Let Right Be Done
The Law and Society Series explores law as a socially embedded phenomenon. It is premised on the understanding that the conventional division of law from society creates false dichotomies in thinking, scholarship, educational practice, and social life. Books in the series treat law and society as mutually constitutive and seek to bridge scholarship emerging from interdisciplinary engagement of law with disciplines such as politics, social theory, history, political economy, and gender studies.
Let Right Be Done: Aboriginal Title, the Calder Case, and the Future of Indigenous Rights
This book is dedicated to the generations of Nisga’a people and their supporters who struggled to have Nisga’a title recognized and protected by the Canadian constitution and, in particular, to the plaintiffs in the landmark *Calder et al. v. Attorney-General of British Columbia* decision handed down by the Supreme Court of Canada on 31 January 1973.

As listed in the statement of claim, they were:

Frank Calder, James Gosnell, Nelson Azak, William McKay, Anthony Robinson, Robert Stevens, Hubert Doolan, and Henry McKay, suing on their own behalf and on behalf of all other members of the Nishga Tribal Council;

Roderick Robinson, Cecil Mercer, Jacob Davis, Richard Guno, Chris Clayton, Peter Clayton, and Cecil Morven, suing on their own behalf and on behalf of all other members of the Gitlakdamix Indian Band;

Chester Moore, Henry Azak, and Percy Azak, suing on their own behalf and on behalf of all other members of the Canyon City Indian Band;

W.C. McKay, Henry McKay, Louis McKay, Kelly Stevens, Alvin McKay, and Allan Moore, suing on their own behalf and on behalf of all other members of the Greenville Indian Band; and

Solomon Doolan, Moses Aksidan, Nathan Barton, Nelson Clayton, William Lincoln, Graham Moore, Anthony Robinson, and Hubert Stevens, suing on their own behalf and on behalf of all other members of the Kincolith Indian Band.
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Let Right Be Done
Map of the Nass and Skeena regions of coastal British Columbia, showing the Nisga’a treaty settlement lands. Cartographer: Eric Leinberger
1
The Calder Decision, Aboriginal Title, Treaties, and the Nisga’a
Christina Godlewska and Jeremy Webber

The Nisga’a Go to Ottawa
There is a photograph, taken in November 1971, of fourteen men and two women in the entrance hall of the Supreme Court of Canada. They are plaintiffs and supporters in the court case that came to be known as Calder et al. v. Attorney-General of British Columbia¹ – chiefs of the Nisga’a nation, members of the Nishga Tribal Council, who had come to Ottawa to secure recognition of their title to their ancestral lands.² The names of the plaintiffs can be found on the dedication page of this book. Their lands are located in the Nass Valley of what is now northern British Columbia, on the neighbouring coast, and in the adjoining valleys (see Map).

The event recorded in the photograph represented one of several defining moments in a struggle that had lasted ninety years – ever since the Nisga’a had protested against the first incursions of settlers and surveyors onto Nisga’a lands (see Appendix A).³ For the Nisga’a, Calder was not about a land “claim.” It was another step in the continued assertion of their right to the lands they had never ceased to occupy and defend. In an interview published in this book, Frank Calder (president of the Nishga Tribal Council at the time of Calder and lead plaintiff in the action that bears his name) recounts the story of his people’s resistance to the first surveying party in the Nass Valley in the 1880s. From the early years of the twentieth century until about 1927, the Nisga’a campaigned vigorously, in cooperation with other BC First Nations, for the recognition of their rights under Canadian law. Their efforts were frustrated at that time by the refusal of three levels of government – provincial, federal, and imperial – to refer the matter to the courts. In 1927, the Canadian Parliament prohibited the raising of funds for the making of land claims, forcing the Nisga’a’s struggle into a twenty-five-year hiatus.

Hamar Foster gives a stimulating account of this early campaign in his contribution to this book, describing the personalities, recounting the initiatives, and explaining the legal and political obstacles that ultimately
frustrated the effort – obstacles that also had an impact on the *Calder* decision itself, as we will see. There were other campaigns for the recognition of Aboriginal title on the Pacific coast. The leaders of other BC First Nations worked to defend their lands, sometimes on their own, sometimes in collaboration. Some of the collaborations are discussed in Foster’s account. Paul Tennant and Robert Galois have also published extensively on the history of indigenous advocacy in British Columbia. And Alaskan Aboriginal leaders, just over the border from the Nass Valley, pursued similar initiatives. Stephen Haycox describes those fascinating parallel developments in his contribution to this book.

Despite the frustration of their early campaign, the Nisga’a launched a renewed effort for the legal recognition of their rights in the 1950s, once the prohibition on fundraising had been repealed. It was this second campaign that ultimately led to the event memorialized in the photograph: the hearing of what was to be Canada’s most important case on the law of Aboriginal title, which established once and for all that Aboriginal title was a right recognized by contemporary Canadian law. The Supreme Court of Canada delivered this momentous decision on 31 January 1973. While the
The decision in *Calder* had its antecedents. There was an extensive pattern of recognition of Aboriginal title in North America up until the early years of the twentieth century, including judicial decisions, the Royal
Proclamation of 1763, and the practice of treaty making in the Maritime provinces, Ontario, and the prairies (all of which we discuss later in this chapter). Even following the long hiatus of the mid-twentieth century, a few cases decided by lower courts in the 1960s had suggested that a distinctive set of Aboriginal rights may have survived. Moreover, on the political front, the federal white paper of 1969 had provoked a vehement reaction from Aboriginal leaders, who strenuously asserted what they certainly considered to be rights. In that same year, what has been described as the “most representative gathering of Aboriginal peoples ever assembled in Ottawa” met to protest the white paper. In the following year, the Indian Chiefs of Alberta presented their “red paper” to the Trudeau cabinet, “opposing the entire concept of termination and arguing for greater recognition of treaty rights, Aboriginal claims, and rights to self-government.”

Calder consolidated and extended these developments, firmly establishing the legal foundation of Aboriginal title. The Nisga’a sued for a declaration that their Aboriginal or “Indian” title “has never been lawfully extinguished.” In the judgment, this question broke down into three issues: (1) whether Aboriginal title existed in the first place; (2) whether, in the case of the Nisga’a, this title had been lawfully extinguished; and (3) a procedural issue as to whether the Court had jurisdiction to grant such a declaration despite the fact that the Nisga’a had not secured permission to sue the Crown, which at that time was still required in British Columbia. The major victory of Calder lies in the fact that of the seven judges, six responded to the first issue by affirming the existence of Aboriginal title at common law. However, they split three to three on the legal foundations of this title and on the question of extinguishment, and the case was ultimately decided on the procedural question.

The first group of three judges, whose reasons were delivered by Justice Wilfred Judson, affirmed the Nisga’a’s Aboriginal title based on the simple fact of prior occupation. Although they held that the Nisga’a could not rely on the Royal Proclamation of 1763 to ground their claim (because, in their view, the proclamation did not extend to British Columbia), this decision in no way affected the fact that “when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries.” They concluded that “this is what Indian title means.” The second group of three judges, in reasons drafted by Justice Emmett Hall, undertook a thorough review of legal precedent and the relationship of anthropological and historical evidence to common-law concepts such as possession. The review led this group to base Aboriginal title on two foundations that we now see as mutually inconsistent: on the one hand, the common law of possession and, on the other, a recognition that the title held by Aboriginal people prior to British sovereignty continues to persist in contemporary common law. They also took a different stand from
Justice Judson on the application of the Royal Proclamation of 1763, holding that it did extend to the Nisga’a’s territory. Yet, although they came to their conclusions by different routes, both Justices Hall and Judson, speaking for six members of the Court, concurred on the fact that the Nisga’a had at least originally held Aboriginal title.

However, Justices Judson and Hall disagreed on the question of extinguishment. Justice Judson, again joined by two other judges, reviewed transactions concerning public lands in British Columbia both before and after British Columbia entered Confederation and concluded that they were “inconsistent with the recognition and continued existence of Indian title.” In his view, these transactions demonstrated that Aboriginal title had been extinguished. The three judges led by Justice Hall, on the other hand, concluded that it was “beyond question that the onus of proving that the Sovereign intended to extinguish the Indian title lies on the [government] and that intention must be ‘clear and plain.’” Justice Hall found “no such proof in the case at bar; no legislation to that effect.” The Nisga’a title therefore remained in effect. Justice Hall also found that proclamations and ordinances issued by Governor James Douglas, on which Justice Judson had relied to find extinguishment, were beyond the power conferred on the governor, if these acts had been intended to extinguish Aboriginal title without compensation.

