

# Indigenous Planning:

## A Brief History, The Duty to Consult and Government to Government Reconciliation

*Planning Institute of BC Annual Conference - Equilibrium*

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# Overview

History: Pre-Contact to Present Day

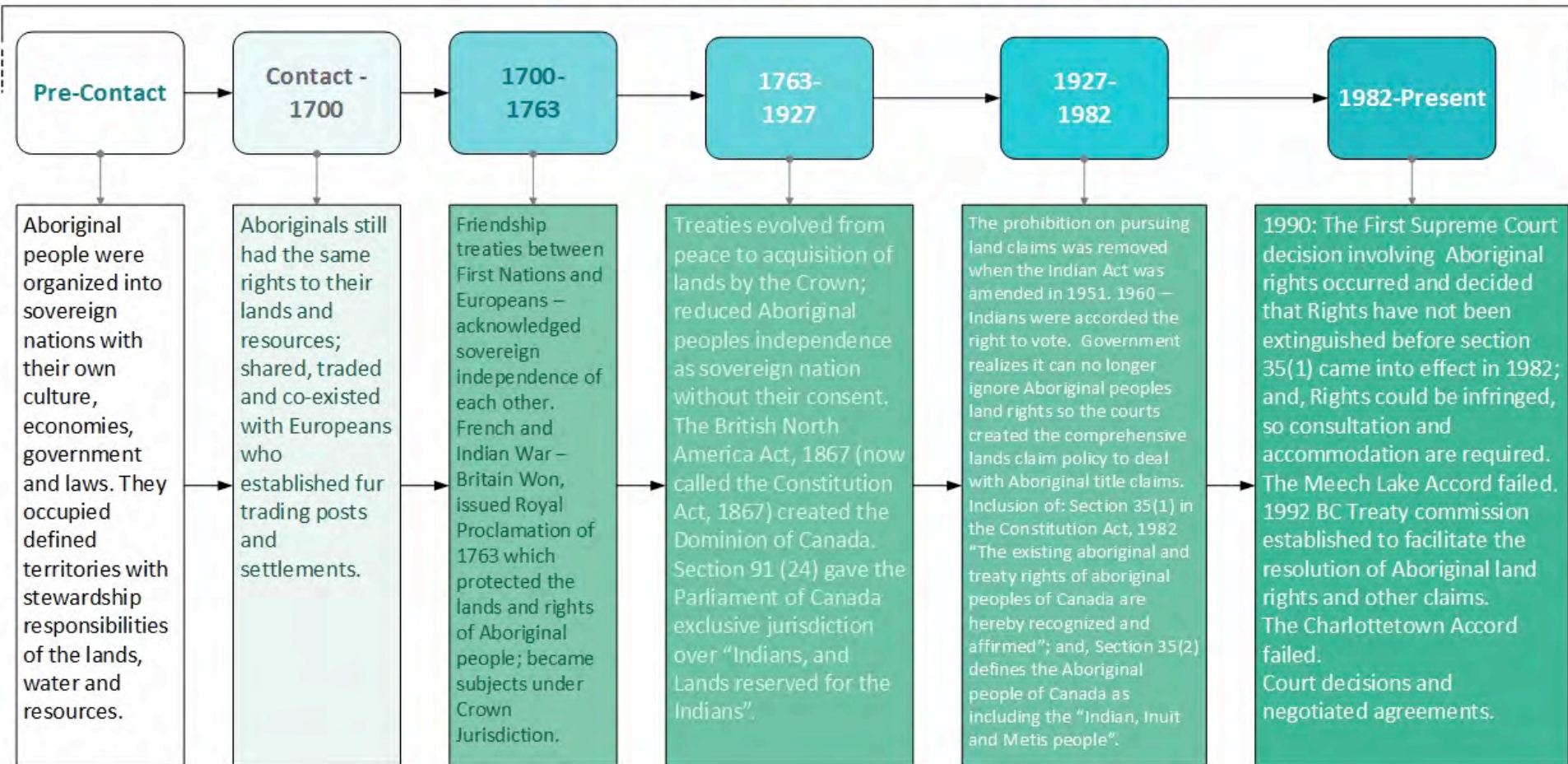
Case Law Summary & The Duty to Consult and  
Accommodate

