Recent Canadian Case Law on Native Title - Implications for Third-Parties

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Northey - Recent Canadian Caselaw on Native Title

Borneo Rainforest Law Conference, Session on Native Title & Recent Case Law across the Commonwealth
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Overview

Canadian law on native title, now termed, Aboriginal title,[2] is part of Canada's modern constitutional law through the *Constitution Act,* 1982. Aboriginal title was also part of Canada's earliest legal history as a British colony through the recognition of several core elements of Aboriginal title in the *Royal Proclamation of* 1763.

Today, Aboriginal title caselaw is remarkably dynamic, not decisively constrained by its lengthy legal history.

The first part of this paper will set out the core elements of Canada's doctrine of Aboriginal title, but will focus on four principles that highlight the distinctiveness of this legal doctrine:

1st Principle - Aboriginal title is independent of and pre-dates sovereignty;

2nd Principle - Aboriginal title is unique for its correlation of inalienability and fiduciary duty;

3rd Principle - Aboriginal title is communal, not individual; and

4th Principle - Aboriginal title can include nomadic, not just intensive possession.

The paper draws these principles from 50 years of remarkable cases from the Supreme Court of Canada, highlighting the 1973 *Calder* decision, the 1984 *Guerin* decision, the 1997 *Delgamuukw* decision, and the 2014 *Tsilhqot'in* decision.

The second part of this paper will consider the modern legal history and status of Aboriginal title issues affecting 3rd parties - notably, project proponents, municipal governments, and local residents.

Part One - Four Key Principles of Canadian Aboriginal Title

The Canadian doctrine of Aboriginal title arises where an indigenous people has traditionally occupied lands pre-European contact.

The current test for Aboriginal title requires an Aboriginal claimant to establish each element of a three-part test: (1) sufficiency of occupation; (2) continuity of occupation; and (3) exclusivity of occupation.[3]

This paper will now highlight four principles of Canada's approach to Aboriginal title.

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[2] The *Constitution Act, 1867* uses the term, Indians; the Constitution Act, 1982 uses the term, Aboriginal peoples, and will be the term used in this paper. Note, additionally, that current federal law uses the term, Indigenous peoples: e.g., *Impact Assessment Act* S.C.2019, c.28, s.2, e.g., "Indigenous peoples of Canada."

[3] *Delgamuukw*, para.143; Tsilhqot'in para.26.

First Principle - Aboriginal Title is Independent of and Pre-dates Sovereignty

1973 - Calder v. Attorney General of British Columbia

The *Calder* case began in 1967. Frank Calder was the elected Chief of the Nishga Tribe within the Nishga Nation in northwestern B.C., close to the Alaska border. In 1967, Mr. Calder and other Tribe members brought a case for a declaration that the aboriginal title of the Nishgas had never been lawfully extinguished. In 1969, the Nisgas lost a preliminary motion at trial and, in 1970, lost unanimously on appeal in the British Columbia Court of Appeal. On further appeal to the Supreme Court of Canada, there was a 5-day hearing in late 1971. In early 1973, the judgments of Justices Judson and Hall accepted the existence of aboriginal title, but the Court disagreed (3-3) over whether Aboriginal title had been extinguished.[4]

For the first time, the Supreme Court of Canada accepted that aboriginal title was part of Canadian law. Further, such title existed independently of colonial law - it was not derived from it. In this respect, the Court disagreed with a 19th century Privy Council decision that concluded the origin of Aboriginal title was the 1763 Roval Proclamation.[5] Both judgments reached this conclusion by delving deep into legal history - in Canada, in the United States, and across the British Commonwealth.

On the other hand, despite this deep dive, the Court split 3-3 on the question whether Aboriginal title was extinguished for the British Columbia lands in question. I acknowledge up-front the limitations of trying to summarize in two paragraphs what the Court took more than a year to decide and involved each Justice writing dozens of paragraphs. On the one side, Justice Judson provided a detailed review of the historical record and numerous Commonwealth authorities and U.S. Supreme Court jurisprudence. Ultimately relying on USSC jurisprudence, he concluded that aboriginal title was extinguished by "sovereign authority" electing to exercise complete "dominion" over the Nisga lands when B.C. joined Canada through 1871 Terms of Union and later opened up its lands for settlement, apart from lands reserved for "Indian occupation."[6]

