Indigenous Perspectives on Business Ethics and Business Law in British Columbia

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Annette Sorensen and Scott van Dyk

BCCAMPUS
VICTORIA, B.C.

The cover image is by Heather Bastin. The colours of the cover art are inspired by the Four Directions of the Medicine Wheel that is common to many Indigenous peoples of Turtle Island (red, yellow, black and white), along with a teal colour representing industry and government.

The concentric lines denote lines of listening, understanding, communicating, and collaborating.

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Introduction

Why We Wrote this Book

This project came about as the result of B.C. business textbooks that we consulted giving only a passing treatment of Indigenous Peoples and their communities, which seemed odd to us. All around us were the Truth and Reconciliation Commission's Calls to Action [PDF] (https://www2.gov.bc.ca/assets/gov/british-columbians-our-governments/indigenous-people/aboriginal-peoples-documents/calls_to_action_english2.pdf) and the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) (https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html) articles that our institution, Coast Mountain College, was advocating for. A piece of that puzzle was "Indigenizing our curriculum," which involved incorporating both Indigenous content and Indigenous means of learning. However, when we wanted to actually implement those recommendations in our classes by incorporating relevant content, we were stuck with what we had, which is to say that we were stuck with little more than nothing at all.

Business instructors had support available at an institutional level to incorporate Indigenous means of learning, but on an individual class basis, they were expected to incorporate Indigenous content where no published textbook content existed. If no content existed at all, instructors were rendered unable to do the subject matter justice. If instructors were lucky enough to have learned the relevant content in their own studies (which seems unlikely, considering how recent the Indigenizing movement is), then they spent valuable time making their own content, like we did.

We decided to formalize the work we've done so that other instructors and students could be the beneficiaries of our learning and growth journeys. We are proud to play a role in business schools implementing UNDRIP and the Calls to Action. Should there be shortcomings in our work, it is not the fault of the people who generously gave their time to us, but that of the authors alone.

We wish you well on your learning journey.

—Annette Sorensen and Scott van Dyk

Characters

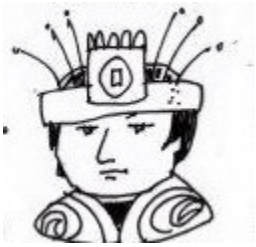
This text uses the same characters throughout in various scenarios and questions. These characters are designed to reflect a wide swath of people who may be using this textbook and reflect the public at large.

Daniel is the project manager of a liquefied natural gas pipeline project that is to go through Indigenous territory.

Stacey is the recently elected band chief of the Gitxsan Nation, located in northern British Columbia.

Sadie is a hereditary matriarch of the Gitxsan Nation.

Clyde represents the hereditary chiefs of the Gitxsan Nation.



Gurpreet is an international student from the Punjab region of India. She is in the first year of a business administration program.

Josh is a non-Indigenous college student. He has a part-time job and works hard in his studies.

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I

History

1.

Pre-Confederation

Learning Objectives

- Describe the effects of the Royal Proclamation, 1763.
- Identify which government is responsible for relationships with Indigenous peoples.

British America and New France were both initially established as trading posts, then as colonies of their mother countries in the late 1500s through the early 1700s with the assistance of Indigenous persons in modern-day northeastern United States and eastern Canada.

In the 1750s, the French and Indian War was a theatre of the Seven Years' War fought between Great Britain and France. British colonialists led by James Wolfe triumphed over New France led by Montcalm in the Battle of the Plains of Abraham (Eccles, 2021). However, that victory was not achieved without help from the Iroquois Confederacy, also known as the Five Nations: the Mohawk, Onondaga, Oneida, Cayuga, and Seneca (Bleiweis, 2013).

A problem arose in the aftermath of the French and Indian War. Colonials in British America, in search of new land, were travelling west into the continent. On their way, they purchased or stole lands from Indigenous persons, and asked their government to protect their newfound property. This westward expansion by colonialists was characterized by underhanded tactics, including alleged "sales" taking advantage of language disparities. Great Britain, cognizant of the critical assistance of the Iroquois Confederacy during the French and Indian War and the ceaseless expansionism of her colonial subjects, sought to manage the situation. In 1763, King George III issued a Royal Proclamation, which still applies in Canada today:

> And whereas it is just and reasonable, and essential to our Interest, and the Security of our Colonies, that the several Nations or Tribes of Indians with whom We are connected, and who live under our Protection, should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to or purchased by Us, are reserved to them or any of them, as their Hunting Grounds…
>
> And We do further declare it to be Our Royal Will and Pleasure, for the present as aforesaid, to reserve under our Sovereignty, Protection, and Dominion, for the use of the said Indians, all the Lands and Territories not included within the Limits of Our said Three new Governments….

> And We do hereby strictly forbid, on Pain of our Displeasure, all our loving Subjects from making any Purchases or Settlements whatever, or taking Possession of any of the Lands above reserved without our especial leave and Licence for that Purpose first obtained. (King George III of England, 1763)

While paternalistic in tone, the Royal Proclamation is foundational for Aboriginal title in Canada. Individual British subjects are unable to purchase land directly from an Indigenous group. Instead, only the government (also called "the Crown") can purchase lands from Indigenous groups. In British Columbia, many of these lands have not been purchased by the Crown, and are therefore unceded.

In 1763, this Royal Proclamation was an outrage to future American revolutionaries in the Thirteen Colonies. Land on the eastern seaboard was becoming more scarce for settlers as the region was populated, and so they started migrating west. When the Royal Proclamation arrived, it was seen as an overstep on the Crown's power over its colonies. The blowback from colonists was so extreme that the Royal Proclamation became one of the enumerated reasons for the rebellion in the United States Declaration of Independence, penned in 1776 by future U.S. President Thomas Jefferson (Paul, 2018).

After the United States won independence from Great Britain in 1783, the following century saw American expansion over most of the continent with little regard to the original inhabitants of the land. In one case, the state of Georgia was imposing its law on the Cherokee Nation, and the Nation, via a legal technicality, did not have the right to pursue their claim in court. However, two white missionaries who wished to live on Cherokee land did have standing to pursue a legal remedy. In 1832, in the case of *Worcester v. Georgia*, the Supreme Court of the United States said that the state of Georgia could not impose its law on Cherokee lands. President Andrew Jackson, who did not want to strain the already fragile bond of the Union, refused to enforce the judgment (Paul, 2018). The cost was an immense human tragedy. This series of events led to the heartbreaking Trail of Tears, in which 12,000 people were forcibly marched 1,300 kilometres. Four thousand of those people never made it. Not only was this tragic event permitted in order to avoid a conflict between the national government and the Southern states, but the American Civil War occurred anyway not three decades later (National Park Service, 2020).

In Canada, Great Britain continued to assert its role in governing Canada until the British North America Act, 1867 (the first of Canada's two constitutions). After, the Government of Canada assumed responsibility for its relationship with First Peoples. To this day, the federal government remains responsible for the Crown's relationship with Indigenous Peoples, although the provinces have been active partners in guiding the actions of the federal government.

2.

The Numbered Treaties

Learning Objectives

- Consider why the Government of Canada set out to negotiate the Numbered Treaties.
- Analyze the effects of the Numbered Treaties on Aboriginal Title in British Columbia.

The first order of business for the Canadian government was twofold: secure land for settlement and the construction of the Canadian Pacific Railway to unite the provinces. The Royal Proclamation made it illegal for individuals or businesses to make agreements with Indigenous communities, and the land was explicitly reserved for all Indigenous Peoples. To do this, the government had to purchase lands and so engaged in the process of negotiating the “Numbered Treaties” (Black, 2014).

Map of the Numbered Treaties negotiated in the late 1800s to early 1900s. [Numbered Treaties Map image description]

The Numbered Treaties remain controversial to this day. The Government of Canada views them as treaties for the legal purchase of land, with modest "reserves" set aside for Indigenous groups (Filice, 2016). Affected groups viewed the treaties as a "right-of-way" or a sharing agreement, or did not understand the language that would have made clear the intent of the Canadian government. Further, some chiefs felt they had no choice but to sign due to diminishing local resources and the rapidly changing ability of communities to be self-sustaining. Lastly, some of the signers may not have had authority to sign the treaties — a recurring theme that will come up again later on when discussing the Crown's "duty to consult."

The North-West Resistance (https://www.thecanadianencyclopedia.ca/en/article/north-west-rebellion) of 1885 in Saskatchewan and Alberta, led by Louis Riel, was in part a response to the Numbered Treaties. Food was becoming scarce on the previously abundant prairies, and the development on involuntarily surrendered land left the Métis and Plains peoples (Cree, Siksika, Kainai, Piikani, and Saulteaux) in a difficult position. Louis Riel formed a provisional government, which lasted only a few short months before the rebellion was quashed by the Canadian government.

In British Columbia, there is a notable and important absence of Numbered Treaties across most of the province. The rationale for why the federal government did not pursue these treaties more aggressively in British Columbia is unclear. The provincial government website notes, "When British Columbia joined Canada in 1871, the Province did not recognize Indigenous title so there was no need for

treaties" (Province of British Columbia, n.d.-b).[1] However, Guuduniia LaBoucan, writing for *Canada's History* magazine, notes that the governor of the colony of British Columbia, James Douglas, attempted to negotiate treaties in 1864 (LaBoucan, 2018). This was categorically rejected by the colonial secretary, who wrote that the British taxpayer would not burden themselves with that purely colonial expense. It appears that the governor, not wishing to impede the movement of settlers into B.C., then simply issued proclamations that the Crown owned all land in B.C. — despite the clear language of the Royal Proclamation.[2] This is further complicated by the fact that Treaty 8, which includes Northeastern B.C., was signed in 1899 to offer gold miners more certainty to their legal claims. Under the government's premise that B.C. lawfully owned all land in the province, this would have been an entirely unnecessary negotiation.

Regardless of the rationale, the impact of not having any of the Numbered Treaties in British Columbia cannot be overstated. The land was never lawfully ceded as was required under the Royal Proclamation, 1763. Canada's Constitution Act, 1982, reaffirms the rights of Aboriginal peoples — rights that were never extinguished in most of British Columbia.

Image Descriptions

() A map of Canada showing the lands covered by each of the eleven Numbered Treaties that were established between 1871 and 1921. It includes most of northern and western Ontario, all of Manitoba, Saskatchewan, and Alberta, northeastern British Columbia, most of Northwest Territories, southeastern Yukon, and a small bit of northwestern Nunavut. [Return to Numbered Treaties Map]

Image Attributions

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1. See also Indigenous and Northern Affairs Canada, 2010.
2. Douglas had also negotiated treaties on Vancouver Island before becoming governor of British Columbia (see Douglas Treaties (https://temexw.org/moderntreaties/douglas-treaties/)). These are similar in nature to the Numbered Treaties, but as they were not negotiated by the Government of Canada, they are not considered part of that series of treaties.

3.

The Indian Act, Residential Schools, and the White Paper

Learning Objectives

- Explain the justification for the White Paper.
- Identify why the Indian Act was enacted.
- Consider why Indigenous people opposed the White Paper.

Government-funded residential schools opened in the 1880s and operated until 1996. In this system, Indigenous children across Canada were removed from their parents and taught in Christian-run schools. Residential schools operated in various forms before the Indian Act (1876) came into effect. This is because education provisions in treaties were negotiated so that Indigenous youth could "learn the skills of the newcomer society and help them make a successful transition to a world dominated by the strangers" (Miller, 2020). After the passage of the Indian Act, the goals of government-mandated Indigenous education changed. They became about not just learning the tools to succeed in a modern world, but also the assimilation of Indigenous people into Euro-Canadian culture.

To achieve this goal, Indigenous youth were separated from their parents, transported to remote locations, given a "white man's name," and forbidden to speak their native language. They also attended Anglican or Catholic church services (depending on the denomination of the group running the school). The lasting effects of this policy are the destruction of language, culture, senses of group identity, and a discontinuity in tradition that compounded later difficulties in proving claims to Aboriginal title in land (Hanson, Gamez, & Manuel, 2020).

