

July 20, 2011

BC 140 today

Living with Crown and Aboriginal title

The legacy of the first colonial government's inaction on treaty making is the small reserves we see today protecting indigenous village sites and surrounding lands.

Government took the view that these reserves were sufficient to address the land interests of aboriginal people. Beyond the reserves the government saw aboriginal rights as limited to subsistence hunting, fishing and gathering.

So, when the colony of British Columbia joined Confederation on **July 20, 1871**, the provincial government of the day did not recognize aboriginal title and had a limited view of aboriginal rights.

The BC government believed it had fulfilled its obligations to the aboriginal people living here by establishing reserves. Indians and lands reserved for Indians then became the responsibility of the Government of Canada.

The Government of Canada imposed the *Indian Act* and their Indian agents administered every aspect of life on reserve. All matters relating to a reserve were under the agent's direct control. For many years, Indian people could not leave their reserve without written permission – not even to hunt, fish or visit extended family members on another reserve.

Despite decades of pleadings to governments, protests, demonstrations and demands, there was no satisfaction for aboriginal people who have called this land home since time immemorial.

Continually dismissed and ignored, aboriginal people's demand for treaties in BC grew stronger, resulting in the formation of the Allied Tribes of British Columbia whose mission was to work for treaties. During the 1920's the Allied Tribes petitioned Parliament to have their case sent to the Judicial Committee of the Privy Council in London (Canada's highest court at the time).

In response, Parliament amended the *Indian Act* to make it illegal for aboriginal people to raise funds to pursue land claims, thereby preventing land claims activity. This restriction was eventually lifted in 1951.

Then, in the landmark *Calder* case, the Supreme Court of Canada recognized that the Crown's underlying title was subject to Nisga'a title to occupy and manage their lands. Six of the seven judges confirmed that aboriginal title is a legal right derived from the Indians' historic...possession of the tribal lands and that it existed whether governments recognized it or not. However, the judges then split on whether Nisga'a aboriginal title still existed or had been extinguished by colonial legislation prior to Confederation.

The *Delgamuukw* case, almost 25 years later, confirmed aboriginal title does exist, that it is a right to the land itself, not just the right to hunt, fish and gather.

So, 126 years after the colony of British Columbia joined Canada, the notion that aboriginal rights and title were insignificant was finally cast aside. Current Canadian law has confirmed that aboriginal rights exist in law and those rights are distinct and different from the rights of other Canadians because of aboriginal peoples' prior occupation and use of the land.

Today in British Columbia we have the Nisga'a, Tsawwassen, and Maa-nulth treaties, as well as a handful of historical treaties on Vancouver Island and in the northeast. We also have a series of judicial decisions acknowledging aboriginal rights, constitutional protection for such rights, a BC treaty process and a general acceptance that major changes must occur.

Two court cases, *Haida Nation v. British Columbia (Ministry of Forests)* and *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)* set out the duty to consult and accommodate First Nations where their interests have yet to be proven in court or set out in a treaty.

The duty to consult and accommodate arises from the need to deal with aboriginal rights in the interim until the rights have been dealt with through a treaty or decision of the court.

Now when a First Nation makes a credible claim of aboriginal title the governments of Canada and British Columbia have a legal duty to consult and, as circumstances dictate, accommodate that First Nation. To determine the validity of a claim the courts have cited a Statement of Intent to negotiate a treaty in the BC treaty process as proof of its merit.

If governments are seeking access to land or resources before the aboriginal rights issues are resolved through a treaty or court decision, they must consult and negotiate with the First Nation claiming ownership. If they do not, they are taking a significant legal risk.

Given these legal developments, the parties in this post-*Haida* and *Taku* period are expected to be motivated to conduct more meaningful negotiations at the treaty table and through other agreements.

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For more information, contact:

Brian Mitchell
Communications Manager
T. (604) 482-9215
bmitchell@bctreaty.ca

