Negotiating Public Forest Reform with Indigenous Peoples: Experience and Emerging Lessons from British Columbia, Canada

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Legal Context in Canada

• 1763 - Indigenous rights to lands and title recognized.
• 1867 - Responsibility for Indigenous people assigned to National government when country formed – Provinces responsible for natural resources.
• Agreements to give up land reached in much of Canada.
• British Columbia refused to negotiate agreements
• Indigenous people in British Columbia protested taking of their lands.
• 1973 - Supreme Court confirms concept of indigenous title.
• 1982 - Constitution Act - indigenous rights receive constitutional protection
• 1991 - British Columbia agrees to negotiate.
• 1997 – Supreme Court defines indigenous title and outlines considerations for proof.
• 2004 – Supreme Court outlines duty to consult and accommodate unproven indigenous claims.
• 2014 – Supreme court awards title of 1750 km2 to indigenous nation in British Columbia
Social Context in Canada

Historic:

• Prior to contact each indigenous nation had its own social & governance system
• Common indigenous belief that land did not belong to people.
• First partnerships were for economic and defense purposes - as populations grew, indigenous people seen as an impediment to growth and prosperity.
• “Civilization” efforts – indigenous encouraged to settle in sedentary communities, take up agriculture and receive an education. Rights to land were surrendered.
• 1876 Indian Act.
• 1883 residential school program.

Current:

• Away from paternalism; recognition of inherent rights

Indigenous people in Canada have poorer health, housing, income, education, and higher levels of incarceration than rest of population.
Indigenous Groups in British Columbia 2016

- 26 Cultural Groups
- 32 Languages
- 203 Federally recognized Indigenous groups
June 2014 Supreme Court finding of Indigenous Title

The Tsilhqot’in went to court seeking title over 4,400 square kilometres. The Supreme Court of Canada ruled the Tsilhqot’in had established title over 1,750 square kilometres, estimated to be about 2% of the band’s traditional territory.

Legend:
- **Green**: Land in the claim area to which the Tsilhqot’in have proven title.
- **Light Green**: Balance of claim area, to which Tsilhqot’in have rights to hunt and trap, but not title to the land.
- **Dark Grey**: Land the court ruled the Tsilhqot’in could have proven title but did not claim.
Supreme Court finding of Indigenous Title

**What is indigenous title?**

- exclusive right to use and benefits associated with the land;
- collective and communal right;
- must use in a manner consistent with the nature of the attachment to land;
- inalienable: cannot be conveyed to private interest.

**How does an Indigenous group obtain title?**

- land must have been **exclusively occupied prior to sovereignty**, and **continuously** used since than.
- Burden of proof lies with Indigenous Group

**How does Canada and British Columbia deal with uncertainty?**

- Crown must consider rights and potential title, consult and accommodate
- Free and prior consent are sure ways to avoid infringement and damages

Two legal orders operating on the same land base
Crown can infringe if compelling social objective and minimize impact
Crown laws of general application apply
Government Reality in 2015

**Risks:**
- Title decision: once something is done it is seen as doable.
- Lost all major court cases in regard to title.
- Costs & uncertainty increasing.

**Opportunities:**
- Communities offer cost effective, durable solution to forest management.
- Indigenous collaboration key to economic & environmental success.
- Indigenous title opportunity to diversify economic base.
- Indigenous title opportunity to address social goals.

Title decision: ‘Absolutely electrifying’
- establishes platform for genuine reconciliation’

Title Decision: ‘The Sky Is Not Falling’
- only 40% of claim awarded; title must be proven’
The Strategic Shift: from Adversaries to Collaborators

What will incent collaboration? What will increase indigenous groups interest in economic activity?

Move on 3 fronts: rights; benefits and accountability

- Recognize indigenous ownership, jurisdiction & governance
  - indigenous government interests cross all levels of western government;
  - activities such as defense, international relations, the national economy & sovereignty are not on the table

- Respect cultural differences:
  - Context: oral, usually very small societies vs. large, formalized
  - Sphere: involves humans, land, animals, creator vs. human only
  - Scope: “our life” vs. government limited to socio-political sphere
  - Direction: attunement vs. progress
  - Unit: clan, kin, community vs. individual locus of rights
The Strategic Shift: from Adversaries to Collaborators

How can the reconciliation process be most efficient?

✓ Indigenous group:
  o Has capacity and united approach;
  o Facing governance reality;
  o Respected by other indigenous groups.
✓ Active economic development tension/opportunity.
✓ Demonstrate respect.
✓ Political environment (values, biases, perspectives, assumptions of indigenous, rights holders & public) conducive to acceptance.
✓ Provide financial, time bound support.
✓ Possibility of foundation support for transition in return for environmental/conservation progress.
The People’s Accord

Establishes comprehensive negotiation framework with eight pillars of reconciliation:
• Tsilhqot’in Governance;
• Strong Tsilhqot’in Culture and Language;
• Healthy Children and Families;
• Healthy Communities;
• Justice;
• Education and Training;
• Tsilhqot’in Management Role for Lands and Resources; and
• Sustainable Economic Base.

www.tsilhqotin.ca/PDFs/Nenqay_Deni_Accord.pdf
Drivers to collaboration:

- **Hardship/Crisis** – clear need to move forward
- **Austerity** – the need for efficiency
- **Impact** – ability to get things done together
- **Complexity** – too much going on; difficult to go it alone
- **Systems & Connectivity** – joint control, social connections, common goals.
- **Culture** – similar norms and ways of doing things (leadership; community; strategic thinking, land)
THANK YOU