THE CROWN'S DUTY TO DETERMINE, RECOGNIZE AND RESPECT ABORIGINAL TITLE

PART I – EXISTENCE OF THE DUTY

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Anyone broadly familiar with Aboriginal law and the history of human settlement of this province knows that a significant amount of the land base must be subject to Aboriginal title. Yet very little of that Aboriginal title has been formally recognized, with the result that the Indigenous Nations who hold those titles continue to be denied their benefits.

In this article, I argue (in very brief form) that the Crown has a duty, arising from its assertion of sovereignty in 1846, to determine, recognize and respect Indigenous peoples' ownership of their lands, which continued after 1846 as Aboriginal title. While such a duty is contemplated in the Supreme Court of Canada's jurisprudence—particularly in *Haida Nation v. British Columbia (Minister of Forests)*[1]—it has been eclipsed by the duty to consult and has since drawn little attention.

I argue that discharging the Crown's *duty to determine* was necessary from the outset for the Crown to avoid illegally dealing with land in which it lacked beneficial ownership, and it is necessary now to advance the Crown's reconciliation with Indigenous peoples.

THE CURRENT LACK OF RECOGNITION OF ABORIGINAL TITLE

In 2004, in *Haida*, the Supreme Court of Canada recognized the Crown's duty to consult and accommodate Indigenous peoples. That duty, grounded in the broader doctrine of the honour of the Crown, arises where Indigenous peoples have asserted claims to Aboriginal rights or title or to treaty rights and those rights may be adversely affected by a government decision. The court summarized its reasoning this way:

> [25] Put simply, Canada's Aboriginal peoples were here when Europeans came, and were never conquered. Many bands reconciled their claims with the sovereignty of the Crown through negotiated treaties.

> Others, notably in British Columbia, have yet to do so. The potential rights embedded in these claims are protected by s. 35 of the *Constitution Act, 1982*. The honour of the Crown requires that these rights be determined, recognized and respected. This, in turn, requires the Crown, acting honourably, to participate in processes of negotiation. While this process continues, the honour of the Crown may require it to consult and, where indicated, accommodate Aboriginal interests. [Emphasis added.]

The duty to consult has become enormously consequential for Indigenous Nations, government and industry, particularly by fostering far greater inclusion of Indigenous Nations in the governance and economic benefits of their lands. But the duty is also limited. While the duty extends to claims that have yet to be proved or accepted, the corresponding rights have so far been confined mainly to participation in a process where the Crown retains the ultimate decision-making power. The result can be unsatisfying on all sides: Indigenous Nations with very strong claims are denied the substantive force that would come if their rights had been proved or accepted in a treaty, and the Crown (and, in practice, industry) must often consult with a wide range of Indigenous Nations, including some with only tenuous claims.[2]

It is apparent from the quotation above that the Supreme Court of Canada's expectation in 2004 was that Indigenous Nations' claims would not forever remain in the limbo state of being merely asserted. Rather, the court clearly and forcefully affirmed that "[t]he honour of the Crown requires that these rights be determined, recognized and respected".

In the almost two decades since *Haida*, however, that project of determining, recognizing and respecting Aboriginal title has made very little progress.

One avenue to determining Aboriginal title is by judicial declaration, which, under current practice, is sought by an Indigenous Nation in an action to which the province and Canada are respondents. But such litigation presents an extraordinarily daunting prospect. After *Delgamuukw* ended in a mistrial, the Supreme Court of Canada's granting of a declaration of Aboriginal title in *Tsilhqot'in* was anticipated to open the door to further determinations of Aboriginal title. So far it has not. Few title claims have been taken to trial since. The Cowichan Tribes trial—concerning a relatively small piece of federally owned land on Lulu Island (Richmond) and fishing rights at the mouth of the Fraser River—perhaps suggests why. The evidentiary portion of the trial has lasted over 450 days and has resulted in approximately 50 interlocutory judgments on procedural and evidentiary matters.[3]

