



RECOGNIZING RIGHTS

ABORIGINAL LAW IN CANADA

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ABORIGINAL LAW IN CANADA — A PLAIN LANGUAGE LEGAL PRIMER



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Disclaimer

The "Recognizing Rights: Aboriginal Law in Canada" was prepared by law students from the University of Victoria, all of whom have yet to take the bar exam and are not qualified lawyers. As such, all information provided in this document is legal information, not legal advice. The accuracy of the information is not guaranteed, and you rely on it at your own risk. If you are filing a claim or responding to legal action and you need legal advice, you should retain qualified legal professionals to advise you.




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INDIGENOUS LEGAL TRADITIONS

At the outset, we wish to recognize that Indigenous Peoples have their own legal systems that have been in place since time immemorial. Canada is a legally pluralistic state founded not only on the common law and civil law but also on Indigenous legal traditions.

The Supreme Court of Canada has recognized that Indigenous societies in Canada possess legal traditions and Aboriginal rights that predate the arrival of Europeans in North America. These are legal traditions and governance structures that continue to function “through people’s actions, teachings, assumptions, premises and philosophies about the nature, operation and the application of law.”¹ As Professor John Borrows says, “The Canadian legal system is not strictly a colonial construct, incompatible with Aboriginal law, as is commonly perceived, but has been built upon a foundation of British, American and Aboriginal Law.”²

While disrupted and at times outlawed by the Canadian government, Indigenous legal traditions are currently experiencing a revitalization and resurgence. Many Indigenous Nations are leading the way in revitalizing and applying Indigenous laws to protect the health of people and the land in their traditional territories.



“The Canadian legal system is not strictly a colonial construct, incompatible with Aboriginal law, as is commonly perceived, but has been built upon a foundation of British, American and Aboriginal Law.”

— John Borrows
Canada Research Chair
in Indigenous Law

INTRODUCTION

The purpose of this guide is to provide information on the different Aboriginal rights as they are understood in Canadian common law, and the ways in which Indigenous people can assert these rights within the Canadian colonial court system.

ABORIGINAL RIGHTS

Canada's Constitution: A Turning Point in Canada's Relationship with Indigenous Peoples

The Constitution did not create Aboriginal rights but recognized and entrenched them in the highest law of Canada through section 35 of the *Constitution Act, 1982*.

Section 35 of the *Constitution Act, 1982* provides:

"35(1) The existing aboriginal and treaty rights of the aboriginal people in Canada are hereby recognized and affirmed.

(2) In this Act, 'Aboriginal Peoples of Canada' includes the Indian, Inuit, and Métis Peoples of Canada.³

(3) For greater certainty, in subsection (1), 'treaty rights' includes rights that now exist by way of land claims agreements or may be so acquired.

(4) Notwithstanding any other provision of this act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons."

The *Constitution Act* dramatically changed the landscape of Aboriginal rights and Canada's relationship with Indigenous peoples. It came about in large part due to a strong Indigenous grassroots movement that culminated with a "Constitution Express" in 1980 that saw over 1,000 Indigenous activists descend on Parliament Hill, demanding that explicit recognition of Aboriginal and Treaty rights be written into the Constitution⁴

The inclusion of Aboriginal and Treaty rights in the constitution put an end to attempts by both the federal and some provincial governments to extinguish those rights or claim that they never existed. After decades of disenfranchisement — including infamous *Indian Act* provisions that made it impossible for Indigenous peoples to initiate land claims, or hire lawyers — Indigenous peoples now had a legal recourse. They were now able to seek protection of their rights in court.

How does the Constitution define Aboriginal Rights?

Beyond conferring constitutional recognition, which prevents Aboriginal rights from being extinguished, the Constitution did not further define Aboriginal rights, leaving it to the courts to define them through judicial interpretation.

Unfortunately, in practice, this has meant that, in order to secure Aboriginal rights, Indigenous peoples must shoulder the burden of expensive litigation.