Indigenous Planning

Carrier-Sekani First Nations Government to Government  
Agreement

‘Collaborative Natural Resource Management: A Case  
Study Of Forestry Sector Operations On Nadleh  
Whut’en First Nation Territory’

## Aboriginal History Timeline : Pre Contact – 2017



# Aboriginal Case Study Examples

## Aboriginal Rights and Title

Van der Peet; Delgamuukw; Sparrow

## Consultation and Accommodation (The Duty to)

Haida; Taku River Tlingit

Rio Tinto (Can bring a claim after the fact for past wrongs)

## Consent (Free, Prior and Informed Consent)

Tsilhqot'in

# The Duty to Consult and Accommodate

The Crown has a constitutional duty to consult with Aboriginal peoples when it contemplates conduct or a decision that may have an adverse impact on a recognized or asserted Aboriginal or treaty right.

How extensively the Crown must consult varies with the circumstances, and will depend in large part on how serious the potential impact is on the Aboriginal title or rights in question.

Aboriginal peoples include Indians (“First Nations”), Inuit, and Métis

# Free, Prior and Informed Consent (FPIC)

*The new standard is consent, not just consultation...*

*“Free, Prior and Informed Consent broadly refers to the rights of indigenous peoples to participate in decisions affecting their lands and resources, especially as related to natural resource development”.*

(Source: Boreal Leadership Council, *Free, Prior, and Informed Consent in Canada: A summary of key issues, lessons, and case studies towards practical guidance for developers and Aboriginal communities*, <http://borealcouncil.ca/wp-content/uploads/2013/09/FPICReport-English-web.pdf>, Canada, 2012, p 3.)

# United Nations Declaration on the Rights of Indigenous People

The United Nations Declaration on the Rights of Indigenous People (UNDRIP) further expands the principles of Free, Prior, and Informed Consent (FPIC) to include:

- A range of project development activities;

- The right to redress for lands, territories and resources that had been adversely affected; and

- A commitment by the state to obtain free, prior, and informed consent of indigenous peoples before the approval of any project affecting their lands or territories and other resources.

# Common Indigenous Planning Objectives

Improved management of cumulative effects

Preservation and protection of cultural and sacred use resources and conservation areas

Clearly identify future land uses and zoning to reduce risks and/or conflicts

Create better land certainty for unceded Territories

Create a sustainable balance for various types of development

Develop and manage infrastructure needs and enhancements

Geospatial data collection and geographic information systems



# Resources Indigenous People Require to Sustain Their Needs

Healthy populations of fish and game in preferred  
harvesting areas

Ability to maintain traditional land tenure and governance  
systems

Clean and plentiful water from natural sources on the land

Adequate, safe, and well known routes of access and  
transportation to harvesting areas

An adequate land base within which to pursue seasonal  
rounds

Freedom from competition for access to and harvesting of

# Resources Indigenous People Require to Sustain Their Needs

Faith in the quality of country foods and feelings of safety and security on the land

Healthy cultural and spiritual relationships with the land

Abundant berry, food crops and medicines in preferred harvesting areas

Adequacy and access to known and preferred habitation sites on the land and

Strong knowledge of land and socio-cultural institutions to pass across generations.

# Carrier Sekani First Nations (CSFN's) G2G

## Building

The combined traditional territories of the Carrier Sekani First Nations accounts for approximately 78,000 square kilometres (7.8 million hectares) here in north-central B.C.

## Seeking Reconciliation

Withdrew from the Treaty process in 2007

Entered into negotiations with BC in 2013

Entered into a 3 year Government to Government Agreement with BC in 2015 until 2018

Recently entered into the Pathway Forward Agreement to address Reconciliation

# CSFN's & BC Socio-Cultural Initiatives

## Agreement Stewardship Working Groups

Collaborative Decision Making Matrix

Pipeline Monitoring, Compliance and Enforcement

Cumulative Effects Assessment, Monitoring and Management

Framework development

Collaboration Management

Oil and Gas Commission Agreement

## Socio-Cultural Working Groups

Skills and Training

# CSFN's & BC Collaboration Agreement

## Collaboration Working Groups

Aboriginal Rights & Title Discussion Table

Atmospheric Benefit Agreement Table

Main Forestry Table

Prince George Timber Supply Review Forestry Table

Mining Table: Newgold Blackwater Project and Kemess  
Mine

Major Projects Table (Provincial)

# Indigenous Planning Take Away

In order to uphold the principles of Free, Prior and Informed Consent (FPIC), First Nations need to thoroughly assess the potential implications and adverse effects of projects and activities occurring or being proposed within their Traditional Territories.

