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Lorne J Ternes Professional Corporation – 2018 IRWA

INDIGENOUS (ABORIGINAL) CONSULTATION

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CANADA

ABORIGINAL PAST AND PRESENT

THE SOURCE OF ABORIGINAL RIGHTS

✘ *Canada is a young nation with ancient roots. Manitoba Métis Federation Inc. Vs Canada (AG) – 2013 Supreme Court of Canada*

✘ ***Sublimis Deus – Papal Bull 1523***

Indians are truly men. They may and should, freely and legitimately enjoy their liberty, and the possession of their property. Nor should they in anyway be enslaved. Should the contrary happen it shall be null and of no effect



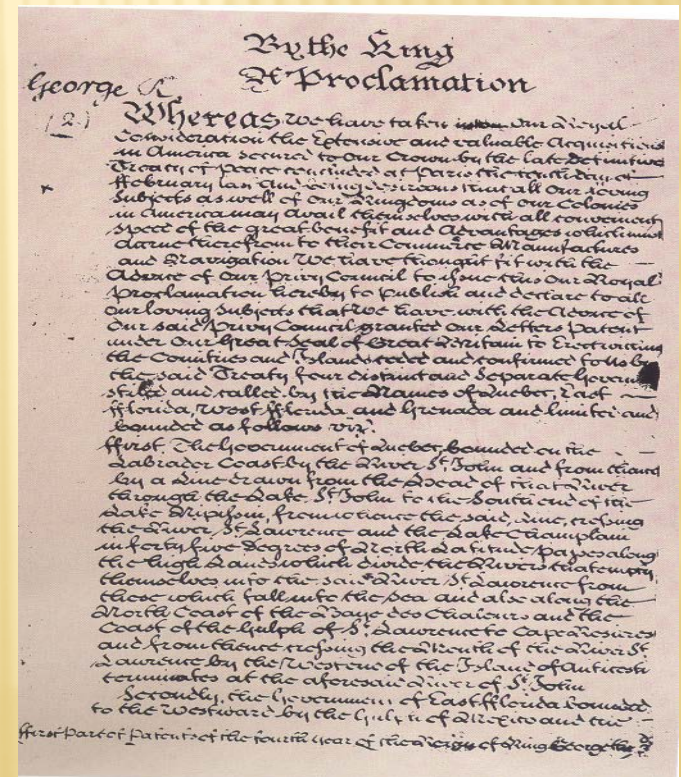
ABORIGINAL PAST AND PRESENT

THE ROYAL PROCLAMATION OF 1763

The theme that aboriginal people have rights that are recognized and enforced by the state was adopted by the British Crown and applied in the Royal Proclamation of 1763. This Proclamation is part of Canada's Constitution

✘ Set aside a huge tract of land in North America for the several Nations or Tribes of Indians with whom We are connected:

- ✘ Reserved lands for *Hunting Grounds*
- ✘ Grants, purchases, or settlements had be made through the Crown
- ✘ Permitted purchase of these lands only through the Crown
- ✘ License to trade with the Indians only through the Crown



ABORIGINAL RIGHTS CAN BE MODIFIED INTO TREATY RIGHTS

Aboriginal rights: Legal rights that some Aboriginal peoples of Canada hold as a result of their ancestors' long-standing use & occupancy of the land.

Calder vs. BC (AG) 1973 SCC
(Indigenous and Northern Affairs Canada)