On the other side, Justice Hall carried a similarly broad and detailed review of Commonwealth and U.S. Supreme Court authorities to conclude that Aboriginal title exists on lands traditionally and exclusively possessed by Native peoples unless and until there is express legislative action by the Crown to extinguish it. Justice Hall found that no legal document demonstrated express intent to extinguish the Nisga lands. Further, he concluded that the 1871 Act of Union could not have addressed the Nisga lands because the events prior to 1871 did not address these lands.[7] Further, the sovereignty over these lands - as between Britain and the United States - was not resolved until 1903.[8] Additionally, Hall J. disagreed that a sovereign "act of state" could extinguish this title as the

[4] The decisive 7th vote dismissed the application on the basis that the action against the Crown in Right of British Columbia required a prior *fiat* from the Crown that was not obtained, and the other two judgments also disagreed on the need for this fiat.
[5] Judson, paras.12-13, 26; Hall, para.133
[6] Judson, paras.48, 53-57, 74
[7] Hall, paras.147-8.
[8] Hall, paras.89-91, 150, 164.

exercise of this power involves acts between sovereign states, and, unlike longstanding court jurisprudence reviewing Aboriginal title, is excepted from any judicial review.[9]

Despite the judicial loss in 1973, the Nisgas ultimately succeeded 25 years later with the Government of British Columbia settling the first modern land claim in its history with the Tribe now known as Nisga'a Nation. The 1998 Final Agreement provided Aboriginal self-government over more than 2,000 square kilometres of land.[10]

Second Principle - Aboriginal Title is Unique for its Correlation of Inalienability and Fiduciary Duty

1984 - Guerin v. R.

In 1975, Chief Delbert Guerin of the Musqueam Indian Band commenced an action for a declaration that the Federal Crown breached its trust responsibility in leasing 162 acres of Reserve land in the City of Vancouver to a third party - a golf course - in 1958 for 75 years on terms that were expressly contrary to terms authorized by the band.

Following a 31-day hearing, the Band succeeded at trial in 1982, but was reversed by the Federal Court of Appeal in 1983 on the basis that the lease was concluded under a non-justiciable "political trust." In 1984, the entire Supreme Court of Canada agreed that the Band should succeed and reversed the Federal Court of Appeal.

There were two lengthy opinions by Justice Wilson (for 3 justices) and Chief Justice Dickson (for four Justices), plus a short concurring opinion by Justice Estey. Both of the lengthy opinions found that the Crown breached its fiduciary obligation to the Musqueam. Both judgments also rejected application of the "political trust" doctrine. Further, both judgments relied not on the terms of the federal *Indian Act* (i.e., a statutory argument), but on the basis of aboriginal title discussed in *Calder*. I will focus on the judgment of the Chief Justice.

The Chief Justice applied the *Calder* decision to decide the case on the basis of "aboriginal, native or Indian" title (para.80). This concept provided the basis for statutory language in the *Indian Act*, but is not limited to that statutory language. The Chief Justice then articulated at least three features of aboriginal title that contributed to its special if not unique status. First, the Chief Justice distinguished aboriginal title from any trust - private or political (paras.78, 79). Second, the Chief Justice denied that the Aboriginal interest in land gives rise to any fiduciary duty (para.80). Third, the Chief Justice advised that aboriginal title creates an obligation in equity for the Crown because the Crown has made the Aboriginal interest in its lands "inalienable" except by surrender to the Crown (para.80). On this third point, the Chief Justice noted that the Crown "first took this responsibility upon itself in the Royal Proclamation of 1763 (para.81).

In relation to the First Principle of Aboriginal title cited above, this arose from the opinion of the Chief Justice following an extremely concise review of the two major opinions in *Calder*

[9] Hall, paras.153-4, 165.
[10] Nisga'a Lisims Government website, "Understanding the Treaty"

(paras.82-84). Following this review, the Chief Justice added the principle that "a change in sovereignty over a particular territory does not in general affect the presumptive title of the inhabitants." Further, as concerns parties claiming aboriginal title, "Their interest in their lands is a pre-existing legal right not created by Royal Proclamation, by s.18(1) of the *Indian Act*, or by any other executive order or legislative provision." (para.85)

The Chief Justice also addressed the broad scope of aboriginal title. In particular, "It does not matter...that the present case is concerned with the interest of an Indian band in a reserve rather than with unrecognized aboriginal title in traditional tribal lands." (para.86). The interest is the "same" in both cases.