Time is required to assess the benefits, challenges and impacts of:

Revenue sharing models and opportunities

Training and employment opportunities

Environmental, cultural, socioeconomic and cumulative

# Lessons Learned

Achieving Free, Prior and Informed Consent is the new Standard

Capacity-building

Collaboration

Communication

Decision Making Vs. Active Participation

Institutional Development Vs. Program Approach

# Collaborative Natural Resource Management:

## A Case Study of Forestry Sector Operations on Nadleh Whut'en First Nation Territory

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ENPL 430

05/31/2017

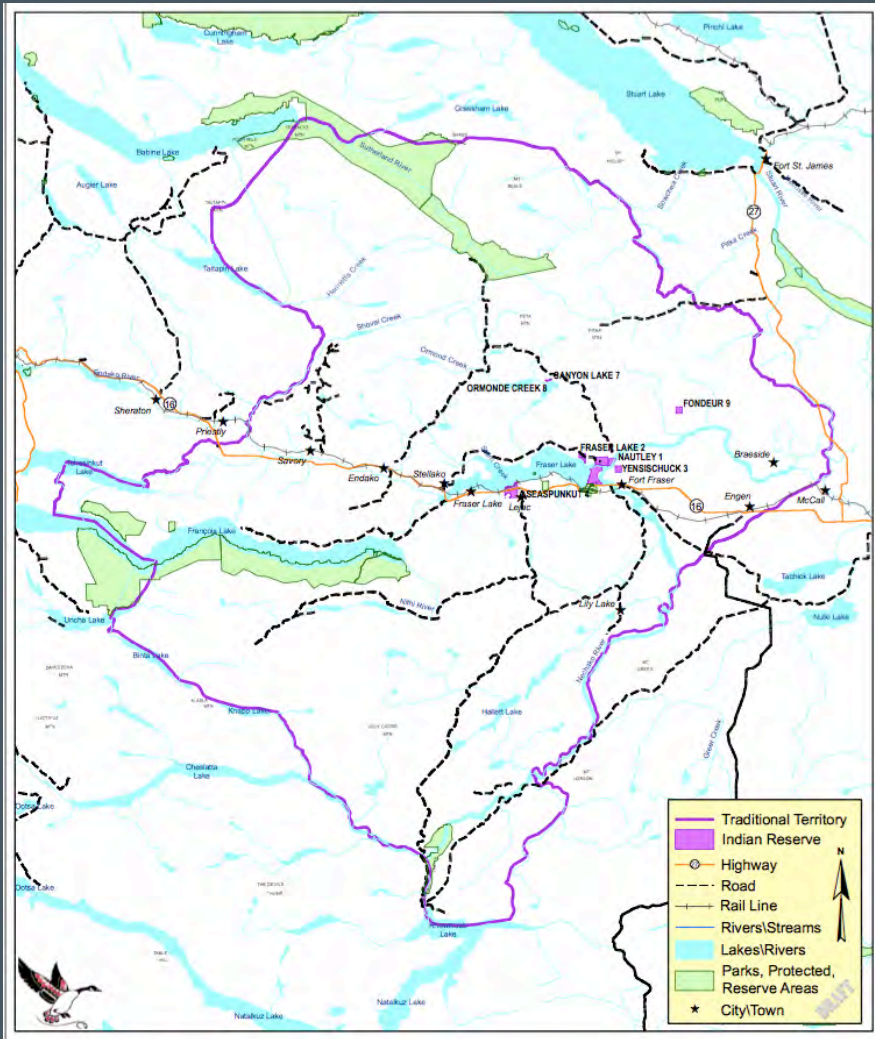
**UNBC**





# Overview

- Introduce Nadleh Whut'en First Nation
- Duty to consult with a focus on referrals
- Literature on co-management
- Framework for successful co-management
- Research questions
- Results
- Conclusion



