INDIGENOUS RIGHTS *in One Minute*

What You Need to Know to Talk Reconciliation

Bruce McIvor

Also by Bruce McIvor

Standoff: Why Reconciliation Fails Indigenous People and How to Fix It

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The Top 50 Aboriginal Law Decisions and Why They Are Important

Preface

This book is not intended for lawyers. It's meant for non-lawyers interested in Canada's commitment to reconciliation with Indigenous Peoples, and how to make it a reality. I have done my best to ensure the entries are accurate, but have no pretensions of being impartial. There will be lawyers, academics and judges who disagree with my editorial comments—fair enough.

The fact that informed, reasonable people have different perspectives on what court decisions mean, as well as those decisions' shortcomings and strengths, underscores the important point that law is not an absolute truth that only judges may generously explain to the rest of us.

The law is alive and constantly changing—sometimes subtly, sometimes unexpectedly quickly. It has a history. It reflects the biases, prejudices and particular worldviews of the judges who make it—many of whom have long ago made the journey to the place of no return. The law expresses society's vision and its shortsightedness, its generosity and its meanness, its fears and its hopes for a better future.

Members of the legal profession are responsible for not only explaining and demystifying the law to improve access to justice, but just as importantly, for holding lawyers, judges, politicians and government officials to account, so that the law, both in its application and its evolution, supports the bringing into existence of a better tomorrow for Indigenous people in Canada. To the best of my abilities, this book is a small contribution to that honourable undertaking.

Aboriginal law (not to be confused with Indigenous law—see page 32) is a wide and ever-growing area of Canadian law. This book does not attempt to cover it all. If you're looking for details about the law surrounding the Indian Act, such as elections and registration, you won't find the answers here. Instead, this book seeks to explain the law on the constitutional protection for Aboriginal rights and treaty rights, against federal and provincial interference with these rights.

The book is divided into two sections. The first includes short, readable answers to the questions I'm most often asked about Indigenous rights. The questions come from my nearly thirty years of working for First Nations, the courses I've taught at the Peter A. Allard School of Law at the University of British Columbia and the Haida Gwaii Institute, and the dozens of workshops I've conducted for First Nations and non-Indigenous organizations across Canada. The format is one-sentence answers followed by longer explanations. I've done my best to limit each explanation to what most people can read in a minute. The second section follows a similar format. It includes concise explanations—from my perspective—of the leading court decisions in Aboriginal law and why they are important.

Understanding the role of Canadian law in colonization starts with understanding the language it uses. Some of the terminology in this book will be jarring for many readers, e.g. "Who is an Indian?" I use these words, including "Aboriginal," in their legal context, not because I accept or endorse them as acceptable categories or descriptors. "Indigenous People" is another way to refer to an Indigenous Nation. "Indigenous people" refers to individuals. Keywords are set in boldface and definitions can be found in the Glossary at the back of the book.

Whether you're completely new to Indigenous rights, have a basic understanding, want a refresher on key principles or are hoping to win an argument with a friend, family member or co-worker, I hope you find *Indigenous Rights in One Minute* useful and informative. Most of all, I hope you find it simple and easy to read.

Bruce McIvor
Vancouver
January 2025

What Is the Difference Between Aboriginal Rights and Indigenous Rights?

Indigenous rights are inherent rights derived from being a member of an Indigenous Nation; Aboriginal rights are practices or activities Canadian courts have decided are integral to what makes Indigenous people uniquely "Aboriginal."

Aboriginal rights are not Indigenous rights. Aboriginal rights are a creation of the colonizer's legal system based on their laws. They are difficult to prove and limited in scope. Inherent rights are the rights of Indigenous people based on their particular nation's laws.

Section 35 of the constitution is not the source of Aboriginal rights. Aboriginal rights were part of Canadian law long before section 35 of the Constitution Act. The existence of Aboriginal rights in Canadian law is based on the fact that before colonizers arrived, Indigenous Peoples were already present, occupying their lands (see "Why Is the *Calder* Decision Important?"). The effect of section 35 was to provide constitutional protection to Aboriginal rights in existence when the constitution came into effect in April 1982.

