

Native Title A Canadian Perspective



R. Scott Hanna, BSc, MRM, CEnvP (IA Specialist)
19 February 2015



Topics of Presentation

- Aboriginal Peoples and First Nations of Canada
- Historic and Modern Treaties
- Modern Land Title Claims Processes
- Legislation and Case Law
 - Royal Proclamation, 1763
 - *Constitution Act, 1867 (BNA Act); Constitution Act, 1982*
 - Indian Act, 1876
 - Calder Decision, 1973
 - Sparrow Decision, 1990
 - Van der Peet Decision, 1996
 - Delgamuukw Decision, 1997
 - Taku River Tlingit and Haida Gwai Decisions, 2004
 - William Decision, 2014
- Summary



Aboriginal Peoples and First Nations of Canada

- Aboriginal peoples include Indian, Inuit and Metis people
- The First Nations are the various Aboriginal peoples in Canada who are neither Inuit nor Métis.
- There are currently over 630 recognized First Nations governments or bands spread across Canada, roughly half of which are in the provinces of Ontario and British Columbia.
- The total population is nearly 700,000 people
- There are 198 recognized First Nations in British Columbia, or just under 1/3 of all First Nations in Canada

Historic First Nations Treaties in Canada

- Treaties apply to 364 of 617 of Canada's FNs (59%)
- 9 of Canada's 10 Provinces, and 3 Territories
- Pre-Confederation (pre 1867)
 - Peace and Neutrality Treaties (3) – 1701-1760
 - Maritime Peace and Friendship Treaties (8) - 1725-1779
 - Upper Canada Land Surrenders (30) – 1781-1862
 - Robinson Treaties (2) – 1850
 - Douglas (Vancouver Island) Treaties (14) – 1850–1854
- Post-Confederation / Pre-Modern (until 1975)
 - Numbered Treaties (11) – 1871-1921
 - Williams Treaties (2) – 1923

