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Issue: Implementation of the UN Declaration will entail nations granting consent for projects on Indigenous lands, regardless of whether title has been proven in a crown legal context. What are options to engage Indigenous approaches to Indigenous land ownership and stewardship? How can these approaches be understood and applied in the context of crown legal concepts?

Introduction

Indigenous consent is one expression of the Indigenous jurisdictional and legal relationship with land and resources. This relationship is, of course, not a new one. Indigenous peoples have for countless generations made decisions regarded lands and resources guided by their legal orders and governance systems. This relationship has been fundamentally ignored throughout Canada's colonial history. Even as the affirmation of Indigenous rights has advanced through tremendous advocacy, constitutional reform, court decisions, and leadership, there has been enduring delay and resistance to substantively recognizing the Indigenous relationship to lands and resources, and the vital roles of Indigenous laws and jurisdictions.

Today, there are some signs of change. The potential that we are entering a moment of real, long overdue transformation, is seen in many factors including: the growing consensus around the *United Nations Declaration on the Rights of Indigenous Peoples* (UN Declaration) as the "framework for reconciliation"; the affirmation of Aboriginal title as a real, meaningful, and territorial right to land in *Tsilhqot'in Nation;* the action and awareness encouraged by the Calls to Action of the Truth and Reconciliation Commission; and legislative, policy, and agreement shifts, including British Columbia's *Declaration of the Rights of Indigenous Peoples Act*. In this climate of change, the implementation of the standard of free, prior, and informed consent of Indigenous peoples in regards to lands and resources is recognized a central issue of dialogue, debate, and focus.

Real change, however, is always accompanied by some dynamics of fear, confusion, and misunderstanding. These challenges are present throughout current work to understand Indigenous consent and how to operationalize it in relation to land and resource decision making. Shifting to proper models of consent-based decision making has also been made vastly more complex by the generations of colonial delay and denial by Crown governments – which has led to economic uncertainty, growing environmental degradation, enduring, real-world impacts to the lives of Indigenous peoples and communities, and on-going interference as Indigenous peoples try to rebuild their governments and Nations.

Much of the confusion and fear that accompanies current dialogue about consent in relation to lands and resources is rooted in (mis)assumptions and (mis)understandings about the nature of property rights in Canada, including the nature of Aboriginal title under section 35(1) of the *Constitution Act, 1982,* and the minimum standards regarding lands and resources in the UN Declaration. Answers to three questions about the legal relationship between Indigenous

peoples and lands and resources can be of assistance as the work of operationalizing consent moves forward:

1. What is the Indigenous relationship to lands and resources, both under section 35(1) of the *Constitution Act, 1982* and the UN Declaration?

2. What is the relationship between Indigenous property rights and other property rights in Canada?

3. How may consent operate to help structure that relationship between Indigenous and other property rights?

1. What is the Indigenous relationship to lands and resources, both under section 35(1) of the Constitution Act, 1982 and the UN Declaration?

The starting point for any discussion of the legal relationship of Indigenous peoples to lands and resources in Canada is to recognize that 'Aboriginal title' is not the same as what might be called 'Indigenous title'.

Aboriginal title is a creation of the common law. It exists, is defined, and operates within, not without, the role of section 35(1) to articulate collective rights that exist as limits on action by the Crown. This is distinct from what may be called Indigenous title, which is the political and legal relationship Indigenous Nations held as sovereigns with the lands that make up Canada prior to colonial settlement, treaty-making, and the establishment of Canada. Indigenous title is defined through Indigenous legal orders and customs, animated by conceptions of property, relationships to land, and worldviews that are in many ways different from those that undergird the common law. While such Indigenous legal orders are diverse, many share the following elements: an integrative and animated view of the relationship of humans with all things in creation; relations to land that emphasize stewardship, responsibility, and duty; and concepts of ownership that are layered, diffuse, and shared as distinct from primarily individual.

The roots of the common law recognizes this distinction between Indigenous title and Aboriginal title. The legal requirement for historic treaty-making is founded in a recognition of Indigenous sovereignty - that the lands and resources were owned and governed by Indigenous peoples under their legal orders and governance systems. A treaty was required to structure a relationship between sovereigns – and through which Indigenous land rights could also be conceptualized and understood in a common law framework. Section 35(1) has been interpreted and implemented by the Supreme Court of Canada with a similar recognition of Indigenous sovereignty, which needs to be reconciled with the assumption of Crown sovereignty. (*Haida,* paragraph 20) The title and rights affirmed and protected under section 35(1) are constructs to express and reflect that reconciliation; while not an affirmation of

Indigenous title itself, it reflects many aspects of Indigenous title and is rooted in an affirmation of pre-existing Indigenous sovereignty.

