

WALKING TOGETHER

First Nations, Métis and Inuit Perspectives in Curriculum

Aboriginal & Treaty Rights **Aboriginal & Treaty Rights: A Personal Perspective**

by Sykes Powderface

Government of Alberta ■





ABORIGINAL AND TREATY RIGHTS: A PERSONAL PERSPECTIVE

By Sykes Powderface

ABORIGINAL AND TREATY RIGHTS: A PERSONAL PERSPECTIVE

By Sykes Powderface

Introduction

Aboriginal and Treaty Rights have been an ongoing issue between Aboriginal peoples of Canada and federal and provincial governments. The relationship has been strained to the point of litigation and court decisions. Arguments in the courts are based on two ways of understanding. One way is by the government and the other is by Aboriginal peoples. The main issue is Aboriginal rights and title to lands co-inhabited and enjoyed from time immemorial by the Aboriginal peoples. To support their arguments, governments use the idea of surrender of lands and a view of Aboriginal peoples as subjects or wards of the government who need to be legislated as were other nationalities under colonial rule. Aboriginal peoples based their arguments on “Indigenous Rights” of the Aboriginal peoples to continue their ancestral, traditional, cultural, sacred and spiritual connection to lands.

In addition to land rights, there are specific non-land related rights, such as education, service and program-oriented rights. Non-land related rights are dealt with politically, through existing related legislation. These issues are governed by federal and provincial government legislation, orders and policies. These are mostly administrative and program oriented services rights, provided by governments to Aboriginal peoples. In some cases the services are similar to services provided to all peoples.

Supreme Court rulings have given significant support for Aboriginal rights as the right for Aboriginal peoples to continue their historical, traditional, cultural and spiritual connections to lands they shared with other Aboriginal peoples of North America.

This discussion will focus on the issue of land-related rights to demonstrate the complexity of this issue. There are many factors that impact attempts to define and interpret the rights. These factors include

- what these rights are
- who the rights apply to
- who is responsible for implementation
- who has jurisdiction.

This is a personal perspective intended to highlight some key factors to give you a snapshot of the complexity of the subject. It is also a very sensitive matter, with many issues related to who, when, where, how and why. Those Aboriginal peoples affected have to be involved to bring awareness as to who the Aboriginal people in question are, and how the appropriate rights apply to them.



Existing Rights

After Canada repatriated the *Constitution Act (BNA Act, 1867)* in 1982, the Supreme Court of Canada ruled on existing rights. These are “**non-extinguished rights**” contrary to government’s definition of the word “**existing**.” This ruling supports the argument that Aboriginal peoples have the right to continue to exercise their rights and have access to their traditional and ancestral territories that they occupied and co-inhabited with other Aboriginal peoples of North America from time immemorial.

Regina v. Sparrow was the first major court decision in favour of Aboriginal peoples. In 1990, the Supreme Court ruled on the interpretation of the word “**existing**” in the *Constitution Act, 1982*.

Section 35(1) reads

- (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.

The Court found in reference to section 35(1) that

The term “existing” in s. 35(1) of the *Constitution Act, 1982*, makes it clear that the Aboriginal rights to which the section applies are those that were in existence when the *Constitution Act, 1982*, came into affect.

This ruling supports the arguments that Aboriginal and Treaty Rights are very much a reality. They are living rights and exercisable.

“Indian, Inuit and Métis peoples”

The second question is which Aboriginal peoples are entitled to existing rights and which level of government is responsible.

To have some insight and understanding of this question, we need to remember that there are three Aboriginal groups defined in section 35(2) of the *Constitution Act, 1982*, as the “Indian, Inuit and Métis.” These groups are set apart by legislation, governmental orders and policies. Rights issues and matters affect and impact each of them differently. As a result, each group is forced to deal with each issue or matter separately from the other groups as legislation, order, policy and government jurisdictions would dictate. This separation into three groups makes it a very complex matter, and Aboriginal people experience difficulties in working together jointly on some matters that affect their people on a daily basis.