Thus, on the question of extinguishment, the Court was equally divided with three judges holding that the title had been extinguished long in the past and three holding that it remained in effect. The final decision fell to the seventh judge, Justice Louis-Philippe Pigeon. He avoided all issues of title and extinguishment and, instead, decided the question on a matter of procedure – the requirement, which was still in effect in British Columbia at the time, that a litigant obtain the consent of the attorney general before bringing an action against the province. He rejected arguments that this case fell within the exceptions to this rule. In his view, the plaintiffs in Calder required permission. They had not obtained it. Their action therefore failed. At the time, the permission of the attorney general was commonly called a “fiat” after the Latin phrase that attorneys general used to signify their assent to the action: fiat justicia or, in English, “let right be done.” This book takes its title from this phrase.

The Calder case itself, then, was ultimately decided on purely procedural grounds. Yet its primary importance lay in what it said about Aboriginal title. Six of the seven judges had decided that Aboriginal title existed as a right within the common law, regardless of whether it had been recognized by the government or acknowledged in any treaty. Moreover, they decided that Aboriginal title existed not just in territories under European influence at the time of the Royal Proclamation – that is, in eastern Canada and the prairies, where it had already been largely addressed through treaties – but
also across the entire continent, including British Columbia. They divided three to three on the important question of how Aboriginal title could be extinguished and especially on whether general provisions for land grants were sufficient to erase the title. However, this issue was not resolved. It was left for future determination – *Calder* itself being decided merely on the procedural requirement that a fiat be obtained before a claim could be brought against the provincial Crown (a requirement that was itself abolished in the year following *Calder*).18

As with many leading decisions, *Calder*’s implications were difficult to predict at the time. It was entirely possible that a future court would agree with the reasons of Justice Judson and his two colleagues and hold that the colony of British Columbia had extinguished Aboriginal title wholesale (as indeed Chief Justice Allan McEachern did at trial in *Delgamuukw v. British Columbia* eighteen years later).19 If so, then the First Nations’ victory would have been pyrrhic indeed. Furthermore, the Court’s reasoning contained the openness and range of possibilities that often mark path-breaking judgments. Even if Aboriginal title had not been extinguished, which of the rationales would have prevailed – those cited by Justice Hall, that expressed by Justice Judson, or some new formulation? What was required to prove the existence of Aboriginal title? What was its scope? What powers of regulation, what powers of governance, were implicit in the title? What constraints did it impose on the provincial administration of public lands? Over the next thirty years – and still today – these issues would be worked out through judicial decisions and treaty negotiations. In this book, the chapters by Michael Asch, Brian Slattery, and Kent McNeil explore many of these developments.

However, *Calder*’s general affirmation of Aboriginal title has had a tremendous impact. Not only did it set the terms for the long chain of judicial decisions on Aboriginal title that followed but it also had a sudden and lasting effect on federal policy. Immediately following the decision, both the Progressive Conservative and New Democratic parties took positions that “supported Aboriginal groups in pressing for the resolution of claims.”20 Prime Minister Trudeau “warmly embraced” the proposal by the Yukon Native Brotherhood for the negotiation of land claims in the Yukon, which was presented just two weeks after *Calder*.21 Finally, on 8 August 1973, less than seven months after *Calder* was handed down, a new federal policy for the settlement of “comprehensive claims” – claims founded on Aboriginal title – was announced by then minister of Indian Affairs and Northern Development, Jean Chrétien.22 As expressed in a booklet later prepared by the Department of Indian Affairs and Northern Development, “Canada would now negotiate settlements with Aboriginal groups where rights of traditional use and occupancy had been neither extinguished by treaty nor
Thus, the federal government began the long process of negotiating comprehensive settlements of Aboriginal title, eventually concluding modern-day treaties in northern Québec, the Yukon, the former Northwest Territories (including Nunavut), and, ultimately, with the Nisga’a nation itself. Indeed, the process of negotiating claims continues, particularly in British Columbia, the Yukon, and the Northwest Territories.

Moreover, the decision had an important impact on the law of Aboriginal title internationally, especially in Australia and New Zealand. One of the authors of this introduction once asked Ron Castan, QC and lead counsel for the plaintiffs in *Mabo v. Queensland (No. 2)*—the judgment that in 1992 recognized, for the first time, the existence of Aboriginal title in Australia—to what extent he had drawn upon Australian experience with statutory land rights in making his arguments. He replied: “Not at all. I just laid *Calder* before them and said, ‘It’s all there, your Honours. That is what you have to decide.’” Castan was exaggerating, of course, his response doubtless shaped by courtesy to a Canadian visitor. But it is true that *Mabo* drew very heavily on the precedent in *Calder*, and, indeed, for many years Canadian and Australian courts have relied on each other’s Aboriginal-rights decisions in making their own. Garth Nettheim provides a fine assessment of this fruitful exchange in his contribution to this book, also giving a valuable introduction to the law of Native title in Australia. David Williams does the same for New Zealand in his chapter.

**The Purpose of This Book**

This book takes stock of the doctrine of Aboriginal title thirty years after *Calder*. It places this decision in context, describing the long process of advocacy by the Nisga’a and other peoples of the northwest coast, beginning in the nineteenth century (notably through the contributions of Foster and Haycox). It reminds the reader of the state of Canadian law on Aboriginal title at the time of *Calder* (La Forest) and includes first-hand reflections by two distinguished individuals, Frank Calder and Thomas Berger, who were instrumental in bringing the action.

It then reviews what has happened to Aboriginal title since *Calder*, not by providing a case-by-case account of the many decisions of recent years – there are many such accounts in journals and in textbooks – but by standing back and reflecting upon the possibilities inherent in *Calder*, considering the ways in which some of these possibilities were pursued and others neglected, and suggesting how the law of Aboriginal title might be conceived today. Thus, Michael Asch considers the general ideas of the Aboriginal/non-Aboriginal relationship presented in *Calder* itself, Brian Slattery looks at the structure of Aboriginal rights within Canadian law, and Kent McNeil addresses the governmental dimension inherent in Aboriginal title. These
articles are critical and synthetic, with leading scholars providing their best assessment of where we stand. Their conclusions speak to crucial debates in the area.

The book then explores the broader significance of Calder, both internationally – in the experience of two closely related settler dominions, Australia (Garth Nettheim) and Aotearoa New Zealand (David Williams) – and for Aboriginal/non-Aboriginal relations within Canada (John Borrows and the distinguished authors who provide the “closing thoughts”). It explores these developments always against the backdrop of the Nisga’a campaign for recognition. One of the reasons for this focus is commemorative. These articles emerged out of a conference held to mark the thirtieth anniversary of Calder – a conference that also celebrated the personal contributions of Frank Calder, who simultaneously received an honorary doctorate from the University of Victoria.27 The conference was both stirring and enlightening. This book attempts to recapture those qualities and convey them to a broader audience. It is easy to forget that Calder was the product of a decades-long struggle for legal recognition. The steadfastness, resilience, consistency, seriousness of purpose, and sustained hard work of the Nisga’a were remarkable. Even if one begins one’s account of the campaign with the founding of the Nishga Tribal Council in 1955 and ignores the first campaign, the Nisga’a spent eighteen years preparing for the decision in Calder and a further twenty-seven years preparing for the resumption of a portion of their lands and the recognition of rights of self-government and resource management under the Final Agreement. Moreover, the Nisga’a nation was very active during those years, holding annual conferences of the Nishga Tribal Council and numerous community meetings, hammering out positions, developing consensus, and deciding what demands were essential and what could be compromised. This foundation of discussion and deliberation allowed the Nisga’a to retain a remarkable degree of unity throughout a long and difficult struggle. It was responsible, in no small measure, for the success they achieved.

However, the focus on the Nisga’a also has a strong analytical purpose. We often forget that these decisions affected real individuals, communities, and peoples. We reduce them to abstract propositions of law, losing sight of their connections to particular people’s histories, struggles, and aspirations. No one can read the comments of Frank Calder or Joseph Gosnell – or those of the lieutenant-governor, who speaks of her first education in Aboriginal title as a child among the piers of a salmon cannery on the Skeena River – without seeing what this struggle has meant to the people of the Nass. Placing the issues back in context can also reveal complexities and forgotten dimensions that we have neglected with time. A community’s debates are always more contentious, richer, and more vulnerable to uncertainty and adversity than the thumbnail sketches of communities’ positions on which
we often rely. Reminding ourselves of how these debates appeared at the
time can reveal lessons that deserve our concerted attention.

