No Treaty Signed No Battle Fought

The Foundations of Aboriginal Title in the Yukon

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In 1993, an historic step was taken toward resolving comprehensive aboriginal land claims in the Yukon Territory. The signing of the Umbrella Final Agreement ("UFA") between the Council For Yukon Indians, and the governments of Canada and the Yukon, ended twenty years of negotiations and generations of indifference and ignorance toward the claims of Yukon native peoples.[1] Although the creation of the UFA process is a significant step toward the recognition of many aboriginal rights, it is still important to examine the underlying legal basis for the Yukon bands' claims. Should the Crown engage in activities that adversely affect a band's use of land outside the scope of an existing UFA settlement agreement, an examination of the bands' legal rights would prove useful for both sides.

Canadian law with respect to aboriginal title is still developing. There are no cases that authoritatively address the issue of aboriginal title in the Yukon Territory. This paper explores the historical foundations of aboriginal title in the Yukon. The aboriginal peoples of the Yukon might possess unextinguished title to lands based upon historical and constitutional recognition of their rights to the land in the North-Western Territory, and Rupert's Land between 1867 and 1870.[2] Furthermore, an examination of American precedents[3] suggests that a right of compensation may exist in the event that the Crown negatively affects the aboriginal peoples' ability to exercise their traditional rights upon unceded Crown land.

The Doctrine of Aboriginal Title

Aboriginal title at common law is an amorphous doctrine, taking its roots in international law, concepts of English property law, and colonial law and practice.[4] Aboriginal title in Canada is derived from the simple fact that native peoples possessed North American lands when settlers arrived from Europe.[5] As one academic observer described it succinctly:

> The Crown's acquisition of a new colony… may have given it a feudal title blending imperium (the right of government) and dominium (paramount ownership of all land), but the latter was considered "burdened" or qualified at law by the natives' traditional rights in their land. The aboriginal title was proprietary in character and capable of extinguishment only by the Crown through valid legislative process or voluntary agreement with the native owners.[6]

The landmark case *Calder* v *A.G.B.C.*[7] affirmed the existence of aboriginal title at common law. In that case the court split on whether the title of the Nisga'a people was lawfully extinguished by acts of government.[8] However, unextinguished aboriginal title has been found to exist in parts of the Northwest Territories at common law.[9]

Although it is possible that aboriginal title in the Yukon Territory exists at

1 The Umbrella Final Agreement, was signed in Whitehorse on May 29, 1993. It is published under the authority of the Minister of Indian Affairs and Northern Development, by Supply and Services Canada, 1993. The UFA in itself did not create or affect any legal rights. Instead, it provided a framework for the terms and conditions Yukon bands could incorporate into subsequent "Settlement Agreements" with the governments. Section 2.2.1 provides that Settlement Agreements shall be land claims agreements within the meaning of section 35 of the Constitution Act, 1982, R.S.C. 1985, App. II, No. 44. Four final agreements were signed in 1993 by: The Champagne and Aishihik, the First Nation of Na-Cho-Ny'A'K-Dun, the Teslin Tlingit Council, and the Vuntut Gwichin.

2 This is not to imply that aboriginal title depends upon state recognition in all instances, merely that such recognition is significant evidence of its existence.

3 *United States* v. *Alcea Band of Tillamooks et al.*, 341 U.S. 48, (1951) and *Tee-Hit-Ton Indians* v. *United States*, 348 U.S. 272 (1955).

4 The decision of the High Court of Australia in *Mabo* v. *Queensland* (1992), 107 Australian Law Reports 1 (Australian High Court) provides a comprehensive survey of the theoretical development of the doctrine of aboriginal title. For sources of Canadian law of aboriginal title, see J. Woodward, *Native Law*, (1989), at 197-201.

common law, it is still necessary to explore its historical foundations for two reasons. Firstly, the case *Tee-Hit-Ton Indians* v. *United States* stands for the proposition that compensation for lands taken without the consent of the Indians is not possible without a statutory direction to pay.[10] Secondly, an examination of the Yukon's legislative history reveals a unique framework that may constitutionally protect the territory's aboriginal title from extinguishment.

