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Indigenous Law at the Supreme Court of Canada

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Indigenous Law at the Supreme Court of Canada

The Honorable Russell Brown *

First, let me thank Dean Kirgis for his kind invitation to visit the University of Montana, and to Professors Zellmer, Bryan and Mills, and their colleagues for all the work they have done to make this visit so very rewarding.

I actually feel very much at home in Montana. I developed something of a love affair with this state when I was 12 years old and my aunt and uncle took me to Glacier National Park.

And when my own children were younger and we still lived in Alberta, we camped most years in Montana, and not only in Glacier, but on the banks of the Yellowstone River, the Musselshell, and the Jefferson. We've listened to folk bands in Great Falls and watched Fourth of July fireworks at Billings Heights. My family made repeat visits in successive years to the Great Northern Carousel in Helena and to the Museum of the Rockies in Bozeman. My younger son and I have ridden horseback on trails cut as far north as Chief Mountain and as far south as Paradise Valley. And in my living room in Ottawa is a very large oil painting depicting the view looking south to Goat Haunt and Mt. Cleveland, in Glacier National Park.

I recount all this not to convey some sense of Montana provenance or street credibility, but rather to explain why I say—as odd as it might sound to hear this coming from someone in my position—that I feel more at home in Montana than I do almost anywhere else (including eastern Canada, where I have set up camp since my appointment to Ottawa). And, to explain why I say that I'm very happy to be back.

In late July 2015, during the same week that the Prime Minister asked me to accept an appointment to the Supreme Court, our then Chief Justice Beverley McLachlin (a previous visitor to this law school, I might add, who was raised not far from here, just inside Alberta) was asked at a public event to identify the type of case that *she* foresaw dominating our docket in the years ahead. Her answer was “section 35 claims,” which refers to the section of our 1982 constitutional document which recognizes and affirms the aboriginal rights of the Indigenous peoples of Canada.

* Justice, Supreme Court of Canada.

This answer was unsurprising, since the law on § 35 was already in significant flux, and since cases on § 35 had occupied much of the Court's docket over the previous 15 years. But it was also foreboding, since the pace of developments over the past 15 years had left many wondering "what more could there *be*?"

I thought then, however—and I still think now—that she was probably *right*. So, let me first review what had already come by then.

The history of colonial settlement and the exercise of colonial state power in Canada over Indigenous peoples is, broadly speaking, not dissimilar to yours in that it is one of European settlement, Indigenous displacement, treaties, reserves, denial of civil rights, and a gradual extending of civil rights. But there are particular features of that history in Canada that merit special mention.

First, treaties have come late to the game in certain parts of the country. Canada treated with its Inuit population only 25 years ago: in 1993, with the *Nunavut Land Claims Agreement*.¹ And only a very small part of British Columbia, our westernmost and third-largest province, has been formally ceded by treaties, and treaty negotiations over the rest of that province as well as much of the northern territories are ongoing today. As I will come to explain, this dearth of treaties in British Columbia has influenced significantly the development of our law under § 35.

Second, our federal structure—which was constitutionally enshrined in 1867 when the present Canadian state was formed by the confederation of three former British colonies in what is now eastern Canada—is designed in such a way that necessitates the involvement of *both* the federal *and* provincial governments in treaty negotiations.² And that is because our 1867 constitutional document confers jurisdiction on the *federal* government for "Indians, and Lands reserved for Indians," but also allows *provincial* governments to affect the interests of such "Indians" through the passage of provincial laws of general application on matters falling within their own jurisdictional responsibilities. Those provincial responsibilities include property and civil rights, which empowers provinces to regulate most types of industrial activities, and management of Crown (that is, public) lands, which empowers provinces to regulate activities such as mining and lumbering.

1. Nunavut Land Claims Agreement Act, S.C. 1993, c. 29.

2. *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11, formerly the *British North America Act*, (UK), 30 & 31 Victoria, c.

3.

It becomes readily apparent, then, that both the federal government and the provinces have to be at the treaty table. Just as a simple illustration of why that is so, consider the federal jurisdiction over “Lands reserved for Indians.” Those lands would be Crown lands—that is public lands, the management of which is a provincial responsibility. So clearly our Constitution contemplates that *both* orders of government have a role in the Canadian state’s relationship with Indigenous peoples.

So, I mentioned three distinct features of our history that are important to set the stage: first, the dearth of treaties in some areas; and second, the nature of our federal division of powers. Now the third is something that is much more recent. And, unfortunately, it also represents among the darkest stains on Canadian history.