Since 1982, a number of landmark court rulings have clarified the nature of Aboriginal rights. They are communally-held rights, which arise from Aboriginal peoples' continued use and occupation of land before the assertion of British sovereignty in Canada or before the time of contact, depending on the Indigenous Nation.⁵ They are not general or universal and will depend entirely on the practices, customs, and traditions of the Aboriginal community claiming the right.⁶

Key Decisions: *Van der Peet*, 1996

The Supreme Court decision in the *Van der Peet* case further defined Aboriginal rights as outlined in Section 35 of the *Constitution Act, 1982*.

The case involved a member of the Stó:lo First Nation in B.C., who was charged with selling salmon that was caught under a food fishing license. This license allowed Aboriginal people to fish for sustenance and ceremonial use, but prohibited the sale of fish to non-Aboriginal people. The charges were challenged, and it was argued that as an Aboriginal person, Van der Peet had a right not only to harvest but also to sell fish. Despite the Stó:lo peoples' traditional practice of engaging in trade relationships with other First Nations, the Supreme Court of Canada held that, while fishing was an Aboriginal right, trade in salmon was not.

This ruling set down ten criteria for determining the scope of a community's Aboriginal rights. In order to be an Aboriginal right, an activity must be an element of a practice, custom, or tradition integral to the distinctive culture of the Aboriginal group claiming the right.⁷

While Aboriginal rights are based on practices, customs, and traditions that were, and still are, integral to the Aboriginal group, the exercise of the right doesn't need to follow the traditional methods as they were before contact with Europeans. Courts have interpreted Aboriginal rights to evolve over time. For example, if an Aboriginal group has a recognized right to hunt and it was traditionally exercised with a bow and arrow, the right is not eliminated if a rifle is now used.

Some examples of Aboriginal rights that have been recognized include: hunting, fishing, trapping, and commercial fishing.

Because Section 35 made Aboriginal rights part of the Constitution, actions by the federal or provincial governments cannot interfere with the rights unless that interference is justified.⁸ The criteria for determining whether interference is justified were first set out in the *Sparrow* decision (see box).

Key Decisions: Sparrow, 1990⁹

In 1984, a Musqueam band member was arrested for fishing with a net longer than permitted by his food fishing license. In 1990, the Supreme Court of Canada heard the case and ruled that, despite nearly a century of governmental regulations and restrictions on the Musqueam's right to fish, their Aboriginal right to fish had not been extinguished.

This case also set out criteria to determine whether government infringement on an Aboriginal right was justified. These criteria are known as the "Sparrow Test", a two-part test that determines:

1. whether the government is acting pursuant to a valid legislative object; and
2. whether the government's actions are consistent with its fiduciary duty to Aboriginal Peoples.

If a valid legislative object is found, three questions need to be addressed to determine whether the government's actions were consistent with its fiduciary duty to Aboriginal Peoples:

- a) Has there been as "little infringement as possible" in order to achieve the intended result?
- b) Where there has been expropriation, has fair compensation been paid?
- c) Has the particular Aboriginal group been consulted?

THE UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES

The *UN Declaration on the Rights of Indigenous Peoples (UNDRIP)* was adopted by the United Nations in September 2007.¹⁰ *UNDRIP* protects the individual rights of Indigenous people and collective rights that are not addressed in other legislation.¹¹ It does not annul any rights contained in treaties or agreements between Indigenous peoples and individual states, but calls for the enforcement of the agreements.¹² For more information on the *UNDRIP*, [check this website](#).

Australia, Canada, New Zealand, and the United States were initially opposed to the ratification of the *UNDRIP*. These countries expressed concern that recognizing the level of autonomy given to Indigenous peoples in the *UNDRIP* would undercut their states' sovereignty.¹³ However, the four countries have altered their views and now endorse the *UNDRIP*.¹⁴ Canada announced it would support the *UNDRIP* in 2010 and, in 2015, stated its intention to fully implement the *UNDRIP* to align with the Constitution.¹⁵

The incorporation of *UNDRIP* into law in Canada is an ongoing process. Bill C-15, *An Act respecting the United Nations Declaration on the Rights of Indigenous Peoples*, was passed on December 3, 2020, and received Royal Assent on June 21, 2021. In *C-92 Reference (Reference re An Act respecting First Nations, Inuit and Métis children, youth and families, 2024 SCC 5)*, the SCC recognized *UNDRIP* as part of Canada's domestic law. However, the meaning of *UNDRIP* in Canada continues to be debated and questioned through various litigation across the country.

