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# A Court Between: Aboriginal and Treaty Rights in the British Columbia Court of Appeal

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## A COURT BETWEEN:

### *Aboriginal and Treaty Rights in the British Columbia Court of Appeal*

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DOUGLAS C. HARRIS<sup>1</sup>

“MR. SANDERS, WE ENJOYED your interesting argument.”<sup>2</sup> With these final words the British Columbia Court of Appeal, in a brief oral judgment of 28 January 1977, dismissed the appeal of nine members of the Cowichan Tribes in *R. v. Jack*. The nine had been convicted at trial for fishing during the closed season, the latest altercation in almost a century of conflict over the fisheries on the Cowichan River.<sup>3</sup> Their legal argument, constructed around the terms of British Columbia’s entry into Confederation and the history of fisheries regulation in the former colony, deserved serious judicial consideration from the three-justice bench, not platitude.<sup>4</sup> However, in an era before the constitutional entrenchment of Aboriginal and treaty rights, and in a province that had long denied their existence, the claims re-emerged in the 1960s and 1970s to a sceptical Court of Appeal – a subject of interest but a novelty of uncertain legal consequence.

Claims to Aboriginal and treaty rights all but disappeared from Canadian courts in the second quarter of the twentieth century. A 1927 amendment to the *Indian Act*, repealed in 1951, prohibited the raising of funds to pursue land claims without leave from the Department

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<sup>2</sup> *R. v. Jack*, [1977] B.C.J. No. 123 (28 January 1977) at para. 24. The comment is from Bull J.A. It follows the oral judgment delivered for the court by Robertson J.A.

<sup>3</sup> On the conflict over fisheries on the Cowichan River, see Douglas C. Harris, *Fish, Law, and Colonialism: The Legal Capture of Salmon in British Columbia* (Toronto: University of Toronto Press, 2001) chap. 3.

<sup>4</sup> The court ruled that its even more perfunctory decision in *R. v. Point* (1957), 22 W.W.R. 527, denying the accused member of the Musqueam Nation recourse to the terms of union as a defence against a charge for failing to file an income tax return, was binding. When *R. v. Jack*, [1980] 1 S.C.R. 294, [1979] 2 C.N.L.R. 25, reached the Supreme Court of Canada, Justice Laskin and Justice Dickson, in concurring judgments, upheld the fisheries convictions but dismissed, in Justice Laskin’s words, the “narrow ground” of the BCCA’s ruling.

of Indian Affairs.<sup>5</sup> The effect was to bar claims to Aboriginal rights, with the result that these rights were largely unknown to the judiciary in British Columbia when, in the 1960s, Aboriginal peoples and their legal counsel began to reassert them in the courtroom. The constitutional entrenchment of Aboriginal and treaty rights in 1982 dramatically altered the legal landscape, drawing those rights into courtrooms where they had seldom been heard and elevating the role of the judiciary in defining the relationship between Aboriginal peoples and the Canadian state.<sup>6</sup> Nowhere is this more true than in British Columbia, a province largely devoid of treaties and where the issue of Aboriginal title remains unresolved.

This article reviews the decisions of the British Columbia Court of Appeal (BCCA) in the area of Aboriginal and treaty rights and reflects on the court's role in defining the content of those rights. It turns first to the two most important of the early cases to work their way through the court – *R. v. White and Bob*<sup>7</sup> and *Calder v. British Columbia*<sup>8</sup> – and to several other cases that reveal a court confident in its assumption that Aboriginal rights had little bearing on the province. The decisions of the court in the 1970s reflected and consolidated the status quo, at least as regards Aboriginal rights and title. This would change in a series of decisions from the court in the short decade following 1982, when it began to infuse those rights with substantial legal effect. *MacMillan Bloedel Ltd. v. Mullin* (the Meares Island case)<sup>9</sup> and *R. v. Sparrow*,<sup>10</sup> in particular, mark the definitive end of an era when the claims of Aboriginal peoples might give rise to a sense of moral obligation but no legal consequence.

In the early 1990s a cluster of cases, including *R. v. Van der Peet*<sup>11</sup> and *Delgamuukw v. British Columbia*,<sup>12</sup> worked their way through the BCCA

<sup>5</sup> *An Act to Amend the Indian Act*, S.C. 1927, c. 32.

<sup>6</sup> *Constitution Act, 1982*, s. 35, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11: “The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.”

<sup>7</sup> *R. v. White and Bob* (1964), 50 D.L.R. (2d) 613, 52 W.W.R. 193 (B.C.C.A.) [*White and Bob* (B.C.C.A.) cited to D.L.R.].

<sup>8</sup> *Calder v. British Columbia (Attorney General)* (1970), 13 D.L.R. (3d) 64, 74 W.W.R. 481 (B.C.C.A.) [*Calder* (B.C.C.A.) cited to D.L.R.].

<sup>9</sup> *MacMillan Bloedel Ltd. v. Mullin*, [1985] 3 W.W.R. 577, [1985] 2 C.N.L.R. 55 (B.C.C.A.) [*MacMillan Bloedel* (B.C.C.A.) cited to W.W.R.].

<sup>10</sup> *R. v. Sparrow*, [1987] 2 W.W.R. 577, [1987] 1 C.N.L.R. 145, (B.C.C.A.) [*Sparrow* (B.C.C.A.) cited to W.W.R.].

<sup>11</sup> *R. v. Van der Peet*, [1993] 5 W.W.R. 459, [1993] 4 C.N.L.R. 221 (B.C.C.A.) [*Van der Peet* (B.C.C.A.) cited to W.W.R.].

<sup>12</sup> *R. v. Delgamuukw*, [1993] 5 W.W.R. 470, [1993] 5 C.N.L.R. 1 (B.C.C.A.) [*Delgamuukw* (B.C.C.A.) cited to W.W.R.].

to the Supreme Court of Canada (scc). These cases form cornerstones in Aboriginal rights jurisprudence, but a divided BCCA had a muted role in this foundation building. In recent years, rights and title cases have been less to the fore, but the BCCA has reframed the practice of Aboriginal rights litigation through a diverse set of decisions on the relationship between Aboriginal title and the province's title registration system, the obligations on the parties to consult, the circumstances in which the courts are prepared to adjudicate a land claim, and the funding of Aboriginal rights litigation. Ascribing an overarching approach in these most recent cases to what has become an increasingly large and diverse appellate bench is a difficult undertaking, but it is apparent that the court is more comfortable defining the parameters of a process than in determining the content of Aboriginal rights and title.

There are many ways to explore the growing prominence of Aboriginal and treaty rights in British Columbia. An analysis of the decisions of a single court, even the province's highest court, can provide only the most partial of explanations. Provincial courts of appeal are institutionally confined, positioned between the trial courts that produce the record of the case and, in the area of Aboriginal and treaty rights, an engaged scc. Moreover, changes within the domestic legal system are only part of a larger set of forces, the result of which is a much more enhanced recognition of Aboriginal and treaty rights than existed a generation ago. Nonetheless, in the years following the constitutional entrenchment of Aboriginal and treaty rights in 1982, the BCCA became one of the prominent voices in their articulation. This article divulges that voice, its early reticence, and the diverse strands within it, through an analysis of the court's decisions.

#### PRE-SECTION 35 ABORIGINAL AND TREATY RIGHTS

James Douglas, the chief factor of the Hudson's Bay Company (HBC) at Fort Victoria, concluded a set of fourteen agreements with Aboriginal peoples on Vancouver Island between 1850 and 1854. The written text of each of the agreements was in the form of a land transfer, not a formal treaty, and, a century after their making, these agreements were unfamiliar parts of the legal or political landscape in British Columbia, at least beyond the Aboriginal communities that were parties to them. Thomas Berger, legal counsel for the Snuneymuxw (Nanaimo) in *R. v. White and Bob*, the first treaty rights case to reach the BCCA, recounts

his surprise when Snuneymuxw elders told him that their people had a treaty right to hunt.<sup>13</sup> According to the text of the agreements, the Snuneymuxw retained the “liberty to hunt over unoccupied land and to carry on their fisheries as formerly.”<sup>14</sup> However, to be effective as a defence against charges of hunting out of season and without a licence, Berger and the Snuneymuxw had to convince the BCCA that the 1854 agreement with James Douglas was a treaty. They retained the provincial archivist, Willard Ireland, and Wilson Duff, the curator of anthropology at the provincial museum in Victoria, as expert historian and anthropologist, respectively.<sup>15</sup> Berger also turned to a more distant set of legal documents, including the *Royal Proclamation of 1763* and the 1823 decision of Justice Marshall of the United States Supreme Court in *Johnson v. McIntosh*.<sup>16</sup> These and other sources had been marshalled in what Hamar Foster has described as the first campaign for Indian title, 1908–28, but a generation had passed since they had been aired in British Columbia, and they had never been presented to the BCCA.<sup>17</sup> Berger was leading the court into legal terrain it had never before traversed.

