indians and its relationship to provincial legislative authority under section (92). In 1972 and indeed in

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<sup>17</sup> 43 U.S.C. § 1601-29f (1971).

<sup>18</sup> Indian-Eskimo Association of Canada, *Native Rights in Canada* (Toronto: Indian-Eskimo Association of Canada, 1970).

<sup>19</sup> Part VI in Cumming & Mickenberg, *supra* note 15 at 243.

2004, Professor Lysyk's 1967 article in the *Canadian Bar Review* entitled "The Unique Constitutional Position of the Canadian Indian"<sup>20</sup> was and remains essential reading and the key text in this area of the law. This article reveals the hallmarks of Professor Lysyk's scholarship as it later came to be reflected in his advocacy with the Attorney General's office of Saskatchewan and in his judgments as a Supreme Court Judge. In terms of its academic style, post-modernist academic scholars might criticize it for being an example of black letter legal analysis, which does not sufficiently contextualize the issues in their social and economic frame, but from my perspective as a scholar who never made any great claims to be either a black letter lawyer or a post-modernist, Professor Lysyk's masterful and succinct legal analysis of the relevant case law under section 91(24) gave me all the context that I could handle within the framework of the principles of Canadian federalism, including the doctrine of inter-jurisdictional immunity.<sup>21</sup>

Professor Lysyk's 1967 article helped shape my understanding and my lectures on the constitutional context of Aboriginal Law and for that I, and I am sure most of my colleagues who teach First Nations and the Law, are indebted to his scholarship.

In the modern history of Aboriginal Rights, 1973 can lay claim to being of both ordinal and cardinal significance. The judgment of the Supreme Court of Canada that year in *Calder*,<sup>22</sup> initiated by the Nisga'a, is the first of the modern cases on Aboriginal Rights. It re-introduced into the lexicon of the common law the concept of Aboriginal Title, which for almost fifty years had gone into legal eclipse. Although the Supreme Court in a four to three decision rejected the Nisga'a appeal on a procedural technicality, all six judges that addressed the substance of the appeal recognized that Aboriginal Title was a pre-existing right, not dependent upon executive or legislative recognition. The Court split three-three on the pivotal issue whether Aboriginal Title in British Columbia had been extinguished, an issue which was only resolved by the Supreme Court twenty-four years later in *Delgamuukw*.<sup>23</sup>

For today's generation of young lawyers and law students, reading the text of a judgment of the Supreme Court of Canada is literally a click away through electronic databases. Back in 1973, getting one's hands on the very

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<sup>20</sup> (1967) 45 Can. Bar Rev. 513 [1967 article]. For an account of the backdrop to this article see Alan Cairns, "Kenneth Lysyk, the *Hawthorn Report*, and the Unique Constitutional Position of the Canada" (2005) 38 U.B.C. L. Rev. 275.

<sup>21</sup> For those interested in knowing what style of legal scholarship I do subscribe to, it is the realist school best articulated by Karl Llewellyn and Oliver Wendell Holmes, which nowadays my young colleagues don't seem much interested in but was once regarded as quite radical.

<sup>22</sup> *Calder v. British Columbia (A.G.)*, [1973] S.C.R. 313, 34 D.L.R. (3d) 145 [*Calder*].

<sup>23</sup> *Supra* note 1.

lengthy judgments of the Supreme Court in *Calder*<sup>24</sup> required greater diligence and the extensive legal and historical analysis contained in those judgments did not immediately penetrate into the legal conscientiousness of most Canadian or British Columbian lawyers. It is in this context that Professor Lysyk's next major scholarly contribution assumes special significance. Later in that same year as the Supreme Court's judgment in *Calder* was delivered, the *Canadian Bar Review* published Professor Lysyk's article "The Indian Title Question in Canada: An Appraisal in the Light of *Calder*".<sup>25</sup> In today's legal research environment, in an internet and Quicklaw world, an article in the *Canadian Bar Review* is one of many sources of legal analysis and commentary. Back in 1973, the *Canadian Bar Review* occupied a larger space in both the academic and professional arenas and Professor Lysyk's article was the medium which communicated the important message in *Calder* that Aboriginal Title was deeply woven into the fabric of Canadian Law and was both of historical and of contemporary significance in working out a respectful and just relationship with Aboriginal Peoples.

