Aboriginal Title

The Court has described Aboriginal title as a right to occupy and possess land.[1] However, the Crown retains underlying title to the land[2] and Aboriginal title land can only be sold to the Crown.[3] According to the *Royal Proclamation of 1763*, these restrictions on title were created so that the Crown could act as a as an interlocutor between Indigenous groups and settlers and so that the Indigenous groups could not be exploited by settlers.[4]

The definition of Aboriginal title has evolved since its recognition. In the case of *Calder v British Columbia* (1973), the Supreme Court described the nature of Aboriginal title as being based on the historic occupation and possession of the land by Indigenous people.[5] After Aboriginal and treaty rights were enshrined in the *Constitution*, the Supreme Court further elaborated on the features of Aboriginal title in the case *Delgamuukw v British Columbia* (1997). Chief Justice Lamer, writing for the majority of the Justices, described Aboriginal title as having the following features:

- Aboriginal title land is held communally;[6] and
- the land is subject to a limit. Aboriginal title land cannot be used in a manner that is irreconcilable with the nature of the Aboriginal group's attachment to the land (ie one cannot strip mine in a hunting area),[7] but can otherwise use the land for whatever purpose the group chooses.[8]

In the *Delgamuukw* case (1997), the Supreme Court also articulated the test for establishing Aboriginal title. To prove that an Aboriginal group has a title claim to land, the group must show that occupation of that land was exclusive at the time of sovereignty (1867, when Canada became a country).[9] Exclusive occupation does not mean that land cannot have been shared. Indigenous groups can make joint claims if they occupied the land together and excluded all others. Or, if a group historically permitted another to share their resources, this could be evidence that the group considered itself to have the right to decide who could come on to the land.[10]

The first and only successful Aboriginal title claim was made by the Tsilhqot'in First Nation, a group of six semi-nomadic bands that claimed title over 4400 square kilometers of land to the south-west of Williams Lake in British Columbia (the area over which Aboriginal title was successfully made out is about 1,700 square kilometres). The Supreme Court clarified in this case in 2014 what factors need to be in place to establish title.

The Supreme Court decided that traveling and living in multiple locations at different points in the year could satisfy the "exclusive occupation" requirement for making an Aboriginal title claim. To found a claim, the Court ruled there must be an historical intention to occupy the land, communicated to other groups through action or law/custom,[11] combined with actual regular use.[12] The Court said that In determining whether occupation is sufficiently intense, courts should take into account the uses to which the relevant land can be put, as well as the technological capacity and mode of life of the group historically.[13] In this case,

the land was quite barren and could not have easily supported a larger population.

Aboriginal title is the most well-developed right recognized in section 35 as an Aboriginal right.

[1] *Calder et al v Attorney-General of British Columbia*, [1973] SCR 313, 34 DLR (3d) 145 ; *Guerin v The Queen*, [1984] 2 SCR 335 at 378, 382, 13 DLR (4th) 321 . See also *St Catharine's Milling and Lumber Co v R (1887), [1887] 13 SCR 577, [1888]* 14 AC 46 (PC) .

[2] *Guerin*, *supra* note 1 at 379; see also *St Catharine's*, *supra* note 1.

[3] *Guerin*, *supra* note 1 at 365.

[4] George R, Proclamation, 7 October 1763 (3 Geo III), reprinted in RSC 1985, App II, No I; Patrick J Monahan, Byron Shaw & Padraic Ryan, *Constitutional Law*, 5th ed (Toronto: Irwin Law Inc, 2017) at 475.

The Royal Proclamation is a document issued by King George III after the Seven Years War to proclaim ownership over the territory in North America. The Royal Proclamation also includes statements governing the relationship between settlers and Indigenous peoples.

[5] *Calder*, *supra* note 1 at 376; *Guerin, supra* note 1 at 399; *R v Van der Peet,* [1996] 2 SCR 507 at 538, 137 DLR (4th) 289 at 540, 577.

[6] *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at para 180, 153 DLR (4th) 193 . at para 115.

[7] *Delgamuukw*, *supra* note 6 at 124.

[8] *Ibid* at para 117.

[9] *Ibid* at para 142.

[10] *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at para 48, [2014] 2 SCR 257 .

[11] *Ibid* at para 38.

[12] *Ibid* at para 42.

[13] *Ibid* at para 33-44.