The UN Declaration, in its own way, also recognizes Indigenous title and how this is distinct from how constitutional orders, such as Canada's, may conceptualize Indigenous property rights. Article 26 expressly articulates the rights to lands traditionally held – Indigenous title – while at the same time calling on states to legally recognize such lands with "due respect" to the Indigenous legal orders which traditionally governed those lands:

> Article 26
> 1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.
> 2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.
> 3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.

Article 27 builds on this right, by calling on States to establish fair processes to recognize and adjudicate the rights of Indigenous peoples related to their lands, with "due recognition" to Indigenous legal orders:

> States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.

Articulated in both Article 26 and Article 27 is a right of Indigenous title, as well as recognizing a practical reality that State processes are required to be implemented today in contexts that may also require considering how that right is to be upheld in relation to others. This is made express in Article 46(2):

> In the exercise of the rights enunciated in the present Declaration, human rights and fundamental freedoms of all shall be respected. The exercise of the rights set forth in this Declaration shall be subject only to such limitations as are determined by law and in accordance with international human rights obligations. Any such limitations shall be non-discriminatory and strictly necessary solely for the purpose of securing due recognition and respect for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society.

2. What is the relationship between Indigenous property rights and other property rights in Canada?

The recognition of Indigenous sovereignty and title that is the foundation for how Aboriginal title has been constitutionally understood in Canada gives rise to the understanding that Aboriginal title is a distinct, and *sui generis* form of property right. As the Supreme Court of Canada stated in *Delgamuukw:*

> Aboriginal title is a right in land and, as such, is more than the right to engage in specific activities which may be themselves aboriginal rights. Rather, it confers the right to use land for a variety of activities, not all of which need be aspects of practices, customs and traditions which are integral to the distinctive cultures of aboriginal societies. Those activities do not constitute the right per se; rather, they are parasitic on the underlying title. However, that range of uses is subject to the limitation that they must not be irreconcilable with the nature of the attachment to the land which forms the basis of the particular group's aboriginal title. This inherent limit…flows from the definition of aboriginal title as a *sui generis* interest in land, and is one way in which aboriginal title is distinct from a fee simple. (*Delgamuukw,* 111)

In *Tsilhqot'in Nation* the Supreme Court of Canada also reinforces the *sui generis* nature of Aboriginal title:

> The characteristics of Aboriginal title flow from the special relationship between the Crown and the Aboriginal group in question. It is this relationship that makes Aboriginal title *sui generis* or unique. Aboriginal title is what it is — the unique product of the historic relationship between the Crown and the Aboriginal group in question. Analogies to other forms of property ownership — for example, fee simple — may help us to understand aspects of Aboriginal title. But they cannot dictate precisely what it is or is not. As La Forest J. put it in *Delgamuukw*, at para. 190, Aboriginal title "is not equated with fee simple ownership; nor can it be described with reference to traditional property law concepts". *(Tsilhqot'in Nation,* 72)

As a *sui generis* property right, Aboriginal title stands apart from other property rights in Canada. Aboriginal title is best understood as an interest in land under section 35 of the Constitution, and not a section 91 or 92 property interest. Within this is the affirmation of some of the Indigenous jurisdictional and governance dimensions of Indigenous title – and the limiting of Crown jurisdiction that normally flows over section 91 and 92 property interests.

This is re-affirmed in how the Supreme Court of Canada describes some of the aspects of Aboriginal title as a property interest in *Tsilhqot'in Nation,* including the following:

- *Aboriginal title is a collective beneficial interest in the land* – the title holders have the right to the benefits associated with the land, which the Court describes as the right to "use it, enjoy it, and profit from its economic development". *(Tsilhqot'in Nation,* 70) This includes:

  (a) Ownership rights similar to those associated with fee simple – such as the right to decide how the land will be used, the right of enjoyment and occupancy; the right to possess the land; the right to the economic benefits of the land; and the right to pro-actively use and manage the land;

  (b) A restriction on the use of Aboriginal title lands is that the collective title is held for the present generation and all future generations. The implications of this are that "it cannot be alienated except to the Crown or encumbered in ways that would prevent future generations of the group from using and enjoying it". *(Tsilqhot'in Nation,* 15) This does not mean that changes to the land, including permanent ones, are impossible. It will depend on the specifics of the proposed use.