Government relationships

Historically, government responsibilities are based on legislation that prescribes a relationship and responsibility. The *British North America Act, 1867*, states which level of government is responsible for Aboriginal peoples in the division of powers between federal and provincial governments. In section 91(24), the federal government has a distinct responsibility and “authority to legislate for. . . Indians and lands reserved for the Indians.”

Over the years this section has been the basis for government responsibilities for Indians.

ABORIGINAL AND TREATY RIGHTS: A PERSONAL PERSPECTIVE

By Sykes Powderface



Identity references in the BNA act initially labelled all three Aboriginal groups as “Indians.” This relationship has been the history of disputes over many years and continues as the ongoing issue in defining what are Aboriginal and treaty rights and who can exercise them.

Government obligations and responsibilities for Aboriginal peoples remain unclear. There is no easy way to deal with these issues other than the courts. This is why Aboriginal peoples find themselves challenging government interpretations, definitions and applications through courts.

Two Perceptions of Aboriginal Rights and Treaty Rights

The continuing argument is about whose understanding of the relationship to land, related to the Aboriginal and treaty rights, is right. There are two perceptions and understandings of this relationship. One perception is from the Aboriginal peoples’ point of view and understanding, and the other is from government perspectives through documented legal and policy interpretations.

Rather than create further confusion and misunderstanding, we will not even attempt to interpret or translate court decisions that have determined what are Aboriginal and treaty rights. Our intent is to bring awareness of the **existence of Aboriginal and treaty rights to lands and of the relationship between Aboriginal peoples and governments in the application of these rights.** These rights to lands will continue to be challenged through litigation at various levels of justice, including the international arena.

An important point is that Aboriginal and Treaty Rights are two separate rights that apply differently from one group to another or jointly depending on the matter at hand. These rights are not the same as one another.

Aboriginal rights are rights to lands that were exercised by Aboriginal people before colonial rule. Treaties confirm the existence of Aboriginal rights and the ability of those peoples who entered into treaties to negotiate and conclude treaties between and amongst other nations.

Treaty rights, in addition to lands, are rights included as trade gifts or commitments through a surrender process as found in treaty text. The Aboriginal peoples’ perception is the spirit and intent of the treaties based on the understanding of Indian peoples and their base of law for coexistence, peace and harmony with nature and mankind. These rights are those declared in the *Royal Proclamation, 1763*, and entrenched in section 25(a) of the *Constitution Act, 1982*, “. . . any rights and freedoms that have been recognized by the *Royal Proclamation* of October 7, 1763.”

Rights include the right to be sovereign as a nation to exercise their historical, traditional, cultural and spiritual systems and practices to the lands they occupied and co-inhabited with other Aboriginal peoples of North America from time immemorial.

The two perspectives are to highlight key points to demonstrate the subject is an unfinished task to determine what these rights are in terms of **purpose, intent, meaning and application.**

More importantly, how are these rights implemented, and by whom?



ABORIGINAL AND TREATY RIGHTS: A PERSONAL PERSPECTIVE

By Sykes Powderface



Government perception is based on these main points:

- In the *Constitution Act, 1867*, section 91, “parliament has the authority to legislate for . . . Indians and lands reserved for Indians.”
- In the text of the treaties, there was a “surrender” of lands to Her Majesty the Queen of England and Indians are Her subjects.
- The *Indian Act* prescribes administrative duties and responsibilities of the federal government.

Aboriginal perception is based on these main points:

- “Indigenous rights” exist for peoples who were here before colonial rule.
- Spirit and intent of the treaties is peace and harmony for cohabitation and coexistence.
- Court cases have ruled in favour of Aboriginal peoples.

The 1997, the Supreme Court ruled in *Delgamuukw v. British Columbia*. The decision clearly confirmed the existence of Aboriginal rights to lands occupied before British sovereignty in 1846. Continuity of occupation is an important factor. This ruling further defined Aboriginal rights to include Aboriginal title. Title is established on the basis that the land was traditionally used and occupied.