To take one example, it is striking to note the Alaskan Aboriginal leaders’
emphasis on the acculturation of Alaskan indigenous people in their early
campaigns, which is described by Stephen Haycox. The Nisga’a often took a
similar stance. They were virtually alone in supporting the federal govern-
ment’s 1969 white paper; they argued strongly for full legal equality in a
manner that drew heavily on the idea that the same laws should apply to
all; and Joseph Gosnell recalls how, when the Nisga’a Final Agreement was
ratified by the Canadian Parliament, the Nisga’a representatives in the pub-
lic gallery stood to sing “O Canada.” How do we square these facts with the
Nisga’a’s resolute struggle for the recognition of their Aboriginal title and
the restoration of a substantial degree of self-government? We tend to treat
the issues now as a simple contrast: either Aboriginal land rights or the
same rights; Aboriginal self-government or allegiance to Canada. The strong
advocacy of both by the Nisga’a should give us pause, leading us to ask
whether the common dichotomies are too simple and whether they may
ultimately be reconciled. We do not mean, in this introduction, to suggest
facile solutions. We know that different Aboriginal people may well have
opposing positions on these issues. Yet the Nisga’a’s vigorous advocacy of
both should at least prompt us to inquire more deeply in order to under-
stand how they might be combined.\textsuperscript{28}

We hope, then, that for readers who already have an extensive background
in the law of Aboriginal title, this book will foster a more profound under-
standing of Calder’s context and stimulate reflection on the chief character-
istics of the law today, especially how the various elements of this law might
be incorporated in a new synthesis. For people without this background, we
hope that this book will provide a comprehensive, accessible, and insight-
ful overview of the modern development of this law.

An Overview of Aboriginal Title
We are aware that for many readers this book may be their first encounter
with Aboriginal title. In the remainder of this chapter, we provide a brief
introduction to the law. We want this to serve as an entrée to the extensive
literature on the subject. We have therefore developed the notes so that
they serve a bibliographical role, guiding the reader into this literature. They
do not cover everything of value. The work on Aboriginal rights in Canada
is voluminous. But the notes do provide useful starting points for further
reading. One particularly rich source of information and recommendations
to which readers are advised to refer is the various reports of the Royal
Commission on Aboriginal Peoples, which conducted hearings, sponsored
studies, held conferences, and formulated proposals during the period from
1991 to 1996.\textsuperscript{29}
Historical Foundations
The foundation of Aboriginal title is intertwined with the history of Aboriginal/non-Aboriginal encounters in North America. It draws on the common law and international law principles regarding the acquisition of territory; but, as many would strongly argue, its primary elements were formed in the crucible of interaction between colonists and indigenous peoples. Colonists arrived in North America with little sense of the peoples they would meet or the principles on which their relations should be founded. There was considerable variation among the separate British colonies (let alone among the British, French, and Spanish colonies) as they came into contact with First Nations. Violent conflict did occur, sometimes with devastating consequences. For example, the indigenous people of Newfoundland, the Beothuk, ceased to exist (at least as an independent entity) by the early nineteenth century as a result of a combination of factors, including disease, displacement from the coast, disruption of access to resources, and brutal hostility between themselves and the settlers – the Beothuk being especially vulnerable because of their small numbers. However, in general, the interaction of colonists and Aboriginal people was tempered by attempts at peace. Although some colonists thought that they could rely on their land grants and on their own presumed superiority with no concessions to the land’s inhabitants, they soon found that this approach was dangerous in the extreme. They began to negotiate with their indigenous neighbours and, in the process, developed a set of expectations and procedures for intercultural interaction.

In the first years of British settlement, these expectations could vary from colony to colony. They were often set aside because of settlers’ hunger for land (as colonists pushed into territories not yet opened for settlement) or were vulnerable to the vagaries of colonial politics (as colonial governments calculated, from time to time, that a policy of aggression would bring them greater benefits than one of conciliation). Yet gradually these policies were standardized. The imperial authorities withdrew responsibility for Aboriginal relations from the individual colonies and vested it in officials appointed from London precisely in order to avoid outbreaks of war, obtain (in the northern colonies) the benefits of the fur trade, and secure indigenous allies in Britain’s competition with New France. A crucial landmark in this process was the Royal Proclamation of 1763, which was issued in the wake of the British conquest of New France and which provided the first constitution for British colonial government in the former French colonies and – most importantly for our purposes – codified the rules regarding colonial/Aboriginal interaction with respect to land. (The relevant provisions of the Royal Proclamation are quoted in the 1913 Nisga’a petition reproduced in Appendix B of this volume.) It is important to realize that this was a codification, not
The Calder Decision, Aboriginal Title, Treaties, and the Nisga’a

The enactment of entirely new policies. And it is also important to note that this law was common to all parts of North America then claimed by Britain. The law of Aboriginal title in Canada and the United States shares the same origins, although the subsequent treatment of Aboriginal peoples has differed in these two countries. Indeed, a set of judgments by the United States Supreme Court in the early nineteenth century – the “Marshall judgments,” named after the first chief justice of that court – serves as the foundation of the common law of Aboriginal title in both countries.

The principles enshrined in the Royal Proclamation of 1763 provide a useful summary of this law. First, it prohibited the settlement, or even the surveying, of lands that had not yet been ceded by First Nations to the imperial authorities, and, indeed, it directed settlers already in possession of such lands to vacate them (though to very limited effect). Second, it prohibited entirely private purchases of Aboriginal lands. Third, it established an exclusive process for the acquisition of Aboriginal lands. These were to be purchased by the Crown, through the governors and commanders-in-chief of the various colonies (through officers, that is, who were appointed under imperial authority, not under the authority of the individual colonies themselves), “at some public Meeting or Assembly of the said Indians, to be held for that Purpose.”

It purported to establish, in other words, a system for the protection of Aboriginal lands until those lands were purchased by public treaty between the principal representatives of the Crown on the one hand and the relevant First Nation (acting collectively) on the other.

Note the nature of this law. It did not determine the internal law – the internal structure of landholding – within each First Nation. It was very much a law of the interface, which recognized First Nations’ entitlement to their lands and established an orderly means for those lands’ acquisition. It was confined to relations between peoples, not purporting to regulate Aboriginal patterns of landholding. This task was left to each First Nation.

The essential nature of the common law of Aboriginal title has remained very much the same throughout its development. This law is not about the internal regulation of Aboriginal lands. Although Canadian courts have sometimes spoken as though Aboriginal title involved the absorption or translation of Aboriginal property interests into the common law, so that those interests would then be interpreted and enforced by the common law courts, the courts’ practice has generally been quite different. They have confined their role to declaring the existence of Aboriginal title, describing its broad outlines, and urging the parties to negotiate the details. Although the courts have over time incrementally extended their description of the title, they have done so reluctantly, in the absence of effective negotiations. And even when the courts have described the contours of Aboriginal title,
they have done so very much from the outside, describing its outer boundaries. They have had virtually nothing to say about the apportionment of rights within the laws of the different First Nations. The courts have left this role, at least implicitly, to the First Nation concerned (although, as we will see, First Nations’ authority was significantly eroded and, indeed, remains constrained by the Indian Act). This reluctance to define and enforce the detail of Aboriginal proprietary rights has been wise. Non-Aboriginal judges are, of course, poorly placed to interpret Aboriginal law, and it would be a matter of some irony if the recognition of Aboriginal title led to its amateurish interpretation by well-meaning, but ill-informed, judges. Rather, the common law of Aboriginal title has focused on respect for First Nations’ entitlement to their lands, understood as the First Nation’s collective control over these lands, unless and until this authority is extinguished by valid government action. Some have argued that it is more akin to the international law concept of a nation’s “territory” than a private law notion of “property” (although the courts continue to use and, to some extent, conceive of Aboriginal title in the latter terms).

**Treaty Negotiations and the Imposition of the Indian Act**

The restrictions imposed by the Royal Proclamation and the common law were often breached. This was especially true in the newly independent United States, where the constraints codified in the Royal Proclamation were soon overthrown. Very substantial erosion occurred in Canada as well (as we will see). However, the recognition of Aboriginal title in imperial policy, the Royal Proclamation, and the common law of Aboriginal title nevertheless provided the foundation for the practice of negotiating treaties in the territory that was to become Canada. This experience divides roughly into four periods: (1) the era of unsystematic treaty making; (2) the era of the “numbered treaties”; (3) an era of paternalistic administration, during which the practice of negotiating treaties was discontinued and many treaty rights were eroded; and (4) the modern treaty era.

The first period lasted from the earliest years of contact until about the middle of the nineteenth century. During this time, treaties tended to be unsystematic, with limited geographical scope and highly variable content. There was no attempt to regulate, in comprehensive fashion, the Aboriginal/non-Aboriginal relationship. Those treaties that dealt simply with the maintenance of good relations are often called “peace and friendship” treaties, although this term is sometimes applied to all of the unsystematic treaties. They are found in eastern Canada, especially the Maritime provinces, southern Ontario, and the area around Montreal, although around fourteen such treaties were also concluded on Vancouver Island in the early 1850s – the so-called “Douglas Treaties” (named after James Douglas, then governor of the colony of Vancouver Island).
These treaties were long considered to be of uncertain status, many entirely forgotten by non-Aboriginal governments. Those same governments often took the view that these treaties created no legal obligations and that they were merely treaties of friendship. But in a series of recent decisions, the courts have affirmed that they did create binding legal rights. One of
the most important precursors to the Calder decision, the decision in R. v. White and Bob, dealt with a Douglas treaty concluded by the Snuneymuxw First Nation of the Nanaimo region. Thomas Berger, lead counsel in Calder, had also served as counsel in this case.