The Chief Justice's opinion in *Guerin* closed with two overarching conclusions:

- First, Aboriginal title "constitutes a unique interest in land." (para.92)

- Second, the nature of the Aboriginal interest involved in Aboriginal title is "best characterized" by (1) its general inalienability" and (2) the Crown obligation to deal with the land on the tribe's behalf when the interest in land is surrendered. (para.93).[11]

The Chief Justice also upheld the Trial Judge's award of damages of $10 million to the Musqueam Indian Band, exclusive of a further award of costs for legal fees at all levels of court (para.114).

Third Principle - Aboriginal Title is Communal, not Individual

1997 - Delgamuukw v. British Columbia

Delgamuukw was one Chief of the Gitksan and Wet'suwet'en hereditary chiefs who were part of fifty-one "Houses". The claim sought title over 133 territories that totaled 58,000 km^2 in the Province of British Columbia beside and to the east of the Nisga'a people who led the *Calder* litigation, above. The claimed area is more than 10 times greater than Canada's smallest Province, Prince Edward Island). A major issue was the question whether the original claim by 51 chiefs was properly amended into two collective claims.

The proceedings commenced in 1984. The original trial and subsequent appeal to the British Columbia Court of Appeal are difficult to summarize regarding the facts and the law. However, in general, the trial before Chief Justice McEachern of the British Columbia Supreme Court involved 374 days of evidence, and largely went against the plaintiffs. Their oral history was rejected as evidence as was their claim against Canada. The Court granted the Indigenous claimants' right to use unoccupied or vacant land, but subjected this right to the general law of the Province of British Columbia. At the British Columbia Court of Appeal, two Justices wrote separate opinions that largely refused to reverse the Trial Judge. One dissenting judgment allowed the appeal on whether aboriginal

[11] As such, the Chief Justice also advised that there is no conflict between cases that describe Aboriginal title as "a beneficial interest of some sort" and cases that describe it as "a personal, usufructuary right" because neither categorization is "quite accurate." (para.92).

title existed, but required that the case be sent back to trial to address a number of questions. A second dissent applied to part of the Trial Judge's conclusions.

On further appeal to the Supreme Court of Canada, the entire Court granted the appeal on the basis of aboriginal title; however, there were two major opinions: the opinion of Chief Justice Lamer and two other Justices; a concurring opinion of two Justices (La Forest J. and L'Heureux-Dube J.); and a very brief opinion from one Justice concurring with the Chief Justice and expressing "substantial" agreement with the concurring opinion (para.209).

A major component of the opinion of the Chief Justice was on factual issues related to the treatment of traditional Aboriginal knowledge. I will not address these issues in this paper beyond noting that, due to issues over the evidence, the entire Court concluded that a new trial would be required to establish title.

Chief Justice Lamer's opinion also devoted extensive attention to Aboriginal title on the basis that "all of the parties have characterized the content of aboriginal title incorrectly." (para.110). The Chief Justice then elaborated on what makes aboriginal title *unique* (para.113). He started with the *Guerin* component of inalienability - except to the Crown (para.113). Then the Chief Justice added the further point that Aboriginal title was unique due its source - it arises before the assertion of British sovereignty (para.114). Thirdly, the Chief Justice advised that Aboriginal title is held "communally" - it is a collective right to land held by all members of an aboriginal nation. (para.115).

Chief Justice Lamer also sought to address the *content* of Aboriginal title (para.117) according to two propositions:

- First, Aboriginal title encompasses the right to exclusive use and occupation of land for a variety of purposes - not restricted to those purposes that are distinctive to that nation's Aboriginal culture (paras.118-124); and
- Second, the protected uses must not be irreconcilable with the nature of the nation's attachment to the traditional lands (paras.125-132).

The Lamer opinion also sought to address the constitutional status of Aboriginal title. According to this opinion, Aboriginal title is constitutionally protected in Canada by virtue of s.35(1) of the *Constitution Act, 1982*. Next, Chief Justice Lamer sought to distinguish Aboriginal title from other Aboriginal rights. Some Aboriginal rights are related to *activities* on a specific tract of land (that is not covered by title), e.g., hunting and fishing rights (paras.138-139). However, distinctly, Aboriginal title confers the right to the land itself (paras.138-140).