Sources of Aboriginal Title in the Yukon Territory

The Yukon Territory Act created the Yukon Territory from a portion of the Northwest Territories in 1898.[11] By necessary implication, any laws or government action relating to aboriginal title in the Northwest Territories prior to 1898, in turn applied to aboriginal title in the Yukon Territory.[12] This is a significant point, because the terms and conditions of the admission of Rupert's Land and the North-Western Territory into the Dominion of Canada make express reference to settling Indian claims to the land.[13]

The starting point is section 146 of the Constitution Act, 1867.[14] This section provided for the admission of Rupert's Land and the North-Western Territory into Canada on such terms and conditions as might be expressed in an Address from the Houses of Parliament of Canada and approved by the Queen. In addition, the Rupert's Land Act, 1868[15] passed by the British Parliament enabled the Crown to accept a surrender of the lands of the Hudson's Bay Company[16] and to admit Rupert's Land into the Dominion of Canada by order-in-council.[17]

The subsequent terms and conditions for the admission of Rupert's Land contained in the Address of 1867 are included in the following passage:

> And furthermore, that, upon the transference of the territories in question to the Canadian Government, the claims of the Indian tribes to compensation for lands required for purposes of settlement will be considered and settled in conformity with the equitable principles which have uniformly governed the British Crown in its dealings with the aborigines.[18]

With respect to the admission of the North-Western Territory, the Address of 1869 stipulated that the same terms and conditions of the 1867 Address were to apply.[19] The resulting Rupert's Land and North-Western Territory Order, 1870[20] formally admitted the two territories into the Dominion of Canada on June 23, 1870. Term 14 of the Order is particularly important. It stated:

> Any claims of Indians to compensation for lands required for purposes of settlement shall be disposed of by the Canadian Government in communication with the Imperial Government; …[21]

It is apparent from the terms and conditions and the Order itself, that the existence of an aboriginal title in what would become the Yukon Territory received strong legislative recognition between 1867 and 1870.

There are two implications that may be drawn from the terms and conditions of the admission of the territories. Firstly, it is clear that the Indian interest in their lands was to be recognized by the Crown. Secondly, the use of the term "equitable principles" seems to impose an obligation on the Canadian government

5 Jack Woodward, *Native Law*, see note 4 at 200.

6 Dr. P.G. McHugh, "Legal Status of Maori Fishing Rights in Tidal Waters" [1984] 14 Victoria University of Wellington Law Review 247 at 247, note 1. The apparent duality of interests in land, and the sole right of the Crown to extinguish Indian title is enshrined in the historic decisions of the Marshall Supreme Court in nineteenth century United States in *Johnson* v. *McIntosh*, 21 U.S. 543 at 573-574 (1823). See also *Worcester* v. *State of Georgia*, 31 U.S. 515 (1832). These principles were incorporated into Canadian law in *St. Catharines Milling and Lumber Co* v. *The Queen* (1887), 13 Supreme Court Reports 577, affirmed (1888), 14 Appeal Cases 46 (Privy Council) [Ontario].

7 [1973] Supreme Court Reports 313.

8 The case was dismissed on the technicality that a fiat had not been granted to the appellants. The existence of aboriginal title at common law in Canada has since been affirmed in *Guerin* v. *R.*, [1984] 2 Supreme Court Reports 335 at 376-377. Most of the aboriginal title throughout Canada was voluntarily extinguished with the signing of the numbered treaties. A portion of Treaty 8 encompasses British Columbia, but much of the province is untreated land and therefore is the subject of massive land claims. In the Yukon, the controversial Treaty 11 touches a corner of the territory. See K.Coates , ed. *Aboriginal Land Claims in Canada* (Toronto: Copp Clark Pitman,1992) at 8 and 172-174. But for the agreements signed in 1993, the remainder of the Yukon Territory is potentially open to a claim asserting unextinguished aboriginal title.

9 *Baker Lake* v. *Min. of Indian Affairs & Nor. Dev.*, [1980] 5 Western Weekly Reports 193 at 234, additional reasons [1981] 1 Federal Court 266 (Trial Division).

10 348 U.S. 272 at 279 (1955). Supreme Court Justice Judson quoted the *Tee-Hit-Ton* rule favorably in *Calder* at 343-344.

11 *Yukon Territory Act*, R.S.C. 1985, App. II, No, 19.

12 P.A. Cumming and N.H. Mickenberg, *Native Rights in Canada* (Toronto: Indian - Eskimo Assoc. of Canada in assoc. with General Pub. Co., 1972) at 197-198.