The Indian Act, passed in 1876, unilaterally set out the rules for bands to operate their treaty-created reserves. It also defined who an "Indian" is — a legal definition that has ever caused controversy for the Metis and Inuit.[1] This was also why the federal government chose to consolidate all its laws regarding the Crown's relationship with Indigenous Peoples into one act. Government decision-makers saw this as necessary due to the hodgepodge of different laws that affected the government's relationship with Indigenous Peoples (Henderson, 2020). Numerous laws had been passed providing inconsistent policies for different Indigenous groups since the Royal Proclamation of 1763 had become law. However, the Indian Act also had the effect of imposing on Indigenous communities a set of legal

1. Note that "Indian" is the term used in foundational Canadian documents and is a legal term that remains in use to this day. This is no longer an acceptable form of address outside the strict legal usage.

procedures that they were to govern themselves with, rather than relying on the individual communities to use their own developed decision-making procedures.

In 1969, Prime Minister Pierre Trudeau and Minister of Indian Affairs (and future prime minister) Jean Chrétien introduced the White Paper (https://indigenousfoundations.arts.ubc.ca/the_white_paper_1969/). “White paper” is a term used for an in-depth research document about a specific topic. In this case, the 1969 White Paper was a document introducing numerous recommendations to the federal government about changing its relationship with Indigenous Peoples. The name “White Paper” was ironically noted by Indigenous leadership, as the input of Indigenous people was ignored in its creation.

The policy goal was to eliminate the separate legal status of Indigenous people from Canadian law as a means to achieve Pierre Trudeau’s vision of a “Just Society” (https://www.cbc.ca/archives/entry/pierre-trudeau-canada-must-be-a-just-society) (Indigenous Foundations, n.d.). Part of his Just Society ideology was that all Canadians — French, English, Indigenous, and everyone else — would be equal under the law. Jean Chrétien made numerous recommendations to achieve this policy goal: the Indian Act would be eliminated, reserve land would become private property, the Department of Indian Affairs would be abolished, and a commissioner would be appointed to resolve land claims and terminate existing treaties.

These recommendations were dramatic. The Indian Act is legislation that has numerous flaws, including imposing Canadian law unilaterally on Indigenous groups. Still, it at the very least acknowledged the special status of Indigenous Peoples due to their living on the continent first. The White Paper sought to remove that privilege as a means to equalize the status of all Canadians.

The White Paper never became law due to the backlash against it. One of the lasting effects of the White Paper was the formation of Indigenous political groups, including the Union of British Columbia Indian Chiefs (https://www.ubcic.bc.ca/about) (Indigenous Foundations, 2009b).

4.

Mid-Chapter Questions

Mid-Chapter Questions

1. Indigenous Peoples in British Columbia argue that their territory is unceded. How do they support this argument?
2. Why did the government introduce the White Paper? What were the reasons that Indigenous Peoples rejected the recommendations?

Mid-Chapter Scenario

Stacey is an elected band chief. She's highly educated and has recently returned home to Gitxsan territory to be closer to her family after spending the last ten years in Vancouver. She decided to run to be a band chief to give back to her community and was elected last year.

1. Despite the "band" being the creation of the Indian Act, why would Stacey and many others like her choose to participate in this system?

5.

The Constitution Act, 1982, and Court Cases from the 1970s to the 2010s

Learning Objectives

- Identify crucial laws and legal decisions that have been passed in the last 50 years.
- Explain what an Aboriginal right is.

The Constitution Act, 1982 (passed in the United Kingdom as the Canada Act) was a document that took the UK's authority to amend Canada's constitution and gave it to Canada. It is the second of Canada's two constitutions (the first being the Constitution Act, 1867, commonly known as the British North America Act, 1867).

Section 35 of the Constitution Act, 1982 (https://laws-lois.justice.gc.ca/eng/const/page-13.html), has the following provision:

> The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

This has several important effects:

1. It recognizes *already existing* rights. Note that the Constitution Act, 1982, does not *create* any new Aboriginal rights.
2. It is up to the Supreme Court of Canada to determine what the specifics of those rights are.
3. Rights enshrined in the Numbered Treaties are affirmed. Rights extinguished by the Numbered Treaties, including to land, are not resurrected. This is a reason why Indigenous groups argue that the Numbered Treaties were a right-of-way rather than a land grant, but the Canadian government argues otherwise. (Hogg, 2010)

The extent and effect of these Aboriginal rights have been debated for decades. Typically, the content of these rights has to do with privileges regarding usage of the land, including hunting, fishing, and not having traditional land spoiled by industrial activity. However, these specific rights are decided on a case-by-case basis according to the traditional usage of that land. The first modern case to hit the Supreme Court of Canada was *Calder et al. v. Attorney-General of British Columbia* (https://indigenousfoundations.arts.ubc.ca/calder_case/) in 1973. Since then, the leading case of

Delgamuukw v. British Columbia (https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1569/index.do) in 1997 established the legal test for Aboriginal title and the Crown's duty to consult.

All rights in the Canadian Charter of Rights and Freedoms (https://www.canada.ca/en/canadian-heritage/services/how-rights-protected/guide-canadian-charter-rights-freedoms.html) — including the rights to freedom of expression and freedom of religion and the rights in section 35 of the Constitution — are "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." While section 35 is not part of the Canadian Charter of Rights and Freedoms, the government can still infringe Aboriginal rights if it justifies the infringement. In 1990, in *R. v. Sparrow* (https://indigenousfoundations.arts.ubc.ca/sparrow_case/), the Supreme Court of Canada affirmed Aboriginal rights, but also created a framework that the government must use if they seek to legally justify an infringement of those rights.

More information on the content and duties surrounding Aboriginal rights can be found in the section The Nature of Aboriginal Title.

6.

Modern Treaty Negotiations

Learning Objectives

- Contrast the Numbered Treaties and the modern treaty process.

Other treaties have been in consideration for the last few decades. In 1992, a new process for modern treaty negotiations was started on recommendation from a British Columbia Claims Task Force report (British Columbia Claims Task Force, 1991). These treaty negotiations began as a result of court cases and the Constitution Act, 1982, which reaffirmed the pre-existing Aboriginal rights of Indigenous people. The old notion that all unceded lands were Crown lands was no longer acceptable. Therefore, to create more certainty in the province and develop a new relationship between the government and Indigenous groups, these new treaties would be developed. Despite the federal government having jurisdiction over the matter, the British Columbia government became involved by mutual agreement.

The Numbered Treaties were made on the "extinguishment" model, wherein Indigenous rights and claims to land would be extinguished. The BC Treaty Commission (https://www.bctreaty.ca/about-us) instead operates on the "non-assertion model," where Indigenous groups would agree not to assert any rights other than ones set out in the final treaty. These treaty negotiations have been ongoing since 1992, with many Indigenous groups entering and exiting negotiations continuously (BC Treaty Commission, n.d.-a).

Although not part of the BC Treaty Commission process, as negotiations started two years prior to its formation, the first modern treaty to be agreed to in B.C. after Treaty 8 in 1899 is the Nisga'a Treaty. Signed in 1998 and effective in 2000, the Nisga'a Treaty grants self-government to the Nisga'a Nation. Located in Nass River Valley (proximate to Terrace and Prince Rupert), the Nisga'a Treaty covers 2,019 square kilometres of land. This treaty has many ground-breaking features:

1. The Nisga'a Nation is self-governing and has its own decision-making process. Therefore, the Indian Act no longer applies to the Nisga'a Nation or Nisga'a citizens.
2. Nisga'a laws operate alongside federal and provincial laws, and people are required to follow the strictest set of laws concerning an area in which there is concurrent authority.
3. Nisga'a laws are subject to the Canadian constitution. For example, the Nisga'a government may not violate their citizens' rights to free expression or freedom of conscience.
4. Nisga'a people are both Nisga'a Nation citizens and Canadian citizens.

5. The Nisga’a Nation owns forest resources, and the federal or provincial government may not charge licensing fees for fish harvesting (although the Province may still engage in conservation efforts).
6. The Nisga’a government levies taxes against its citizens to help pay for health, education, and social services. (Nisga’a Nation, n.d.-c)

No other treaties with such an amazing scope have been signed since the modern treaty process started.

7.

Truth and Reconciliation Commission and the United Nations Declaration on the Rights of Indigenous Peoples

Learning Objectives

- Explain the difference between UNDRIP and the Truth and Reconciliation Commission's Calls to Action.

In September 2007, the UN General Assembly adopted the United Nations Declaration on the Rights of Indigenous Peoples, known as UNDRIP. This declaration was intended to eliminate human rights violations against Indigenous peoples around the world (UN General Assembly, 2007). Four states — Australia, Canada, New Zealand, and the United States — voted against. In 2016, the Canadian government announced support of UNDRIP, and the government of British Columbia committed to implementing UNDRIP in 2017.

In 2019, the B.C. legislature passed the Declaration on the Rights of Indigenous Peoples Act (https://www2.gov.bc.ca/gov/content/governments/indigenous-people/new-relationship/united-nations-declaration-on-the-rights-of-indigenous-peoples). The legislation text, while short on specific details, obligates the government to create a plan that would fully implement UNDRIP and to ensure that all laws are consistent with UNDRIP. The first B.C. annual report detailing efforts to conform with UNDRIP confirms that the province is still in the early stages of developing an effective plan and are in the process of engagement with Indigenous groups (Province of British Columbia, 2020).

In June 2021, the Government of Canada formally passed legislation to implement UNDRIP. The legislation text requires the government to delegate duties to a minister, who will then create a plan that will fully implement UNDRIP. [1] As part of the legislation, the Government of Canada will ensure all its laws are consistent with UNDRIP and will attempt to achieve the objectives of UNDRIP.

In response to the tragedy that was the residential schools system, the Truth and Reconciliation Commission was established in 2007 and had its final report issued in 2015 (Government of Canada, 2021). The purpose of this commission was to preserve the history of the Residential School system, educate Canadians on the practices that occurred, and create calls to action to begin the process of healing (National Centre for Truth and Reconciliation, n.d.). The final recommendations in the report spanning six volumes is called the "Calls to Action" [PDF] (https://www2.gov.bc.ca/assets/gov/british-

1. Read the text of An Act respecting the United Nations Declaration on the Rights of Indigenous Peoples (https://parl.ca/DocumentViewer/en/43-2/bill/C-15/royal-assent) online.

columbians-our-governments/indigenous-people/aboriginal-peoples-documents/calls_to_action_english2.pdf). The B.C. government has committed to implementing all of these Calls to Action. This process includes reviewing relevant laws that affect Indigenous peoples and educating civil servants (Province of British Columbia, n.d.-a).

UNDRIP is an international human rights document, and the Calls to Action are specific to the Canadian experience with Residential Schools. That said, both documents have commitments by the provincial and federal Governments to be implemented in full, and there are some commonalities between the two documents. This includes the preservation of Indigenous culture and identity and the protection of legal rights.

The chapter UNDRIP in Canada contains more information about the Government of Canada's obligations to Indigenous Peoples under UNDRIP.

8.

End-of-Chapter Questions

End-of-Chapter Questions

1. Why did the federal and provincial governments decide to start entering treaty negotiations in the 1990s via the BC Treaty Commission?
2. What does it mean when the Numbered Treaties were negotiated on the "extinguishment model"? How are the modern treaties negotiated differently?
3. What is the difference between the United Nations Declaration on the Rights of Indigenous Peoples and the Truth and Reconciliation Commission's Calls to Action?

End-of-Chapter Scenario

Gurpreet is an exchange student from the Punjab region of India. It's her intention to study business administration in British Columbia while working under a work permit. Afterwards, she would like to stay in Canada and open her own business.