The second period of treaty making – the period of the “numbered treaties” – began in the mid-nineteenth century and lasted until 1923. These treaties represented a systematic attempt to deal with Aboriginal title prior to non-Aboriginal settlement or resource extraction in northern Ontario, the Prairie provinces, and a substantial area of the Northwest Territories. They tended to have a standard structure and often very similar terms. They purported to extinguish Aboriginal title over the entirety of the area covered. It is probably best to consider that the numbered treaty era began with the Robinson-Huron and Robinson-Superior treaties of 1850.

The Robinson treaties were prompted by the incursion of miners into Anishinabe territory to the north of the Great Lakes. The Anishinabe hired a lawyer, cited the obligations imposed by the Royal Proclamation of 1763, and demanded a treaty. They were successful. The Robinson treaties were followed by a series of eleven treaties, each identified by number, commencing with Treaty 1 in southern Manitoba (1871) and ending with Treaty 11 in the Northwest Territories (1921). Together, these treaties cover virtually the entirety of western Canada east of the Rockies and south of the tundra (including the watershed of the Peace River in British Columbia). The Williams treaties, which were concluded in 1923, dealt with Ontario First Nations that had been overlooked in previous treaty processes.

The numbered treaties have long been of crucial importance to Aboriginal/non-Aboriginal relations on the prairies, in northern Ontario, and in parts of the Northwest Territories. They have been criticized because of the parties’ unequal bargaining power and the impact of this inequality on the treaties’ terms, the vulnerability of these terms to erosion over time, the federal government’s sometimes rough-and-ready approach to Aboriginal consent, and the fact that the written terms did not always conform to the First Nations’ understanding of the agreement. However, it would be a great mistake to discount the treaties altogether. They are deeply valued by treaty nations, who consider them both a matter of fundamental obligation and a cherished expression of a nation-to-nation relationship, even when non-Aboriginal governments have failed to fulfil their terms. This book will not deal in detail with concerns particular to the numbered treaties, but it is worth noting that these treaties have generated many disputes and much litigation over who should be considered parties to the treaties; over the interpretation of their terms (including the rectification of their terms when the text departs from the parties’ actual agreement); over the enforcement of their terms (including situations in which promised reserves were never
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designated or were later reduced); and over the impact of the natural resources transfer agreements (constitutional arrangements that not only transferred the ownership of public lands from the federal government to the Prairie provinces but also provided qualified protection for treaty rights). Indeed, the federal government has set up processes for dealing with “specific claims,” a category that includes, among other things, disputes under treaties.

The last of these treaties was concluded in 1923, but, by this date, the nature of federal policy was already changing. In place of a policy founded upon Aboriginal autonomy, negotiations, and treaty making, the federal government was increasingly pursuing a paternalistic approach in which Aboriginal people were treated as wards of the state: their lands and their lives were controlled by government agents, their children were sent to residential schools, their language and customs were suppressed, and reserves were allocated, or reduced, by administrative fiat rather than by treaty. This is the third period that was identified earlier – the era of paternalistic administration. Its centrepiece was the Indian Act, originally adopted in 1876. The third period was especially dominant in British Columbia where, west of the Rockies, the only treaties concluded were the Douglas Treaties, and where the provincial government set its face against the recognition of Aboriginal land rights.

The Aboriginal/non-Aboriginal relationship had long been an unequal one, deeply eroded by the decimation of the Aboriginal population by disease, then by the diminishing importance of the fur trade and the rapid increase in European settlement. By the late nineteenth century, First Nations were no longer seen as partners but rather as holdovers from another period – obstacles to non-Aboriginal economic expansion. Increasingly, the relationship was marked by stark conflicts over resources, including land, water rights, and fisheries. First Nations were confined to reserves covering a small portion of their traditional territories and were prohibited from acquiring resources by means available to the settlers. They were unable to homestead land; their right to hunt and fish was restricted; and they were denied water rights, so that streams on which they depended for growing their own crops were diverted to water non-Aboriginal farms. This third period led directly to the social problems of the late twentieth century: economic degradation; alcoholism; family violence; and sometimes a loss of individual and collective self-respect. Many contemporary policies address these and similar issues, although this book can only concentrate on land and related questions.

It was against this background of neglect, paternalism, and hardship that Calder was decided. By 1973, the treaty process had been discontinued for half a century. Aboriginal people had been prevented from pursuing their
interests before the courts by the need to secure the consent of the Crown to sue and by the Indian Act's 1927 prohibition on fundraising for the pursuit of land rights without the superintendent-general's consent. The last important judgment on the question had occurred in 1888. For many Canadians, then, Aboriginal title was a long-surpassed doctrine of questionable legal effect. Even to many Canadians sympathetic to Aboriginal concerns the essential problem seemed to be one of racial prejudice. The solutions lay, they believed, in targeted social programs and better welfare provision, not in the resurrection of what many considered to be archaic and racially defined rights. This spirit was amply reflected in the federal government’s white paper of 1969. Of course, this neglected the fact that First Nations had long campaigned for respect for their lands and that the adjudication of these rights had been consciously excluded from the courts. It also neglected the fact that in many cases dispossession had not occurred long in the past – unless, that is, one adopted a highly abstract concept of dispossession. On the contrary, First Nations like the Nisga’a were still living on their lands and still using them. Dispossession was occurring very much in the present, as hydroelectric dams flooded their territories, hillsides were logged, and governments made further grants.

The Supreme Court of Canada’s decision in *Calder* undermined the attempt to ignore Aboriginal title. It made clear that Aboriginal title was a genuine legal right that, if not extinguished, continued to exist. This decision, together with First Nations’ fierce criticism of the government’s white paper, prompted a dramatic change in government policy, leading to the fourth period in Canadian Aboriginal relations – the era of modern treaties. The first of this new generation of treaties was the *James Bay and Northern Quebec Agreement* (JBNQA). It covers two-thirds of the province of Québec, an area roughly equal to the entire province of Ontario. It was concluded with the Cree and the Inuit after these peoples objected to the proposed development of an extensive hydroelectric scheme on several rivers flowing into James and Hudson Bays, which was going to flood territory on which they lived, hunted, fished, and trapped. Construction had commenced without any settlement of Aboriginal title. The Cree and Inuit had then obtained an injunction stopping construction on 15 November 1973 in a decision in which the Supreme Court of Canada’s decision in *Calder*, rendered a little over nine months previously, played a significant role. The Québec Court of Appeal, pending full hearing of the appeal, quickly suspended this injunction. But the risk of an adverse decision forced the Québec government to the bargaining table. The result was the first modern treaty, signed on 11 November 1975.

The JBNQA was followed in 1978 by the *Northeastern Quebec Agreement*, which essentially extended the JBNQA’s terms to include the Naskapi First Nation. A series of “complementary agreements” since that time has
amended or extended both of these agreements. In addition, in separate negotiations, often lasting many years, final agreements have been concluded with:

- the Inuvialuit in the Northwest Territories (1984)
- the Gwich'in First Nation on the Northwest Territories/Yukon border (1992)
- the Inuit of the eastern Arctic (1993; this agreement led to the division of the Northwest Territories and the creation of the new territory of Nunavut)
- the Council of Yukon Indians (1993; this was an umbrella agreement establishing terms for agreements with individual Yukon First Nations)
- the Sahtu Dene First Nation and associated Métis in the Northwest Territories (1994)
- the Nisga’a First Nation (1998)
- the Tlicho First Nation in the Northwest Territories (2003)
- the Inuit in Labrador (2005)
- the Kwanlin Dun First Nation (2005).61

Negotiations continue towards other modern treaties, especially under the British Columbia treaty process, facilitated by the British Columbia Treaty Commission, which was established by the provincial and federal governments and the First Nations Summit in the early 1990s. On 29 October 2006, Canada, British Columbia, and the Lheidli T’enneh First Nation initialled the first draft final agreement under the BC treaty process, although the nation’s members ultimately rejected the agreement at a ratification vote. By spring 2007, two further final agreements were initialled.62

The modern treaties have a number of common elements:

- They set aside a portion of the territory for the Aboriginal people’s exclusive use, effectively (if not actually) in full ownership. In the Nisga’a treaty, these settlement lands amounted to about 8 percent of the area that had been claimed.
- The Aboriginal people are guaranteed more restricted rights to harvest resources in the rest of the lands. The Nisga’a treaty, for example, sets out various rules for determining allocations of fish from the Nass River and also directs the Nisga’a to enter into a harvest agreement with the province. It provides that the Nisga’a can hunt for domestic purposes over the Nass wildlife area (defined in the treaty). Both hunting and fishing rights are subject to measures necessary for conservation and legislation for public health and safety and, in the case of designated species (such as grizzlies), subject to an allocation set out as a percentage of the total allowable harvest set by the province.
• Certain land-use decisions in the broader territory are subjected to co-management – to regulatory bodies made up of representatives of both the Aboriginal people and the non-Aboriginal government. Sometimes this also involves some sharing in resource revenues. For example, the Nisga’a treaty continues the practice of managing the Nisga’a Memorial Lava Bed Park under a joint management committee, delegates the implementation of fishing provisions to a Joint Fisheries Management Committee, and allocates decisions regarding species designation and hunting allocations to a (joint) Wildlife Committee.

