# DOES CONSTITUTIONAL CHANGE MATTER? CANADA'S RECOGNITION OF ABORIGINAL TITLE

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## I. INTRODUCTION

In 1997, the Gitksan and Wet'suwet'en hereditary chiefs' land claims against the Canadian government reached the Canadian Supreme Court in *Delgamuukw v. British Columbia*.[1] Each chief, acting on behalf of himself and his people, asserted that their historical use of the lands demonstrated ownership and claimed jurisdiction over 58,000 square kilometers of land. British Columbia counterclaimed, arguing that the chiefs had no interest in the land or, alternatively, that they only had a claim for monetary compensation against the Canadian government. The Canadian Supreme Court had to sift through a long historical record to decide whether the tribes' First Nations' claims to Aboriginal title were cognizable.[2]

Aboriginal title claims like *Delgamuukw* are not new, rare, or isolated. Since the arrival of British settlers, the British Crown has struggled with how to deal with disputes over land ownership.[3] While the Crown instituted several policies to address these land title disputes, many remained unresolved and were inherited by the Canadian government upon Confederation in 1867.[4] Like the British Crown, the Canadian government has enacted various laws and policies to address land rights issues, and even proscribed the discussion of Aboriginal land

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1. [1997] 3 S.C.R. 1010.

2. Ultimately, the Court did not decide the merits of the case. Instead it remanded the case for a new trial because the original complaint described the claims as individual rather than communal and the pleadings were never properly amended. *Id.* at 1063.

3. *See, e.g.*, SIDNEY L. HARRING, WHITE MAN'S LAW: NATIVE PEOPLE IN NINETEENTH-CENTURY CANADIAN JURISPRUDENCE 35-36 (1998).

4. *Id.* at 35-41.

claims between 1927 and 1951.[5] Despite these policies, Aboriginal land claims continue[6] and to this day, Aboriginal peoples seek to have their land rights adjudicated in and affirmed by Canadian courts.[7]

A new twist in the contestation over land title and rights developed in 1982, when Canada overhauled its Constitution and added a new section recognizing the distinct status and rights of Aboriginal peoples. Section 35(1) of the Constitution Act, 1982 states, "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed."[8] While section 35 recognizes and affirms existing Aboriginal and treaty rights, it does not define these rights or the extent of their constitutional protection.[9] Nor does it include any language indicating whether the rights are judicially enforceable. This textual indeterminacy raises the question: What difference does the constitutional recognition of Aboriginal rights make to the litigation of Aboriginal title claims?

Constitutional law scholars have long tried to evaluate the actual impacts of constitutional provisions.[10] They have continually debated whether constitutional provisions matter, what they actually do, and whether changes in constitutional norms are attributable to them.[11] While most scholars agree that

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5. THE REPORT OF THE ROYAL COMMISSION ON ABORIGINAL PEOPLES 296 (1996).

6. These tensions not only continue, but occasionally erupt as they did in 1990 when the town of Oka announced its intention to expand a golf course into an area claimed by local Iroquois. The Iroquois responded by barricading the location and a crisis ensued. For a detailed history of the Oka Crisis, see OLIVE PATRICIA DICKASON, CANADA'S FIRST NATIONS: A HISTORY OF FOUNDING PEOPLES FROM EARLIEST TIMES 326-30 (3d ed. 2002).

7. *See, e.g.*, Gitxsan Houses v. British Columbia, [2003] 10 B.C.L.R.4th 126; Chippewas of Sarnia Band v. Canada, [2001] 51 O.R.3d 641; Haida Nation v. British Columbia, No. SC3394, 101 A.C.W.S. (3d) 659 (B.C.S.C. Nov. 21, 2000), *available at* 2000 A.C.W.S.J. LEXIS 55017, *rev'd*, [2004] 3 S.C.R. 511; Westbank First Nation v. British Columbia, [2001] 191 D.L.R.4th 180 (B.C.); Chemainus First Nation v. British Columbia Assets & Land Corp., No. 983940, 88 A.C.W.S. (3d) 520 (B.C.S.C. Jan. 7, 1999), *available at* 1999 A.C.W.S.J. LEXIS 48116.

8. Constitution Act, 1982, Canada Act, 1982, sched. B, pt. II, § 35(1) (U.K.), *as reprinted in* R.S.C., No. 44 (Appendix 1985).

9. *Id.* § 35. Ardith Walkem notes the uncertainty surrounding section 35 when it was adopted. Ardith Walkem, *Constructing the Constitutional Box: The Supreme Court's Section 35(1) Reasoning, in* BOX OF TREASURES OR EMPTY BOX? TWENTY YEARS OF SECTION 35, at 195, 196-97 (Ardith Walkem & Halie Bruce eds., 2003).

10. *See* CASS R. SUNSTEIN, DESIGNING DEMOCRACY: WHAT CONSTITUTIONS DO 4-6 (2001); David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 877-79 (1996) [hereinafter Strauss, *Common Law*]; JAMES BOYD WHITE, WHEN WORDS LOSE THEIR MEANING: CONSTITUTIONS AND RECONSTITUTIONS OF LANGUAGE, CHARACTER AND COMMUNITY 231-33 (1985).

11. *See, e.g.*, Charles R. Epp, *Do Bills of Rights Matter? The Canadian Charter of Rights and Freedoms*, 90 AM. POL. SCI. REV. 765 (1996) [hereinafter Epp, *Do Bills of Rights Matter?*].

constitutions matter at least symbolically as foundational national documents,[12] some identify constitutions as potential focal devices that can be used to define common ways of interacting[13] and others challenge whether written constitutions are useful at all.[14] Some skeptics contend that courts interpret constitutional texts to implement the common law rather than to revise the common law.[15] Others doubt that constitution-makers can bind later generations to act, or not act as the case may be, in a specified manner.[16] They reject precommitment theories of constitutionalism, which suggest that constitutional provisions are enacted to remove topics from political agendas by constraining the decisions future generations can make about them.[17] Recently, at least one scholar has suggested that constitutions may even "entrench barriers to commitment."[18]

The richness of these debates emerges in dialogs in the United States over whether constitutional amendments play a significant role in the development of constitutional norms.[19] Arguably, the most famous of these discussions revolves around the Thirteenth, Fourteenth, and Fifteenth Amendments. While these amendments have had tremendous symbolic importance from their adoption, whether they had any actual impact on constitutional decision-making or norms during the first 100 years of their existence is often questioned.[20] David Strauss, for example, argues that "these amendments changed things much less than one might think" because none of them were principal means of constitutional change

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12. WHITE, *supra* note 10, at 231.

13. Russell Hardin, *Why a Constitution?*, *in* THE FEDERALIST PAPERS AND THE NEW INSTITUTIONALISM 100, 100-01 (Bernard Grofman & David Wettman eds., 1987).

14. *See* Strauss, *Common Law, supra* note 10, at 877.

15. *See id.* at 882.

16. *See generally* Jon Elster, *Don't Burn Your Bridge Before You Come to It: Some Ambiguities and Complexities of Precommitment*, 81 TEX. L. REV. 1751, 1758-59 (2003); Douglass C. North & Barry R. Weingast, *Constitutions and Commitment: The Evolution of Institutions Governing Public Choice in Seventeenth-Century England*, 49 J. ECON. HIST. 803, 803 (1989).

17. Cass R. Sunstein, *Constitutionalism and Secession*, 58 U. CHI. L. REV. 633, 639 (1991); John Ferejohn & Lawrence Sager, *Commitment and Constitutionalism*, 81 TEX. L. REV. 1929, 1929-31 (2003).

18. David S. Law, *The Paradox of Omnipotence: Courts, Constitutions, and Commitments,* Legal Studies Research Paper Series, Research Paper No. 06-16, at 5 (May 2005) (on file with author) (emphasis in original omitted).

19. *See generally* David A. Strauss, *The Irrevelance of Constitutional Amendments*, 114 HARV. L. REV. 1457 (2001) [hereinafter Strauss, *Irrelevance*]; Reva B. Siegel, *Text in Contest: Gender and the Constitution from a Social Movement Perspective*, 150 U. PA. L. REV. 297 (2001); Adrian Vermuele, *Constitutional Amendments and the Constitutional Common Law* (Chicago Law School Pub. L. & Legal Theory Working Paper Series, Paper No. 73, 2004), available at http://ssrn.com/abstract_id=590341.

20. *See, e.g.*, Strauss, *Irrelevance*, *supra* note 19, at 1478-86.

at the time of their adoption.[21] Other scholars dispute Strauss's claims, suggesting that he undervalues or ignores the multiple roles that amendments play in our constitutional system.[22] They point to the great symbolic value of the Thirteenth Amendment, which was seen by its contemporaries as the transforming act ending slavery and the original Constitution's compact with the devil by sanctioning slavery, as evidence of Strauss's limited view.[23] The Fourteenth Amendment, Denning and Vile contend, not only overturned "the infamous *Dred Scott* decision of 1857 and notorious three-fifths compromise," but also enabled civil rights advocates "to point to a portion of the text of the Constitution–the fundamental law of the land–that guaranteed equality of persons . . . ."[24]

The question of whether constitutional provisions matter is of increased significance in an era of renewed constitution-making around the world.[25] This article contributes to the debate over whether constitutions matter by taking a specific case of constitutional change and empirically studying its impacts.

This article takes the strong claim that constitutional provisions do not matter and evaluates it. It adds to the debate over the importance of constitutional change by demonstrating that constitutional provisions, and more specifically, the constitutional recognition of rights, have an actual impact in at least one particular case. When considered in relation to other case studies of constitutional change, it contributes to a larger scholarly project of determining whether, when, and how constitutions matter.

This article focuses on the actual effects of the constitutional recognition of Aboriginal rights on Aboriginal title litigation because countries are increasingly considering or adopting these provisions.[26] In the past twenty-five years,

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21. *Id.* at 1479 ("The amendments made relatively little difference when they were adopted."). Strauss describes the Thirteenth Amendment as merely hastening "the end of slavery in a few border states by a few years," *id.* at 1480-81, the Fourteenth as unnecessary, *id*. at 1484, and the Fifteenth as "added to the Constitution's text but [it] did not become part of the Constitution in operation." *Id.* at 1483. He also asserts that the influence of the Fourteenth Amendment during the civil rights revolution in the 1950s was limited and not without qualification. *Id.* at 1484-85.

22. *See, e.g.*, Brannon P. Denning & John R. Vile, *The Relevance of Constitutional Amendments: A Response to David Strauss*, 77 TUL. L. REV. 247, 251 (2002); MICHAEL VORENBERG, FINAL FREEDOM: THE CIVIL WAR, THE ABOLITION OF SLAVERY, AND THE THIRTEENTH AMENDMENT 6 (2001).

23. Denning & Vile, *supra* note 22, at 259-61; VORENBERG, *supra* note 22, at 6.

24. Denning & Vile, *supra* note 22, at 260.

25. *See, e.g.*, CLETUS GREGOR BARIÉ, PUEBLOS INDÍGENAS Y DERECHOS CONSTITUCIONALES EN AMÉRICA LATINA: UN PANORAMA 474 (2000); DONNA LEE VAN COTT, THE FRIENDLY LIQUIDATION OF THE PAST: THE POLITICS OF DIVERSITY IN LATIN AMERICA 257-60 (2000). *See generally* RICHARD SPITZ & MATTHEW CHASKALSON, THE POLITICS OF TRANSITION: A HIDDEN HISTORY OF SOUTH AFRICA'S NEGOTIATED SETTLEMENT (2000).

26. VAN COTT, *supra* note 25, at 1-4. Indian rights advocates and legal scholars in the United States have also proposed constitutional amendment as a way to resolve conflicts

several countries have adopted constitutional provisions recognizing Aboriginal rights.[27] Many praised these constitutional changes as beneficial to the legal recognition and protection of Aboriginal rights.[28] They predicted that the constitutional recognition of Aboriginal rights would alter the second-class citizenship status of Aboriginal peoples, who have long been dispossessed of their land, discriminated against, and impoverished.[29]

Despite this initial praise, some scholars are beginning to doubt whether the constitutional recognition of Aboriginal rights always benefits Aboriginal peoples and increases cultural tolerance within the state.[30] Largely, these scholars doubt the state's ability to pre-commit to the protection of Aboriginal rights. Some suggest that the political expediency of recognizing Aboriginal rights may be limited because the recognition of Aboriginal rights may be politically advantageous at the time of constitution-making, but dangerous to political elites in the long run, many of whom cite ambiguities in the text to justify inaction later.[31] Similarly, some political elites may have never intended for constitutional recog-

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between Indian Nations, states, and the federal government. *See, e.g.*, WINONA LADUKE, ALL OUR RELATIONS: NATIVE STRUGGLES FOR LAND AND LIFE 198-200 (1999); Frank Pommersheim, *Is There a (Little or Not so Little) Constitutional Crisis Developing in Indian Law?: A Brief Essay*, 5 U. PA. J. CONST. L. 271, 285-86 (2002).

27. VAN COTT, *supra* note 25, at 1-4, 266-68 tbl.4 (noting that Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Paraguay, and Peru have all recently constitutionally protected Aboriginal rights).

28. *See, e.g.*, Arthur Manuel, *Aboriginal Rights on the Ground: Making Section 35 Meaningful*, *in* BOX OF TREASURES OR EMPTY BOX? TWENTY YEARS OF SECTION 35, at 316-17 (Ardith Walkem & Halie Bruce eds., 2003) (expressing the author's initial high hopes for the constitutional protection of Aboriginal rights); PATRICK MACKLEM, INDIGENOUS DIFFERENCE AND THE CONSTITUTION OF CANADA 5 (2001).

29. VAN COTT, *supra* note 25, at 1-4. Institute of Latin American Studies, MULTICULTURALISM IN LATIN AMERICA: INDIGENOUS RIGHTS, DIVERSITY AND DEMOCRACY 4-5 (Rachel Sieder ed., 2002) [hereinafter MULTICULTURALISM IN LATIN AMERICA]. Additionally, some scholars suggested that the entire state, not just Aboriginal peoples, will gain from the recognition of Aboriginal rights because such constitutional rights promote multiculturalism and more inclusive national political communities. *See* VAN COTT, *supra* note 25, at 1-4; MULTICULTURALISM IN LATIN AMERICA, *supra*, at 4-5; Will Kymlicka, *Three Forms of Group-Differentiated Citizenship in Canada*, *in* DEMOCRACY AND DIFFERENCE: CONTESTING THE BOUNDARIES OF THE POLITICAL 153 (Seyla Benhabib ed., 1996).

30. *See, e.g.*, MULTICULTURALISM IN LATIN AMERICA, *supra* note 29, at 11; ALAN C. CAIRNS, CITIZENS PLUS: ABORIGINAL PEOPLES AND THE CANADIAN STATE (2000); John Borrows, *Frozen Rights in Canada: Constitutional Interpretation and the Trickster*, 22 AM. INDIAN L. REV. 37, 37-41 (1997) [hereinafter Borrows, *Frozen Rights*]; THE QUEST FOR JUSTICE: ABORIGINAL PEOPLES AND ABORIGINAL RIGHTS (Menno Boldt & J. Anthony Long eds., 1985) [hereinafter THE QUEST FOR JUSTICE].

31. MULTICULTURALISM IN LATIN AMERICA, *supra* note 29, at 11.

nitions of Aboriginal rights to be implemented or enforced. Other scholars indicate that institutional concerns may undermine the impact of recognized Aboriginal rights.[32] The political elites acting for the state in adopting the constitutional provisions may not be the same actors charged with enforcing the constitution.[33] Thus, constitutional recognitions may be ignored by the state actors expected to enforce them.[34]

The debate over the effects of the constitutional incorporation of Aboriginal rights extends beyond Canada to other states that have adopted constitutional provisions recognizing Aboriginal rights.[35] These provisions constitutionalize collective group rights based on claims to self-determination that remain controversial even within the expansive international human rights regime.[36] Recognition of these rights challenges historical notions of unified state sovereignty and political communities based on nationalism.[37] They introduce new concepts such as the idea of multinationalism within a single constitutional state.[38] While some may suggest that the recognition of collective group rights is inconsistent with the idea of a liberal democracy,[39] such arguments conceal the complex relationship between collective group and individual rights within a constitutional system.[40] As Aboriginal rights are some of the first autonomy based collective group rights ever incorporated into constitutions, the impacts of these rights are often debated.

While many of the debates over the impact of constitutional change appear to make quasi-empirical claims, few empirical studies have been conducted to determine whether constitutional provisions have any practical effects.[41]

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32. Borrows, *Frozen Rights*, *supra* note 30, at 37-41.

33. MULTICULTURALISM IN LATIN AMERICA, *supra* note 29, at 9-11.

34. David Strauss discusses the problems of rights enforcement in detail in arguing that constitutional amendments and texts do not lead to legal change. Strauss, *Common Law*, *supra* note 10, at 901-06; *see also* Strauss, *Irrelevance*, *supra* note 19, at 1457-69.

35. *See* VAN COTT, *supra* note 25, at 266-68 tbl.4, 269.

36. *See* PATRICK THORNBERRY, INDIGENOUS PEOPLES AND HUMAN RIGHTS 1-10 (2002).

37. Kymlicka, *supra* note 29, at 153; Charles Taylor, *The Politics of Recognition*, *in* MULTICULTURALISM AND THE POLITICS OF RECOGNITION 25, 51-61 (Amy Gutmann ed., 1994) [hereinafter Taylor, *Politics*].

38. Kymlicka, *supra* note 29, at 153; Taylor, *Politics*, *supra* note 38, at 51-61.

39. TOM FLANAGAN, FIRST NATIONS? SECOND THOUGHTS 194 (2000). Flanagan argues that Aboriginal rights are inconsistent with liberal democracy because they make race "the constitutive factor of the political order." *Id.*

40. *See* Jürgen Habermas, *Struggles for Recognition in the Democratic Constitutional State* (Shierry Weber Nicholsen trans.), *in* MULTICULTURALISM AND THE POLITICS OF RECOGNITION 107, 107 (Amy Gutmann ed., 1994).

41. While few empirical studies have been done, several descriptive and normative works have been written on the subject of Aboriginal rights. *See, e.g.*, Borrows, *Frozen Rights*, *supra* note 30; THE QUEST FOR JUSTICE, *supra* note 30; BOX OF TREASURES OR

Scholars have conducted legal impact studies to analyze the effect of individual criminal rights, such as the impact of the United States Supreme Court's decision in *Miranda v. Arizona*,[42] but these studies focus on constitutional decision-making by a Supreme Court rather than the incorporation of a new constitutional provision.[43] Others have looked at whether the incorporation of the Canadian Charter of Rights and Freedoms has altered the Canadian Supreme Court's agenda setting practices,[44] but very few studies have attempted to determine the impact of autonomy based collective rights. In the specific context of constitutional recognitions of Aboriginal rights, political scientist Donna Lee Van Cott conducted a preliminary analysis of the implementation of constitutional recognitions of Aboriginal rights in Colombia and Bolivia.[45] Her work, however, focused more on governmental implementation of these rights through legislation than the use of litigation to enforce Aboriginal rights.[46] Similarly Yrigoyen Fajardo analyzed the protection of Aboriginal juridical autonomy in Peruvian courts under the 1993 Peruvian Constitution.[47] Yrigoyen Fajardo's work looked at the legal implementation of constitutional protections of Aboriginal rights by Peruvian courts; it did not address whether constitutional reforms have impacted the number and kinds of claims being made by Aboriginal peoples.[48]

This study builds upon these few existing empirical works by looking at the multidimensional aspects of the impact of constitutional change. This article discusses the potential impacts of constitutional change on both courts and Aboriginal title litigants and considers several possible explanations for these effects. It asserts that political, legal, and social factors produce constitutional change on litigation. It concludes that constitutional impacts are best understood in a broader context than traditionally considered by legal scholars.

