

Comparative Common Law – Canada

“[a]fter all, that is the beauty of the common law; it is a maze and not a motorway.” Lord Diplock

Class Summary

Canadian law has its roots in English common law which means that judges clarify the meaning of the case law. Definitions and concepts have been left largely unchanged. The Canadian system is pluralistic as it also has influence from the French and Spanish traditions. Quebec is heavily influenced by the French civil system. Through the Charter of Rights and Freedoms to the Canadian Constitution common law was also introduced to the Quebec province. Since 1982 Canadian rights have become clearer and more easily protected.

The Royal Proclamation of 1763 was first issued by King George III to officially claim British territory in the North of Canada. It has been argued that the Proclamation is still valid law because no other law has since overruled it. The Royal Proclamation is important as it is a foundational document for the evolution of Canada's territorial development. The document was instrumental in defining the relationship between the Crown and First Nation people. The Proclamation served as the basis for the issuance of treaty making. The intention of the Royal Proclamation was to slow down the encroachment of the West but it also served as the first public recognition of First Nations rights to land and title. As a result of the Royal Proclamation between 1871-1921 several treaties were entered into which regulated the relationship of the Crown and First Nations where the Crown was able to pursue agriculture, settlement and resource development. A key factor in the success of the Proclamation was part due to Sir William Johnson, Superintendent for Indian Affairs. Sir Johnson was instrumental in securing the trust of the Indigenous people this was achieved by honouring their social conventions and recognising how the Indigenous people understood their relationship with the crown. The proclamation concerned not only the Indigenous people but also the fate of the french settlers in that area. The territory of New France had been much larger than the tiny of province of Quebec which was created by the Proclamation. The Proclamation was the culmination of the end of the war in Canada and the French settlers they themselves became colonised.

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Required Reading

Please read the articles below by following the associated link and then answer the self-check questions:

1. **Constitution Act 1982**
2. **Calder v Att. Gen. B.C.[1973] SCR 313**
3. **R v Sparrow [1990] 1 SCR 1075**
4. **Delgamuukw v. British Columbia [1997] 3 SCR 1010**

Self Check Questions

1. How does the Constitution Act 1982 provide for aboriginal title? What sections provide this protection and how.
2. In the case of Calder what was the argument of the dissenting judgment concerning, “the Nishgas claim that their title arises out of aboriginal occupation; that recognition of such a title is a concept well embedded in English law; that it is not dependent on treaty, executive order or legislative enactment”?
3. Describe the “Sparrow test” and its significance for aboriginal title.
4. The case of Delgamuukw had to consider several issues one of which was, to what extent is the content of aboriginal title, protected by s. 35(1) of the Constitution Act, 1982, and what is required for its proof. Please explain and describe what the court determined in relation to the protection provided by s.35(1) of the Constitution Act 1982.

Further Recommended Reading

Please read the articles below by following the associated link and then answer the self-check questions:

1. **Landmark new agreement lays out path for reconciliation with Lake Babine**
2. **The Royal Proclamation of 1763**

Further Self Check Questions

1. Explain the significance of the decision of Lake Babine in light of the historical decisions of the Canadian Supreme Court on aboriginal title.

Definitions/Key Terminology

Please make sure that you familiarise yourself with the below expression as they are important to the understanding of this topic:

- Exclusive possession
- Substantial maintenance
- Land rights
- Extinguishment
- Fiduciary obligation
- Terra nullius
- Royal proclamation