• The treaties provide for a degree of Aboriginal self-government, establishing (or recognizing) Aboriginal governmental institutions and specifying their jurisdiction over such things as the administration of justice, schools, and health care. The Nisga’a agreement affirms the Nisga’a’s right to self-government in accordance with the terms of their treaty, which includes a framework to establish a Nisga’a constitution and guidelines for relations with residents who are not Nisga’a citizens, and it also grants the Nisga’a government power to make laws with respect to a wide variety of subjects, including Nisga’a public works, incorporations, solemnization of marriages, elections, the definition of citizenship, and the protection of cultural property.

• Financial compensation is provided for the surrender of all other rights or for the crystallization of Aboriginal rights so that their enforcement is limited to those specified in the treaty. In the Nisga’a case, the compensation amounted to approximately $253 million or $46,000 for each of the approximately 5,500 members of the Nisga’a First Nation. However, the entire sum was not available for distribution, since normally, the costs that the First Nation incurs in negotiating the settlement (including lawyers’ fees) are subtracted from the compensation. The Nisga’a, for example, were to repay the $50.3 million that the government had advanced to support the negotiating process.

Most of the modern treaties to date have occurred in the Yukon and Northwest Territories. There, it is easier to achieve agreements because Ottawa has complete constitutional authority, extensive tracts of Crown land are available for settlement lands, and First Nations form a much larger proportion of the population. Negotiations are more difficult in southern Canada. There, the potential for conflict over land is substantially increased. Indeed, much of the usable land is often already in private hands. And although only Ottawa has the constitutional authority to alter Aboriginal title, the provinces own public lands and control resource exploitation. Aboriginal title tends to interfere then with provincial resource policies, and, if Aboriginal title is removed, the benefit accrues to the province. Moreover, First Nations inevitably seek some continued role in controlling land use in the
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...some form of co-management. In practice, this means that the First Nation and the province have to find ways to work together for the long term. In the south, then, negotiations necessarily involve both the provincial and federal governments and are often lengthy and contentious.

Aboriginal Title in the Courts and in the Constitution
At the same time as the modern treaty negotiations – indeed, often as an impetus to talks – Aboriginal title has been fought out in the courts. Calder was followed by a long series of cases that attempted to define what was necessary to prove Aboriginal title, how Aboriginal title might have been extinguished, the general content of this title, the relationship between rights to hunt and fish and title, whether Aboriginal rights to hunt and fish took precedence over non-Aboriginal activities, whether they extended to commercial hunting and fishing, and whether and how Aboriginal rights could be limited. A great many such issues remain unresolved today, especially the extent of Aboriginal rights to marine and subsurface resources, Aboriginal self-government rights, and the extent to which products harvested under Aboriginal rights can be sold commercially. Indeed, recognizing the magnitude of the task, the courts have often encouraged the parties to deal with these issues themselves, through negotiations.

We will not discuss all of these questions in this introduction. Many are addressed in the chapters by Asch, Slattery, and McNeil, and there is an enormous periodical literature. In this chapter, we will first provide a very brief outline of the common law of Aboriginal title as it has emerged from the recent cases and then focus on two additional developments that have greatly shaped its interpretation: the idea that the Crown owes a fiduciary obligation to Aboriginal people and the recognition of Aboriginal rights in the Canadian constitution.

The Current Structure of the Common Law of Aboriginal Title
Recent cases have drawn a distinction between “Aboriginal title” and “Aboriginal rights.” This was especially true of the landmark decision of the Supreme Court of Canada in Delgamuukw (1997), which concerned the Gitxsan and Wet’suwet’en peoples (the Nisga’a’s neighbours in northern British Columbia). Aboriginal title refers to the right to exclusive use and occupation of land, which is understood as the rough equivalent of full ownership, although the courts have also made clear that Aboriginal title is sui generis – that is, not directly comparable to any other interest in the law. Aboriginal title involves the right to the land itself (including subsurface minerals). The land can be used for a wide variety of purposes, including ones that are not based in Aboriginal tradition. The only inherent limitation is that the land “cannot be used in a manner that is irreconcilable with the nature of the claimants’ attachment to those lands.” Its use must be
compatible, for example, with the continued employment of the land into the future.

The Supreme Court of Canada has consistently held that Aboriginal title is communal and that it can only be sold to the Crown, not to any private party. However, it is important to realize that this does not preclude the Aboriginal people from allocating and transferring rights internally according to indigenous law, and, indeed, Aboriginal peoples do recognize that individuals, families, or other groups have rights to different tracts of land within the traditional territory. Once again, the common law of Aboriginal title is best seen as a law of the interface, requiring above all that non-Aboriginal governments respect the Aboriginal people's presence on the land. It is not concerned with enforcing the law of the Aboriginal people (although the courts sometimes speak as though this were the case). From the courts' external perspective, Aboriginal title does appear to be communal, in the sense that it concerns the entire people's right to the territory, not the people's internal attribution of rights.69

A people holds Aboriginal title to a particular territory if it had exclusive occupation of this territory at the time that the colonial power asserted its sovereignty over the area. What counts as “occupation” depends on the nature of the Aboriginal community and the types of uses appropriate to the land. The courts have also said that they will take into account the Aboriginal perspective when deciding whether the land had been sufficiently “occupied.” Regular use of the area for hunting, fishing, and other activities will generally be sufficient. By “exclusive,” the courts mean the ability to exclude non-rights-holders. It is possible, for example, for more than one people to share a particular area. There is no need for the people claiming Aboriginal title to have maintained continuous use of the lands, as long as they have maintained “substantial connection” to them.

Even when an Aboriginal people has not “occupied” the land sufficiently to obtain Aboriginal title, it may possess particular rights over the land – rights to hunt and fish, for example. The Supreme Court of Canada has applied a quite different test to these more limited “Aboriginal rights.” In R. v. Van der Peet (1996), the Court held that they have to satisfy a cultural test: they must be “an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right”,70 they must constitute a “defining feature”71 of the Aboriginal culture. The culture is determined against an historical reference point: the protected rights must “have continuity with the practices, customs and traditions that existed prior to contact [with European society].”72

This test has been strongly criticized.73 Commentators have argued that in emphasizing the protection of cultural distinctiveness, the courts may deny protection to interests that have long been important to the economic well-being of indigenous societies but that do not have a distinctly cultural
character. It tends to “culturalize” indigenous societies so that they are defined entirely by their cultural specificity, not by, for example, their character as self-determining political communities. Above all, commentators have argued that by using a historical reference point, this test implicitly treats Aboriginal peoples as frozen in time, with their distinctive culture crystallized at the point of contact. The Court in *Van der Peet* anticipated this objection and made clear that the rights only had to be *continuous* with pre-contact practices and that they could be an “exercise in modern form” of a pre-contact practice.74 Yet many commentators have been concerned that this still ties Aboriginal rights entirely to pre-contact practices and fails to recognize practices that had emerged more recently, taking insufficient account of any culture’s potential for change, and perhaps even preventing change, if the change would extend beyond the bounds of the traditional practice. To take one specific and very important example, those practices that emerged in relation to the fur trade – during the very first period of contact – would appear to fall outside the test.

To some extent, *Delgamuukw* represented a corrective to *Van der Peet*, responding to the criticisms and modifying the tests. *Van der Peet* had described Aboriginal title as a particular form of Aboriginal right. As a result, commentators wondered whether Aboriginal title would be subject to the same cultural test and constrained to traditional uses. *Delgamuukw* made clear that it would not. Aboriginal title was defined as a right to the land itself, which could then be used for a wide range of purposes, including uses that had nothing to do with pre-contact practices. The time for determining the existence of Aboriginal title was different from that established for Aboriginal rights in *Van der Peet*: the assertion of sovereignty, not first contact. Henceforth, there would be two types of indigenous right: Aboriginal title (established by the *Delgamuukw* tests) and Aboriginal rights (established by the *Van der Peet* tests). Still, the relationship between these two categories remains ambiguous. One of the purposes of Brian Slattery’s contribution to this book is to suggest how we should understand this relationship.