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EMPTY BOX? TWENTY YEARS OF SECTION 35 (Ardith Walkem & Halie Bruce eds., 2003); FLANAGAN, *supra* note 40; ABORIGINAL AND TREATY RIGHTS IN CANADA (Michael Asch ed., 1997).

42. 384 U.S. 436 (1966).

43. Legal impact studies after *Miranda* have looked at a wide variety of topics, including the impact of Miranda warnings on law enforcement and rates of confessions. *See, e.g.*, Nat'l Center for Policy Analysis, *Handcuffing the Cops:* Miranda's *Harmful Effects on Law Enforcement* (1998), http://www.ncpa.org/studies/s218/s218b.html; Richard H. Seeburger & R. Stanton Wettick, Jr., Miranda *in Pittsburgh – A Statistical Study, in* LAW & SOCIETY: READINGS ON THE SOCIAL STUDY OF LAW 550 (Stewart Macaulay et al. eds., 1995); *Interrogations in New Haven: The Impact of Miranda*, 76 YALE L. REV. 1519 (1967).

44. *See, e.g.*, Epp, *Do Bills of Rights Matter?*, *supra* note 11, at 765.

45. VAN COTT, *supra* note 25, at 35.

46. *Id.* at 35.

47. Raquel Yrigoyen Fajardo, *Peru: Pluralist Constitution, Monist Judiciary – A Post-Reform Assessment*, *in* MULTICULTURALISM IN LATIN AMERICA, supra note 29, at 158.

48. *Id.* at 158.

This article uses comparative historical analysis to examine whether the constitutional recognition of Aboriginal rights increases the legal recognition and protection of Aboriginal title claims brought in Canadian courts.[49] Aboriginal title claims in Canada provide an excellent case study because Canada has one of the longest histories of constitutional incorporation of Aboriginal rights, a high level of institutional development, and an extended history of Aboriginal title claims. Aboriginal title claims are central to Aboriginal rights claims because the basis of many Aboriginal rights claims stems from Aboriginal peoples' possession and occupation of land.[50] In addition to the importance of Aboriginal title to Aboriginal rights in general, Aboriginal title was recognized under the common law and thus, allows for evaluation of one of the major arguments against the impacts of constitutional change, namely that over time the common law would have evolved in the same way.[51]

Part II looks at what, if anything, has happened to Aboriginal title doctrine since Aboriginal rights were constitutionally recognized in 1982. It analyzes whether Aboriginal title doctrine has changed since constitutional incorporation by examining the Canadian Supreme Court's jurisprudence on Aboriginal title. It concludes that the jurisprudence relating to Aboriginal title doctrine has changed since 1982.

Part III discusses whether the change in Aboriginal title doctrine matters by determining whether the number of Aboriginal title claims has increased since Aboriginal rights were constitutionally incorporated in 1982. It categorizes Aboriginal title claims cases before the Canadian courts into two time periods, before and after constitutional incorporation, to determine whether the recognition of Aboriginal rights has opened the door for the adjudication of Aboriginal title claims.

Part IV suggests a preliminary framework for understanding these changes in Aboriginal title litigation. It evaluates what influence, if any, the constitutional incorporation of Aboriginal rights has had on Aboriginal title litigation and doctrine. It attempts to determine whether constitutional incorporation has had a measurable effect on the bringing of Aboriginal title claims and the recognition of Aboriginal title by considering some of the possible factors that could be influencing Aboriginal title claims and doctrine. It analyzes the underlying arguments for the claims to discover other foundations for affirming Aboriginal title claims, including international law and the common law. It argues

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49. This article does not analyze the impacts of the constitutional recognition of Aboriginal rights on the claims settlement negotiations in Canada. Instead it focuses on the bringing of Aboriginal title claims in Canadian courts. Further, while it acknowledges that the two processes are intertwined, the interplay between them is beyond the scope of this article.

50. Kent McNeil, *Aboriginal Title and Aboriginal Rights: What's the Connection?*, 36 ALTA. L. REV. 117, 118-23 (1997).

51. *See generally* Strauss, *Common Law*, *supra* note 10.

that section 35 has influenced Aboriginal title litigation because both Aboriginal peoples and the Supreme Court of Canada rely on section 35 in their presentation and analysis of these claims. Part IV also considers nondoctrinal factors that could influence the changes in Aboriginal title litigation. In particular, it looks at changes in the judiciary and the rise of legal support networks to determine if either of these played a major role in the changes. It argues that while some changes in the judiciary have occurred and a legal support network is slowly developing, these factors cannot completely account for the changes in Aboriginal title litigation. The evidence indicates that while section 35 may not have directly caused the changes, it has served as a means for the changes to occur. This article concludes that both doctrinal and nondoctrinal factors influence the impact of formal constitutional change and that these effects are best understood by placing them in a broader social context.

## II. PARLIAMENT CONSTITUTIONALIZED ABORIGINAL RIGHTS, NOW WILL JUDGES RECOGNIZE AND ENFORCE THEM: HAS ABORIGINAL TITLE DOCTRINE CHANGED SINCE 1982?

Part II argues that Aboriginal title doctrine in Canada has changed since Aboriginal rights were constitutionally incorporated in 1982. By focusing on the decisions of the highest legal authority in Canada, the Supreme Court, it analyzes the jurisprudence related to Aboriginal title and how it has evolved since 1982. It contends that while Aboriginal title was recognized under the common law, the Supreme Court of Canada has revised its earlier Aboriginal title doctrine since 1982. The law related to Aboriginal title has changed in five identifiable ways.[52] First, the Supreme Court of Canada has expressly held that Aboriginal title, as a distinct kind of Aboriginal right, has been recognized and affirmed by section 35(1).[53] Second, the Court has defined the content, nature, and scope of Aboriginal title, which remained indeterminate prior to constitutional incorporation. Third, the Court has expanded the types of evidence admissible in Aboriginal title cases to ensure that Aboriginal peoples are given a fair opportunity to prove Aboriginal title claims. Fourth, the Court has allowed for the payment of interim costs in Aboriginal title cases under certain circumstances. Finally, the Court has held that both federal and provincial governments have a duty to consult with Aboriginal peoples when making decisions that may adversely affect unproven Aboriginal title and rights claims.

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52. The author makes no normative claims about these changes and does not wish to enter into the debate over whether Aboriginal title law has changed dramatically enough in the past twenty years. *See, e.g.*, Borrows, *Frozen Rights*, *supra* note 30; THE QUEST FOR JUSTICE, *supra* note 30; FLANAGAN, *supra* note 39.

53. Delgamuukw v. British Columbia, [1997] 3 S.C.R. 1010, 1026-27.

The first major change to Aboriginal title doctrine has been the definition and recognition of the right as constitutionally protected under section 35. Although Canadian courts recognized Aboriginal title under the common law,[54] the scope, nature, and content of this right was never defined. While Aboriginal peoples did not bring many Aboriginal title claims in Canadian courts until 1969,[55] questions about Aboriginal title reached the Supreme Court of Canada in other kinds of cases much earlier.

The Supreme Court of Canada, and the Judicial Committee of the Privy Council, the court of final appeal in Canada until 1949,[56] first discussed the issue of Aboriginal title in *St. Catherine's Milling & Lumber Co. v. The Queen*.[57] This case did not involve an Aboriginal title claim,[58] but a dispute between the Canadian federal government and the Province of Ontario over which governmental entity owned land after Aboriginal title had been surrendered by treaty.[59] In dicta, both the Canadian Supreme Court and the Privy Council in *St. Catherine's Milling* noted that Aboriginal title was a "personal and usufractory right" granted by the Royal Proclamation of 1763.[60] Neither the Court nor their Lordships, however, analyzed the nature of Aboriginal title.[61] Both the Supreme Court of Canada and the Privy Council glossed over the issue of Aboriginal title, merely finding that the Saulteaux Tribes of the 1873 Treaty had Aboriginal title to surrender through the Treaty.[62] Both then upheld the province's claim to the treaty land cession.[63]

The Privy Council's dicta in *St. Catherine's Milling* was the final judicial discussion on Aboriginal title for almost 100 years.[64] In 1973, the Supreme Court

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54. *See, e.g.*, St. Catherine's Milling & Lumber Co. v. The Queen, [1888] 14 App. Cas. 46, 54-55 (P.C.); Calder v. Attorney-General of British Columbia, [1973] S.C.R. 313, 376 (Hall, J., dissenting).

55. *See infra* Part III.

56. CHARLES R. EPP, THE RIGHTS REVOLUTION: LAWYERS, ACTIVISTS, AND SUPREME COURTS IN COMPARATIVE PERSPECTIVE 161 (1998).

57. [1887] 13 S.C.R. 577; [1888] 14 App. Cas. at 46.

58. Nor were any Aboriginal peoples represented in these proceedings or given an opportunity to present their understanding of the 1873 Treaty to the courts. JAMES (SAKEJ) YOUNGBLOOD HENDERSON ET AL., ABORIGINAL TENURE IN THE CONSTITUTION OF CANADA 223 (2000).

59. [1888] 14 App. Cas. at 46.

60. HENDERSON, *supra* note 58, at 222.

61. [1888] 14 App. Cas. at 55 ("There was a great deal of learned discussion at the Bar with respect to the precise quality of the Indian right, but their Lordships do not consider it necessary to express any opinion on that point."); *see also* HENDERSON, *supra* note 58, at 222.

62. HENDERSON, *supra* note 58, at 222-23.

63. The Privy Council and the Supreme Court supported this holding with widely varying interpretations of the Constitution Act, 1867.

64. HENDERSON, *supra* note 58, at 228 ("The *St. Catherine's Milling* decision was still considered controlling law."). Although the *St. Catherine's Milling* decision is still consid-

of Canada heard its first Aboriginal title claim.[65] In *Calder v. Attorney-General of British Columbia*,[66] the Nisga'a[67] of Northwestern British Columbia sought a declaration that they had Aboriginal title to 1,000 square miles of land and that this title had not been lawfully extinguished.[68] The Canadian Supreme Court split evenly in *Calder* over whether the Nisga'a had Aboriginal title with full status and enforceable rights at the common law. Three justices held that the Nisga'a had Aboriginal title that had not been lawfully extinguished and were inclined to issue a declaration to that effect.[69] Three justices found that even if the Nisga'a had Aboriginal title it had been extinguished.[70] A final justice ruled that the case was improperly brought because such actions were not allowed under British Columbia law and thus, did not consider the question of Nisga'a title at all.[71] While the court did not unequivocally recognize the Nisga'a's Aboriginal title claim in *Calder* or the right of any Aboriginal peoples to bring Aboriginal title claims, the Court hinted for the first time that Aboriginal title did not stem from the Royal Proclamation of 1763.[72] The Privy Council in *St. Catherine's Milling* had mentioned only the Royal Proclamation as a source of Aboriginal title[73] but the Court's language in *Calder* suggested an independent, non-Proclamation source of Aboriginal title.[74] Also for the first time, three Justices of the Supreme Court, in the dissenting opinion, expressly recognized the existence of Aboriginal title and Aboriginal title claims.[75] While many scholars view *Calder* as demonstrating that Canadian courts were open to Aboriginal title claims,[76] the Court's decision was far from definitive as to whether Aboriginal peoples could prevail on such claims

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ered good law, it has been questioned over the years. *See, e.g.*, Attorney-General for Canada v. Giroux, [1916] 53 S.C.R. 172, 197 (Duff, J., concurring) (distinguishing *St. Catherine's Milling* on the ground that the statutory provisions under which the reserve in question had been created conferred beneficial ownership on the Indian Band); Cardinal v. Attorney General of Alberta, [1974] S.C.R. 695, 701 (accepting that Indians may have a beneficial interest in a reserve).

65. Kent McNeil, *The Onus of Proof of Aboriginal Title*, 37 OSGOODE HALL L.J. 775, 777-78 (1999).

66. [1973] S.C.R. 313.

67. The Justices of the Supreme Court spelled Nisga'a, "Nishga." *See id*. at 317.

68. *Id.*

69. *Id.* at 345-46 (Hall, J., dissenting).

70. *Id.* at 345.

71. *Id.* at 426-27 (Pigeon, J., dissenting).

72. *Calder*, [1973] S.C.R. at 322-23 (majority opinion); *see also* HENDERSON, *supra* note 58, at 229.

73. [1888] 14 App. Cas. at 53-54.

74. *Calder*, [1973] S.C.R. at 322-23.

75. *Id.* at 375-77 (Hall, J., dissenting).

76. *See, e.g.*, HENDERSON, *supra* note 58, at 229-30.

and the existence, nature, and content of Aboriginal title under the common law remained undefined.[77]

In 1977, the Supreme Court of Canada heard another Aboriginal title claim on appeal from the Court of Appeal for the Northwest Territory in *Paulette v. The Queen*.[78] In *Paulette*, sixteen Indian chiefs had asked the Register of Titles to file a caveat claiming Aboriginal title in some 400,000 square miles of land in the Northwest Territories.[79] The Register of Titles then referred the chiefs to the courts.[80] The Supreme Court dismissed the appeal, holding that a caveat could not be filed on unpatented Crown land.[81] The Court did nothing to clarify Aboriginal title doctrine or reconcile its various reasons for decision in *Calder*.

While *Calder* and *Paulette* were percolating through the courts in the late 1960s and early 1970s, the Canadian government commenced discussions about constitutional reform.[82] These proposed constitutional reforms, including the repatriation of the Canadian constitution and rejection of the Westminster model of parliamentary supremacy,[83] did not materialize until 1982.[84] As part of these constitutional reforms, several new sections were added to the Constitution, including a Charter of Rights and Freedoms and a separate section addressing the constitutional status of Aboriginal rights.[85]

Section 35 of the Constitution Act, 1982 states: "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and

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77. Kent McNeil, *The Meaning of Aboriginal Title*, *in* ABORIGINAL AND TREATY RIGHTS IN CANADA 135, 136 (Michael Asch ed., 1997) [hereinafter McNeil, *Meaning*].

78. [1977] 2 S.C.R. 628.

79. *Id.* at 630.

80. *Id.*

81. *Id.* at 645.

82. EPP, *supra* note 56, at 159.

83. The Westminster model of parliamentary supremacy is the traditional British style of government, in which the legislature is supreme in relation to all other governmental institutions, including the judiciary, which does not have the power to declare legislative acts unconstitutional. For more information on the Westminster model, *see generally* ALBERT DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION (1885).

84. EPP, *supra* note 56, at 160-61.

85. Some scholars attribute the inclusion of section 35 in the Constitution Act, 1982 to the Supreme Court's decision in *Calder*. DICKASON, *supra* note 6, at 332-33. While the *Calder* decision probably strengthened the position of Aboriginal rights advocacy groups seeking constitutional recognition of their rights, the road to constitutional recognition was a long and hard one. *See, e.g.*, DAVID C. HAWKES, ABORIGINAL PEOPLES AND CONSTITUTIONAL REFORM: WHAT HAVE WE LEARNED? 3-8 (1989). Further, some Aboriginal peoples resisted the constitutional change. R. v. Sec'y of State, [1982] Q.B. 892, 894 (C.A.) (appeal taken from Alta.) (Canadian Aboriginal peoples suing the British Crown for recognition of the continued obligation of the British Crown to them); Manuel v. Attorney-General of England, [1983] Ch. 77, 81 (C.A.) (Aboriginal peoples seeking declaration that the Constitution Act, 1982 was ultra vires).

affirmed."[86] The section is written in extremely broad terms, and leaves Aboriginal rights undefined. For example, section 35(1) does not answer the question of what an Aboriginal right is or whether Aboriginal title is one of the Aboriginal rights that it recognizes and affirms.[87] Further, the inclusion of the word "existing" was believed to limit the applicability of section 35(1) because only Aboriginal and treaty rights existing at the time were protected. Finally, section 35(1), unlike the Canadian Charter of Rights and Freedoms,[88] does not include any language to indicate whether the rights are judicially enforceable.

The Supreme Court of Canada directly addressed a question of Aboriginal title for the first time after the enactment of the Constitution Act, 1982 in *Ontario v. Bear Island Foundation*.[89] In that case, the Bear Island Foundation had registered cautions against tracts of unceded land north of Lake Nipissing, Ontario, on behalf of the Temegami Band of Indians, and the Attorney General of Ontario had sought a declaration that Ontario had clear title to the land in question.[90] The Court dismissed the appeal and avoided any examination of the specific nature of Aboriginal title by summarily finding that the right had been extinguished.[91] Once again the Court avoided making any decisive statements about the nature and content of Aboriginal title. The Supreme Court would not hear another Aboriginal title claim for over six years.

While the Court largely managed to skirt Aboriginal title claims cases for thirty years after deciding *Calder*, this avoidance did not prevent it from regularly discussing Aboriginal title in other Aboriginal rights cases. The lack of a clear distinction between Aboriginal title and Aboriginal rights claims until 1996 placed the Court in the inevitable position of having to address Aboriginal title in other Aboriginal rights cases because claimants often brought claims to Aboriginal hunting and fishing rights as Aboriginal title claims.[92] In *Guerin v. The Queen*, a non-constitutional case about the surrender of reserve lands, the Court suggested that Aboriginal peoples "had rights to their own lands by virtue of their own laws

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86. Constitution Act, 1982, Canada Act, 1982, sched. B, pt. II, § 35(1) (U.K.), *as reprinted in* R.S.C., No. 44 (Appendix 1985).

87. Section 35(2) does define Aboriginal peoples to include "the Indian, Inuit and Métis peoples of Canada." *Id.* § 35(2). This definition, of course, leaves open the question of who is Indian, Inuit and Métis. For a detailed discussion of who is Aboriginal in Canada, see ABORIGINAL RIGHTS LITIGATION (Joseph Eliot Magnet & Dwight A. Dorey eds., 2003).

88. Constitution Act, 1982, Canada Act 1982, sched. B, pt. I, § 24 (U.K.), *as reprinted in* R.S.C., No. 44 (Appendix 1985). Courts have enforced sections 35 through 52(1) of the Constitution Act, 1982.

89. [1991] 2 S.C.R. 570.

90. *Id.* at 573.

91. *Id.* at 575.

92. *See, e.g.*, R. v. Côté, [1996] 3 S.C.R. 139, ¶ 3; R. v. Adams, [1996] 3 S.C.R. 101, ¶ 3.

prior to European colonization."[93] It also stated that Aboriginal interests in reserve land were the same as their Aboriginal title.[94] Similarly, in *R. v. Adams*, a fishing rights case, the Court found that Aboriginal title claims were simply one manifestation of a broader based concept of Aboriginal rights.[95] Despite these comments, the Court had yet to address an Aboriginal title claim for real property and define the content and nature of Aboriginal title.