Aboriginal Rights

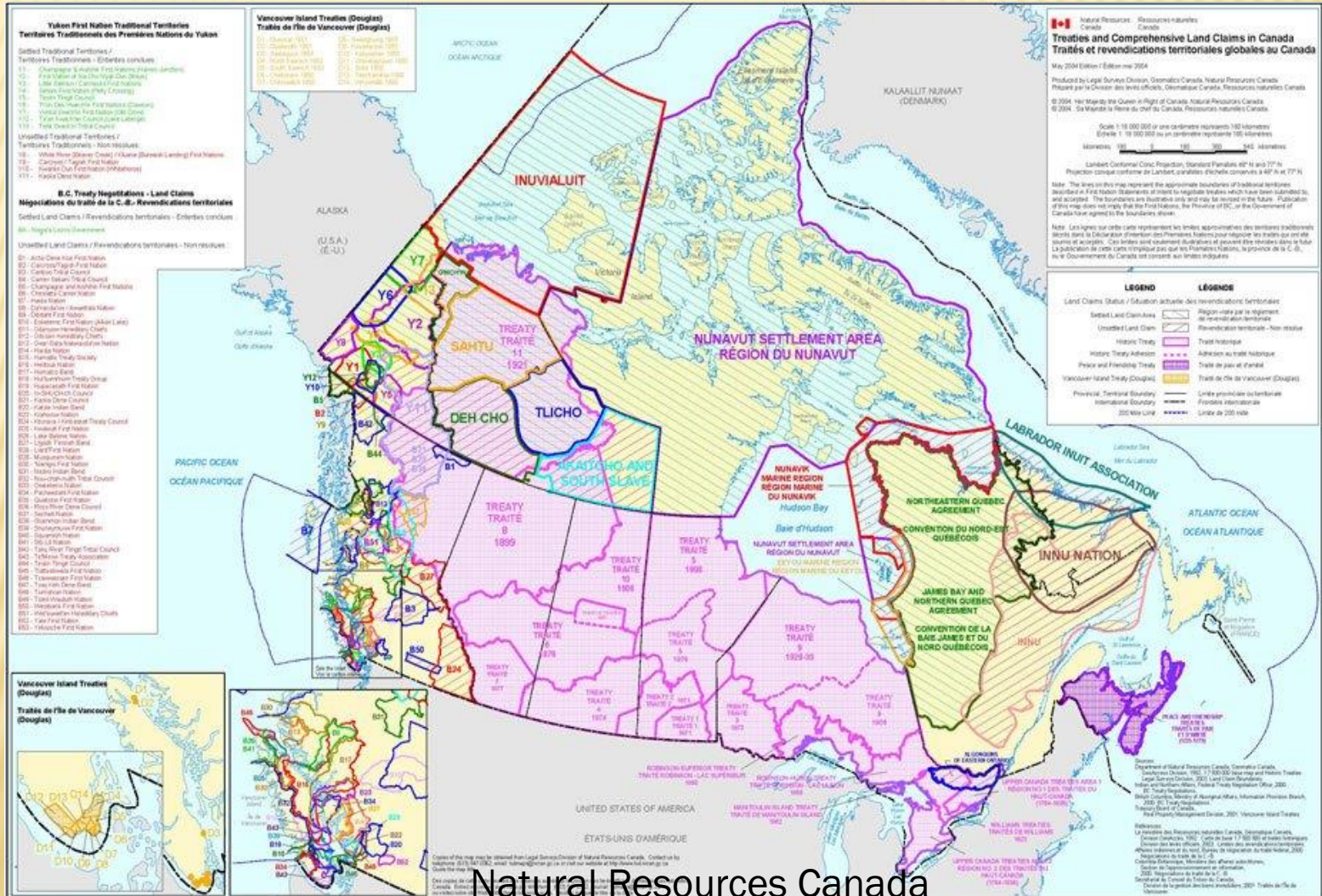
Treaty rights: Special rights to lands and entitlements that Indian people legally have as a result of treaties. (Alberta Indigenous Relations)

Treaty
Right...hunting,
fishing, trapping,
etc.



Cede, Release & Surrender

HISTORICAL & MODERN LAND CLAIMS PRECONFEDERATION TREATIES, HISTORICAL TREATIES, COMPREHENSIVE CLAIMS AND LANDS UNDER CLAIMS



CONSTITUTION ACT, 1982

× RIGHTS OF THE ABORIGINAL PEOPLES OF CANADA

- × 35 (1) *The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.*
- × (2) *In this Act, 'aboriginal peoples of Canada' includes the Indian, Inuit and Métis peoples of Canada.*
- × (3) *For greater certainty, in subsection (1) 'treaty rights' includes rights that now exist by way of land claims agreements or may be so acquired.*

× THESE ARE UNDEFINED RIGHTS

× * * * * *

× GENERAL

- × 52. (1) *The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.*

Rights are defined by negotiation or litigation



SUPREME COURT OF CANADA (1990)

SPARROW

Prove the Right & Infringement

Step 1:

Is there an existing aboriginal right?

Is the legislation or gov. action unreasonable?

Has the gov. caused undue hardship?

Have you been denied your preferred means of exercising the right?

The purpose of s. 35 of the *Constitution Act, 1982* is to reconcile Aboriginal prior occupation with the assertion of sovereignty of the Crown

Justify the Infringement

Step 2:

Is there a valid legislative objective?

If harvesting, do Indians have priority?

Mitigation?

If expropriation, adequate compensation?

Has there been appropriate **consultation**?