She hears a lot about the treatment of Indigenous Peoples in Canada. Being from a former British colony, she's neither unfamiliar with nor unsympathetic to the harms of colonialism. However, she just wants to do business in Canada and is a touch puzzled why this history is coming up in the context of a business course. How could this history possibly affect her dealings in her everyday life or her business?

1. How would you respond to Gurpreet?
2. There are numerous government programs available to encourage Indigenous entrepreneurship and skills training for private employers. Use a search engine to look for skills training programs or entrepreneurship grants in your area and describe how a local employer may use them.

II

Business Ethics

9.

Ethics

Learning Objectives

- Understand what ethics is and why we study it in business.
- Discuss the key components of our current context and how they impact ethical decision-making in the business environment.

Business Ethics

These chapters help you understand why companies and organizations have come into conflict with Indigenous communities and give you best practices going forward in your business dealings with Indigenous people and communities.

The primary problem in business ethics today is that businesses and governments have not been able to reason through ethical dilemmas. This is not for lack of capacity, either: the critical decisions made by Canada's leaders, who are deemed to be the most brilliant people in the room, consistently have Canadians questioning their actions and decisions. Political leaders and companies promise to run their organizations ethically and continue to embroil themselves in ethical controversies.

According to Lexico, the definition of "ethics" is "moral principles that govern a person's behaviour or the conducting of an activity." "Ethics" is not doing what you have to (abiding by the law); it is what you should do.

Business ethics is "concerned primarily with the relationship of business goals and techniques to specific human needs. It studies the impact of acts on the good of the individual, the firm, the business community, and society" (Crane, Matten, Glozer, & Spence, 2019). Some of the following concepts may influence business ethics, but it is not necessarily an ethical practice to:

- Obey the law
- Follow one's religion
- Follow standard practice
- Do what is best for one's company
- Try not to get fired

Current Context: Ethical Business Behaviour

There are three levels of analysis when we discuss the levels of ethical business behaviour. Business ethics involves you as an individual and the decisions you make; a team or group of people and their decision-making; and the organization, what they stand for, and their choices.

Let us first focus on the individual. When looking at the person, we need to consider their moral maturity, personal conscience, and conflicts of interest. We need to consider these factors to understand their decision-making and actions.

Secondly, in many business organizations, you work in teams or departments. When examining a team or department's decision-making, we explore the pressures of conformity and membership. Businesses can run into trouble, leaving people feeling excluded or alone when these pressures are present in the workplace. Conformity in the workplace will stop people from speaking up and result in poor or even

unethical decision-making. Joseph L. Badaracco states in his book *Defining Moments* that this is where we usually find middle managers in this area of conflict with their ethics. Here are some questions that middle managers can look for to see if their departments may be struggling with conformity and membership:

1. Is the department rewarded or punished for their behaviours?
2. What is the group norm of the team?

Lastly, when studying business management, an organization is viewed as a legal entity or person but not a moral person. Traditionally (but not always), the organization only does the legal minimum required to be considered ethical.

If companies want to do business with Indigenous peoples, they need to understand the complex systems that are part of Indigenous culture. Rich histories, cultures, and stores of resources can be found in the 600 plus Indigenous nations and over 2,000 reserves in Canada. After working through these chapters, you will comprehend why Indigenous communities sometimes appear not to want to engage in business with the colonized system. You will understand that Indigenous communities are eager to engage in projects that bring economic growth and sustainability to their people. To be successful in negotiating a positive outcome, Industry needs to move toward reconciliation, which means respecting other people and yourself and taking responsibility as an individual, an organization, and an employer or employee. We do not need to leave our values at the door when we go to work.

Please read this book's part on History for information on how Indigenous people were treated in the past.

Image Attributions

10.

Societal Expectations and the 92nd Call to Action

Learning Objectives

- Apply and interpret the societal expectations and the duty to commit to meaningful consultation to gain support for economic opportunities.
- Demonstrate an understanding of the 92nd call to action and what this means in the business sector.

Indigenous rights activist blocking CN Rail lines in Toronto during the Wet'suwet'en Solidarity Movement of February 2020. She holds the Women's Warrior Flag.

When Industry considers future development opportunities in British Columbia, it will be essential to recognize that First Nations people are interested in economic opportunities for their communities and have "the right to maintain and develop their political, economic and social systems or institutions, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities" (UN General Assembly, 2007, Article 20). This is guaranteed by UNDRIP and under section 35 of the Constitution. Indigenous people want to prosper just like any other Canadians as long as their rights are upheld and considered in the decision-making process.

There has been a significant shift in societal expectations of business practices due increased concerns about environmental impact. There are mounting pressures on Industry to meet these expectations or lose their support to operate. If societal licence is not received, communities and individuals may push back and reject a project. This shift creates an environment that encourages new connections between industrial proponents, First Nations, and the communities affected by proposed projects. As a result, the way Indigenous communities participate in industrial projects has evolved. Initially, Nations might receive royalties, including sums of money provided as payment for projects on First Nations territory.

However, this form of compensation does not involve any direct participation by the affected First Nation. Impact and Benefit Agreements (IBA) were created to rectify the problem of a lack of First Nations involvement in the decision-making of a project. According to an article on IBAs by SHK Law Corporation (https://web.archive.org/web/20210616084646/www.shk.ca/first-nations-consultation-impact-benefit-agreements/), an IBA is a contract that "outline[s] the parameters of the project, the commitment and responsibilities of both parties, and how the First Nations will share in benefits of the operation." The significance of this shift is in the level of participation and responsibilities from both parties. More recently, there has been a shift toward integrated management. Federal, provincial and First Nation governments are coming together to discuss issues nation to nation and with other stakeholders. This collaboration brings First Nations interests to the table to address both environmental sustainability and economic prosperity.

Call to Action 92

> I want to get rid of the Indian problem. I do not think as a matter of fact, that this country ought to continuously protect a class of people who are able to stand alone. That is my whole point…. Our object is to continue until there is not a single Indian in Canada that has not been absorbed into the body politic, and there is no Indian question, and no Indian department, that is the whole object of this Bill.
>
> —Duncan Campbell Scott, deputy superintendent of the Department of Indian Affairs, 1920[1]

As a result of the treatment of Indigenous people of Canada since colonization, where the government of Canada and the Catholic Church partnered together to "get rid of the Indian problem," the Truth and Reconciliation Commission of Canada created a Call to Action report [PDF] (https://www2.gov.bc.ca/assets/gov/british-columbians-our-governments/indigenous-people/aboriginal-peoples-documents/calls_to_action_english2.pdf). This report calls the government to reconcile with the Indigenous Peoples of Canada for the mistreatment and injustices imposed on them.

1. Read more in Robert L. McDougall's Duncan Campbell Scott article in The Canadian Encyclopedia (https://www.thecanadianencyclopedia.ca/en/article/duncan-campbell-scott).

The 92nd call to action speaks to businesses in Canada:

> We call upon the corporate sector in Canada to adopt the *United Nations Declaration on the Rights of Indigenous Peoples* as a reconciliation framework and to apply its principles, norms, and standards to corporate policy and core operational activities involving Indigenous peoples and their lands and resources. This would include, but not be limited to, the following:
>
> i. Commit to meaningful consultation, building respectful relationships, and obtaining the free, prior, and informed consent of Indigenous peoples before proceeding with economic development projects.
> ii. Ensure that Aboriginal peoples have equitable access to jobs, training, and education opportunities in the corporate sector, and that Aboriginal communities gain long-term sustainable benefits from economic development projects.
> iii. Provide education for management and staff on the history of Aboriginal peoples, including the history and legacy of residential schools, the *United Nations Declaration on the Rights of Indigenous Peoples*, Treaties and Aboriginal rights, Indigenous law, and Aboriginal–Crown relations. This will require skills based training in intercultural competency, conflict resolution, human rights, and anti-racism. (Truth and Reconciliation Commission of Canada, 2015)

Merriam-Webster's definitions of "reconcile" (https://www.merriam-webster.com/dictionary/reconcile) are "to restore to friendship or harmony" or "settle, resolve." For Industry to operate ethically and work toward reconciliation, they need to find out what the needs of the community are. One of the challenges regarding the 92nd call to action arises whenever a company comes to a community, wanting to develop an IBA. If the company does not have a meaningful consultation, the outcome will be a negative one. When working with Indigenous communities, it is important to ensure that your company is aware of colonialism's impacts on them. A common mistake in consultation is that Industry has failed to recognize the barriers to employment for Indigenous communities. A company may have good intentions to bring employment opportunities and promise jobs, but they forget that some Indigenous communities do not have the required credentials to apply for the jobs offered and do not help prospective applicants bridge the skills gap.

Finding out the community's needs and consulting to find a mutual agreement is an act of operating your business ethically and is the right thing to do.

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11.

United Nations Declaration on the Rights of Indigenous Peoples in Canada

Learning Objectives

- Explain why the United Nations Declaration on the Rights of Indigenous Peoples had to be adopted to uphold Indigenous peoples' rights.
- Understand the United Nations Declaration on the Rights of Indigenous Peoples and how it relates to business.

What does the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) have to do with a business ethics course?

The declaration is key for Indigenous people in Canada to have their rights acknowledged and addressed when Industry wants to conduct business with Indigenous people and their territories. Past practice before UNDRIP was incorporated, Industry, whether it be a logging company, pipeline industry or fishing company would either ignore the Supreme court rulings on Rights and Title and conduct their business sometimes without any communications to the indigenous communities they were doing business on. Even though it has taken over eight years for Indigenous people to be identified as Humans according to the United Nations. With these rights clearly identified in the UNDRIP document, Indigenous people and Industry can refer to and follow the declaration as it is outlined in the UNDRIP document.

UNDRIP [PDF] (https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf) is a document that declares the collective rights of Indigenous peoples as well as their rights to culture, identity, employment, health, education, and other rights that need to be addressed for indigenous people around the world (UN General Assembly, 2007).

This document was created because the rights of Indigenous peoples were being ignored for too long and not doing anything about it was morally and ethically wrong. For world leaders claiming to care about their nations, they could not ignore this major injustice any longer. For your own reflection, consider: What injustices did Indigenous Peoples suffer in British Columbia?

In the conclusion of this book, we talk about the relationship between UNDRIP and court cases in Canada.

UNDRIP Articles Relevant to Indigenous Peoples of British Columbia

The United Nations General Assembly adopted UNDRIP on September 13, 2007. At the time, Canada was one of four countries to vote against the motion, but has reversed this position and now supports UNDRIP.

Below, we have outlined several articles from UNDRIP that are relevant to legal cases in British Columbia and Canada. Even though UNDRIP is addressed to governments, the government has put the onus on businesses to implement the articles in their dealings.

Article 10

Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.

When Industry wants to do business with indigenous people and communities Article 10 is essential. Canada's history shows that past practices with Industry extracting the rich resources from Indigenous land without consent resulted in disaster. Indigenous people have defended their land through the courts and blockades against development companies.

Article 20

1. Indigenous peoples have the right to maintain and develop their political, economic and social systems or institutions, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities.
2. Indigenous peoples deprived of their means of subsistence and development are entitled to just and fair redress.

How this relates to conducting business is that Industry has to consider that when conducting business, they need to understand that the communities have their governance, so it will do the business well to know that each Indigenous community is different from another Indigenous community. One example of governance in Indigenous communities is the two separate governance within the Indigenous community. One governance will be band elected chiefs that deal with the administration of the funds from the government, and the other will be specific territorial chiefs that oversee the territory that their House owns.

It may be easier to relate the territorial chief for a particular area in the same context as Canada's Minister of Natural resources. Both roles "gather, compile, analyze, coordinate and make decisions for the land and resources." The Minister works for the government of Canada, and the Territorial chief works for the House that they belong to and that is rightfully assigned to protect and oversee.