Additionally, the Lamer opinion identified a three-part test to claim Aboriginal title: (1) the land must have been occupied prior to any assertion of sovereignty; (2) there must be substantial continuity of occupation between present and pre-sovereignty occupation;[12] and (3) the pre-Sovereignty occupation must have been exclusive (para.143).

[12] See meaning of "substantial" continuity in para.153. Note also that this concept of continuity allows changes to the "precise nature of occupation" (para.154)

Chief Justice Lamer also addressed jurisdiction to extinguish Aboriginal title. He concluded that only the federal government has jurisdiction to extinguish title (paras.179-181).

Today, unlike the neighbouring Nisga'a who led the *Calder* litigation, the Gitxan-Wet'suwet'en First Nations have not reached any land claim agreement.

Fourth Principle - Aboriginal Title Includes Nomadic, Not Just Intensive Possession

2014 - Tsilhqot'in Nation v. British Columbia

Chief Roger William was a member of the Tsilhqot'in Nation and Chief of the Xeni Gwet'in First Nations government (also known as the Nemiah Valley Indian Band), one of six bands making up the the Tsilqot'in Nation. The litigation commenced in 1983 when the Province of British Columbia granted a forestry licence in part of the territory claimed by the Tsilqot'in. Following numerous court applications and injunctions, the claim was amended in 1998 to include the claim of Aboriginal title over approximately 5 percent of what the Tsilqot'in regard as their traditional territory.

A trial commenced in 2004 and involved 339 trial days over 5 years. The first of several major issues addressed at trial was whether the Tsilhqot'in people were entitled to a declaration of Aboriginal title over all or part of the claimed area. The Trial Judge found in principle that the Tsilqot'in had established aboriginal title to 1,700 square kilometres of land, but did not grant title for procedural reasons. On appeal, the British Columbia Court of Appeal denied that title was established, but left open the possibility of future title for specific sites.

At the Supreme Court of Canada, Chief Justice McLachlin led a unanimous Court to allow the appeal and grant the declarations of Aboriginal title over the territory set out at trial. The Court rejected the view of the Court of Appeal that the claim required "regular" use of claimed territory.

In setting out the legal basis for the Court's judgment, the Court started with *Calder,* referenced s.35 of the *Constitution Act, 1982* for recognizing and affirming existing Aboriginal rights, and turned to *Guerin* regarding Aboriginal title. After dealing with a further case, *R. v.* Sparrow, regarding the s.35 framework for Aboriginal rights and what is required to justify any infringement of these rights,[13] the Court then advised that *Delgamuukw* summarized the content of Aboriginal title through two propositions:

- Positively, "[A]boriginal title encompasses the right to exclusive use and occupation of the land held pursuant to that title for a variety of purposes, which need not be aspects of those [A]boriginal practices, customs and traditions which are integral to distinctive [A]boriginal cultures" (para. 117).
- Negatively, the "protected uses must not be irreconcilable with the nature of the group's attachment to that land" (ibid.) — that is, it is group title and cannot be alienated in a way that deprives future generations of the control and benefit of the land.

[13] [1990] 1 S.C.R. 1075 summarized in *Tsilqot'in*, para.13

Noting that the courts below had disagreed on the correct approach to Aboriginal title, the Court affirmed the 3-part test in *Delgamuukw* for occupation of land: it must be sufficient, continuous, and exclusive, as follows:

> (i) the land must have been occupied prior to sovereignty,
> (ii) if present occupation is relied on as proof of occupation pre-sovereignty, there must be a continuity between present and pre-sovereignty occupation, and
> (iii) at sovereignty, that occupation must have been exclusive.
> (*Delgamuukw*, para.143; affirmed in *Tsilhqot'in*, para.26)

The Court then reviewed the Court of Appeal view that proof of occupation required proof that ancestors "intensively used a definite tract of land" (para.28). As set out by the Court:

> For semi-nomadic Aboriginal groups like the Tsilhqot'in, the Court of Appeal's approach results in small islands of title surrounded by larger territories where the group possesses only Aboriginal rights to engage in activities like hunting and trapping. By contrast, on the trial judge's approach, the group would enjoy title to all the territory that their ancestors regularly and exclusively used at the time of assertion of European sovereignty. (para.29)

The Court concluded that "occupancy" was a context-specific inquiry. Further, "The intensity and frequency of the use may vary with the characteristics of the Aboriginal group asserting title and the character of the land over which title is asserted." (para.37). Turning to this case, the Court observed that "the land, while extensive, was harsh and was capable of supporting only 100 to 1,000 people." Further, "The notion of occupation must also reflect the way of life of the Aboriginal people, including those who were nomadic or semi-nomadic." (para.38). The Court then rejected as unsupported by jurisprudence or scholarship the Court of Appeal view that Aboriginal title was confined to "specific village site or farms." (para.42).

