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FIRST NATIONS STRATEGIC BULLETIN

FIRST NATIONS STRATEGIC POLICY COUNSEL

Federal Justice Minister is Selling Decades Old Termination Plan as a New "Reconciliation" Framework

Former Prime Minister & INAC 1969 White Paper Minister, Jean Chretien and Federal Justice Minister, Jody Wilson-Raybould. (Photo courtesy of Twitter @Puglass)

By Russell Diabo

I attended the Assembly of First Nation's 37th Annual General Assembly in Niagara Falls, an Indigenous sacred area that is now covered with urban development consisting of a casino, hotels and restaurants, but was the site of one of the most important foundational treaties in Canada—the **1764 Treaty of Niagara** between the British, the Haudenosaunee Confederacy and the Anishinabe Nations.

At the AFN Assembly I observed how the Trudeau government is rolling out its interpretation of the **Nation-to-Nation** and **Reconciliation** promises with Indigenous Peoples by using **AFN** as a partner to help the federal government control and mange the messaging and Federal-First Nation "***co-development***" policy processes, as **INAC Minister Carolyn Bennett** described it during her speech to the AFN Assembly.

In the morning of the first day of the AFN Assembly there was a media event where **National Chief Bellegarde** and **INAC Minister Carolyn Bennett** signed a **Memorandum of Understanding on Federal-First Nations Fiscal Relations**, which the APTN news organization reported, the AFN Executive Committee and community Chiefs had not seen the text of prior to the signing ceremony.

The AFN-Canada MOU on Fiscal Relations states, in part, that:

> "***Canada is now engaging in parallel collaborative policy development processes with First Nations across Canada, including on reform of education and child and family services, on the renewal of the self-government fiscal approach, as well as other discussions, that will contribute to joint work on a new fiscal relationship.***"

So like the Harper government before it the Trudeau government is not being transparent about these "***collaborative policy development processes***", which are probably with First Nation Chiefs and organizations like **AFN** that are compromised and

Special points of interest:

- **Justice Minister Repackaging Canada's Old Termination Plan as New Reconciliation Framework**
- **Trudeau Breaks Promise & Ok's Permits for Site C Hydro Power Dam**
- **Art Manuel to Help Fight for Indigenous Rights in Softwood Lumber Dispute**
- **Trudeau Keeps Harper's Assault on Human Rights Using C-51**

Inside this issue:

AFN NC Bellegarde & IN-AC Minister Bennett sign MOU on Fiscal Relations. (Photo courtesy of APTN)

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coopted by the one sided terms and conditions of federal funding agreements.

Minister Bennett seems to be the lead Minister for the Trudeau government for First Nation programs and services, particularly for social development while Minister Wilson-Raybould seems to be the lead federal Minister on First Nations Inherent, Aboriginal and Treaty rights.

So on the first day of the AFN Assembly, prior to the **MOU** signing, it was the **Justice Minister Jody Wilson-Raybould** who during her address to the Chiefs told them that she is a "***proud Indigenous person as well as a proud Canadian***" as she also informed the Chiefs-in-Assembly that "***adopting the UNDRIP as being Canadian law are unworkable and, respectfully, a political distraction to undertaking the hard work required to actually implement it.***"

"Minister Bennett seems to be the lead Minister for the Trudeau government for First Nation programs and services, particularly for social development while Minister Wilson-Raybould seems to be the lead federal Minister on First Nations Inherent, Aboriginal and Treaty rights"

Minister Wilson-Raybould went on to say:

> "***the way the UNDRIP will get implemented in Canada will be through a mixture of legislation, policy and action initiated and taken by Indigenous Nations themselves. Ultimately, the UNDRIP will be articulated through the constitutional framework of section 35.***"
>
> "***This includes mechanisms to negotiate modern treaties under new mandates as well as other constructive arrangements that will provide a clear and predictable path for Indigenous peoples and governments for the exercise of decision-making and governance. It means supporting Nation building in the context of historic treaties and, where there are no treaties, respecting the proper title-holders. It means creating new mechanisms to facilitate self-government beyond the Indian Act band.***"

Allow me to decode what the Minister is saying, which is, the Trudeau government will continue to seek final agreements limiting and restricting section 35 constitutional rights with First Nations under the federal policy negotiation framework of land claims (comprehensive & specific) and Jean Chretien's 1995 municipal self-government policy.