Cowichan Tribes may be an extreme case, but the trend is for trials over Aboriginal title to be among the longest in B.C. history.[4] The evidence is complex and, despite recent directives from Attorneys General to their lawyers,[5] the federal and provincial governments generally continue to oppose Aboriginal title claims with great vigour. The resulting costs for running the litigation are enormous. While the Supreme Court of Canada's recent decision in *Anderson v. Alberta*[6] may signal greater openness to advance costs where a litigant is impecunious and the litigation is of overarching importance, it remains an exceptional situation, and accordingly the sheer cost of Aboriginal title litigation is prohibitive for most Indigenous Nations.

Litigation through the courts appears unlikely to resolve many Aboriginal title claims, let alone the majority of them.

The other avenue for such resolution to date has been negotiations, mainly by way of treaties, through which Indigenous Nations' rights to land and self-government are spelled out and constitutionally protected in exchange for the governments obtaining certainty over the limits of those rights. As seen in *Haida*, the Supreme Court of Canada has strongly encouraged governments and Indigenous Nations to negotiate, instead of litigating. In *Delgamuukw*, for instance, while sending the case back for retrial, Chief Justice Lamer urged that it is through negotiated settlements that reconciliation will be achieved. He closed with the famous line, "Let us face it, we are all here to stay."[7]

The difficulty is that, as any reader of *Getting to Yes*[8] knows, what drives a negotiated settlement is the judgment by each party that it is a better outcome than their likely alternative. Even though the governments may seek to negotiate honourably and in good faith, if there is little threat that an Indigenous Nation will litigate their Aboriginal title claims, then there is little incentive for the governments to raise their offers to achieve a settlement. The governments' BATNA (best alternative to a negotiated agreement) is that they maintain control of the land base, subject to the duty to consult.

Unsurprisingly, this imbalance has resulted in very few final agreements since the BC Treaty Process was established in the early 1990s. To date, just eight modern treaties have been finalized in British Columbia.[9] A variety of factors have contributed to that relative lack of progress. One is that the negotiations intentionally do not address the question of which Indigenous Nations historically occupied a given area.[10] While this arrangement has the benefit of removing initial barriers to Indigenous Nations wishing to enter negotiations, it has caused intractable overlap disputes between them, with-

out any clear mechanism for resolution.[11] It also tends to sideline Indigenous Nations' substantive claims to Aboriginal title, which likely contributes to what many Indigenous Nations view as the inadequacy of government negotiators' mandates, particularly as it comes to land; on average, the "treaty settlement lands", over which the Indigenous Nation gains control, comprise less than five per cent of their traditional territory.[12] In recent years the federal and provincial governments and the First Nations Summit (representing Indigenous Nations in the treaty process) have sought to reinvigorate the process in various ways, but it appears unlikely many treaties will result as long as the structural imbalance remains.[13]

This relative lack of recognition of Aboriginal title is objectionable from the perspectives of both social justice and public policy. But that is not the issue addressed here. Rather, this article's narrower thesis is that this situation is inconsistent with the Crown's constitutional obligations arising from the honour of the Crown, as contemplated in the Supreme Court of Canada's established jurisprudence.

THE CROWN'S DUTY TO DETERMINE ABORIGINAL TITLE

The honour of the Crown is a "core constitutional precept" that arises "from the Crown's assertion of sovereignty over an Aboriginal people and *de facto* control of land and resources that were formerly in the control of that people".[14] The purpose of the doctrine, as stated by the Supreme Court of Canada, is "the reconciliation of pre-existing Aboriginal societies with the assertion of Crown sovereignty".[15] To that end, the doctrine charges the Crown with specific duties in specific circumstances, including the duty to negotiate with Indigenous Nations in good faith,[16] the duty to consult Indigenous Nations before adversely impacting even unproved Aboriginal and treaty rights,[17] and a fiduciary duty where a specific Aboriginal right or interest has been established.[18]