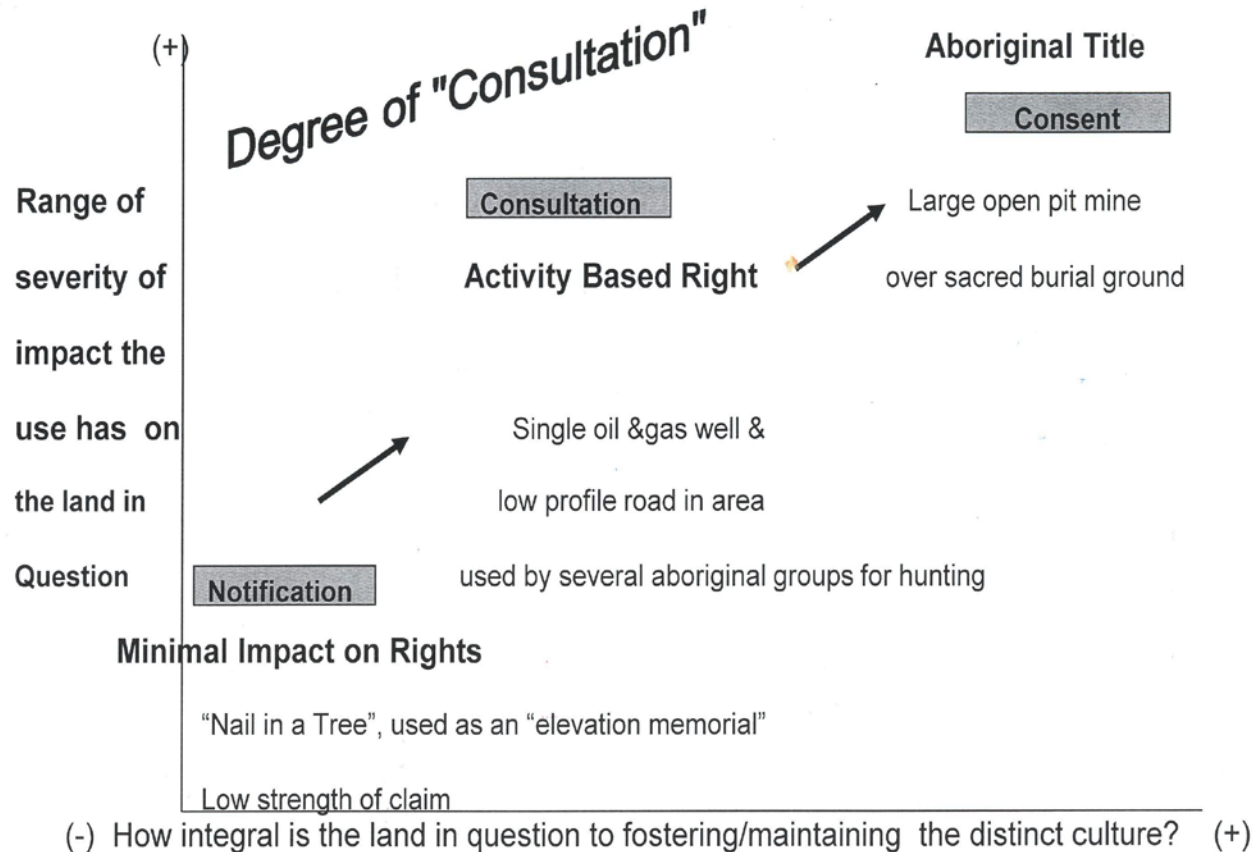
HONOUR OF THE CROWN

Charged under the BC fishing regulation



THE CALIBRATION TEST

1997 Delgamuukw Justification/Consultation Calibration in an Aboriginal Rights Context



PRINCIPLES

- ✘ S. 35 of the *Constitution Act, 1982* requires the Crown act with Honour towards aboriginal peoples (object is reconciliation - *Sparrow*). Any potential infringement of an asserted or established aboriginal or treaty right requires consultation with the affected peoples. Legal remedies such as injunctions, mandamus, quashing of authorities and damages are available to ensure potential rights and substantive are not infringed.
- ✘ The Crown must demonstrate reasonable responsiveness to satisfy the procedural and substantive duty.
- ✘ The duty to consult applies in both aboriginal and treaty rights.

PRINCIPLES

- ✘ The Crown must act with honour (demonstrate reconciliation) when exercising the treaty “taking up process”. (All “Alberta treaties” provide the right to take land up out of treaty for “development”.)
- ✘ The duty also applies towards Métis aboriginal rights bearing communities.
- ✘ The duty is held by the Crown but procedural elements may be delegated to industry.
- ✘ If the impact of the infringement cannot be mitigated reasonably through accommodation then the process moves to negotiation and compensation.
- ✘ There is no aboriginal veto, but satisfying the duty is a substantial challenge.

WHAT NEXT?

- ✘ The case law continues to develop at a furious pace and all players struggle with capacity and process
- ✘ Major projects in particular are susceptible to delays and cancellations
- ✘ Canada is also trying to apply many of the principles behind the articles of the United Nations Declaration of the Rights of Indigenous Peoples (UNDRIP). Application of these principles such as the “free, prior and informed consent” to Indigenous communities in the regulatory process, will continue to change the consultation landscape in fundamental ways