



Aboriginal Empowerment

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1. Introduction

In his *First Nations? Second Thoughts*, historian Tom Flanagan (2000) complains about the growing influence of an “aboriginal orthodoxy.” His complaints indicate that aboriginal people have gained some power over their homes and their traditional territories. Such increases in the control of their lives and the lands they used to or continue to utilize can be defined as “aboriginal empowerment.” Flanagan is upset about many things, particularly that courts recognize a need to uphold the “Honour of the Crown,” and reinterpret treaties. He is also bothered by the Canadian Royal Commission on Aboriginal Peoples (1996). Since Flanagan is an advisor to Prime Minister Stephen Harper, perhaps the trend he identifies and objects to will be reversed. This paper first reviews the sources of aboriginal empowerment in the last 40 years, particularly since the enactment of Section 35(1) of the Constitution Act of 1982. It then offers modest projections of the trends that can be observed.

In seeking to increase their influence over their own lives, aboriginal peoples have pursued a number of strategies: demonstrations, blockades, litigation, engagement with neighbors, entrance into comanagement agreements, participation in land use planning, participation in environmental assessment, participation in private and social enterprises, reorganization of their own governments, and signing modern treaties or agreements. Each band, tribal organization, regional organization, and national organization pursues its own combination of these strategies.

The impact of aboriginal empowerment on forestry activities derives from profound value differences between dominant values in Canadian society and those of most aboriginal peoples. The indigenous people see themselves responsible for caring for the land of their ancestors, whether or not they have control of that land now. They used to and still do obtain a variety of goods, services, and other values from the land. Their oral histories provide long memories of the land and their relationship to it. While the impact of colonial domination has in some cases weakened the connection to the land, the desire for that connection remains an important force. Often it provides an operational guide to negotiations: accept measures that increase connection to the land, oppose measures that decrease it. In economic terms, their desire is to pursue some form of strong sustainability: maintenance of the inherent capacity of the land to support life as it was, denial of destruction of natural capital for transformation into other forms of capital. “Life as it was” includes support of human populations, not locking away land into reserves without human responsibility.



2. A Look Back

After World War II, indigenous peoples both in Canada and in the United States organized to pursue a reversal of policies that had preceded the war and continued after it. National and regional organizations began to mobilize, helped by a variety of factors. One was an international climate that discouraged outright injustices, such as criminalizing the act of pursuing land claims in court. Another was increased understanding among indigenous peoples of political organizing and resistance. They organized to resist proposed national policies in new ways. They utilized litigation to considerable success. They also learned how to manage their messages through the media, often in the face of considerable media bias.

Through this period, policy changes in Canada seemed to lag behind those in the United States by a few years. In the USA, proposed termination of reservations was faced and defeated in the 1950s-1970s. A similar policy wasn't proposed in Canada until Pierre Trudeau's White Paper, 1969, which generated a similar storm of protest from aboriginal leadership. President Nixon started the self-determination policy in the USA in 1972. Ten years later, in 1982, Canada amended its Constitution with section 35(1), which jumped beyond laws in the United States to give Canadian courts the last word in interpretation of legislative action: "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed."

The question of whether section 35(1) has been interpreted by the Canadian courts to support indigenous rights as fully as it might is highly contested (Walkem and Bruce 2003). Although the important land claims case implicitly recognizing prior aboriginal title, *Calder*, occurred in 1973, many of the subsequent court victories occurred after 1982. The *Meares Island* case in 1984 actually halted timber harvest in Clayoquot Sound. But important cases like *Delgamuukw v. the Queen* (1997) and *Haida Nation v. British Columbia* (2004) were ambiguous. *Delgamuukw* contained strong definitions of Aboriginal Title; but it also described conditions of "justified infringement" of such title that clearly made indigenous land rights more vulnerable to government action than the conditions of private property. The *Haida Nation* case declared that Haida potential interests in land through aboriginal title required consultation and accommodation, including participation in strategic land use planning. Yet no injunction halting timber harvest accompanied the decision, and the Court emphasized that the Haida would not be able to exercise a "veto" over land use decisions of the Province. (John Burrows, reporting on a visit by the Trickster to British Columbia, reports the following Trickster's opinion of the Supreme Court: "He likes their style, even though it sometimes makes him jealous." (Burrows 2002: 104)) A subsequent blockade by the Haida led to negotiations with British Columbia over land use policies.