# The Duty to Consult

## What it is

Foundation for why/how government and industry consult with First Nations about development on their traditional territories

Acknowledges the existence of Aboriginal rights and title

## Where we are

Triggered when the Crown has knowledge of the Aboriginal rights and contemplates conduct that might affect those rights/title

Referrals process (local importance/provincial significance)

## How we got here

Sparrow (1990)

Delgamuukw (1997)

Tsilhqot'in (2014)

# Co-management

Refers to the sharing of power between governments and local resource users

Formal agreements that share power and responsibility for management

Embedded within broader lens of collaborative governance

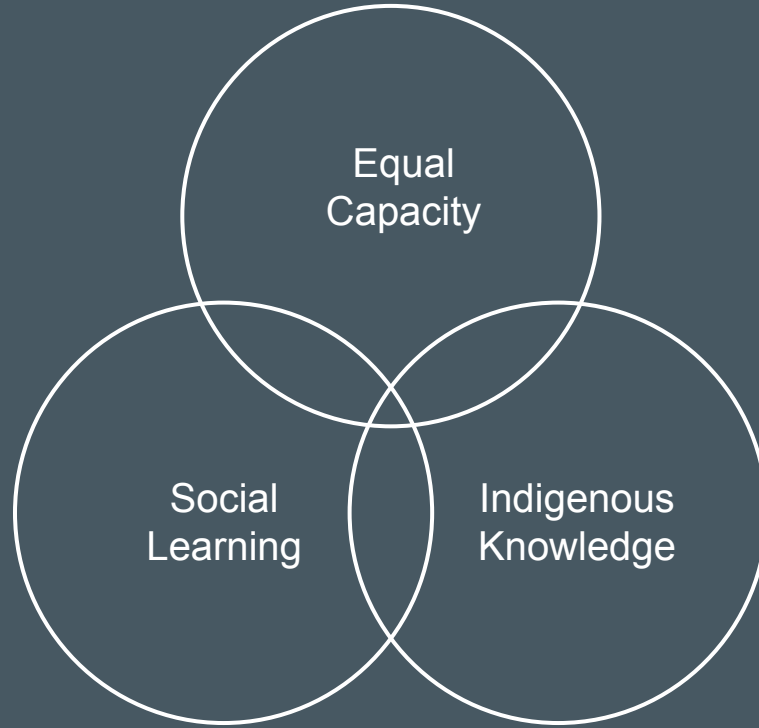
Promoted as a way to deal with complex issues

Informative	Minimal exchange of information, one-way communication
Consultative	Consultation mechanism exist, government makes decisions
Cooperative	Groups have equal decision making authority
Advisory	Group (ex: fishers) advise government on decisions to make
Informative	Decision making authority delegated to groups who inform government of decisions made

# Critiques of Co-Management

1. Consultative aspect of co-management not deemed 'real' co-management by many Indigenous peoples and communities (Tipa & Welch, 2006).
2. Assumption of government control over natural resources (Bowie, 2013; von der Porten et al., 2015).
3. Viewing First Nations as one of many stakeholders (von der Porten et al., 2015).

# Framework for successful co-management with Indigenous communities



# Framework for successful co-management with Indigenous communities



## Equal Capacity

The ability to do something and relies on:

Human resources

Financial resources

Knowledge

Policies and procedures

Power

# Framework for successful co-management with Indigenous communities



## **Social Learning**

Development of new knowledge and understanding. Occurs when participants share experiences, ideas, and information. Elements include:

Relationship building

Cross-cultural dialogue

Shared motivation and willingness

Trust



# Framework for successful co-management with Indigenous communities



## Indigenous Knowledge

Systems of knowledge, know-how, and practices maintained and managed by Indigenous groups.

Place-based

Holistic

Embedded in unique worldviews

Inseparable from knowledge holders

# Research Gaps

1. Omission of the legal duty to consult and concept of consent
2. Local experiences with the referrals process

# Research Questions

1. How do forestry companies understand their role within the consultation doctrine?
2. What factors influence the willingness and capacity of companies to adhere to Nadleh Whut'en's Land Use Plan and Consultation Policy?
3. What constitutes meaningful and appropriate consultation with industry according to Nadleh Whut'en knowledge holders and land users?

