

# 17

## Canadian Courts and Aboriginal Rights

### Chapter Outline

The purpose of this chapter is to discuss the issue of Aboriginal rights as well as the experience of Indigenous peoples in Canadian courts. In this chapter, the issue of Aboriginal rights is traced through the various court cases that have attempted to define what these rights entail. Oftentimes, these court cases centre around land, with the first precedent setting case taking place in Ontario in 1884. In *St Catherine's Milling v. The Queen*, the Privy Council in London ruled that as “heathens and barbarians,” Indigenous peoples held no proprietary rights to the soil. A century later, one of the most well-known land conflicts culminated with a standoff at Oka, Quebec, in 1990. This claim dates back to the early 1700s when the Sulpicians were granted land in the area by Louis XV. The lands remained in dispute for over 200 years, and land claims were brought forward by the Haudenosaunee in the 1970s and 1980s, which culminated to a violent situation when the Haudenosaunee took a stand against the town of Oka’s attempt to expand its nine-hole golf course over a Haudenosaunee burial ground. It resulted in the death of one Quebec provincial police officer, and the Canadian army was eventually sent in to deal with the situation. Eventually the Haudenosaunee ended the blockade, but the land issue is still outstanding.

Litigation in Canada regarding land claims and Aboriginal rights has been marked by a number of ongoing key court cases, beginning in the 1973 Supreme Court decision in *Calder v. Attorney General*. Although the Nisga’a lost on a technicality, the existence of Aboriginal rights was affirmed and this led Pierre Trudeau to concede that Indians may have more rights than he had previously recognized. A number of other cases throughout the 1980s continued to reinforce the idea that Aboriginal rights existed prior to European contact and that these rights have to be taken into consideration. Cases such as *Delgamuukw*, as well as the *Marshall* cases, have all moved Canada’s courts towards recognition of Aboriginal rights and attempts to define what these rights entail. There have also been some landmark decisions for the Métis. In 2001, the Ontario Court of Appeal, ruled that as a distinct people, the Métis had the right to hunt and fish out of season. And, in 2017, the Supreme Court of Canada agreed with the Manitoba Métis Federation, that the Crown had failed to implement the land grand provisions of the Manitoba Act of 1870. In spite of this progress, there have been setbacks as well; even though Aboriginal Rights are protected by the Constitution, the division of powers between the federal and provincial governments also means that it is likely further litigation will continue as both governments and Indigenous peoples alike, strive to have clear definitions placed on these rights.

The criminal justice system has also been in the spotlight since the 1970s. As statistics began to point to the high number of incarcerations within the justice system, many began to question why the numbers were so skewed towards Indigenous people and what might be done. This resulted in a

number of inquiries and commissions, which have found that the justice system has failed Indigenous peoples and that, "...at best, the equal application of the law has unequal results." In 2001, a 2.5-million-dollar Commission was launched to undertake a thorough examination of the criminal justice system. The Commission on First Nations and Métis Peoples and Justice Reform, released its findings in 2004, and among other recommendations, called for better screening of police candidates, more Indigenous personnel throughout the justice system, and better training for police forces.

On the other side of the picture, in 2000, Canada's first Indigenous court opened on the Tsuu T'ina reserve west of Calgary. However, when considering the legal position of First Peoples, the role of the Indian Act must also be accounted for. With the goal of protection and assimilation, the Act has emphasized control instead of development, thereby stifling initiative and enterprise, and subjecting First Nations to colonial rule. In 2017, the government of Justin Trudeau proposed changes to the Act, though it remains to be seen what changes will be made.

## Learning Objectives

- To understand the short- and long-term consequences of the Oka crisis and the results of the crisis
- To recognize the main litigations that have resulted in the advancement of the land claims and other Aboriginal Rights in Canada
- To recognize and understand the concerns brought forward regarding the criminal justice system and the findings and recommendations of inquiries and commissions developed to address these concerns
- To understand the important role that Indigenous leaders and activists have played in fighting for Aboriginal rights

## Key Terms, Figures or Sites

**Aboriginal Rights** A legal term originally signifying the rights that Canada's Indigenous peoples hold as a result of their ancestors' long-standing use and occupancy of land, including the right to hunt, trap, and fish, but now including the right to traditional self-government (p. 300).