These federal termination policies have their genesis in the **1969 White Paper on Indian Policy** issued under the Liberal government of **Pierre Elliot Trudeau** with **Jean Chretien** as the then Minister of Indian Affairs, who later became Prime Minister from 1993 until 2003, where he was able to advance the **1969 White Paper** assimilationist/termination tenets through legislation and policy.

Justin Trudeau & Jody Wilson -Raybould.

Jean Chretien's termination efforts were followed by **Paul Martin's** brief tenure as Liberal Prime Minister from 2003-2006, who was long on process but short on results when it came to Federal-First Nation policy. The ill fated **2005 Kelowna Accord** being a prime example.

The Harper decade (2006-2015) accelerated the previous Liberal First Nations Termination Plan using the federal land claims and self-government negotiation policy framework resulting in some First Nations compromising their constitutional rights in Final Agreements with Canada.

In preparation for the 2015 federal election, **Justin Trudeau** with the help of strategists—likely including Indigenous Liberal Candidates, the Liberal Aboriginal Commission and communication specialists—issued a progressive sounding Indigenous Policy Platform to counter the **NDP's** electoral platform in wooing Indigenous voters and public support from progressive Canadians.

'Jody Selling Termination' conclusion from page 2

Now, with the results of the federal election giving the Liberal's a majority government facing a significant Conservative opposition, the Trudeau government—with the help of federal bureaucrats like the **Clerk of the Privy Council, Michael Wernick**—has apparently decided to interpret their Indigenous platform promises narrowly by trying to tinker with the long-standing federal termination based land claims and self-government policies while focusing on First Nations' social and economic conditions through federal programs and services. Albeit by back ending most of the federal spending until after the next federal election as evidenced by **Budget 2016** and publicly pointed out by **Cindy Blackstock**.

The **AFN**, particularly **National Chief Perry Bellegarde**, figures prominently into the Trudeau government's post-election strategy to control and manage community level First Nation Chiefs and Peoples' and their demands for "***real change***".

During the AFN Assembly, federal Ministers' were handled by AFN National Chief and Executive Committee members to avoid having to be accountable for their remarks to First Nation Community Chiefs and members at the AFN Assembly.

No questions from Chiefs were provided for in the AFN plenary session after both Minister Bennett and Wilson-Raybould spoke on the first day even after Wilson-Raybould told the Chiefs **UNDRIP** was "***unworkable***" as federal legislation, a position **NDP M.P. Romeo Saganash** strongly disagrees with.

As the recent debate on the new assisted dying law shows the Trudeau government will also be relying on the Liberal "***Indigenous Caucus***" to help implement the Liberal's Termination aka "***Reconciliation***" Plan, several of them have very tenuous—even questionable—ties to being "***Indigenous***" persons. It seems the Liberal definition of an "***Indigenous***" person is self-identification, which is problematic for many reasons.

In any case, watch as Prime Minister Trudeau, Minister Wilson-Raybould, federal Ministers and the Liberal "***Indigenous***" Caucus make public pronouncements on Indigenous policy. You will need to drill down to see what is really going on in terms of policy and law, including international law.

The Indigenous right of self-determination, the right to land and treaty rights, are all matters of international law and cannot be contained within Canada as "***existing aboriginal and treaty rights***" within section 35 of Canada's constitution, but this is exactly what the Trudeau government is attempting to do as Justice Minister Wilson-Raybould said in her speech to the Chiefs.

Indigenous Peoples' need to counter the Trudeau government's attempts to keep Indigenous People's as a domestic policy issue by taking their matters outside of Canada to the international level, meaning the United Nations and beyond!