# My Approach to Research

Respect

Appreciation for Indigenous perspectives and worldviews and placing value on Indigenous knowledge

Relevance

Ensuring direct and tangible benefits for the community

Reciprocity

Two-way process of learning, creating new knowledge and understanding

Responsibility

Transparency and commitment of doing no harm

# Data Collection

## Participants

Forestry key informants (3)

Nadleh Whut'en community knowledge holders and land users (6)

## Semi-structured Interviews

Interview chart informed interview questions

Interview guides developed in collaboration with Nadleh's Chief and Lands Manager

## Research question

What factors influence the willingness/capacity of forestry companies to adhere to Nadleh Whut'en's Land Use Plan and Consultation Policy?

## Theme

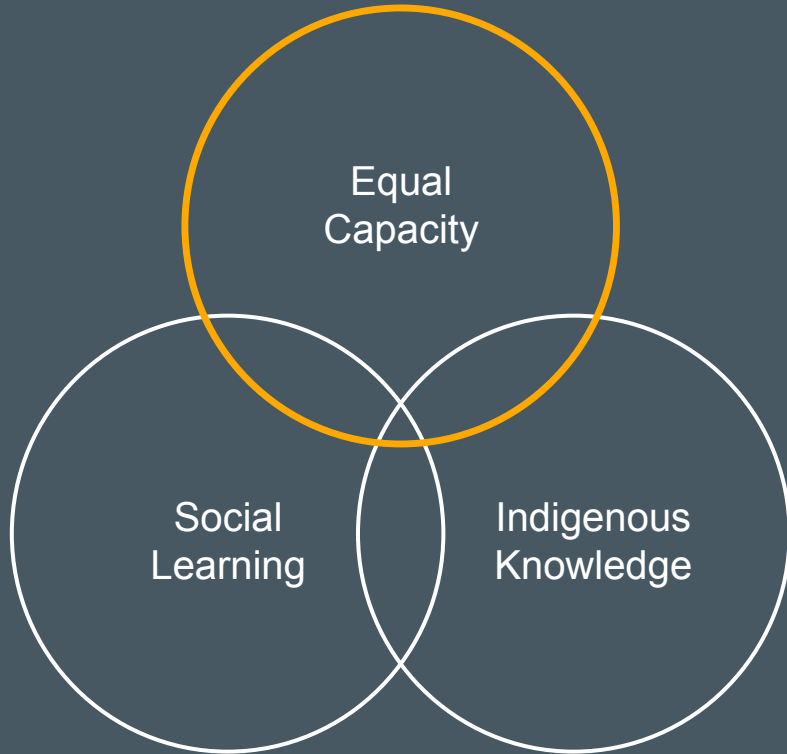
Company ethic

## Interview question

What value does the company see in consulting with First Nations regarding forestry planning and management?

# Results

# Equal Capacity



- Human Capacity
- Financial Capacity
- Knowledge
- Power

# Awareness

Lack of awareness and influence over land use decisions resulting in uncertainty around the ability to access traditional foods and medicines

# Human

# Resources

Human capacity not well distributed within forestry companies

“Yeah, so hunting is something that’s pretty scarce now a days, and then in the summer we’re always out there gathering our berries and then picking our medicines in the fall or the spring depending on what medicine it is. There’s areas that we used to go and pick all our Labrador Tea and that areas is (now) clear-cut. It’s the same place we went every year and now it’s gone.”