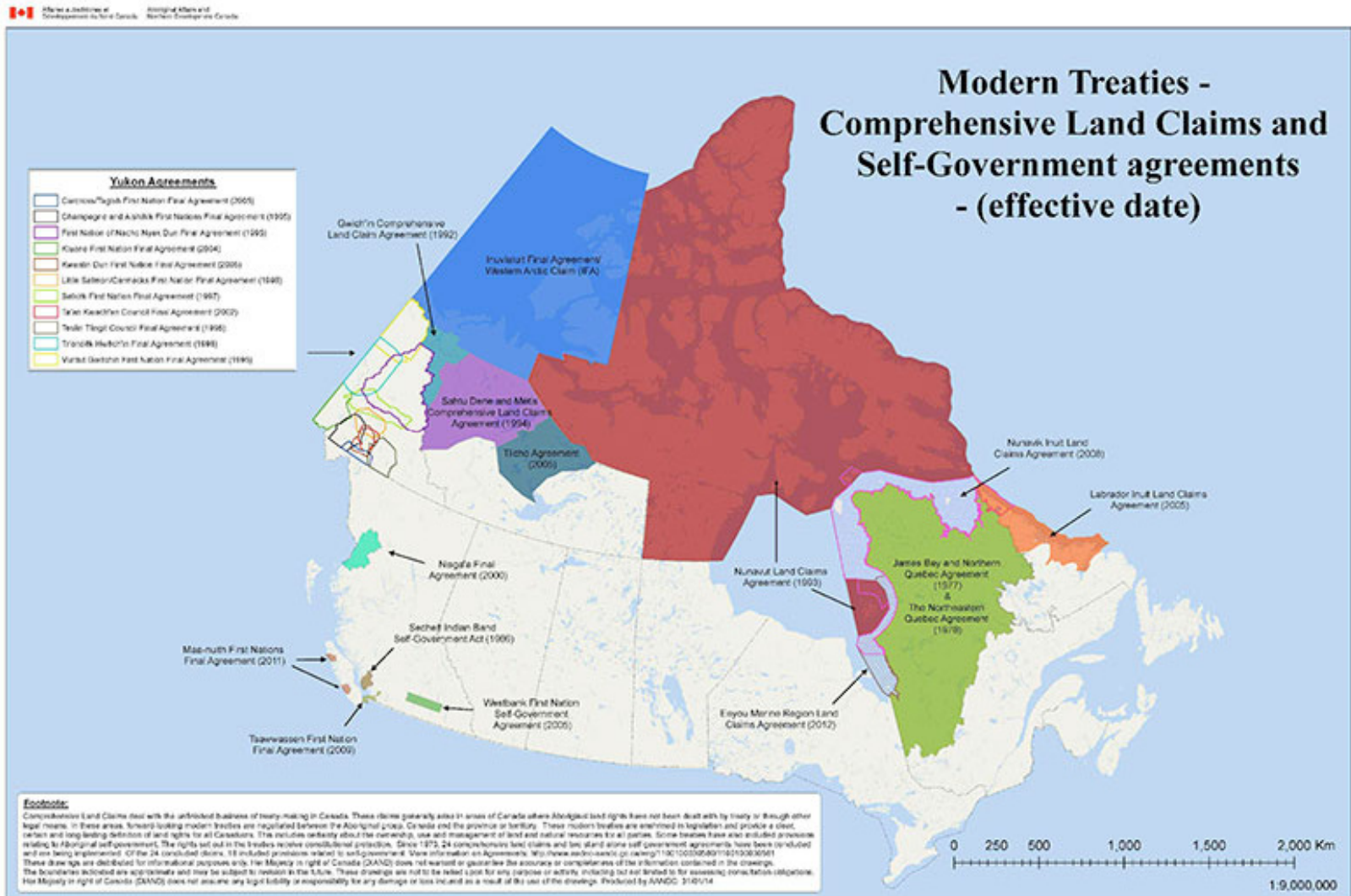
Historic Treaties



Safety • Quality • Reliability • Innovation



Modern Treaties and Agreements



Safety • Quality • Responsibility • Innovation



British Columbia Treaties (24 of 198 FNs)

- Pre-Confederation (pre-1867) Treaties
 - Douglas Treaties 1850-54 (Beecher Bay; Esquimalt; Malahat; Nanoose; Pauquachin; Semiahmoo; Snuneymuxw; Songhees; T' sou-ke; Tsartlip; Tsawout; Tseycum)
- Post Confederation Treaties (Numbered Treaties)
 - Treaty 8 – 1899 (Blueberry River; Dog River; Fort Nelson; Halfway River; McLeod Lake [2000]; Prophet river; Saulteau; West Moberly)
- Modern Treaties
 - Sechelt – 1999
 - Nisga' a – 2000
 - Westbank - 2006
 - Tsawwassen – 2009
 - Maa-nulth – 2011 (Huu-ay-aht; Kyuquot/Cheklasahht; Toquaht; Uchucklesaht; Ucluelet)



Safety • Quality • Sustainability • Innovation

Modern Land Title Claims Processes

- Canadian Comprehensive Land Claims Process
 - Policy document 1973; updated 1986
 - New interim policy document 2014 – addresses major developments that have occurred since the publication of the 1986 comprehensive land claims policy
- British Columbia Treaty Process
 - Negotiation process started in 1993 to resolve outstanding issues - including claims to un-extinguished aboriginal rights
 - Six stage process - Canadian, BC and FN governments
 - Stage 1: Statement of Intent to Negotiate
 - Stage 2: Readiness to Negotiate
 - Stage 3: Negotiation of a Framework Agreement
 - Stage 4: Negotiation of An Agreement In Principle
 - Stage 5: Negotiation to Finalize a Treaty
 - Stage 6: Implementation of the Treaty



Safety • Quality • Sustainability • Innovation

Royal Proclamation, 1763

- Issued by King George III
- Officially claimed British territory in North America after the Seven Years War
- Sets out guidelines for European settlement of Aboriginal territories
- Explicitly states that:
 - Aboriginal title has existing and continues to exist;
 - All land is Aboriginal land until ceded by treaty;
 - Settlers forbidden from claiming land unless first bought from the Crown and sold to settlers;
 - Only the Crown can buy land from First Nations
- First step in recognizing existing Aboriginal rights and title, and right to self-determination
- Enshrined in the s25 of *Canadian Constitution Act*