Although mentioned less frequently in the jurisprudence, there is another duty inherent in the honour of the Crown, as observed in *Haida*: "The honour of the Crown requires that these rights be determined, recognized and respected." In *R. v. Desautel*, Justice Rowe for the majority put it this way: "The honour of the Crown requires that Aboriginal rights be determined and respected…".[19] And most recently, in the constitutional challenge to Bill C-92,[20] the Quebec Court of Appeal elaborated that "the honour of the Crown requires governments to delineate [s. 35] rights so they can be implemented in a tangible way", given that "refusing to delineate these rights can result in the *de facto* denial of their very existence or, at the very least, make them ineffective or inoperative", and "[r]equiring long and

costly litigation prior to recognizing an Aboriginal right can have the same effect."[21]

This duty on the Crown to determine, recognize and respect Aboriginal title—what could be termed the *duty to determine*, for short—has received little attention from the courts or commentators, which is surprising given how fundamental the duty is to the reconciliation project. Section 35 "serves to recognize the prior occupation of Canada by Aboriginal societies and to reconcile their contemporary existence with Crown sovereignty" and give "effect to rights and relationships that arise from the prior occupation of Canada by Aboriginal societies".[22] Unless the boundaries of Aboriginal titles can actually be enforced, then s. 35's purpose cannot be fulfilled and the reconciliation project will fail.

The purpose of the duty to determine is to ensure that does not occur. Anchored in established doctrines of Aboriginal law, the duty obliges the Crown to establish effective, legitimate processes by which Aboriginal title is identified and respected.

THE NEED TO AVOID ILLEGALITY

Aboriginal title is recognizable and enforceable under Canadian common law and constitutional law, and yet it has its source in Indigenous Nations' legal orders that predate the Crown's assertion of sovereignty. When the Crown asserted sovereignty over British Columbia in 1846, the then-existing rights of Indigenous Nations to occupy and control their lands were not erased in the eyes of the common law. They instead were received by the common law and continued as Aboriginal title. That is the essential revelation in the famous *Calder* case: "the fact is that when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries. This is what Indian title means".[23]

It is, of course, possible to imagine a colonial legal regime that refused to recognize the pre-existing land rights of the Indigenous Nations. But for a variety of reasons, including considerations of both justice and expediency,[24] that is emphatically not the approach British imperial law took. As Chief Justice McLachlin set out in *Mitchell*:

> European settlement did not terminate the interests of aboriginal peoples arising from their historical occupation and use of the land. To the contrary, aboriginal interests and customary laws were presumed to survive the assertion of sovereignty, and were absorbed into the common law as rights, unless (1) they were incompatible with the Crown's assertion of sovereignty, (2) they were surrendered voluntarily via the treaty process, or (3) the government extinguished them. Barring one of these exceptions, the practices, customs and traditions that defined the various aboriginal societies as distinctive cultures continued as part of the law of Canada.[25]

But while Indigenous Nations' rights were presumed to continue after the assertion of British sovereignty, the corresponding presumption in the jurisprudence is that jurisdiction over the land and ownership of its underlying title vested in the Crown.[26] It is the collision of those two outcomes in British imperial law—i.e., Crown sovereignty and ownership of the "radical" title,[27] but subject to continuing Aboriginal title based on prior occupation and Indigenous law—that gives rise to the honour of the Crown and the duty to determine.

One reason the duty arises is that, with its presumed ownership of the land, the Crown could provide for the transfer of ownership to settlers. In British Columbia, that was done with great enthusiasm, first mainly through pre-emptions and then later through Crown grants, mineral claims and leases, forest tenures and other authorizations for natural resource extraction.[28] But where Indigenous peoples' preceding control of land translated into Aboriginal title and that title remained unsurrendered and unextinguished, the Crown lacked beneficial ownership of that land and was in no position to purport to transfer rights in it to settlers. The rule that one cannot give what one does not have (*nemo dat quod non habe*t) applies equally to the Crown as it does to anyone else.