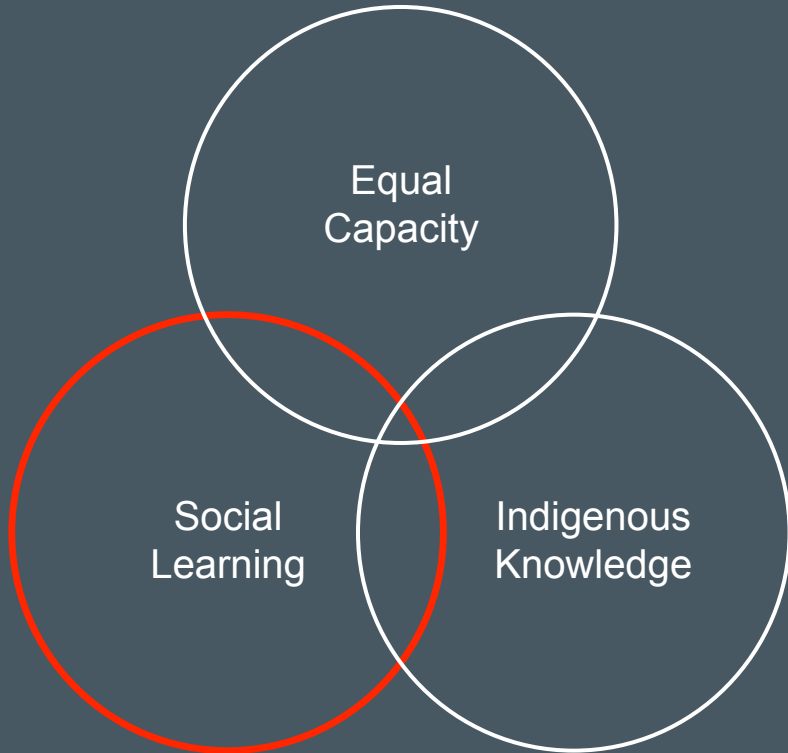
Community knowledge holder and land user  
1

“Even if I do respond they aren’t going to answer back anyways”

Community knowledge holder and land user  
2



# Social Learning



- Shared motivation and willingness
- Cross-cultural dialogue
- Relationship building

# Risk Management

Companies concerned with securing access to land and minimizing conflict with First Nations.

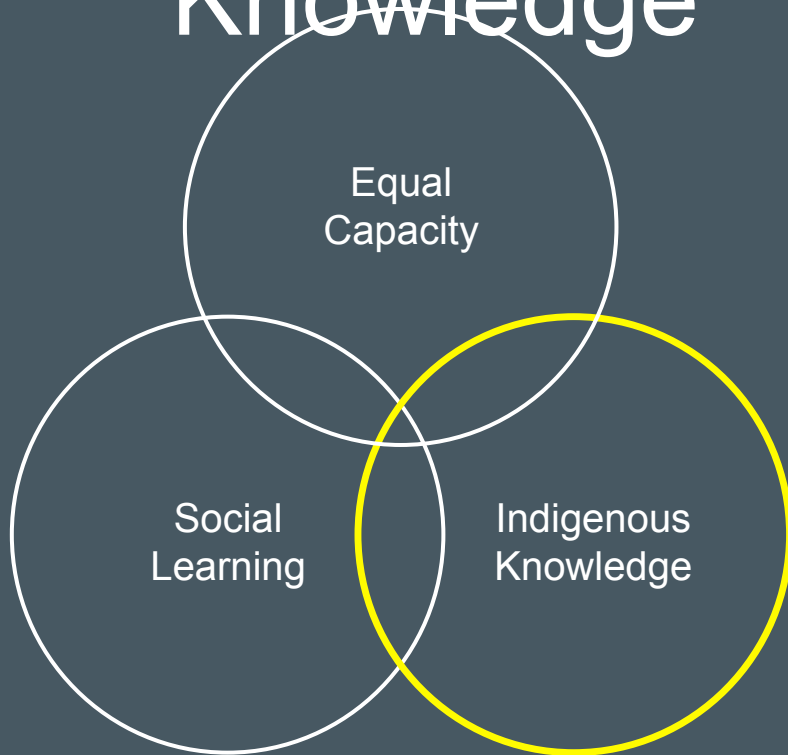
“Access to land, it’s what it’s all about”

Forestry key informant 3

“There’s nothing worse than going to lay out cut blocks and finding out that you have to exclude part of it or all of it because of First Nations issues”

Forestry key informant 3

# Indigenous Knowledge



- Status of Indigenous knowledge
- Discrepancies between knowledge systems

# Status of Indigenous Knowledge

Re-think the hierarchy of plans and policies that are followed by forestry companies.