The court split. Justices Sheppard and Lord concluded that the agreements were merely land transfer agreements, Justices Davey and Norris, in separate reasons, that the agreements were treaties. Justice Sullivan concurred with Justice Davey. By a 3:2 margin the agreements were treaties. In his reasons, Justice Norris set out a framework for the interpretation of historic treaties between Aboriginal peoples and the Canadian state that the SCC would adopt in later cases:

<sup>13</sup> Thomas Berger, *One Man's Justice: A Life in the Law* (Vancouver: Douglas and McIntyre, 2002) 88. On the changing nature and role of legal counsel in litigating Aboriginal and treaty rights cases, see Douglas Sanders “Lawyers and Indians,” 17 January 2001 (unpublished).

<sup>14</sup> The text of the Douglas treaties is reproduced in *Papers Connected with the Indian Land Question, 1850–1875, 1877* (Victoria: Queen's Printers, 1987) 5–11. There is no text of the agreement with the Snuneymuxw but, instead, a notation after the first thirteen agreements indicating that the “Saaquun Tribe – Nanaimo” had made “a similar conveyance.”

<sup>15</sup> See Wilson Duff, “The Fort Victoria Treaties,” *BC Studies* 3 (1969): 3–57.

<sup>16</sup> *Johnson v. McIntosh*, (1823) 21 US (8 Wheat) 543.

<sup>17</sup> Hamar Foster, “We Are Not O’Meara’s Children: Law, Lawyers, and the First Campaign for Aboriginal Title in British Columbia, 1908–28,” in Foster, Heather Raven and Jeremy Webber, eds., *Let Right Be Done: Aboriginal Title, the Calder Case, and the Future of Indigenous Rights* (Vancouver: UBC Press, 2007) 61–84.

The question is, in my respectful opinion, to be resolved not by the application of rigid rules of construction without regard to the circumstances existing when the document was completed nor by the tests of modern day draftsmanship. In determining what the intention of parliament was at the time of enactment of sec. 87 of the *Indian Act*, parliament is to be taken to have had in mind the common understanding of the parties to the document at the time it was executed. In the section “treaty” is not a word of art and, in my respectful opinion, it embraces all such engagements made by persons in authority as may be brought within the term “the word of the white man,” the sanctity of which was, at the time of British exploration and settlement, the most important means of obtaining the goodwill and cooperation of the native tribes and ensuring that the colonists would be protected from death and destruction. On such assurance the Indians relied.<sup>18</sup>

Treaty interpretation was to be based on an attempt to discern “common understanding,” not the Crown’s unilateral construction of meaning and “not by the application of rigid rules of construction without regard to the circumstances.” Moreover, Justice Norris continued, even if the agreements were not treaties, the Snuneymuxw rights to hunt and fish “still exist.”<sup>19</sup> As a result, “this is not a case merely of making the law applicable to native Indians as well as to white persons so that there may be equality of treatment under the law, but of depriving Indians of rights vested in them from time immemorial, which white persons have not had, viz., the right to hunt out of season on unoccupied land for food for themselves and their families.”<sup>20</sup> In short, the rights preceded the treaty, had been confirmed by it and by the *Royal Proclamation*, and had not been extinguished. Justice Norris doubted that the colony or the province could extinguish those rights; that power lay with the imperial government and, after Confederation, with the federal government.<sup>21</sup> In sum, his was an exceedingly powerful statement about the continuing legal salience of Aboriginal rights and title, particularly so from a judge near the end of a prominent career in the province’s business community and legal establishment.<sup>22</sup> However, in 1964 Justice Norris stood alone in this analysis. The scc would uphold the decision of the BCCA in a

<sup>18</sup> *White and Bob* (B.C.C.A.) at 648-49. The scc cited the first two sentences of this passage in *R. v. Sioui*, [1990] 1 S.C.R. 1025 at para. 16, [1990] 3 C.N.L.R. 127. See also para. 44.

<sup>19</sup> *Ibid.* at 647.

<sup>20</sup> *Ibid.* at 648.

<sup>21</sup> *Ibid.* at 656-57.

<sup>22</sup> See G.S. Cumming, Q.C., “Nos Disparus: The Honourable Thomas Grantham Norris, M.C., Q.C.,” *The Advocate* 35 (1977): 69-70.

brief oral judgment but only on the ground that the agreements were treaties.<sup>23</sup> It would withhold comment on the nature of Aboriginal title until *Calder*.

The issue of Aboriginal title was a long time in coming directly before Canadian courts. The Judicial Committee of the Privy Council had considered and defined its content as a “personal and usufructuary right, dependent on the good will of the Sovereign” in the late nineteenth century case of *St. Catharine’s Milling & Lumber Co.*<sup>24</sup> However, that case revolved around a jurisdictional dispute between the federal government and Ontario, not a claim of Aboriginal title. The Nisga’a would be the first to bring an Aboriginal title claim when, in 1967, they turned to the courts for a declaration that their Aboriginal title had not been extinguished. They did not ask for a definition of that title or a determination of its geographic scope but merely a declaration that their title had not been extinguished. Such a declaration, they believed, would then form the basis for treaty negotiations with Canada and the province. Thomas Berger would argue the Nisga’a case from trial, through the BCCA, to the SCC, and it was likely that his success in *White and Bob* was the catalyst that brought the Nisga’a to court. However, as early as 1913 the Nisga’a had formulated the basis of their claim to Aboriginal title in a petition that the Judicial Committee of the Privy Council declined to entertain.<sup>25</sup>

The trial court heard expert archival and anthropological evidence on the nature of Nisga’a use, ownership, and territorial control of their lands, and on the history of Nisga’a interaction with government officials.<sup>26</sup> The court also heard the testimony of five Nisga’a chiefs, including Nisga’a Tribal Council president Frank Calder. They testified as to the structure of Nisga’a society, Nisga’a relations with their neighbours, the extent of Nisga’a territory, and to the fact that the Nisga’a had never surrendered their Aboriginal title to that territory.<sup>27</sup> Douglas McK Brown,

<sup>23</sup> *R. v. White and Bob*, [1965] S.C.R. vi, 52 D.L.R. (2d) 481.

<sup>24</sup> *St. Catharine’s Milling & Lumber Co. v. R.* (1888), 14 App. Cas. 46 at 54.

<sup>25</sup> The petition is reproduced in Foster et al., *Let Right Be Done*, Appendix B, 241–45. See also Foster, “We Are Not O’Meara’s Children.”

<sup>26</sup> Berger turned again to Willard Ireland and Wilson Duff. See Wilson Duff, *The Indian History of British Columbia*, vol. 1: *The Impact of the White Man* (Victoria: Royal British Columbia Museum, 1969), written between his testimony in *White and Bob* and *Calder*.

<sup>27</sup> The other chiefs to testify were James Gosnell of New Aiyansh, Maurice Nyce of Canyon City, W.D. McKay of Greenville, and Anthony Robinson of Kincolith. For extensive excerpts of the testimony, see the judgment of Hall J. in the SCC. See also Berger, *One Man’s Justice*, 115–19.

counsel for the province, did not challenge this evidence.<sup>28</sup> He based the province's defence on two legal propositions: (1) that Aboriginal title never existed in British Columbia but (2) that if it had, it had been extinguished. It was a straightforward and honest legal statement of what had long been provincial policy. The considerable challenge for Berger and the Nisga'a was to demonstrate that the province was wrong in law, a challenge compounded by the fact that such a finding would disrupt deeply seated assumptions within the province about the inviolability of the Crown's title.

The trial judge ruled that, whatever the legal status of Aboriginal title (he declined to make a determination), it had been extinguished. The BCCA went further: Aboriginal title did not exist. Chief Justice Davey wrote that the Nisga'a "must establish that by prerogative or legislative act, or by a course of dealing by the Crown from which a prerogative act can be inferred, the Crown ensured to the Nishga Nation aboriginal rights in the lands in question."<sup>29</sup> In short, Aboriginal title was a legal interest only if the colonial state recognized it as such. Without a treaty to establish the Crown's recognition, the Nisga'a turned to the *Royal Proclamation of 1763*, but Justices Tysoe and Maclean ruled that the imperial edict did not apply to British Columbia. Moreover, if Aboriginal title did exist then the various colonial land ordinances and acts had effectively, albeit implicitly, extinguished it. Justice Tysoe overcame the lack of any express extinguishment of Aboriginal title in the legislative record with the weight of statutes and ordinances – thirteen in all between the creation of the mainland colony in 1858 and British Columbia's entry into Confederation in 1871 – in which the Crown asserted its title and outlined the terms under which it would distribute interests in land.<sup>30</sup> All three justices in *Calder* ignored the reasons of Justice Norris in *White and Bob*, which to that point was the fullest examination of the status of Aboriginal title. Instead, in language similar to the findings of the trial court in the next Aboriginal title case, *Delgamuukw*, Chief Justice Davey found that "they [the Nisga'a] were undoubtedly at the time of settlement a very primitive people with few of the institutions of civilized society, and none at all of our notions of private property."<sup>31</sup> The judgment

<sup>28</sup> See "Frank Calder and Thomas Berger: A Conversation," in Foster et al. eds., *Let Right Be Done*, 43-44.