The ambiguity of the decisions marked a distinct change from prior legal theories, since after 1982 some support for aboriginal rights began to occur in the decisions. Policies of total denial of prior land claims, such as followed by British Columbia in its arguments,



were rejected. These victories appeared to create uncertainty, opening room for some recognition of indigenous rights. Legal cases in the East and Center of Canada contained similar hints that the winds of legal decisions might be changing to be more favorable to aboriginal claims.

Recently, British Columbia has appeared to make a sharp break with past policies, declaring a desire to develop a “New Relationship” with the indigenous peoples of the province. The full implications of this new policy are not yet clear. The adoption of the New Relationship was preceded by the development of a unity alliance among all of the aboriginal regional organizations in BC. While the Union of BC Indian Chiefs, the First Nations Summit, and the B. C. Assembly of First Nations, had tended to fight with each other, they united in 2003 to oppose the policies of the Liberal government in failing to comply with the recent Supreme Court decisions such as *Delgamuukw*.

New policies have also occurred in other provinces. Ontario agreed to a jointly developed land use plan with the Pikangikum Nation. Quebec has signed a series of agreements with the Cree, each appearing to recognize more power for the Cree in land use decisions. Accompanying this trend is increased desire by the elders and those knowledgeable about the land to have others learn from them.

Someone relying on national media in Canada would receive the impression that band government is universally strife-ridden and ineffective. This focuses attention on only one part of the spectrum of governance among First Nations. Many have sought to reform their Indian Act imposed governmental forms to ones that serve their own purposes much better. Others have learned how to use the Chief and Council system effectively. With good governance sorted out, many First Nations have embarked on successful development of both private and social enterprise. Once a First Nation has developed an independent source of revenue, it can pursue many political strategies with more effectiveness. Robert Anderson (2002) and his co-authors have provided a number of examples of such developments.

Canadian aboriginal leaders have been participating in international organizations in order to promote their interests. The General Assembly of the United Nations in 2007 finally approved its Declaration on the Rights of Indigenous Peoples (International Work Group for Indigenous Affairs 2007). Only four countries voted against the resolution: Canada, the United States, Australia, and New Zealand. Similar to the other three, Canada gave as a reason for a negative vote that aspects of the Declaration are inconsistent with Canadian Law. While the four countries note the resolution does not have the force of international law until adopted by the Security Council, widespread international support suggests the Declaration can have considerable persuasive power. Canada could be embarrassed enough to move toward compliance.

Probably clauses such as Article 8(2)(b) are an example of reasons for a negative vote: “States shall provide effective mechanisms for prevention of, and redress for: . . . (b) Any action which has the aim or effect of dispossessing them [indigenous peoples] of their



lands, territories, or resources.” Article 25 is particularly relevant to issues of sustainable forest management:

Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.

Articles 26, 27, 28 and 29 elaborate on the point of Article 25, providing specific details about how indigenous peoples’ land rights are to be respected, or compensated when not respected. This support from the United Nations, while not binding, may affect the role of aboriginal rights in C&I systems such as that of the Forest Stewardship Council.

Another source of aboriginal empowerment is growing respect among academics for aboriginal knowledge. Beginning after the implementation of self-determination in the United States (1972) and the resistance to Trudeau’s White Paper (after 1969), a literature began to grow praising the relevance of traditional or indigenous knowledge. Recent examples are the books by Berkes (1999) and Turner (2005). The SFMN has supported research projects which include traditional knowledge as part of the inquiry.