Two years after the Constitution Act, 1982 incorporated Aboriginal rights into the Canadian Constitution, hereditary chiefs of the Gitksan and Wet'suwet'en bands in British Columbia filed a lawsuit claiming Aboriginal title to over 58,000 square kilometers of land.[96] British Columbia counterclaimed, arguing that the chiefs had no interest in the land, or alternatively, that they only had a claim for monetary compensation against the Canadian government.[97] Almost fifteen years later in 1997, this case, *Delgamuukw v. British Columbia*, reached the Supreme Court of Canada.[98] The Supreme Court remanded the case for retrial on technical grounds due to a defect in the pleadings.[99] Before doing so, however, the Court addressed the content of Aboriginal title, the requirements for its proof, and its recognition and protection under section 35(1).[100]

The Supreme Court's decision in *Delgamuukw* represented a shift from its earlier precedent on Aboriginal title in three ways. To begin with, for the first time, the Supreme Court in *Delgamuukw* defined the right of Aboriginal title and determined that this right was constitutionally recognized in section 35(1). Second, the Supreme Court established the tests for proof of and infringement on Aboriginal title. Third, the Supreme Court determined the kind of evidence admissible in Aboriginal title cases.

The Supreme Court in *Delgamuukw* developed its earlier Aboriginal title jurisprudence by defining the right of Aboriginal title for the first time and finding that it was a constitutionally protected right under section 35(1). The Court explained that the only source of Aboriginal title is occupation of the land prior to

93. McNeil, *Meaning*, *supra* note 77, at 136.

94. Guerin v. The Queen, [1984] 2 S.C.R. 335, 379.

95. *Adams*, [1996] 3 S.C.R. 101, ¶ 25.

96. *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, was originally filed as a claim under the Land Titles Act. After *Calder*, a few Aboriginal title claims were filed under the Land Titles Act. These suits sought encumbrances on land based on Aboriginal title claims. *See, e.g.*, Paulette v. The Queen, [1977] 2 S.C.R. 628; Cook v. Beckman, [1990] 84 Sask. R. 89, ¶ 4 (Ct. App.). These cases sought encumbrances on land based on Aboriginal title claims.

97. *Delgamuukw*, [1997] 3 S.C.R. at 1029.

98. *See id*. at 1010.

99. *Id.* at 1063.

100. *Id.* at 1061.

the Crown's assertion of sovereignty over what is now Canada.[101] Thus, the Court finally fully departed from the dicta in *St. Catherine's Milling*, which indicated that the source of Aboriginal title was the Royal Proclamation of 1763.

The Court defined Aboriginal title as a proprietary right: it is "an interest in the land" and a "right to the land itself."[102] In the majority opinion, then Chief Justice Lamer rejected both the plaintiff's argument that Aboriginal title under section 35(1) was tantamount to inalienable fee simple and the respondent's argument that Aboriginal title merely connoted a bundle of rights rather than an independent right or only meant an Aboriginal right to use and occupy the land.[103] Then he explained the content of Aboriginal title:

> Aboriginal title is a right in land and, as such, is more than the right to engage in specific activities which may be themselves aboriginal rights. Rather, it confers the right to use land for a variety of activities, not all of which need be aspects of practices, customs, and traditions which are integral to the distinctive cultures of aboriginal societies. Those activities do not constitute the right *per se*; rather, they are parasitic on the underlying title.[104]

The Court thus defined Aboriginal title as distinct from both Aboriginal rights and a fee simple interest in the land.

The Court identified Aboriginal title as *sui generis* and noted that its *sui generis* nature triggered its various dimensions.[105] The dimensions of Aboriginal title include its inalienability to third parties, its status as a collective, communally held right, and its inherent limitation.[106] Aboriginal title is inalienable because it cannot be transferred, sold, or surrendered to anyone other than the Crown.[107] It is

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101. *Id.* at 1082 ("[I]t is now clear that although aboriginal title was recognized by the Proclamation, it arises from prior occupation of Canada by aboriginal peoples.").

102. *Id.* at 1081, 1095-96. The Court's recognition of Aboriginal title as a constitutionally protected property right distinguishes Aboriginal title from other property rights. Property rights were not included in the fundamental rights and freedoms guaranteed by the Charter in 1982. KENT MCNEIL, EMERGING JUSTICE? ESSAYS ON INDIGENOUS RIGHTS IN CANADA AND AUSTRALIA 295 (2001) [hereinafter MCNEIL, EMERGING JUSTICE?].

103. *Delgamuukw*, [1997] 3 S.C.R. at 1080 ("The content of aboriginal title, in fact, lies somewhere in between these two positions.").

104. *Id.*

105. *Id.* at 1081.

106. *Id.* at 1081-82.

107. *Id.* at 1081.

a collective right because it is held communally by all members of an Aboriginal nation rather than held by individual Aboriginal persons.[108]

Before addressing whether Aboriginal title is inherently limited, the Court emphasized that Aboriginal title "encompasses the right to exclusive use and occupation of the land."[109] This exclusive use and occupation is not limited to purposes which are aspects of Aboriginal practices, customs and traditions integral to distinctive Aboriginal cultures.[110] It stated that despite the underdeveloped nature of Aboriginal title jurisprudence, nothing suggested that Aboriginal practices, customs, and traditions are a qualifier on the right of Aboriginal title.[111] Further, the Court stated that Aboriginal interests in Aboriginal title mirror Aboriginal interests in reserve lands and should be interpreted as broadly.[112]

Despite asserting that Aboriginal title is not generally limited, the Court did find an inherent limit to Aboriginal title in that "lands subject to aboriginal title cannot be put to such uses as may be irreconcilable with the nature of the occupation of that land and the relationship that the particular group has had with the land."[113] The Court suggested that such an irreconcilable use would occur if occupation to the land were established based on the use of the land as a hunting ground and then the Aboriginal nation sought to strip mine the property.[114]

In addition to defining the nature, scope, and content of Aboriginal title, the Court in *Delgamuukw* found that Aboriginal title is a constitutionally protected right under section 35(1).[115] The Court explained that section 35(1) did not create constitutional rights but rather extended constitutional protections to Aboriginal rights existing under the common law in 1982.[116] As a constitutionally protected right, the Court noted that Aboriginal title could not be extinguished by either federal or provincial governments after 1982. Further, the constitutional recognition of Aboriginal title changed the remedies available in Aboriginal title cases by

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108. *Id.* at 1082-83 ("Decisions with respect to that land are also made by that community.").

109. *Delgamuukw*, [1997] 3 S.C.R. at 1083.

110. *Id.*

111. *Id.* at 1084.

112. *Id.* at 1086 ("On the basis of *Guerin*, lands held pursuant to aboriginal title, like reserve lands, are also capable of being used for a broad variety of purposes."). Some scholars have interpreted the Court's statements about the breadth of the right of Aboriginal title to include natural resources on and under the land whether or not those resources were utilized by the Aboriginal nation prior to the assertion of Crown sovereignty. MCNEIL, EMERGING JUSTICE?, *supra* note 102, at 134.

113. *Delgamuukw*, [1997] S.C.R. at 1089.

114. *Id.* For a critique of the Court's creation of this inherent limit as paternalistic, see MCNEIL, EMERGING JUSTICE?, *supra* note 102, at 116-22.

115. *Delgamuukw*, [1997] 3 S.C.R. at 1091 ("Aboriginal title at common law is protected in its full form by s[ection] 35(1).").

116. *Id.* at 1092.

providing a constitutional remedy, namely the laws infringing on the right can be declared unconstitutional. In recognizing Aboriginal title as a constitutionally protected right, the Court reiterated the distinction it drew between Aboriginal title and other Aboriginal rights in *R. v. Adams*.[117] The Court explained, "although aboriginal title is a species of aboriginal right recognized and affirmed by s[ection] 35(1), it is distinct from other aboriginal rights because it arises where the connection of a group with a piece of land 'was of a central significance to their distinctive culture.'"[118] The Court confirmed that Aboriginal rights may exist independent of Aboriginal title.

The Supreme Court also expanded Aboriginal title doctrine in *Delgamuukw* by establishing the test for proof of Aboriginal title. The Court established a three-part test for proving Aboriginal title and placed the burden of proving Aboriginal title on Aboriginal peoples.[119] In order to make a prima facie case of Aboriginal title, an Aboriginal nation must show that (1) the land was occupied prior to Crown assertion of sovereignty, (2) there was continuity between present and pre-sovereignty occupation, and (3) that occupation was exclusive when the Crown asserted sovereignty.[120]

The Court found that Aboriginal peoples may meet the first prong of the test by showing that they occupied the land at the time Crown sovereignty was asserted.[121] Occupation may be proven by showing actual physical presence or through proof of the existence of a system of Aboriginal law under which Aboriginal title to the territory existed.[122] In this respect, for the first time, the Court acknowledged that Aboriginal laws and perspectives (in addition to physical presence) are central to Aboriginal title claims.

To meet the second prong of the test, continuity, the Court stated that the Aboriginal nation must show substantial maintenance of the connection between the community and the land.[123] Noting that it may be difficult to present conclusive evidence of continual occupation, it rejected the idea that an Aboriginal nation has to demonstrate "an unbroken chain of continuity" between present and past occupation. The Court stated that changes and disruptions in occupation would not preclude a claim for Aboriginal title.[124]

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117. *Id.* at 1093-94 (citing R. v. Adams, [1996] 3 S.C.R. 101, ¶ 25).

118. *Id.* at 1094 (quoting *Adams*, [1996] 3 S.C.R. 101, ¶ 26).

119. *Id.* at 1097.

120. *Id.*

121. *Delgamuukw*, [1997] 3 S.C.R. at 1099-1100; *see also* MCNEIL, EMERGING JUSTICE?, *supra* note 102, at 105-07.

122. *Delgamuukw*, [1997] 3 S.C.R. at 1099-1100; *see also* MCNEIL, EMERGING JUSTICE?, *supra* note 102, at 105-07.

123. *Delgamuukw*, [1997] 3 S.C.R. at 1103 (quoting Mabo v. Queensland (1992) 107 A.L.R. 1 (Austl.)).

124. *Id.*

Finally, the Court explained that to meet the exclusivity prong, an Aboriginal nation would have to demonstrate its ability to exclude others from use and occupation of the land.[125] The Court found both common law and Aboriginal perspectives equally important to proof of exclusivity.[126] It recognized that exclusive occupation may be demonstrated even if other Aboriginal groups were present, or frequented the claimed lands.[127] It also noted that even if Aboriginal title could not be proven because occupation and use was not exclusive, the Aboriginal nation may have a claim for Aboriginal rights short of Aboriginal title.[128]

In this way, the Court established a test for proving Aboriginal title. While prior to the *Delgamuukw* decision, Aboriginal peoples were presumed to be able to bring claims for Aboriginal title under *Calder*, the standards of proof for such a claim remained uncertain because the Supreme Court had not conclusively spoken on the matter. In fact, prior to *Delgamuukw*, some confusion existed in the lower courts after *Calder* as to what the appropriate test was and how to apply it.[129]

The Court also spoke for the first time in *Delgamuukw* about the kind of evidence Aboriginal peoples could use to prove Aboriginal title claims. In perhaps its boldest move, the Supreme Court departed from traditional common law rules of evidence in recognizing the vital role and admissibility of oral histories in Aboriginal title cases. Relying on its previous interpretation of section 35(1) in *R. v. Van der Peet*,[130] the Court reiterated its statement that courts must take the perspective of Aboriginal peoples into account in adjudicating Aboriginal rights claims.[131] The Court stated that the laws of evidence must be adapted:

> so that the aboriginal perspective on their practices, customs and traditions and on their relationship with the land, are given due weight by the courts. In practical terms, this requires the courts to come to terms with the oral histories of aboriginal societies, which, for many aboriginal nations, are the only record of their past.[132]

The Court detailed the problems with the use of oral histories under common law rules of evidence, particularly the question of hearsay, and noted that

125. *Id.* at 1104.
126. *Id.*
127. *Id.*
128. *Id.* at 1106.
129. *See, e.g.*, Baker Lake (Hamlet) v. Canada, [1980] 1 F.C. 518, 555-57.
130. [1996] 2 S.C.R. 507.
131. *Delgamuukw*, [1997] 3 S.C.R. at 1065-66.
132. *Id.* at 1067.

the oral histories of Aboriginal peoples have been and would continue to be "consistently and systematically undervalued by the Canadian legal system" unless they were admissible in Aboriginal rights cases.[133] It then concluded that the inadmissibility of Aboriginal oral traditions could prevent Aboriginal peoples from ever being able to establish their historical claims and that this would be unacceptable under the Constitution.[134]

Finally, the Court in *Delgamuukw* explained the extent of constitutional protection of Aboriginal title under section 35(1). While Aboriginal title is a constitutionally protected property right, it is not an absolute right.[135] The Court emphasized that the purpose of section 35(1) is "to reconcile the prior presence of aboriginal peoples in North America with the assertion of Crown sovereignty."[136] The Court explained that section 35(1) requires that infringements of Aboriginal rights by provincial and federal governments must meet a test of justification.[137] It then applied the two-part test for the infringement of Aboriginal rights established in *R. v. Sparrow*.[138] First, any infringement of the Aboriginal right has to be "in furtherance of a legislative objective that is compelling and substantial."[139] It explained:

> Aboriginal rights are a necessary part of the reconciliation of aboriginal societies with the broader political community of which they are part; limits placed on those rights are, where the objectives furthered by those limits are of sufficient importance to the broader community as a whole, equally a necessary part of that reconciliation.[140]

Second, the infringement must be consistent with the special fiduciary relationship between Aboriginal peoples and the Crown.[141] This inquiry is legally and factually specific to the content of each claim of infringement, but should include an assessment of the amount of infringement and consultation with the Aboriginal nation.[142] The Court then found that the province of British Columbia did not have the power to extinguish Aboriginal rights after 1871, allowed the

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133. *Id.* at 1074.
134. *Id.* at 1077-78.
135. *Id.* at 1107.
136. *Id.* at 1096.
137. *Delgamuukw*, [1997] 3 S.C.R. at 1107.
138. *Id.* at 1107.
139. *Id.*
140. *Id.* at 1108.
141. *Id.*
142. *Id.* at 1109.

appeal, and remanded for new trial to determine whether the First Nations had Aboriginal title.[143]

Recently, the Court clarified the precedent it established in *Delgamuukw*.[144] On July 20, 2005, the Supreme Court of Canada directly addressed Aboriginal title claims for the first time since *Delgamuukw* in *R. v. Bernard* and *R. v. Marshall*.[145] While these cases primarily involved questions of treaty rights, the Court, unlike in *Delgamuukw*, actually heard the merits of and rendered a decision on the Aboriginal title claims in *Bernard*. For the first time since *Delgamuukw* shifted Aboriginal title doctrine away from the common law, the Court provided practical guidance on what is necessary to make a successful Aboriginal title claim and then applied it to a specific set of facts.

The Court disposed of two companion cases in the *Bernard* decision. In the first case, Bernard, a Mi'kmaq Indian, was arrested for the unlawful possession of logs in violation of the Crown Lands and Forest Act, 1980.[146] Similarly, in *Marshall*, Mi'kmaq Indians were charged with the unauthorized cutting of timber on Crown lands in violation of the Crown Lands Act, 1989.[147] In both cases, the defendants argued that they did not need Crown authorization to log on Crown lands because they had either treaty rights to engage in commercial logging or Aboriginal title to the land.[148] The Supreme Court rejected the treaty rights and Aboriginal title claims, finding that the Mi'kmaq could not log on Crown lands without authorization.

Before determining that the Mi'kmaq did not have Aboriginal title to the Crown lands, the Court clarified its decision in *Delgamuukw* in several ways. First, the Court reiterated that section 35 is a constitutionally protected common law right, and that as such, it can no longer be extinguished by clear legislative act unless the Crown can establish that its infringement on title "is justified in pursuance of a compelling and substantial legislative objective for the good of larger

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143. *Delgamuukw,* [1997] 3 S.C.R. at 1122-23.

144. The Court has repeatedly reaffirmed the position it took in *Delgamuukw* in cases involving land issues other than unextinguished Aboriginal title. *See, e.g.*, Osoyoos Indian Band v. Oliver, [2001] 3 S.C.R. 746, 796 ¶ 46.

145. 2005 S.C.C. 43, 30005, [2005] S.C.J. No. 44 QUICKLAW (July 20, 2005). The two companion cases in *Bernard* are related to two earlier Supreme Court cases adjudicating Mi'kmaq treaty and fishing rights. R. v. Marshall, [1999] 3 S.C.R. 456, ¶ 4 (finding that the Mi'kmaq have treaty rights to trade in the products of their fishing, hunting, and gathering); R. v. Marshall, [1999] 3 S.C.R. 533, ¶ 48 (rejecting petition for rehearing).

146. *Bernard*, 2005 S.C.C. 43, at ¶ 3.

147. *Id.* ¶ 2.

148. *Id.* ¶ 37. The defendants advanced three different arguments for Aboriginal title: common law; the Royal Proclamation; and Governor Belcher's Proclamation. *Id.* The latter two arguments contend that these proclamations reserved the land to the Mi'kmaq. This article's analysis will focus on the common law arguments because they are the only ones directly related to section 35.

society."[149] Then, the Court focused on refining its test for proof of an Aboriginal title claim. It noted that the appellate courts in each case had applied a more lenient standard than the trial courts, and explained that this raised issues "as to the standard of occupation required to prove title, including the related issues of exclusivity of occupation, application of this requirement to nomadic peoples, and continuity."[150]

Before determining the appropriate standard, the Court considered two concepts central to inquiries into the existence of Aboriginal rights. First, the Court elaborated on "the requirement that both aboriginal and European common law perspectives [] be considered."[151] The Court explained that this requirement means that courts must answer the question of "whether the aboriginal practice at the time of assertion of European sovereignty . . . translates into a modern legal right, and if so, what right?"[152] To answer this question:

> The Court must consider the pre-sovereignty practice from the perspective of the aboriginal people. But in translating it into a common law right, the Court must also consider the European perspective; the nature of the right at common law must be examined to determine whether a particular aboriginal practice fits it. This exercise in translating aboriginal practices to modern rights must not be conducted in a formalistic or narrow way. The Court should take a generous view of the aboriginal practice and should not insist on exact conformity to the precise legal parameters of the common law right. The question is whether the practice corresponds to the core concepts of the legal right claimed.[153]

The Court emphasized the role of Aboriginal perspectives in grounding this analysis, and held that "[a]bsolute congruity is not required, so long as the practices engage the core idea of the modern right."[154]

The Court further expounded on the process of reconciling Aboriginal and European perspectives in describing the second underlying concept. It defined the second concept as "the variety of aboriginal rights that may be affirmed,"[155] and described it as flowing from the process of reconciling Aboriginal and European perspectives. The Court explained that the reconciliation process seeks to determine "what modern right best corresponds to the pre-sovereignty

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149. *Id.* ¶ 39.
150. *Id.* ¶ 40.
151. *Bernard*, [2005] S.C.C. 43, ¶ 45.
152. *Id.* ¶ 48.
153. *Id.*
154. *Id.* ¶ 50.
155. *Id.* ¶ 45.

aboriginal practice, examined from the aboriginal perspective."[156] It reiterated the distinction that it drew in *Delgamuukw* between Aboriginal title and Aboriginal rights by identifying Aboriginal title as only one of several independent Aboriginal rights[157] and emphasized the context-specific nature of common law title.[158]

After its review of these general principles, the Court clarified the specific requirements for title established in *Delgamuukw* as proof of "'exclusive' pre-sovereignty 'occupation' of the land by their forebears."[159] It started by looking at what it meant by occupation through physical presence in *Delgamuukw*.[160] The Court explained "that exploiting the land, rivers or seaside for hunting, fishing or other resources may translate into aboriginal title to the land if the activity was sufficiently regular and exclusive to comport with title at common law."[161] The Court stated that seasonal or occasional use was generally not "sufficiently regular and exclusive" to prove title.[162] Instead, and "more typically, seasonal hunting and fishing rights exercised in a particular area will translate into a hunting or fishing right."[163] It then reiterated that to determine which rights the traditional practices correspond to, courts are to look at "whether the practices established by the evidence, viewed from the aboriginal perspective, correspond to the core of the common law right claimed."[164]

The Court continued on to discuss three sub-issues involved in *Bernard*: exclusivity, nomadic possession, and continuity. The Court noted the difficulty in determining exclusivity and may have taken a more lenient approach than indi-

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156. *Id.* ¶ 52.