In his introduction to the 1973 article, Professor Lysyk reminded the reader that "so completely had [the concept of Indian title] faded into history over the last half century that discussion of the subject at this time must contend with a credibility gap, an initial scepticism as to whether the concept of Indian title is one which has any basis at all in our jurisprudence."<sup>26</sup> Professor Lysyk reprised the conclusions of the six judges in *Calder* who held that Indian title (which hereafter I will refer to as "Aboriginal Title") was not dependent upon Crown recognition and existed both independently of the provisions of the Royal Proclamation of 1763<sup>27</sup> and regardless of whether the Proclamation extended to British Columbia (on which issue the Court split three-three). Professor Lysyk went on to describe with masterful brevity the historical pattern of Crown dealings with Aboriginal Title in Canada, outside of British Columbia, to demonstrate that "the law did indeed take cognizance of the existence of Indian title."<sup>28</sup> In re-reading these pages, I was struck by the fact that, thirty years later, they still represent the most succinct review of the way in which the Imperial, Colonial, and Federal Crown acknowledged the legal reality of Aboriginal Title.

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<sup>24</sup> *Supra* note 22.

<sup>25</sup> K. Lysyk, "The Indian Title Question in Canada: An Appraisal in the Light of *Calder*" (1973) 51 *Can. Bar Rev.* 450 [1973 article].

<sup>26</sup> *Ibid.* at 451.

<sup>27</sup> *Supra* note 10.

<sup>28</sup> 1973 article, *supra* note 25 at 455.

In the next section of the 1973 article, Professor Lysyk presented what he describes as a “nutshell” description of the development of colonial policy respecting Aboriginal Title in British Columbia.<sup>29</sup> It, too, is as good a summary as you will find in the literature. Although a summary, it highlights three particularly historically significant statements: one by the Federal Minister of Justice and the others by the Governor General of Canada. These statements have become centerpieces in legal arguments since *Calder*<sup>30</sup> to buttress the assertion that Aboriginal Title was a pre-existing right that was recognized by the common law at the founding of the Colony of British Columbia and that the later policy of the Colony and the new Province after Confederation, in not recognizing that title, was both unprincipled and unlawful. The first statement by the then Minister of Justice Fournier marked the first occasion upon which the federal power of disallowance of provincial legislation was utilized. In disallowing British Columbia’s first *Crown Land’s Act*<sup>31</sup> of 1874 because it did not exempt from its operation un-surrendered Indian lands, the Minister of Justice wrote:

[T]he undersigned feels that he cannot do otherwise than advise that the Act in question is objectionable, as tending to deal with lands which are assumed to be the absolute property of the province, an assumption which completely ignores, as applicable to the Indians of British Columbia, the honor and good faith with which the Crown has, in all other cases, since its sovereignty of the territories in North America, dealt with their various Indian tribes.<sup>32</sup>

Minister Fournier, in a passage that foreshadowed the conclusion of the Privy Council in the *St. Catherine’s Milling*<sup>33</sup> case, referred to the provision of section 109 of the *BNA Act, 1867*<sup>34</sup> which, in affirming Provincial ownership of Crown lands within the Province, subjects that ownership to any interest other than that of the Province, and the Minister advised that the un-surrendered Indian title was such an interest.

The second statement is contained in the communication, also in 1874, from the Governor General of Canada, Lord Dufferin, to the Secretary of State for the Colonies wherein the Governor General wrote:

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<sup>29</sup> *Ibid.* at 452-67.

<sup>30</sup> *Supra* note 22.

<sup>31</sup> S.B.C. 1874, No. 2.

<sup>32</sup> W.E. Hodgins, *Correspondence, Reports of the Ministers of Justice and Orders in Council upon the Subject of Dominion and Provincial Legislation, 1867-1895* (Ottawa: Government Printing Bureau, 1896) at 1028, cited in 1973 article, *supra* note 25 at 464.

<sup>33</sup> *Supra* note 8.

<sup>34</sup> Now titled *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5.

In Canada the accepted theory has been that while the sovereignty and jurisdiction over any unsettled territory is vested in the Crown certain territorial rights or at all events rights of occupation, hunting and pasture, are *inherent* in the aboriginal inhabitants.