ABORIGINAL TITLE

Aboriginal title refers to an Indigenous Nation's exclusive right to use and control land and to benefit from those uses.¹⁶ Aboriginal title is a subset of Aboriginal rights. Aboriginal title was first acknowledged by the Supreme Court of Canada ("SCC") in *Calder v. British Columbia (AG)*, [1973] SCR 313. The SCC determined the right to Aboriginal title had survived the assertion of Crown sovereignty, but the judges were divided on whether it had been subsequently extinguished.¹⁷

It was not until over 20 years later, in *Delgamuukw v. British Columbia*, [1997] 3 SCR 1010, that a discussion about the content of Aboriginal title took place. The SCC held that Aboriginal title was unique, as it is based on occupation of the land prior to the assertion of Crown sovereignty.¹⁸ Aboriginal title includes the right to exclusive use and occupation of the land ("occupy and possess") for a variety of purposes, which do not all have to be Aboriginal practices, customs, or traditions that are integral to the culture;¹⁹ rather, it incorporates present-day needs. Aboriginal title is a collective title held by the group, rather than by an individual.

This means it cannot be used or developed in any way that would deprive future generations of the control and benefit of the land, and it cannot be alienated (i.e., sold or transferred), except to the Crown.²⁰

The *Delgamuukw* decision also set out criteria that an Aboriginal group needs to prove in order to establish Aboriginal title:

- “Sufficiency”: from time immemorial, the organized group has occupied a specific territory over which it asserts Aboriginal title, and the traditional use and occupancy of the territory must have been sufficient at the time of assertion of sovereignty by the British Crown. For example, regular use of territory for hunting, fishing, trapping, etc., is “sufficient use” to ground Aboriginal title.²¹
- “Exclusivity”: The occupation of the territory by the Aboriginal group was largely to the exclusion of other organized societies. Exclusivity of occupation involves offering evidence of an intention or capacity to retain exclusive control. It can be established by several methods, such as proof that others were excluded from the land; proof that others were only allowed access to the land with the permission of the Aboriginal group; evidence of treaties or agreements with other groups; and a lack of challenges to occupancy.²²
- The group’s Aboriginal title and rights to resource use has not been dealt with by treaty.
- Aboriginal title has not been eliminated by other lawful means. The criteria of sufficiency and exclusivity were reaffirmed recently in *Tsilhqot’in Nation v. British Columbia*, [2014] 2 SCR 257.

Key Decisions: *Tsilhqot’in Nation v British Columbia*, 2014

This case was the first time in Canadian history that the Supreme Court of Canada declared Aboriginal title. In its decision, the SCC concluded that the trial judge was correct in finding that the Tsilhqot’in had established title to 1,750 square km of land southwest of Williams Lake, B.C. It also reaffirmed the test in *Delgamuukw* for proving the existence of Aboriginal title, underscoring the criteria of occupation, sufficiency, and exclusivity.

In *Tsilhqot’in*, the SCC reasoned that Aboriginal title was not limited to village sites but also extended to lands regularly used for hunting, fishing, trapping, foraging, and other cultural purposes or practices. This includes lands in the surrounding area over which the Aboriginal group had effective control. Therefore, Aboriginal title can exist on a territorial basis.

The downside of this decision is that it also reduced Indigenous people’s ability to rely on the Federal Government’s exclusive legislative authority when provinces seek to enact legislation affecting Aboriginal title and rights. According to the Court, provinces are now entitled to regulate the exercise of Aboriginal rights, and infringe on Aboriginal rights (including title) if they can justify that infringement.

