



CONTINUING LEGAL EDUCATION: ABORIGINAL LAW CONFERENCE 2015

“Perspectives and Best Practices in Aboriginal Law”

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Presentation Outline

This presentation provides a political perspective with the key theme, *what should we be doing to advance reconciliation?*

The presentation will canvass the following areas:

- Part 1 – Context
- Part 2 – Advancing Reconciliation
- Part 3 – Moving Forward (In pursuit of solutions)
- Part 4 - Concluding Thoughts



Part 1 - Context

- In numerous decisions Canadian courts have reminded us that the fundamental objective of the modern law of aboriginal and treaty rights is the reconciliation of Aboriginal peoples and non-aboriginal peoples and their respective claims, interests and ambitions (*Mikisew Cree*, para. 1)
- In reviewing case law, standard questions naturally arise: What does the law require? What point of law be pulled from this case to build an argument? While these questions are typical starting points for analysis, such a narrow focus may miss the mark in bringing us down the path of reconciliation.



Part 1 - Context

- In review of cases, we have seen decades of legal strategy advanced by Canada and British Columbia grounded in the denial of Aboriginal Peoples, Title, jurisdiction, and laws. Emanations of denial has appeared in may forms:
 - a. Beginning as the doctrine of discovery;
 - b. Later expressed as extinguishment: if Aboriginal Title existed it had been extinguished by the actions of the Crown (rejected in *Delgamuukw*);
 - c. Irrelevant & Small Spots: re-branded by the Crown as irrelevant until proven through court declaration (rejected in *Haida & Saik'uz First Nation and Stelat'en First Nation v. Rio Tinto Alcan Inc.*). Further, if it existed it was limited to small spots and de facto irrelevant (rejected in *Tsilhqot'in*).



Part 1 – Context cont.,

- Ultimately, Aboriginal Title and Rights are not contingent on recognition by the Crown. First Nations have actively sought reconciliation through a number of solutions grounded in political, legal and economic mechanisms.
- Efforts have resulted in a vast body of decisions affirming Aboriginal title and rights, yet key legal principles are frequently minimized or ignored by the Crown in negotiations, law/regulation/policy development.
- As we review and discuss case law, I ask that we broaden our scope of inquiry and consider another important question: ***what should we be doing in response to this court decision in order to advance reconciliation?***



Part 2 – Advancing Reconciliation

- At its core, reconciliation requires that all Canadians work toward building new forms of understandings across cultures, societies, new patterns of relationships and demonstrating respect for one another. Further, it is incumbent upon each of us to call on the federal and provincial governments to work toward similar efforts (*See: TRC Report, “Honouring the Truth, Reconciling for the Future Summary of the Final Report of the Truth and Reconciliation Commission of Canada”*).
- Advancing reconciliation requires that Canada and BC discontinue the practice of purporting to engage in negotiations based on the spirit of reconciliation, while advancing adversarial, “denial-based” arguments in litigation, as this is inconsistent with reconciliation.



Part 2 – Advancing Reconciliation cont.,

- Writing for the majority in *Haida*, McLachlin C.J. articulated that during the course of negotiations the Crown is required to adjust its conduct to reflect a yet unresolved Aboriginal claims:

“The Crown, acting honourably, cannot cavalierly run roughshod over Aboriginal interests where claims affecting these interests are being seriously pursued in the process of...negotiation and proof. It ***must respect these potential, but yet unproven, interests***. The Crown is not rendered impotent. It may continue to manage the resource...pending claims resolution... To unilaterally exploit a claimed resource during the process of proving and resolving the Aboriginal claim to that resource, may be to deprive the Aboriginal claimants of some or all of the benefit of the resource...” (emphasis added)



Part 3 – Moving Forward

In pursuit of solutions:

- Most recently we have seen in the *Saik'uz First Nation and Stellat'en First Nation v. Rio Tinto Alcan Inc.*, the court clearly confirmed that Aboriginal Title and Rights exist before a declaration of title or recognition by way of agreement.
- In seeking to be responsive to decisions, to be collaborative and with a desire to contribute to the economic well-being of all Canadians, the following changes are essential to achieving the reconciliation that we are all seeking:
 - i. In light of recent court decisions, it is evident that any land or resource decision is best made in the context of presuming the existence of Aboriginal Title and Rights and acting accordingly. This means working with First Nations as land and resource owners and seeking consent.



Part 3 – Moving Forward cont.,

In pursuit of solutions:

- ii. The implications of key court decisions require that we move beyond narrowly interpreted legal obligations and into genuine collaboration and partnership.

- iii. Failure to contemplate the existence of Aboriginal Title in meaningful ways has the potential to create economic uncertainty and unnecessarily places projects at risk and introduces the avoidable potential for damages owing.



Part 3 – Moving Forward cont.,

In pursuit of solutions:

- **iv.** At minimum, Crown negotiation mandates/laws/regulations/policies must be aligned with obligations under Canadian law (e.g. consistent with spirit and intent of section 35 of the *Constitution Act, 1982*).
- **v.** Further, encourage alignment with key international standards, laws and instruments regarding Indigenous rights (e.g. United Nations Declaration on the Rights of Indigenous Peoples and ILO Convention No. 169 - Indigenous and Tribal Peoples Convention, 1989)



Part 4: Concluding Thoughts

- Canadian courts have consistently held that Aboriginal perspectives resonate and have meaning as vehicles for a just reconciliation and that section 35 of the Constitution is directed at effecting social, political and economic change. Further, the courts have explicitly cautioned about the legal perils of Crown indifference and lack of respect for the concerns and perspectives of Aboriginal Peoples. Such a mindset is irreconcilable with the objective of reconciliation.
- As First Nations work with the Crown in processes of reconciliation, it is our collective responsibility as Canadians and as lawyers with the skills and ability to support First Nations in achieving that important aim in a timely, efficient and effective manner.



Mussi Cho (Thank you)

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