This outline describes in abbreviated form the current state of the law with respect to the nature and proof of Aboriginal title. But it is not sufficient to prove that Aboriginal title existed. One also has to establish that it continues to exist, that it has not been “extinguished.” Here, the law has been clarified since *Calder*. Justice Hall’s test has been accepted: Aboriginal title could have been extinguished by non-Aboriginal legislative authority (at least prior to constitutional entrenchment in 1982) but that action had to manifest a “clear and plain intention.”75 The simple fact that a legislature may have acted without considering Aboriginal title – the simple fact, for example, that it established a system for granting public lands to settlers without first addressing the Aboriginal interest – was insufficient to establish a clear and plain intention. Aboriginal title in British Columbia was
not, then, extinguished wholesale by BC governments’ policy with respect to public lands. The courts have also drawn a distinction between extinguishment (which obliterates Aboriginal title) and regulation of this title (where the use of the title may be constrained for a period but where the underlying right persists). This means that Aboriginal title is extinguished only where there is an intention to remove the title altogether. It is not extinguished piecemeal by regulations that restrict its exercise. Finally, Aboriginal title can be extinguished only by a level of government that has constitutional authority to do so. After British Columbia entered confederation, only Ottawa had power to extinguish Aboriginal title.

The aspects of Aboriginal title just discussed develop themes that were already apparent in the Supreme Court of Canada’s decision in Calder. Since this decision, two further developments have substantially shaped the law.

The Fiduciary Obligations of the Crown
First, the courts have held that Canadian governments owe special duties to Aboriginal peoples, especially a set of “fiduciary obligations.”

Fiduciary obligations are like the obligations a trustee owes to the beneficiary of a trust: the trustee should act entirely in the interest of the beneficiary, treating the beneficiary’s interests as though they were the trustee’s own. Fiduciary obligations are commonly imposed in situations of dependence, often where one person administers another person’s property and where the beneficiary must therefore rely entirely on the fiduciary’s good faith. In 1984, in Guerin v. The Queen, the Supreme Court of Canada held that the Crown owed such a duty to Aboriginal people. Guerin itself concerned the federal government’s administration of Indian reserve lands. At the time, there was some question whether the duty would be limited to similar situations, where the government was administering Aboriginal assets. Later cases have made clear that the duty is broader, though not unlimited. A distinctly fiduciary duty will apply whenever the Crown has assumed “discretionary control in relation [to particular obligations or interests of Aboriginal people, including Aboriginal rights protected under section 35 of the Constitution Act, 1982] sufficient to ground a fiduciary obligation.” The courts have begun to differentiate these strictly fiduciary duties from a broader obligation that the Crown also owes to Aboriginal people to engage in fair dealing, to uphold “the honour of the Crown.” Both of these special obligations – the fiduciary duties and those flowing from the need to maintain “the honour of the Crown” – bind the federal and the provincial governments.

The “honour of the Crown,” together with the more demanding fiduciary duties, builds upon the special relationship between the Crown and Aboriginal peoples reflected in the Royal Proclamation of 1763, the language of the historic treaties, and the control exercised over reserve lands.
The two concepts have been used by the courts to support a demanding test for the extinguishment of Aboriginal title, to establish a relatively lenient standard for the regulation of Aboriginal and treaty rights by non-Aboriginal governments, and to require those governments to respect Aboriginal title even before this title has been established in court. They have served, then, as a crucial influence in the development of the law of Aboriginal title. One wonders, however, how long they will continue to play such an important role. The fiduciary obligation, in particular, tends to have a paternalistic tone, founded as it is on a relationship of dependence. As Aboriginal peoples gain control of their own resources and assume their own government, one suspects that distinctly fiduciary duties will fall away, replaced by the more general “honour of the Crown.” Indeed, this appears to be happening in the most recent cases.

Constitutional Protection of Aboriginal Title

The second development is the constitutional protection of Aboriginal rights, including Aboriginal title.

In 1982, following a long period of negotiation and with the approval of the federal and all provincial governments except Québec, the Canadian constitution was “patriated.” Essentially, this meant that an amending formula was enacted that would allow the constitution to be changed by Canadian legislatures acting alone (before 1982, most constitutional amendments had to be adopted by the British Parliament, although, in recent years, the British Parliament had acted only on the request of Canadian authorities). At the same time, a number of additional amendments were made, including the adoption of the Canadian Charter of Rights and Freedoms. During the discussions that led to patriation, Aboriginal representatives campaigned strongly for the recognition of Aboriginal and treaty rights in the new constitutional order, arguing that otherwise their rights might be prejudiced by the elimination of British authority and by the emphasis on individual rights in the Charter. Their efforts resulted in section 35 of the Constitution Act, 1982, which stated that “[t]he existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed” and which defined “aboriginal peoples” as including the Indian, Inuit, and Métis peoples. For many Aboriginal representatives, this was not enough. They argued that section 35 failed to define the rights and that the rights should have been “guaranteed,” not merely “recognized and affirmed.” In response, section 37 was added to the Constitution Act, 1982, stating that a constitutional conference would be held within one year of the new provisions entering into force. At this conference, governments would seek to define Aboriginal rights (with Aboriginal participation). Some Aboriginal leaders continued to oppose the new constitution. Nevertheless, the new provisions, including sections 35 and 37, came into effect on 17 April 1982.
The promised constitutional conference was convened in March 1983, and three further conferences were held between then and 1987. They did have some success. The phrase “treaty rights” was defined to include present and future land claims agreements, a clause was added to guarantee gender equality in Aboriginal and treaty rights, and the constitution was amended to require a constitutional conference, with Aboriginal participation, before the Aboriginal provisions of the constitution could be amended. But the conferences failed to achieve what soon became the Aboriginal representatives’ primary objective: the constitutional recognition of Aboriginal self-government. By the end of the conferences, the federal government and five provinces supported this objective (although they did not agree with Aboriginal representatives on the form it should take). The governments of British Columbia, Alberta, Saskatchewan, and Newfoundland opposed it, however, and Québec refused to take a position because of its continuing objections to the patriation of the constitution. There was another attempt to write Aboriginal self-government into the constitution in the “Charlottetown Accord” of 1992 – a package of proposed constitutional amendments that covered a wide range of issues, from the recognition of Québec’s distinct society to reform of the Senate (including many Aboriginal concerns in addition to self-government). This time, all Canadian governments supported the accord, but the governments had also undertaken to put the package to a national referendum. This occurred on 26 October 1992. The accord was conclusively defeated. Thus, after nearly a decade of constitutional discussions, the principal provision protecting Aboriginal rights (section 35) remained virtually the same, subject only to the modest amendments adopted in 1983.

But what did section 35 mean? The first thing to note is that it protected only “existing” rights. It did not revive rights that had been extinguished prior to adoption of the new constitutional provisions in 1982. Could Aboriginal and treaty rights be limited or extinguished after 1982? The critical issue was the meaning of the phrase “recognized and affirmed.” The Supreme Court of Canada soon decided that this did provide a measure of constitutional protection, although the protection was not absolute. Ottawa could still regulate those rights, but, to do so, it had to meet a standard of justification established by the Court. This standard requires, first, that the legislation’s objective be “compelling and substantial” and, second, that the action be taken in a manner that is consistent with the honour of the Crown, including the Crown’s fiduciary obligations. With respect to the first requirement, conservation, resource management, and safety requirements count as compelling and substantial objectives, as do economic development and “the settlement of foreign populations to support those aims.” With respect to the second, the fiduciary obligation requires at least that the Aboriginal people be consulted (in some circumstances, it may require
more than that, perhaps even the Aboriginal people’s consent) and may also require financial compensation, Aboriginal priority in using certain resources, and an attempt to minimize any impact on Aboriginal interests. Section 35 does, then, offer some protection against legislative action, but the extent of this protection is qualified, depending on the nature of the right, the extent of the infringement, the reason for the infringement, and any offers of compensation.

In addition to protecting Aboriginal rights, section 35 may also have influenced their interpretation. This is more speculative because, ostensibly, section 35 merely protects Aboriginal rights and does not create them. In at least one respect, however, it does appear to have shaped the courts’ definition of the rights. In *Van der Peet*, the Supreme Court of Canada emphasized the need to define Aboriginal rights in a manner that reflected their essential purpose. But the purpose on which the Court tended to focus was not that of the underlying rights— not the purpose of Aboriginal title or of hunting and fishing rights under the Royal Proclamation and the common law. Rather, the Court concentrated on section 35’s purpose, found it to be the protection of cultural distinctiveness, and then used that as the basis for the cultural test it applied to Aboriginal rights. There is a strong argument that the Court should have been examining the purpose of the rights themselves, not the purpose of section 35, which merely purported to protect rights already in existence.