13 For an extensive analysis of these terms and conditions relating to native rights, see K. McNeil *Native Claims in Rupert's Land and the North-Western Territory:*

that the resulting settlements be fair, just and reasonable.[22]

In addition, the reference to the principles that governed the British Crown's prior dealings with natives raises a question of interpretation. Although the Yukon and the Northwest Territories are likely outside the geographical scope of the Royal Proclamation of 1763,[23] the Proclamation nonetheless serves as the earliest definitive statement of British policy regarding its dealings with aboriginal peoples.[24] The essence of the Proclamation is that the Indians' proprietary interest was to be respected.[25] It can be inferred that the same principles were to govern the administration of Canada's two new territories.

The Issue of Extinguishment

The question of extinguishment is perhaps the most crucial issue with respect to evaluating the scope of the rights flowing from aboriginal title in the Yukon Territory. Generally, the sovereign must possess a clear and plain intention to extinguish aboriginal rights.[26] More specifically, the British Columbia Court of Appeal in *Delgamuukw* v. *British Columbia*[27] held that the intent to extinguish aboriginal rights may be inferred from the language of the statute:

> However, the legislative intention to do so will be implied only if the interpretation of the statute permits no other result. Sparrow has made it clear that if the intention is only to limit the exercise of the right it should not be inferred that the right has been extinguished.[28]

In summary, aboriginal title may be extinguished via express language, or where the intention to extinguish is manifested by unavoidable implication.[29]

Territorial legislation exists that may implicitly authorize the extinction of Yukon aboriginal title. Section 4 of the Territorial Lands Act[30] allows the Governor-in-Council or the Minister to authorize the sale, lease, or other disposition of territorial lands. One possible interpretation is that by conferring all powers of disposition on itself, the government has clearly implied that the native title in the land has been extinguished. However, such a reading would be inconsistent with the terms and conditions expressed in the 1870 Order. Furthermore, the *Delgamuukw* case suggests that extinguishment will depend upon an evaluation of each grant under the Act on a case-by-case basis.[31]

The nature of the legislative recognition that aboriginal title in the Yukon received in 1870 also raises a unique constitutional issue.[32] Section 146 of the Constitution Act, 1867 stipulated that the order-in-council admitting Rupert's Land and the North-Western Territory shall have the effect as if they were enacted by the Parliament of Great Britain.[33] Prior to 1931, Imperial Enactments could not be amended or repealed by the Canadian government. The Statute of Westminister, 1931[34] for the most part removed this restriction on Parliament's legislative authority. However, section 7 of that statute reads:

> 7.(1) Nothing in this Act shall be deemed to apply to the repeal, amendment or alteration of the [Constitution Acts], 1867 to 1930, or any order, rule or regulation made thereunder.[35]

Canada's Constitutional Obligations. (Saskatoon: Native Law Centre, Univ. of Saskatchewan,1982) at 6-26. Also see Cumming and Mickenberg, *Native Rights*, see note 12 at 147-150.

14 R.S.C. 1985, App.II, No. 5.

15 R.S.C. 1985, App.II, No. 6.

16 See above, section 3.

17 See note 15, section 5.

18 *Rupert's Land Order* (Schedule A), R.S.C. 1985, App.II, No.9, at 8.

19 see above (Schedule B), at 14-15.

20 See note 18.

21 See above at 6-7.

22 McNeil, *Native Claims*, see note 13 at 21.

23 R.S.C. 1985, App. II, No. 1.

24 With respect to the issue of the geographical scope of the Royal Proclamation, Supreme Court Justice Hall in Calder at 395 suggested that the Proclamation was a law that "followed the flag". However, in *Baker Lake*, see note 9 at 224 it was held that the Proclamation did not include Rupert's Land.

25 McNeil, *Native Claims*, see note 13 at 22.

26 *R* v. *Sparrow*, [1990] 1 Supreme Court Reports 1075 at 1099.

27 [1993] 5 Western Weekly Reports 97. Leave to appeal to Supreme Court of Canada granted.