Starting in the 1880s, Canada separated Indigenous children from their parents, sending them to residential schools, often far away from their families and ancestral lands. This was not done to educate them, but to break their link to their culture and identity. This was part of a deliberate and coherent policy to eliminate Indigenous peoples as distinct peoples and—against their will—to assimilate them, so far as was thought possible, into the Canadian mainstream. Funded by the federal government and run by the Roman Catholic and Protestant churches, the system expanded to 139 schools over the years, through which at least 150,000 Indigenous children were passed through. Although most of the schools had closed by the late 1970s—the one in the area in which I grew up closed in 1976—the last federally supported residential schools closed only in the late 1990s.³

For the children in these schools, life was lonely and alien. Buildings were poorly located, poorly built, poorly heated and poorly maintained. The staff was limited in numbers, inadequately trained and inadequately supervised. Discipline was harsh, daily life highly regimented, and sexual and physical abuse widespread. Indigenous languages and cultures were suppressed and denigrated. Educational goals and technical training often gave way to the drudgery of chores necessary to keep the schools self-sustaining.

And I can tell you—and this is my personal testimony, since I was raised in a community where children I knew went to these schools—that these schools destroyed families and family life. They impaired

3. See, generally, *Final Report of the Truth and Reconciliation Commission of Canada*, (2015), http://nctr.ca/assets/reports/Final%20Reports/Principles_English_Web.pdf.

community life. The echoes in these communities reverberate today, where both victims and abusers often continue to live side by side. Only now, by way of a Truth and Reconciliation Commission that reported to Parliament in 2015, are we beginning to understand the depth and breadth of damage done.

Inasmuch as residential schools were designed, and, indeed this was their prime mission, to transform Indigenous children into something less Indigenous or, preferably non-Indigenous, this aspect of our history has *also* formed an important backdrop to the understanding of the content of § 35. Although I haven't heard it put this way, I see the legacy of those schools playing out in this sense: they give a kind of normative force to § 35's guarantee of aboriginal rights. Because they show how things can, even in a relatively benign country like Canada, go terribly wrong when one doesn't consider Indigenous peoples as rights-holding peoples *as such*.

As I say "as such" intentionally. To have aboriginal rights, of course, means that one has rights *as an aboriginal person*. And when we lose track of that premise which underlies the constitutional granting of such rights—that these are *distinct* peoples, with *distinct* legal rights—we fall into the same trap into which our settler forbears also fell. That natural, but deeply unfortunate human trait, of wanting people to fit a particular mould that we find comfortable and familiar. And of course, there are many examples in recent history of that sort of hubris, and of its easy descent into inhumanity. And residential schools, which for this very reason I say an important backdrop to § 35, is a peculiarly *Canadian* example.

So, this was the historical background that led to our 1982 constitutional document, the *Constitution Act 1982*, and its enshrinement in § 35 of aboriginal and treaty rights. Now, how has my court applied § 35 so far?

I am going to canvass three ways. The first two, giving substance to § 35's affirmation of (1) aboriginal rights, and (2) development of a doctrine of aboriginal title, I'll deal with a little more briefly than the final way, which is the development of a duty to consult.

Now, a preliminary point. Who are these rights-holders? Who are Canada's Indigenous peoples, or as our Constitution calls them, "aboriginal" peoples? The text of § 35 itself answers that question. It specifies three groups: the "Indians" (as they were then called—now, typically, the term "First Nations" is used); the Métis; and the Inuit.

Just who is Métis is the subject of some controversy. It typically refers to the descendants of the fur traders and First Nations women in western Canada, and I just learned from Professor Johnstone last evening, in places like the South Fork of the Teton River. Although some other people of mixed European and Aboriginal heritage claim to be Métis as well. I expect that “who is Métis” may land in our lap someday, and I won’t say more on that today.

So: aboriginal rights; aboriginal title; and duty to consult. Now let me canvass each of these, and as I do so, I’ll identify some areas of—let us say—*tension*. Some have been resolved, some have been sort-of resolved, and some have been resolved *not at all*. And then I’ll discuss where I think we might be going with all this; in other words, *what lies ahead in our legal development?*

So, let me first turn to aboriginal rights. First question: how are “aboriginal *rights* different from aboriginal *title*?” In 1996, in a case called *Van der Peet*, my Court distinguished aboriginal *title* from aboriginal *rights*, the latter being aboriginal interests in land falling *short* of title.⁴ This is significant if you consider Indigenous communities that traversed large stretches of land over the course of the seasons or years—for example, to follow caribou or buffalo—or Indigenous communities that made use of the land for fishing or hunting purposes, but whose occupation was seen as falling short of supporting a claim of title. These aboriginal *rights* might include site-specific rights to engage in particular activities, practices, customs and traditions on lands that were integral for those purposes, but which also might be integral to *other* Indigenous communities that also historically made use of those lands.