157. *Bernard*, [2005] S.C.C. 43, ¶ 53. Several scholars have criticized the Court for artificially separating Aboriginal title from Aboriginal rights. *See, e.g.*, Douglas Harris, *Indigenous Territoriality in Canadian Courts, in* BOX OF TREASURES OR EMPTY BOX? TWENTY YEARS OF SECTION 35, at 175 (Ardith Walkem & Halie Bruce eds., 2003).

158. *Bernard*, [2005] S.C.C. 43, ¶ 53. The Court described common law title as recognizing the following: that possession is a factual matter dependent upon all the circumstances and the nature of the land, "that a person with adequate possession for title may choose to use it intermittently or sporadically," and "that exclusivity does not preclude consensual arrangements that recognize shared title to the same parcel of land." *Id.* ¶ 54.

159. *Id.* ¶ 55.

160. In *Delgamuukw*, the Court may have established two ways to prove occupation, either through actual physical presence or through proof of the existence of a system of Aboriginal law under which Aboriginal title to the territory existed. Delgamuukw v. British Columbia, [1997] 3 S.C.R. 1010, 1099-1100; MCNEIL, EMERGING JUSTICE?, *supra* note 102, at 106-08. Here the Court only discussed occupation as physical occupation. *Bernard*, [2005] S.C.C. 43, ¶ 36. While the Court mentioned several ways of showing physical occupation, it did not mention or discuss whether and how Aboriginal peoples may be able to prove occupation through the existence of a system of Aboriginal law.

161. *Bernard*, [2005] S.C.C. 43, ¶ 58.

162. *Id.* ¶¶ 58-59.

163. *Id.* ¶ 58.

164. *Id.* ¶ 60.

cated in *Delgamuukw*. In the earlier case, it stated that to meet the exclusivity requirement, Aboriginal peoples had to show that they had the ability to exclude. The Court clarified that requirement by establishing that "evidence of acts of exclusion is not required to establish aboriginal title."[165] On the sub-issue of nomadic possession, it found that nomadic or semi-nomadic peoples may be able to make a claim to title if the degree of physical occupation or use is equivalent to common law title.[166] Finally, the Court determined that continuity requires modern day claimants to "establish a connection with the pre-sovereignty group upon whose practices they rely to assert title or claim to a more restricted right" and to show that their connection with the land has been "of a central significance to their distinctive culture."[167]

The Court concluded its clarification of *Delgamuukw* with a note on the evidence that Aboriginal claimants can use to prove their rights. It reiterated the importance of admitting oral histories to prove Aboriginal title claims by explaining that all of the matters discussed may be proven using oral history. At the same time, the Court qualified its earlier statements on oral history by saying that it is only admissible as long as it meets two conditions. First, the oral history must provide "evidence that would not otherwise be available or evidence of the aboriginal perspective on the right claimed."[168] Second, the witness must represent "a credible source of the particular people's history."[169]

Having clarified what it said in *Delgamuukw*, the Court found that the trial courts had applied the correct test in each case because "they required proof of sufficiently regular and exclusive use of the cutting sites by Mi'kmaq people at the time of the assertion of sovereignty."[170] Finding no error in the test that was applied, the Court considered whether the lower courts had correctly assessed the evidence. The Court defined the test for assessing the evidence as "whether the practices on a broad sense correspond to the right claimed."[171] It then evaluated the evidence and concluded that the trial judges had correctly assessed it.[172]

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165. *Id.* ¶¶ 64-65.

166. *Id.* ¶ 66.

167. *Bernard*, [2005] S.C.C. 43, ¶¶ 67-68.

168. *Id.* ¶ 68.

169. *Id.*

170. *Id.* ¶ 72. The Court rejected the appellate court's argument in *Marshall* that the test applied by the trial court was too strict and that it was sufficient to prove occasional entry and acts from which an intention to occupy the land could be inferred as leaving out the requirement of "sufficiently regular and exclusive use" needed to establish title under the common law. *Id.* ¶ 76.

171. *Id.* ¶ 78.

172. *Bernard*, [2005] S.C.C. 43, ¶¶ 78-83. While the decision was unanimous, two judges disagreed with the majority's reasoning. In a strongly-worded concurrence, Justices LeBel and Fish condemned the majority for over-focusing on the common law and ignoring the crucial role that Aboriginal perspectives should play in the proof of Aboriginal title claims. They criticized the majority for establishing a test that "might well amount to a

Accordingly, the Court in *Bernard* clarified the test for proof of Aboriginal title established in *Delgamuukw*. It reaffirmed many of the revisions to Aboriginal title doctrine originally mentioned in *Delgamuukw*, including the definition of Aboriginal title as a constitutional right and the establishment of tests for the proof and infringement of the right. At the same time, the Court in *Bernard* refined the test for proof of Aboriginal title by actual physical presence to require proof of sufficiently regular and exclusive use of the sites by the Aboriginal group at the time of the assertion of sovereignty.

In addition to the changes in Aboriginal title doctrine developed in *Delgamuukw* and *Bernard*, the Canadian Supreme Court altered the law relating to Aboriginal title doctrine in *British Columbia v. Okanagan Indian Band*.[173] In 2003, the Court heard its first Aboriginal title case involving an Aboriginal title claim since *Delgamuukw*, an interlocutory appeal for interim costs in *Okanagan Indian Band*. Four members of the Band received stop-work orders from the Minister of Forests after they commenced logging on Crown land in British Columbia in 1999.[174] The Minister then started proceedings to enforce the

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denial that any aboriginal title could have been created by . . . patterns of nomadic or semi-nomadic occupation or use." *Id.* ¶ 126 (LeBel, J., concurring). They rejected the majority's view of the role of Aboriginal perspective, and suggested that:

> [A]boriginal conceptions of territoriality, land-use and property should be used to modify and adapt the traditional common law concepts of property in order to develop an occupancy standard that incorporates both the aboriginal and common law approaches. Otherwise, we might be implicitly accepting the position that aboriginal peoples had no rights in land prior to the assertion of Crown sovereignty because their views of property or land use do not fit within Euro-centric conceptions of property rights. *Id.* ¶ 127.

They argued that if, as the Court has said in the past, Aboriginal title is a *sui generis* interest in land, then it, like other section 35 rights, "arises from the prior possession of land and the prior social organisation and distinctive cultures of aboriginal peoples on that land." *Id.* ¶ 129. Aboriginal perspectives on title then must be given "equal consideration" in evaluating Aboriginal title claims, *id.*, and could not be relegated to simply assisting in the translation of Aboriginal practices into common law title. *Id.* ¶ 130.

173. [2003] 3 S.C.R. 371, 379. Despite increasing Aboriginal title claims litigation, *see infra* Part III, the Supreme Court of Canada has only reviewed the merits of one Aboriginal title claim on appeal since *Delgamuukw*. A review of lower court cases applying the *Delgamuukw* tests are outside the scope of this article. For more information on lower court application, see Kent McNeil, *Extinguishment of Aboriginal Title in Canada: Treaties, Legislation, and Judicial Discretion*, 33 OTTAWA L. REV. 301, 320-22 (2001-2002) [hereinafter McNeil, *Extinguishment*].

174. *Okanagan Indian Band*, [2003] 3 S.C.R. at 380.

orders.[175] The Band "claimed that they had Aboriginal title to the lands in question and were entitled to log them."[176] The Band then filed a notice of a constitutional question challenging the Forest Practices Code of British Columbia Act, under which they were allegedly illegally logging.[177] The Minister requested that the case go to trial rather than be summarily disposed of, and the Band resisted full trial, arguing that they lacked the financial resources to fund a lengthy trial.[178] In the alternative, the Band argued that the court should use its discretion to award interim costs so that the case could go to trial.[179] The Supreme Court granted leave of appeal to determine whether the Minister should pay the interim costs of the trial.[180] After explaining that there was no issue of a constitutional right to funding in the case, the Court held that the case was of sufficient merit that it should go to trial and that interim costs were appropriate because the respondents were impecunious and could not proceed without interim costs.[181] While the Court in *Okanagan Indian Band* did not address the Band's Aboriginal title claim directly, it did depart from its earlier Aboriginal title jurisprudence relating to Aboriginal title by finding that the case was sufficiently meritorious to require the payment of interim costs so that the trial could proceed.

More recently, the Supreme Court of Canada has determined that federal and provincial governments have a duty to consult with Aboriginal peoples when making decisions that may adversely affect unproven Aboriginal title claims.[182] In November 2004, the Canadian Supreme Court issued its judgments in two related Aboriginal title cases relating to Aboriginal title claims, *Haida Nation v. British Columbia* and *Taku River Tlingit First Nation v. British Columbia*. While the Court in the *Haida Nation* and *Taku River* cases did not adjudicate the two First Nations' Aboriginal title claims, it did clarify the consultation requirement, mentioned in *Delgamuukw*, that has to be met before Aboriginal title and rights may be infringed. It unanimously established for the first time that both federal and provincial governments have a duty to consult and accommodate Aboriginal

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.* at 380-81.

180. The British Columbia Supreme Court found that the case should go to trial but refused to award interim costs. British Columbia v. Okanagan Indian Band, No. 29419, [2000] B.C.T.C. 548, ¶¶ 126-27 (B.C.T.C. July 25, 2000), *available at* 2000 B.C.T.C. LEXIS 1481. The British Columbia Court of Appeal also held that the case should go to trial but reversed the lower court's decision that interim costs were inappropriate. British Columbia v. Okanagan Indian Band, [2001] 95 B.C.L.R.3d 273, ¶ 39 (B.C. Ct. App.).

181. *Okanagan Indian Band*, [2003] 3 S.C.R. at 402.

182. Haida Nation v. British Columbia, [2004] 3 S.C.R. 511; Taku River Tlingit First Nation v. British Columbia, [2004] 3 S.C.R. 550, ¶ 21.

peoples when making decisions that may adversely impact unproven Aboriginal title and rights claims.[183]

In *Haida Nation*, the Court found this duty to consult grounded in the honour of the Crown and section 35 of the Constitution.[184] The duty arises "when the Crown has knowledge, real or constructive, of the potential existence of the aboriginal right or title and contemplates conduct that might adversely affect it."[185] It explained that the scope of the duty to consult is "proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed."[186] The Court limited the duty to consultation rather than agreement.[187] It then held that British Columbia had a duty to consult with the Haida Nation, which had a long-standing claim to Aboriginal title, about timber licensing and that it had failed to do so.[188]

The Court applied the test it set out in *Haida Nation* in *Taku River*. In that case, the Court found that British Columbia had a duty to consult with the Taku River Tlingit First Nation, which had been in treaty negotiations over its Aboriginal title claims with the province since the late 1970s, about the possible reopening of the Tulsequah Mine.[189] While British Columbia had fulfilled this duty by extensively including the First Nation in the environmental assessment process, the Court required it to continue to consult with the First Nation in other stages of the mine licensing.[190]

The Court's decisions in *Haida Nation* and *Taku River* demonstrate a dramatic shift from the pre-constitutional treatment of Aboriginal title and rights claims because prior to constitutional incorporation, the Crown could unilaterally extinguish Aboriginal title and rights.[191] After constitutional incorporation, and based in part on section 35, the Crown, either in the provincial or the federal government, now has a duty to consult and accommodate Aboriginal peoples even when their Aboriginal title and rights claims have yet to be proven. Further, *Taku River* indicates that a high bar has to be met to fulfill this duty. Even though the

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183. *Haida Nation*, [2004] 3 S.C.R. 511, ¶¶ 64-79; *Taku River Tlingit First Nation*, [2004] 3 S.C.R. 550, ¶ 21.

184. [2004] 3 S.C.R. 511, ¶ 20.

185. *Id.* ¶ 35.

186. *Id.* ¶ 39.

187. *Id.* ¶ 42 ("[T]here is no duty to agree; rather, the commitment is to a meaningful process of consultation.").

188. *Id.* ¶ 78.

189. Taku River Tlingit First Nation v. British Columbia, [2004] 3 S.C.R. 550, ¶¶ 27-28.

190. *Id.* ¶¶ 46-47.

191. Delgamuukw v. British Columbia, [1997] 3 S.C.R. 1010, 1037.

Supreme Court has yet to uphold an Aboriginal title claim,[192] there is no question that the jurisprudence relating to Aboriginal title doctrine has changed since 1982. The Court altered the doctrine in several ways in *Delgamuukw*. Most significantly, the Court identified Aboriginal title as a constitutionally protected common law right that cannot be extinguished after 1982 without substantial justification by the Crown. In recognizing Aboriginal title as a constitutional right, it extended constitutional remedies including the declaration of legislation unconstitutional to Aboriginal title cases. The Court also, for the first time, defined the scope, nature, and content of Aboriginal title, established the tests for proof of and infringement upon Aboriginal title, and approved oral histories for use as evidence in Aboriginal title cases. The Court reaffirmed and refined these changes by clarifying its test for the proof of Aboriginal title claims in *Bernard*. The Court continued to develop its Aboriginal title jurisprudence relating to Aboriginal title in *Okanagan Indian Band* by ordering the payment of interim costs and thus, reducing the financial burden on destitute Aboriginal peoples defending Aboriginal title claims. Finally, the Court has recognized a duty to consult and accommodate Aboriginal peoples when making decisions that may adversely affect unproven Aboriginal title claims.

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192. Many Aboriginal scholars have criticized the Supreme Court for continuing the colonial practices of the past. *See, e.g.*, John Borrows, *Sovereignty's Alchemy: An Analysis of* Delgamuukw v. British Columbia, 37 OSGOODE HALL L.J. 537, 540-41 (1999) [hereinafter Borrows, *Sovereignty's Alchemy*]. To some extent, the Court's interpretation of section 35(1) may undermine Aboriginal title claims. The Court has interpreted section 35(1) as facilitating reconciliation between Aboriginal peoples and the rest of Canada. This interpretation of section 35(1) undercuts Aboriginal title claims by mandating that the courts balance these claims with the rights of non-Aboriginals. John Borrows criticizes the reconciliation approach as leading to absurd results, such as the Court in *Delgamuukw* finding that British Columbia was prejudiced in that case by the defective pleadings. *Id.* at 549. Similarly, Kent McNeil identifies this approach as licensing lower courts to judicially extinguish Aboriginal title even though the Supreme Court has decided that the federal and provincial legislatures cannot extinguish Aboriginal title after 1982. McNeil, *Extinguishment*, *supra* note 173, at 303. Despite the real possibility that the Court's interpretation in *Delgamuukw* may undercut Aboriginal title rights, the majority in Canada viewed the *Delgamuukw* decision as a win for Aboriginal peoples.

The Court's recent decision in *Bernard* appears to support the earlier criticisms of *Delgamuukw* as possibly undercutting Aboriginal title claims. It suggests a "two steps forward, one step back" approach to Aboriginal rights. While the decision in *Delgamuukw* indicated that the jurisprudence on Aboriginal title may be moving two steps forward, the decision in *Bernard* can be read as a definite step back. The Court rejected the common law Aboriginal title claims, and clarified a test that emphasizes the European perspective to such a degree that it may be impossible for some Aboriginal peoples to establish their Aboriginal title claims. R. v. Bernard, 2005 S.C.C. 43, 30005, [2005] S.C.J. No. 44 QUICKLAW, ¶ 126 (July 20, 2005) (LeBel, J., concurring). Thus, the reconciliation approach may be undermining Aboriginal title claims in the very way that Borrows predicted it could.

## III. ABORIGINAL RIGHTS ARE CONSTITUTIONALLY RECOGNIZED, ARE THE COURTS BEING USED TO ENFORCE THEM?

This Part considers how the changes to Aboriginal title doctrine matter by investigating when and how claims to Aboriginal title are made. It looks at claims made and adjudicated in Canadian courts from 1867 to 2005.[193] It categorizes Aboriginal title cases before the Canadian courts into two time periods, before and after constitutional recognition in section 35.[194] Aboriginal title cases are broadly defined as cases in which a party, either the plaintiff or the defendant has raised a claim of un-extinguished Aboriginal title to land.[195] It then compares

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193. The last query of cases was conducted on September 30, 2005. The data-set may not be complete if cases were filed and adjudicated later in 2005.

194. The data used here consists of all cases listed in the Canadian Native Law Reporter and in the Westlaw CAN-ALLCASES database. The Canadian Native Law Reporter contains reported and unreported Aboriginal law cases from all court levels and jurisdictions in Canada. It does not include cases decided within two years of each other if the second case does not vary from the first. Telephone Interview with Zandra Wilson, Editor, Canadian Native Law Reporter (Nov. 22, 2004). It may also underreport provincial court decisions because many provincial court decisions are not reported. *Id.*

195. This definition limits the cases considered as Aboriginal title claims by eliminating many of the cases brought prior to the 1960s. The first cases in Canada to address Aboriginal title were not brought as Aboriginal title claims and Aboriginal peoples were not even involved in the litigation. *See, e.g.*, St. Catherines' Milling & Lumber Co. v. The Queen, [1888] 14 App. Cas. 46, 46 (P.C.) (whether Dominion or Province owns land surrendered by Saulteax Tribes in 1873 Treaty). It also may underreport early Aboriginal title claims brought before Canadian and British courts because it does not include actions to eject trespassers from Aboriginal lands, *see, e.g.*, HARRING, *supra* note 3, at 41-54, and similar complaints. Further it excludes claims not brought in courts, such as the claims and complaints about land losses continually made to Indian agents. *See, e.g.*, ROBIN JARVIS BROWNLIE, A FATHERLY EYE: INDIAN AGENTS, GOVERNMENT POWER, AND ABORIGINAL RESISTANCE IN ONTARIO, 1918-1939, at 81-98 (2003).

The definition also excludes most land rights cases dealing with Indian Reserves because in the majority of these cases, the issue is not Aboriginal title per se, but trespass, surrender, or the Band's authority to tax. *See, e.g.*, Osoyoos Indian Band v. Oliver, [2001] 3 S.C.R. 746, ¶ 1 (whether Band has authority to impose a tax on reserve land used by town for canal); Guerin v. The Queen, [1984] 2 S.C.R. 335, 340-41 (whether Band surrendered valuable reserve land for lease to a golf club).

Further, it excludes cases in which a party has raised a claim of Aboriginal title as a basis for other Aboriginal rights, such as fishing or hunting rights. Prior to 1996, the Supreme Court of Canada had not delineated the relationship between Aboriginal title to land and other Aboriginal rights. *See* R. v. Côté, [1996] 3 S.C.R. 139, ¶ 3; R. v. Adams, [1996] 3 S.C.R. 101, ¶ 3. Accordingly, prior to 1996 Aboriginal peoples brought claims to Aboriginal title to fishing and hunting rights. It does, however, include cases in which claimants made both a claim to land and to another Aboriginal right, such as hunting, fishing, or self-government.

the cases in the two time periods to determine whether more Aboriginal title claims were made after 1982. It concludes that more Aboriginal title claims have been made since 1982.