One of the foundations supporting the duty to determine, then, is the Crown's responsibility not to act *illegally*, according even to its own legal system,[29] by assuming it had rights in the land it did not actually have. The rule of law, which requires that all government action comply with the law,[30] demanded that the Crown squarely face the reality of Aboriginal title so it could act within the bounds of its own law. That law supplied options for the Crown in dealing with Indigenous Nations' titles, the most obvious of which was to recognize and respect those titles, and only assume ownership rights to land clearly not burdened by them. The Crown could also treat with the Indigenous Nations in order to define and demarcate those titles, as it did with the handful of "Douglas treaties" on Vancouver Island. And last, according to the Supreme Court of Canada's jurisprudence, an emanation of the Crown with the necessary jurisdiction[31] could extinguish Aboriginal title by specific legislation, although that was a card no settler government in Canada was ever willing to play given the moral and political consequences, including potential civil unrest.

What was not a legal option for the Crown—again, according to its own law—was simply to ignore the existence of Aboriginal title and pretend it did not burden the Crown's underlying title. In order legally to provide for European settlement by granting rights in land to settlers, the Crown had to determine where Aboriginal title existed so it could avoid granting rights to land that was not its to give.

Of course, the Crown did not undertake any such determination. Instead, despite recurring debates about how to answer the "Land Question", the Crown (particularly the provincial Crown) largely chose to ignore Aboriginal title and to deal with the land base as if through the alchemy of its assertion of sovereignty it had obtained beneficial ownership over all of it.[32] But the Crown's failure to fulfill the duty to determine does not mean it was not subject to that duty. What it means instead is that the Crown's control of the land base is *de facto*—as the Supreme Court of Canada has noted more than once[33]—as opposed to *de jure*.

THE NEED FOR LEGITIMATION

These problems with the legality of the Crown's control of the land in turn present serious problems of legitimacy. As the Court observed in the *Secession Reference*, a viable political system not only requires a legal foundation, but it also requires legitimacy, and "[o]ur law's claim to legitimacy also rests on an appeal to moral values, many of which are imbedded in our constitutional structure".[34]

Since 1846, the perverse unfairness to Indigenous peoples of the Crown's failure to determine and recognize their rights has only sharpened in focus. Increasing settlement has deprived Indigenous peoples of the use of more and more of their land, leading (along with other contributing factors, such as residential schools) to intergenerational poverty, trauma and cultural loss.

At the same time, and particularly since the 1970s, our legal and political rhetoric has increasingly recognized the need to protect Aboriginal title. The entrenchment of s. 35 in 1982 promised "a just settlement for aboriginal peoples".[35] Our case law now spells out the existence of Aboriginal title (*Calder*) as well as the test for proving it (*Delgamuukw* and *Tsilhqot'in*), and the Supreme Court of Canada has once found it to have actually been proved (*Tsilhqot'in*). Parliament and British Columbia's Legislative Assembly have directed their respective governments to take measures to achieve the objectives of the United Nation Declaration on the Rights of Indigenous Peoples, which, among other things, commits us to providing "effective redress" for Aboriginal title lands that have been stolen.[36] And in meetings in broader society we regularly acknowledge that in British Columbia we reside on unceded Indigenous lands.

Yet, because of the factors discussed above, only a very small amount of land in British Columbia has been subject to determinations of whether Aboriginal title exists or not, and what the boundaries are. That gap between what our law and politics call for in theory and what has been recognized in practice poses a real challenge to the legitimacy of the Crown's

continued assumption of jurisdiction and control of the land base. It has been understood since *Delgamuukw* in 1997 that a substantial amount of land in British Columbia must be subject to Aboriginal title. Yet in almost every case, except for the Tsilhqot'in and the few B.C. Indigenous Nations that have signed treaties, the Aboriginal title we know must be out there exists only in the shadowland of asserted claims, as opposed to established rights. All the while Indigenous Nations are deprived of the economic and social benefits of their lands, perpetuating unconscionable disparities in socio-economic outcomes and feeding well-founded grievances.