[Reprinted from Kahnawake Newspaper Iorì:wase Vol. 4 Issue 15]

Romeo Saganash, NDP M.P. Abitibi-Baie-James-Nunavik-Eeyou, Critic for Intergovernmental Aboriginal Affairs

"The AFN, particularly National Chief Perry Bellegarde, figures prominently into the Trudeau government's post-election strategy to control and manage community level First Nation Chiefs and Peoples' and their demands for "real change"

L to R: INAC Minister Carolyn Bennett, Justice Minister Jody Wilson-Raybould & AFN National Chief Perry Bellegarde. (Photo by R. Diabo)

L to R: Michael Wernick, Clerk-PCO, Perry Bellegarde, AFN-NC, Ottawa, Feb. 5, 2016. (Photo by Dale Leclair)

The Mackenzie River Basin

Trudeau Just Broke His Promise to Canada's First Nations

Image: Caleb Behn via Zack Embree and Fractured Land

By Emma Gilchrist • Friday, July 29, 2016 - 13:42, DESMOGCANADA

Justin Trudeau's government has quietly issued its first batch of permits for the Site C dam — allowing construction to move forward on the $8.8 billion BC Hydro project despite ongoing legal challenges by two First Nations.

The federal-provincial review panel's report on Site C found the 1,100 megawatt dam will result in significant and irreversible adverse impacts on Treaty 8 First Nations.

"These permits suggest very strongly that, at least these ministries, if not Trudeau's entire cabinet, are unwilling to engage in reconciliation with indigenous peoples"

Caleb Behn, who is from West Moberly First Nation, one of the nations taking the federal government to court, says Trudeau has broken his promise.

"It's 19th century technology being permitted with 19th century thinking and I expected more from the Trudeau government," he said. "These permits were our last best hope to resolve this."

"These permits suggest very strongly that, at least these ministries, if not Trudeau's entire cabinet, are unwilling to engage in reconciliation with indigenous peoples. I thought this country could be more."

Charlie Angus, MP for Timmins-James Bay and NDP critic for Indigenous and Northern Affairs, echoed those sentiments.

Tweet: "I think this was a real test of the Trudeau government and they failed the test," Angus said.

"The Liberals seem to be thinking that if they say the right things, it's somehow the same as doing the right things."

Trudeau has emphasized building a new relationship with indigenous peoples since taking office in October. He included the following paragraph in every ministerial mandate letter:

"No relationship is more important to me and to Canada than the one with Indigenous Peoples. It is time for a renewed, nation-to-nation relationship with Indigenous Peoples, based on recognition of rights, respect, co-operation, and partnership."

But with the issuing of the Site C permits, doubts have been cast on that promise.

"We hear from all the key ministers about the nation-to-nation relationship and then they rubber stamp and go ahead with all the big projects," Angus said.

For Behn, who was the subject of a documentary called Fractured Land last year, the sense of disappointment was palpable.

"What do they care about a backwater in northern B.C. that only has 40,000 voters?" he asked. Tweet: "If you spent $9 billion on solar panels, geothermal … you wouldn't have to run roughshod over indigenous rights."

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Liberals Ignore Calls to Delay Permits

The permits allow BC Hydro to block the flow of the Peace River and disrupt fisheries, activities that require federal permission. Until now, the Liberal government hadn't issued any permits for the dam (the only federal permits issued were doled out during the last election by former prime minister Stephen Harper).

The Site C dam will flood more than 100 kilometres of river valley and impact 13,000 hectares of agricultural land — including flooding 3,800 hectares of farmland in the Agricultural Land Reserve, an area nearly twice the size of the city of Victoria. Groups ranging from Amnesty International to the David Suzuki Foundation to the Royal Society of Canada have called on Trudeau to halt construction of the dam.

"The people of Treaty 8 have said no to Site C. Any government that is truly committed to reconciliation with indigenous peoples, to respecting human rights and to promoting truly clean energy must listen," stated a letter sent to the federal government in February.