Canadian Constitution Act, 1867 and 1982

- Prior to 1982, federal Parliament could extinguish Aboriginal rights under *Constitution Act (BNA), 1867*
- Section 35 of the *Constitution Act, 1982* entrenched in the Constitution of Canada all the rights granted in native treaties and land claims agreements enacted before 1982, giving the rights outlined in the original agreement the status of constitutional rights
 - Defines Aboriginal (Indian, Inuit, Metis), but not the term “aboriginal rights” or provide a closed list
 - Courts have confirmed section 35 protects rights to fish, log, hunt, the right to land, and the right to enforcement of treaties
 - Canada has a policy recognizing self-government under section 35

Indian Act, 1876

- Applies to registered (status) Indians, their bands, and system of Indian reserves
- Does not apply to Metis, Inuit and non-status Indians
- Primary document governing how Canada interacts with First Nations
- Wide-ranging in scope
 - Defines who is and who is not an “Indian”
 - Sets out rules for governance on reserves, powers of band councils, land use, health care, education, tax exemption, etc.

SCC Calder Decision – 31 January 1973

- Issue**
- F. A. Calder of the **Nisga'a Nation Tribal Council** brought an action against the Government of British Columbia for a declaration that aboriginal title to certain lands in the province had never been lawfully extinguished
- Decision**
- SCC determined that Aboriginal title to land existed prior to the colonization of the continent (i.e., prior to Royal Proclamation of 1763), and was not merely derived from statutory law
 - SCC split on whether title had (or had not) been extinguished by Confederation and colonial occupation of lands
- Outcomes**
- Government of Canada overhauled much of the Comprehensive land claim negotiation process with aboriginal peoples (BC eventually followed in 1990)



Safety • Quality • Sustainability • Innovation

SCC Sparrow Decision – 31 May 1990

Issue

- R. Sparrow of the **Musqueam Band** was caught fishing with a drift net longer than permitted by regulation; claimed he was exercising his aboriginal right to fish under s35(1) of Constitution Act, 1982

Decision

- R. Sparrow was exercising “inherent” Aboriginal right, that existed before provincial legislation – guaranteed and protected by s35(1) of the Constitution Act, 1982
- Based on historical records over centuries, into colonial times, a clear right to fish for food
- Crown not able to prove right to fish extinguished prior to 1982 – licensing scheme merely means to regulating fisheries

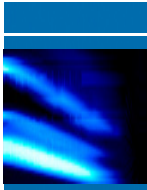


Safety • Quality • Sustainability • Innovation

SCC Sparrow Decision – 31 May 1990 – Cont' d

- Decision**
- Government's fiduciary duty to exercise restraint when applying powers in interfering with aboriginal rights
 - Aboriginal rights are not absolute – can be encroached upon given sufficient reasons
- Outcomes**
- The "Sparrow Test" – way of measuring how much Canadian legislation can limit aboriginal rights
 - Legislation can only limit Aboriginal rights if they have been given appropriate priority – Aboriginal rights have different nature than non-aboriginal rights

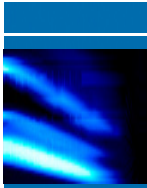




SCC Van der Peet Decision – 21 August 1996

- Issue**
- D. Van der Peet of the **Stó:lō First Nation** charged for selling salmon caught lawfully under a native food fish license – license forbids sale of fish caught for food and ceremonial purposes
 - Was the law prohibiting the sale of food fish an infringement of aboriginal rights under s35(1) of the Constitution Act, 1982?
- Decision**
- SCC determined that Aboriginal fishing rights did not extend to commercial selling of fish as the exchange of fish for money or goods did not constitute a practice, custom or tradition integral to Stó:lō culture
- Outcomes**
- Practices, customs and traditions which constitute Aboriginal rights are those which have continuity with those that existed prior to European contact

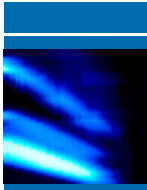




SCC Delgamuukw Decision – 11 December 1997

- Issue**
- **Gitksan and Wet’suwet’en First Nations** claimed ownership and legal jurisdiction over 133 hereditary territories (total 58,000 km²)
 - Chose to go to court, bypassing the Federal Land Claims process, because Province of British Columbia would not participate at the time
- Decision**
- SCC made no decision on land dispute; insisted that another trial was necessary
 - SCC stated legitimacy of Indigenous oral history
 - Established test for Aboriginal title based on “occupation” of land prior to assertion of European sovereignty
- Outcomes**
- Oral history now recognized as being as (if not more) important than written evidence for determining historical truth