There are other ways in which section 35 may have shaped the interpretation of the rights. It is likely that constitutionalization, together with the lengthy negotiations over Aboriginal self-government, has advanced the definition of Aboriginal rights. On the other hand, some have worried that constitutionalization might have prompted more limited interpretations of Aboriginal rights because these rights are now much more difficult to change. These arguments remain open. What is undeniable is that the interpretation of Aboriginal rights is no longer simply a matter of the common law. It occurs within a distinctly constitutional framework.

**Current Challenges in the Law of Aboriginal Title**

In this concluding section, we identify a number of challenges facing the development of Aboriginal rights and the negotiation of treaties. We can do little more than raise these issues. Some are addressed in greater detail in later chapters. As always, we provide references to further discussions in the notes.

**The Continuing Challenge of Negotiating Treaties**

A number of issues bedevil modern treaty negotiations. The main one is simply a contest over resources. Parties on all sides now accept that a final settlement must involve some sharing of territory. But what shares, organized in what way? The parties are often far apart in their expectations. Second,
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non-Aboriginal governments have sought a high degree of “certainty” so that the indigenous interest is clarified once and for all. They have tried to achieve this by having treaties “extinguish” Aboriginal rights, replacing those rights with specifically agreed provisions. Aboriginal peoples have deeply resented the language of extinguishment. Those individuals seeking to advance negotiations have tried to find other, more acceptable terms, perhaps structuring the agreements so that they “recognize” Aboriginal rights and render them precise rather than extinguishing them.96 Third, there has often been deep disagreement over the extent of self-government and co-management. Some provincial governments continue to resist significant Aboriginal powers and have argued that Aboriginal governments should be seen as, in effect, specialized municipalities. First Nations generally argue for much more extensive powers.97 Fourth, status Indians have long benefited from an exemption from taxation for property on reserve. Modern treaty negotiations inevitably raise the question of whether and, if so, how this exemption should be discontinued.98

Behind these issues of substance lie questions of process. How should negotiations be structured so that they lead to lasting agreements? The Royal Commission on Aboriginal Peoples made many recommendations in this regard, arguing especially that a new “royal proclamation” should be adopted to establish the symbolic framework within which comprehensive negotiations could occur. It also recommended that Indian bands, recognized under the Indian Act, undergo a process of consolidation to create nations that would be better able to undertake a wide range of responsibilities.99 Neither of these recommendations was accepted. There is also a growing and highly stimulating theoretical literature on cross-cultural negotiations, some of which tries to combine indigenous and non-indigenous forms.100 These studies have been complemented by a number of practical initiatives. Important recent examples include the BC treaty process and the process used to settle claims in the Yukon Territory (which involved the negotiation of an umbrella agreement at the territorial level; the subsequent negotiation of specific agreements with each First Nation; the creation of internal constitutions for those nations; and the development of self-government provisions under which the First Nations could periodically draw down powers, tailoring their responsibilities to their capacities).101

The development of productive treaty processes has been difficult. It involves balancing demands from the First Nations, the provinces, and the federal government. It often requires that one conciliate profoundly different conceptions about the nature and scope of negotiations. And it also requires processes within each party for working through disagreements, developing a consistent negotiating position, and maintaining popular accountability. This is as true for the non-Aboriginal as it is for the Aboriginal parties. The BC treaty process, for example, has been disrupted by questions...
of authority and accountability on both the non-Aboriginal and Aboriginal sides; by frustrations over the mandates under which government negotiators operate (mandates that take time to develop and approve, that can shift with the election of a new government, and that are then generally kept confidential from the Aboriginal party); by a new BC government’s holding of a province-wide referendum in order to test non-Aboriginal support for a number of features of the process; as well as by disagreements within Aboriginal communities.102

One of the most promising steps in recent years has been the gradual acceptance that, prior to the full determination of Aboriginal title, interim measures should be put into place to safeguard the Aboriginal interest and provide some of the benefits of Aboriginal title. This had been one of the recommendations of the Royal Commission on Aboriginal Peoples.103 Without interim measures, Aboriginal peoples have had to watch as lands over which they claimed Aboriginal title were logged, flooded for hydroelectric projects, mined, hunted upon, subjected to road building, or granted to third parties, generally with no consultation with the Aboriginal people. Often, the only way they could derive any benefit from their title was to engage in long and immensely costly litigation or attempt to force the issue through direct action, such as blockades and the like. Moreover, interim measures have another great benefit: they can provide the skeleton of an eventual agreement. Two reasons why modern-day treaties have been so hard to negotiate are (1) the broad scope of matters up for negotiation – how to come to a single set of terms given the great distance between the parties on so many issues – and (2) the finality of the treaty negotiations – the tendency to approach treaties as though they were once-and-for-all agreements, covering all aspects of Aboriginal rights for all time. Interim measures help to overcome each of these hurdles. They allow the parties to put into place provisional solutions without the pressure of finality, allowing the parties to experiment with different institutional structures and to live with provisional settlements, in the hope that these may one day ripen into full-fledged treaties.

The employment of interim measures was given impetus by the Supreme Court of Canada’s 2004 judgment in Haida Nation v. British Columbia (Minister of Forests), in which the Court decided that the honour of the Crown required that federal and provincial governments respect, and not simply ignore, the probable existence of Aboriginal title, even before it had been proven in court.104 At the very least, governments had to consult with First Nations before taking actions that might prejudice the Nations’ title and, in appropriate circumstances, enter interim agreements to accommodate that Nation’s concerns. In 2005, the BC government announced a “new relationship” with Aboriginal people in which consultation prior to proof of title and other interim measures figured prominently.105
Self-Government
A central feature of treaty negotiations is self-government. But the issue extends well beyond treaties. There is a strong argument that governmental autonomy has always been the principal concern of Aboriginal peoples – a concern that was pursued predominantly through the framework of land claims both because of the importance of resources to any true autonomy and because framing the rights in proprietary terms stood a greater chance of acceptance. Kent McNeil’s contribution to this book explores the deep connections that exist between the recognition of Aboriginal title and self-government.

Issues of political autonomy remain important to indigenous peoples. In recent years, First Nations have sought to transform band administrations established under the Indian Act by rejecting the paternalistic oversight of government officials, reforming their internal processes so that they better reflect First Nations’ traditions and experimenting with various ways of blending the traditional authority of Elders with band-level government. First Nations have also taken responsibility for specific governmental services such as schools, child-welfare agencies, and procedures for handling crime in the community. These tend to be community-based experiments, conceived and pursued differently by different bands. They have had varied success. But over time, a number of influential and often highly successful models have emerged. These have, in turn, served as prototypes for self-government provisions in treaties.

With the expansion in the role of First Nations governments, concerns have been raised in some cases over the transparency of decision making, financial management, political accountability, and impartiality in administration. Aboriginal people themselves have often worked to improve governmental performance and accountability and have criticized maladministration. In addition, in 2002, the federal government sought to revise the Indian Act regime in order to impose additional controls across all communities. This federal initiative was strongly resisted by First Nations on the grounds that any changes should involve full Aboriginal participation – that they should, in other words, be negotiated. Ottawa ultimately abandoned its bill.

Issues of governance have occasionally been addressed by the courts, either as an extension of the rights associated with Aboriginal title or as a freestanding right under section 35 of the Constitution Act, 1982. First Nations have also argued for political autonomy on the basis of the international right of self-determination, especially in international forums. To this point, however, the courts have generally shied away from strong judicial recognition of a right of self-government, leaving it to political negotiations.

The emphasis on the language of rights in arguments for Aboriginal governmental autonomy is understandable and perhaps even necessary, especially given the long history of denial. Yet it also has its limitations –
limitations that are evident in the difficulty First Nations have had establishing governmental authority through the courts. The language of rights stresses entitlement but provides little guidance on how responsibilities should be divided between Aboriginal and non-Aboriginal governments. It speaks in broad and abstract generalities, leading some non-Aboriginal observers to think of Aboriginal self-government either as a complete rejection of co-existence with non-Aboriginal Canadians, as complete governmental separation, or, if independence is not on the cards, as a special right claimed by Aboriginal people on the basis of culture or race – an outcome difficult to reconcile with ideas of the equality of citizens. All of these implications are misleading. A few indigenous people do argue for complete Aboriginal sovereignty, at least as the notional starting point for negotiations. But, more often, the aim is fundamentally federal in nature. They seek spheres of autonomy in which, for certain issues, rules can be framed on the basis of their traditions – as the outcome of debates that occur within their communities – just as British Columbians, Québeckers, or Newfoundlanders are able to do within areas of provincial jurisdiction. The authority of First Nations would no doubt be tailored to areas in which they have a particular interest. These areas may well differ from the spheres of provincial authority. But most Aboriginal peoples nevertheless seek only a relative autonomy – one that is potentially consistent with equal participation, as Canadian citizens, on other matters.