FIDUCIARY DUTY

There is a fiduciary relationship between Indigenous Nations and the Crown. This means the federal government has a responsibility to act in a way that honours this “special trust relationship.” Acting in such a way upholds the Honour of the Crown. The fiduciary duty arose out of the unique nature of Aboriginal title, as it existed before Crown sovereignty, and is inalienable (cannot be transferred).²³

In the Sparrow decision, the Supreme Court of Canada held that section 35 of the Constitution Act, 1982, constitutionally protected all existing Aboriginal rights and imposed a fiduciary duty on the Crown with respect to those rights. The government is required to bear the burden of justifying any legislation that has some negative effect on any right protected under section 35 of the Constitution.²⁴

The scope of the fiduciary duty will be decided on a case-by-case basis and depends on whether:

1. a specific Aboriginal interest exists; and
2. whether the Crown has exercised discretionary control over that interest.²⁵

In order for the Aboriginal interest to exist, it must have existed before the assertion of Crown sovereignty, and it must be communal and integral to the connection between the community and the land. Lands held by an individual, rather than a community, will not qualify.²⁶ For example, an Aboriginal interest may take the form of Aboriginal title.

Key Decisions: *Guerin v. The Queen*, 1985

This case established that the Federal Government owed a legally enforceable fiduciary duty to Aboriginal Peoples, specifically in regard to reserve lands.

In 1958, the federal government leased a portion of the Musqueam Reserve to a private company to be used as a golf course on behalf of the Musqueam First Nation. The band claimed the final written agreement prepared by the government contained terms that they had not agreed to when they voted to accept the terms of the lease. The terms they were concerned with gave the company a very significant discount lasting until 2033. The Musqueam took the government to court, claiming that both the terms of the lease and the secretive manner in which it was negotiated breached the federal government’s fiduciary duty to the Musqueam people.

As a result, the Supreme Court of Canada ruled in favour of the Musqueam and reinstated the \$10 million award initially granted by the Federal Court.

DUTY TO CONSULT AND ACCOMMODATE

The duty to consult is a constitutionally owed duty to Indigenous communities by the federal and provincial governments.²⁷ This duty can arise in situations where the communities do not have proven treaty or Aboriginal rights, as seen in *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 SCR 511.²⁸

As discussed above, Aboriginal rights are now recognized within section 35 of the *Constitution Act, 1982*, which states that “the existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.”²⁹ Through their interpretation of section 35, the courts have defined the duty to consult.

The duty to consult arises when the federal or provincial government's actions may negatively impact an existing or potentially existing Aboriginal right or title.³⁰ Therefore, the test for when the duty to consult arises is:

1. The Crown has knowledge of a potential or proven Aboriginal claim or right;
2. The Crown must be contemplating conduct which engages a potential Aboriginal right; and
3. There must be the potential that the contemplated conduct may adversely affect an Aboriginal claim or right.³¹

As stated above, the federal or provincial government has a duty to consult if certain conduct will adversely affect any rights set out in a treaty with Aboriginal peoples. However, this is not the case if the treaty provides an alternative arrangement that will continue to maintain the honour of the Crown.³²

The threshold required for conduct to trigger the duty is not high, which is meant to maintain the honour of the Crown.³³ However, the extent to which the Crown must consult is often referred to as a spectrum and depends on two factors:

1. The strength of the rights claim, and
2. The seriousness of the potential infringement of those rights.³⁴

For example, if the evidence to support an Aboriginal right is weak and the infringement on that right is minor, the Crown may be able to fulfill its duty to consult by simply giving notice. In contrast, for communities with rights recognized by the government, such as treaty First Nations, in addition to consultation, the government may have to accommodate Aboriginal rights or provide justification for any infringement on those rights.³⁵

The government can delegate this duty, but the responsibility to ensure the duty is met remains with the government.³⁶

When justification is needed, the government must show that the project is necessary, is designed to have a minimal effect on Aboriginal rights, and its benefits outweigh the negative impacts on the First Nations.³⁷

If Aboriginal title has been established, encroachments may require the consent of the Aboriginal group.³⁸

The courts have set out minimum requirements that the federal or provincial government must meet in order to fulfill their duty to consult, as described in the *Tsilhqot'in* decision:³⁹

1. Consultation with the affected community must start at the earliest stages of planning.
2. The government must act in good faith during consultation and properly address the concerns of the Indigenous peoples.
3. The government must have the ability to change or alter the project after consultation with the community.