As a consequence the Government of Canada has never permitted any lands to be occupied or appropriated, whether by Corporate bodies or by individuals, until after the Indian title has been extinguished . . . .

In British Columbia this principle seems never to have been acknowledged.<sup>35</sup>

The occasion of the third statement was a speech given in Victoria by Lord Dufferin in the course of which he stated:

Most unfortunately . . . there has been an initial error ever since Sir James [Douglas] quitted office, in the Government of British Columbia neglecting to recognize what is known as the Indian title. In Canada this has always been done: no Government, whether provincial or central, has failed to acknowledge that the original title to the land existed in the Indian tribes and the communities that hunted or wandered over them. Before we touch an acre we make a treaty with the chiefs representing the bands we are dealing with, and having agreed upon and paid the stipulated price . . . we enter into possession, but not until then do we consider that we are entitled to deal with a single acre."<sup>36</sup>

At the time Professor Lysyk wrote his 1973 article,<sup>37</sup> he was already the Deputy Attorney General of Saskatchewan. It is a great pity that he never became the Deputy Attorney General of British Columbia because, with the benefit of his legal advice firmly grounded in an appreciation of the historical record, British Columbia might not have maintained its century-old policy of intransigence and resistance to the recognition of Aboriginal Title, and would not have continued to advance for another twenty-five years its arguments before the Courts the contention that Aboriginal Title was not recognized in British Columbia.

In his 1973 article, Professor Lysyk, in addressing the nature of the Indian title, provides the reader with an excellent clarification of the concept of the underlying title of the Crown and its relationship to Aboriginal Title, a concept and relationship some students find on a par with the concept of specific intent and its relationship with *mens rea*, which Chief Justice Brian Dickson once described as an "elusive cerebration in the mind."<sup>38</sup> Professor

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<sup>35</sup> Cited in 1973 article, *supra* note 25 at 466 [emphasis added].

<sup>36</sup> Henry Milton, *Speeches and Addresses of the Right Honourable Frederick Temple Hamilton, Earl of Dufferin* (London: John Murray, 1882) at 209, cited in *ibid*.

<sup>37</sup> *Supra* note 25.

<sup>38</sup> *R. v. Leary* (1977), 74 D.L.R. (3d) 103, [1978] 1 S.C.R. 29.

Lysyk, in explaining the relationship between the Crown's underlying title and Aboriginal Title, proceeds from the judicial articulation in Privy Council decisions arising both from Canada and other former British colonies to show how, conceptually, there is no inconsistency in locating the underlying title in the Crown while recognizing the contemporaneous existence of Aboriginal Title as a burden on that underlying title. He continues to argue, therefore, in support of the position of Justice Hall in *Calder*<sup>39</sup> and contrary to the position taken by Justice Judson, that pre-confederation British Columbian colonial ordinances (the so-called *Calder 13*) that stated that all lands belong in fee to the Crown did not constitute a denial of the existence nor amount to an implied extinguishment of Aboriginal Title. Justice Hall's and Professor Lysyk's analyses of the law were finally affirmed by the British Columbia Court of Appeal in *Delgamuukw*.<sup>40</sup>

Professor Lysyk again reveals his discriminating eye for significant statements in the historical and jurisprudential record in discussing the nature of the Crown's beneficial interest in Aboriginal Title lands. He pays particular attention to a passage in the judgment of the Privy Council in the *St. Catherine's Millings* case, where Lord Watson stated:

The fact that the power of legislating for Indians, and for lands which are reserved to their use, has been entrusted to the Parliament of the Dominion is not in the least degree inconsistent with the right of the Provinces to a beneficial interest in these lands, available to them as a source of revenue *whenever the estate of the Crown is disencumbered of the Indian title*.<sup>41</sup>

Professor Lysyk then writes, "[t]he clear implication is that the beneficial interest in the lands was not available to the province *until* the Indian title was extinguished."<sup>42</sup> Professor Lysyk also refers to a passage from the judgment in the 1921 *Amodu Tijani*<sup>43</sup> case, another Privy Council decision, where Lord Haldane spoke of the nature of the aboriginal beneficial interest conferred by Aboriginal Title as capable of being "... so complete as to reduce any radical right in the Sovereign [the underlying title] to one which only extends to comparatively limited rights of administrative interference."<sup>44</sup>

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<sup>39</sup> *Supra* note 22.