“Obviously with Nadleh they would rank fairly high on that land base, so we're trying to deal with Nadleh Whut'en the Band's plan or Vanderhoof LRMP in Nadleh's traditional territory. I would almost think that the Nadleh plan would overweigh even the Vanderhoof LRMP”

Forestry key informant 2

# Conclusion

- Variety of understandings of the Aboriginal consultation doctrine
- Willingness of forestry companies to adhere to Nadleh Whut'en's LUP dependent on land access, risk management, pressure from Nadleh Whut'en
- Need for face-to-face dialogue between Nadleh Whut'en and forestry company decision-makers
- Need for stable, long-term, sufficient funding to support consultation

# Thank You



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Aboriginal title can be defined by three *sui generis* characteristics: it is held communally, it “arises from possession *before* the assertion of British sovereignty, as distinguished from other estates such as fee simple that arise *afterward*” (*Tsilhqot’in Nation v British Columbia*, 2014 SCC 44, Para 14), and it is “inalienable other than by surrender to the Crown” (McNeil, 2015, p. 68).

*Tsilhqot’in* provided some insight into potential developments that might justify infringement on Aboriginal title lands. They include “the development of agriculture, forestry, mining, and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations to support those aims” (*Tsilhqot’in Nation v British Columbia*, 2014 SCC 44, Para 83). Justification requires a compelling public purpose and must be consistent with the Crown’s fiduciary duty to the Nation.

# Case Study Methodolog y

Why I used it:

**Complexity** - in depth exploration of a specific case to explain phenomena too complex for other instruments

**Flexibility** in approach

**Respectful** - highlights the importance of local knowledge in addressing research questions



# Data Analysis: Coding

**Open** - break apart the data into relevant themes (equal capacity, social learning, indigenous knowledge)

**Axial** - break apart more into sub-themes

**Selective** - reconstruct data into groups and identify relationships between themes

(S) equal capacity  
→ (SL) Social Learning  
(IK) Indigenous Knowledge  
(K&S) Knowledge Co-generation  
Interview 1  
Code: Forestry Key Informant 1 (FKI1)

FKI1

I: First question, its quite general, but based on your experience working with both forestry operators in the forest industry and a lot of communities, what approaches do companies take to communicate with First Nations?

EC [ FKI1: I think that varies. I know, and I don't know how much this you'll put in your research, but I spoke with quite a few forestry companies because we have a tool call called where it would be a web post thing and the forest company would enter in there and it would go automatically. So my question to them was would they be willing to pay for that. And in that I kind of learn a little bit of their processes, so and I know we've done software say for to help them manage, they have to where they have to communicate with First Nations. ] Tools  
Financial commitment

SL Report that they've, you know, internally they have to say when they've consulted and what happened, that sort of thing. Some forest companies in my opinion, this is my opinion only, some companies have a real desire to have a really good working relationship with First Nations, they see that it there is some value there, that it is important and that it is something they are willing to invest time and money into. True desire  
relationships

SL [ There are other forest companies that I get the sense that it's more of just a check box off their checklist, did we consult with First Nations, meaning they sent out their letter and expect no response, or its not taken, there's no value put on that really. So I think its varied out there, so it really depends, there are some communities, First Nations communities that have really good relationships with the forest companies, and there is a real true desire to work together. I've also seen where they, they talk that talk until it came time when we and they started getting the invoices, and then all the sudden its 'whoa, we're not paying these', so a lot of times my sense was that they talk it but they don't, you know they talk the talk, but they don't walk the walk kind of thing. ] financial commitment  
expectations

EC [ I've experienced a whole different level, so it really is, I think, company specific, its not, and First Nations too, like there's some communities have no capacity so they don't really do a whole lot, so there's no need for the forestry companies to actually take it to any lands because there's nobody at the other end to even talk to or you know what I mean. ] Power  
limiting  
responsibility

I: Yes, for sure.

EC [ FKI1: To do true consultation with, like, in those cases its just that letters been sent and they wait 30 days and away they go right. And that's on both ends right, that's both ends, so whether that company would you know if the First Nation community had something, had the resources the tools and the people and place then maybe the companies would take it more serious as well right. ] companies  
achieving power  
through financial  
Financial