And why? Largely because the Crown presumed it took control of the entire land base in 1846. The Crown has not established processes to determine the existence and boundaries of Indigenous Nations' Aboriginal titles based on their historical occupation, with the result that Indigenous Nations have had to turn to the courts for that determination—where the onus of proof falls on them, the Crown denies their claims, the procedural and evidentiary rules are based on Canadian common law, and the effort and cost of the litigation are so enormous that few Indigenous Nations can pursue their claims.

The question we must ask ourselves is whether the continuation of this scenario is honourable—whether it is *legitimate*—given our contemporary legal, political and moral values and understanding. I believe most of us would say no—that somehow we must find a more effective process for determining Aboriginal title. Such an alternative process would need to be, at a bare minimum, accessible, timely and fair. Above all, it would need to be co-developed by Indigenous Nations as equal partners in order for the process to be legitimate. While the Crown bears the duty to ensure Aboriginal title is determined, recognized and respected, an honourable and credible process of determination cannot be undertaken unilaterally, but would necessarily depend on the confidence and partnership of the Indigenous Nations whose titles were at issue.

In Part II, I will offer some thoughts on how that might possibly be done.

ENDNOTES

1. *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73.
2. David Rosenberg, KC and I wrote of some of the limits of the current state of consultation in "Mapping Aboriginal Title in British Columbia, Part I: The Need for Transformative Change" (2016) 74 Advocate 505.
3. At the time of writing, final argument in *Cowichan Tribes* has not concluded.
4. *Delgamuukw v British Columbia*, (1991) 79 DLR (4th) 185 (BCSC) was a 374-day trial and resulted in a mistrial. *Tsilhqot'in v British Columbia*, 2007 BCSC 1700—the only successful title claim to date—lasted 339 days. See also 2014 SCC 44. The *Ahousaht* fishing rights trial proceeded in two stages (2008 BCSC 1494 and 2018 BCSC 633), totalling 270 days. An exception to this trend is the *Nuchatlaht* title claim (2023 BCSC 804), which took only 54 days. Ultimately, however, the court found in that case that the evidence did not show sufficient occupation of the entire claim area to establish Aboriginal title; the court invited the Nuchatlaht to pursue a title declaration over smaller sites within the claim area.
5. See British Columbia's directive at <news.gov.bc.ca/files/CivilLitigationDirectives.pdf> and Canada's at

<www.justice.gc.ca/eng/csj-sjc/ijr-dja/dclip-dlcpa/litigation-litiges.html>.