<sup>29</sup> *Calder* (B.C.C.A.) at 67.

<sup>30</sup> *Ibid.* at 87-94.

<sup>31</sup> *Ibid.* at 66. In the SCC, [1973] S.C.R. 313, 34 D.L.R. (3d) 145, Hall J. would challenge Davey C.J.B.C. directly on this point (p. 347), reproducing pages of testimony and evidence from the trial to find, at page 375, that "the Nishgas in fact are and were from time immemorial a distinctive cultural entity with concepts of ownership indigenous to their culture and capable of articulation under the common law."



reflected provincial policy and broadly accepted public perceptions. It has been ignored by subsequent courts but not by the province, which claimed for more than another decade that the decision of the BCCA on Aboriginal title was binding, notwithstanding the SCC decision that was to follow.

The decision of the SCC in *Calder* was either an exquisite piece of judicial balancing or equivocation. The court split three, three, and one: three that Aboriginal title existed but had been extinguished; three that it existed and had not been extinguished; and one that the Nisga'a had not secured the requisite permission from the province to bring a lawsuit against the province. The three who found that Aboriginal title had been extinguished concurred with the one who ruled on the procedural shortcoming and thus, in a four-to-three ruling, the SCC denied the Nisga'a appeal. However, six justices repudiated the lower court's finding that Aboriginal title did not exist, and three of those held that Aboriginal title remained intact as a legal interest. This outcome prodded the federal government to transform its Indian policy, establish a comprehensive Indian land claims process, and enter treaty negotiations. In British Columbia the provincial government maintained that, because the SCC had ruled against the Nisga'a on a technical ground, the judgment of the BCCA on Aboriginal title – that Aboriginal title did not exist, or, that if it did, it had been extinguished – properly reflected the state of the law.

The decisions of the BCCA before the constitutional entrenchment of Aboriginal and treaty rights reveal much about the nature of British Columbia's settler society and its relations with Aboriginal peoples. In varying degrees, they reflect the attempts of that society to justify in law its position of superiority and power in a colonial setting, while at the same time beginning to come to terms with the consequences of the colonial encounter and the processes of reconciliation. The judgments of Justice Norris and, to a lesser extent, of Justice Davey in *White and Bob* speak most clearly to the effort of reconciliation. Conversely, the decisions of the court in *Calder* and then in *Jack* reflect the long and much more broadly held perception that the colony and then the province of British Columbia had managed its Aboriginal peoples full well without the unhelpful intrusion of legal doctrines such as Aboriginal title and rights, concepts that provincial officials believed were of dubious legal pedigree and uncertain effect. Where the cases went to the SCC, as many of them did, the latter upheld the decisions of the BCCA, dismissing the Crown's appeal in *White and Bob* and that of the Aboriginal appellants in

the other cases. However, this tally of confirmations is misleading, particularly in *Calder* but also in *Jack*, where the SCC justices were sketching out a fundamentally different legal framework for relations between Aboriginal peoples and the Canadian state, while the BCCA decisions remained embedded in and sustained a set of legal and more broadly cultural assumptions of Western superiority and entitlement.<sup>32</sup>

#### ABORIGINAL AND TREATY RIGHTS FOLLOWING S. 35

The lodging of Aboriginal and treaty rights within the Canadian Constitution in 1982 presaged an enormous transformation in Canadian law. Once viewed with scepticism, these rights now had constitutional purchase, and four decisions from the BCCA in the mid-late 1980s reveal the effects of this elevated status. The first and last of these cases, *R. v. Bartleman*<sup>33</sup> and *Tsarwout Indian Band v. Saanichton Marina Ltd.*,<sup>34</sup> dealt, respectively, with the hunting and fishing provisions in the Douglas treaties. Two other cases decided within a year of each other, the Meares Island case and *Sparrow*, illustrate even more clearly the early impact of the constitutional entrenchment of Aboriginal rights and title.

In 1977, conservation officers charged Joseph Bartleman, a member of the Tsartlip First Nation, for hunting deer with a prohibited cartridge. Seven years later he appeared before the BCCA pleading a treaty rights defence based on the hunting provision in the Douglas treaties. After *White and Bob*, there was no doubt that the 1852 agreement between the Tsartlip and the HBC was a valid treaty. In this case Bartleman had been hunting on private land outside the boundaries of the lands described in the treaty. Did the treaty right to “hunt over unoccupied land” extend beyond the described boundaries to include the traditional hunting territory of the Tsartlip, and might “unoccupied land” include private land? A unanimous BCCA overturned the conviction of the trial court;<sup>35</sup> the treaty right to hunt extended throughout the traditional hunting territory of the Tsartlip, and the private lands in question were “unoccupied lands” within the meaning of the treaty. Justice Lambert,

<sup>32</sup> See also the two decisions that the BCCA released on 28 February 1975: *R. v. Derriksan*, [1975] 4 W.W.R. 761, 9 C.N.L.C. 507 (B.C.C.A.); and *R. v. Kruger*, [1975] 5 W.W.R. 167, 9 C.N.L.C. 620 (B.C.C.A.).

<sup>33</sup> *R. v. Bartleman* (1984), 12 D.L.R. (4th) 73, [1984] 3 C.N.L.R. 114 [*Bartleman* (B.C.C.A.) cited to D.L.R.].

<sup>34</sup> *Saanichton Marina Ltd. v. Claxton*, [1989] 5 W.W.R. 82, [1989] 3 C.N.L.R. 46 (B.C.C.A.) [*Saanichton Marina* (B.C.C.A.) cited to W.W.R.].

<sup>35</sup> *R. v. Bartleman*, [1981] 1 C.N.L.R. 83 (B.C. Co. Ct.).

who wrote the central judgment, drew on emerging principles of treaty interpretation that required not only a liberal interpretation of treaty terms in favour of the Tsartlip but also that the treaties be interpreted as they would have been understood by them.<sup>36</sup> The decision provoked controversy, although not so much for the conclusion or for the principles of treaty interpretation that it reinforced as for Justice Lambert's stepping beyond the accustomed judicial role by collecting and reviewing historical material that neither party had introduced in evidence.<sup>37</sup> In a concurring judgment that appeared designed to assuage concern, Justice Esson (with Justice Carrothers) indicated that they agreed with Justice Lambert's interpretation of the treaty but had reached this conclusion without seeing or relying on any of the material that had not been introduced at trial.

The BCCA signalled in *Bartleman* that it would not construe Aboriginal treaties in narrow, technical terms but, rather, that it would infuse the slight text of the Douglas treaties with substantial meaning. However, the court also ruled that treaty rights had their limits, particularly where it perceived that public safety was an issue. *R. v. Napoleon* arose when Saulteaux hunters, parties to Treaty 8, shot a deer within a "No Shooting" zone adjacent to a public highway.<sup>38</sup> The hunters argued that the regulations were in conflict with the hunting rights in Treaty 8 and, therefore, did not apply to them. Justice Taggart, writing for the court, disagreed: the object of the regulations was "the protection of the public from unsafe shooting" and to set "standards of safety expected of all members of the public."<sup>39</sup> The BCCA reiterated this position nearly two decades later in the night hunting case of *R. v. Morris and Olsen*.<sup>40</sup> Justices Thackray and Huddart agreed with the trial judge that hunting at night was "inherently dangerous," and that the night hunting prohibition in the *Wildlife Act* did not infringe or unjustifiably infringe the Douglas treaty right to hunt.<sup>41</sup> Justice Lambert, in dissent, held otherwise: "the true meaning of the treaty is that safety is a matter for control by the Indian peoples under their own laws, customs, traditions, and practices and not by the unilateral non-consultative enactment of the largely non-Indian

<sup>36</sup> *Bartleman* (B.C.C.A.) at 86-91.

<sup>37</sup> See M.H. Ogilvie, "Case Notes: *R. v. Bartleman*," *Canadian Bar Review* 64 (1986): 183-205, and the rejoinder, P.B. Carter, "Do Courts Decide According to the Evidence?" *UBC Law Review* 22 (1988): 351-67.

<sup>38</sup> *R. v. Napoleon*, [1985] 6 W.W.R. 302, [1986] 1 C.N.L.R. 86 (B.C.C.A.) [cited to W.W.R.].

<sup>39</sup> *Ibid.* at 318.

<sup>40</sup> *R. v. Morris and Olsen*, 2004 BCCA 121. See also *R. v. Seward* (1999), 171 D.L.R. (4th) 524, [1999] 3 C.N.L.R. 299.