28 See above at 157.

29 See note 27 at 156.

30 R.S.C. 1985, c. T-7.

31 [1993] 5 Western Weekly Reports 97 at 157-158. For example, a conveyance of title might unavoidably be considered extinguishment, whereas granting a resource license might be considered a mere impairment of rights, as opposed to extinguishment. At 163-164 Mr. Justice Macfarlane further held that the statutory land settlement scheme of British Columbia's Colonial Instruments 1858-1870 did not preclude the possibility of future treaties or co-existance of Indian and Crown interests.

32 McNeil, *Native Claims*, see note 13 raises this argument at 27-31.

33 R.S.C. 1985, App. II, No. 5.

34 R.S.C. 1985, App. II, No. 27.

35 See above Section 7(1) was repealed insofar as it applies to Canada by section 53(1) of the Constitution Act, 1982. The implications with respect to aboriginal title in the Yukon though are unchanged, as s. 35 of that act recognizes and affirms all existing aboriginal rights.

To the extent that these terms and conditions recognize and protect the Indian interest in territorial lands, it appears that the aboriginal title in the Yukon has a unique constitutional protection from extinguishment.

Because the Rupert's Land Order, 1870 had the effect of being an Imperial enactment, it appears that its terms and conditions were unalterable by Canadian Parliament. Therefore, to the extent that these terms and conditions recognize and protect the Indian interest in territorial lands, it appears that the aboriginal title in the Yukon Territory has a unique constitutional protection from extinguishment.

There are two cases relating to the constitutional status of the terms and conditions of the Rupert's Land Order, 1870. In *Re Paulette et al. and Registrar of Titles (No. 2)*,[36] Mr. Justice Morrow wrote:

> It would seem to me from the above that the assurances made by the Canadian Government to pay compensation and the recognition of Indian claims in respect thereto did by virtue of s. 146 above, become part of the Canadian Constitution and could not be removed or altered except by Imperial statute. To the extent, therefore, that the above assurances represent a recognition of Indian title or aboriginal rights, it may be that the Indians living within that part of Canada covered by the proposed caveat may have a constitutional guarantee that no other Canadian Indians have.[37]

An authority to the contrary appears in *Hamlet of Baker Lake* v. *Minister of Indian Affairs and Northern Development*.[38] Mr. Justice Mahoney recognized that aboriginal title subsisted when Rupert's Land became part of Canada, but declared that the Order did not create rights or obligations, nor did it limit the legislative competence of Parliament.[39] He further held that the Order "merely transferred existing obligations from the [Hudson's Bay] Company to Canada."[40] Although the aboriginal title in the Northwest Territories was not extinguished, competent legislation that diminished the rights comprised in aboriginal title prevailed.[41] Compensation was not sought in the action, and Mahoney did not pass judgment on the issue. Canadian law is unsettled with respect to whether the unique constitutional protection afforded to the aboriginal peoples of the Yukon as espoused in *Re Paulette*, would give rise to compensation for legislation that diminished their rights.

The Issue of Compensation

There is no case law in Canada concerning a claim for compensation for aboriginal title extinguished by legislation. The issue is discussed in the *Calder* decision, citing a wealth of American authorities on the subject.[42] It is a principle of American constitutional law that aboriginal title claims for compensation based upon Fifth Amendment property rights must be founded upon a statutory direction to pay.[43]

In *Calder*, Justice Judson examined the Terms of Union under which British Columbia entered Confederation with the Dominion of Canada. Article 13, the legislative equivalent of the Rupert's Land Order, 1870 reads in part:

> The charge of the Indians, and the trusteeship and management of the lands reserved for their use and benefit, shall be assumed by the Dominion Government, and a policy as liberal as that hitherto pursued by the British Columbia Government shall be continued by the Dominion Government after the Union.[44]

Applying the American rule in *Tee-Hit-Ton Indians* v. *United States*, Judson held that

36 (1973), 42 Dominion Law Reports (3d) 8 (Northwest Territories Supreme Court) [hereinafter *Re Paulette*].

37 See above at 29. Mr. Justice Morrow's decision was reversed by the Northwest Territories Court of Appeal on other grounds. See (1975), 63 Dominion Law Reports (3d) 1, and (1976), 72 Dominion Law Reports (3d) 161 (Supreme Court of Canada).