In 1982 the intention was to hold a subsequent conference to decide what Aboriginal rights were protected by section 35. Because this never happened, it was left to the Supreme Court to decide the purpose of section 35 and how to identify Aboriginal rights. The Court decided Aboriginal rights are based on Indigenous practices essential in making people "Aboriginal" and uncontaminated by European influences

(see "Why Is the *Sparrow* Decision Important?" and "Why Is the *Van der Peet* Decision Important?").

Aboriginal rights are not part of the Charter of Rights and Freedoms and so are not subject to the notwithstanding clause. The charter protects individual rights from interference by government, e.g. freedom of speech. Section 35 Aboriginal rights protect the communal rights of "Aboriginal people."

Aboriginal rights in existence in 1982 cannot be formally extinguished by federal or provincial governments. But, the Court decided Aboriginal rights are not absolute—they can be infringed by the Crown for a wide range of purposes (see "Why Is the *Delgamuukw* Decision Important?"). The constitutional protection against extinguishment is not as reassuring as many would assume because for all intents and purposes infringement can equal extinguishment.

What Rights Are Guaranteed by Treaty?

Treaty rights include written and oral promises, any rights necessary to exercise a treaty right and the right to use modern-day technology.

Governments often take an overly narrow view of treaty rights by focussing on the exact wording in the written document. In so doing, they ignore the courts' treaty interpretation principles and minimize the promises made to Indigenous people.

Treaties between the Crown and First Nations were oral agreements. Identifying treaty rights requires an understanding of what was agreed to by both parties in their face-to-face meetings. The written document does not necessarily represent the oral agreement. It reflects what the Crown may have intended or hoped to achieve as part of the treaty negotiations. It often contains technical terms that either were not explained to First Nations or were most likely not understood in the Western European legal sense as they are understood by modern-day judges. The so-called "**cede, release and surrender**" clauses are a prime example.

Identifying treaty rights requires analyzing the record, written and oral, that explains each side's objectives entering into treaty negotiations. Having identified objectives, it is necessary, as best as possible, to identify the treaty promises made during negotiations. These promises should then be compared to the written document. How do the terms of the written document compare to the promises made or likely made during the oral negotiations? Oral promises may not have been recorded in the written document, nonetheless, they are still enforceable treaty rights. Given that the document was written by and in the language of the Crown, a healthy skepticism should be applied to terms in the written document adverse to the interest of First Nations.

Despite sustained efforts by federal and provincial governments to insist on a narrow interpretation of treaty rights, the courts have repeatedly concluded they are broad and inclusive. For example: hunting rights include the right to travel with a gun and ammunition (see "Why Is the *Simon* Decision Important?"); harvesting rights include the right of access to the harvesting area (see "Why Are the *Adams* and *Côté* Decisions Important?") and the right to build a hunting cabin (see "Why Is the *Sundown* Decision Important?").

Treaty rights are not frozen in time. Although they may have been guaranteed over a hundred years ago, Indigenous people can exercise them today by relying on modern technology. For example, treaties from the 1850s on Vancouver Island guaranteed the right to hunt at night. At the time, Indigenous people hunted at night with torch lamps. In the 2006 *Morris* decision, the Supreme Court confirmed that a modern-day expression of the treaty right includes the use of rifles and high-powered lights.

Why Is the Duty to Consult Inadequate?

The duty to consult is inadequate because it is based on denial.

Clients and students are often surprised I'm not a fan of the duty to consult. While it is definitely better than what preceded it (uphill attempts to convince a court to grant an injunction) and has undoubtedly established the parameters for many negotiated agreements, ultimately it is premised on the denial of Indigenous rights.

For the so-called historical treaties, First Nations are left with the duty to consult because the Crown denies they retained decision-making authority over their lands when they entered treaty. Instead, the Crown takes the position that treaty First Nations surrendered the right to decide how their lands are used. For First Nations without treaties, the duty to consult is based on the denial of all their rights and the assumption that all decision-making lies with the Crown.

Resting on a foundation of denial, the duty to consult entitles Indigenous people to no more than a process. As the courts have endlessly repeated, First Nations don't have a veto and the Crown is not obligated to agree to anything. Unless the consultation process is wholly misguided, First Nations are obligated to participate. If they don't, companies and the Crown argue in court that their unwillingness to engage "frustrated" consultation.