<sup>41</sup> *Ibid.* paras. 173-74, 212.

people.”<sup>42</sup> A majority of the SCC would agree with Justice Lambert, at least in so far as the general prohibition against night hunting was an overly broad restriction of the treaty right to hunt.<sup>43</sup>

In the 1980s, the BCCA would also interpret the right to “fisheries as formerly” in the Douglas treaties as providing substantial protection for traditional fishing territories. In *Tsawout Indian Band v. Saanichton Marina Ltd.* the Tsawout turned to the courts to challenge a proposed marina in Saanichton Bay that, if built, would occupy the fishing ground in front of their village site and Indian reserve and would infringe their treaty right. In a move that revealed the continuing opposition within the province to the idea that the Douglas treaties might contain enforceable rights, the Crown and company “pleaded emphatically” at trial that the Douglas treaties, if indeed they were treaties, were not binding on the Crown.<sup>44</sup> It was an argument that Hamar Foster has described as “not merely tenuous, but unworthy” of the Crown,<sup>45</sup> and the trial judge dismissed it in a preliminary motion.<sup>46</sup> In the alternative, the Crown argued that the “fisheries as formerly” provision secured nothing more than the right of the Tsawout and other signatory tribes to participate in the fisheries on the same terms as the public. The trial judge dismissed this argument as well and ordered a stop to the marina. The BCCA agreed. Justice Hinkson, writing for a court that included Justices Lambert and Locke, concluded that, while the “fisheries as formerly” provision “does not amount to a proprietary interest in the sea bed nor a contractual right to a fishing ground[,] it does protect the Indians against infringement of their right to carry on the fishery, as they have done for centuries, in the shelter of Saanichton Bay.”<sup>47</sup> The effect of the treaty was “to afford to the Indians an independent source of protection of their right to carry on their fisheries as formerly.”<sup>48</sup>

British Columbia’s highest court was now telling the province, through *Bartleman* and *Saanichton Marina*, that the hunting and fishing provisions in the Douglas treaties conferred enforceable rights that did more than simply guarantee Native peoples the right to participate on the same terms as the non-Native public. The court’s rejection of

<sup>42</sup> Ibid. para. 62.

<sup>43</sup> *R. v. Morris and Olsen*, 2006 SCC 59.

<sup>44</sup> *Saanichton Marina Ltd. v. Claxton*, [1988] 1 W.W.R. 540 at 547-48, [1987] 4 C.N.L.R. 48 [*Saanichton Marina* (B.C.S.C.) cited to W.W.R.].

<sup>45</sup> Hamar Foster, “The Saanichton Bay Marina Case: Imperial Law, Colonial History and Competing Theories of Aboriginal Title,” *UBC Law Review* 23 (1989): 629-50 at 640.

<sup>46</sup> *Saanichton Marina* (B.C.S.C.) Schedule 2 at 551-54.

<sup>47</sup> *Saanichton Marina* (B.C.C.A.) at 93.

<sup>48</sup> Ibid. at 94.

provincial policy was even more striking in its decisions respecting Aboriginal rights and title.

In *Calder* the SCC had announced that Aboriginal title was an interest of legal consequence. Whether it had been extinguished in British Columbia remained to be resolved, as did the details of its content. Initial answers began to appear in the 1980s, particularly in the BCCA's decision regarding the Meares Island case. This case emerged from a high-profile conflict between a logging company and the province on the one hand, and environmentalists and Native peoples on the other, over the logging of Meares Island. MacMillan Bloedel, to which the province had granted timber rights on the island, planned to begin logging; environmentalists sought to preserve the old-growth forest on the island; and the Nuu-chah-nulth Tribal Council (NTC) claimed the island as an integral part of its traditional territory to which the Nuu-chah-nulth held Aboriginal title. The case came before the courts in the form of requests for injunctions, one from MacMillan Bloedel to stop the protestors from blocking its access to the island, another from the Clayoquot and Ahousaht (members of the NTC) to stop the company from logging pending the resolution of the claim to Aboriginal title.

The chambers judge who heard the injunction requests held that the claim of the Clayoquot and Ahousaht to Aboriginal title had no prospect of success at trial and, further, that the claim had been too long in coming. Moreover, if granted, the injunction would have "potentially disastrous consequences" for the provincial economy, given the extent of unresolved claims to Aboriginal title and the possibility that the grant of an injunction in this case would set a precedent that would spread across the province.<sup>49</sup> In a split decision, the BCCA disagreed. All the justices found that the claim to Aboriginal title presented a fair question or a serious issue to be tried. *Calder* was not, as the chambers judge had held, "a complete answer to the assertion of aboriginal title."<sup>50</sup> Justice Macfarlane, who concurred with Justices Seaton and Lambert in the majority, suggested instead that "using the *Calder* case as a standard [for determining the continued existence of Aboriginal title] the least that can be said is that there is an even chance of success at trial."<sup>51</sup> Moreover, the BCCA dismissed the notion of undue delay. Justice Seaton put it this way: "The Indians have pressed their land claims in various ways for generations. The claims have not been dealt with and found invalid.

<sup>49</sup> *MacMillan Bloedel Ltd. v. Mullin*, [1985] 2 W.W.R. 722 at 749, [1985] 2 C.N.L.R. 26, (B.C.S.C.) [cited to W.W.R.].

<sup>50</sup> *Ibid.* at 739.

<sup>51</sup> *MacMillan Bloedel* (B.C.C.A.) at 605.

They have not been dealt with at all. Meanwhile, the logger continues his steady march and the Indians see themselves retreating into a smaller and smaller area.”<sup>52</sup>

Unified on the question of a serious issue to be tried, the BCCA divided on which of the parties would bear the larger burden if the injunction were granted or denied. Justice Craig in dissent held that to permit the logging would not cause “irreparable damage” to the Nuu-chah-nulth; if they were eventually able to establish Aboriginal title over all or some part of the island, compensation for damages would be a sufficient remedy.<sup>53</sup> Justice Macdonald, also in dissent, echoed the concern of the chambers judge that to grant the injunction would have “potentially disastrous consequences” and would wreak “havoc” on the provincial economy.<sup>54</sup> The dispute over logging on Meares Island, he suggested, was not unique, and he was worried about the precedent it would set and the advantage it would give Native peoples in future negotiations.<sup>55</sup>

Justice Seaton disagreed. Any damage to MacMillan Bloedel as a result of an order to stop logging on Meares Island was minimal, particularly when compared to the Nuu-chah-nulth loss if the logging were to proceed and they were later able to establish Aboriginal title:

Meares Island is of importance to MacMillan Bloedel, but it cannot be said that denying or postponing its right would cause irreparable harm. If an injunction prevents MacMillan Bloedel from logging pending the trial and it is decided that MacMillan Bloedel has the right to log, the timber will still be there.

The position of the Indians is quite different. It appears that the area to be logged will be wholly logged. The forest that the Indians know and use will be permanently destroyed. The tree from which the bark was partially stripped in 1642 may be cut down, middens may be destroyed, fish traps damaged and canoe runs despoiled. Finally, the island’s symbolic value will be gone. The subject matter of the trial will have been destroyed before the rights are decided.<sup>56</sup>

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<sup>52</sup> *Ibid.* at 589.

<sup>53</sup> *Ibid.* at 596.

<sup>54</sup> *Ibid.* at 599.

<sup>55</sup> *Ibid.* at 603-4.

<sup>56</sup> *Ibid.* at 588.

Justices Lambert and Macfarlane concurred, and the BCCA ordered MacMillan Bloedel to stop logging pending the outcome of the Nuu-chah-nulth claim to Aboriginal title. It was an enormously important decision that put the province on notice that resource extraction and other activity that interfered with or had the potential to infringe Aboriginal title, even where that title was claimed but not yet established or confirmed, would be subject to new limits.<sup>57</sup> The BCCA would return to these issues twenty years later in *Haida Nation v. British Columbia (Minister of Forests)*.<sup>58</sup>

The decision of the BCCA in *R. v. Sparrow* is hardly remembered. Such is the fate of a decision that sits in the shadow of the SCC decision that established the basic framework for the interpretation of Aboriginal rights. However, the 1986 decision of a unanimous court revealed the extraordinary distance that the BCCA had travelled over the emerging terrain of Aboriginal rights in the decade since its decision in *Jack*.

In the early 1980s, in an effort to halt what it perceived to be the illegal sale of salmon caught under a food-fishing licence, the federal Department of Fisheries and Oceans imposed fishing net-length restrictions, conducted a “sting” operation in which an undercover officer posed as a fish buyer, and eventually raided the Musqueam Indian Reserve seizing vehicles. Charges followed but were eventually dismissed. The dispute festered, and in 1984 the federal department laid charges against Ron Sparrow for fishing with a net that was too long. The Musqueam raised an Aboriginal rights defence: their fishery had priority subject only to valid conservation requirements. The trial judge convicted Sparrow. In his estimation, the BCCA decision in *Calder* was binding, and therefore the Musqueam had no Aboriginal right to fish or, if they did have a right, it had been extinguished by the *Fisheries Act* and regulations. On appeal, the County Court judge concurred and held, further, that s. 35 could not revive a right that had been extinguished by regulation.