  (c) While Aboriginal title is tied to the historic occupation of the land prior to sovereignty, the uses of the land by First Nations are not confined to historic uses and customs. The land can be used in modern way, if that is what the Nation chooses.

  (d) Where Aboriginal title exists the Court stated that the lands in question "vests" in the Aboriginal group. This means that the full beneficial interest in the land – the right to enjoy the land and its resources and enjoy the fruits of their use, is that of the Aboriginal group and not the Crown.

- *The existence of Aboriginal title means the land is not Crown land:* Where Aboriginal title exists, the land is no longer Crown land – the Crown does not "own" it.

- *Where title exists, the Crown only has a limited underlying Crown Title:* While the Crown does not own Aboriginal title land, there still remains a limited Crown title to Aboriginal title land. The Court stated that at the time of formation of Canada, by virtue of s. 109 of the Constitution, the Crown received title to all land within the Province. However, this Title was subject to Aboriginal title – the Province only took what is left once Aboriginal Title is subtracted. Where Aboriginal title exists this leaves the Crown only a limited underlying title interest. This underlying title "is held for the benefit of the Aboriginal group" (*Tsilhqot'in Nation,* 85) - meaning it includes a fiduciary obligation on the Crown to protect the Aboriginal group's interest in the land.

- *Title must be understood from both common law and Aboriginal perspectives:* As the Court states, one "must be careful not to lose or distort the Aboriginal perspective by

forcing ancestral practices into the square boxes of common law concepts, thus frustrating the goal of faithfully translating pre-sovereignty Aboriginal interests into equivalent modern legal rights." (32)

- *Where title exists, the standard is consent:* Indigenous consent is required for the use of title lands, and where consent is not received projects may be cancelled and/or compensation owed. To justify the infringement of Aboriginal title, an onerous test must be met by the Crown.

- *The existence of title is not dependent on an agreement or Court declaration:* Aboriginal title exists, and has always existed since Confederation, wherever there is sufficient, continuous, and exclusive occupation historically. Title is no way dependent on recognition or acknowledgement by a Crown government, or declaration by a Court. To state it more bluntly, Aboriginal title exists where it exists. As such, Crown actors and third parties need to always be cognizant of these property interests. This is why the Supreme Court of Canada cautioned that achieving consent is the recommended course of action "whether before or after a declaration of Aboriginal title". (*Tsilhqot'in Nation,* 97) The legal consequences of this are seen, for example, in how First Nations can sue for damages to lands and resources whether or not a declaration of title has taken place. (*Saik'uz,* 60 – 66)

The implications of this legal doctrine of Aboriginal title for other property rights, and land and resource development, are far-reaching.

First, a functional reality created by the nature of Aboriginal title is that the only path to true certainty for land and resource development is through achieving consent. While a choice may be made to technically rely on the 'prior to proof' approach to consultation and accommodation developed in *Haida Nation*, the reality is that a government or third party can never be certain whether Aboriginal title exists or not unless the matter has been determined and resolved by treaty or court declaration. A practical, and principled, choice thus has to be made between bearing the substantial risk of project cancellation or owing damages – as well as other potential political and social challenges – or pursuing consent.

Second, as identified above, the relationship between Crown land and Aboriginal title is clear – wherever Aboriginal title exists the full beneficial interest in the land is the proper title holders. The Crown, subject only to the stringent standards of justification, requires consent in order to authorize or use the land. Further, this substantive limitation on Crown property rights has existed since the time of Confederation wherever Aboriginal title exists.

This appears to have huge potential implications for fee simple property interests. To be clear, the courts have not ruled directly on the relationship between Aboriginal title and fee simple. The matter is before the courts now in a number of cases, including Aboriginal title litigation by the Cowichan Nation Alliance and the Haida Nation. Based on the logic of the reasoning in

Tsilhqot'in Nation, however, at the time of Confederation the Crown could only take an interest in land minus Aboriginal title. Like any actor, the Crown cannot further alienate or grant what it does not possess. Where Aboriginal title exists, absent consent, the Crown could not alienate land for purposes of settlement, and as part of establishing and maintaining a private property system of landholding. Despite this legal reality, of course, this is what historically and in fact occurred.