Article 20 means that if an outside group stops the Indigenous people from engaging in these traditional activities, they have the right to be compensated and seek justice.

Article 23

Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, Indigenous peoples have the right to be actively involved in developing and determining health, housing and other economic and social programs affecting them and, as far as possible, to administer such programmes through their own process, which may differ from what is deemed "formal business practices and process" in the business world.

To conduct business with Indigenous people, Article 23 means that Indigenous people have the right to prioritize their development and social and community goals through their own process. It would benefit businesses to get informed of the community's priorities before engaging in business. It would be good to understand. For example, Traditional Ecological Knowledge is a priority for Indigenous people when dealing with land and resources. Indigenous communities want economic opportunities that will advance and benefit their community, but their priority to protect the land at all costs is usually the most important. Incorporating Traditional Ecological knowledge into decision-making regarding land and resources will be of high importance to the indigenous people, Understanding their priorities first will benefit good business dealings in the future.

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 26 is to protect Indigenous Peoples' lands, territories, and resources. Canada is full of natural resources that can be used for economic purposes. This article ensures that Indigenous territories are not disproportionately impacted by the adverse effects and potential risks of resource development. For best practices, businesses must get informed about the need to get "Free, Prior Informed Consent from the Indigenous communities to conduct business effectively.

Scenario: Stacey signs the contract

Daniel gives Stacey a quick overview of the pipeline project and asks for her permission to go forward. Daniel places the contract in front of Stacey and tells her that there is a signing bonus of $10,000 just for her if she signs. Daniel informs Stacey that the company will cut a 500 km path through the Gitxsan territory through the rivers and forest, but it will not affect the community. He argues that there is little risk, really nothing to worry about. Daniel also tells Stacey that he is only here to help her tribe and that she is lucky the

company chose them since they considered many other communities. Stacey feels pressured, so she signs the contract and tells Daniel that she needs to discuss it with the community and will contact him after she discusses the opportunity with the band members. Daniel doesn't really listen because he is happy that Stacey has signed the contract. He lets her know that there is an urgency because they are working on a tight deadline to start this project.

1. Does Daniel have any knowledge of the United Nations Declaration on the Rights of Indigenous Peoples?
2. What is going on in this situation? Is Daniel acting ethically? Is he informing Stacey fully? Is this offer free of coercion and bribery?
3. What are the next steps both need to take so that they are both operating ethically for the corporation and the community?
4. What article is relevant in this case and why?

12.

Aboriginal Title

Learning Objectives

- Understand what Aboriginal title means and how it is determined.
- Identify why Aboriginal title is important when dealing ethically with Indigenous people.

Since time immemorial, Indigenous Peoples have lived on and managed the territory that has become Canada. Throughout history, from the arrival of the Europeans to 1973, the colonial, federal, and provincial governments took steps to control and use the land for their purposes. They did this through documents such as the Royal Proclamation or the Deed of Surrender (https://en.wikipedia.org/wiki/Deed_of_Surrender). There have been significant legal cases to establish that Indigenous Peoples have the title to the territory known as Canada.

For more information on the Aboriginal Title court cases, please go to: The Constitution Act, 1982, and Court Cases from the 1970s to the 2010s.

For most Aboriginal people, the land is their connection to culture, sustenance, and identity. Most of their land was taken from them, but now that Canada has adopted UNDRIP and ruled in favour of Indigenous peoples in several court cases regarding land rights, Indigenous peoples have established Aboriginal title. Aboriginal title "refers to the inherent Aboriginal right to land or a territory. The Canadian legal system recognizes Aboriginal title as […] a unique collective right to the use of and jurisdiction over a group's ancestral territories" (Hanson, 2009a). Please see Proving Aboriginal Title to understand how far Indigenous Peoples in Canada have moved forward on proving this.

Here is an overview of how Aboriginal title (AT) is established, according to Thomas Milne in a 2017 article about *Tsilhqot'in Nation v. British Columbia*:

- **The Test for AT**: AT is based on "occupation" prior to the assertion of sovereignty. *Delgamuukw* affirms a "territorial use–based approach" to establishing AT, where the claimant group must show its occupation possesses the following three characteristics:

i. sufficient occupation of the land claimed to establish title at the time of assertion of sovereignty,
ii. continuity of occupation (where present occupation is relief on), and
iii. exclusive historic occupation.

- **What Rights Does AT Confer?**: AT confers the right to the benefits associated with the land: to use it, enjoy it and profit from its economic development. As well, it includes ownership rights similar to those with fee simple, including the right to decide how the land will be used; the right of enjoyment and occupancy of the land; the right to possess the land; the right to the economic benefits of the land; the right to proactively use and manage the land; and, the right to control the land.
- **Breach of the Duty to Consult**: Before AT is declared, the honour of the Crown requires the Crown to consult and accommodate the interests of the potential AT holders.
- **Provincial Laws of General Application**: Provincial laws that regulate AT lands are constitutionally limited by s. 35 which acts as a limit on provincial jurisdiction.

Tsilhqot'in Nation Passes the Test

In the *Tsilhqot'in Nation v. British Columbia* case, the ruling was that there was a requirement to have consent and cooperation in dealing with the First Nation.

The Tsilhqot'in Nation were the first to receive Aboriginal title through the legal system (CBC News, 2014). In their case, they argued that forestry clear-cutting without consulting was not allowed because the First Nation's rights were tied to a vast territory where they hunted, fished, and lived. The Province refused to acknowledge their rights of territory, as they claimed that their rights were only to their old village sites.

The Supreme Court unanimously ruled that the Tsilhqot'in hold Aboriginal title to over 1,700 square kilometres, which was about half of the claim area. Where title is found, the government and others seeking to use the land must obtain the consent of the Aboriginal title holders. This is the first time Aboriginal title was granted to a piece of land.

This ruling will impact the consultation process around resource extraction, as there are large parts of British Columbia not covered by the treaty. This case will help ensure that no company can come into First Nations territory to log, mine, or explore for oil and gas without seeking agreement.

Being informed about Aboriginal title will help businesses understand that Indigenous people legally occupy and own their territories and that there needs to be informed consultation and consent where title is found.

13.

First Nations Governance

Learning Objectives

- Understand the First Nations governance structure.
- Critically analyze problems and generate ethical business solutions.

Before European contact in North America, the land was inhabited by Indigenous people; each community shared their own beliefs, structure, and practices. The Indigenous people of North America had their own legal system and governance unique to their community. Considering Aboriginal rights and land claims is increasingly essential when understanding First Nations claims and aspects of self-governance in the region. The traditional land claims are linked to community historical land/water use dating back, in many cases, for thousands of years. As Malone and Chisholm said, “Oral histories shared between generations also contain traditional knowledge about ancestral territories. These stories provide information about an Indigenous nation’s territory thorough knowledge of use patterns and observations about ecological systems and past events that have occurred through thousands of years of occupation.” Three groups hold power in Indigenous communities:

1. Elected Band Council – Elected chiefs and council generally hold authority over reserve lands and infrastructure. To become an elected Band member, the community votes and elects the chief. Even though their community members elect them, they do not work for the community; they work for the federal government. First Nations governance centres on the relative authority and power of elected chiefs and councils, which are empowered by a system that was created under the Indian Act, this system was and still is imposed as an assimilation tactic that was implemented to undermine traditional leadership, which includes hereditary chiefs, elders and matriarchs. Another consideration is to remember that when you conduct your research before entering into any business discussions, you need to understand the election cycle. “If you are beginning your engagement with a community that is nearing the end of its election cycle, be careful who you align yourself with.” (B. Joseph, 2019)
2. Hereditary chiefs, traditional leaders, and clan leaders are the traditional knowledge keepers and are recognized as having greater authority and rights relative to things like traditional territory or cultural knowledge and tradition. Hereditary chiefs differ from the elected chiefs because they are born into their role. There are many communities where a child is selected at birth and trained for leadership responsibilities, similar to the role of kings and queens throughout history.

3. “Many First Nations were matrilineal, meaning that descent — wealth, power, and inheritance — were passed down through the mother. Historians and scholars have emphasized the various capacities in which women were able to hold positions of power and leadership in their community.” (Hanson, 2009b)

Adding to this possible confusion is that communities often have very different weights assigned to the sources of governance. For Industry to achieve an agreement with Indigenous communities, typically, hereditary chiefs, matriarchs, and elected chiefs and councils will need to be consulted during negotiations. Every Indigenous community has a highly distinctive social organization shaped by their culture and traditions, their hereditary governance, and the governance structure imposed by Crown–Indigenous Relations and Northern Affairs Canada (CIRNAC). These factors all influence how a community does business, their recognition of land and title, their wealth, and their trading and political objectives.

Whatever style of governance — self-governance, Indian Act, or more traditional governance — businesses still need to conduct business. The conversations and negotiations still need to happen, information needs to be shared and consent has to be given for a project to proceed. Respecting and acknowledging that every Indigenous community has their form of governance will be vital to creating a good business relationship. In one community you may be conducting business with chief and council elected into their position. In other communities, a combination of hereditary and elected chiefs may make the decisions.

One of the challenges here is when the elected and hereditary chiefs do not agree on a project. You may think, “Not my problem; all we need to do is get someone with authority to sign on to the project.” The best practice here is to hold a community information session for the whole community and invite everyone involved in the project; if there is no possible way for both hereditary chiefs and elected chiefs to conduct business in the same room, hold two separate sessions. Learning about the community’s decision-making protocols and procedures beforehand will help you greatly in attaining an agreement that benefits both parties.

Scenario

Day one: Stacey, the elected band chief, signs the IBA contract and receives a $10,000 cheque addressed to her. Daniel, the project manager, is happy and phones the main corporate office to let them know that the project is a go. He thinks he may even get a promotion for being so efficient and amazing. He tells Stacey that he will come back in two weeks to take her out to the site to see how the project is going. Daniel tells Stacey that there will not be much going on, as they are just getting started, but it would be good to go out and take a look.

In the meantime: Stacey is excited about this project; even though she decided on her own to approve the project, she is confident the community will approve and will understand that she knows what is best for them. She wants to cover her bases anyway and ensures that she informs the community. As she was leaving work for the day, she casually mentioned to the band workers, including the janitors who were

working that day, the great news about the project. She thinks that word of mouth will be enough to inform the community of this major project. She goes home and starts planning her next vacation.

Daniel does nothing.

Two weeks later: Daniel returns; he has not communicated at all with Stacey or anyone from the community since the first meeting. Daniel rushes into the band office and tells Stacey that they will go look to see how the project is progressing today. When they arrive at the site, they are not prepared for what they find: a group of community members lying on the grass, not allowing the construction to start. Here is a clip depicting this scene:

A YouTube element has been excluded from this version of the text. You can view it online here: https://opentextbc.ca/indigenousperspectivesbusiness/?p=58 (https://opentextbc.ca/indigenousperspectivesbusiness/?p=58#pb-interactive-content)

Transcript – Police standoff in the sacred headwaters [PDF] (https://opentextbc.ca/accessibilitytoolkit/wp-content/uploads/sites/414/2021/05/Transcript-Police-standoff-in-the-sacred-headwaters.pdf)

Questions:

1. From an ethical standpoint, what has Daniel missed in the consultation process?
2. Do you believe that Stacey was acting ethically?
3. From what you have learned in this chapter, who else needed to be consulted?
4. What do Daniel and Stacey need to do to fix this situation?

5. Do you think this deal can be saved? If so, how?
6. What UNDRIP article has this breached?
7. What other ACTIONS could Daniel take to show his company is sincere and is dealing ethically with the community?

Media Attributions

- “Police standoff in the Sacred Headwaters (https://youtu.be/y4_U2DRYEwA)” by Beyond Boarding (https://www.youtube.com/channel/UCmHUnpzzbp3iGxMBuPef8eg) is licensed under the Standard YouTube licence. The transcript is provided for accessibility and is not openly licenced.