A unanimous BCCA led by Chief Justice Nemetz disagreed. As a first order of business, it buried the notion that its decision in *Calder* remained a binding statement on the state of Aboriginal rights and title in British Columbia.<sup>59</sup> The Musqueam had fished on the Fraser River since time immemorial, and this gave rise to an Aboriginal right to fish.<sup>60</sup> Moreover,

<sup>57</sup> The SCC refused leave to appeal. See *MacMillan Bloedel Ltd. v. Mullin*, [1985] 5 W.W.R. lxiv.

<sup>58</sup> *Haida Nation v. British Columbia (Minister of Forests)*, 2002 BCCA 147.

<sup>59</sup> *Sparrow* (B.C.C.A.) at 592–96.

<sup>60</sup> *Ibid.* at 596.

“the ‘extinguishment by regulation’ proposition has no merit.”<sup>61</sup> Turning to s. 35, the court held that the Aboriginal right to fish was now “entitled to constitutional protection.”<sup>62</sup> The result was that “the Indian food fishery is given priority over the interests of other user groups” and that the right “cannot be extinguished.”<sup>63</sup> Thus, while the government could restrict the Indian food fishery, it could only do so in a manner that “can be reasonably justified as being necessary for the proper management and conservation of the resource or in the public interest.”<sup>64</sup> In this case, the Crown had not discharged its burden of establishing that the net-length restriction was necessary as a conservation measure and an appropriate restriction on a constitutionally protected right. Finally, the court defined the category of “food fishing” broadly: “‘food purposes’ should not be confined to subsistence. In particular, this is so because the Musqueam tradition and culture involves a consumption of salmon on ceremonial occasions and a broader use of fish than mere day to day domestic consumption.”<sup>65</sup> The BCCA set aside the conviction and ordered a new trial.

The BCCA ruling in *Sparrow* was a remarkable decision from a unanimous court that, only a few years earlier, had thoroughly dismissed the idea of Aboriginal rights and title. In 1990, the SCC upheld the result and the basic framework of analysis adopted in the BCCA; the s. 35 protection for Aboriginal and treaty rights would not be reduced to a constitutional afterthought. The Supreme Court also imposed stricter limits on the Crown’s capacity to infringe a constitutional right. Conservation was a valid objective that might justify infringing the right, and there might be other valid objectives, such as the prevention of harm, but limiting the right in the public interest, as the BCCA had proposed, was “so vague as to provide no meaningful guidance and so broad as to be unworkable as a test for the justification of a limitation on constitutional rights.”<sup>66</sup> Apart from this pointed correction, the Supreme Court’s decision in *Sparrow* was a strong affirmation of the now largely forgotten decision of the BCCA.

<sup>61</sup> Ibid. at 597.

<sup>62</sup> Ibid. at 599.

<sup>63</sup> Ibid. at 608.

<sup>64</sup> Ibid. at 609.

<sup>65</sup> Ibid. at 608.

<sup>66</sup> *R. v. Sparrow*, [1990] 1 S.C.R. 1073 at 1113, [1990] 3 C.N.L.R. 160.



ABORIGINAL RIGHTS AND TITLE  
FOLLOWING *SPARROW*

In *Sparrow* and the Meares Island case, Aboriginal rights and title were as much a part of the legal terrain of British Columbia as trees and salmon were of its land and rivers. However, the detail of that terrain remained undefined. The single greatest effort of any Canadian court to describe that terrain came on 25 June 1993, when a five-panel bench of the BCCA released seven decisions regarding Aboriginal rights to hunt and fish,<sup>67</sup> as well as its decision in the Aboriginal title case of *Delgamuukw*. Most of the cases turned, first, on whether the Aboriginal defendants could establish an Aboriginal right and, then, on whether the Crown could justify its infringement of that right.<sup>68</sup> All but the two hunting rights cases would rise to the SCC, and several – *Van der Peet*, *Gladstone*, and *Delgamuukw* – would become central to the emerging interpretation of s. 35. The effort of the BCCA was monumental, but its contributions in these seven cases to that interpretation were modest, a function, in part, of preceding the SCC in the cases that it would use to define its approach to Aboriginal rights and title. However, it was also a function of the fact that, unlike *Sparrow* where the court had spoken with a single voice, in 1993 the BCCA spoke with many and with little unanimity. Nonetheless, a few echoes from the twenty-four judgments of the five justices over the eight cases continue to reverberate in the growing body of case law on Aboriginal and treaty rights. A summary of the decisions appears in Table 1.

The two hunting rights cases – *Alphonse* and *Dick* – involved Aboriginal rights defences to charges under the provincial *Wildlife Act*, in *Alphonse* for hunting out of season, in *Dick* for hunting without a permit. Justice Macfarlane wrote for the majority in both cases, with Justice Lambert writing separate, concurring reasons. Using the interpretative framework established in *Sparrow*, the BCCA acquitted the defendants on the grounds that they were exercising an Aboriginal right to hunt, that the *Wildlife Act* infringed that right, and that the government had

<sup>67</sup> *R. v. Dick*, [1993] 5 W.W.R. 446, [1993] 4 C.N.L.R. 63 (B.C.C.A.); *R. v. Alphonse*, [1993] 5 W.W.R. 401, [1993] 4 C.N.L.R. 19 (B.C.C.A.); *Van der Peet* (B.C.C.A.); *R. v. Gladstone*, [1993] 5 W.W.R. 517, [1993] 4 C.N.L.R. 75 (B.C.C.A.); *R. v. N.T.C. Smokehouse*, [1993] 5 W.W.R. 542, [1993] 4 C.N.L.R. 158 (B.C.C.A.); *R. v. Nikal*, [1993] 5 W.W.R. 629, [1993] 4 C.N.L.R. 117 (B.C.C.A.); *R. v. Lewis*, [1993] 5 W.W.R. 608, [1993] 4 C.N.L.R. 98 (B.C.C.A.).

<sup>68</sup> Aboriginal rights were an issue in every case except *R. v. Lewis*, which turned on the connection between the allotment of Indian reserves and the fisheries, something that was also an issue in *N.T.C. Smokehouse* and *Nikal*. For an account of the connections between Indian reserves and the fisheries, see Douglas C. Harris, *Landing Native Fisheries: Indian Reserves and Rights to Fish in British Columbia, 1849–1925* (Vancouver: UBC Press, 2008).

TABLE 1

*British Columbia Court of Appeal Decisions by Justice in the Aboriginal Rights and Title Cases Released 25 June 1993. (Bold indicates that the justice authored a decision in the case.)*

	TAGGART	LAMBERT	HUTCHEON	MACFARLANE	WALLACE	THE COURT
<i>R. v. Dick</i>						
Aboriginal Right?	YES	YES	YES	YES	YES	YES
Justifiably Infringed?	NO	N/A <sup>i</sup>	NO	NO	NO	NO
Results?	ACQUIT	ACQUIT	ACQUIT	ACQUIT	ACQUIT	ACQUIT
<i>R. v. Alphonse</i>						
Aboriginal Right?	YES	YES	YES	YES	YES	YES
Justifiably Infringed?	NO	N/A	NO	NO	NO	NO
Results?	ACQUIT	ACQUIT	ACQUIT	ACQUIT	ACQUIT	ACQUIT
<i>R. v. Van der Peet</i>						
Aboriginal Right?	NO	YES	YES	NO	NO	NO
Justifiably Infringed?	N/A	NO	NO	N/A	N/A	N/A
Results?	CONVICT	ACQUIT	NEW TRIAL	CONVICT	CONVICT	CONVICT
<i>R. v. Gladstone</i>						
Aboriginal Right?	NO	YES	YES	NO	NO	NO
Justifiably Infringed?	YES	NO	YES	YES <sup>ii</sup>	YES	YES
Results?	CONVICT	ACQUIT	CONVICT	CONVICT	CONVICT	CONVICT
<i>R. v. N.T.C. Smokehouse</i>						
Aboriginal Right?	NO	YES	NO	NO	NO	NO
Justifiably Infringed?	N/A	NO	N/A	N/A	N/A	N/A
Results?	CONVICT	ACQUIT	CONVICT	CONVICT	CONVICT	CONVICT
<i>R. v. Nikal</i>						
Aboriginal Right?	NO	YES	NO	NO	NO	NO
Justifiably Infringed?	N/A	NO	N/A	N/A	N/A	N/A
Results?	CONVICT	ACQUIT	CONVICT	CONVICT	CONVICT	CONVICT
<i>R. v. Lewis</i>						
Fishing within Reserve?	NO	NO	NO	NO	NO	NO
Results?	CONVICT	CONVICT	CONVICT	CONVICT	CONVICT	CONVICT
<i>Delgamuukw v. B.C.</i>						
Ownership?	NO	YES	YES	NO	NO	NO
Jurisdiction?	NO	YES	YES	NO	NO	NO
Results?	DISMISS	NEW TRIAL	NEW TRIAL	DISMISS	DISMISS	DISMISS

<sup>i</sup> In *Dick* and *Alphonse* Lambert J.A. held that the regulations under the provincial *Wildlife Act* did not apply to the defendants in the exercise of an Aboriginal right to hunt.

