



How Far Have We Come from Treating Indigenous Peoples as "Just Another Stakeholder" in Forest Management?

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Acknowledgement

I thank signatories to Treaty 6 and Treaty 8 in Alberta for welcoming me to their territory. I also want to thank the First Nations in Alberta, including Kee Tas Kee Now Tribal Council, for challenging the Province of Alberta's plans to separate from Canada.



Outline

- Past—1970s–1990s
- Current—2000s–2024
- Future: Finding a new path



Past—1970s–1990s



Inherent Rights

- Indigenous rights—inherent to all Indigenous people, deriving “from their political, economic & social structures & from their cultures, spiritual traditions, histories & philosophies, especially their rights to their lands, territories & resources” (UNDRIP 2007)
- Examples of inherent rights:
 - Rights to land (ancestral territory) & resources
 - Right to self-determination & self-government
 - Right to cultural integrity & practices, including language and spirituality
 - Right to economic development
 - Right to customary law
 - Right to honourable treatment by the Crown
 - Rights to negotiate treaties

The Result? Constitution Act, 1982, section 35, recognizing Aboriginal & Treaty Rights

35. (1) The existing aboriginal & treaty rights of the aboriginal peoples of Canada are hereby recognized & affirmed.

(2) In this Act, “aboriginal peoples of Canada” includes the Indian, Inuit & Métis peoples of Canada.

(3) For greater certainty, in subsection (1) “treaty rights” include 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 & treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

Aboriginal Peoples are no longer just another “stakeholder”

Supreme Court of Canada Decisions on Aboriginal & Treaty Rights

Calder (BC)	1973	Recognition of Nisga'a's "Aboriginal title"—a unique ("sui generis") form of land ownership; intent to extinguish rights must be clear & plain
Constitution Act, 1982, s. 35, Aboriginal & treaty rights		
Guerin (BC)	1984	The Crown must protect the interests of "Indians" as a fiduciary obligation. Found in "breach of trust".
Sioui (QC)	1990	A 1760 treaty guaranteed Huron-Wendat right to use park land for ceremonial purposes, including harvest of trees.
Sparrow (BC)	1990	Clarification of extent of "rights"; s. 35 must be treated liberally; rights must be given meaning today, not frozen in time or stuck in history
Badger (AB)	1996	Ambiguity in treaty interpretation will be resolved in favour of the "Indians"; Natural Resources Transfer Act, 1930 did not extinguish right to hunt for food
Van der Peet (BC)	1996	Rights based in historic use & must be integral to culture; no right to sell fish
Gladstone (BC)	1996	Rights based on practice, custom or tradition continuous from prior to contact; fishery regulation should consider fairness to all people, not just priority Aboriginal use



Current—2000s–2024

Key Highlights of Current Period

- Legal requirements for Duty to Consult & Accommodate clarified
- Recognition of historic treaties
- Recognition of Métis hunting rights
- Confirmation of provinces' constitutional authority for natural resource management
- International recognition of Indigenous rights
- Acknowledgement of cumulative impacts of resource development
- Beginnings of commitment to implement UNDRIP & free, prior, & informed consent
- Ongoing fight of Indigenous Peoples to have their inherent rights recognized



Supreme Court of Canada Decisions on Aboriginal & Treaty Rights

Delgamuuk'w (BC)	1997	Aboriginal title, duty to consult, oral evidence, historic use; "inescapable" economic component; First Nations also have a duty to consult
Marshall (NS)	1999	Right to earn a "moderate living"
Powley (ON)	2003	Métis hunting rights acknowledged; infringed by Ontario hunting legislation; Métis rights post-contact
Haida (BC)	2004	Crown duty to consult, not private sector. Crown can delegate "procedural aspects" of consultation
Taku River Tlingit (BC)	2004	Environmental assessment met duty to consult & honour of the Crown
Mikisew (AB)	2005	Duty to consult applies to historic & modern treaties, not just in BC where there are no agreements
Marshall, Bernard (NB, NS)	2005	Treaties of 1760-61 conferred right to trade; commercial logging not logical evolution of products traded at time of treaty
Sappier, Gray (NB)	2006	Right to cut timber on Crown land for personal use without provincial harvesting licence; to be interpreted flexibly in contemporary context

