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***ABORIGINAL TITLE
IN BRITISH COLUMBIA:
HAS THE WORLD CHANGED
FOR POLICY MAKERS***

24 October 2014

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PRESENTATION TO BC EXPROPRIATION ASSOCIATION

TSILHQOT'IN NATION v. BRITISH COLUMBIA,
2014 SCC 44



TOPICS FOR DISCUSSION

1. What is Aboriginal title;
2. How did we get here;
3. What do BC First Nations want; and
4. Where do we go now.

(1) WHAT IS ABORIGINAL TITLE



Aboriginal title is *sui generis*, and so distinguished from other proprietary interests, and characterized by several dimensions. It is inalienable and cannot be transferred, sold or surrendered to anyone other than the Crown.

Delgamuukw v. British Columbia,
[1997] 3 S.C.R 1010

(1) WHAT IS ABORIGINAL TITLE (Cont'd)



*Sui generis: Of its own kind or class;
unique or peculiar.*

*Black's Law Dictionary
Seventh Edition*

(1) WHAT IS ABORIGINAL TITLE (Cont'd)



REQUIREMENTS TO ESTABLISH ABORIGINAL TITLE

1. Sufficient occupation of the land at the time of assertion of European sovereignty;
2. Continuity of occupation where present occupation relied on; and
3. Exclusive historic occupation.

(1) WHAT IS ABORIGINAL TITLE (Cont'd)



FIVE PRINCIPLES HAVE EMERGED

1. Crown title is subject to Aboriginal land interests where those interests can be proved;
2. Aboriginal title gives Aboriginal groups the right to use and control the land and enjoy its benefits;
3. Governments can infringe Aboriginal rights only where the infringements can be justified on the basis of “compelling and substantial purpose” and in a manner that is consistent with the Crown’s fiduciary responsibility;

(1) WHAT IS ABORIGINAL TITLE (Cont'd)



4. Where Aboriginal title has not been established, the Crown is obligated to consult Aboriginal groups about resource development; and
5. Governments must negotiate in good faith to resolve aboriginal claims.

(2) HOW DID WE GET HERE



1. Why do Aboriginal rights have special status in Canada; and
2. Is BC different from other Canadian provinces and territories.

(2) HOW DID WE GET HERE (Cont'd)



WHO IS THIS PERSON



(2) HOW DID WE GET HERE (Cont'd)



Royal Proclamation 07 October 1763

And whereas it is just and reasonable, and essential to our Interest, and the Security of our Colonies, that the several Nations or Tribes of Indians with whom We are connected, and who live under our Protection, should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to or purchased by Us, are reserved to them, or any of them, as their Hunting Grounds.

(2) HOW DID WE GET HERE (Cont'd)



DOCTRINE OF *TERRA NULLIUS*

The doctrine of *terra nullius* (no one owned the land prior to European sovereignty) never applied in Canada.

Therefore, Crown title is burdened by the pre-existing legal rights of Aboriginal people who occupied and used the land prior to European arrival.

(2) HOW DID WE GET HERE (Cont'd)



ABORIGINAL RIGHTS

- Survived European settlement;
- *Calder v. British Columbia (Attorney General)*, [1973] S.C.R. 313;
- *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010;
- *Guerin v. Canada*, [1984] 2 S.C.R. 335;

(2) HOW DID WE GET HERE (Cont'd)



ABORIGINAL RIGHTS

- *Constitution Act, 1982*;
- 35(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed; and
- *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511.

(3) WHAT DO BC FIRST NATIONS WANT



IS BC DIFFERENT

1. Relationship between Crown and Aboriginal peoples unique;
2. Lack of historic treaties in British Columbia;
3. More than 200 *Indian Act* bands;
4. 166 B.C. *Indian Act* bands have an on-reserve population of less than 500 people; and
5. Reserves account for less than 1/2 percent of land mass in province.

(3) WHAT DO BC FIRST NATIONS WANT (Cont'd)



FIRST NATIONS LEADERSHIP COUNCIL STATEMENT 11 SEPTEMBER 2014

1. Relationships based on recognition and implementation of the existence of indigenous peoples' inherent title and rights, and pre-confederation, historic, and modern treaties;
2. Indigenous systems of governance and laws are essential to the regulation of lands and resources;

(3) WHAT DO BC FIRST NATIONS WANT (Cont'd)



3. Relationships, negotiations, and agreements to be based on recognition; and
4. Consent based decision making and title based fiscal relations, including revenue sharing.

(4) WHERE DO WE GO FROM HERE



1. Revitalize modern treaty process;
2. Bilateral agreements and arrangements (incremental treaty agreements, non-treaty arrangements, contracts, legislation, memoranda of understanding, reconciliation protocols, consultation and accommodation processes);
3. Elevated Crown duty to consult *i.e.* consent required where strong claim to Aboriginal title;

(4) WHERE DO WE GO FROM HERE (Cont'd)



4. Deferral to judicial system for recognition of Aboriginal title claims; and
5. Establishment of tribunal for recognition of Aboriginal title claims.



THANK YOU