Taken together, the history of colonialism has created what might be called the 'domino effect' amongst property rights in Canada. The original sin of ignoring Indigenous title, and as such denying Aboriginal title, knocks down much of what has been presumed to be aspects of Crown title in Canadians history, which then knocks down much of the foundation for certainty of fee simple property title. And further, while the dominos fell long ago - when Canada was founded - we have acted since as if they hadn't, and that there were no dominos to fall.

Now we know better, and so here we are – the domino effect that is reflected in today's legal landscape poses a massively complex political, economic, social, and cultural reality. And of course, while there remains court determinations still to be made, with a range of possible outcomes, the domino effect is at the epicentre of the real work of addressing Canada's colonial reality, and the urgent need to implement in concrete ways the UN Declaration as the framework for reconciliation.

3. How may consent operate to help structure that relationship between Indigenous and other property rights?

Our challenge is to deal with the domino effect that runs through the legal landscape of property rights in Canada. This requires addressing the original sin – recognizing the role Indigenous legal orders and governance systems must play in supporting a coherent property rights scheme in Canada. Operationalizing consent through an explicitly legally plural approach that recognizes both Indigenous legal orders and the common law is a path to accomplishing this. Through the standard of consent a bridge is built Indigenous approaches to ownership and stewardship and common legal concepts.

Professor John Borrows has identified some of the rationale and dimensions of such an approach.[1] As Borrows describes "both the common law and Indigenous peoples' law contain mutually obligatory practices which facilitate syncretic and synergistic relationship to land". (94) With respect to the common law, Borrows highlights, as above, that Aboriginal title is not the same as Indigenous title; in his words it is formed "through inter-societal law" and "mutually modified by both Indigenous and common law perspectives". (104) In this comes limitations, and the underlying objective of reconciliation, that creates space for a relationship between Aboriginal title and property rights.

[1] John Borrows, "Aboriginal Title and Private Property", https://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1307&context=sclr

Indigenous legal orders also create space for recognizing other property interests; their own laws "can accommodate a wide variety of interests". (112) This was evidenced by the testimony given by Tsilhqot'in Elders in *Tsilhqot'in Nation* and is a reflection of how some of the foundational principles, in distinct ways, of many Indigenous legal orders highlight values of reciprocity, respect, sharing, interdependence, and responsibility. Through this, Borrows argues that proper recognition of Indigenous governance systems and legal orders can be used to protect non-Indigenous land; that we need to abandon the old demands that Indigenous peoples extinguish, modify, or change their rights. True reconciliation, including addressing the domino effect, will take place through recognizing the role of Indigenous legal orders in regulating property rights and land use in Canada.

From this perspective, free, prior, and informed consent becomes a central mechanism for expressing the proper relationship between Indigenous and non-Indigenous property interests, and managing the complexity of land and resource decision-making. But not any understanding or model of consent. In this understanding, consent-based decision making is addressing the domino effect by upholding Indigenous governments, laws, and jurisdictions in the decision-making process. For this to be implemented, there are certain elements that must be present within the models of consent-based decision making.

First, any legitimate model of consent must be bijuridical. In this context, it means that the model of consent is expressly, and distinctly, authorized by the common law and the Indigenous legal order. The Crown cannot determine or legislate the model of consent alone or unilaterally. Indeed, any Crown regulation regarding the model of consent may only be to authorize its own place within the model adopted. The Indigenous legal order involved must expressly regulate regarding its role and place in the model.

Second, and directly flowing from bijuridicalism, any model must be designed and transparently express how it has roots within the Crown and Indigenous legal perspectives from which it stems. This is necessary for ensuring the model has sufficient legitimacy to play the role of properly addressing the relationship between Indigenous and non-Indigenous property interests, and jurisdiction over how lands are used. For the Crown, this includes using legal instruments to demonstrate how the model of consent upholds obligations and standards under section 35(1) and the UN Declaration, as well as basic public and administrative law principles related to public decision-making, such as how and on what basis Crown decision-makers may act. For the Indigenous government, this includes articulating how the model of consent has been adopted through their systems and processes, and how the model reflects and implements the legal norms and practices that are to be applied.