<sup>40</sup> *Delgamuukw v. British Columbia (A.G.)*, [1993] 5 W.W.R. 97, 104 D.L.R. (4th) 470 (B.C.C.A.).

<sup>41</sup> *Supra* note 8 at 59, cited in *supra* note 25 at 473 [emphasis added by Lysyk].

<sup>42</sup> 1973 article, *supra* note 25 at 473 [emphasis in original].

<sup>43</sup> *Amodu Tijani v. The Secretary, Southern Nigeria*, [1921] 2 A.C. 399 (P.C.) [*Amodu Tijani*].

<sup>44</sup> *Ibid.* at 410, cited in 1973 article, *supra* note 25 at 475.

The Supreme Court of Canada, in a series of cases interpreting section 35 of the *Constitution Act, 1982*<sup>45</sup> beginning with *Sparrow*,<sup>46</sup> has developed and expanded the concept of justifiable federal and provincial interference with Aboriginal rights and title but has never sufficiently nor adequately explained the conceptual fit between justifiable interference and the following principles reflected in the Privy Council jurisprudence, all of which Professor Lysyk identified in his 1973 article.<sup>47</sup> Aboriginal Title, under section 109 of the *BNA Act, 1867*<sup>48</sup> is an interest other than that of the Province in the lands of British Columbia; this title constitutes a burden on the Province's underlying title; until that title has been disencumbered by treaty or in some other way lawfully extinguished by the Federal Crown, the Province, by virtue of its underlying title cannot utilize Aboriginal Title lands as a source of revenue; and that underlying title allows the Province to exercise comparatively limited rights of administrative interference. Re-reading Professor Lysyk's 1973 article is the clearest reminder that a cogent legal analysis based on first principles does not lose its cogency by virtue of governmental disregard.

The last piece of Professor Lysyk's writing to which I want to refer is the 1977 Report of the Alaska Highway Pipeline Inquiry, an inquiry that he chaired.<sup>49</sup> Its mandate was to provide the Minister of Indian Affairs and Northern Development (Jean Chrétien) with a preliminary report on the social and economic impacts of a proposed gas pipeline through the southern Yukon. This inquiry was convened following the Report of the MacKenzie Valley Pipeline Inquiry that was presided over by Justice Tom Berger (as he then was). Justice Berger took three years to complete his monumental work and I was privileged to be part of that process as Commission Counsel for the Community Hearings. The Alaska Highway Pipeline Inquiry was convened in April 1977 and was given four months to complete its preliminary report. Given the extremely short time frame, the detailed and perceptive discussion of the issues contained in the Lysyk Report set a precedent that has rarely been equalled.

The Lysyk Report contains a separate chapter on the Yukon Indian Land Claim. The Yukon land claim had been tabled with the Federal Government in a proposal entitled "Together Today for our Children Tomorrow" shortly after

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<sup>45</sup> Being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

<sup>46</sup> *R. v. Sparrow*, [1990] 1 S.C.R. 1075 at 1092, 70 D.L.R. (4th) 385.

<sup>47</sup> *Supra* note 25.

<sup>48</sup> *Supra* note 34.

<sup>49</sup> Kenneth M. Lysyk, Edith E. Bohmer & Willard L. Phelps, *Alaska Highway Pipeline Inquiry* (Ottawa: Minister of Supply and Services Canada, 1977) [Lysyk Report].

the judgment of the Supreme Court of Canada in *Calder*.<sup>50</sup> The chapter in the Lysyk Report locates the claim in an historical and comparative perspective, and reviews subsequent developments in negotiating the claim as well as the main contours of the proposed settlement. Of particular importance, that chapter sets out the nature of the prejudice that would occur to the achievement of a just settlement of the claim if the pipeline construction began prior to that settlement. To avoid that prejudice, the report recommended that construction should not begin for at least another four years. In the interim the report recommended some of the measures that could be taken to mitigate the adverse effects of pipeline construction on the Indian land claim. This included a proposal which would minimize the prejudice to land selection under the settlement model while avoiding an unnecessary rigid land freeze in the Yukon. The report suggested that its proposals constituted “a reasonable accommodation.”<sup>51</sup>