The first case involving a question of Aboriginal title, *Corinthe v. Seminary of St. Sulpice*, was adjudicated in 1912.[196] Other cases are not reported to have been filed and adjudicated for over fifty years after *Corinthe*, but Aboriginal peoples actively made claims to Indian Agents, the Department of Indian Affairs, the Crown, and the Privy Council throughout the first half of the twentieth century.[197] These claims largely fell on deaf ears and, in 1927, the Canadian government amended the Indian Act to proscribe the bringing of Aboriginal rights claims in Canadian courts.[198] This prohibition on Aboriginal claims remained for almost twenty-five years until it was repealed in 1951.[199] Despite the removal of the prohibition on Aboriginal title claims in 1951, the first recent Aboriginal title case was not filed until 1969 by the Nisga'a Nation.[200]

Chart 1 shows the number of cases adjudicated in Canadian trial courts by year from *Calder* in 1969 to 2005. As Chart 1 illustrates, few Aboriginal title claims were brought and adjudicated in Canadian courts before 1982. A search of reported cases adjudicated in provincial and federal trial courts indicated that six

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The definition also excludes Aboriginal title claims filed as comprehensive claims in the British Columbia Treaty Commission, under the Canadian government's comprehensive claims policy, or involved in any other Indian claims process unless a related claim has been filed in a court of law. In some of the included cases, the Aboriginal title claim is in or has been in negotiations with the government and the Aboriginal claimants have sued to clarify a particular question in the case, such as when the government has to consult with the Aboriginal group before taking action adverse to the land involved in the Aboriginal title claim. *See, e.g.*, Haida Nation v. British Columbia, [2004] 3 S.C.R. 511, ¶ 38; Taku River Tlingit First Nation v. British Columbia, [2004] 3 S.C.R. 550, ¶¶ 27-28.

The inclusion or exclusion of any particular case is a judgment call made by the author and cases included or excluded may have been treated differently by another scholar. Some cases were excluded because they appeared to include the same Aboriginal title claim by the same First Nation and the author did not want to over-represent the number of actual Aboriginal title claims. *Compare* Gitanyow First Nation v. British Columbia, Nos. L012405, L021243, L021279, 114 A.C.W.S. (3d) 301 (B.C.S.C. Apr. 30, 2002), *available at* 2002 A.C.W.S.J. LEXIS 5472, *with* Lax Kw'Alaams Indian Band v. British Columbia, No. L021483, 2002 B.C.D. Civ. J. 1212 (B.C.S.C. July 19, 2002), *available at* 2002 B.C.D. Civ. J. LEXIS 588. For a complete list of included cases, see *infra* note 201, which lists cases adjudicated before 1982, and note 204, which lists cases after 1982.

196. [1912] 5 D.L.R. 263 (P.C.).

197. BROWNLIE, *supra* note 195, at 81-98.

198. THE REPORT OF THE ROYAL COMMISSION ON ABORIGINAL PEOPLES, *supra* note 5, at 296.

199. *Id.*

200. Calder v. Attorney-General of British Columbia, [1973] S.C.R. 313.

cases involving an un-extinguished Aboriginal title claim were adjudicated before 1982.[201] Of these, two cases were heard by the Supreme Court of Canada (see Chart 2).[202] The small number of claims brought before 1982 does not reflect a lack of Aboriginal title claims, but uncertainty about whether such claims were legally cognizable and could be brought in Canadian courts.[203]

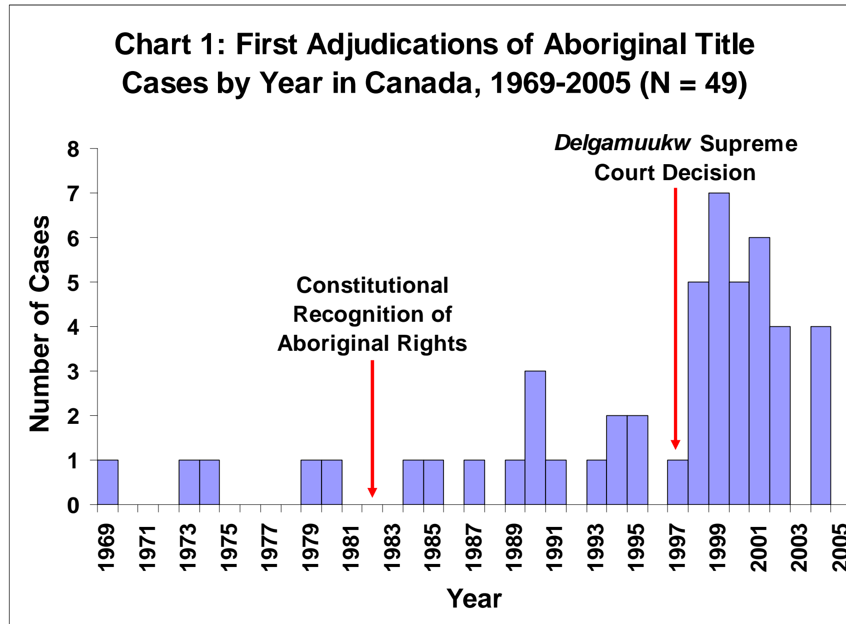


Chart 1 demonstrates that the number of cases in which a party claimed Aboriginal title increased dramatically after 1982. Almost nine times as many cases involving a claim of un-extinguished Aboriginal title were filed and adjudi-

201. *Corinthe*, [1912] 5 D.L.R. 263 (P.C.); Calder v. Attorney-General of British Columbia, [1970] 74 W.W.R. 481 (B.C. Ct. App. 1970), *aff'd*, [1973] S.C.R. 313; Paulette v. The Queen, [1977] 2 S.C.R. 628; R. v. Derriksan, [1975] 52 D.L.R.3d 744 (B.C.S.C.), *aff'd*, [1975] 60 D.L.R..3d 140 (B.C. Ct. App.); Hamlet of Baker Lake v. Canada, [1979] 107 D.L.R.3d 513 (Fed. Ct. Trial Div.); Lubicon Lake Band v. R., [1981] 117 D.L.R.3d 247 (Fed. Ct. Trial Div.), *aff'd*, [1981] 13 D.L.R.4th 159 (Fed. Ct. App.).

202. *Calder*, [1973] S.C.R. 313; *Paulette*, [1977] 2 S.C.R. 628.

203. Several sources suggest that Aboriginal people claimed title to the land even if they were not bringing Aboriginal title claims in the courts. *See, e.g.*, HARRING, *supra* note 3, at 38-39, 187; THE REPORT OF THE ROYAL COMMISSION ON ABORIGINAL PEOPLES, *supra* note 5, at 296.

cated after 1982 as before.[204] While the greatest number of cases has been adjudi-

204. Not all of these adjudications determined whether the claimant had Aboriginal title as claimed. Several of the cases involved adjudication over a related issue and did not decide the question of Aboriginal title.

The forty-four cases included in the dataset as involving an un-extinguished Aboriginal title claim are: Gitanyow First Nation v. British Columbia (Minister of Forests), No. L021243, 136 A.C.W.S. (3d) 396 (B.C.S.C. Dec. 30, 2004), *available at* 2004 A.C.W.S.J. LEXIS 9354; Homalco Indian Band v. Canada (Minister of Agriculture, Food & Fisheries), No. L043154, 2005 BCSC 283 (B.C.S.C. Mar. 2, 2005), *available at* 2005 BC.C. LEXIS 409; New Brunswick (Minister of Nat'l Resources) v. McCoy, No. 75/04/CA, [2004] N.B.J. No. 201 (Ct. App. May 20, 2004), *available at* 2004 NB.C. LEXIS 248; Walpole Island First Nation, Bkejwanong Territory v. Canada (Attorney General), Nos. 00-CV-189329, 03-CV-261134CM1, 2004 A.C.W.S.J. 6197 (Ont. Super. Ct. May 13, 2004), *available at* 2004 A.C.W.S.J. LEXIS 3340; Haida Nation v. British Columbia, [2004] 3 S.C.R. 511; Taku River Tlingit First Nation v. British Columbia, [2004] 3 S.C.R. 550; British Columbia v. Okanagan Indian Band, [2003] 3 S.C.R. 371; Gitxsan Houses v. British Columbia, [2003] 10 B.C.L.R.4th 126; R. v. Bernard, No. 12130113, [2000] N.B.J. No. 138 (N.B. Prov. Ct. Apr. 13, 2000), *available at* 2000 CarswellNB 539, *aff'd*, [2001] 239 N.B.R.2d 173 (N.B. Ct. Q.B.), *rev'd*, [2003] 262 N.B.R. (2d) 1 (N.B. Ct. App.), *rev'd*, 2005 S.C.C. 43, 30005, [2005] S.C.J. No. 44 QUICKLAW (July 20, 2005); Canadian W. Trust Co. v. Robson, No. 0203-0346-AC (Alta. Ct. App. Oct. 17, 2002), *available at* 2002 CarswellAlta 1242; Sterritt v. Prince Rupert (City), No. SC 4384 (B.C.S.C. Mar. 21, 2002), *available at* 2002 CarswellBC 749; Lax Kw'Alaams Indian Band v. British Columbia (Minister of Sustainable Resource Management), [2002] 9 W.W.R. 173 (B.C. Ct. App.); Peerless Lake Indian Band v. Canada (Minister of Indian Affairs & Northern Development), No. A-246-01 (Fed. Ct. App. Mar. 8, 2002), *available at* 2002 CarswellNat 567; Desjarlais v. Canada, No. T-165-01 (Fed. Ct. Trial Div. Sept. 12, 2002), *available at* 2002 CarswellNat 2493; Sun Peaks Resort Corp. v. Billy, No. S013235 (B.C.S.C. July 18, 2001), *available at* 2001 CarswellBC 1485; Soowahlie Indian Band v. Canada (Attorney General), [2001] 209 D.L.R.4th 677 (Fed. Ct. App.); R. v. Marshall, [2001] 191 N.S.R.2d 323 (N.S. Provincial Ct.), *aff'd*, No. S.H. 170568, 53 W.C.B. (2d) 132 (N.S. Ct. App. Mar. 1, 2002), *available at* 2002 W.C.B.J. LEXIS 211, *rev'd*, No. CAC 178066, 59 W.C.B. (2d) 556 (N.S. Ct. App. Oct. 10, 2003), *available at* 2003 W.C.B.J. LEXIS 2084; Chippewas of Sarnia Band v. Canada, [2001] 51 O.R.3d 641; Skeetchestn Indian Band v. British Columbia, [2000] 80 B.C.L.R.3d 233 (B.C. Ct. App.); Westbank First Nation v. British Columbia, [2000] 191 D.L.R.4th 180 (B.C.S.C.); Union of Nova Scotia Indians v. Nova Scotia (Attorney General), [1999] 180 N.S.R.2d 314 (N.S. Ct. App.); Nemaiah Valley Indian Band v. Riverside Forest Products Ltd., Nos. 90 0913, 98 4847, 92 A.C.W.S. (3d) 729 (B.C.S.C. Nov. 2, 1999), *available at* 1999 A.C.W.S.J. LEXIS 52364; Chemainus First Nation v. British Columbia Assets & Land Corp., No. 983940, 88 A.C.W.S. (3d) 520 (B.C.S.C. Jan. 7, 1999), *available at* 1999 A.C.W.S.J. LEXIS 48116; Siska Indian Band v. British Columbia (Minister of Forests), Nos. A981672, A992665 (B.C.S.C. Oct. 22, 1999), *available at* 1999 CarswellBC 2377; Ouj-Bougoumou Cree Nation v. Canada, No. T-3007-93, 176 F.T.R. 307 (Fed. Ct. Trial Div. Dec. 1, 1999), *available at* 1999 F.T.R. LEXIS 1642; Sawridge Band v. Canada, No. T-66-86, 164 F.T.R. 95 (Fed. Ct. Trial Div. Jan. 20, 1999), *available at* 1999 F.T.R. LEXIS 641; Kitkatla Band v. British Columbia (Minister of Forests), 56 B.C.L.R.3d 144 (B.C. Ct. App.); Kelly Lake Cree Nation v. British Columbia (Ministry of Energy & Mines),

cated since 1982, Chart 1 indicates that increases in Aboriginal title litigation occurred after significant legal events. More Aboriginal title claims cases were adjudicated after *Calder* in 1973 and after the Constitution Act, 1982. The most dramatic increase in Aboriginal title claims adjudications, however, occurred after the Supreme Court recognized Aboriginal title as a constitutionally protected right in *Delgamuukw* in 1997.[205] While the majority of these adjudications have occurred in the lower courts, many of these cases are being appealed.[206] Six Aboriginal title cases have made it onto the Supreme Court's agenda since 1982.[207] There has not only been a general increase in Aboriginal title claims, but

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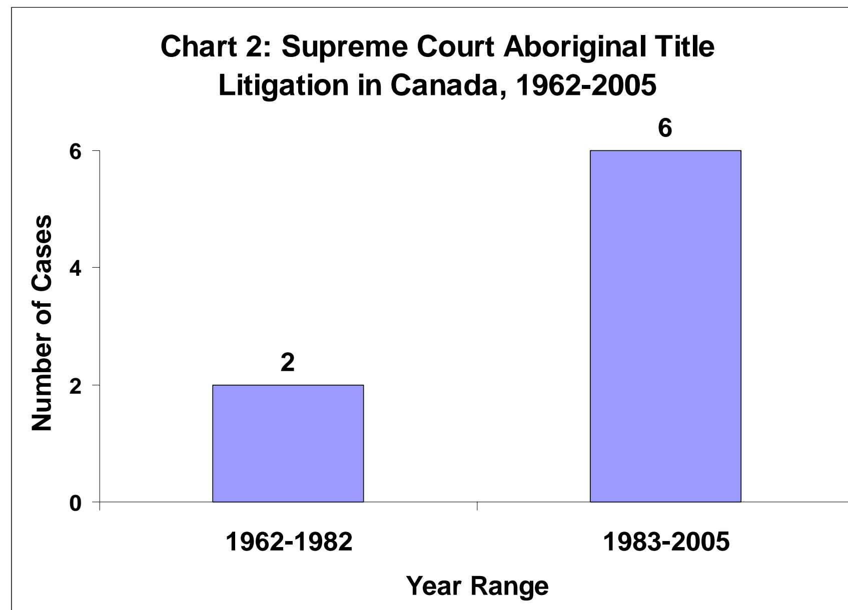
A982279, A982280, [1998] B.C.J. No. 2471 (B.C.S.C. Oct. 23, 1998), *available at* 1998 CarswellBC 2261; Nunavik Inuit v. Canada (Minister of Canadian Heritage), [1998] 164 D.L.R.4th 463 (Fed. Ct. Trial Div.); R. v. Denault, No. 4380 (B.C. Provincial Ct. Jan. 29, 1998), *available at* 1998 CarswellBC 3041; Yale Indian Band v. Aitchelitz Indian Band, No. T-776-98, 151 F.T.R. 36 (Fed. Ct. Trial Div. June 24, 1998), *available at* 1998 F.T.R. LEXIS 1149; Delgamuukw v. British Columbia, [1997] 3 S.C.R. 1010; McKenzie c. Québec (Procureur général), No. 500-05-027983-962 (Que. Super. Ct. June 2, 1997), *available at* 1997 CarswellQue 771; Nanoose Indian Band v. British Columbia, No. V02523, 54 A.C.W.S. (3d) 7 (B.C. Ct. App. Mar. 24, 1995), *available at* 1995 A.C.W.S.J. LEXIS 47232; Newfoundland v. Ploughman, [1995] 410 A.P.R. 84 (Nfld. Trial Div.); MacMillian v. Simpson, No. C916306 (B.C.S.C. May 24, 1994), *available at* 1994 CarswellBC 2092; James Smith Indian Band v. Saskatchewan (Master of Titles), [1995] 131 Sask. R. 60 (Ct. App.); Ontario v. Bear Island Found., [1991] 2 S.C.R. 570; Tlowitsis-Mumtagila v. MacMillan Bloedel Ltd., (B.C.S.C. Nov. 9, 1990), *available at* 1990 CarswellBC 1501; R. v. Roche, [1990] 90 Nfld. & P.E.I.R. 199 (Provincial Ct.); Cook v. Beckman, [1990] 84 Sask. R. 89 (Ct. App.); Grant v. British Columbia, No. CA007960 (B.C. Ct. App. June 27, 1990), *available at* 1989 CarswellBC 564; R. v. Ashini, [1989] 79 Nfld. & P.E.I.R. 318 (Ct. App.); MacMillian Bloedel Ltd. v. Mullin, [1985] 2 W.W.R. 722 (B.C.S.C.), *rev'd*, [1985] 61 B.C.L.R. 145 (Ct. App.).

205. *See, e.g.*, *Haida Nation*, [2004] 3 S.C.R. 511; *Taku River Tlingit First Nation*, [2004] 3 S.C.R. 550; *Okanagan Indian Band*, [2003] 3 S.C.R. 371; *Gitxsan Houses*, [2003] 10 B.C.L.R.4th 126; Xeni Gwet'in First Nations v. Riverside Forest Prods. Ltd., [2002] 10 W.W.R. 486 (B.C.S.C.); *Marshall*, [2001] 191 N.S.R.2d 323; *Chippewas of Sarnia Band*, [2001] 51 O.R.3d 641; *Skeetchestn Indian Band* [2000] 80 B.C.L.R.3d 233; *Westbank First Nation*, [2001] 191 D.L.R.4th 180; *Nunavik Inuit*, [1998] 164 D.L.R.4th 463; *Denault*, 1998 CarswellBC 3041.

206. *See, e.g.*, *Haida Nation*, [2004] 3 S.C.R. 511; *Taku River Tlingit First Nation*, [2004] 3 S.C.R. 550; *Okanagan Indian Band*, [2003] 3 S.C.R. 371; *Delagamuukw*, [1997] 3 S.C.R. 1010; *Gitxsan Houses*, [2003] 10 B.C.L.R.4th 126; *Chippewas of Sarnia Band*, [2001] 51 O.R.3d 641; *Westbank First Nation*, [2001] 191 D.L.R.4th 180; *Chemainus First Nation*, 1999 A.C.W.S.J. LEXIS 48116.

207. *Bernard*, [2005] S.C.C. 43; *Haida Nation*, [2004] 3 S.C.R. 511; *Taku River Tlingit First Nation*, [2004] 3 S.C.R. 550; *Okanagan Indian Band*, [2003] 3 S.C.R. 371; *Delagamuukw*, [1997] 3 S.C.R. 1010; *Bear Island Found.*, [1991] 2 S.C.R. 570.

as Chart 2 shows, the number of Aboriginal title claims heard by the Supreme Court of Canada has tripled since 1982.




Since section 35 was added to the Constitution in 1982, the number of cases filed and adjudicated has increased at both the trial and appellate level. The greatest increase in the number of cases occurred after the Supreme Court of Canada recognized Aboriginal title as a constitutionally protected right in 1997. These increases suggest that Aboriginal title claimants have had the option of using section 35 in making Aboriginal title claims since 1982 and that they have been more inclined to make Aboriginal title claims since 1997.

## IV. HOW TO UNDERSTAND THESE CHANGES AND THEIR RELATION TO THE CONSTITUTION: A PRELIMINARY ANALYSIS OF THE POSSIBLE SOURCES OF LEGAL CHANGE

As Parts II and III demonstrate, Aboriginal title doctrine and litigation have changed since 1982. This part attempts to understand these changes by exploring several possible sources of legal change, including the constitutional recognition of Aboriginal rights, changes in the composition of the Supreme Court of Canada, and the development of legal support networks. Instead of constructing a straightforward causal model to explain these changes, it concludes that they

can best be understood as part of sustained interactions among several influences, including section 35.