14.

Mid-Chapter Questions

Mid-Chapter Questions

1. Do ethics matter in business?
2. What does the term “reconciliation” mean in business?
3. Why does the United Nations Declaration on the Rights of Indigenous Peoples matter in regards to Canadian economic growth?
4. Do you think you are an ethical person? Why do you think so?

15.

Coming together, Indigenous Business Relationships and Ethical Sustainability

Learning Objectives

- Compare and contrast Indigenous and Industry world views on sustainability.
- Implement strategies for ethical business collaboration with Indigenous communities that will not harm their way of life.

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. (United Nations, 2008)

The Clash of Indigenous and Industry World Views

The Indigenous view of projects flowing through British Columbia to the ocean is the opposite of the industrialized view. Indigenous people have a strong relationship with the land and water; they used the earth as a source of food and as a way of subsistence that extends back thousands of years. As such, Indigenous people believe they are caretakers of the earth, and any action that would affect their relationship to the earth is of great concern to them and their well-being. Researching Industry's main goals reveals a few key items, such as profit, excellent service, and employee retention — protecting the land and water is not a priority for most corporations.

Many Indigenous communities live in resource-rich areas with revenue-generating potential for extracting oil, gas, and minerals. In the past, resource extraction projects were sometimes in direct conflict with First Nations lands and territories. In December 2015, Prime Minister Justin Trudeau promised to address the 94 recommendations from the Truth and Reconciliation Commission, including the establishment of a federal regulatory process for protecting the environment in Canada that supports

First Nations engagement and input on the environmental effects of Industry on First Nations land and territories. Part of their process includes cooperation and communication with Indigenous peoples regarding environmental assessment, a vital component of the Impact Assessment Act. This Act recognizes the importance of including consulting with Indigenous peoples in impact assessments.

Here is a list of effects that projects may potentially have on Indigenous Peoples and must be considered when completing an Impact Assessment:

- "quality and quality of resources available for harvesting (e.g., species of cultural importance, traditional and medicinal plants);
- access to culturally important harvesting areas or resources of importance;
- experiences of being on the land (e.g., changes in air quality, noise exposure, effects of vibrations from blasting or other activities);
- current and future availability and quality of country foods (traditional foods);
- the use of travel ways, navigable waterways and water bodies;
- commercial and non-commercial fishing, hunting, trapping and gathering and cultural or ceremonial activities and practices;
- commercial, non-commercial and trade economies; and,
- cultural heritage, and structures, sites or things of historical, archaeological, paleontological or architectural significance to groups" (Impact Assessment Agency of Canada, 2020, s. 19.1)

To learn more about consent and consultation, see Who Does the Consulting?

Strategies for Creating Business Relationships that Include Ethical Sustainability

Starting environmental assessments early in planning a project will assist the Government of Canada in discharging its legal duty to consult and — if appropriate — accommodate Indigenous peoples when Industry activities may adversely impact established or potential Aboriginal and treaty rights.

Understand Indigenous views of sustainability: protecting the land is the number one priority for Indigenous people.

Respect Indigenous culture. This includes the practice of living off the land, as negotiations may be interrupted by the need to fish or pick berries. Keep in mind that an event such as a death in the community may slow down business dealings.

Remember: Free Prior Informed Consent is needed to proceed on any project on Indigenous land.

16.

Working with Indigenous Communities Ethically

Learning Objectives

- Understand and interpret Free, Prior and Informed Consent.
- Design a strategy using the three R concept when engaging with Indigenous communities.

Article 32

1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.
2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources. (UN General Assembly, 2007)

This article recognizes the Indigenous people's rights affecting their land and territories; therefore, researching the communities you would like to partner with and understanding their cultural, political and societal position will be helpful. Understanding Article 32 specifically knowing that Industry needs to obtain free informed prior consent on any projects on Indigenous territory. Companies need to recognize that they must operate ethically in business dealings with Indigenous communities. In previous chapters, we learned about companies trying to make side deals and bribing individuals within the community. This practice is not ethical and goes against UNDRIP Article 32 — "free" consent means giving consent without being manipulated, coerced or pressured.

The environmental issues that impact Indigenous people need to be recognized as a priority if Industry wants to succeed in getting its product to market. The modern assessment of projects must integrate science and traditional knowledge into data collection and planning processes to enable better decision-making and responsible governance.

Furthermore, common Industry practice was and still is in some cases start projects on territories without adhering to Article 32. If you want to form a good relationship with Indigenous communities, the Industry needs to inform, consult and seek consent for the project prior to conducting *any* business.

Suppose Industry fails to consider the impact of their projects, and it negatively affects Indigenous land and their sources of food and livelihood. In that case, Indigenous people will withhold their consent because of the environmental concerns because this affects their whole being, spiritually and physically.

The Three Rs

Moving forward, is there one correct way to work with Indigenous People? One strategy that will fit all business dealings that will result in success? Unfortunately, that is too easy for such a unique and complex group of people. In their 2019 book *Indigenous Relations: Insights, Tips & Suggestions to Make Reconciliation a Reality*, Bob Joseph and Cynthia F. Joseph introduce the concept of the three Rs, which are needed to create a path forward to working effectively with Indigenous peoples and their communities.

Recognition

Recognition is to recognize that the Indigenous Peoples of Canada have constitutionally protected Indigenous rights. When Industry acknowledges and respects these rights, they start with building transparent, trusting relationships with the Indigenous communities. To ensure the whole community is informed, relationships must be developed with community members outside of specific project assessments. There must be meaningful, inclusive engagement and discussions with all partners, rights holders, and stakeholders for success.

Another way to practice Recognition is to respect the uniqueness of individual Indigenous Peoples and their cultures. We have learned through this course that each community operates differently from its neighbouring communities. Each community has their form of governance and practices; conducting business with a view that all Indigenous communities are the same will result in disaster.

Respect

Respect means addressing the uniqueness of individual Indigenous peoples, their cultures and their constitutionally protected rights.

Reconciliation

There are many definitions of Reconciliation. Bob Joseph and Cynthia J. Joseph say, “Reconciliation means to restore harmony between Indigenous and non-Indigenous people.”

Respecting Indigenous people and their rights by researching and learning about them will help build trust and ethical business relationships.

Living in an instant world seeking immediate results, Industry may feel frustrated in acknowledging and respecting Indigenous rights as it takes longer to establish a good business relationship. For example, in the business world, when someone dies, the company still operates; when someone dies in a community, the community stops most operations and makes the death of a community member a top

priority, which may hold up business processes for days, even weeks. However, honouring this will save your relationships and time, as you will not be trying to repair a severed relationship.

Reading this chapter and incorporating Reconciliation at a personal level will ensure that you, as an individual representing your company, will establish and maintain a mutually respectful relationship with Indigenous peoples. When you have this respectful relationship, conducting business with Indigenous communities will be successful.

17.

ReconciliACTIONs

Learning Objectives

- Recognize that the individual can contribute to reconciliation.
- Identify what a reconciliACTION is to Indigenous communities and Industry.

Many small-scale reconciliation acts can make a significant change for all. The new term to describe an act of coming together in an ethical way to conduct business is "reconciliACTION (https://downiewenjack.ca/our-work/reconciliactions/)."

According to the Gord Downie & Chanie Wenjack Fund, "A reconciliACTION is a meaningful action that moves reconciliation forward. ReconciliACTIONs aim to bring Indigenous and non-Indigenous people together in the spirit of reconciliation to create awareness, share, and learn. It is the answer to Gord's call to *'Do Something'*; do something to raise further awareness, do something that improves the lives of Indigenous people, do something that improves the relationship between Indigenous and non-Indigenous people. ReconciliACTIONs act as the catalyst for important conversations and meaningful change, recognizing that change starts with every one of us and each person can make an impact."

Reconciliation is the right thing to do, and we should do it.

Whether Indigenous or non-Indigenous, we all have a role to play in reconciliation in Canada. With historical knowledge, we can learn from the past so we can move forward in a good way together. The following section has some ideas for reconciliACTIONs you can take.

ReconciliACTIONs

Celebrate National Indigenous Peoples' Day

National Indigenous Peoples' Day takes place every year on June 21. Honouring this day is essential because it acknowledges Canada's history. As stated in an article by Georgian College about celebrating National Indigenous Peoples' Day (https://www.georgiancollege.ca/blog/student-life/national-indigenous-peoples-day-21-things/), "It's a day for all Canadians to recognize, celebrate and honour Indigenous cultures and communities. No matter where you are in Canada, there's a rich history

and presence of Indigenous Nations. June 21 is a day to honour the original peoples of this country and also to acknowledge the contributions and sacrifices Indigenous Peoples have made."

You or your organization can do this by acknowledging the land you are living, working, and playing on, as well as attending National Indigenous Peoples' Day festivities.

Give territory acknowledgements where appropriate

You can also implement reconciliation principles by shifting the language of your everyday office interactions. For example, giving territory acknowledgements in your communications at the beginning of events and at the start of some meetings will show respect to the Indigenous Peoples on whose territory you live and do business. (Read the article 7 Ways to Incorporate Reconciliation into Your Business (https://animikii.com/news/7-ways-to-incorporate-reconciliation-into-your-business) for other ideas on how to make reconciliation principles a part of your business practice.)

A good way to get started on writing a territory acknowledgement is to ask yourself the question, "Why do I want to create my own land acknowledgement?" Then, start researching the territory that you are living or working on and write out your own territory acknowledgement that resonates with you personally.

For more information on how to complete this activity, read the blog post Five Steps to Writing a Land Acknowledgment (https://www.careaboutclimate.org/blog/five-steps-to-writing-a-land-acknowledgement).

Other actions

Other possible things you can do include:

- "Remember that you and your organization are in many cases doing business with a culture, not with another business." (B. Joseph, 2019) Indigenous cultures are primarily cultures of collectivism. Ensuring everyone in the community has an opportunity to know what is happening with your organization is critical.
- Hire and retain Indigenous talent. When your organization hires Indigenous people, implement a retention plan to ensure they want to stay.
- Provide training for your organization on UNDRIP and the 94 calls to action to inform your employees and prepare them for success when dealing with Indigenous communities.

Exercises

Break into groups and discuss these questions for 15 minutes:

1. How do you feel about ReconciliACTION?

2. What do you find most challenging when thinking about ReconciliACTION?
3. How can you bring your organization closer to ethically working with Indigenous communities?
4. What is one way you, as a Canadian, can contribute to ReconciliACTION?

18.

End-of-Chapter Questions

End-of-Chapter Questions

1. How do the views of Industry and Indigenous groups differ?
2. If you were the head of your household and someone told you that you were not able to provide for your family because the source of your subsistence was going to be destroyed, what would you do?
3. If someone walked onto your property and told you they were going to demolish your home, and you needed to relocate to somewhere else, what do you think you would say or do to that person?
4. What do you need to do to ensure you are acting in an ethical way in business?
5. As a business leader, how can you use the three Rs?

End-of-Chapter Scenario

Sometime in September. Your company asks you to go into the Gitxsan territory to inform the nation that you will build a pathway through their territory to transport liquefied natural gas to the Port of Prince Rupert to deliver it to Asian markets. You think to yourself, “This project will be good for the economy and the communities that are affected by this project. It will bring many job opportunities and financial stability to their nation, and they are so lucky that we are offering this opportunity to them.” You have a deadline with a bonus attached if this project goes well.

Day 1. You book the next flight to Smithers. You arrive and decide to start with the closest community, Moricetown, and work down the line from there. You pick up the phone and call the band office. No answer. You leave a message. Tomorrow, you will drive to Moricetown and show up at the band office to talk to someone in charge.

Day 2. You arrive at the band office; it is locked up with the lights out. You call again and leave a message. You look around, and there are many plumes of smoke coming from various yards in small shacks, and you wonder what that’s all about. You are annoyed and think how unprofessional the band employees are to not be available during business hours.