Thinking of self-government as a form of federalism may help direct our minds to the central issues (the appropriate division of authority, the relationship between the different orders of government) and suggest ways of reconciling principles of equality and governmental autonomy. It may also help us to understand the apparent paradox noted earlier, namely that the Nisga’a and other First Nations have often embraced an unrelenting commitment to the vindication of Aboriginal title and, at the same time, to legal equality and Canadian citizenship.

Urban Aboriginal People, Métis, and Non-Status Indians

Thus far in this chapter, we have tended to focus on issues principally of interest to the First Nations and the Inuit – and, even then, to members of those peoples resident on their ancestral lands – principally because they are the people to whom the doctrine of Aboriginal title most directly relates. But they are far from the only Aboriginal people. Many people of First Nations ancestry have lost status as “Indians” under the Indian Act by the way in which the act defines who is an Indian and who is not, especially as a result of marriages outside the community. These “non-status Indians” lack the right to share in the lands and resources administered by band governments and cannot participate in the political institutions of bands, which are the institutions generally considered to be the contemporary
representatives of the First Nations. Even among First Nations people who retain Indian status, a great many – probably at least half – live off-reserve. Many of these individuals retain strong links to their home communities, but many do not. Moreover, there is one constitutionally recognized Aboriginal people – the Métis – that has generally not been treated as a holder of Aboriginal title.¹¹³

What do concepts such as Aboriginal title and self-government mean to these people? How should Aboriginal identity be accommodated in urban settings, where individuals of different Aboriginal origins often collect together in communities that cross traditional boundaries? Are there ways in which these people can reconnect with their ancestral communities? Should they be encouraged to do so? Are there distinctive forms of self-government that make sense for the Métis, for urban Aboriginal people, or for rural off-reserve non-status Indians, which also fit with their relationship with the broader Canadian community?¹¹⁴ All of these questions are profoundly important and immensely difficult – questions that are only now receiving the attention they deserve. They are likely to present one of the critical challenges for Aboriginal peoples and non-Aboriginal Canadians alike in the coming decades.

Aboriginal Definitions of Aboriginal Rights

Discussions of Aboriginal rights generally take colonial experience, the treaty process, and the decisions of courts as their point of departure. However, there is another way of approaching these issues. One can start with indigenous traditions, think through what it means to be Cree, Inuvialuit, Coast Salish, Anishinabe, Nisga’a, Miq’mac, or Métis, and then work from there to understand one’s relations to the land, responsibility to one’s neighbours, political obligations, and institutions. This approach does not deny the fact of colonialism. It may well recognize that, at a later stage, one must think about how distinctively Aboriginal commitments might be reconciled with the need to live together with non-Aboriginal Canadians. But it does insist that Aboriginal traditions are worth understanding on their own terms, in a manner that is not from the very beginning crimped and contorted by a colonial frame.

This resolutely Aboriginal perspective has produced some of the most exciting scholarship in recent years, led by a new generation of indigenous scholars who draw on their community’s traditions and use them to address contemporary issues of indigenous rights and governmental reform. John Borrows, the author of the concluding chapter in this book, is one of those scholars, and there are a good many others, some of whose publications you will find cited in the notes.¹¹⁵

A variant of this approach is also found in practical action. At several points, especially since the resurgence of Aboriginal advocacy in the 1970s,
Aboriginal peoples have looked to their own resources to rebuild institutions, reforge relationships to the land, and restore their communities. This, indeed, was one of the principal tasks undertaken by the Nisga’a during the long years in which they built the Nishga Tribal Council and prepared and pressed their claims for a treaty. Sometimes this strategy involves direct action: Aboriginal people taking steps to control their own destinies, even before a fully negotiated solution. In the words of Philip Awashish of the Eeyou of Mistissini (one of the nations of the James Bay Cree), some First Nations have recognized that “self-determination is the power of choice in action” and have adopted a “just do it” approach. So, for example, in the early 1980s, the Waglisla First Nation (Bella Bella) created its own school, initially in opposition to provincial authority but ultimately securing provincial funding and recognition. Many other Aboriginal peoples have taken similar action, sometimes peaceably but, at other times, through confrontations that have, on occasion, turned violent. Our intention is not to romanticize these efforts or to suggest that they have all been equally successful, constructive, or worthwhile. Our point is simply to note that issues of Aboriginal title and governmental autonomy have never been exclusively a matter of judicial decision and constitutional text. They have always been driven by commitments and political struggles that find their source within indigenous communities themselves.

This kind of direct initiative from outside the settled confines of the legal order is hardly unprecedented in Canada. It is imprinted in the democratic character of the Canadian constitution, which was achieved not by the free grant of the sovereign but by insistent demands by those excluded from the political process – demands that resulted in the creation of representative assemblies, responsible government, and then the progressive extension of the franchise. Indeed, the very idea of democratic government makes government responsive to unruly popular action, rendering (in Albert Venn Dicey’s terms) the legal sovereign answerable to the political sovereign. Moreover, the Canadian constitution has long responded to the special demands of French Canada and of Canada’s regional societies, incorporating them through its federal structure, although such institutional accommodations, while essential, have never completely harnessed the political implications of these societies.

Aboriginal peoples have similar potential to shape the Canadian constitutional order from outside. During certain periods of our history, they have had much more than potential. Aboriginal rights, title, treaties, self-government, section 35, and the fiduciary obligation all represent ways of accommodating indigenous societies within the Canadian legal order. But these ways are always first approximations. They never exhaust the creative resources resulting from the continuing encounter between indigenous and non-indigenous societies. The new scholarship on indigenous law and
government, developed by indigenous scholars, is only the most recent manifestation of these resources.

Final Comments
The conference on which this book is based ended with a gala event at the University of Victoria to celebrate the contributions of the Nisga’a, particularly those of Frank Calder. One of the authors of this introduction had responsibility for marshalling the platform party for its entry onto the stage. This party consisted of the Honourable Frank Calder in his full regalia; his Nisga’a contemporaries Rod Robinson (who bore the high-ranking name Sim’oogit Minee’eskw and had been a founding member of the revitalized Nisga’a Land Committee in the 1950s) and Hubert Doolan (another leader of the Nisga’a and one of the plaintiffs in Calder); Dr. Samuel Sam of the Tsartlip people with his son and assistant, Greg Sam; Chief Joseph Gosnell, then President of the Nisga’a Lisims government; the Honourable Lance Finch, Chief Justice of British Columbia; Professor David Turpin, President of the University of Victoria; and, last but not least, the Honourable Iona Campagnolo, Lieutenant-Governor of British Columbia, assisted by her aide-de-camp. The Nisga’a Ts’amiks Dancers were on stage in force – between forty-five and fifty dancers – to dance in honour of Frank Calder.

The author had been given detailed instructions on the order of precedence for the platform party from the protocol officers at Government House and, like the well-brought-up boy he was, he sought dutifully to obey them. Yet it soon became clear that there was another protocol at work. Gently, firmly, Sim’oogit Minee’eskw was reordering the party, so that they would dance in procession in the manner required by the Ts’amiks Dancers’ songs, which were a song of welcome and a song to summon the dignitaries into the Big House. The author stepped back, taking comfort in the fact that this would certainly have been the preference of this lieutenant-governor, raised as she was on the estuary of the Skeena.

Those of us who were there will never forget that evening. The speeches were remarkable (there are excerpts towards the end of this book). But, more than the speeches, the image that will remain in our minds will be that of Sim’oogit Minee’eskw leading the procession, dancing with great dignity to the exuberant singing and dancing of the Ts’amiks Dancers, the other dignitaries dancing in single file behind, some, like Frank Calder, Hubert Doolan, and Joseph Gosnell, secure in their tradition, and others, like the non-Aboriginal participants, following along as best they could, dancing and joining in the spirit of the event.

The evening was a remarkable meeting of cultures and encounter between protocols. The multitude of Ts’amiks Dancers – of all genders and ages, from toddlers to Elders – leaped and turned and sang, led in the dance by their director with cedar-bark hat, button blanket, and talking stick. Their joy
and pride was infectious. They and the dignitaries listened respectfully to the songs and prayers of our hosts for the conference, Dr. Samuel Sam and his assistants of the Straits Salish people, as Dr. Sam formally closed the conference, thanked the delegates, and wished them well on their way. Then the two groups joined together, the Salish and the Nisga’a, in the singing of other songs. The platform party once again formed in procession and danced their way around the stage, led by Sim’oogit Mine’eeskw, before leaving to the wings. But the singing and the dancing continued long after their departure, generously exceeding the time that the organizers had allotted for the event. As we write, three years later, their songs continue to sound in our minds, voicing a promise of the benefits, indeed the privilege, of encounter.