***Calder v. Attorney General*** (1973) Court case in which the Nisga'a of British Columbia claimed continued Aboriginal rights in their traditional territory. The Nisga'a lost on a technicality, but the case led the federal government to negotiate land claims based on outstanding Aboriginal title (p. 309).

**Cardinal, Harold (1945-2005)** a Cree man who was an influential leader of the Indian Association of Alberta; he played an important role in helping to shape Indian policy. He is also well known for his publications, *The Unjust Society: The Tragedy of Canada's Indians* and *Citizen's Plus*, otherwise known as the "Red Paper, which was the official Indigenous response to the White Paper" (p. 310).

***Delgamuukw v. British Columbia*** A 1991 court case in which the Gitksan and Wet'suwet'en claimed Aboriginal right over traditional lands in northern British Columbia. The BC Court of Ap-

peal rejected their claim, but in 1997 the Supreme Court of Canada overturned the earlier judgment, arguing that the lower courts had not given enough weight to oral tradition (p. 312).

**Gabriel, Ellen** a Kanienkehaka woman who as media spokesperson, became the face of the Oka Crisis in 1990. She continues to engage in high profile activism and remains a model for calm but forcible assertion of rights (p. 306).

**Judicial Committee of the Privy Council** A board of the British Privy Council that had jurisdiction over the courts of Great Britain's colonies, including, until 1949, Canada (p. 302).

**Marshall, Donald Jr** (1953–2009) Mi'kmaw man released from prison in 1983 after spending 11 years in jail for a murder he did not commit; was acquitted in 1999 in a landmark court case involving Aboriginal right to fish out of season (p. 313).

**Oka** (Kanesatake, Lake of Two Mountains) Land near Montreal granted by France in 1717 to the Seminary of St Sulpice as a mission. A long-standing dispute over ownership of the land culminated in a standoff in 1990 in which Canadian military intervened (p. 303).

***St. Catherine's Milling v. The Queen*** (1885–9) Ontario court case in which the question of federal and provincial jurisdiction was central, and which led to a ruling of the Judicial Committee of the Privy Council that the Proclamation of 1763, which recognized Indigenous land, was valid, but also that the British had gained title to all Indigenous lands simply by setting foot in North America (p. 301).

## Study Questions

1. What was the importance of the *St Catherine's Milling v. The Queen* case?
2. What were the long-term causes of the confrontation at Oka in 1990?
3. What were the short-term causes of the confrontation at Oka in 1990?
4. What was the result of the Oka confrontation of 1990 and what policy or other initiatives did this crisis result in?
5. What were the main arguments of *Calder v. Attorney General*?
6. In spite of constitutional recognition of Aboriginal title in 1982, on what basis did the judge rule against the Teme-agama Anishnabay in the *Attorney General of Ontario v. Bear Island Foundation*, case of 1984?
7. In what way does the separation of Constitutional powers affect Indigenous land claims?
8. What three cases represent a turning point in the more inclusive Canadian legal approach to Aboriginal rights? Briefly describe each.

9. Why was the Donald Marshall Jr case of 1999 considered to be an explosive case?
10. Why was the 2001 decision in the Ontario Court of Appeal (ruling that Métis, as a distinct Indigenous people, had the constitutional right to hunt for food out of season) of additional significance to the Métis?
11. What is the status of the Manitoba Métis Federation's case against the Crown regarding the delay in implementing the land provisions of the 1870 Manitoba Act?
12. What was the 1971 case involving Donald Marshall of Nova Scotia about, and what did it reveal about the justice system and its relationship with Indigenous people?
13. Where and when did Canada's first Indigenous court open?
14. Name a key finding and at least three key recommendations of the Commission on First Nations and Métis Peoples and Justice Reform report that was released in 2004.
15. Why has the Indian Act been among the most harmful legislation for Indigenous Peoples in Canada?

