

Cumulative Impacts of Resource Development on Treaty 8 Land-Based Rights: A Legal Analysis

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Last year (2006-2007) I completed a draft legal analysis of land-based rights recognized by Treaty 8 and their evolution over time. Here is an outline of this draft paper.

Defining the Treaty 8 Land-based Rights

1. Introduction

The purpose of the paper is to examine:

1. what land-based rights were guaranteed to Aboriginal parties under Treaty 8;
2. how these treaty rights have evolved as a result of historical circumstances;
3. the implications of the constitutional protection of treaty rights in 1982;
4. the legal entitlement of Treaty 8 peoples to a sustainable culture and livelihood/economy.

2. What land-based rights were guaranteed under Treaty 8?

2.1 *The hunting right clause as a key condition of signing the treaty*

2.2 *The contents of the right*

2.2.1 The right to a livelihood

2.2.2 The right to maintain a way of life and a culture

2.2.3 The right to retain control over lands and resources

2.3 *The limitations on the right*

2.3.1 The regulatory limitation

2.3.2 The geographical limitation

2.3.3 The Crown's right to take up land

3. How were these rights affected by historical and legal developments

3.1 *Initial period: 1899-1905*

3.2 *1905- 1929*

This period starts with the creation of the provinces of Alberta and Saskatchewan and ends with the negotiation of the Natural Resources Transfer Agreements (NRTAs)

3.3 *1930- 1982*

From the NRTAs to the enshrinement of Aboriginal and treaty rights in the *Constitution Act, 1982* (s. 35)

4. Constitutional protection of Aboriginal and treaty rights in 1982: implications for land-based treaty rights

4.1 *Government can no longer extinguish the rights*

- 4.2 *Government can only infringe the rights in limited circumstances*
 - 4.3.1 The need for justification: the *Sparrow* test
 - 4.3.2 Should the *Sparrow* test apply to the infringement of treaty rights?
 - 4.3.3 Are limitations on Treaty 8 rights independent rights of the Crown, or are they infringements to the rights that need to be justified?
 - 4.3.4 The duty to consult and the duty to accommodate
- 4.3 *The honour of the Crown and the emerging duty of accommodation*
- 5. **Conclusion: the Treaty 8 FNs' entitlement to sustain their livelihood and their culture**

The work to be conducted during the next two years (2007-2009) includes:

1. refine the legal analysis and expand on it as needed;
2. conduct research on the legislative framework on resource development, focusing on cumulative impacts legislation and practices;
3. examine land and resource planning legislation in each of the 4 jurisdictions. Identify case studies of land use and resource planning initiatives, both within and outside Treaty 8, that offer a means to manage cumulative impacts of resource development. Eg. Muskwa-Kechika in northern BC. Other models elsewhere: eg. Deh Cho land-use plan in the NWT, the North and central Coast Land-Use Plans (the Great Bear Rainforest) and new ecosystem-based forest management regime in BC.