6. *Anderson v Alberta*, 2022 SCC 6.
7. *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at para 186.
8. Roger Fisher, *Getting to Yes: Negotiating Agreement without Giving In* (Boston: Houghton Mifflin, 1991).
9. Seven through the BC Treaty Process, plus the Nisga'a Final Agreement, which was negotiated outside that process.
10. See "The Report of the British Columbia Claims Task Force" (28 June 1991), at 7–8, online: <www.bctreaty.ca/sites/default/files/bc_claims_task_force_report.pdf>. The report set out recommendations that formed the basis of the BC Treaty Process.
11. Douglas Eyford, "A New Direction: Advancing Aboriginal and Treaty Rights" (2015), online: <www.rcaanc-cirnac.gc.ca/eng/1426169199009/1529420750631>.
12. Judith Sayers, "Aboriginal Title in British Columbia Examined Under the New Liberal Agenda", Yellowhead Institute (5 June 2018), online: <yellowheadinstitute.org/2018/06/05/aboriginal-title-in-british-columbia-examined-under-the-new-liberal-agenda/>.
13. In 2009, in admitting a petition brought by the Hul'qumi'num Treaty Group, the Inter-American Commission on Human Rights ("IACHR") concluded that neither litigation nor the BC Treaty Process constituted an effective process to protect their rights. See the IACHR's Report No. 105/09, at paras. 37–41, online: <www.cidh.oas.org/annualrep/2009eng/Canada592.07eng.htm>.
14. *Manitoba Métis Federation Inc v Canada (Attorney General)*, 2013 SCC 14 at para 66 [*MMF*]; *Haida*, *supra* note 1 at para 32.
15. *MMF*, *supra* note 14 at para 66.
16. *Ibid* at para 73.
17. *Haida*, *supra* note 1 at paras 20 and 25.
18. *Ibid* at para 18; *MMF*, *supra* note 14 at paras 49–50.
19. *R v Desautel*, 2021 SCC 17 at para 30 [*Desautel*].
20. *An Act respecting First Nations, Inuit and Métis children, youth and families*, SC 2019, c 24.
21. *Renvoi à la Cour d'appel du Québec relatif à la Loi concernant les enfants, les jeunes et les familles des Premières Nations, des Inuits et des Métis*, 2022 QCCA 185 at paras 443–44.
22. *Desautel*, *supra* note 19 at para 31.
23. *Calder v Attorney-General of British Columbia*, [1973] SCR 313 at 328, per Judson J. Later judgments, particularly *Delgamuukw* and *Tsilhqot'in*, clarified that Aboriginal title is a *sui generis* legal concept, defined by both the common law and the law of the relevant Indigenous Nation.
24. See, for instance, the comments of Professor Slattery quoted in *MMF*, *supra* note 14 at para 66. See also John Borrows, "Sovereignty's Alchemy: An Analysis of *Deglamuukw v British Columbia*" (1999) 37 Osgoode Hall LJ 537 ["Sovereignty's Alchemy"], where he notes that Indigenous peoples in British Columbia far outnumbered the settlers even when British Columbia joined Confederation in 1871.
25. *Mitchell v MNR*, 2001 SCC 33 at para 10 [*Mitchell*] [citations omitted].
26. *Ibid* at para 9.
27. The term "radical title", used in *Delgmamuukw*, *supra* note 4 at para 52, is appropriate: it is a *radical* notion that the Crown gained the underlying title to British Columbia merely through its assertion of sovereignty in 1846.
28. The classic text in this regard is Cole Harris's *Making Native Space: Colonialism, Resistance, and Reserves in British Columbia* (Vancouver: UBC Press, 2002) [*Making Native Space*].
29. I stress in this article the boundaries of legality of the Crown's own legal system because the problems of legitimacy raised by the Crown's transgressions of those boundaries are so glaring. A full consideration of this question of legality and legitimacy, however, would also need to assess the Crown's conduct according to the legal orders of the Indigenous Nations whose lands the Crown presumed to own and control.
30. See, for instance, *Reference re Secession of Quebec*, [1998] 2 SCR 217 at para 72 [*Secession Reference*].
31. That is, one of the colonies before British Columbia joined confederation in 1871, or the federal government following 1871, but excluding the Province of British Columbia, for which such legislation would be ultra vires as being legislation in relation to "Indians, and Lands reserved for Indians": *Delgamuukw*, *supra* note 7 at paras 179–80.
32. *Making Native Space*, *supra* note 28 at 13–22, 96–98, 152–53, 216–18, 224–28.
33. *Haida*, *supra* note 1 at para 32; *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, 2004 SCC 74 at para 42; *MMF*, *supra* note 14 at para 66; *Mikisew Cree First Nation v Canada (Governor General in Council)*, 2018 SCC 40 at paras 21 (per Karakatsanis J) and 57 (per Abella and Martin JJ). And see the recent comment in *Thomas and Saik'uz First Nation v Rio Tinto Alcan Inc.*, 2022 BCSC 15 at para 198.
34. *Secession Reference*, *supra* note 30 at para 67.
35. *R v Sparrow*, [1990] 1 SCR 1075 at 1106.
36. *United Nations Declaration on the Rights of Indigenous Peoples Act*, SC 2021, c 14 and *Declaration on the Rights of Indigenous Peoples Act*, SBC 2019, c 44. Also notable is that the federal Act states that protection for Aboriginal rights is "an underlying principle and value of the Constitution of Canada".