Overall, the Court reached the following conclusion on occupancy:

> The evidence in this case supports the trial judge's conclusion of sufficient occupation. While the population was small, the trial judge found evidence that the parts of the land to which he found title were regularly used by the Tsilhqot'in. The Court of Appeal did not take serious issue with these findings. (para.55)

The Court also re-affirmed the unique nature of Aboriginal title as arising from the "special relationship between the Crown and the Aboriginal group in question." (para.72)

The Court in *Tsilhquot'in* also addressed what must be established by government to *justify* infringement of Aboriginal title. The government must meet a 3-part test of showing:

> (1) that it discharged its procedural duty to consult and accommodate;
> (2) that its actions were backed by a compelling and substantial objective; and
> (3) that the governmental action is consistent with the Crown's fiduciary obligation to the group. (para.77)

By way of example for part (2) of the test, the Court approved what was said in *Delgamuukw* about a "compelling and substantial public purpose" as follows:

> In my opinion, the development of agriculture, forestry, mining, and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations to support those aims, are the kinds of objectives that are consistent with this purpose and, in principle, can justify the infringement of [A]boriginal title. Whether a particular measure or government act can be explained by reference to one of those objectives, however, is ultimately a question of fact that will have to be examined on a case-by-case basis. (para. 165, emphasis omitted)

The Court also addressed part (3) of the test as follows:

> First, the Crown's fiduciary duty means that the government must act in a way that respects the fact that Aboriginal title is a group interest that inheres in present and future generations. The beneficial interest in the land held by the Aboriginal group vests communally in the title-holding group. This means that incursions on Aboriginal title cannot be justified if they would substantially deprive future generations of the benefit of the land.
>
> Second, the Crown's fiduciary duty infuses an obligation of proportionality into the justification process. Implicit in the Crown's fiduciary duty to the Aboriginal group is the requirement that the incursion is necessary to achieve the government's goal (rational connection); that the government go no further than necessary to achieve it (minimal impairment); and that the benefits that may be expected to flow from that goal are not outweighed by adverse effects on the Aboriginal interest (proportionality of impact). (paras.86-87).

Because of the novelty of the result in *Tsilhqot'in*, the Court also addressed the novel question of how provincial laws of general application would apply to lands subject to Aboriginal title. It ruled as follows:

> Provincial power to regulate land held under Aboriginal title is constitutionally limited in two ways. First, it is limited by s. 35 of the Constitution Act, 1982. Section 35 requires any abridgment of the rights flowing from Aboriginal title to be backed by a compelling and substantial governmental objective and to be consistent with the Crown's fiduciary relationship with title holders. Second, a province's power to regulate lands under Aboriginal title may in some situations also be limited by the federal power over "Indians, and Lands reserved for the Indians" under s. 91(24) of the Constitution Act, 1867. (para.103)

Regarding the specific topic of the forestry permits issued by the Province of British Columbia in this case, the Court advised:

> I agree with the courts below that no compelling and substantial objective existed in this case. The trial judge found the two objectives put forward by the Province — the economic benefits that would be realized as a result of logging in the claim area and the need to prevent the

> spread of a mountain pine beetle infestation — were not supported by the evidence. After considering the expert evidence before him, he concluded that the proposed cutting sites were not economically viable and that they were not directed at preventing the spread of the mountain pine beetle. (para.126)

Part Two - Implications of Aboriginal Title on Third Parties

(1) Post-Calder - the 1977 Berger Mackenzie Valley Pipeline Inquiry

The relationship between native title and third parties arose very shortly after the *Calder* decision in 1973. Thomas Berger - legal counsel for the Nishga'a in *Calder* became a judge in the British Columbia Supreme Court and was then appointed in March 1974 by Canada's first Prime Minister Trudeau to lead a public inquiry into the proposed Mackenzie Valley Pipeline. This pipeline proposed to move natural gas more than 1,000 kilometres from Canada's far north down to markets through the Province of Alberta.[14]

At the time, Canada's north consisted of two federal territories, not provinces, Yukon Territory and the Northwest Territories - stretching west-east from Alaska to Hudson's Bay. The Berger Inquiry became Canada's first major environmental assessment - dealing in a very public way under national media attention - with all relevant technical and environmental issues, as well as social and Indigenous issues. Building on the dissent in *Calder*, the Berger Inquiry Report concluded in 1977 that there should be no pipeline across the Northern Yukon for environmental reasons and a postponement of any pipeline south in the Mackenzie Valley for 10 years to address Indigenous rights in the north.