## A. A Traditional Legal Inquiry: Doctrinal Explanations of Constitutional Change

Part IV.A evaluates the similarities and differences among the pre and post-1982 cases to determine if constitutional recognition has had a measurable effect on the changes in Aboriginal title litigation. It measures the influence of section 35(1) by looking at the sources relied on by the claimants, and the sources cited by the justices of the Canadian Supreme Court as underlying their decisions. This Part then compares the use of these sources to see if the claimants and the Court relied on one more than the others. This analysis indicates that an understanding of the Canadian Supreme Court's complex and often interrelated use of sources explains the changes to Aboriginal title doctrine since 1982. It suggests that section 35(1) influences Aboriginal title litigation because both Aboriginal title claimants and the justices of the Supreme Court of Canada rely on section 35(1) in Aboriginal title claims cases.

To determine whether section 35 has influenced Aboriginal title litigation since 1982, it is important to look at whether more Aboriginal title claims are being brought and whether claimants are basing their claims on section 35. As discussed in Part III, Aboriginal title claims have increased since 1982. The number of Aboriginal title claims rose the most dramatically, not after the *Calder* decision, but after *Delgamuukw*.[208] The increase after *Delgamuukw* but not *Calder* indicates that uncertainty remained about whether common law Aboriginal title claims were cognizable after *Calder*. It also suggests that Aboriginal title claims are now clearly cognizable and can be proven in Canadian courts. Aboriginal title claimants may feel that they have stronger Aboriginal title claims now that they know what kind of proof is required and that Aboriginal title is a constitutionally protected right. The constitutional recognition of Aboriginal title in *Delgamuukw* appears to have encouraged Aboriginal peoples to bring Aboriginal title claims.[209]

In making these Aboriginal title claims, Aboriginal peoples are increasingly raising their claims under section 35(1). Preliminary analysis of the cases

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208. *See supra* Part III.

209. Not enough time has passed to determine the impact of the Court's most recent Aboriginal title decision in *Bernard*. It appears to make it harder for nomadic and semi-nomadic Aboriginal peoples to prove their title claims, *Bernard*, [2005] S.C.C. 43, ¶ 126 (LeBel, J., concurring), and accordingly, may decrease the number of Aboriginal title claims made. At the same time, the *Bernard* decision provides greater clarity on how Aboriginal title claims may be proven, and this could encourage Aboriginal peoples deadlocked in negotiations with the Crown to litigate their rights instead.

adjudicated since 1982 indicates that claimants have increasingly based Aboriginal title claims on section 35(1) of the Canadian Constitution or had their Aboriginal title claims treated as constitutional claims by Canadian courts.[210] Of the forty-four cases adjudicated after 1982, thirty-four cases involve some discussion of section 35 or section 35 cases.[211] In twenty-two of those cases, the parties appear to be making a constitutional claim to Aboriginal title.[212]

A shift occurred from the late 1960s to the early 1990s, as claimants moved away from making claims based on the Land Titles Act. In the late 1960s and early 1970s, Aboriginal title claims were brought under the Land Titles Act as Aboriginal peoples sought to encumber land titles by asserting Aboriginal title claims.[213] Since the mid-1990s, claimants have increasingly relied on the common law and section 35(1) of the Constitution instead of the Land Titles Act in making Aboriginal title claims.[214] This increased use of section 35 by Aboriginal title claimants appears to have been bolstered by the Canadian Supreme Court's recognition and validation of section 35 in Aboriginal title cases like *Delgamuukw*. Since 1997, only one Aboriginal title claimant has made an argument based on land title registration and that claimant also appealed to the constitutional

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210. While this article notes the increased use of section 35 by Aboriginal title claimants, it has not attempted to infer anything about the meaning of this use. For an analysis of the meaning of the increased use of section 35, see Lee Maracle, *The Operation was Successful, But the Patient Died, in* BOX OF TREASURES OR EMPTY BOX? TWENTY YEARS OF SECTION 35, at 308 (Ardith Walker & Halie Bruce eds., 2003).

211. If the court's decision mentioned section 35 or section 35 cases, the author coded the case as discussing section 35.

212. In some cases, it was difficult to determine the basis, if any, of the Aboriginal title claim. The author coded a case as a constitutional claim if it appeared that the claimant or the court treated it as such or if the claimant had been previously involved in negotiations with the government. If it was unclear what the basis of the claim was or the claimant was clearly relying on some other legal basis for its claim, the author did not code the case as a section 35 claim.

213. *See, e.g.*, Paulette v. The Queen, [1977] 2 S.C.R. 628; Cook v. Beckman, [1990] 84 Sask. R. 89 (Ct. App.); James Smith Indian Band v. Saskatchewan (Master of Titles), [1995] 131 Sask. R. 60 (Ct. App.); Skeetchestn Indian Band v. British Columbia, [2000] 80 B.C.L.R.3d 233 (B.C. Ct. App.).

214. *See, e.g.*, Gitxsan Houses v. British Columbia, [2003] 10 B.C.L.R.4th 126; Xeni Gwet'in First Nations v. Riverside Forest Prods. Ltd., [2002] 10 W.W.R. 486 (B.C.S.C.); Taku River Tlingit First Nation v. British Columbia, [2002] 98 B.C.L.R.3d at 16; R. v. Marshall, [2001] 191 N.S.R.2d 323 (N.S. Provincial Ct.), *aff'd,* No. S.H. 170568, 53 W.C.B. (2d) 132 (N.S. Ct. App. Mar. 1, 2002), *available at* 2002 W.C.B.J. LEXIS 211, *rev'd,* No. CAC 178066, 59 W.C.B. (2d) 556 (N.S. Ct. App. Oct. 10, 2003), *available at* 2003 W.C.B.J. LEXIS 2084; Chippewas of Sarnia Band v. Canada, [2001] 51 O.R.3d 641; Nunavik Inuit v. Canada (Minister of Canadian Heritage), [1998] 164 D.L.R.4th 463 (Fed. Ct. Trial Div.); Haida Nation v. British Columbia (Minister of Forests), [1998] 45 B.C.L.R.3d at 80 (Ct. App.); R. v. Denault, No. 4380 (B.C. Provincial Ct. Jan. 29, 1998), *available at* 1998 CarswellBC 3041.

protection of Aboriginal title by citing *Delgamuukw*.[215] This evidence suggests that section 35 has created a tool for claimants to use in pursuing Aboriginal title claims and that claimants have increasingly been making greater use of it. Moreover, the lower court cases demonstrate that Aboriginal title claimants are using section 35 both as plaintiffs bringing Aboriginal title claims and as an affirmative defense to criminal charges.[216] This indicates that Aboriginal peoples are using section 35 in several different ways. Since 1982, the number of Aboriginal title claims has increased and progressively more Aboriginal title claimants are relying on section 35. This suggests that section 35 has emerged as a viable basis for Aboriginal title claims.

Further, the cases suggest that Aboriginal title claimants have been making constitutional claims for some time. While the claimants in *Delgamuukw* did not originally raise a section 35 claim when they brought the case in 1984, the trial judge allowed for, and the Supreme Court upheld, a de facto amendment of their pleadings to include a section 35(1) claim for their Aboriginal title at trial because of the constitutional Aboriginal rights jurisprudence that had developed since the claim was originally filed.[217] The plaintiffs' reliance in *Delgamuukw* on section 35 indicates that Aboriginal title claimants were making constitutional arguments as soon as they appeared to be available and not legally frivolous.[218] Additionally, in *Delgamuukw*, both parties relied on section 35(1).[219] This suggests that all parties involved in Aboriginal title cases, and not just Aboriginal peoples, may be increasingly relying on section 35.

As mentioned before, the data shows that the use of section 35 by Aboriginal parties has continued to increase since *Delgamuukw*. Significantly, the Aboriginal peoples involved in the four Aboriginal title cases heard by the Supreme Court since *Delgamuukw* have also used section 35 in making their claims.[220] The data suggests that section 35 is playing a role in increased rates of litigation and that Aboriginal peoples now see section 35 as a tool in making Aboriginal title claims.

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215. *Skeetchestn Indian Band*, [2000] 80 B.C.L.R.3d 233.

216. *See, e.g.*, Delgamuukw v. British Columbia, [1997] 3 S.C.R. 1010, 1026; British Columbia v. Okanagan Indian Band, [2003] 3 S.C.R. 371, 380.

217. *Delgamuukw*, [1997] 3 S.C.R. at 1062. The *Delgamuukw* claimants may not have originally argued for Aboriginal title under section 35 because when the Constitution Act, 1982 was enacted it was not clear that Aboriginal rights were enforceable rights.

218. *Id.*

219. *See id.* at 1026-29.

220. R. v. Bernard, 2005 S.C.C. 43, 30005, [2005] S.C.J. No. 44 QUICKLAW, ¶¶ 38-39 (July 20, 2005); Haida Nation v. British Columbia, [2004] 3 S.C.R. 511, ¶ 20; Taku River Tlingit First Nation v. British Columbia, [2004] 3 S.C.R. 550, ¶ 24; *Okanagan Indian Band*, [2003] 3 S.C.R. at 380-81. In *Okanagan Indian Band*, the defendants made a constitutional claim in asserting Aboriginal title. [2003] 3 S.C.R. at 380-81. They did not argue that their claim to interim funding was a constitutional claim. *See id.*

Another indicator of the influence of section 35 on Aboriginal title litigation is whether the Canadian courts are relying on section 35 in deciding Aboriginal title cases. As mentioned earlier, courts have discussed section 35 or section 35 cases in thirty-four of the forty-four Aboriginal title cases adjudicated since 1982. This evidence shows that courts, possibly even more than claimants, have been inclined to use section 35 in hearing Aboriginal title cases and that Canadian courts are increasingly treating Aboriginal title claims as constitutional cases. This indicates that section 35 has also created a tool for courts to use in hearing Aboriginal title cases.

The fact that section 35 has created a tool for courts to use is supported by the Supreme Court of Canada's Aboriginal title jurisprudence since 1982. The Canadian Supreme Court has relied heavily on section 35(1) and its earlier precedents interpreting section 35(1) in Aboriginal title cases since 1982. The Court has used section 35(1) or its section 35(1) precedent's jurisprudence in explaining its reasons for decision in four (of the six) post-1982 Aboriginal title cases involving an Aboriginal title claim: *Delgamuukw*, *Bernard, Haida Nation*, and *Taku River*.

In the majority opinion in *Delgamuukw*, then Chief Justice Lamer found section 35(1) to be central to his analysis of the issues in the case. First, the majority opinion relied on section 35(1) in explaining the test it established for proof of Aboriginal title.[221] Lamer also cited section 35(1) and the Court's previous constitutional analysis under section 35(1) in *Van der Peet* as the basis for his decision that the evidentiary standards that apply in Aboriginal rights claims, and particularly Aboriginal title claims cases, are distinct from traditional rules of evidence.[222] Finally, he relied on section 35(1) and the Court's previous interpretations of that section in *R. v. Sparrow* and *R. v. Gladstone* in developing the justificatory test for the infringement of Aboriginal title by provincial and federal governments.[223] The Court noted that constitutional recognition and protection of Aboriginal title placed specific constraints on what the federal and provincial governments could do to infringe the right.[224] The Supreme Court's reliance on section 35 indicates that the constitutional incorporation of Aboriginal rights is affecting Aboriginal title litigation.

The Court also based its clarification of the test for the proof of Aboriginal title in *Bernard* on section 35 and its earlier section 35 precedents. In *Bernard*, the Court began its decision by reiterating the importance of section 35 to its analysis of the common law right of Aboriginal title.[225] It specifically cited to *Delgamuukw* as defining the tests for Aboriginal title claims based on exclusive

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221. *Delgamuukw*, [1997] 3 S.C.R. at 1107.
222. *Id.* at 1065-67, 1079.
223. *Id.* at 1107.
224. *Id.* at 1107-08.
225. *Bernard*, [2005] S.C.C. 43, ¶¶ 38-39.

occupation at the time of British sovereignty.[226] The Court in *Bernard* admitted that it was clarifying the tests established in *Delgamuukw*.[227] It relied on section 35 cases in clarifying the process of reconciling Aboriginal perspectives and the European common law in proving Aboriginal title claims.[228] The Court explained, "[*Delgamuukw*] requires that in analyzing a claim for aboriginal title, the Court must consider both the aboriginal perspective and the common law perspective."[229] It also used section 35 cases to refine the concepts of occupation[230] and exclusivity,[231] to define the distinction between Aboriginal title and other Aboriginal rights,[232] and to explain when oral histories can be used in proving Aboriginal title claims.[233]

A comparison of the Court's reliance on section 35 with its reliance on other legal sources demonstrates how much influence section 35 has had on Aboriginal title litigation. In addition to citing section 35 and its progeny heavily, the Court in *Delgamuukw* and *Bernard* cited to other sources as a basis for its decisions. Most common among these other sources were the common law[234] and law review articles on Aboriginal title.[235] The Court often used law review articles and books to shed light on its section 35 analysis,[236] but less often than it relied on either section 35 or the common law.

226. *Id.* ¶ 40.

227. *Id.*

228. *Id.* ¶ 49.

229. *Id.* ¶ 46.

230. *Id.* ¶ 56 (citing Delgamuukw v. British Columbia, [1997] 3 S.C.R. 1010, 1100-01 ¶ 149).

231. *Bernard*, [2005] S.C.C. 43, ¶ 57 (citing *Delgamuukw*, [1997] 3 S.C.R. at 1104 ¶ 155).

232. *Id.* ¶¶ 58-59 (citing R. v. Vanderpeet, 137 D.L.R.4th 289 (Can. 1996); R v. Nikal, [1996] 1 S.C.R. 1013; R. v. Adams, [1996] 3 S.C.R. 101; R. v. Côté, [1996] 3 S.C.R. 139; and *Delgamuukw*, [1997] 3 S.C.R. at 1106-07 ¶ 159).

233. *Id.* ¶ 68 (citing Mitchell v. Minister of Nat'l Revenue, [2001] 1 S.C.R. 911).

234. By common law, this article refers to common law cases either unrelated to section 35 or decided prior to the incorporation of section 35 in 1982. The Supreme Court is developing a constitutional common law related to section 35. The author coded this as part of the impacts of section 35 rather than as part of the development of the common law because this constitutional common law could not exist independent of section 35 and it largely revises the common law of Aboriginal title to account for the new constitutional status of the common law right of Aboriginal title.

235. The author also looked for citations to international law, the laws of other common law countries, and statutes. The author found few, if any, citations to these sources in *Bernard* and *Delgamuukw*. These sources were cited more in other cases, such as *Okanagan Indian Band*, which did not rely on section 35.

236. *See, e.g.*, *Bernard*, [2005] S.C.C. 43, ¶ 57 (citing *Delgamuukw*, [1997] 3 S.C.R. at 1104-05 ¶ 156 (citing KENT MCNEIL, COMMON LAW ABORIGINAL TITLE 204 (1989))).

While some scholars have suggested that constitutional changes reflect the evolution of the common law more than actual changes in the text of the constitution,[237] a comparison of how the Court has used the common law and section 35 and how it has seen the relationship between the two does not completely support that argument. Instead a look at the Court's use of these sources in *Delgamuukw* and *Bernard* indicates that courts rely in complex ways on both the common law and constitutional texts in devising their jurisprudence after constitutional reforms. Further, the analysis suggests that the Supreme Court of Canada has been using section 35(1) to modify and revise the common law of Aboriginal title in significant ways.

As noted above, the Court in *Delgamuukw* and *Bernard* relied heavily on both section 35(1) and the common law. The Court often used section 35(1) to revise the common law to take into consideration the new constitutional status of Aboriginal title. Nonexclusive Aboriginal title had some undefined recognition and protection under the common law prior to constitutional incorporation of the right.[238] As the Court acknowledged in *Delgamuukw*, the content, scope, and nature of Aboriginal title had not been expressly defined under the common law even though earlier precedent had suggested that Aboriginal title was not equal to fee simple absolute under the common law of property.[239] The Court largely defined the content, scope, and nature of Aboriginal title under the common law.[240] It relied entirely on the common law in defining the right and then recognized that section 35(1) incorporates the common law right.[241]

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237. Constitutional law scholar David Strauss has suggested that constitutional texts play at most a small role in constitutional interpretation and development. Strauss, *Common Law*, *supra* note 10, at 877. He argues that evolving understandings of what the Constitution requires–what he calls the constitutional common law–play a more important influence in constitutional interpretation. *Id.* He contends that "[w]hatever guidance the text of the Constitution (or any other text) gives, it gives because of a complicated set of background understandings shared in the culture (both the legal culture and the popular culture)." *Id.* at 911. In cases where the text of the constitution is not precise, such as with section 35(1), which is written in broad terms, it "serves to limit the range of disagreement" but does little else. *Id.* at 912. Strauss suggests that "[t]he text matters most for the least important questions." *Id.* at 916. While the author agrees with Strauss that many factors play a role in constitutional development, she thinks that courts and litigants rely on constitutional texts more than he suggests and that courts use constitutional provisions to revise the common law more than he admits. For other critiques of Strauss, see Vermuele, *supra* note 19.

238. *See, e.g.*, St. Catherine's Milling & Lumber Co. v. The Queen, [1888] 14 App. Cas. 46, 54-55 (P.C.); Calder v. Attorney-General of British Columbia, [1973] S.C.R. 313, 376 (Hall, J., dissenting).

239. Delgamuukw v. British Columbia, [1997] 3 S.C.R. 1010, 1080-82.

240. MCNEIL, EMERGING JUSTICE?, *supra* note 102, at 296.

241. [1997] 3 S.C.R. at 1080-82. In defining Aboriginal title under the common law in *Delgamuukw*, several scholars contend that the Court departed from the common law of

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property. MCNEIL, EMERGING JUSTICE?, *supra* note 102, at 296; Brian Donovan, *Common Law Origins of Aboriginal Entitlements to Land*, 29 MAN. L. J. 289, 336-37 (2003) [hereinafter Donovan, *Common Law Origins*]. The Court distinguished Aboriginal title from other common law property rights by finding that it was a communal rather than an individual right. Under Anglo-Canadian law generally property rights must be vested in an individual. MCNEIL, EMERGING JUSTICE?, *supra* note 102, at 298-99. The Court also found that Aboriginal title was less than a fee simple absolute. Usually prior occupation under the common law indicated that the possessor had fee simple unless another prior occupier could show that he had better title. Donovan, *Common Law Origins*, *supra*, at 309-11, 314-17.

These scholars also note that the Court remained consistent with the common law in several respects. *See, e.g.*, MCNEIL, EMERGING JUSTICE?, *supra* note 102, at 106-07. As with other common law property rights, the Court found that prior occupation was proof of title, *id.* at 106, that Aboriginal law could also be used to prove title, *id.*, that the executive had no power to abrogate the right, *id.*, and that the content of the right was not limited to traditional uses. *Id.* at 112.

These departures from the common law of property appear related not to the constitutional nature of Aboriginal title, but to the Court's earlier precedent on Aboriginal title and definition of the right under the common law. Even before constitutional incorporation, Aboriginal title did not receive the same protections under the common law as other property rights. McNeil, *Extinguishment*, *supra* note 173, at 311; Donovan, *Common Law Origins, supra*, at 340. While many scholars contend that Aboriginal title should have received more protection under the common law than it currently receives, they all note that the departure from the common law of property occurred in *St. Catherine's Milling* and not after the constitutional recognition of Aboriginal rights in 1982. McNeil, *Extinguishment*, *supra* note 173, at 311; Donovan, *Common Law Origins, supra*, at 340.