Federal Green Party leader Elizabeth May called Site C the "litmus test" for the federal government's commitment to a new relationship with indigenous peoples.

Tweet: "It is agonizing to witness the starting gun for a race between bulldozers and justice," May said in a statement in which she expressed "deep disappointment" with the federal government.

The Royal Society of Canada described the Site C Joint Review Panel report as the strongest and most negative review to be ignored by government.

In its report, the panel wrote that it couldn't conclude that the power from Site C was needed on the schedule presented, adding: "Justification must rest on an unambiguous need for the power and analyses showing its financial costs being sufficiently attractive as to make tolerable the bearing of substantial environmental, social and other costs."

The panel recommended the project be reviewed by the B.C. Utilities Commission — however, the B.C. and federal governments approved the dam without further review.

Was Government Consultation Adequate?

West Moberly First Nation and Prophet River First Nation will appear in a federal court in Montreal in September to fight their case.

"Sitting down and consulting with the provincial and federal government is a waste of time," said Chief Roland Willson of West Moberly First Nation. "The only option we have is to challenge them in court."

The Department of Fisheries and Oceans responded to DeSmog Canada's request for comment on the issuing of Site C permits with the following statement:

"For the past seven months, DFO has consulted potentially affected Indigenous groups on the department's review of BC Hydro's application for authorization for the main civil construction works. In particular, DFO contacted the Prophet River and West Moberly First Nations, along with ten other potentially affected indigenous groups. DFO officials have made significant efforts to provide opportunities for input, including a July 18 face-to-face meeting between Minister LeBlanc and West Moberly First Nations Chief Roland Willson and Prophet River First Nation Chief Lynette Tsakoza.

DFO will continue to engage with Indigenous groups that have raised concerns about the project to ensure that their concerns continue to be heard and taken into account."

Willson told DeSmog Canada the July 18th meeting marked the first time in six years that his nation has met with an official federal decision-maker on the Site C file.

"We met in Vancouver for about an hour. They sat there and took their notes and shook

Contractors excavate soil to prepare for Site C construction.

"The people of Treaty 8 have said no to Site C. Any government that is truly committed to reconciliation with indigenous peoples, to respecting human rights and to promoting truly clean energy must listen"

Chief Roland Willson, West Moberly First Nations.

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their heads in disbelief and then hopped on a plane back to Ottawa," Willson said.

"That whole process was to check the box. They haven't responded to any one of our concerns. If we don't go, they get to check the box beside the other box saying that we refuse to consult with them. There's no box anywhere that says 'this was meaningful.' The only box is did we show up or didn't we."

Willson said the Liberals have forgotten their election promises.

Tweet: "This Liberal government is no different than the previous Harper government. They're just sneaky. At least with Harper they were upfront about it."

Democracy group LeadNow has launched a phone action across Canada to encourage citizens to "flood the phone lines before they flood the Peace Valley." They are asking Canadians to call their MPs and let them know it is unacceptable for Trudeau to issue permits while there's an outstanding First Nations legal challenge about the Site C dam. RAVEN Trust is also raising funds to support the First Nations legal challenge.

Enbridge Northern Gateway Pipeline Overturned Due to Lack of Consultation

"This Liberal government is no different than the previous Harper government. They're just sneaky. At least with Harper they were upfront about it"

Recently, the Federal Court of Appeal ruled that the federal government failed to meet even a basic standard of First Nations consultation on another controversial B.C. proposal — the Enbridge Northern Gateway pipeline.

With that ruling, the approval of the pipeline was overturned.

"The inadequacies — more than just a handful and more than mere imperfections — left entire subjects of central interest to the affected First Nations, sometimes subjects affecting their subsistence and well-being, entirely ignored," the judges wrote in their ruling.

"Many impacts of the project — some identified in the Report of the Joint Review Panel, some not — were left undisclosed, undiscussed and unconsidered."

The question of whether there has been adequate consultation ultimately rests with the courts — but if the Site C dam approval is overturned, a whole lot of public money will be at risk.