38 See note 9.

39 See above at 234.

40 See note 9.

41 see above at 543. The legislation in this case was the *Canada Mining Regulations*, C.R.C. 1978, Vol. XVII, c. 1516. There is some question as to whether legislation passed by the territorial government can unilaterally diminish or extinguish aboriginal rights. In R.G. Pugh, "Are Northern Lands Reserved For the Indians" [1982] 60 Canadian Bar Review 36, the author at 77-79 concludes that if aboriginal lands at common law are lands reserved for the Indians in the context of s. 91(24) of the *Constitution Act, 1867*, territorial governments do not have the jurisdiction to legislate in relation to these traditional lands.

42 See note 7 at 340-345. Hall J. simply held at 416 that the Nisga'a had a right to compensation if and when extinguishment was attempted or should take place. For a more recent analysis, see *Mabo* v. *Queensland* (1992), 107 Australian Law Reports 1 (Australian High Court).

because of the absence of a statutory direction to pay, the Nisga'a had no right of compensation.[45]

The situation of the aboriginal peoples of the Yukon territory can be distinguished from those of British Columbia. The terms and conditions of the Rupert's Land Order, 1870 do contain a clear statutory direction to pay that is enshrined in the Constitution via section 146. Recall that term 14 reads:

> Any claims of Indians to compensation for lands required for purposes of settlement shall be disposed of by the Canadian Government in communication with the Imperial Government;…

Thus it appears that the native peoples of the Yukon have a right to compensation that may not be available to the majority of aboriginal peoples in Canada.[46]

There remains an issue of interpretation with respect to the phrase, "purposes of settlement." The obvious inference is that the lands would actually have to be taken for inhabitation by incoming residents of the territory. One possibility is that Parliament intended that lands not required for the purpose of settlement would be left in the possession of the native peoples. Nonetheless, it seems likely that the uncompensated expropriation of lands for purposes other than settlement is inconsistent with the spirit of the 1867 Address calling for the use of "equitable principles that uniformly governed the British Crown in its dealings with the aborigines."[47]

It appears that the native peoples of the Yukon have a right to compensation that may not be available to the majority of aboriginal peoples in Canada.

Conclusion

Exploring the legal basis of a claim based on aboriginal title in the Yukon Territory reveals two important points. First, it is unclear whether aboriginal title to the area has been extinguished. Moreover, it appears that the recognition of the Indian interest in the land contained in the terms and conditions of the Rupert's Land Order, 1870 could potentially constitute a legally enforceable obligation to compensate the Yukon native peoples for lands taken for the purposes of settlement.

Although the current climate of political goodwill is favorable towards the resolution of long-standing claims in the Yukon, the historical indifference on the part of Canadian governments should not be forgotten. As Whitehorse Band Chief, Elijah Smith stated in 1968:

> We, the Indians of the Yukon, object to the treatment of being treated like squatters in our own country. We accepted the white man in this country, fed him, looked after him when he was sick, showed him the way of the North, helped him to find the gold; helped him build and respect him in his own rights. For this we have received very little in return. We feel the people of the North owe us a great deal and we would like the Government of Canada to see that we get a fair settlement for the use of the land. There was no treaty signed in this Country and they tell me the land still belongs to the Indians. There were no battles fought between the white and the Indians for this land.[48]

Indeed, should similar concerns resurface, the aboriginal peoples of the Yukon Territory would not be without legal redress. The legal basis of Yukon land claims is an important source of rights that should not be underestimated or forgotten.

43 *United States* v. *Alcea Band of Tillamooks et al.*, and *Tee-Hit-Ton Indians* v. *United States*, see note 3. As a matter of clarification, the Fifth Amendment does not protect aboriginal title. The compensation flows from the statutory direction to pay. In the absence of such direction, the U.S. government is not legally obliged to pay compensation for a claim based upon original Indian title.

44 R.S.C. 1985, App. II, No. 10.

45 *Calder*, at 344. For a critique of Judson's reasoning, see G. Lester, *Inuit Territorial Rights In The Canadian Northwest Territories* (Ottawa: Tungavik Federation of Nunavut, 1984), at 33-37.

46 This notion is reconcilable with the *Baker Lake* decision, as it appears that Term 14 merely clarifies who bears the legally enforceable obligation of compensating the Indians for lands taken, as opposed to creating a new right.

47 See note 18.

48 Department of Indian Affairs and Northern Development, *Report of the Indian Act Consultation Meeting*, (Whitehorse, : Supply and Services Canada, October 21-23, 1968), at p. 48. As cited in Cumming and Mickenberg, see note 12 at 197.