Brian Donovan has suggested that the closest the Court has come to an interpretation of Aboriginal title equal to property rights under the common law was in *Calder*. Brian Donovan, *The Evolution and Present Status of Common Law Aboriginal Title in Canada: The Law's Crooked Path and the Hollow Promise in* Delgamuukw, 35 U.B.C. L. REV. 43, 60-62 (2001). If the Court had followed common law of property like the dissent indicated it might in *Calder*, Aboriginal title doctrine may have developed more consistently with common law property rights. The Court's divergence from common law property rights in *Delgamuukw*, however, relates to how it sees the common law evolving now post-*Calder*. It can only be attributed to section 35 to the extent that section 35 recognizes "existing" Aboriginal rights. The word "existing" in section 35 suggests that the Court had to rely primarily, if not exclusively, on the common law in defining the nature, scope, and content of Aboriginal title. While the Court may have been able to do something entirely different if section 35 recognized all Aboriginal rights and not just "existing" ones, this is not the argument made by these scholars. Rather, they contend that the Court could have done something entirely different under the common law. Thus, while it is impossible to determine how the common law would have evolved in any other set of circumstances, it is unlikely that the Court would have interpreted Aboriginal title under the common law in any other way. Further, based on Supreme Court precedents dealing with Aboriginal title other than *Calder*, very little suggests that the Court was prepared to define Aboriginal title like other common law property rights such as a fee simple absolute.

The Court relied more heavily on section 35 in defining the constitutional protection of Aboriginal title and establishing the tests for proof and infringement of Aboriginal title in *Delgamuukw*. The Court modified the common law by establishing procedural mechanisms to ensure protection of the common law right of Aboriginal title consistent with its new constitutional status under section 35(1). While the Court noted that the common law was also relevant to the development of these procedures, it focused more on how the constitutional recognition of Aboriginal title dictated its inquiries.[242] The Court in *Delgamuukw* differentiated constitutional incorporation from mere recognition of common law rights by explaining that constitutional rights receive different protections than common law rights.[243] It then explored this distinction in discussing how Aboriginal title is to be treated now that it is a constitutionally protected right. The Court departed from its earlier precedents, under which Aboriginal title was extinguishable by provincial and federal governments.[244] It held first that post-1982 Aboriginal title cannot be extinguished and established constraints on infringements of it. This indicates that section 35 played a key role in the Court's interpretation of how Aboriginal title is to be treated as a constitutionally protected right and saw the Constitution as playing a role in how it should determine when and how the right can be infringed. It also shows how the Court interpreted section 35 to revise the common law protections accorded to Aboriginal title and developed new procedural mechanisms for protecting the now constitutionally recognized common law right.

The Court dealt with the interrelationships between the common law and section 35 in more complex ways in refining the test for proof of Aboriginal title in *Bernard*. The Court's use of section 35 in relation to the common law in *Bernard* further illustrates how section 35 modifies and incorporates the common law. In *Bernard*, the Court acknowledged the importance of both the common law of property and Aboriginal perspectives as required by section 35.[245] While

242. *See, e.g.*, *Delgamuukw*, [1997] 3 S.C.R. at 1107.

243. *Id.*

244. Kent McNeil argues that the Court departed from the common law of property by creating a justificatory test that makes it easier to infringe on Aboriginal title, a constitutionally protected property right, than to infringe on other property rights under the common law expropriation of land doctrine. MCNEIL, EMERGING JUSTICE?, *supra* note 102, at 308. In making this argument, McNeil assumes that Aboriginal title should have received either the same protections under the common law as other property rights or that constitutional protection of Aboriginal rights should afford more protection than the common law does. While intuitively his argument makes sense, the question here has to be which common law–the common law of property or the common law of Aboriginal title. The Supreme Court of Canada has treated Aboriginal title as distinct from other common law property rights and created a separate common law of Aboriginal title, from which it refuses to depart.

245. R. v. Bernard, 2005 S.C.C. 43, 30005, [2005] S.C.J. No. 44 QUICKLAW, ¶¶ 44-48 (July 20, 2005).

the concurrence criticized the Court's majority for over-focusing on the common law and ignoring the crucial role that Aboriginal perspectives should play in the proof of Aboriginal title claims,[246] the majority stated (at least rhetorically) that Aboriginal perspectives inform the test for proof of Aboriginal title.[247] The Court's reaffirmation of the important role that Aboriginal perspectives play in proving Aboriginal title claims shows that it has significantly revised the common law, under which Aboriginal perspectives may not have been considered, because of section 35. The Court then alternated between its reliance on both section 35 cases and the common law in clarifying the test for proof of Aboriginal title. The Court's combined use of the two sources was most apparent (and complex) when it cited to section 35 cases to support common law (of property) propositions.[248] In doing so, the Court indicated that section 35, in addition to the common law, informs the test for proof of Aboriginal title claims and that section 35 alters the common law to incorporate the constitutional status of Aboriginal title as a common law right.

The Court's reliance on section 35 in its discussion of how Aboriginal title can be proven in *Delgamuukw* and *Bernard* demonstrated that the Constitution influenced Aboriginal title litigation. The Court revised the common law to allow for the introduction of oral histories and Aboriginal perspectives because it determined that this was required to achieve the reconciliatory purpose of section 35.[249] The Court defined the criteria under its test for proof of Aboriginal title to support this purpose.[250] Without section 35, it is not clear what the standards of proof for Aboriginal title would have been as the common law (of Aboriginal title) had not developed any standards. Under the common law, Aboriginal perspectives may not have been considered in the proof of Aboriginal title. Instead the Court's heavy reliance on section 35 in both *Delgamuukw* and *Bernard* suggests that without section 35 the test may have been different.

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246. *Id.* ¶ 126 (LeBel, J., concurring).

247. The dissent made a very cogent point about how the majority treated Aboriginal perspectives in clarifying the test for proof of Aboriginal title. *See supra* Part II. The majority's decision in *Bernard* can be read to indicate that Aboriginal perspectives, while mandated to be considered by section 35, play a much smaller and lesser role in the proof of Aboriginal title claims than originally suggested by the Court in *Delgamuukw*. Having said that, the author takes the Court at its word in that it clearly asserts that section 35 requires that Aboriginal perspectives be considered.

Even if the Court has lessened the role that Aboriginal perspectives play in the test for proving Aboriginal title claims that does not undermine the fact that the Court is relying on section 35 at least rhetorically in *Bernard*. If nothing else, the Court's continued use of section 35 and section 35 cases in *Bernard* suggests that section 35 has tremendous symbolic value in Aboriginal rights cases.

248. *See Bernard*, [2005] S.C.C. 43, ¶ 54.

249. *Id.* ¶ 46.

250. *Id.* ¶ 52.

While the standards may have evolved in the same way under the common law due to its acceptance of legal pluralism in property cases,[251] this is not clear given the proscription against the use of oral histories as hearsay evidence under the common law. The question for the court would be which common law to follow–the common law of property, which accepted legal pluralism and evidence of assertions of control over land,[252] or the common law of evidence, which heavily proscribes the use of hearsay evidence in courts of law. Although several scholars suggest that under the common law of property the Court would have reached the same or a better result than it did in *Delgamuukw*,[253] these scholars do not consider competing common law precedents that the Court may have followed including the common law of Aboriginal title and common law rules of evidence. They overlook how the Court viewed the common law of evidence in *Delgamuukw.*[254] In *Delgamuukw*, the Court indicated that it was altering the common law of evidence by allowing for the admission of oral histories in Aboriginal title cases and that section 35 required this departure.[255] This indicates that if the Court had followed the common law of evidence, which was clearly an option, its decision may have been dramatically different.

The Court has justified many of its departures from the common law as required by section 35. The constitutional incorporation of Aboriginal rights consequently provided the Court with a basis separate from and in addition to the common law for its decision in *Delgamuukw*. The Court has used section 35 to modify and revise the common law to account for the constitutional status of Aboriginal title and to develop procedural mechanisms consistent with that constitutional status. While the Court may have departed from the common law anyway because, under the evolutionary nature of the common law, precedents

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251. Donovan, *Common Law Origins, supra* note 241, at 296-98.

252. *Id.*

253. *See id.* at 291; MCNEIL, EMERGING JUSTICE?, *supra* note 102, at 296-97.

254. Then Chief Justice Lamer suggested in *Delgamuukw* that under the common law rules of evidence oral histories would not be admissible in Aboriginal title cases. He explained, "Many features of oral histories would count against both their admissibility and their weight as evidence of prior events in a court that took a traditional approach to the rules of evidence." *Delgamuukw*, [1997] 3 S.C.R. at 1068. In particular, he noted the potential hearsay problem when he stated:

> Another feature of oral histories which creates difficulty is that they largely consist of out-of-court statements, passed on through an unbroken chain across the generations of a particular aboriginal nation to the present-day. These out-of-court statements are admitted for their truth and therefore conflict with the general rule against the admissibility of hearsay.

*Id.* at 1069.

255. *Id.*

can be discarded when they are no long relevant,[256] it is not clear that the Court would have done this, or would have done it in this way, without section 35.

Further, while courts may have evolved the common law to recognize and protect Aboriginal title and rights in the same way that it has under section 35, it is not clear how long it would have taken for that process to occur. As Part III illustrated, the Court does not take very many Aboriginal title cases, and over thirty years passed between *Calder* and *Delgamuukw*. If nothing else, section 35 prompted the Court to address questions of Aboriginal title and encouraged it to develop Aboriginal title doctrine sooner rather than later.

While the Court's dual reliance on the common law and the constitution suggests that it was influenced by both, its heavy use of section 35 in its creation of tests for proof and infringement of Aboriginal title suggests that section 35 is playing a large role in its decision-making. Further, the Court has indicated that it is using section 35 to revise the common law in accordance with the constitutional recognition of Aboriginal title. The Court has made it clear that the constitutional recognition of Aboriginal title matters in at least two ways. First, section 35 prohibits the extinguishment of Aboriginal title after 1982, and necessitates that any infringement of the right mandates substantial justification. If substantial justification of the infringement cannot be shown, then the statute or regulation may be declared unconstitutional. Second, section 35 requires that courts consider Aboriginal perspectives in determining whether Aboriginal title exists. This indicates that the constitutional incorporation of Aboriginal rights has been a significant influence in the Court's adjudication of Aboriginal title claims. The Court's reliance on both the common law and section 35, however, suggests that the best explanation for the Court's development of Aboriginal title doctrine since 1982 is as a complex and interrelated reading of the common law and section 35.[257]

The Court has also relied heavily on section 35 in two of the other four cases that it has heard since 1982. Although the Court mentioned its growing section 35 jurisprudence in *Ontario v. Bear Island Foundation* and *British Columbia v. Okanagan Indian Band*, it did not rely on section 35 in its reasons for the decisions in those cases.[258] Neither case appears to have been brought pursuant to section 35, and the Court in *Okanagan Indian Band* expressly stated that the "issue of a constitutional right to funding d[id] not arise."[259]

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256. Donovan, *Common Law Origins, supra* note 241, at 312-13.

257. This reading may also explain why the Court did not go further in its Aboriginal title jurisprudence and depart from the common law entirely. The Court had to rely on both the common law and section 35 because to some extent, the term "existing" in section 35 mandated that the Court define the right under the common law.

258. Ontario v. Bear Island Found., [1991] 2 S.C.R. 570, 575; British Columbia v. Okanagan Indian Band, [2003] 3 S.C.R. 371, 387.

259. *Okanagan Indian Band*, [2003] 3 S.C.R. at 387.

The Court heavily relied on section 35 in its reasons for decision in *Haida Nation* and *Taku River*.[260] In *Haida Nation*, the Court explicitly found the Crown's duty to consult and accommodate Aboriginal peoples when making decisions that may adversely impact unproven Aboriginal title and rights claims in section 35 of the Constitution.[261] It found that section 35 protects the potential rights embedded in the claims,[262] and that a duty to consult and accommodate is essential to maintaining the honour of the Crown in the reconciliation process mandated by section 35.[263] The Court also relied on section 35 in its determination that the law of injunctions did not exclusively govern the situation.[264] Similarly, in *Taku River*, the Court rejected the province's argument that the common law duty of fair dealing did not extend to the facts at hand, and re-emphasized the importance of the Crown's duty to consult under section 35.[265]

In the majority of its post-constitutional Aboriginal title cases involving Aboriginal title claims, the Court has relied heavily upon section 35 to justify its reasons for decision. This indicates that section 35 has influenced and continues to influence Aboriginal title litigation. That influence, however, does not fully explain the Court's development of Aboriginal title doctrine since 1982. To fully comprehend the changes in Aboriginal title doctrine, it is essential to consider the complex interrelationship between the Court's reliance on section 35 and other sources, including the common law.

## **B. Law and Society: An Inquiry into Nondoctrinal Sources of Constitutional Change**

While the Court attributes its reasons for decision in most of its post-1982 Aboriginal title cases to section 35, other factors may also play a role in its decision-making and in the increased number of Aboriginal title claims being adjudicated by the lower courts. Many scholars maintain that constitutional provisions alone do not account for changes in constitutional norms or litiga-

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260. In a simple counting of the sources relied upon by the Court in these cases, the author found that the Court cited section 35 and section 35 cases more than any other individual source.

261. [2004] 3 S.C.R. 511, ¶ 20.

262. *Id.* ¶ 25.

263. *Id.* ¶ 33 ("To limit reconciliation to the post-proof sphere risks treating reconciliation as a distant legalistic goal, devoid of the 'meaningful content' mandated by the 'solemn commitment' made by the Crown in recognizing and affirming aboriginal rights and title.").

264. *Id.* ¶¶ 14-15.

265. Taku River Tlingit First Nation v. British Columbia, [2004] 3 S.C.R. 550, ¶¶ 23-24.

tion.[266] Political scientist Charles Epp suggests that the constitutional text alone does not explain the rights revolution in Canada.[267] He argues that changes in the judiciary and the development of legal support networks also influence Supreme Court agendas.[268] Rates of litigation may increase if claimants think the justices are more receptive to their claims or legal support networks develop to facilitate the bringing of these claims. Changes in legal doctrine may also be related to changes in the judiciary and changes in the legal atmosphere.

This section considers some other possible factors that could be influencing the changes to Aboriginal title litigation, including changes in the Supreme Court of Canada and the development of legal support networks. To gauge changes in the judiciary, it evaluates appointments and the judicial predispositions (such as whether the justices on the Court are considered to be more liberal or conservative over time) of justices of the Supreme Court of Canada. It then measures the rise of legal support networks by looking at the development of rights advocacy organizations and sources of funding. It argues that while some changes in the judiciary have occurred and legal support networks are slowly developing, these factors cannot completely account for the changes in Aboriginal title litigation. It concludes that the recent changes in Aboriginal title litigation are best understood as the result of both doctrinal and nondoctrinal influences.

Changes in the personnel of the Supreme Court of Canada in the past forty years may have had some influence on the changes in Aboriginal title litigation.[269] The small number of Aboriginal title cases heard by the Court, however, makes this very difficult to determine with any certainty. Generally, the Canadian Supreme Court is considered much less politicized than the U.S. Supreme Court[270] and exactly what influence can be attributed to changes in court personnel is unclear.

The composition of the Supreme Court of Canada has changed somewhat in the thirty years since *Calder*. Relatively conservative justices, who were not open to the recognition of civil liberties and civil rights claims, composed the Canadian Supreme Court in the early 1970s when *Calder* was decided.[271] Starting in the mid-1980s, this began to shift, and by the early 1990s the Court had an

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266. *See, e.g.*, Strauss, *Irrelevance*, *supra* note 19, at 1457, 1462-64 (suggesting constitutional provisions only make a difference when certain conditions are met); Siegel, *supra* note 19, at 316-28 (noting that popular mobilization is a factor in changes in constitutional norms and litigation).

267. EPP, *supra* note 56, at 156-57.

268. *Id.*

269. The author limits this analysis to the past forty years because until 1949, the Privy Council, not the Supreme Court of Canada, had final say in Canadian cases. For this reason, the Supreme Court was generally considered a weak and ineffectual body until the mid to late twentieth century.

270. EPP, *supra* note 56, at 165-67.

271. *Id.* at 167.

almost even mix of liberal and conservative justices.[272] This liberalization of the Court may have had some impact on its decision-making in Aboriginal title cases.[273]

Another significant change in the Court's composition that could be affecting Aboriginal title cases is the increase in the number of female justices. The first woman, Justice Bertha Wilson, was appointed in 1982. Since then, the Court has experienced an increasing number of female appointments.[274] Today, the Court has four female justices, including the Right Honorable Beverly McLachlin, who was appointed in 2000 to be the first Madam Chief Justice. If differences exist in voting patterns by gender, then the increased number of women on the Court may be affecting its decision-making in Aboriginal title cases.[275]

The mix of justices on the Court alone, however, does not influence its decision-making. Unlike in the United States, where all nine justices of the Supreme Court constitute a panel, in Canada, six justices often compose a panel. Thus, the composition of each individual panel may matter as much, if not more, than the general composition of the Court.

While these changes in the Court's composition may have influenced some of the judicial decision-making, they have not led to revolutionary changes in the Supreme Court's agenda.[276] The Court has had almost unfettered discretion

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272. *Id.* at 169 tbl.9.1.

273. Generally, social scientists have found the appointment of justices by a conservative or liberal Prime Minister largely irrelevant to how they vote. *See, e.g.*, PETER MCCORMICK, CANADA'S COURTS: A SOCIAL SCIENTIST'S GROUND-BREAKING ACCOUNT OF THE CANADIAN JUDICIAL SYSTEM 90-91 (1994). While McCormick noticed that Liberal appointees were slightly more likely to vote to reverse than Conservative ones, the effects were "too limited to suggest a strong causal relationship." *Id.* at 90.

274. Since 1982, the following women have been appointed to the Canadian Supreme Court: Hon. Beverly McLachlin (1989); Hon. Louise Arbour (1999); Hon. Marie Deschamps (2002); Hon. Rosalie Silberman Abella (2004); and the Hon. Louise Charron (2004). Canadian Supreme Court, About the Judges, http://www.scc-csc.gc.ca/AboutCourt/judges/curformpuisne/index_e.asp (last visited Nov. 7, 2005).

275. Several studies have attempted to determine whether gender makes a difference on the Supreme Court of Canada. Generally, the studies found that whether gender matters depends on the kind of case being adjudicated. Candace C. White, *Gender Differences on the Supreme Court, in* LAW, POLITICS AND THE JUDICIAL PROCESS IN CANADA 85, 89-90 (Frederick L. Morton ed., 3d ed. 2002). This indicates that gender may make a difference in Aboriginal rights cases, but the author knows of no studies that have looked specifically at the role of gender in such cases.

