

12. Reconciliation and Indigenous Rights and Title

A fundamental issue that remains largely outstanding in BC today is the reconciliation of pre-existing Aboriginal sovereignty with the assertion of sovereignty by provincial and federal governments (the Crown).

The fact that First Nations were here first and have inherent Indigenous Rights and Title must be reconciled with what the Crown asserts as its rights and powers.

Generally speaking, Indigenous Right and Title are about the First Nations' rights to occupy and use lands and resources in their traditional territories, including for economic benefit. They also include rights to determine their own lives, govern themselves, and to practice and continue their cultures, languages, and legal traditions.

In some parts of Canada, Indigenous Rights and Title were formally recognized through treaties, but the same did not happen in BC. Instead, decades of conflict and litigation occurred over land, resource use and governance powers. Few historic treaties were made, and modern treaty negotiations have been slow.

Early court cases recognized that First Nations had some form of rights. Then Section 35 of the Constitution Act, 1982, was enacted. It states that the “existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.”

Many cases were brought forward testing what this meant. Cases focussed on what are “ab- original rights” and what are the corresponding obligations or restrictions of the Crown.

Much common law (judge-made law) on the meaning of Section 35 has come from BC.

Many milestone court decisions arise from cases in BC, culminating in the historic Tsilhqot'in decision in 2014. This was the first time the Court made a declaration of Aboriginal Title over a specified area of land.

Court cases continue today, but the conflicts and legal arguments made are changing based on the evolution of the law and our understanding of Section 35.

The courts have confirmed that the purpose of Section 35 is “reconciliation” – that is, to reconcile the fact that First Nations were pre-existing societies with inherent rights and title, with the assertion of Crown title and jurisdiction. Reconciliation requires negotiation to agree on who owns what lands, and whose laws apply where.

First Nations in BC have always fought to have their Indigenous Rights and Title recognized and respected, and to reconcile what the federal and provincial governments assert as their jurisdiction. Recent First Nations' successes in the courts have pressured the governments to negotiate based on recognition of Indigenous Rights and Title, rather than continuing to deny their existence.

Today, First Nations communities and individuals are taking diverse paths on how best to protect and exercise their Indigenous Rights and Title. One means for achieving reconciliation is through the BC Treaty Process. A small number of First Nations have signed treaties, and some are participating in the process, but have made little progress. Some are finding ways to revitalize the treaty process. Other Nations choose not to participate in the BC Treaty Process.