1. What should you have done before you left your office?

2. Why do you think the band office is closed? What should your next steps be?
3. Is your company aware of how to conduct business with Indigenous communities in an ethical way?

III

Business Law

Learning Objectives

- Describe the nature of Aboriginal title and the Duty to Consult
- Analyze current issues related to the Duty to Consult
- Consider best practices for industry to respectfully engage with Indigenous communities

The first part of this text focused on the pre-Confederation history of Indigenous peoples' interaction with the Canadian government. This serves as the foundational context to develop an understanding of Indigenous peoples' interactions with business interests and the legal system. Some interactions with industry are positive. Many are not.

Significant tracts of British Columbia have not been ceded by Indigenous groups (see the section on The Numbered Treaties). These lands frequently find themselves as the sites of resource extraction (forestry, fishing, mining), thoroughfares (pipelines), or as collateral damage in other projects (pollution runoff, hydro dam flooding). The Supreme Court of Canada has developed the "Duty to Consult" in response to successful Indigenous arguments that the Crown has acted inconsistently with Indigenous rights. These rights arise from Indigenous peoples occupying British Columbia first. In 1982, these rights were further reaffirmed when, in Canada's new constitution (https://laws-lois.justice.gc.ca/eng/const/page-13.html), section 35 was included:

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

These developments have been positive, but a lot remains to be explored. What is "consultation"? Who consults whom? When has consultation been achieved? What are government's obligations? What are the current issues facing the "Duty to Consult"? The following text explores these questions and more, but you'll find that plenty of ambiguity remains in this area of law. For Indigenous peoples and Industry that wishes to respectfully work on their territory, much work remains to be done in ensuring the "Duty to Consult" does not serve as cover to affirm exploitative practices.

19.

The Nature of Aboriginal Title

Learning Objectives

- Describe what Aboriginal Title is.
- Explain the relationship between the Numbered Treaties and Aboriginal Title.

Aboriginal title is difficult to define, as each Indigenous group with title receives different rights as a result of it. The best explanation is that it is a right to occupation and land that has arisen as a result of Indigenous peoples being the first peoples to occupy the territory (Hogg, 2010).

In the 1973 decision *Calder et al. v. Attorney-General of British Columbia*, the Supreme Court of Canada recognized Aboriginal title as pre-existing confederation. In 1982, Canada's new constitution (https://laws-lois.justice.gc.ca/eng/const/page-13.html) was enacted and included the following section:

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

This section did not create Aboriginal rights or title, but affirmed their existence. The Supreme Court of Canada case *R. v. Sparrow* (https://indigenousfoundations.arts.ubc.ca/sparrow_case/) confirmed in 1990 that not only do these rights exist, but they are constitutionally protected.

"Aboriginal title" sounds similar to "title in property," and so it is tempting to simplify the definition by calling it ownership over a vast swath of land. In B.C., a "fee simple" interest in land is what we conventionally call real property ownership. However, Aboriginal title is decidedly *not* conventional property ownership. Instead, it has the following characteristics:

1. Aboriginal title exists because Indigenous peoples were in Canada first.
2. Indigenous peoples have special rights that are not available to other Canadians to use the land for traditional purposes.[1] For example, if the Indigenous group traditionally hunted in a territory pre-sovereignty, they have special rights to continue using that territory for hunting.
3. Aboriginal title is "inalienable" (meaning it cannot be sold by or taken from someone), unless sold to the government.

1. "Traditional" having the very specific meaning of being before the time of "effective European control," which was at some point in the mid-1800s for B.C.

4. Aboriginal title is a communal right held by a nation.
5. Aboriginal title is constitutionally protected, whereas other property interests are not. (Hogg, 2010)

Courts have noted that modern tools may be used for traditional purposes (such as hunting with guns), but that the activity must substantially be a traditional one (see *Delgamuukw v. British Columbia* (https://jurisprudence.reseaudialog.ca/en/case/delgamuukw-v-british-columbia/), 1997). An extreme example would be that an Indigenous band may not claim Aboriginal title over an area of land if they wish to flood the land to build a hydroelectric dam. Instead, Aboriginal title would be surrendered to the federal or provincial government (called "the Crown"), and then the government would release the land back to the band with the Aboriginal title to the land forever gone.

The Numbered Treaties had the effect of extinguishing Aboriginal Title across most of Canada. Many Indigenous groups convincingly argue that this title was never extinguished and that the Numbered Treaties were a "right-of-way" or land-sharing agreement. However, courts have upheld that Aboriginal title was extinguished on these lands.[2]

B.C., on the other hand, is mostly free of treaties, so Aboriginal title exists across most of the province (less Northeast B.C. and Vancouver Island). Therefore, many developments in the law surrounding Indigenous rights and title have occurred in British Columbia. Northwest B.C. especially has a long history of litigation, protests, and extensive treaty negotiations.

2. A positive development is that courts have extended the Duty to Consult across treaty lands as well, but as this is a B.C.-focused text, we will not be discussing that in-depth.

20.

Proving Aboriginal Title

Learning Objectives

- Explain the difficulties that oral evidence has had and how courts have remedied those difficulties.
- Identify the test used to prove Aboriginal Title.
- Consider the difficulties of applying the test to Métis, nomadic groups, or groups with shared boundaries.

To prove Aboriginal title, an Indigenous group must prove the following:

1. The group occupied the land prior to European sovereignty.
2. There was continuous occupation of land from pre-sovereignty to modern times.
3. The group exclusively occupied that land.

This test was established in 1997 by the leading Supreme Court of Canada case *Delgamuukw v. British Columbia* [PDF] (https://www.bctreaty.ca/sites/default/files/delgamuukw.pdf). If an Indigenous group can meet the conditions of this test, then Aboriginal title is established on their lands. Despite the apparent simplicity of this test, there are numerous challenges.

Evidence standards changed to accommodate this test. In *Delgamuukw*, the trial judge at the Supreme Court of British Columbia did not accept oral histories. In that case, the Wet'suwet'en and Gitxsan were using oral histories called "Adaawk" and "Kungax" to prove their title to land. Common law evidence standards demanded written historical records to prove title. However, most Indigenous groups did not have written historical records and relied on oral traditions. That evidential standard would have dramatically undermined most Indigenous groups' pursuits for justice. The Supreme Court of Canada, recognizing this, allowed traditional evidence to be used to prove Aboriginal title.

To show the recency of this development, many of the authors' students reported memories of their parents and grandparents meeting with lawyers and swearing affidavits (providing testimony under oath for use as evidence in court), accompanied by maps, to record what activities took place traditionally and the geographical extent of those activities.

In addition to evidential difficulties, there are a few other challenges that have arisen in proving

Aboriginal title. First, nomadic Indigenous groups have a difficult time proving that they have continuously occupied any tract of land (Curpen, Braul, Mellett, Mathewson, & Monaco, 2014). Second, this test precluded modern Indigenous cultures, including the Métis, from asserting their rights (Hogg, 2010). Third, if there was a shared boundary or shared custody of land between two Indigenous groups, then neither may claim Aboriginal title over that land because the occupation was not "exclusive." Finally, the authors have had conversations with people who express frustration with Aboriginal title as an idea. Those people wish that legal concepts viewed Indigenous peoples as many unique cultures that are continuously evolving in today's modern world, rather than having their cultural identity tied to tests for traditional usage of their ancestral land. They believe that Indigenous cultural identity and unique communities should be able to expand their legal rights to allow for development of other cultural activities on traditional land.

21.

The Duty to Consult

Learning Objectives

- Describe what the Duty to Consult is.
- Consider the intended goals of the Duty to Consult.

The Duty to Consult is an obligation of the Crown to consult Indigenous groups when undertaking a project that affects their Aboriginal rights and title. This duty arises when Indigenous people have a land claim that has not yet been resolved.

The famous case of *Delgamuukw v. British Columbia*, decided in 1997, created the Duty to Consult. Legally, the Crown owes a fiduciary duty (also known as a duty of loyalty) to Indigenous peoples. The Crown must abide by this fiduciary duty and fulfil its Duty to Consult in order to maintain its honour in negotiations.

The Duty to Consult holds the Crown to obligations that live on a spectrum. If the impact of a project is transitory, or if the project is on territory with a weak claim to title, then the duty may be a mere "discussion" of important decisions with the affected Indigenous group. The Supreme Court of Canada follows this up in *Delgamuukw* with, "In most cases, [the Crown obligation] will be significantly deeper than mere consultation. *Some cases may even require the full consent of an aboriginal nation* [emphasis added], particularly when provinces enact hunting and fishing regulations in relation to aboriginal lands." [1]

In the more than two decades since this decision, there has been no identifiable case where full consent of the Aboriginal nation was required.[2]

The Duty to Consult has a number of purposes. First, it is intended to be one among many tools that will build a nation-to-nation relationship between Canada and Indigenous Peoples. Second, courts have been struggling with maintaining the Canadian government's sovereignty to make decisions while

1. To see this quotation in context, see section 168 of the Supreme Court of Canada decision in *Delgamuukw v. British Columbia* (https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1569/index.do).
2. *Tsilhqot'in Nation v. British Columbia*, decided by the Supreme Court of Canada in 2014, did require the government to get consent from the Tsilhqot'in Nation. However, if the Crown can "justify" its infringement, operations may continue. More on justification in Crown Infringement of Aboriginal Title.

respecting Indigenous rights, and the Duty to Consult is a means to bridge that gap (Ritchie, 2013). This is discussed more in the next two sections.

22.

Mid-Chapter Questions

Mid-Chapter Scenario

Josh works a part-time job while going to school. He works hard, gets good grades, and is a positive contributor to his community in rural British Columbia.

Josh is frustrated after having read about “extra” rights that Indigenous people have in his community. He loves fishing in the outdoors, but his total allowable catch is less than that of Indigenous persons around his town. Further, whenever any projects are developed around his small town, he may make his views known via the ballot box and the newspaper, but he is not given any extra consultative roles, nor does the law mandate accommodations to meet his needs.

He thinks to himself, “I understand Indigenous Peoples have had their share of rough treatment in this country, and it’s awful. I wish it never happened. But that’s in the past, and this current generation of Canadians has not done anything wrong. Why should we pay for the sins of previous generations?”

He doesn’t mean any harm by his comments, but his irritation is palpable. He views the Duty to Consult and other Indigenous rights as special privileges granted to another group of people in Canada based only on race.

1. How would you respond to Josh’s concerns regarding “special privileges based on race” for Indigenous Peoples?
2. Why is it important for Canadians to right the wrongs of past generations?

23.

Crown Infringement of Aboriginal Title

Learning Objectives

- Explain the test used by the Crown to infringe upon Aboriginal Title.

Sometimes the Crown views it as a necessity to infringe upon Aboriginal rights without receiving the consent of the affected Nation. For example, the Crown may have an objective to conserve fish in an area in a season with a poor salmon yield. They may also wish to approve an interprovincial pipeline and override a single Nation's opposition. Whatever the case, the Crown is able to infringe upon these rights if they can demonstrate a few things. These criteria were developed by the Supreme Court of Canada in *R. v. Sparrow* in 1990 and further elaborated in *Tsilhqot'in Nation v. British Columbia*.[1]

If Aboriginal title is confirmed to exist on the land, or if it is likely to exist, then:

1. The government must consult with the affected Indigenous group and accommodate their concerns where feasible.
2. The government's actions must be backed by a "compelling and substantial public purpose."
3. The government's actions must be "consistent with the Crown's fiduciary obligation to the group."[2]

We've discussed the Duty to Consult from criteria 1 throughout this chapter: essentially, the Crown is required to accommodate concerns. For example, if they wish to build a pipeline, they may have to reroute it through less sensitive environmental areas.