SCC Taku River Tlingit and Haida Gwaii Decisions – November 2004

Issue

- Separate challenges to resource management decisions by Government of British Columbia
 - **Haida Nation** challenged transfer of tree farm license from one company to another
 - **Taku River Tlingit** challenged award of EA certificate to mining company seeking to open an old mine
- What are the limits of the duty to the Crown to consult and accommodate Aboriginal peoples?

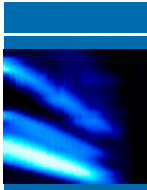


Decision

- SCC confirms concept of the Honour of the Crown, which imposes duties upon the government
- Asserted rights can trigger crown consultation obligations
- Scope of duty to consult is proportionate to impact of decision



Safety • Quality • Sustainability • Innovation



SCC Taku River Tlingit and Haida Gwaii Decisions – November 2004 – Cont' d

Decision

- Duty to consult rests solely with Crown
- Crown can delegate procedural aspects of consultation to third parties
- Government can design consultation process
- Duty to accommodate rests with Crown
- No Aboriginal veto over resource decision making



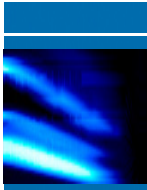
Outcomes

- Environmental assessment agencies develop guidelines for First Nations consultation
- Project proponents (or consultants) identify First Nations likely to be affected by project – Crown confirms list
- Strength of claim assessments become the norm
- Proponents/consultants carry out project specific consultations as per guidelines – Crown conducts separate government to government consultations



Safety • Quality • Sustainability • Innovation





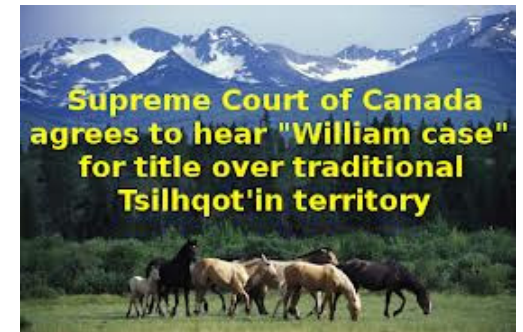
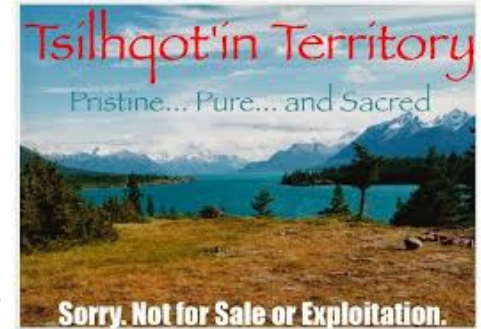
SCC William Decision – 26 June 2014

Issue

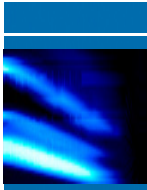
- **Tsilhqot'in** claim Aboriginal title in Claim area, stemming from Provincial Crown decision to grant forest license and cutting permit to logging/lumber company
- Did Tsilhqot'in hold Aboriginal title/rights to all or part of Claim area; did *Forest Act* apply; did issuance of licenses/permits infringe on rights in the Claim area?

Decision

- SCC found that the test for Aboriginal title was met as set out in *Delgamuukw Decision*, and declared Tsilhqot'in's Aboriginal title over the Claim area
- SCC further declared Province of British Columbia breached its duty to consult as set out in *Taku River Tlingit and Haida Gwai* decisions, in respect of issuing logging licenses under the *Forest Act*