Now all this may sound straight forward enough, depending on your standpoint, but let me point to one particular area of tension. Being where the way in which Indigenous people use the land has changed. Does the aboriginal right evolve without the use, so as to continue to protect it? While the Court said in two companion cases called *Marshall* and *Bernard* that these practices, customs and activities can evolve over time, they have not always been considered to evolve in ways asserted by the Indigenous communities themselves.⁵ For example: in *Lax Kw’alaams v. Canada*, in 2011, my Court held that cultural practices of exchanging one particular

4. R. v. Van der Peet, [1996] 2 S.C.R. 507.

5. R. v. Marshall; R. v. Bernard, [2005] 2 S.C.R. 220.

species of fish and products derived from it did not *today* ground a commercial fishing right in *all* species of fish.⁶

So, what are some examples of aboriginal rights that have been protected? In its 1990 decision in *Sparrow v. The Queen*, my Court held that the practice of fishing for food, having been conducted prior to contact with Europeans, was protected under § 35.⁷ But, in *Van der Peet*, the Court put a lid on that by ruling that there was no aboriginal right to market the fish caught for that purpose.

In two other companion cases in 2006 called *Sappier and Gray*, my Court recognized an aboriginal right to harvest logs for personal use: to build a house, for firewood and to make furniture.⁸ But again not for commercial use.

So, that's a thumbnail sketch of aboriginal rights. Let me turn to aboriginal title. And just to revisit the distinction: whereas an aboriginal *right* is a right to *use* land, aboriginal title confers a right to *the land itself*.

In a 1997 judgment called *Delgamuukw*, my Court developed a test for determining whether an Indigenous claimant holds title to land.⁹ The claimant must *show occupancy at the time when the Crown*—which, I'll say for present purposes is shorthand for *the government*, which is the earlier colonial British state, or the later Canadian state—*asserted sovereignty over that land*.

So, to reiterate: a claim of aboriginal *title* hangs on the claimant showing occupancy *at the time the settler state asserted itself*. Meaning, the land must have been occupied by the claimant's people prior to the assertion of Crown sovereignty. But also, the Court in *Delgamuukw* said that Indigenous occupation must have been *exclusive*. (More about that in just a moment). And, if *present occupation* is being relied upon as *proof of pre-sovereignty occupation*, there must be *continuity* between *present and pre-sovereignty* occupation.

Now, back to the requirement of “exclusive,” which—as you might guess—presents an area of some difficulty. Now, obviously, a measure of exclusivity is necessary because otherwise it would be possible for more than one Indigenous group to have title over the same piece of land. But, at the same time, my Court has cautioned that some flexibility

6. Lax Kw'alaams Indian Band v. Canada (Attorney General), [2011] 3 S.C.R. 535.

7. R. v. Sparrow, [1990] 1 S.C.R. 1075.

8. R. v. Sappier; R. v. Gray, [2006] 2 S.C.R. 686.

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

should be allowed. So, for example, in *Delgamuukw* it said that where other Indigenous groups were present on the land or frequented the land, joint title might exist based on *shared* exclusivity. This notion of joint title can obviously get complicated—and we haven't yet had to decide it.

Another area of tension is in that last requirement: not just that there be prior occupation, and that it be exclusive, but that the occupation be *continuous*. And indeed, there has been significant criticism of that last requirement, since it suggests the need for an unbroken chain of continuity between prior and present occupation in circumstances where any break in that chain might well have been the product of an unjust colonial displacement.

And so, my Court has since, in the 2015 case of *Tsilqot'in* (the only decision in which the Supreme Court has actually recognized aboriginal title), clarified that continuity of occupation is not necessary.¹⁰ It is, rather, merely an evidentiary basis by which present occupation *may* be used to prove prior occupation. But that does not mean that an aboriginal group cannot claim land that was occupied pre-sovereignty but has not been occupied since, even if that land is quite distant from presently occupied lands.