3. A Look Ahead

Looking ahead with confidence is difficult because of the general difficulty of predicting political or judicial events. Sometimes changes can occur surprisingly quickly. Few probably thought that the Campbell government in BC could rapidly change its rhetoric from protecting the rights of private landowners—the great fear that overcomes recognition of the importance of Crown Land in the Province—to promoting reconciliation. When the Australian High Court in *Mabo (no.2)* declared the death of the doctrine of *terra nullius* (empty land at settlement), many indigenous people throughout the world took heart. But by 2002, the court had undercut that opinion almost entirely, by rejecting in basis of aboriginal title in common law or in aboriginal law (Russell 2004: 378-380). In the United States, the Rehnquist Court in the 1990s reversed the trend started under Chief Justice Warren in the 1950s of recognizing a sphere of tribal sovereignty. The counterbalancing components of the Supreme Court of Canada in *Delgamuukw* and *Haida* leave reversal of the real impact of the decisions easy to accomplish. On the one hand, those decisions recognize a right to land for indigenous peoples; on the other, the decisions also lay out conditions for justified infringements of aboriginal title. The balance between these two components is not always clear. The decisions have opened an arena for negotiated agreements that may be more flexible and realistic than court decisions.

The main trend seems to be that aboriginal title and treaty rights receive protection from the Supreme Court, subject to not overturning Canada’s economy. Claims for sovereign powers of self-government are given much less support in the courts, although the door has not been closed (Wilkins 2004). The proportional impact on aboriginal peoples can



be quite significant if they obtain access to some of the forested land base, while the constraint that the non-aboriginal economy not be hurt too much will probably mean that aboriginal empowerment will not have a major impact.

The range of aboriginal decision-making power in requirements for consultation and accommodation can range from very low power, when First Nations are informed of decisions or can only comment on proposals already made, to very high power, when First Nations participate in development of plans and have financial support to provide serious evaluation of the alternatives (Forsyth, et al 2006).

One can more confidently predict growing political and economic strength of First Nations based on their own internal reforms and developments. Their efforts may lead to greater impact than the trends in Canadian jurisprudence. Canadian aboriginal leaders often refer to the work of the Harvard Project on Economic Development for inspiration regarding the kinds of internal governance issues that need to be and can be addressed (Cornell et al 2005; Cornell 2006).

First Nations are also building alliances with neighbors through the use of existing governmental processes such as land use planning and environmental assessment. Although comanagement arrangements do not always respect aboriginal input (Nadasdy 2003), aboriginal people continue to participate as best they can. Joint ventures with non-indigenous companies are another type of alliance which can provide some aboriginal empowerment. First Nations are participating in community forests in British Columbia. All of these measures should increase in the next forty years. They reflect the desire of many elders to create learning communities to deal with the changes that are occurring because of climate change and other influences.

Indigenous peoples look further ahead than to those who give great weight to the present, such as companies facing a cost of capital of 10% or more per year. Because of this difference in time perspective, indigenous peoples may be able to obtain title or control of lands devastated by timber harvest or climate change. This effect is unlikely to impact the near future (the next 40 years).

Another trend likely to continue to support aboriginal empowerment is growing presence in universities and other intellectual institutions as the appreciation for indigenous knowledge continues to grow, aided both by increasing examples of accurate predictions, but by support from increasing political empowerment both through internal development and increased control of land through cooperation with neighbors.

4. Alternative Scenarios

1. Increased Aboriginal Empowerment

In this scenario, beneficial trends all occur, resulting in increased empowerment of aboriginal communities. Courts increasingly recognize the need for land settlements in Canada and Australia; the United Nations makes its declaration binding, communities



strengthen their governance, and universities and other organizations continue to express support for aboriginal knowledge. All of these trends would increase the ability of aboriginal peoples to build strong alliances with other local people, as well as develop their own societies as they wish.

2. *Mixture of trends*

In this scenario, aboriginal people continue to improve their internal governance and receive support from some allies outside of their communities in both universities and in environmental movements. But legislatures and executives continue to be intransigent in supporting narrow interpretation of aboriginal title and of the extent of treaty rights. Courts divide regarding the strength of the government positions, thus depriving aboriginal communities of access to land and resources. Aboriginal communities' leverage on local communities also does not strengthen because their own jurisdictional powers are not protected by the courts, and are opposed by legislatures. Continued resistance to these trends from aboriginal people create uncertainty in some regions regarding what outcomes will be.