276. The largest change in the Canadian Supreme Court's agenda has been a shift from largely private law cases in the nineteenth century to public law cases. *See* MCCORMICK, *supra* note 273, at 81-82. This change is attributed to the entrenchment of the Charter in 1982 and the Court's discretionary authority over its docket. *Id.* at 82-83. In his study of the Canadian Supreme Court's practices of granting leave to appeal, Roy Flemming found

over when it grants a leave to appeal since 1975,[277] and largely sets its own agenda. Studies of the Court's agenda setting practices suggest that it is less politicized than the United States Supreme Court.[278] Jurisprudential accounts, which posit that legal considerations weigh heavily in justices' decisions to grant review, offer the most persuasive explanations of Supreme Court decisions in Canada.[279] Despite changes in court personnel, until recently, the Court has not found it necessary to place Aboriginal title claims on its agenda very often.[280] Only in the past couple of years has the Court taken one or two Aboriginal title cases every term,[281] and one case every term does not constitute a large part of the Court's agenda. In general, Aboriginal rights cases (including Aboriginal title cases) were not significant enough to merit their own category in the Supreme Court's statistics of the cases it has granted leave of appeal in and heard since 1993.[282] Nor have the Court's decisions in Aboriginal title cases indicated that it is more receptive to upholding these claims.[283] The trend towards more liberal

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that ideological disagreements did not play a significant role in decisions to grant leave of appeal. ROY B. FLEMMING, TOURNAMENT OF APPEALS: GRANTING JUDICIAL REVIEW IN CANADA 82-83 (2004).

277. EPP, *supra* note 56, at 157. The Canadian Supreme Court does not have complete discretion over its docket because it has to hear appeals as of right in some criminal cases and reference questions put to it by the federal government or Governor-in-Council. FLEMMING, *supra* note 276, at 6-7; MCCORMICK, *supra* note 273, at 76-77.

278. FLEMMING, *supra* note 276, at 99-100. The Canadian Supreme Court may be perceived as less politicized in part because interest group participation through intervener (amicus curiae) briefs is strongly discouraged at the leave of appeal stage in Canada. *Id.* at 13. While the Court liberally grants intervener status, intervener involvement is limited almost exclusively to during the merits stage of the litigation. *Id.*

279. *Id.* at 99-100.

280. EPP, *supra* note 56, at 157.

281. The Supreme Court of Canada heard one case in 2003 (*Okanagan Indian Band*), two companion cases in 2004 (*Haida Nation* and *Taku River*), and two consolidated cases in 2005 (*Bernard*).

282. Supreme Court of Canada, Supreme Court Statistics 2004, Category 3: Appeals Heard, Appeals Heard 2004: Type, http://www.scc-csc.gc.ca/information/statistics/HTML/cat3_e.asp (last visited Nov. 7, 2005).

283. The Court's decision in *Bernard* may be read to suggest the exact opposite, namely that the Court is less likely to affirm Aboriginal title claims after 1982. The *Bernard* decision is the second time since 1982 that the Court has rejected Aboriginal title claims. *See also* Ontario v. Bear Island Found., [1991] 2 S.C.R. 570, 575. Prior to 1982, the Court also dismissed two Aboriginal title claims. Calder v. Attorney-General of British Columbia, [1973] S.C.R. 313, 345; Paulette v. The Queen, [1977] 2 S.C.R. 628, 645. To date, the Court has never affirmed an Aboriginal title claim, so in a rough win-loss counting of Aboriginal title cases before and after 1982, it looks like Aboriginal peoples fare no better under section 35. A more complex analysis, however, suggests that Aboriginal peoples have made small gains in pursuing their title claims since 1982, because now the

and female Justices may influence the changes in Aboriginal title litigation, but it does not appear to be a major force in these changes. Instead, the influence of changes in the judiciary is best understood as part of the multiple influences leading to the changes in Aboriginal title doctrine and litigation since 1982.

Another factor that could be influencing the changes in Aboriginal title litigation is the development of legal support networks to facilitate litigation. To determine whether legal support networks are developing to facilitate the litigation of Aboriginal title claims, the development of two aspects of the legal community need to be evaluated: rights advocacy organizations and sources of funding.[284]

National Aboriginal rights advocacy movements began developing prior to constitutional change in 1982, and some actively worked for the constitutional incorporation of section 35.[285] Since 1982, however, many of these rights advocacy organizations have focused on lobbying and legislative strategies for change rather than litigation.[286] The Assembly of First Nations (AFN), which represents First Nations in all regions of Canada, describes itself as a lobbying organiza-

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Crown cannot extinguish title, has to consult with Aboriginal peoples even before their claims are proven, and may have to supply interim funds to Aboriginal peoples to try their claims.

284. The relationship between social movements and legal change remains widely debated. In the United States, several studies have attempted to determine the relationship between courts and social change. *See generally*, GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (1991); MICHAEL W. MCCANN, RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION (1994). The findings of these studies remain largely indeterminate because of feedback effects between courts and social change. While the majority of the literature focuses on the relationship between social attitudes and doctrinal change, a few studies have attempted to look at the impact of social movements on the rates of litigation rather than doctrinal change. *See, e.g.*, EPP, *supra* note 56, at 4-5.

Feedback effects exist in the causal relationship between social change and courts, which is why constitutional changes are best explained as part of a larger sustained dynamic between influences, rather than as part of a unidirectional causal trajectory. The author contends that an evaluation of the success of social movements entails not only a study of whether they successfully placed their issues on the constitutional agenda in 1982, but also whether after 1982 they were able to ensure the enforcement of the rights embodied in the Constitution of 1982.

285. Aboriginal rights advocacy organizations participated in, albeit in a more minor role than they would have liked, the constitutional negotiations leading up to the Constitution Act, 1982. *See generally* HAWKES, *supra* note 85, at 3-8. They were at least partially successful in placing Aboriginal issues on the constitutional agenda in 1982, because section 35 was incorporated into the Constitution Act, 1982.

286. *See* Assembly of First Nations National Indian Brotherhood, *Assembly of First Nations – The Story* (2001), http://www.afn.ca/article.asp?id=59 (last visited Nov. 6, 2005).

tion.[287] AFN has played a limited role in Aboriginal rights litigation generally. It filed intervener's briefs in *Bear Island Foundation* and *Bernard*,[288] but otherwise does not appear to be involved in Aboriginal title litigation. Similarly, the national Inuit organization, Inuit Tapiriit Kanatami, has used a land settlement negotiations strategy rather than litigation to resolve outstanding land claims with the Canadian government.[289] While section 35 may not have been incorporated without their past efforts, neither of these national organizations appear to have built legal support networks or invested significant resources in the litigation of Aboriginal title claims.[290]

Rights advocacy organizations supporting Métis[291] and non-status and off-reserve Indians have been more actively engaged in developing legal support networks.[292] Both the Congress of Aboriginal Peoples (CAP) and the Métis National Council (MNC), the two main rights advocacy organizations serving Métis and non-status and off-reserve Indians, include information on recent litigation on their websites.[293] The CAP has also brought at least one lawsuit in

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287. Assembly of First Nations National Indian Brotherhood, *Description of the AFN*, http://www.afn.ca/article.asp?id=58. (last visited Nov. 6, 2005). While the AFN does provide information on residential schools litigation, its website does not highlight any other Aboriginal litigation. *See id.*

288. *Bear Island Found*., [1991] 2 S.C.R. 570; R. v. Bernard, 2005 S.C.C. 43, 30005, [2005] S.C.J. No. 44 QUICKLAW (July 20, 2005).

289. Inuit Tapiriit Kanatami, *ITK and Land Claims*, http://www.itk.ca/corporate/history-land-claims.php (last visited Nov. 6, 2005). This is consistent with the approach of Inuit peoples generally. *See* JOHN J. BORROWS & LEONARD I. ROTMAN, ABORIGINAL LEGAL ISSUES: CASES, MATERIALS AND COMMENTARY 437-42 (2d ed. 2003).

290. J.R. Miller suggests that a rare moment of Aboriginal unity led to the successful incorporation of Aboriginal rights into the constitution in 1982. J.R. MILLER, SKYSCRAPERS HIDE THE HEAVENS: A HISTORY OF INDIAN-WHITE RELATIONS IN CANADA 243 (1989). This unity largely dissipated during the struggles over the constitution, *id.*, and the resulting disunity may explain in part their inability to obtain effective implementation of section 35.

291. Métis are one of the three Aboriginal groups constitutionally protected by section 35. The Royal Commission on Aboriginal Peoples referred to Métis as "distinct Aboriginal peoples whose early ancestors were of mixed heritage (First Nations, or Inuit in the case of the Labrador Métis, and European) and who associate themselves with a culture that is distinctly Métis." REPORT OF THE ROYAL COMM'N ON ABORIGINAL PEOPLES VOL. 1 (1996), *available at* http://www.ainc-inac.gc.ca/ch/rcap/sg/sg1_e.html.

292. It is not surprising that rights advocacy organizations for Métis and non-status and off-reserve Indians are more inclined to develop legal support networks because they have been left out of many of the Canadian government's alternative negotiation and settlement options, forcing them to litigate their Aboriginal rights claims. The legal status of Métis was unclear prior to *R. v. Powley*, [2003] 2 S.C.R. 207.

293. Congress of Aboriginal Peoples, *Onsite Links to Legal and Case Law Info* http://www.abo-peoples.org/Legal/legal.html (last visited Nov. 6, 2005); MÉTIS NAT'L

the federal courts, seeking the recognition of the rights of non-status Indians and Métis under Constitution Act, 1867 section 91(24) and negotiations with the Canadian government for violations of these rights.[294] While this claim may involve Aboriginal title at some point, it is not clear that they are claiming Aboriginal title in litigation presently or supporting other Aboriginal title claims brought by Métis and non-status Indians. The CAP did, however, intervene in *Bernard*,[295] which may indicate that they are taking a more active interest in litigation. The MNC has also taken a more active approach. It has a two part Métis rights strategy, mixing litigation with negotiations, but admits that to date only one Aboriginal title claim has been brought by Métis and it has not reached the Supreme Court.[296] The MNC, however, has been actively involved in other litigation to recognize Métis rights, including the *Powley*[297] case recently heard by the Supreme Court of Canada. While CAP and MNC are slowly building legal support networks to enforce their Aboriginal rights, they have not played a significant role in Aboriginal title litigation to date.

Finally, an Indigenous Bar Association exists in Canada to promote the development of indigenous law and indigenous lawyers. Although it is building a network of indigenous lawyers, it does not appear to be engaged in funding or pro bono work on Aboriginal title claims.[298]

While national Aboriginal rights advocacy groups do not include Aboriginal title litigation as a key part of their agendas, at least one regional Aboriginal rights advocacy group has. The Union of British Columbia Indian Chiefs (UBCIC) has made the defense and protection of Aboriginal Title part of its mission.[299] The UBCIC intervened in *Taku River* and actively promotes the research of land claims.[300]

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COUNCIL, MÉTIS CASE LAW: SUMMARY AND ANALYSIS (2000), *available at* http://www.metisnation.ca/rights/download/metis_case_law_summary_2000.pdf.

294. Plaintiff's Statement of Claim, Daniels v. the Queen, No. T-2172-99 (Fed. Ct. Dec. 1999), *available at* http://www.abo-peoples.org/Legal/CAP91(24).html.

295. R. v. Bernard, 2005 S.C.C. 43, 30005, [2005] S.C.J. No. 44 QUICKLAW, (July 20, 2005).

296. MÉTIS NAT'L COUNCIL, *supra* note 293, at 13-14.

297. R. v. Powley, [2003] 2 S.C.R. 207.

298. *See* Indigenous Bar Association, *What is the IBA?*, http://www.indigenousbar.ca/main_e.html (last visited Nov. 6, 2005).

299. Union of British Columbia Indian Chiefs, Our History, http://ubcic.bc.ca/about/history.htm (last visited Nov. 6, 2005).

300. The number of interveners in Aboriginal title claims at the appellate level has increased since *Calder*, but this may in part be because it has been easier to intervene since 1975. Aboriginal rights advocacy groups in general, however, have not been intervening in Aboriginal title litigation. More commonly, the attorney generals of various provinces and individual First Nations intervene in these cases.

While legal support networks in general have grown in Canada since the late 1960s,[301] few, if any, of these networks have focused specifically on Aboriginal rights and Aboriginal title litigation. National Aboriginal rights advocacy groups have focused their attention on negotiating with the government rather than litigating their rights and have not actively created legal support networks.[302] Thus, while these Aboriginal rights advocacy groups were somewhat successful in achieving the constitutional incorporation of section 35 in 1982 and amendments to it in 1983,[303] they have not played as central a role in the enforcement of section 35 rights as they might have by developing Aboriginal legal support networks.

A second aspect of the legal community that may influence Aboriginal title litigation is the availability of funding to support Aboriginal title claims. The expense of litigation is a major roadblock to litigation in any context and the bringing of Aboriginal rights litigation often depends on whether Aboriginal peoples have the resources to pursue their claims.[304] An analysis of private and public funding sources for Aboriginal title claims indicates that legal support networks are not developing funding programs to support Aboriginal title claims.

Generally, private funding sources for Aboriginal title claims have been slow to develop.[305] As previously discussed, Aboriginal rights advocacy organizations are not designating resources towards these claims. Further, legal aid societies have not developed sections committed to Aboriginal rights litigation.[306] Nor have Aboriginal rights cases become part of the pro bono agendas of major law firms, which tend to concentrate more on Aboriginal business development.[307] Many of the legal support networks that have developed fund individual rights issues, such as landlord-tenant relationships or claims under the Canadian Charter of Rights and Freedoms.[308]

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301. EPP, *supra* note 56, at 180.

302. The author has not attempted to determine the impact that these negotiations may be having on Aboriginal title doctrine and vice versa in this article but acknowledges the possibility of such interactions.

303. In 1983, the Canadian Constitution was amended through the Constitution Amendment Proclamation, 1983 to entrench recognition of rights obtained under Aboriginal land claims agreements, to provide for gender equality, and to commit all governments to invite Aboriginal and territorial government representatives to conferences on issues relating to them. William F. Maton, *Canadian Constitutional Documents: A Legal History* (2004), http://www.solon.org/Constitutions/Canada/English.

304. Ian Taylor, *Financing Aboriginal Litigation, in* ABORIGINAL RIGHTS LITIGATION, *supra* note 87, at 348.

305. *Id.* at 350-60.

306. *Id.* at 351.

307. *Id.* at 350.

308. *Id.* at 352-53. For instance, Aboriginal Legal Services Toronto assists individual Aboriginal people, and the Court Challenges Program funds litigation relating to the language and equality provisions in the Charter of Rights and Freedoms.

Public sources of funding are more widely available, but remain limited as well. The government program most active in Aboriginal rights cases is the Indian and Northern Affairs Canada (INAC) Test Case Funding Program (TCFP). This program started in 1965 to promote "the development of case law relating to Indian issues."[309] Initially, it only funded litigation about treaty rights, Indian Act issues, and criminal murder cases.[310] In 1983, the TCFP was reengineered into its current form[311] and its scope was expanded to include Aboriginal rights cases. While the program has funded several large Aboriginal title cases, including *Bear Island Foundation* and *Delgamuukw*,[312] it is tiny when compared to the plethora of Aboriginal title claims percolating through the Canadian legal system. Traditionally, it has had a budget of under $1 million Canadian per year.[313]

Due to its limited resources, the TCFP is not advertised by INAC and it only funds adjudication at the appellate level.[314] All initial case research and trial court costs have to be paid before Aboriginal rights litigants are even eligible for the program. Further, if a recipient of TCFP receives a judgment or award of costs against the government of Canada in litigation or a sum from the government in settlement of a claim, those amounts are to be set off against the contribution received through the TCFP.[315] Thus, the program is very limited in its scope and financial support of Aboriginal rights claims.

Despite these limits, at least one scholar has noted that there appears to be a link between the cases funded by the TCFP and the cases taken on appeal by the Canadian Supreme Court. This possible link indicates that INAC may play some role in case selection and development and thus, influence the development of Aboriginal rights doctrine. While the program has provided some support for Aboriginal title claims, its limited resources alone cannot fully explain the explosion in the number of Aboriginal title claims filed and adjudicated since 1982. More likely, INAC has used the program to influence the Supreme Court's agenda and which cases develop the doctrine of Aboriginal title.

The absence of funding opportunities, however, has also influenced the Court's Aboriginal title jurisprudence. Arguably, if adequate funding sources existed, the Okanagan Indian Band would not have sued for interim litigation expenses in *British Columbia v. Okanagan Indian Band*.[316] In that case, the

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309. DEP'T OF INDIAN AFFAIRS AND NORTHERN DEV., LEGAL LIAISON AND SUPPORT STUDY, TEST CASE FUNDING PROGRAM 5 (1988) [hereinafter LEGAL LIAISON AND SUPPORT STUDY].

310. *Id.*

311. *See id.* at 3.

312. Taylor, *supra* note 304, at 355.

313. Through the late 1980s, the entire budget for the program was set at $300,000 Canadian a year. LEGAL LIAISON AND SUPPORT STUDY, *supra* note 309, at 15.

314. *Id.* at 11-12.

315. *Id.* at 14.

316. [2003] 3 S.C.R. 371.

Okanagan Indian Band argued that it was unable to find any governmental or pro bono sources of aid to help support its Aboriginal title claim.[317] The Court found the Band's argument persuasive and held that interim costs could be granted to a party seeking recognition of its constitutional rights when the litigation would be unable to proceed if the order were not made, the claim to be adjudicated was prima facie meritorious, and the issues raised transcended the individual interests of the particular litigant, were of public importance, and had not been resolved in previous cases.[318]

While limited legal support networks have developed since the 1960s to support Aboriginal title claims, these networks have not emerged to the same degree as general legal support networks. Government programs and funding sources have the largest influence on Aboriginal title litigation and the limited resources of these programs cannot fully explain the changes in Aboriginal title litigation. It appears that the limited development of legal support networks has had some influence on Aboriginal title litigation.

Multiple influences have contributed to the changes in Aboriginal title litigation since 1982. These changes can therefore only be understood by considering these multiple influences as part of a larger, interrelated social dynamic. While section 35 is clearly not the only influence on these changes, it has played an important role, at least symbolically, in Aboriginal title litigation since 1982, as both parties and courts have used section 35 as a basis upon which to justify Aboriginal title claims. Section 35's influence, however, cannot be fully appreciated without acknowledging how it relates to the other factors influencing these changes to Aboriginal title litigation.

## V. CONCLUSION

Constitutional change suggests legal, social, and political change, yet the practical effects of textual changes to constitutions are rarely empirically evaluated. Constitutional recognitions of Aboriginal peoples are thought to positively impact Aboriginal peoples by increasing the legal recognition and protection of their rights. But many unintended consequences may stem from the constitutional recognition of Aboriginal rights, suggesting that constitutional recognitions of rights may not fulfill the promises of doctrinal certainty attributed to them. By evaluating some of these claims in terms of Aboriginal title litigation, this article sheds some light on constitutionalism and whether constitutional rights matter at all.

A comparison of Aboriginal title litigation before and after 1982 demonstrates that Aboriginal title litigation has changed in the last twenty years. First, Aboriginal title doctrine changed substantially with the Supreme Court's decisions

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317. *Id.* at 405 (Major, J., dissenting).

318. *Id.* at 399-400.

in *Delgamuukw*, *Bernard*, *Okanagan Indian Band*, *Haida Nation*, and *Taku River*. Second, the number of Aboriginal title claims has skyrocketed since 1982.

Several factors have influenced these changes in Aboriginal title litigation. The evaluation of these factors suggests that the constitutional recognition of Aboriginal rights has had a significant impact on Aboriginal title litigation in the past twenty years. The Canadian Supreme Court and Aboriginal title claimants' heavy reliance upon section 35(1) indicates that the Constitution has at least symbolically influenced the development of Aboriginal title litigation since 1982. The textual changes to the Canadian Constitution, however, do not fully explain the changes to Aboriginal title litigation. Rather these changes are best explained as part of sustained interactions among multiple influences, including the common law, changes in court personnel, and the development of legal support networks, over time.