Now how far will that be taken? It remains to be seen. I think in most cases, realistically speaking, most claims will be using continuity between present and prior occupation to support title claims.

Another area of difficulty: what about Indigenous groups that were mobile—what are sometimes called “nomadic” or “semi-nomadic” peoples? How are *they* to prove that they occupied or possessed a territory and thus can claim aboriginal title to land?

And this is a particularly acute challenge for the Inuit, who, true enough, would confine themselves to a particular area, but a *very large* area, and would not remain at a single place within that area “continuously.”

In a case 22 years ago called *Adams*, then Chief Justice Lamer opined that such peoples *could not* claim for title, but rather could claim for the lesser aboriginal *right* to use specific tracts of land for specific purposes.¹¹ About ten years later, in *Bernard*, my Court took a second look at the issue and decided that yes, in fact, such peoples can claim title to lands, but the strength of their claim would depend on the evidence.¹²

10. *Tsilhqot'in Nation v. British Columbia*, [2014] 2 S.C.R. 256.

11. *R. v. Adams*, [1996] 3 S.C.R. 101.

12. *R. v. Bernard*, [2005] 2 S.C.R. 220.

Meaning, whether they could show sufficient possession or occupation depended on “all the circumstances,” but that those circumstances would include the nature of the land and the manner in which it was used. So, sufficient possession or occupation at the time of the assertion of Crown authority could be established in a variety of ways, ranging from construction of dwellings, cultivation and enclosure of fields, or regular use of definite tracts for hunting and fishing. What “possession” means, then, for these purposes, is a highly contextual, nuanced concept.

The author of the lead judgment in *Bernard* was then Chief Justice McLachlin. A concurrence was written by Justice LeBel—a significant concurrence, I think, from the standpoint of nomadic Indigenous groups.

Common law concepts of property must, he said, be modified in order to develop a possession/occupancy standard that incorporates aboriginal understanding of property rights and use, informed as it was by geography, climate, terrain and their way of life. Any other approach, he cautioned, effectively treats Canada as *unoccupied*, thereby perpetuating the old injustice of *terra nullius*—meaning that the land belonged to nobody and was open to the first European who claimed it.

Without stating where I would land in a future case, I will say that I find this concurrence quite compelling. Surely the pre-Crown sovereignty way of life must be accounted for, and the nature of the land itself and the way in which it was used must be accounted for. Particularly where, I might add, many of these claimants *still remain* on that land and, particularly in the case of the Inuit, *still use it* for much the same purposes and in broadly similar ways.

Now there’s another decision of importance on the challenge of nomadic or semi-nomadic peoples establishing prior occupation or possession. And it’s a case I’d mentioned earlier, the 2015 case of *Tsilhqot’in*, decided just a few months before my appointment to the Supreme Court.

In that case, the Supreme Court overturned a decision of a lower appeals court which held that aboriginal title could not be proven without evidence of exclusive, intensive possession of the definite tract of land claimed. In doing so, the Supreme Court accepted that a historically mobile (“semi-nomadic” the Court called it) Indigenous group could establish exclusive occupation. And, as a result, it granted the historic first declaration of aboriginal title over a definite tract of land.

Now, I should probably mention something about the kinds of evidence that Canadian courts hear in title claims.

The evidence in these cases is, in two words, complex and voluminous. It typically includes evidence of: pre-Crown sovereignty occupation by archaeologists, anthropologists, elders (for whom the rules of evidence are relaxed so that they can give evidence of their history has passed down through oral traditional stories and songs); reports on excavations; journals of early explorers; evidence of family histories and genealogical linkages that establish relationships between the land and its current occupants; and post-Crown sovereignty resettlements and relocations.

As to the volume, just as an example, the *Tsilhqot'in* trial took 339 trial days, spread over five years.

Now, that's (1) aboriginal *rights* and (2) aboriginal *title*. Which were, you will recall, two of the three ways in which the *inclusion* of § 35 in our Constitution of 1982—the section that enshrined aboriginal rights—have changed the legal landscape. Or, more accurately, two of the three ways in which § 35 allowed the *Supreme Court of Canada* to change the legal landscape.

Now, (3) the third way, and where much of the action is under § 35 because, in part, these cases take so long to try—the judicial recognition and development of something called *the duty to consult*.