## Essay Questions

1. Who was Harold Cardinal and why is he important in Canadian history?

Although Harold Cardinal is recognized for helping to shape Canadian policy with regards to Indigenous people, he is mostly known for his publications. His most important book was published in 1969 and is called *The Unjust Society: The Tragedy of Canada's Indians*. It found a wide audience and after its publication, governments could no longer manage to ignore Indigenous perspectives. As a challenge to the 1969 White Paper and its assimilative nature, Cardinal was one of the primary authors of *Citizens Plus*, published by the Indian Association of Alberta. He advocated for the rights of First Peoples and argued that the White Paper would destroy those rights (p. 310).

2. Briefly discuss the Commission that conducted a comprehensive examination of the Canadian justice system.

The Commission on First Nations and Métis Peoples and Justice Reform was instituted on 15 November, 2001. It was chaired by Alberta lawyer, Wilton Littlechild. It released its final report in June of 2004 in which it stated that racism is central to the untrusting attitude that Indigenous peoples have towards police services. Among the Commission's many recommendations is the need for more appropriate officers and legal personnel, as well the need for more First Nations' and Métis officers. It also advocated for alternative approaches to justice rather than incarceration (pp. 314-315).

3. Describe the important role that Ellen Gabriel played in the Oka crisis as an ongoing activist for Indigenous rights.

Ellen Gabriel served as the media face and voice of the Haudenosaunee during the Oka crisis. A long-time activist for Indigenous rights, her calm and courageous demeanor won support from all segments of Canadian society. While always presenting calm, Gabriel maintains a forcible assertion of rights. Since the Oka Crisis of 1990, which she refers to as the Siege of Kahnésatake, she has travelled throughout the world, not only speaking about the Siege, but also about Indigenous peoples' rights, history, culture and the traditions and realities of Indigenous peoples of this Turtle Island (pp. 306-307).

## Additional Resources

### Further Readings

- Asch, Michael. *On Being Here to Stay: Treaty and Aboriginal Rights in Canada*. Toronto: University of Toronto Press, 2014.
- Clark, Bruce A. *Native Liberty, Crown Sovereignty*. Montreal and Kingston: McGill-Queen's University Press, 1990.
- McNab, Dagit T. *Circles of Time: Aboriginal Land Rights and Resistance in Ontario*. Waterloo, ON: Wilfrid Laurier University Press, 1999.
- Miller, J.R. *Compact, Contract, Covenant: Aboriginal Treaty Making in Canada*. Toronto: University of Toronto Press, 2009.
- Mills, Antonia. *Hang on to These Words: Johnny David's Delgamuukw Testimony*. Toronto: University of Toronto Press, 2005.
- Morse, Bradford. *Aboriginal Peoples and the Law: Indian, Métis and Inuit Rights in Canada*. Ottawa: Carleton University Press 1991.
- Sterritt, Neil J. *Tribal Boundaries in the Nass Watershed*. Vancouver: University of British Columbia Press, 1998.
- Whyte, John D. *Moving Toward Justice: Legal Traditions and Aboriginal Justice*. Saskatoon: Purich Publishing, 2008.
- Wicken, William C. *Mi'kmaq Treaties on Trial: History, Land, and Donald Marshall Junior*. Toronto: University of Toronto Press, 2002.
- Wiebe, Rudy, and Yvonne Johnson. *Stolen Life: The Journey of a Cree Woman*. Toronto: Alfred A. Knopf, 1998.

## Websites

CBC Digital Archives – “The Oka Crisis”

- <http://www.cbc.ca/archives/topic/the-oka-crisis>

Criminalizing Dissent – “The Burnt Church Crisis”

- <https://criminalizingdissent.wordpress.com/2014/10/16/the-burnt-church-crisis/>

International Institute for Restorative Practices – “Circle Sentencing: Part of the Restorative Justice Continuum”

- [http://www.iirp.org/article\\_detail.php?article\\_id=NDQ3](http://www.iirp.org/article_detail.php?article_id=NDQ3)

Government of Saskatchewan – “Creating a Healthy, Just, Safe and Prosperous Saskatchewan: a Response to the Commission on First Nations and Métis Peoples and Justice Reform”

- <http://publications.gov.sk.ca/documents/9/15014-ActPlanFinal.pdf>