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Aboriginal Law



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How climate change intersects with Inuit land claims agreements

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In the midst of grappling with the impact of global warming on the Arctic, with a seemingly growing list of nations laying competing claims to maritime access to the Northwest Passage and the riches lying beneath the forbidding landscape, the Inuit are looking to their land claims agreements with the government of Canada to address the environmental challenges faced by their communities.

With their way of life under siege, the Inuit have already begun testing the flexibility and fluidity of northern land claims agreements, having filed a \$1-billion suit against the federal government in what may foreshadow long drawn-out legal battles, spurred in part by shifting environmental and climatic changes in the north.

In a suit that will test competing visions of the interpretation and nature of land claims agreements, Nunavut Tunngavik Inc. (NTI) filed

It remains to be seen whether the court will embrace the view long espoused by the Inuit, who view land claims agreements as working documents, which can and should be adaptable to changing circumstances in the North...

a statement of claim against the Attorney General of Canada nearly four years ago for breach of contract, alleging that the federal government failed to live up to its obligations and has therefore violated the *Nunavut Land Claims Agreement Act* (Agreement). The Agreement identi-

fied the geographical area of the Northwest Territories as the Nunavut Settlement Area, and on Apr. 1, 1999 the area became the Territory of Nunavut. NTI, a body established to assist in the implementation of the land claims agreement negotiated by the Inuit and the government of Canada, coordinates and manages Inuit responsibilities set out in the Agreement, while ensuring that the federal and territorial governments fulfill their obligations.

While the specific claims in the NTI suit, which is now at the discovery stage, do not specifically refer to climate change, an interpretative approach is being advocated by the Inuit that will encourage examination of the issue, said Dougald Brown of Nelligan O'Brien Payne in Ottawa, who is representing NTI. Under the Agreement, the federal government was required to establish a Nunavut Wildlife Management Board that would implement and monitor a plan to oversee eco-

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Fish weirs, clam gardens offer proof of aboriginal title



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Provincial government lawyers and officials are typically quick to dismiss the possibility of aboriginal title to foreshore and submerged lands. This attitude is apparently based on an assertion that foreshore and submerged lands are “public” (and therefore controlled by the provincial government) and that First Nations could not possibly have owned or physically occupied foreshore or submerged lands historically.

Despite these assumptions, ownership of foreshore and submerged lands was an integral aspect of the common law historically. Archaeological analysis of First Nation fish weirs and clam gardens provides extensive evidence of title to foreshore and waterlots, both under the common law and the law of aboriginal title. Many First Nations have strong aboriginal rights and title claims to foreshore and waterlot areas, and the provincial government should deal with these claims before proceeding with further privatization.

Many Indian reserves in B.C. were allocated based on access to the fisheries. In his book, *Landing Native Fisheries*, Douglas Harris provides a detailed history of a reserve-creation process guided by the principle that white settlers would pursue a land-based economy and the marine-based economy would be left to First Nations. Indeed, reserves were often smaller in B.C. than elsewhere in Canada because of the expectation and promise that First Nations would be pursuing fishing and not farming (see *Pasco v. C.N.R.*, [1986] 1 C.N.L.R. 34).

Unfortunately, the government parcelled out the land to settlers

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Historical evidence reveals use of fish weirs over hundreds of years

Weirs

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and have since proceeded to also privatize foreshore and waterlots.

The test for proving aboriginal title is “exclusive use and occupation” prior to the assertion of Crown sovereignty. Exclusive use and occupation must be grounded in physical occupation, but must also take into account traditional aboriginal laws regarding occupation and title (*Delgamuukw v. British Columbia*, [1997] S.C.J. No. 108). In *Delgamuukw*, the Supreme Court of Canada accepted that physical occupation may be established in a variety of ways, ranging from the construction of dwellings through cultivation and enclosure of fields to regular use of definite tracts of land for hunting, fishing or otherwise exploiting its resources.

In *R. v. Marshall; R. v. Bernard* [2005] S.C.J. No. 44, Chief Justice Beverly McLachlin suggested that taking an aboriginal practice and identifying its modern equivalent right requires that the right claimed be recognizable to the common law.

There has been some recognition from the federal government of potential claims of First Nations

to submerged lands. Federal negotiators were at one point advised to negotiate offshore areas “to the extent possible, as though the claims involved land.” In more enlightened areas of Canada outside of B.C., treaty negotiations include the seabed (see, for example, ss. 4.2.1 to 4.2.4 of the *Labrador Inuit Land Claims Agreement*).

First Nations in Canada have had mixed success to date in securing foreshore and submerged land areas as part of reserves. Riverbeds, lake beds, foreshore and waterlots are included in some reserves but not others. The Haida Nation has claimed title to submerged lands, the seabed and the ocean extending out from Haida Gwaii, but their claim has not yet been adjudicated by the court.

During low tide at Comox Harbour, an observer can see the wooden remains of a complex fish weir system that spreads over several square kilometres. Archaeological analysis and radio-carbon dating have confirmed the presence of over 11,000 stakes and an estimate of over 100,000, arranged into complex double chevron and crescent patterns, dating back over 1,284 years and

in continual use until recent times. Archaeologists have also discovered remnants of tightly woven basketry attached to the stakes and dating back to the year 1720.

Similarly, archaeologists have turned their attention to clam gardens: beaches and foreshore areas that have been modified and enhanced through hundreds of years of labour by First Nations. These clam gardens have been “discovered” and analyzed, demonstrating the dramatic increase in harvests of bivalves created by removing rocks from sandy areas and creating rock walls to retain sands and enhance habitat.

Historical and oral history evidence define regular and repeated use of fish weirs and clam gardens over hundreds of years. This is not occasional use, but repeated and regular use over time.

The extensive enclosure, investment of labour, and ongoing use of fish weirs and clam gardens call to mind the classic common law principle that investment of labour and building of fences creates property rights. This is a foundation of British political theory that dates back at least as far as John Locke and was carried across the Atlantic to North

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America by early settlers and the common law. Early American legal decisions confirm the importance of “enclosure” to demonstrate real property ownership. The creation of property rights in Canada derived in large part from the concept of pre-emptions whereby settlers received Crown grants by demonstrating investment of labour, clearing of land or construction of “improvements” on so-called Crown land.

It would be patently discrimin-

atory for Canadian law to recognize investment of labour and construction of enclosures and improvements as a basis for property rights for non-aboriginal settlers, while failing to recognize the same principles as a basis for aboriginal title. Logically, fish weirs and clam gardens demonstrate exclusive use and occupation, not only from the aboriginal perspective, but from the strictest interpretation of property law and common law.

The challenge for the court will be to look beyond the western confusion about waters and recognise foreshore and submerged lands as simply another species of land that is subject to claims of aboriginal title. These marine dispositions should be subject to the same scrutiny as their terrestrial counterparts. ■

Murray Browne is legal counsel for several First Nations in the forefront of treaty negotiations and also works on Specific Claims, aboriginal rights and title litigation. Drew Mildon has been a park ranger, an assistant epidemiologist, author, and a teaching assistant. He is now a lawyer who works with First Nations.