Muskrat Falls Boondoggle 'Almost Identical' to Site C

We need look no further than the Muskrat Falls debacle in Newfoundland to learn what happens when provinces embark on mega-dam projects without a proven need for the power.

The 824-megawatt Muskrat Falls hydro project now under construction on the Lower Churchill has nearly doubled in cost since first beginning construction (from $6.2 billion to $11.4 billion).

Stan Marshall, the CEO of Nalcor, Newfoundland's provincial power corporation, has called the project a "boondoggle."

"It was a gamble and it's gone against us," he told reporters last month.

Muskrat Falls Hydro Power Project Under Construction.

By 2022, the domestic rate for power in the province is expected to nearly double. For the average homeowner, Nalcor estimates this could mean an extra $150 per month in power costs.

"The generation and transmission project was much too large than was necessary to meet the energy requirements of the province," he said.

"The original capital cost analysis, estimates and schedule was very aggressive and overly optimistic and just didn't account for many of the risks that were known, or should've been known, at the time."

Muskrat Falls went ahead without review by Newfoundland's Public Utilities Board and in

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defiance of the advice of the joint federal-provincial review panel.

Sound familiar?

"It's almost an identical case," Marc Eliesen, former CEO of BC Hydro, told DeSmog Canada.

"It's clear even more so as each day goes by that there really is no business case for Site C, especially with Hydro's own electricity demand decreasing significantly."

BC Hydro's recent annual report shows that demand projections were off by nearly half a Site C dam last year.

Can The Site C Dam Be Stopped?

With the federal permits in place and B.C. Premier Christy Clark vowing to get the dam "past the point of no return" before the next election, the big question is: can Site C still be stopped?

Eliesen points to examples from other provinces where projects have been halted mid-way.

For instance, in the 1970s, Manitoba Hydro began to build a dam on the Nelson River called the Limestone generating station. After 2.5 years of construction, it became apparent that the long-term power forecasts had changed and construction was suspended.

"They stopped, not withstanding construction for 2.5 years on a generation station that was larger than Site C," Eliesen said.

"Can you postpone, can you suspend, can you cancel Site C? Basically the experience in other jurisdictions shows that you can if the end result shows that the cost to the ratepayer will be more than if you postpone or suspend."

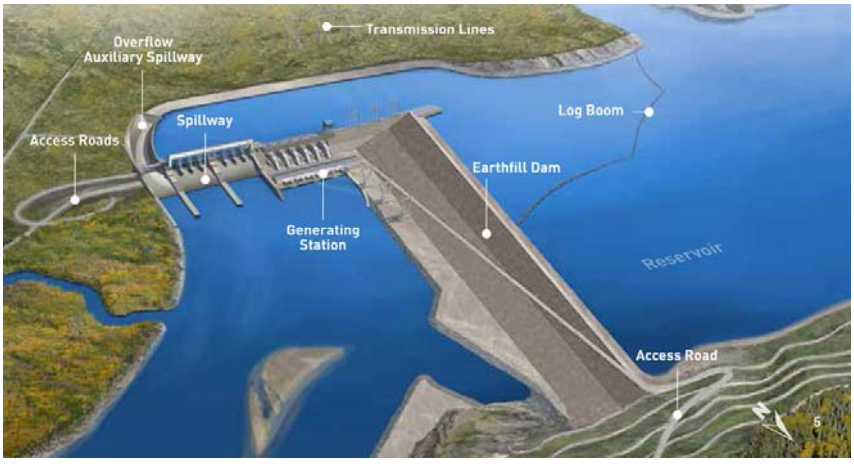
The Limestone project resumed seven years later in 1985 once a major export contract was negotiated with Minnesota. Eliesen was chairman of Manitoba Hydro at the time.

"If you want to export the power, you have to make sure it's exported on a firm power demand basis," Eliesen said. "Any firm power deal would have to be made in advance on any decision to construct something in British Columbia. It would be folly to think otherwise."