For someone like me, who in his early career was characterized as a radical lawyer fighting for the civil and human rights of those who are most marginalized in our society including Aboriginal Peoples and prisoners, the concept of “reasonable accommodation” was not something in my vocabulary of advocacy. However, over the years, I have come to gain much greater respect for the concept. Aboriginal Peoples, whose cultures and economies hinge upon accommodation and reciprocity between peoples, animals, and their habitats, have taught me the need for balancing and accommodating rights with responsibilities and the importance of seeking consensus as a sustaining principle and process. Throughout his career, Professor Lysyk, through the pen of the scholar and the voice of an advocate in the areas of Aboriginal Law, Federalism, and most famously in his arguments in the *Patriation Reference*,<sup>52</sup> sought to forge reasonable accommodations, not on the anvil of power or popular politics, but upon principles and processes that provide a full measure of justice.

In many ways, Professor Lysyk’s scholarship anticipated the discourse that has been adopted by the Supreme Court of Canada in its jurisprudence under section 35 of the *Constitution Act, 1982*,<sup>53</sup> which has sought to establish principles to guide reconciliation of the pre-existence of Aboriginal societies with the sovereignty of the Crown. In its decision in *Delgamuukw*,<sup>54</sup> the

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<sup>50</sup> *Supra* note 22.

<sup>51</sup> Lysyk Report, *supra* note 49 at 120.

<sup>52</sup> *Reference Re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753, (*sub nom. Reference Re Amendment of the Constitution of Canada (Nos. 1, 2 and 3)*) 125 D.L.R. (3d) 1 [*Patriation Reference*].

<sup>53</sup> *Supra* note 45.

<sup>54</sup> *Supra* note 1.

Supreme Court articulated one of those principles as a duty to consult and seek workable accommodations with Aboriginal Peoples as a prerequisite to any justifiable interference with Aboriginal rights. In its most recent judgments, the Supreme Court, in the *Haida Nation*<sup>55</sup> and *Taku River*<sup>56</sup> cases, extended the Crown's duty to consult and accommodate to asserted but unresolved Aboriginal title and rights claims. Chief Justice McLachlin stated:

Honourable negotiation implies a duty to consult with Aboriginal claimants and conclude an honourable agreement reflecting the claimants' inherent rights. But proving rights may take time, sometimes a very long time. In the meantime, how are the interests under discussion to be treated? Underlying this question is the need to reconcile prior Aboriginal occupation of the land with the reality of Crown sovereignty. Is the Crown, under the aegis of its asserted sovereignty, entitled to use the resources at issue as it chooses, pending proof and resolution of the Aboriginal claim? Or must it adjust its conduct to reflect the as yet unresolved rights claimed by the Aboriginal claimants?

The answer, once again, lies in the honour of the Crown. The Crown, acting honourably, cannot cavalierly run roughshod over Aboriginal interests where claims affecting these interests are being seriously pursued in the process of treaty negotiation and proof. It must respect these potential, but yet unproven, interests. The Crown is not rendered impotent. It may continue to manage the resource in question pending claims resolution. But, depending on the circumstances ... the honour of the Crown may require it to consult with and reasonably accommodate Aboriginal interests pending resolution of the claim. To unilaterally exploit a claimed resource during the process of proving and resolving the Aboriginal claim to that resource, may be to deprive the Aboriginal claimants of some or all of the benefit of the resource. That is not honourable.<sup>57</sup>

Spurred by the Supreme Court's jurisprudence, a new discourse and practice, framed along the axis of accommodation, is developing as a necessary part of working out the relationship between First Nations and the Crown.

The discourse and practice of accommodation was given voice by Professor Ken Lysyk twenty-five years ago, and as with so much of the work of this elegant jurist, it provides a contemporary model of scholarship in the service of justice.

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<sup>55</sup> *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, 245 D.L.R. (4th) 33, 2004 SCC 73 [*Haida Nation*].

<sup>56</sup> *Taku River Tlingit Nation v. British Columbia (Project Assessment Director)*, [2004] 3 S.C.R. 550, 245 D.L.R. (4th) 193, 2004 SCC 74.

<sup>57</sup> *Haida Nation*, *supra* note 55 at paras. 26-27.