Key Decisions: *Haida Nation v British Columbia*, 2004 SCC 73

The Haida Nation was in the process of proving their title claim to Haida Gwaii, their traditional homeland. The government, however, asserted it owned the land and exercised that right by giving a forestry company the rights to log a particular area. The Haida Nation challenged the government's decision, arguing that the government had a duty to consult and accommodate the Nation and that otherwise their land would be deprived of the forests "vital to their economy and their culture."⁴⁰

Their challenge started at the British Columbia Supreme Court, where the court ruled that the government had a moral duty to consult, but not a legal duty.

Haida Nation challenged this ruling at the BC Court of Appeal, which reversed the decision. It held that the government and the forestry company both had a duty to consult and accommodate the Haida people.

This was appealed by the government, and the case was heard by the Supreme Court of Canada. The final ruling was that even though the Haida Nation's claim had not been finalized, the government still owed the Haida a duty to consult and to accommodate if required. Though a duty to consult does not mean agreement will be reached, the consultation must be meaningful.

TREATIES

Treaty rights are Aboriginal rights that are set out in a treaty; they are specific rights. Through treaties, Indigenous people are able to claim land ownership. Many treaties were made between the government and Aboriginal people across Canada beginning in the 18th century.⁴¹ Under the historic treaties, which were signed between 1871 and 1923, Indigenous groups typically gave up large areas of land to the Crown. In exchange, they would receive hunting and fishing rights, annual payments, ammunition, or equipment and animals.⁴² The modern treaties, those signed since 1923, involve land claim settlements, which are discussed below.

In response to the *Calder* decision recognizing that Aboriginal title survived the assertion of British sovereignty,⁴³ the Crown developed a comprehensive claims process to deal with issues related to Aboriginal claims where Aboriginal title had not been previously addressed through the treaty process.⁴⁴ The claims process was initiated to extinguish Aboriginal title in exchange for rights and benefits that were outlined in the settlement itself.⁴⁵ Completion of the exchange is referred to as achieving certainty, which occurs by modifying existing rights or reaching an agreement that the Indigenous group will never assert particular rights.⁴⁶ This idea was controversial among Indigenous people, and since then, many Indigenous leaders and community members have aided the government in changing the approach.⁴⁷ However, the concerns of Indigenous people are still prevalent as the new approach works to achieve the same goal – “to cede, release, and surrender their rights and title aside from what is explicitly outlined in the settlement.”⁴⁸