In the ruling, Aboriginal title rights were explained:

Moreover, when dealing with a generalized claim over vast tracts of land, accommodation is not a simple matter of asking whether licenses have been fairly allocated in one industry, or whether conservation measures have been properly implemented for a specific resource. Rather, the question of accommodation of “aboriginal title” is much broader than this. Certainly, one aspect of accommodation in this context entails notifying and consulting aboriginal peoples with respect to the development of the affected territory. Another aspect of accommodation is fair compensation. More specifically, in a situation of expropriation, one asks whether fair compensation is available to the aboriginal peoples (see *Sparrow. Supra*, p.1119) Indeed the treatment of “Aboriginal Title” as a compensable right can be traced back to the *Royal Proclamation, 1763*. (Delgamuukw, p. 203; LaForest, p. 11)

These are some of the factors that must be researched to gain greater insight into the constitutional recognition and affirmation of Aboriginal and Treaty Rights.

Background Information

The following are background factors not discussed earlier, but these factors play a role in the history of this ongoing dispute about Aboriginal and Treaty Rights. For protocol, respect and preferences by Aboriginal peoples, we will refer to them as “First Nations” to support that they are the First people of North America.

There are three groups that share the definition of “Aboriginal Peoples.” Each of them is set apart by government legislation, order and policies that prescribes responsibilities of governments under varying jurisdictions.



ABORIGINAL AND TREATY RIGHTS: A PERSONAL PERSPECTIVE

By Sykes Powderface



“Indians”

As defined by the *Indian Act* in section 2(1), “Indian” means “a person who pursuant to this Act is registered as an Indian or entitled to be registered as an Indian.”

- Indian is further defined as Status and Non-Status for the purposes of government policies, programs and administrative responsibilities.
- Not all Status Indians are covered by a treaty. There are approximately 600 Status Chiefs in Canada represented by Assembly of First Nations (AFN). Approximately 200 Chiefs and their members are covered by treaties entered into with Her Majesty the Queen of England since the 15th century.
- Approximately 400 are non-treaty Chiefs along with their members. These Chiefs and members are either negotiating treaty, still claiming treaty entitlement or negotiating land claim.
- Non-status Indians are those who are entitled to be Status Indians by way of land claims and the *Indian Act*.
- Each First Nation has their own distinct language that sets them apart from other First Nations, unless they belong to the same linguistic grouping, such as Cree, Blackfoot or Mohawk.

Métis

Métis are people of part Aboriginal descent and part non-Aboriginal who identify themselves as Métis.

- By legislation, Métis are a provincial responsibility. Some Métis reside on lands known as colonies.
- Métis do not have treaties like the Status treaty Indians or other Non-Status Indians who acquired lands from land claims and treaty entitlement agreements.
- Métis have settlement agreements with the provincial government. Alberta is the only provincial government with settlement agreements.
- Métis also have agreements with other levels of government.
- Métis people predominately speak Cree as their base language or a mixture of French and Cree (Michif).

Inuit

Inuit live on lands are in Northwest Territories and north of 60° latitude.

- Inuit are totally a federal government responsibility.
- Inuit are not covered by the *Indian Act*.
- Like other Aboriginal peoples, Inuit speak a number of different dialects in their language.



A Declaration of First Nations

Finally, the foundation of the Aboriginal peoples' perception of rights is a shared view of distinct collective rights given by the Creator to continue to be who they are and to continue to exercise their indigenous rights to lands as they have from time immemorial. These continuing rights are stated in *A Declaration of First Nations*, signed by the National Indian Brotherhood in 1981.

We the Original Peoples of this land know the Creator put us here.

The Creator gave us laws that govern all our relationships to live in harmony with nature and mankind.

The Laws of the Creator defined our rights and responsibilities.

The Creator gave us our spiritual beliefs, our languages, our culture, and a place on Mother Earth, which provides us with all our needs.

We have maintained our Freedom, our Languages, and our Traditions from time immemorial.