The original rationale for the duty to consult was as follows. Remember, I'd mentioned that very little of the territory of the province of British Columbia—our third largest province—was ceded by treaty. And so, treaty negotiations are happening *now*, and have been for nearly 30 years. And they are taking a long time. The reasons for this are complex but led to the obvious problem that in the meantime, *the world doesn't stop moving*. And, in particular, lumbering, mining, oil and gas exploration, and other resource extraction and development on lands being claimed under the treaty process does not stop happening. And, even more particularly, applications for provincial Crown licences to log, mine, build a road, develop a ski resort, whatever—all keep happening.

So, what to do where claims to lands and territories are being pursued through treaty negotiations, while the integrity of that land or those territories, or their value (howsoever one defines that value) is being depleted via resource extraction or development? In a landmark case called *Haida Nation*, the Supreme Court gave the answer.¹³

13. *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511.

Just offshore from the north coast of British Columbia is located an archipelago of islands called Haida Gwaii—formerly the Queen Charlotte Islands—the traditional homeland of the Haida people, who have been in treaty negotiations since the early 1990s, pursuant to a claim made over 120 years ago. The islands of Haida Gwaii are heavily forested and have been logged since before the First World War, although substantial old-growth forests still stand.

So, in the 1990s, the British Columbia government approved transfer of an old timber harvesting license to Weyerhaeuser, a large forest company. And the Haida challenged this transfer in the courts, invoking § 35. And in finding for the Haida, the Supreme Court said this: that the purpose of § 35 is to facilitate “reconciliation” between the assertion of Crown sovereignty by the British then Canadian state over land, and the prior occupation of that land by Indigenous peoples. Achieving this reconciliation is a constitutional imperative, which flows from something the Court referred to as “the Honour of the Crown.” Meaning, the Crown has a duty to act *honourably* in all its dealings with Indigenous peoples. And that duty to act honourably means that the Crown cannot ride roughshod over Indigenous peoples’ interests where claims affecting those interests are being seriously pursued in treaty negotiations. This means the Crown must consult and reasonably accommodate those interests pending resolution of the claim.

The point is that, while negotiations are being held, the Crown cannot make any decision allowing exploitation of claimed lands without consultation with the affected Indigenous peoples. This does not mean handing the Indigenous peoples a *veto*; while the goal may be to obtain consent, that is not the requirement. Rather, consultation is the requirement.

Now, to what extent does the Crown have to consult? How close to consent must it get? The answer is necessarily abstract, in that the extent of consultation will be influenced by the strength of the claim, and the extent to which the proposed activity would diminish what is being claimed. In the face of a strong claim and proposed development that would ravage the land, the consultation must be, as we say, “deep.” In the face of a weak claim with minimal impact on the land, the consultation need not be so extensive. But true consultation there must be.

So, a duty to consult exists during that long holding period where we are in treaty negotiations. But what about once we have a treaty? Does

the duty to consult evaporate, or does it continue to bind the Crown in respect of its treaty partner?

In 2005, in a case called *Mikasew Cree*, the Court extended this consulting requirement beyond the negotiation-towards-a-treaty stage, to a case where an actual treaty right was at stake, but where there was uncertainty about the scope of that treaty right.¹⁴ So, while that uncertainty is being sorted out in the courts, the Crown must consult on any matter that might undermine that potential right—usually where a company is seeking to extract resources from the disputed land.

And then, in 2014, in a case called *Grassy Narrows*, the Court went further, by stating that the duty to consult *still applies* even *after* the negotiation of a treaty, and even where *everyone clearly understands* the scope of the treaty right.¹⁵ So, for example, if the Crown is exercising its powers which were reserved to the Crown under a treaty to allow settlement, mining, or logging on treaty lands, the Crown must *still* consult with its Indigenous treaty partners.

These pronouncements have opened up a whole new doctrine geared to protecting aboriginal rights under § 35. And, as you might imagine, it has required governments to develop new policy frameworks at the licence application and issuance stage in order to implement this doctrine.

The Supreme Court has revisited, and mostly strengthened, the doctrine on several occasions since those early cases. And I'll turn now to briefly outline the most important handful of those cases, beginning with its 2010 decision in *Rio Tinto v. Carrier Sekani*.¹⁶

In *Rio Tinto v. Carrier Sekani*, the Crown approved excess sales of hydro-electric power by Rio Tinto, sourced from a dam located not far from where I was raised, as it happens, on the traditional lands of the member First Nations of the Carrier Sekani Tribal Council. Much of the damage to their lands had already occurred in the 1950s, with the construction of the dam which diverted the Nechako River and permanently displaced several aboriginal communities.