The handful of First Nations able to cobble together enough resources to challenge a Crown decision in court face a difficult battle. Governments and companies convince judges to only review the record created as part of the consultation process—context and the Indigenous perspective are rarely considered. The consultation process needs to be no more than adequate. The government decision-maker is granted a

wide degree of deference. Their decision only needs to fall somewhere on the spectrum of a reasonable outcome, i.e. it will pass muster as long as it's not obviously groundless.

If reconciliation is going to be about substance instead of process, it needs to extend beyond the duty to consult. It needs to begin with recognition, including recognizing First Nations', both treaty and non-treaty, decision-making authority.

What Is "Land Back"?

Land Back is about recognizing Indigenous Peoples' inherent authority over their lands.

The **Land Back** movement requires Canadians to recognize the fundamental lie at the basis of the Canadian state—the lie that colonizers have simply claimed Indigenous land as their own and relegated Indigenous people to making a claim for their own land. Land Back is also about forging new relationships between Indigenous Nations and the Crown that create space for Indigenous people to exercise their inherent rights and responsibilities to make decisions about their lands and benefit from them.

It is important to understand what Land Back isn't. Land Back isn't about using established legal mechanisms based on the assumption of Crown sovereignty. For example, adding land to Indian Act reserves isn't Land Back. Additions to reserves, while important for individual First Nations, are based on an acceptance of Canada's claim to Indigenous land. When lands are added to reserves, legally they are owned by the federal government for the use and benefit of an Indian Act band of "Indians." This isn't Land Back.

Land Back also isn't about transferring land through modern-day treaties. The entire premise of Canada's comprehensive claims process is contrary to Land Back because it is based on the assumption that colonizers have a legitimate claim to Indigenous land and Indigenous Nations must accept limited rights over a small percentage of their territory in exchange for surrendering their rights to the majority of their territory.

Aboriginal title also isn't about Land Back. Aboriginal title is an interest in land created by Canadian courts that denies Indigenous People's inherent rights and responsibilities. It is based on essentializing Indigenous people, has significant limits and can be infringed, i.e. extinguished, by the Crown, for a multitude of purposes (see "What Is Aboriginal title?").

Land Back is about rejecting the lie of the Doctrine of Discovery. It is about accepting that Indigenous Nations have law-making authority over their lands. Land Back is about negotiating Crown-Indigenous agreements that establish a relationship that recognizes and puts into effect this reality.

Essential and concise answers to the top questions Canadians ask about truth and reconciliation, from leading Indigenous rights lawyer Bruce McIvor.

During his nearly three decades advocating for Indigenous rights and teaching Aboriginal law, Bruce McIvor has recorded the fundamental questions that Canadians from all corners of society have asked to advance reconciliation.

In expertly succinct segments, McIvor breaks down the most important topics about Indigenous rights today:

- **BASICS** Why do Indigenous People have special rights?
- **RIGHTS** Who holds Indigenous rights and why?
- **TREATIES** What are treaties and how are they infringed?
- **OBLIGATIONS** What legal duties does Canada owe Indigenous People?
- **RECONCILIATION** How does the current model of reconciliation perpetuate colonialism?
- **TOP ABORIGINAL LAW DECISIONS** How have they impacted Aboriginal title and rights, treaty rights, fiduciary duty and Métis rights?
- **EMERGING ISSUES** How is the law evolving to shape the future of self-government agreements and collective rights?

Drawing on his experience as an advocate for First Nations in courtrooms and at negotiation tables across the country, McIvor reveals why reconciliation as envisioned by the courts and Canadian governments frustrates Indigenous people—and what needs to change.

"If ever there was a book that needed to be in every school, library, and bookshop in Canada, it's *Indigenous Rights in One Minute*. Bruce McIvor's ability to make the information accessible to a broad, non-legal audience will help dispel myths, clarify misunderstandings, and give Canadians the tools they need to help advance reconciliation."

—**DR. PAMELA PALMATER**, author of *Warrior Life: Indigenous Resistance and Resurgence*

"According to Treaty Elders the word for 'truth' in nêhiyawêwin is tâpwêwin, which means 'speaking with precision and accuracy.' While many legal texts are accurate, they lack Bruce McIvor's precise understanding of what Indigenous peoples need to know about Indigenous rights. This book is tâpwêwin."

—**DR. KATHY WALKER**, Treaty Commissioner, Saskatchewan

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