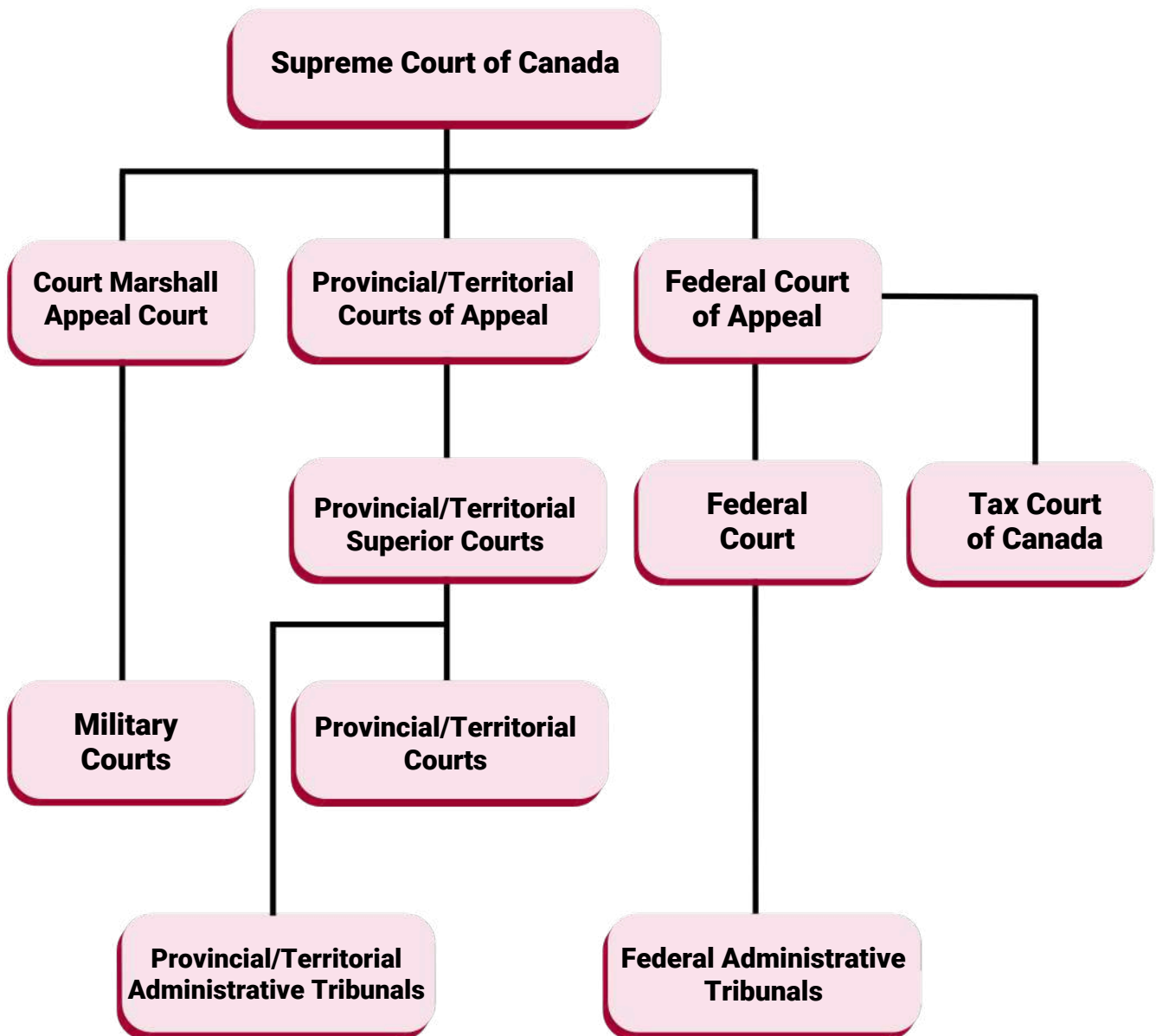
Despite the federal government’s attempt to deal with issues of Aboriginal title, the BC government refused to cooperate until the early 1990s, when resource development in the province declined because of the uncertainty surrounding Aboriginal title.⁴⁹ Primarily motivated by economic losses, the provincial government developed the BC Treaty Process (BCTP) to create agreements with Aboriginal people over title rights.⁵⁰ Unfortunately, the BCTP has not been very successful, as many Indigenous Nations have not engaged in the process based on the belief that “the process simply extinguishes title in favour of government and big business interests, allowing them to continue developing lands at the expense of Aboriginal peoples, territories and cultures.”⁵¹

SELF-GOVERNANCE

Aboriginal people were self-governing long before Europeans came to Canada, but their right to self-governance was dismantled by the Indian Act in 1876, which imposed strict regulations on the lives of Aboriginal people.⁵²

However, the right to self-government was recognized under the Constitution Act, 1982 in section 35.⁵³ The content of that right is currently determined by the approach established in the Pamajewon and Van der Peet decisions, namely that only those practices, customs and traditions that are continuous with and integral to the distinctive culture of an Aboriginal community as it existed prior to European contact will attract constitutional protection.⁵⁴

JUDICIAL STRUCTURE IN CANADA



Self-Governance

The Supreme Court is the highest Court in Canada. It hears appeals from the Provincial Courts of Appeal and reviews complicated and controversial legal matters. Judgments from the Supreme Court are final and are binding upon all levels of court in all jurisdictions in Canada.

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**“Let’s make sure that when we take actions in the present, for the future,
that we don’t forget who we are and where we came from, once upon a time.”**

— John Borrows
Canada Research Chair
in Indigenous Law



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Our vision is a country that embraces the ancestral laws of Indigenous Peoples and their equitable access to the justice system within a thriving natural habitat. Our mission is to raise legal defence funds to assist First Nations who enforce their rights and title to protect traditional territories.

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