



Indian and Northern  
Affairs Canada

Affaires indiennes  
et du Nord Canada

# Certainty

Federal Team Presentation  
October 2010

*Without Prejudice – For Discussion Purposes Only*



Canada

# Certainty

## **Certainty and clarity of rights to ownership and use of lands and resources**

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# 1. Background

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## **Calder decision (1973)**

- SCC accepted that Aboriginal rights are justiciable

## **Sparrow decision**

- SCC recognized and affirmed aboriginal rights
- Placed constitutional limitations on government's ability to affect (infringe) Aboriginal rights
- Government required to justify infringement of aboriginal rights

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## Background - Court Direction

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**Court has not been definitive on the scope and nature of Aboriginal rights**

- content of the right
- geographical scope
- identity of rights holders
- extent of limitations (what is considered justifiable)

**Court has continually said that Aboriginal rights are site and fact specific.**

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# Background - Government Situation

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- Government wants to be able to regulate and manage land and resources interests
- Government came up with the comprehensive claims policy as a means of addressing the uncertainty that results from the potential of Aboriginal rights
- There is a history of the Crown to negotiate a conclusion of Aboriginal rights (originally seeking surrenders) as opposed to unilateral extinguishment.

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## Background - Necessity of Negotiations

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- **Vague nature of the rights** = uncertainty over effectiveness and applicability of legislation and the ability of government and individuals to use land and resources.
- **Solution** : define more precisely the rights that everybody has with respect to the land and resources including limitations.

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## 2. Models - Cede, Release and Surrender

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**Aboriginal rights are terminated and replaced with treaty rights**

**i.e. Inuvialuit Agreement**

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## Models - Modification

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- **Technique modifies the group's Aboriginal rights to possess only those attributes as set out in the treaty**
- e.g. Nisga'a Final Agreement

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# Models - Non-Assertion

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- Aboriginal group retains all of its rights but agrees not to assert any s. 35 rights against the Crown or third parties except those rights set out in the treaty.
- Problem - Dalgamuukw decision indicated that the use of Aboriginal title lands cannot be irreconcilable with traditional Aboriginal use
- means that lands originally claimed and ultimately found to be Aboriginal title lands, but outside the settlement lands may still require a surrender for irreconcilable use
- Solution - Crown requires a backup release for any s. 35 rights other than those set out in the treaty in case a court finds non-assertion ineffective.

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### 3. Release

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#### **Included as a part of all certainty / finality provisions**

- provides for a release from any infringements by the Crown of an Aboriginal or treaty rights claims that may have occurred before the effective date of the treaty.

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