Criteria 2 requires a "compelling and substantial public purpose." The Supreme Court of Canada described in *Delgamuukw* what this looks like:

> "… [T]he development of agriculture, forestry, mining, and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations to support those aims, are the kinds of objectives that are consistent with this purpose and, in principle, can justify the infringement of aboriginal title. Whether a particular measure or government act can be explained by reference to one of those objectives, however, is ultimately a

1. Decided in 2014, this case was the first to grant Aboriginal title to lands not covered by treaty.
2. A "fiduciary obligation" means that the Crown has a legal duty of loyalty to Indigenous groups and may not act in bad faith.

> question of fact that will have to be examined on a case-by-case basis" (*Delgamuukw v. British Columbia*, 1997, para. 165).

The purposes for which government can infringe Aboriginal title are broad.[3]

Criteria 3 requires the Crown to act in a way that respects Aboriginal title being a gift to future generations. To do this, the infringement of Aboriginal title must be:

i. connected to the Crown's goal
ii. only as impactful as necessary to achieve that goal
iii. such that the benefits of the Crown's goal are not outweighed by the negative impacts on the Aboriginal group[4]

Rights are only as good as their enforcement. At the moment, it's unclear what remedies are available to Indigenous groups that have their rights violated without proper Crown justification. No financial compensation has yet been awarded in court (Curpen, Braul, Mellett, Mathewson, & Monaco, 2014), nor would financial compensation be appropriate in every case. We anticipate this issue to be resolved eventually, but at the time of writing, no such case law has been developed.

In summary, Aboriginal title is not an absolute grant of governance over territorial lands to an Indigenous group. Rather, Aboriginal title is still subject to the Crown doing what it views as being in the best interests of Canada. As we will discuss in the next section, this idea causes some critics to view the Duty to Consult and Aboriginal title as ideas that have ceremonial meaning, but lack teeth to meaningfully stop unwanted development on Indigenous territory.

3. This leaves the authors wondering what would not be a compelling public purpose.
4. In legal terms, this is known as "proportionality."

24.

What the Duty to Consult Is Not

Learning Objectives

- Explain the balance the Supreme Court of Canada is trying to strike between the sovereignty of the Crown and acknowledging Indigenous ownership of land.

The Duty to Consult does not grant Indigenous peoples absolute mastery over their own territory. When outlining the Duty to Consult, the Supreme Court of Canada wished to resolve a conflict that appeared unsolvable. Namely, they wanted to reconcile Indigenous ownership of land pre-European contact with the "sovereignty of the Crown."[1]

One of the chief difficulties from the Court's perspective is that Canada's democracy frequently requires the interests of individuals or groups to be subjected to the will of the whole. For example, to build a new SkyTrain line before the 2010 Winter Olympics in Vancouver, some businesses were forced to temporarily close alongside the route. These business owners took on serious losses to accommodate the needs of the many. On a similar — and larger — scale, the Crown is responsible for governance of all Canadian lands and sometimes makes decisions to one group's detriment to improve collective conditions. Where the Supreme Court struggled was effectively asking themselves the question, "How do we preserve the ability of the government to make decisions for the entire public's good while recognizing that Indigenous people, who did not voluntarily agree to become part of Canada, have rights that arise as a result of them being here first?"

Some are skeptical that a fair balance has been struck between the two extremes. One such critic is Gordon Christie, who writes:

> The decision to build a road, for example, might have to be made through consultation with potentially affected Aboriginal rights-holders, and the road itself might have to be constructed in such a way as to "accommodate" certain of the interests expressed during consultation…. But almost certainly the road will be built. (Christie, 2006, p. 160)

In the case of *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)* (https://jurisprudence.reseaudialog.ca/en/case/taku-river-tlingit-first-nation-v-british-columbia/), decided by the Supreme Court of Canada in 2004, the Taku River Tlingit First Nation opposed a

1. This was a recurring theme throughout *R. v. Van der Peet* (https://indigenousfoundations.arts.ubc.ca/van_der_peet_case/), decided by the Supreme Court of Canada in 1996.

mining project and sued the Crown, claiming they violated their Duty to Consult. Peter Hogg wrote this summary in his analysis:

> [T]he Crown's duty had been discharged in this case. The environmental assessment took three and a half years. The First Nation was included in the process. Its concerns were fully explained and were listened to in good faith, and the ultimate approval contained measures to address the concerns. Although those measures did not satisfy the First Nation, the process fulfilled the province's duty of consultation and accommodation. Meaningful consultation did not require agreement, and accommodation required only a reasonable balance between the aboriginal concerns and competing considerations. (Hogg, 2010, p. 193)

Kaitlin Richie brings up the cumulative effect that will happen over time on Indigenous lands. She writes:

> With no ability to veto, no obligation on the parties to agree, and the ability of the Crown to "bargain hard", First Nations seem to be at a clear disadvantage even before any consultation and negotiation occurs. As such, consultation and accommodation will likely require some compromise be made on the part of the First Nation…. With each compromise made, the ultimate result of a First Nation's participation in numerous consultation processes pertaining to development on its traditional lands will be the gradual erosion of Aboriginal and treaty rights that are tied to those lands. (Ritchie, 2013, p. 431)

While no one project may be destructive to Aboriginal title, numerous projects can chip away at it cumulatively to render it meaningless. To combat this, the British Columbia Court of Appeal released the judgment of *West Moberly First Nations v. British Columbia (Chief Inspector of Mines)* (https://www.osler.com/en/resources/critical-situations/2011/west-moberly-first-nations-v-british-columbia-ch) in 2011 requiring that the Crown begin taking into account the cumulative effects of numerous projects on Aboriginal title. However, the Crown frequently delegates the Duty to Consult to industry proponents (as discussed in the next section), and so it is unclear how the Crown will address cumulative project impacts on Aboriginal title.

Whether the Supreme Court of Canada has successfully resolved the conflict between the assertion of Canadian sovereignty over all the land and respecting the rights of pre-existing Indigenous societies remains to be seen. One can sympathize with the Herculean challenge that the Supreme Court gave itself. We leave it to the reader to determine whether an appropriate balance has been struck.

25.

Who Does the Consulting?

Learning Objectives

- Describe who holds the legal obligation to consult.
- Explain why Industry has taken on the role of consulting in recent years.
- Identify problems associated with Industry taking on the Duty to Consult.

The Duty to Consult is a Crown obligation. That said, whenever a private company has wanted to build a project, the Crown has foisted much of that responsibility upon the project's proponent. Corporations have now taken on the Crown's role of maintaining relationships with Indigenous Peoples (Ritchie, 2013).

For example, in 2010, the Canadian company Enbridge filed an application to build an oil pipeline from northern Alberta that would cross B.C.'s northern territory and have a terminus in Kitimat. From there, oil tankers would transport the oil to its end destination. This project was slated to cross numerous groups' territory, and as the project would have an impact on Aboriginal rights, the Duty to Consult was invoked (Government of Canada, 2014).

Pipelines crossing provincial boundaries are a federal responsibility, and joint review panel meetings were held to prepare project approval recommendations to the federal government. The joint review panel took into account environmental, economic, and scientific evidence, in addition to the views of Indigenous peoples. However, the bulk of the consultation work with Indigenous communities was carried out by Enbridge itself. To mitigate damage to traditional territory, the company individually engaged and consulted with all Indigenous groups along the route, such as by instating minor route changes, providing funding for archaeological digs, and forging revenue-sharing agreements (Stueck, 2012). In 2016, the federal government rejected the pipeline, in response to both widespread protests and Indigenous communities' concerns about the project.

Another more recent example is LNG Canada's proposal to build a liquefied natural gas pipeline, with a terminus also landing in Kitimat. The Government of British Columbia did foster some agreements among some groups along the route (Province of British Columbia, n.d.-b). However, much of the heavy lifting to consult and accommodate Indigenous groups landed on LNG Canada's shoulders. This included preferential contracting opportunities for supplies and commitments to employ Indigenous peoples (LNG Canada, 2020).

Kaitlin Ritchie (2013) discusses the many unfortunate consequences of companies becoming heavily involved in the consultation process. First, this undermines long-lasting reconciliation between the Crown and Indigenous groups. There is no longer a nation-to-nation relationship being maintained, but a series of one-off interactions between private business and First Nations. Second, many businesses are not in a position to offer the kinds of long-lasting concessions that would help restore the damaged relationship between Canada and Indigenous groups. Most often, they may only offer minor project alterations or employment promises rather than truly transformative treaties (like the Nisga'a Treaty, which was the first modern treaty between a First Nation and the Government of British Columbia). Last, Indigenous offices are often understaffed and underfunded. They are frequently inundated with numerous government and private interests making requests about a wide variety of topics requiring a significant array of expertise, and the band office may be unable to respond to requests. Leaving individual corporations to consult with Indigenous groups puts more strain on the resources of those groups than if they were to deal only with the same handful of government representatives.

In the section What the Duty to Consult is Not, we noted a problem that has been arising over time: one project may not be destructive to Aboriginal title, but numerous small projects can gradually chip away at a group's Aboriginal title. The Crown is obligated to factor this into account when consulting. Industry proponents not familiar with the past history of other parties' dealings may not be in a position to consider these effects.

Industry is likely not keen on the current situation. In addition to taking on the expense of consulting and relationship-building, they are left with the legal uncertainty of when adequate consultation has been achieved. They are also not in a position to consider the impacts of past projects or grant remedies or accommodations to right past injustices, whereas the Crown would be.

For the time being, people wishing to conduct business in Indigenous territory must, at their own expense, help right the government's colonial history. A private business that fails to adequately consult may have their project court-ordered to a halt because the Crown did not fulfill its legal duty.

26.

Who Must Be Consulted?

Learning Objectives

- Explain the differences between hereditary leadership and band leadership.
- Identify the conflict between democratically elected leaders and hereditary leaders.
- Consider issues that arise when multiple parties must be consulted.

The answer to the question “Who must be consulted?” seems obvious on its face: the affected Indigenous groups, of course! However, once we begin to peel back the layers, this answer gets complicated quickly.

First, many Indigenous groups have power structures that are not immediately familiar in the Euro-Canadian context. A group’s democratically elected band leadership may have been consulted for a project, but that group’s traditional power structure deferred not to democratic leaders, but to hereditary leadership. Recall that the band itself, along with its leadership structure, is a creation of the Indian Act, which was imposed by the Canadian government on these communities. This conflict of values between democratically elected band leaders and traditional leadership structures remains an ongoing issue within Indigenous communities. For more information on this, see the section on First Nations governance.

This conflict was brought squarely into the public eye in 2020. Coastal GasLink wished to build a natural gas pipeline across northeastern B.C. and into the west coast. Consultation with elected band councils occurred across affected Indigenous territories, achieving broad support. However, despite elected band officials approving the pipeline, hereditary Wet’suwet’en leadership opposed the project, and in January 2020, they began blockading a critical railway located near Smithers, B.C. (Stueck & Jang, 2020). They also demanded the Royal Canadian Mounted Police leave their territory. The federal Minister of Crown–Indigenous Relations and B.C.’s Minister of Indigenous Relations and Reconciliation met with Wet’suwet’en hereditary leaders in early February. Discussions soon broke down, and the RCMP arrested and removed blockaders in mid-February, ending the immediate conflict but leaving lingering resentment (BBC News, 2020; Berman, 2020).

The CN Rail line outside of Smithers being blockaded.

Not all Wet'suwet'en agreed with their hereditary leadership. Many wished to have their democratically elected officials make decisions. Others claimed that most Wet'suwet'en supported the project and their wishes were "hijacked" by hereditary leaders (Tumilty, 2020). Whatever the case may be, it's unclear how this conflict between Canadian-imposed democratic leadership and traditional hereditary leadership should actually be resolved for the purposes of the Duty to Consult.