<sup>ii</sup> Macfarlane J.A. (Taggart J.A. and Wallace J.A. concurring) found no Aboriginal right but, in the alternative, if there were a right, the Crown had justified any infringement.

failed to justify the infringement. These decisions, markedly different from earlier cases that had resulted in convictions, revealed the powerful influence of s. 35.<sup>69</sup> It was becoming abundantly clear that the constitutional entrenchment of Aboriginal rights would affect the province's capacity to restrict and limit Native hunting. The Crown did not appeal either case to the SCC.

The fishing rights cases were more contentious. They put the question of an Aboriginal right to a commercial fishery squarely before the court, a question that the BCCA and the SCC had sidestepped in *Sparrow*. The lead case in what became known as the *Van der Peet* trilogy involved charges against Dorothy Van der Peet, a member of the Stó:lō Nation of the lower Fraser River, for selling two salmon that had been caught under a food fishing licence. Justice Macfarlane, with whom Justice Taggart concurred, defined the case this way: "it is about an asserted Indian right to sell fish allocated for food purposes on a commercial basis."<sup>70</sup> Similarly, Justice Wallace asked whether the Stó:lō had an Aboriginal right "to sell fish caught pursuant to a Food Fish licence?"<sup>71</sup> Framed in these terms, the court held that the Stó:lō had failed to establish an Aboriginal right to sell fish caught for food purposes.<sup>72</sup> It reached a similar conclusion in *Gladstone* (Justice Macfarlane for the majority) and *N.T.C. Smokehouse* (Justice Wallace for the majority, Justice Hutcheon concurring).

Justice Lambert was the sole dissenting voice that would have acquitted the accused in each of the commercial fishing rights cases. Instead of defining the claimed right in terms of the extent to which the activity that gave rise to the charges deviated from the regulations (i.e., a right to sell fish caught under a food fish licence), Justice Lambert characterized the right as follows: "If the fishing for salmon was what defined the culture of the society and made possible the cycle of the lives of its members, then it would be possible to describe the aboriginal right as a right to live from the salmon resource and to continue to make the salmon a focus of

<sup>69</sup> The earlier cases include *R. v. Kruger*, [1975] 5 W.W.R. 167, 9 C.N.L.C. 620 (B.C.C.A.); *R. v. Haines*, [1981] 6 W.W.R. 664, [1982] 2 C.N.L.R. 135 (B.C.C.A.); and *R. v. Dick*, (1982) 145 D.L.R. (3d), [1983] 2 C.N.L.R. 134 (B.C.C.A.). Although, see Justice Lambert in dissent in *Dick* (1982).

<sup>70</sup> *Van der Peet* (B.C.C.A.) at para. 30.

<sup>71</sup> *Ibid.* at para. 79.

<sup>72</sup> Andrea Bowker notes the degree to which the existing regulatory structure framed the characterization of the right. That is, the right is articulated in terms of the degree to which Aboriginal fishers are constrained by or free from the existing regulations creating a food fishery. Macfarlane J.A., she argues, "reads the regulation into the right." See Andrea Bowker, "Sparrow's Promise: Aboriginal Rights in the B.C. Court of Appeal," *University of Toronto Faculty of Law Review* 53 (1995): 1-48 at 24.

the sustainment of the lives of the people.”<sup>73</sup> This was a characterization, he claimed, that was “sensitive to the aboriginal perspective,” something that the scc had prescribed in *Sparrow*.<sup>74</sup> Justice Lambert then turned to a series of US cases, primarily treaty fishing rights cases from Washington State, for the proposition that the Aboriginal right to fish extended to such fishing as was necessary to support a moderate livelihood.<sup>75</sup> The right, he concluded, extended to “self-regulation” of the fishery and to a catch of “sufficient salmon to provide all the people who wish to be personally engaged in the fishery, and their dependent families, when coupled with other financial resources, with a moderate livelihood.”<sup>76</sup> He would extend this analysis to the Heiltsuk herring fishery in *Gladstone* and the Sheshaht and Opetchesaht salmon fishery in *N.T.C. Smokehouse*, acquitting the accused in each case.

The defendants appealed their convictions to the scc, which in turn upheld the convictions in every case except *Gladstone*; William and Donald Gladstone had established an Aboriginal right to a commercial fishery. Following Justice Hutcheon’s approach in the BCCA in *Van der Peet*, the scc sent the Crown and the Gladstones back to the trial court to hear more evidence on the Crown’s objectives in regulating the fishery and whether the regulatory scheme for the herring fishery was a justifiable infringement of that right.<sup>77</sup> However, Justice McLachlin on the scc would adopt Lambert’s characterization of the right as conferring a moderate livelihood, and, several years later, the scc would embed it in the framework for the interpretation of historic treaty rights to fish in *R. v. Marshall*.<sup>78</sup> This, perhaps, marks the signal contribution from the BCCA to the emerging understanding of s. 35 in the hunting and fishing rights cases.

<sup>73</sup> *Van der Peet* (B.C.C.A.) at para. 137.

<sup>74</sup> *Ibid.* at para. 132.

<sup>75</sup> For an analysis of the links between the US cases and the development of Aboriginal and treaty rights jurisprudence in Canada, see Douglas C. Harris, “The Boldt Decision in Canada: Aboriginal Treaty Rights to Fish on the Pacific,” in Alexandra Harmon, ed., *The Power of Promises: Indian Treaties in the Pacific Northwest* (Seattle: University of Washington Press, 2008) 128–53.

<sup>76</sup> *Van der Peet* (B.C.C.A.) at para. 150. Lambert J.A. went on to indicate that this right to a moderate livelihood for individuals and their families participating in the salmon fishery would amount to “not less than the quantity of salmon needed to provide every one of the collective holders of the aboriginal right with the same amount of salmon per person per year as would have been consumed or otherwise utilized by each of the collective holders of the right, on average, from a comparable year’s salmon run, in, say, 1800.” See the critique of the moderate livelihood standard from Wallace J.A. at para. 103.

<sup>77</sup> *R. v. Gladstone*, [1996] 2 S.C.R. 723, [1996] 4 C.N.L.R. 65.

<sup>78</sup> *R. v. Marshall*, [1999] 3 S.C.R. 533, [1999] 4 C.N.L.R. 301.

In *Delgamuukw*, the BCCA had before it the controversy generated by the decision of Chief Justice McEachern in the trial court. It was also presented with a somewhat different case. At trial, the chief justice had dismissed the claim of the Gitksan and Wet'suwet'en chiefs to ownership and jurisdiction over their traditional territory, finding instead that the plaintiffs held rights to their villages and non-exclusive Aboriginal rights to use adjacent land for sustenance and ceremony but that these rights had been extinguished by pre-Confederation colonial enactments – the same thirteen land acts and ordinances that had been much debated in *Calder*. In short, the colony had effected a “blanket extinguishment” of Aboriginal title with its land legislation. However, a change in the provincial government between trial and appeal brought about a change in the province’s position. Instead of “blanket extinguishment,” the province conceded that the plaintiffs held Aboriginal rights in the claimed territory, or parts of it, but that these rights had been impaired or infringed in some areas. Nonetheless, the basic issues of ownership and jurisdiction, sometimes referred to in the BCCA decision as Aboriginal title and self-government, remained.<sup>79</sup>

All five justices agreed that the province had been right to concede its claim of “blanket extinguishment”: the colonial legislation had not extinguished Aboriginal rights, and subsequent provincial legislation could not. However, they disagreed on the extent of those rights. Justice Macfarlane found that the plaintiffs had “unextinguished non-exclusive aboriginal rights, other than a right of ownership or a property right.”<sup>80</sup> In a concurring decision, Justice Wallace found “a non-exclusive aboriginal right of traditional occupation.”<sup>81</sup> They did not delineate the content of the Aboriginal right, but it was less than a property interest and they dismissed the plaintiffs claim to ownership. Similarly, both justices concluded that whatever jurisdiction the plaintiffs might retain, it could not impinge on federal or provincial power as divided under the Constitution.<sup>82</sup> Aside from the question of “blanket extinguishment,” which the province had conceded before the appeal, the BCCA upheld the lower court’s decision.

Justice Lambert’s decision was substantially different. Inclined to search broadly for guidance (the archives in *Bartleman*, the US Supreme Court

<sup>79</sup> At the SCC the plaintiffs would alter their pleadings to frame the case explicitly in terms of Aboriginal title and self-government, a change that formed one of the grounds on which the SCC would send the matter back to trial.

<sup>80</sup> *Delgamuukw* (B.C.C.A.) at para. 293.

<sup>81</sup> *Ibid.* at para. 519.