The federal government was not pleased with this outcome, but accepted this result and sought to reach agreement with Indigenous peoples across Canada's north. 30 years later, after reaching agreements for the majority of northern Indigenous peoples in the area - including the Inuvialuit, Gwich'in, and Sahtu Dene and Metis - a new pipeline was proposed and subjected to federal environmental assessment review by a panel in 2004. In 2009, the Panel issued its environmental assessment report, supporting approval. To date, however, this pipeline has not ever proceeded to construction.

(2) Tsilhqot'in - Federal Environmental Assessments of Proposed Mines - 2010 & 2013

More recently, the *Tsilhqot'in* decision in 2014 was expressly related to provincial forestry licences, but was also related to proposed development of a major mine in traditional *Tsilhqot'in* Territory. Uniquely, the mine was subjected to two federal environmental assessment review panels. Both panels identified significant adverse environmental effects to the environment and upon Aboriginal title and rights.[15] In both cases, the federal government decided that these significant effects were not justified and refused approval of the proposed mine.

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[14] *Northern Frontier, Northern Homeland*: Report of the Mackenzie Valley Pipeline Inquiry, Vol.1, 1977, Appendices, "*The Inquiry and Participants*", p.203

[15] Report of the Federal Review Panel over the Prosperity Gold-Copper Mine Project (July 2010), Executive Summary page iv; and Report of the Federal Review Panel over the New Prosperity Gold-Copper Mine (October 2013), Executive Summary, page xi.

(3) Saugeen Litigation in Ontario over Reserve Lands related to Aboriginal Fishing

Today, native title is now triggering major litigation with a new opponent - municipal government. In *Chippewas of Saugeen First Nation v. Town of South Bruce Peninsula*,[16] Justice Vella of the Ontario Superior Court of Justice addressed a dispute over Native title related to an 1854 treaty ("Treaty 72") signed by the Saugeen with the British Crown. The crux of the case was the adequacy of an 1856 survey to implement Treaty 72. The federal Crown supported the claim by the Saugeen. On the other side, the provincial Crown supported the Town of South Bruce Peninsula and three landowners.

The native title in this case was the result of a treaty. The treaty assigned certain lands to the Saugeen as "Reserve" lands - a term used in Canadian federalism to mean lands reserved for the exclusive use of a specific First Nation. However, the survey failed to implement the treaty by surrendering more lands than the Saugeen has agreed upon. As such, the Court concluded that the beach and the nearshore fishing grounds were Saugeen Reserve land. The Court also found that governments became aware of the flawed survey, and though this awareness changed the actions of the federal government, the actions of Ontario were not consistent with the Honour of the Crown. Pursuing the "grand purpose" of section 35 of the *Constitution Act, 1982* to provide reconciliation between Canada's federal and provincial governments and Indigenous governments, the Court ordered that the lands associated with a disputed beach be returned to the Saugeen.

Many further questions arose in relation to third parties, including whether the Saugeen claim was barred, extinguished or defeated by common law or statutes. The Court did not accept any of these constraints. Nor did the Court accept claims by Ontario and the Town that there was a right of public access to the beach.

Conclusion

It is hard to do justice to the balance of complexity and rigour provided in the judgments issued by Canadian courts to grapple with Aboriginal title. The *Calder* case set a very high bar. Fifty years later, courts continue to apply the *Calder* precedent, but have now significantly advanced the legal meaning and implications of aboriginal title, led by the Supreme Court of Canada in the three cases discussed in this paper.

The impacts of Aboriginal title on third parties have engaged the attention of the courts from the outset, but it is clear today that courts are striving to face squarely the challenge of doing so justly. It has been and remains a daunting challenge.

[16] 2023 ONSC 2056