Indigenous groups across the country have different cultures and languages. What is right for one group may not be right for another. Just like different member states of the European Union have unique cultures and languages as well as their own decision-making processes, different Indigenous groups may be undertaking a period of introspection to decide what is right for them. It is important to

understand that Indigenous Peoples are not one uniform entity and what might be true for one is not necessarily true for another.

Next, how much consultation must be done with individual citizens of an Indigenous group, to what degree of formality, for what length of time, and what degree of consensus will make a court satisfied that proper consultation and accommodation have been achieved? These questions are still unanswered. Some companies conduct community hearings. However, their existence might be uncommunicated, or they may be barely attended. Can consensus be achieved at a hearing with those issues? Anecdotally, in the experience of the authors, some companies have offered incentives to attend. Some of these incentives (including items with cash values in the hundreds of dollars) create moral hazards for all participants. Last, is a referendum the appropriate decision-making tool, or should it be up to band councils and hereditary leaders alone to make decisions while merely hearing the views of their own people?

It takes only a little prodding of the question "who must be consulted" to find that the issue is more complicated than it appears at first glance. This is compounded by another issue: a chronic lack of resourcing. Many Indigenous groups are solicited for consultation requests by numerous industry groups and the Crown — sometimes getting numerous requests by different parties for the same project (Ritchie, 2013). The Crown does not subsidize these consultation costs, and the Indigenous groups are left to bear it. Some requests may even require technical expertise for which the band will be expected to cough up the funds. Should the understaffed and underfunded Indigenous group fail to respond in a timely manner, the project may proceed without any consultation having taken place because the industry group can argue that they made an attempt to consult and received no timely response.

The last issue is a lack of clarity on how consultation and accommodation should "scale-up." Let's say a project of large scope crosses 20 Indigenous territories. Nineteen of the 20 make agreements with the industry proponent, but one Indigenous group does not agree, and their rights are severely affected by the project. In theory, courts have said that some projects may require full consent. Should one group out of 20 have the ability to veto such a project that has received widespread approval from other Indigenous groups? How widespread should consent or accommodation need to be to achieve the goals of the Duty to Consult? Again, the answers are unclear.

Combine the difficulties of the Crown offloading consultation duties onto private interest groups, internal conflicts among numerous Indigenous groups as to how consultation should be achieved, and the lack of funding coming into these Indigenous groups, and you have a recipe for a highly uncertain ethical and legal environment. For more information on the ethical issues present, see Working with Indigenous Communities Ethically.

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27.

Best Practices for Working on Indigenous Territory

Learning Objectives

- Consider best practices for conducting business on Indigenous territory.

If you wish to conduct business or start a project on a Nation's territory (or if you identify as Indigenous yourself and are working on another Nation's territory), you may be asking yourself what you should do, given all the legal uncertainty surrounding the Duty to Consult and Aboriginal title. While much is still to be decided in court about Aboriginal title, it's always advisable to not be the party that is paying to have those legal boundaries tested in a lawsuit.

First, while it is the Crown's legal obligation to consult a Nation before accepting or rejecting your project, a businessperson should take matters into their own hands and begin their own relationship-building. By the time the Crown gets around to consulting for your project, the accommodations that may be required will become more expensive to make. Additionally, you will be foreign to the peoples with whom you wish to have positive working relationships. The Duty to Consult does not start after you have already made concrete plans for your project, but at the earliest possible opportunity. Aboriginal title may not have been established by a court yet on the traditional territory that you seek to work on, but you should act as though Aboriginal title already exists.

Start relationship-building early and start broadly. Engage both band and hereditary leadership and consult with individual citizens. The legacy of the Indian Act and the Numbered Treaties has shattered trust between Indigenous peoples and government and industry, and it is a long road to rebuild that trust.

What works for one Nation does not work for another, as Nations all have unique languages, cultures, and traditions. Recognize that each relationship with each Nation needs to be started anew. That said, all peoples have some things in common: we all want prosperous futures for our children, and future generations have trusted all of us to be stewards of their environmental inheritance.

Start early. It takes time to develop relationships and to create accommodations that will respect Aboriginal title. While we have discussed in-depth that the Duty to Consult is not necessarily the duty to agree, it would be highly counterproductive to treat the consultation as giving mere notice to the affected peoples.

Another reason to start early is the chronic underfunding of Indigenous band offices. You may not

receive a response for quite some time. Nations have not been given funding by the Crown to adequately engage with this new legal order, and so may not respond quickly to requests — especially ones that require them to use experts to determine the environmental impacts of a project. By starting early, you can ease the bottleneck.

Use precedents from other deals with both that Nation and other Nations. Research supply and employment agreements that may be of interest to the host Nation. Do not neglect environmental considerations.

If you are Indigenous yourself or have Indigenous partners, there may be funding available from the province to engage in entrepreneurship. Such funding includes the Aboriginal Entrepreneurship Program (https://www.isc-sac.gc.ca/eng/1582037564226/1610797399865) for all Indigenous people in Canada. Other funding or business loans may be tied to specific regions, such as ones that TRICORP offers for those in Northwest B.C.[1]

Last, come with an open heart and mind. If you are encountering resistance to your ideas, have an honest conversation with yourself: Is this project the right one for this Nation? By being open to that possibility, only then can you engage in meaningful relationship-building and consultation.

For more suggestions on working ethically with Indigenous communities, review Working with Indigenous Communities Ethically (#chapter-working-with-indigenous-communities-ethically).

1. You can find out more information about these programs here: First Citizens Fund Business Loan Program (https://www2.gov.bc.ca/gov/content/governments/indigenous-people/economic-development/business-loan-program); TRICORP Business Development Loans (https://www.tricorp.ca/business-development-loans).

28.

End-of-Chapter Questions

End-of-Chapter Questions

1. What is Aboriginal title?
2. What is the relationship between the Numbered Treaties and Aboriginal title?
3. How is Aboriginal title established in court?
4. What must the Crown do if they want to infringe on Aboriginal title without consent?
5. What is the Duty to Consult?
6. Describe at least two difficulties either the Crown or Indigenous peoples have in complying with the Duty to Consult.

End-of-Chapter Scenario

Daniel works for community relations at a liquefied natural gas (LNG) company. His company is considering a project that will go through ten different Indigenous territories. It's still early days for the project, but he learned from his business law course that his company should be pursuing relationship-building with Indigenous communities early. Daniel comes to you asking for help.

1. What is the Crown's role in consultations with Indigenous peoples? How should Daniel coordinate with the Crown?
2. Should Daniel be consulting with hereditary or band leadership? Why?
3. What recommendations can you make to Daniel to help facilitate effective consultation?

IV

Conclusion

29.

Concluding Remarks

We wish to conclude this text by tying together Canada's history with that of two relevant UNDRIP articles.

Article 10

> Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return. (UN General Assembly, 2007)

This article may have the most heartbreaking rationale for inclusion in UNDRIP.

In the mid-1700s, pre–American Revolution, settlers engaged with Indigenous groups in bad-faith private dealings and later called upon their colonial governments to enforce their property claims. The Royal Proclamation of 1763 (pre–American Revolution) was issued by King George III in response to this situation. This document had the effect of reserving western lands for Indigenous groups, which settlers were unhappy about. Thirteen years after its release, the Royal Proclamation became one of the enumerated reasons for rebellion in Thomas Jefferson's Declaration of Independence (Paul, 2018).

In America, the nadir of this relationship was the forcible removal of Cherokee peoples, infamously dubbed the "Trail of Tears." The state of Georgia ignored the Supreme Court of the United States' ruling in *Worcester v. Georgia* (1832), which stated that Georgia could not impose its laws on Cherokee territory. President Andrew Jackson refused to enforce this ruling. In 1838, the Cherokee were forcibly removed from their territory: 12,000 people were marched nearly 1,300 kilometres, and of those people, 4,000 died on the journey (National Park Service, 2020).

In Canada, expansion west was marked not by private dealings by settlers, but by a series of treaties created in the mid-1800s called the Numbered Treaties, which were not without controversy. Many groups claim today that the Numbered Treaties were not a treaty for the sale of land, as the Canadian government argues, but simply a "right-of-way" agreement for the sharing of land.

These Numbered Treaties did not extend to most of British Columbia. Indigenous groups argue that these lands were never ceded to the Canadian government — and with good reason. The Royal Proclamation of 1763, which is still law, states that only the Crown has the authority to purchase lands from Indigenous groups. As most of the land was never purchased by any treaty, occupation is illegal.

Aside from the wrongful occupation of territory, there are modern instances of UNDRIP Article 10 being infringed in British Columbia. This includes forcible separation of children from their parents via the residential school system and the relocation in the 1950s of the Cheslatta T'En First Nation

(Windsor & Mcvey, 2005). Their territory was flooded to build Kenney Dam, a project which still powers the Rio Tinto aluminum smelter located in Kitimat, B.C. (Rio Tinto, 2010).

Article 19

> States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them. (UN General Assembly, 2007)

Although not the direct object of consideration by Canadian courts, the substantive content of Article 19 of UNDRIP has been contested for decades.

In 1984, the Gitxsan and Wet'suwet'en claimed 58,000 square kilometres of land in Northwest B.C., as they have been continuously occupying the territory since before recorded human history. Damages were sought for resources removed and territory taken by private interests (such as land ownership in communities like Smithers and Hazelton). This resource and territory extraction were done with no consultation by the Crown.

The territory and damages claim made its way through the courts until finally coming to a head 13 years later in the landmark 1997 Supreme Court of Canada decision of *Delgamuukw v. British Columbia*. There, the Supreme Court established the "Duty to Consult." This duty scales with the level of intrusion into the Indigenous group's territory. Further, the Supreme Court of Canada decision says, "In most cases, it will be significantly deeper than mere consultation. Some cases may even require the full consent of an aboriginal nation."

In 1983, a logging permit was granted on Tsilhqot'in territory in central British Columbia. No consultation with the Nation was done. In 2014, the Tsilhqot'in had their day in the Supreme Court of Canada in the case of *Tsilhqot'in Nation v. British Columbia*. The court declared that "British Columbia breached its duty to consult owed to the Tsilhqot'in." At the same time, the court also created a framework with which the Crown can override title to Aboriginal lands if a "compelling and substantial public purpose" exists.

This is not the end of the story. Despite the clear language in *Delgamuukw*, there has yet to be a single instance of a project requiring absolute consent from Indigenous groups, as the Crown always has the out of "justifying" their infringement. The authors believe that the ruling of Tsilhqot'in makes that declaration by any court increasingly unlikely. Further, the Supreme Court of Canada did not definitively decide anything related to Gitxsan and Wet'suwet'en territory. *Delgamuukw* was sent for a retrial — a process which has not yet been started. Even though this series of events is almost 40 years old, the Gitxsan and Wet'suwet'en still await their justice.

Conclusion

We believe there is reason for optimism. On the ground, funding has increased for projects at Coast Mountain College and other institutions to Indigenize our curriculum. This text is an outcome of such a project. In 2021, just before this text was published, the federal government increased funding to

implement the Truth and Reconciliation Commission's Calls to Action (APTN News, 2021). In recent years, more people have demonstrated the will to combat systemic racism and atone for the sins of our country's past so that our children may see a better world. Despite the tales of heartbreak, legal battles, and breaches of trust contained in this text, we would be remiss if the reader left feeling defeated. Rather, should these favourable macro trends continue and individuals do their part to carry out the Calls to Action, a better Canada can be built for Indigenous and non-Indigenous people alike.

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> The colours of the cover art are inspired by the Four Directions of the Medicine Wheel that is common to many Indigenous peoples of Turtle Island (red, yellow, black and white), along with a teal colour representing industry and government.
>
> The concentric lines denote lines of listening, understanding, communicating and collaborating.

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This page provides a record of edits and changes made to this book since its initial publication. Whenever edits or updates are made in the text, we provide a record and description of those changes here. If the change is minor, the version number increases by 0.01. If the edits involve substantial updates, the version number increases to the next full number.
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