Third, any model of consent must include the ability to confirm certain outcomes, based on clear criteria regarding the proposal and not the underlying fact of the original sin that created the domino effect and the uncertain nature of non-Indigenous property interests in Canada. One purpose of establishing a proper consent structure is to provide the space for decision-making to continue on a principled basis, through the upholding and operation of

Indigenous laws. Certainly issues of redress and treaty-making will remain live ones to continue to be addressed (and for which revitalized and transformed processes are definitely needed). But such models of consent can both reset the work of establishing proper relations, lay a foundation for that broader work to advance, and solidify how decisions can be made today in a principled and more effective way.

Fourth, based on these understandings – where Indigenous governance systems and laws are explicitly being upheld and operating – there are only a few models of consent that are plausible. This is not a vision of consent as some enhanced model of information sharing and consultation. Nor is it illuminated by rhetorical games about 'veto'. Rather, consent is about implementing clear, stable, transparent, legally mandated and purposeful structures and processes between Indigenous and Crown governments.

As has been discussed elsewhere[2], in general terms, there are only three such models: jurisdictional divide; joint entity; and decision alignment. In the jurisdictional divide model the Crown and Indigenous governments agree, and confirm in their respective laws, which of their respective jurisdictions will be the sole decision-maker regarding a particular matter or area, and any criteria or factors for the exercise of that decision-making. In the joint entity model, both the Crown and Indigenous jurisdiction, acting under their respective laws, authorize a joint entity, and related structures and processes, to make decisions regarding regarding a particular matter or area. In the decision alignment model, the Crown and Indigenous governments make their respective decisions, within a legally mandated regime where both governments must say 'yes' for an affirmative decision.

To date we see few examples where these models are being implemented. Indeed, Crown governments remain largely unwilling to recognize, including as a matter of law, Indigenous governance systems and laws, and a by-product of this is a lack of true consent-based decision making regimes. With that, there are not structured avenues for decision-making that provide the necessary space for addressing the domino effect, and provide for proper relations between Indigenous and non-Indigenous property rights.

Perhaps this will change in the near future. Legislating the UN Declaration is one foundation for potentially entrenching these approaches. For example, section 7 of the *Declaration on the Rights of Indigenous Peoples Act* expressly speaks to implementing consent-based decision making in the joint entity model (s. 7 (1)(a)) and the decision alignment model (s. 7(1)(b)). Combined with how the Act affirms the application of the UN Declaration to the laws of BC, as well as the mechanisms for recognition of Indigenous governing bodies, there does appear to be emerging momentum and legal space for such models of consent.

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[2] Roshan Danesh and Rob McPhee, "Operationalizing Indigenous Consent Through Land-Use Planning", https://irpp.org/research-studies/operationalizing-indigenous-consent-through-land-use-planning/

Fifth, and finally, for true models of consent-based decision making to be designed and implemented both Crown governments and Indigenous Nations have a lot of work to do. Crown laws, policies, and practices need to be changed to recognize the role of Indigenous legal orders and governance systems, and enable consent. Along with this new structures and processes, as well as mindsets and cultures, are needed within governments so that Indigenous governments are truly viewed as governments, and to be interacted with as such. At the same time, operationalizing consent rests upon Indigenous Nations and governments leading the re-building work they must do, based on Indigenous self-determination. This re-building work is critical as part of laying a proper foundation for consent-based decision making that rests upon the Indigenous legal orders and governments.

Conclusion

While colonialism is fuelled by ignorance, it also perpetuates it. In this history of Canada, this has included an ignorance of Indigenous sovereignty, title, legal orders and governance system. With that ignorance having been revealed, including in Supreme Court of Canada decisions, a complex reality now exists where property rights in Canada can only be understood through understanding Indigenous land ownership, and the operation of Indigenous laws and jurisdiction.

The implementation of the UN Declaration, and specifically the operationalization of consent, is a vehicle for navigating this complexity. Properly conceived, consent-based decision making relies upon the recognition and operation of the Indigenous relationship to the land, and the structured interaction of that relationship with that of Crown governments. While the broader work of addressing Canada's colonial legacy unfolds, this explicit and substantive recognition of Indigenous legal orders and governance systems through the the operationalization of consent can be a bridge to a more predictable present and a transformed, and revitalized, future.