<sup>82</sup> *Ibid.* at paras. 171, 484. See the critique in Bruce Ryder, “Aboriginal Rights and *Delgamuukw* v. *The Queen*,” *Constitutional Forum* 5 (1994): 43-48.

in the *Van der Peet* trilogy), in *Delgamuukw* Justice Lambert turned to the recent decision of the Australian High Court in *Mabo v. Queensland* and its ruling that “native title” was an entitlement “as against the whole world to possession, occupation, use and enjoyment of the lands.”<sup>83</sup> It was, in short, a property interest. Adopting this interpretation, Justice Lambert ruled that the Gitksan and Wet’suwet’en held “exclusive” or “shared-exclusive” Aboriginal title over the lands they had occupied exclusively or in combination with other Aboriginal peoples when the British asserted sovereignty in 1846.<sup>84</sup> They also held “a right to harvest, manage and conserve the lands and their resources” as well as “a right to maintain and develop their institutions for the regulation of their aboriginal title” – that is, a right of self-government or self-regulation.<sup>85</sup> The plaintiffs and the province were to negotiate the precise boundaries of Aboriginal title land and the division of jurisdiction that would accompany self-government, but failing successful negotiations, either party could return to court, and Justice Lambert sent the case back to trial. Justice Hutcheon concurred, and so, four years and an unsuccessful round of negotiations later, would the scc.<sup>86</sup> Canada’s highest court deferred the question of self-government but held that Aboriginal title was an interest in land, one that was based on exclusive possession in 1846 and that amounted to exclusive possession in contemporary Canada.

#### ABORIGINAL LAW AND PRACTICE

Aboriginal peoples and occasionally the Crown have turned to the courts to help structure the processes of litigation and negotiation over Aboriginal rights and title, and here perhaps the BCCA has had its greatest influence in recent years. It has ruled on the relationship between Aboriginal title and the title registration system, and on the duty of the Crown to consult Aboriginal peoples where Aboriginal title is claimed but not yet proven. It has also established guidelines regarding when a claim to Aboriginal title can be litigated and the circumstances in which the Crown is obliged to support the litigation costs of an Aboriginal plaintiff or defendant.

<sup>83</sup> Ibid. at paras. 912-914. Lambert J.A. citing *Mabo v. Queensland* (1992) 107 A.L.R. 1 (Aust. H.C.).

<sup>84</sup> Ibid. at paras. 1008-1010, 1074.

<sup>85</sup> Ibid., at para. 1078. See also Bob Freedman, “The Space for Aboriginal Self-Government in British Columbia: The Effect of the Decision of the British Columbia Court of Appeal in *Delgamuukw v. British Columbia*,” *UBC Law Review* 28 (1994): 49.

<sup>86</sup> *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, [1998] 1 C.N.L.R. 14.

In separate decisions, the first involving a preliminary motion in *Delgamuukw*,<sup>87</sup> the other a dispute over a proposed development near Kamloops,<sup>88</sup> the BCAA disallowed the attempts of Aboriginal plaintiffs to register a certificate of pending litigation in the land title system against fee simple interests on land to which they claimed Aboriginal title. If they had been successful, the effect of registering a certificate of pending litigation would have been to freeze further transfers of the fee simple interest until the resolution of the Aboriginal title claim. However, Justice Southin ruled in *Skeetchestn* that the province had never intended Aboriginal title to be a registerable interest when it created the title registration system and, therefore, that private interests in land would remain unencumbered by a claim to Aboriginal title.

In 2002, as the BC Treaty Process laboured without results, Aboriginal title litigation seemed interminable, and the provincial government continued to act as though a claim to Aboriginal title presented little or no burden on the Crown's title. Justices Rowles and Huddart determined that the province had a duty to consult with Aboriginal peoples before authorizing a project, in this case a mine, that could adversely affect their interests.<sup>89</sup> Less than a month later, a unanimous three-panel bench of the BCCA led by Justice Lambert ruled in *Haida Nation v. British Columbia (Minister of Forests)* that the Crown and a large multinational logging company had a duty to consult and to accommodate Aboriginal peoples in circumstances where the Crown permitted and the company undertook activity that could infringe Aboriginal title should that title ever be established.<sup>90</sup> In other words, the duty to consult and accommodate extended to land where title was claimed but not proven. The SCC would pull back a little on these decisions, overturning the decision in *Taku River Tlingit* on the basis that there had been adequate consultation and, in *Haida Nation*, restricting the duty to consult and accommodate to the Crown.<sup>91</sup> Nonetheless, the BCCA had fundamentally reshaped the legal landscape in a province where virtually all land not included within a treaty is subject to a claim of Aboriginal title. In effect, the court had pronounced that Aboriginal peoples were to be a part of any future development within their territory, and the SCC concurred.

<sup>87</sup> *Delgamuukw (Uukw) v. British Columbia*, [1987] 6 W.W.R. 240, 16 B.C.L.R. (2d) 145 (B.C.C.A.).

<sup>88</sup> *Skeetchestn Indian Band v. British Columbia (Register of Land Titles)*, 2000 BCCA 525.

<sup>89</sup> *Taku River Tlingit First Nation v. Ringstad*, 2002 BCCA 59. Justice Southin was in dissent.

<sup>90</sup> *Haida Nation* (B.C.C.A.).

<sup>91</sup> *Taku River Tlingit First Nation v. British Columbia* (Project Assessment Director), 2004 SCC 74; *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73.

Finally, two decisions from Justice Newbury in 2000 and 2001 have the potential to determine the shape of future Aboriginal rights litigation. In *Cheslatta Carrier Nation v. British Columbia* the plaintiffs sought a declaration that they had an Aboriginal right to fish. The chambers judge dismissed the motion for failing to disclose a cause of action, and Justice Newbury, writing for a three-panel bench on the Court of Appeal, agreed. The issue of Aboriginal rights should only be litigated, she held, where there was a “live controversy” or a dispute to be resolved; the court would not consider a motion for a declaration in the absence of a dispute.<sup>92</sup> The full effect of this judgment is yet to be felt, but it is likely to confirm the existing pattern that Aboriginal rights claims appear most commonly in court in response to the prosecution of a regulatory offence, usually relating to hunting or fishing, where there is clearly a “real difficulty” for the court to resolve.<sup>93</sup> Conversely, a civil lawsuit to establish Aboriginal rights has become more difficult. However, if *Cheslatta* made it more difficult for Aboriginal litigants to get to court, one year later, in another unanimous decision authored by Justice Newbury, the court ruled that the Aboriginal litigants in *British Columbia (Minister of Forests) v. Okanagan Indian Band* were entitled to costs in advance of the decision on the merits.<sup>94</sup> The dispute involved the applicability of the provincial *Forest Practices Code* on land to which the Okanagan claimed Aboriginal title, a dispute of considerable public interest involving “exceptional or unique circumstances,” wrote Justice Newbury, that the Okanagan were otherwise unable to fund.<sup>95</sup> Within a month of this decision and citing it in support, the British Columbia Supreme Court made an interim costs order to require that the Crown help the Tsilhqot’in to fund their land claims litigation.<sup>96</sup> The SCC would confirm these orders when it upheld the BCCA’s decision in *Okanagan*,<sup>97</sup> and since then other First Nations have successfully secured similar arrangements.<sup>98</sup>

<sup>92</sup> *Cheslatta Carrier Nation v. British Columbia*, 2000 BCCA 539 at paras. 16–18.

<sup>93</sup> *Ibid.* at para. 17. For an early example of the effect of this ruling see *Nemaiah Valley Indian Band v. Riverside Forest Products Ltd.*, 2003 BCSC 249.

<sup>94</sup> *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2001 BCCA 647.

<sup>95</sup> *Ibid.* at para. 39.

<sup>96</sup> *Xeni Gwel’in First Nations v. British Columbia*, 2001 BCSC 1641.

<sup>97</sup> *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71.

<sup>98</sup> *Hagwiliget Indian Band v. Canada (Minister of Indian Affairs)*, 2008 FC 574. Although see the subsequent decision in *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2008 BCCA 107, to sever the Aboriginal title component of the case, thereby greatly reducing the importance of the costs order.



## A COURT BETWEEN

Provincial courts of appeal sit between trial courts, which produce the evidentiary record, and the scc, the court of final appeal. From this middle perch, they oversee the trial courts but, in turn, are overseen by the Supreme Court. They supervise but are subject to supervision, and their capacity to supervise is determined, in part, by the degree to which they are supervised. If the statements of provincial courts of appeal are frequently countermanded or simply reconsidered, even if not altered, their capacity to shape the development of the law diminishes. Conversely, if the oversight is infrequent, the statements of the provincial courts of appeal assume greater importance. In his study of the relationship between the Supreme Court and provincial courts of appeal, Peter McCormick suggests that “each Supreme Court decision is a message that it is trying to send down the hierarchy to the ultimate consumers, the trial courts and the parties that appear before them, and the appeal process is the way that the Supreme Court oversees the transmission of this message, reinforcing or fine-tuning it on subsequent occasions.”<sup>99</sup> The more the scc intervenes the more it diminishes the importance of the provincial courts of appeal, which play the same role as the scc but lower in the court hierarchy.