Supreme Court of Canada Decisions on Aboriginal & Treaty Rights

Morris (BC)	2006	Provincial laws do not apply when they significantly infringe an Aboriginal or treaty right (right to hunt at night, subject to safety)
Little Salmon/Carmacks (YK)	2010	Crown is responsible to uphold honour of Crown; modern day treaty had provisions for consultation; Crown provided sufficient information, time & opportunities
Carrier Sekani (BC)	2010	BC Utilities Commission's approval of an Energy Purchase Agreement provided adequate consultation; DTC limited to adverse impacts from current Crown decision, not historic or cumulative impacts
Tsilhqot'in (BC)	2014	Recognition of Tsilhqot'in's Aboriginal title based on: 1) sufficient pre-sovereignty occupation; 2) continuous occupation; & 3) exclusive historic occupation
Grassy Narrows (ON)	2014	Province of Ontario has right to issue forest licences, but also has a duty to consult to avoid infringement of rights
Clyde River (Nunavut)	2017	National Energy Board failed in consultation: environmental impacts not addressed, no consideration of Inuit treaty rights, limited participation, not "deep" consultation; inaccessible document; no mutual understanding



UNDRIP, Self-Determination

Article 3. Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.



UNDRIP, Article 32

1. Indigenous peoples have the **right to determine & develop priorities & strategies for the development or use of their lands or territories & other resources.**
2. States shall **consult & cooperate in good faith** with the indigenous peoples concerned **through their own representative institutions** in order to obtain their **free & informed consent prior to the approval** of any project affecting their lands or territories & other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.
3. States shall **provide effective mechanisms for just & fair redress** for any such activities, & **appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.**



Future: Finding a New Path

Supreme Court of Canada Decisions on Aboriginal & Treaty Rights

Southwind (ON)	2021	Compensation for loss of reserve land taken up illegally for development (flooding as a result of damming in 1929) must consider the highest compensation possible, including loss of future use of land.
Restoule (ON)	2024	The Ontario Crown has an obligation to uphold a Robinson treaty (1850) promise to share the wealth from natural resource development; that the annuity of \$4 paid since treaty signing does not meet this obligation.

Notable Provincial Court Decisions

Restoule (ON)	2018-2022	Affirmed the Robinson treaties of 1850 contained an augmentation clause that provided the Crown would share benefits from resource development through annuity payments to the Indigenous treaty signatories Found the Crown liable for failure to augment the \$4 annuity payment that remain unchanged since 1875.
Yahey (BC)	2021	The right of the Crown to “take up” land cannot be used to justify the eradication of treaty rights, not only in single development projects but also in the cumulative impacts of multiple resource development projects over time

A Hierarchy of Land-Based Decision Making between the State & Indigenous Peoples

Self-determination	Indigenous Peoples make & implement their own plans with little interference from the State
Co-management	Joint decision making between Indigenous Peoples & the State
Consent	Indigenous Peoples approve State plans; required by United Nations Declaration on the Rights of Indigenous Peoples, 2007
Consultation	Indigenous Peoples comment on State plans; accommodation sometimes required as per Supreme Court of Canada rulings



Factors Supporting Indigenous Engagement

(Reo et al., 2017)

- Respect for Indigenous knowledges (IK)
- Control of knowledge mobilization (“data sovereignty”)
- Intergenerational involvement
- Self-determination
- Continuous cross-cultural education
- Early involvement



Forms of IK & its application

- Intergenerational knowledge on land-based teachings, including sustainable livelihoods
- Collective knowledge re environmental dynamics
- Knowledge of ceremony & cultural protocols
- Indigenous languages
- Ancient teachings or prophecies
- Knowledge concerning stewardship responsibilities
- Human–non-human relationships
- Communally held values

References

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