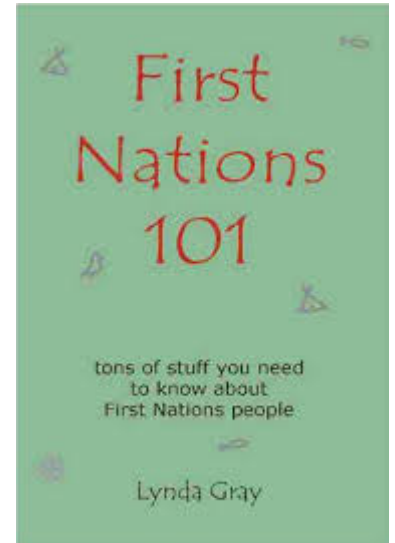


Safety • Quality • Sustainability • Innovation



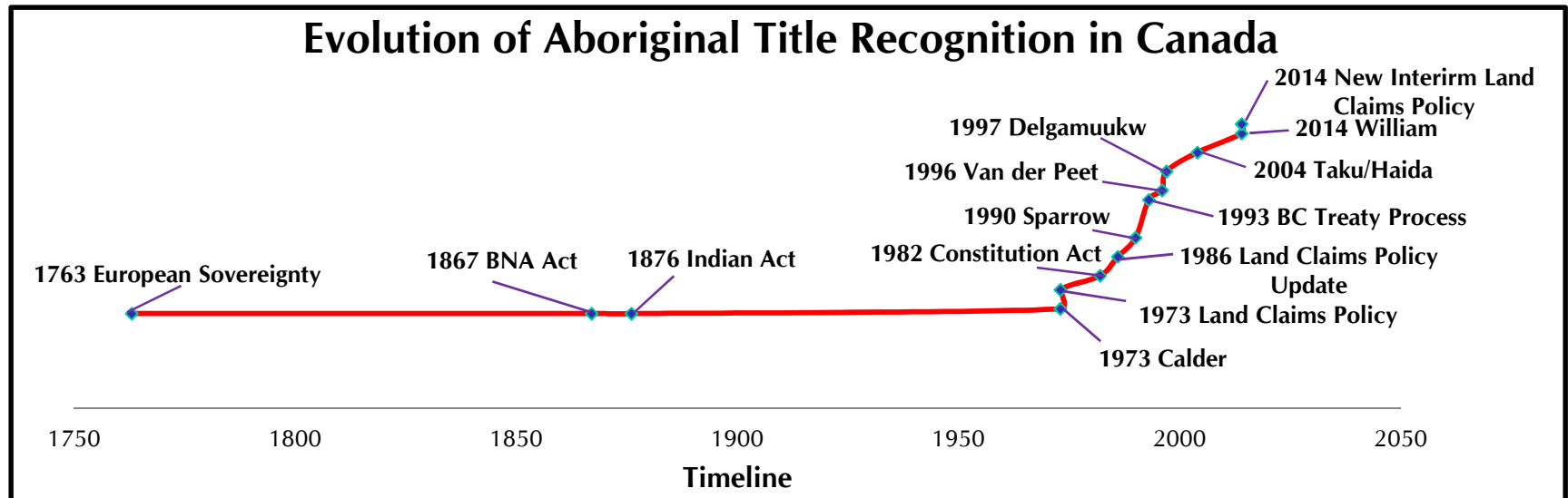
SCC William Decision – 26 June 2014 – Con't

- Outcomes**
- Once Aboriginal title has been proven, given the exclusive rights conferred to an Aboriginal group by Aboriginal title, governments and others seeking to use the land must obtain consent to proceed with development
 - However, once Aboriginal title determined government can still make decisions on land use if it can justify incursion
 - More collaborative economic initiatives between First Nations, government and industry are expected to reconcile economic activity with Aboriginal rights and title interests



Summary

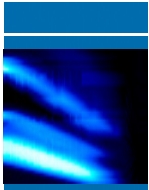
- Aboriginal rights in Canada are entrenched in the Canadian Constitution
- Aboriginal groups, fed up with the long drawn out Government land claims process, have taken to the courts



- Recognition of Aboriginal rights and title has evolved through a series of recent court cases decided by the Supreme Court of Canada, leading to policy changes

Summary – Cont' d

- The most recent case in 2014 – William Decision – has set the stage for greater Aboriginal – Government – Industry collaboration on resource projects to achieve Aboriginal consent, and greater certainty for the resource industry
- Laws have not changed – Government can still exercise land use decisions as long as it can justify incursions on Aboriginal title



Questions?



Safety • Quality • Sustainability • Innovation