The scc’s readiness to grant requests for leave to appeal is one measure of its willingness to intervene. By that measure, the scc has been exceptionally interventionist in Aboriginal law cases emerging from British Columbia. Table 2 lists by decade the number of BCCA decisions in the *Canadian Native Law Reporter* (CNLR) since it began reporting in 1979, the number of requests for leave to appeal that emerged from those cases, and the number of times the Supreme Court granted leave. Of the 115 decisions from the BCCA in the CNLR over this period, one or more of the parties sought leave to appeal in 52 (45 percent) of them. Of these 52 applications, the scc granted leave in 28 (54 percent). The percentages are somewhat higher in the middle decade, the ten years when s. 35 litigation first appeared in the scc, and somewhat lower in the decade just concluded. But all the numbers are high when compared against the general success rate of applications for leave to appeal from British Columbia (21 percent) and from the country as a whole (16 percent) over approximately the same period.<sup>100</sup> Before 1979, leave was sought and the

<sup>99</sup> Peter McCormick, “The Supervisory Role of the Supreme Court of Canada: An Analysis of Appeals from Provincial Courts of Appeal, 1949-1990,” *Supreme Court Law Review* (2d) 3 (1992): 1-28 at 28.

<sup>100</sup> The two sets of data do not correspond exactly. The C.N.L.R., source for BCCA decisions in the area of Aboriginal law, begins reporting in 1979. The *Supreme Court Law Review* reporting

TABLE 2

*Leave to Appeal from British Columbia Court of Appeal to Supreme Court of Canada*

YEARS	BCCA DECISIONS REPORTED IN CNLR  no.	LEAVE TO APPEAL TO SCC REQUESTED  no.	SCC GRANTED TO LEAVE OF APPEAL  no.	SUCCESS RATE OF LEAVE TO APPEAL APPLICATIONS  %	AVERAGE SUCCESS RATE OF ALL LEAVE TO APPEAL APPLICATIONS TO SCC <sup>i</sup>	
					BRITISH COLUMBIA %	CANADA %
					1979-1988	33
1989-1998	45	20	12	60	23	16
1999-2008	38	20	10	50	19	12
TOTAL	116	52	28	54	21	16

<sup>i</sup> Average success rates for leave to appeal applications are derived from statistics produced annually in the *Supreme Court Law Review*. The first set appears in S.I. Bushnell, "Leave to Appeal Applications: The 1984-85 Term," *Supreme Court Law Review* 8 (1986): 383, and includes rates at which the scc granted leave back to the 1981-82 term. The scc defines a term as 1 September to 31 August. The *Supreme Court Law Review* includes rates at which the scc grants leaves to appeal by province beginning in the 1988-89 term. Because of these differences, the line for 1979-88 indicates the rate at which the scc granted leaves to appeal from 1981-82 to 1987-88; the line for 1989-1998 indicates the rate from 1988-89 to 1998-99; and the line for 1999-2008 indicates the rate from 1998-99 to 2007-08.

scc granted leave in almost every Aboriginal and treaty rights case heard in the BCCA.<sup>101</sup>

These figures suggest that the scc's oversight of the BCCA is significantly greater in the area of Aboriginal law than in other areas of the law. This may not be unique to British Columbia; the success rate for leave to appeal from other provincial courts of appeal may be similarly high in Aboriginal law cases. However, as a large number of the most important cases have emerged from British Columbia, the scc appears to have been particularly active in its review of decisions from that province. The constitutional entrenchment of Aboriginal and treaty rights probably explains much of the scc's involvement. This

on the rate at which the scc grants leaves to appeal begins in 1981-82. See the notes to Table 1 for details of the sources and differences.

<sup>101</sup> The scc granted leave in *White and Bob* (1965), *Calder* (1973), *R. v. Derriksan* (1976), *R. v. Kruger and Manuel* (1977), and *R. v. Jack* (1979).

fundamental reshaping of the legal terrain required direction from the country's highest court. But that explanation does not account for the SCC's oversight before 1982, and it probably does not explain all of it afterwards.

When Aboriginal and treaty rights re-emerged in the 1960s and 1970s from *Indian Act*-imposed exile, they did so tentatively and gradually as judges struggled to understand rights that had not been articulated in Canadian courtrooms for half a century. In these early years, as Aboriginal and treaty rights cases came sporadically and then with increasing frequency before the BCCA, the court declined to engage with the substance of the claims. With the exception of *White and Bob*, where the court infused agreements between Aboriginal peoples on Vancouver Island and the HBC with treaty status, Aboriginal peoples did not find a hospitable reception for their claims in BC courtrooms. The BCCA's dismissal of the Nisga'a claim to Aboriginal title in *Calder* was more representative of the court's work as well as of the views of the larger society. Successive provincial governments denied the existence or relevance of Aboriginal title in Canada's westernmost province.

However, the SCC's decision in *Calder* set the country on another track, one that led, in 1982, to the constitutional entrenchment of Aboriginal and treaty rights – “the riveting of these provisions within Canada's legal framework.”<sup>102</sup> This heightened the prominence of Aboriginal and treaty rights, and elevated the role of the courts as arbiters between Aboriginal peoples and the Canadian state. Attempts to assert Aboriginal rights no longer had to be dressed in the garb of federalism and the jurisdictional straying of provincial governments. Instead, claims of Aboriginal title, of rights to fish and hunt, and of self-government could be put directly to the courts, and treaty rights were taken more seriously in light of their newly acquired constitutional status.

When these claims reached the BCCA in the mid 1980s, they encountered a court now prepared to listen. In a remarkable series of decisions, including *Bartleman* and *Saanichton Marina* on treaty rights, the Meares Island case on Aboriginal title, and *Sparrow* on fishing rights, the court put itself at the forefront of an extraordinary transformation in Canadian law. At a national level these decisions helped to establish the foundation on which constitutional rights would be interpreted. Within the province, they pushed the provincial government to admit, in 1990,

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<sup>102</sup> John Borrows, “Uncertain Citizens: Aboriginal Peoples and The Supreme Court,” *Canadian Bar Review* 80 (2001): 15-41 at 18.

that it had a responsibility to join the federal government in negotiations with Aboriginal peoples over the unresolved issue of Aboriginal title.

With this period of initial activism behind it and the British Columbia Treaty Process underway, the court issued a much more ambiguous set of rulings in 1993. A divided court would provide limited recognition of Aboriginal rights and a constrained understanding of Aboriginal title. In the same series of cases the SCC would establish the basic frameworks in which Aboriginal rights and title were to be determined. In this process, the BCCA contributed relatively little. However, the tide turned again in the early twenty-first century when the court delivered a series of influential albeit mixed decisions that, while not ruling directly on an Aboriginal rights or title claim, structure the way in which those claims are litigated or negotiated.

Justice Lambert deserves particular mention. His twenty-five years on the BCCA spanned the turbulent decades following the constitutional entrenchment of Aboriginal and treaty rights, and he, more than any other judge on the court, was at the centre of this rapidly developing area of law. Writing for or with the majority in the 1980s, offering a strongly dissenting voice in the 1990s, and then frequently with the majority in his last few years on the court, Justice Lambert authored a remarkable body of jurisprudence.<sup>103</sup> Sometimes the SCC reined in his rulings, as in *Haida Nation* by limiting the duty to consult and accommodate to the Crown, but more often than not it confirmed his basic approach. No other BC judge exceeds his contribution to the emerging understanding of Aboriginal and treaty rights in Canada.

In its engagement with Aboriginal and treaty rights, the record of the BCCA is as mixed as that of the larger society, which struggles to live justly in a place settled by one group of peoples and then resettled by others. The SCC has been an active intervener, certainly, because of the constitutional entrenchment of Aboriginal and treaty rights, but perhaps also out of a sense, particularly in the early years when Aboriginal peoples and their legal counsel began returning to the courts, that Aboriginal rights and title had not always had their due in British Columbia. The federal government had long disputed the province's refusal to recognize Aboriginal title, and perhaps the difference of opinion in political circles informed judicial approaches as well. Much has changed in the province and in its highest court, even as the

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<sup>103</sup> Louise Mandel, who appeared many times before Justice Lambert, counted twenty-three Aboriginal law judgments from Justice Lambert. See "Honouring a Brave Jurist: The Lambert Tribute," *The Advocate* 64 (2006): 207-16.

efforts to co-exist in a shared territory continue. Sometimes maligned, sometimes lauded, the Court of Appeal's contributions in the field of Aboriginal law are varied but undeniable, and, given the struggle that continues in British Columbia over the recognition of rights and title, the institution will almost certainly continue to play a central role, from its middle perch in the court system, in the unfolding relationship between Aboriginal peoples and the Canadian state. In this sense as well, the British Columbia Court of Appeal is, or must aspire to be, a court between.