We continue to exercise the rights and fulfil the responsibilities and obligations given to us by the Creator for the Land upon which we were placed.

The Creator has given us the rights to govern ourselves and the right to self-determination.

The rights and responsibilities given to us by the Creator cannot be altered or taken away by any other Nation.

This declaration was made and signed by the Status Indians, treaty and non-treaty First Nations. It was the shared view by the Aboriginal Peoples of Canada as collective rights. These rights are “existing” and guaranteed in the rulings by the Supreme Court of Canada discussed earlier in this paper. In *Regina v. Sparrow*, there was a “guarantee to existing aboriginal rights applying to rights which had not been extinguished.”

Treaties

The second part of *A Declaration of First Nations* (Treaty and Aboriginal Rights Principles) on treaties is entrenched in section 25 of the *Constitution Act, 1982*.

The guarantee in this Charter of certain rights and freedoms shall not be construed so as abrogate or derogate from any Aboriginal, treaty or other rights or freedoms that pertain to the Aboriginal peoples of Canada including, any rights or freedoms that have been recognized by the *Royal Proclamation* of October 7, 1763, and any rights and freedoms that now exist by way of land claims agreements or may be so acquired.

ABORIGINAL AND TREATY RIGHTS: A PERSONAL PERSPECTIVE

By Sykes Powderface



There are two views of the meaning and understanding of the treaties.

Government views

These views are based on the treaty text, which indicates surrender to Her Majesty the Queen and Indians are Her subjects. This text is from Treaty No. 7:

hereinafter more fully described and defined, do hereby cede, release, surrender, and yield up to the Government of Canada for Her Majesty the Queen and her successors for ever, all their rights, titles, and privileges whatsoever to the lands.

First Nations views

First Nations views are that the “Spirit and Intent of the Treaties” as peace treaties was negotiated according to their law as declared in *A Declaration of First Nations*, which is “to live in harmony with nature and mankind.”

The process of treaty making is nothing new to Treaty First Nations. Treaties were concluded for coexistence, peace and harmony. This was a way of establishing relationships with other nations. The significance and meaning of treaties is visually expressed and explained in the Two Row Wampum belt, which was a part of treaty negotiations documents between the Mohawk Nations and the Dutch.

The background of the white wampum shall represent a river and the two parallel rows of purple wampum shall represent two vessels travelling upon the river. It is duly recognized that the river is large enough for the two vessels to travel down together. In one vessel shall be found the Kanien’kehaka, and in the other vessel the Dutch. Each vessel shall carry the laws, traditions, customs, languages and spiritual beliefs of each nation: in essence, all that makes a people who they are.

This understanding of establishing relationships paved the way for other treaties between First Nations and Her Majesty the Queen of England as the railroads moved westward. Canada had to cross lands occupied by the indigenous peoples who are referred to as “Nations” in the *Royal Proclamation, 1763*, which was entrenched in the *Constitution Act, 1982*.

In this paper we discussed the two most significant Supreme Court of Canada rulings (*Regina v. Sparrow* and *Delgamuukw v. British Columbia*). These decisions favour Aboriginal peoples’ rights to continue their ancestral territorial connections to lands they occupied from time immemorial and that continue as “existing rights.”

This is a snapshot of Aboriginal and Treaty Rights and highlights of how complex the subject is and how difficult it is to try to explain what Aboriginal and Treaty Rights are in a nutshell. The reality is **how, when, where and why** certain rights would apply to any one of the Aboriginal peoples dealing with any given matter affecting them will continue, yet for some time.

Aboriginal and Treaty Rights are ongoing issues between Aboriginal Peoples and governments. These rights will continue to be challenged and defended in courts.



**ABORIGINAL AND TREATY RIGHTS:
A PERSONAL PERSPECTIVE**

By Sykes Powderface



Walking Together

(Note: Additional supporting document of interest to the Aboriginal peoples on the subject, purposely not referred to, is the UN Declaration on the Rights of Indigenous Peoples, adopted September 13, 2007.)