14. *Mikisew Cree First Nation v. Canada* (Minister of Canadian Heritage), [2005] 3 S.C.R. 388.

15. *Grassy Narrows First Nation v. Ontario* (Natural Resources), [2014] 2 S.C.R. 447.

16. *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, [2010] 2 S.C.R. 650.

Now, obviously, at the time Indigenous people were not consulted (since this was 30 years before § 35 even existed, and 50 years before the duty to consult was recognized). But in 2010, they argued that this *new* energy purchase agreement should be subject to consultation since it meant *further* diversion of the water of the Nechako River, which formed part of its claim area. For its part, the Crown argued that because most of the damage was already done, it owed no duty to consult in approving Rio Tinto's excess sales. The Supreme Court found for the Carrier Sekani and said *any* Crown conduct which might adversely impact *any* aboriginal claim or right must be the subject of consultation. While historical adverse effects cannot be addressed through consultation, the presence of an *additional* adverse effects suffices.

The other major issue addressed in *Rio Tinto v. Carrier Sekani* concerned the role public boards and administrative tribunals play in relation to the duty to consult, where the Crown has by statute delegated its decision-making powers to them. So, for example, if a provincial Crown has created by statute a board that decides on all forestry licence approvals, or all mining licence approvals, can Crown consultation occur through that board? What the Court said is that this depends upon the statutory mandate conferred upon the board or tribunal. If the mandate includes consultation, the board or tribunal may consult. If not, consultation must still occur—the Crown has that duty—even if that cannot occur within the procedures of the board or tribunal. Meaning, the responsible Cabinet Minister—the Minister of Forests, or the Minister of Mines, or the Minister of Indigenous Affairs—must ensure that consultation occurs, by whatever means the Crown has at its disposal.

So, two key issues were addressed and mostly resolved in *Rio Tinto*: (1) what do we do with historical breaches? (The answer: no obligation to consult, on past breaches, although proposed exacerbations are subject to the duty to consult); and (2) what about decisions made by administrative tribunals? (The answer: if their mandate allows for consultation, it may occur through its processes). And this latter point was affirmed in the other significant case—actually, two companion cases—decided in 2017, being the cases of *Clyde River*¹⁷ and *Chippewas of the Thames*,¹⁸ both of which dealt with the National Energy Board, which is a

17. *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, [2017] 1 S.C.R. 1069.

18. *Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.*, [2017] 1 S.C.R. 1099.

federal administrative tribunal and regulatory agency, and the final decision-maker for issuing authorizations for activities such as exploration and drilling for the production of oil and gas in certain designated areas. And the issue was whether the Crown's duty to consult could be met by that agency's own investigative and hearing processes, or whether the duty could only be met by a Minister of the Crown acting personally.

And, in both cases, it was affirmed—consistent with *Rio Tinto v. Carrier Sekani*—that it is open to legislatures to empower regulatory bodies to play a role in fulfilling the Crown's duty to consult. While the Crown always holds ultimate responsibility for ensuring consultation is adequate, it may rely on processes of a regulatory agency to fulfill its duty to consult. In these cases, the Crown's reliance on the National Energy Board was legally sound since its statutory mandate allowed for adequate consultation.

So, this is where the jurisprudence of my Court has come to: a significant but still developing body of law on (1) aboriginal rights; (2) aboriginal title; and a perhaps maturing body of law on (3) the duty to consult.

Let me close with this point. Until my appointment to the bench, I had spent very little of the previous 25 years fretting about aboriginal law. My area of practice was different. My academic interests were different. So, I approach this either with fresh eyes, or as a dilettante, depending on your perspective.

But it seems to me, whether speaking as someone approaching the field afresh or as an untutored neophyte, that we in Canada are entering a period in which our legal culture and constitutional law may be transformed. Whether this occurs and how this occurs depends on our response to the great challenge of our constitutional order as it relates to Indigenous peoples. That challenge, as I see it, is how to achieve change outside the court process. That is, how to achieve change through negotiating provisional outcomes, rather than adjudicating final outcomes, where agreement on those final outcomes is lacking.

Resolving issues in this way seems to be to be more faithful to the predicament in which we find ourselves in Canada. My country is comprised of overlapping societies, not sealed off from each other in watertight compartments. For most of us, Indigenous and non-Indigenous, our home is *in Canada*, and not anywhere else. An out-of-court process by which we negotiate the rules of our co-existence seems to me to be a

better response to our predicament. We are still, in this sense, in an age of encounter.

Thank you.