3. *Declining aboriginal power*

In this scenario, courts also turn against broad interpretations and narrow their support for land claims, treaty rights, and jurisdiction of tribal governments and First Nations. In the face of this resistance, aboriginal people continue to organize and support their rights. But societal values, possibly driven by more interest in material goods than ecosystem services and health, see aboriginal peoples' desires as antithetical to their own interests. Few other groups in society support aboriginal empowerment, and aboriginal people find themselves unable to move forward much; their material standards of living as well as community power decline.

5. Conclusions

As aboriginal peoples gradually improve their internal governmental processes and consequent improvements in economic activity, they will be able to engage judicial processes as well. While section 35 of the 1982 Constitution would seem to encourage a steady flow of favorable decisions, the record to date has been mixed. Courts react when decisions are met with public displeasure, as occurred recently with the *Marshall* decision. International support for indigenous peoples through the United Nations has been met with resistance from the Canadian government. Perhaps the development with the most unpredictable results has been the building of alliances between aboriginal peoples and their neighbors in dealing with common problems. The scenarios just given provide some different possible combinations of these factors.

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Appendix: Aboriginal Empowerment and other Drivers

Tables A1 and A 2 provide an overview of cross effects among the other drivers and aboriginal empowerment. These effects are explained in greater detail in the sections looking ahead and looking back. Some of the important influences on aboriginal empowerment are not clearly connected to other drivers.

Table 1: An Examination of how Changes in Aboriginal Empowerment Affect the Other Drivers of Change.

Driver	How Changes in Aboriginal Empowerment Affect the Driver
Global Climate Change	<ul style="list-style-type: none"> • No effect
Global Wood Supply	<ul style="list-style-type: none"> • No effect
Forest Products Demand	<ul style="list-style-type: none"> • No effect
Geopolitics	<ul style="list-style-type: none"> • Increasing strength in Canada would contribute to world wide aboriginal empowerment
Global Energy	<ul style="list-style-type: none"> • No effect
Technology	<ul style="list-style-type: none"> • Increased aboriginal empowerment will enable aboriginal knowledge to contribute to technological change
Governance	<ul style="list-style-type: none"> • Increases in aboriginal empowerment will contribute to devolution of power
Aboriginal Empowerment	<ul style="list-style-type: none"> •
Ecosystem Health	<ul style="list-style-type: none"> • As aboriginal peoples are able to control more land, the general interest and activity supporting ecosystem health should increase
Competition for Resources	<ul style="list-style-type: none"> • Aboriginal empowerment creates additional competitors for resources
Societal Values	<ul style="list-style-type: none"> • Increased aboriginal empowerment will enable aboriginal knowledge and world views to contribute to changes in societal values.
Industry Structure	<ul style="list-style-type: none"> • Little Effect



Table 2: An Examination of how the Other Drivers of Change Affect Changes in Aboriginal Empowerment

Driver	How the Driver Affects Aboriginal Empowerment
Global Climate Change	<ul style="list-style-type: none"> • Mobilization of multiple sources of information about the climate and its effects can increase aboriginal participation and power.
Global Wood Supply	<ul style="list-style-type: none"> • Little effect
Forest Products Demand	<ul style="list-style-type: none"> • An increase in certification requirements may support aboriginal empowerment
Geopolitics	<ul style="list-style-type: none"> • The United Nations has shown some interest in supporting indigenous rights with its nonbinding declaration. It may become binding if there is a change in the USA policy.
Global Energy	<ul style="list-style-type: none"> • A few First Nations may have an increase in royalty revenue, allowing them to staff their governments.
Technology	<ul style="list-style-type: none"> • Increased technological development tends to undermine aboriginal knowledge
Governance	<ul style="list-style-type: none"> • Devolution as a movement assists aboriginal empowerment.
Aboriginal Empowerment	<ul style="list-style-type: none"> •
Ecosystem Health	<ul style="list-style-type: none"> • Aboriginal peoples depend heavily on multiple ecosystem services; more health helps them.
Competition for Resources	<ul style="list-style-type: none"> • Increased competition reduces aboriginal power.
Societal Values	<ul style="list-style-type: none"> • Trends toward more protection of ecosystem health can include protection of aboriginal rights. Some groups willing to support aboriginal rights.
Industry Structure	<ul style="list-style-type: none"> • Increasing concentration reduces opportunities for joint ventures; decreasing concentration increases the opportunities.