Selling power at the interruptable rate (often five to six times lower than the firm rate) means you don't cover the true cost of service.

"You're going to lose your shirt on it," Eliesen says. "You're going to sell power at a price that is less than it cost to create it."

[Reprinted from DESMOGCANADA: http://www.desmog.ca/2016/07/29/trudeau-just-broke-his-promise-canada-s-first-nations]



A schematic of the Site C Hydro Power Project. [Source: Ecogamut]

Arthur Manuel, Spokesperson, Indigenous Network on Economies & Trade and author of **Unsettling Canada: A National Wake-Up Call**

Canada-US Softwood Lumber Dispute and Indigenous Rights

By Arthur Manuel

(July 30, 2016 Secwepemc Territory) Canada exported $5.9 billion dollars in 2015 and $5.5 billion dollars worth of softwood lumber in 2014 to the United States. British Columbia exported approximately $2.5 billion dollars worth of softwood lumber to the United States in 2013. The American small mill owners accuse Canada of subsidizing these exports by charging less than free market stumpage rates. They base this on Canadian softwood lumber sells at less than what American mill owners can sell their softwood lumber for in the US market. All this softwood lumber comes from our traditional territories and it is our people who suffer because clear-cutting seriously impacts our culture.

Canada and the United States government dealt with this subsidy under a negotiated "***Softwood Lumber Agreement***" (**SLA**), which started in 2006 and terminated last October 2015. When the **SLA** ended Canada and the USA decide to take a year to re-negotiate another **SLA**. But this effort is going to fail. This will mean we will once again be engaged in another **Canada USA Softwood Lumber Dispute**. During the last Softwood Lumber Dispute the **Interior Alliance** (Secwepemc, Okanagan, Sta'at'imc and Nlaka'pamux Nations), the **Nishnawbe Aski Nation**, the **Grand Council Treaty No. 3** and the **Indigenous Network on Economies and Trade** (**INET**) jointly made several amicus curiae submissions to the **World Trade Organization** (**WTO**) and the **Bi-Panel of the North American Free Trade Agreement** (**NAFTA**).

"Canada only wants to share our resources at their discretion through welfare programs and not based on our Aboriginal and Treaty Rights"

The purpose of these submissions was to inform the **WTO** and **NAFTA** that Canada's policy to **NOT** recognize Aboriginal and Treaty Rights is subsidy to the Canadian forest industry. These amicus curiae submissions were accepted by the **WTO** and **NAFTA**. This is significant simply because the **WTO** and **NAFTA** do not like accepting non-governmental amicus Curiae submissions and secondly these were the first amicus curiae submissions made by Indigenous Peoples. The **WTO** and **NAFTA** by accepting these submissions agreed that Indigenous nations do have a substantive proprietary right in our trees and that if they are not dealt with could be an international trade subsidy. Nothing transpired from those decisions because Canada and the USA actually entered into that **2006 Softwood Lumber Agreement**. That **SLA** did not deal with the subsidies but merely set a quota for Canadian lumber exported into the USA. It did not deal with that non-recognition of Aboriginal and Treaty Rights as a trade subsidy.

The small and large mill owners in the United States are organized under the "***US Lumber Coalition***" that is committed to stop Canada from selling subsidized softwood lumber in the USA. The **US Lumber Coalition** has been fighting this cause since 1985. They are now pressing the US government to impose a countervailing duties on Canadian lumber in October 2016 when the year period to re-negotiate a new **SLA** ends. It is more than likely Canada will respond by going to the **WTO** and **NAFTA** to determine if the action taken by the USA is valid under trade law. We need to get involved in this fight because Indigenous Peoples are responsible for the trees. Canada claims the trees before the international trade bodies but we actually say we own the trees under our Aboriginal and Treaty Rights.

Canada got really angry at the **Interior Alliance** when the **WTO** and **NAFTA** accepted our submissions because they like having 100% control over the wealth created by our trees. Canada only wants to share our resources at their discretion through welfare programs and not based on our Aboriginal and Treaty Rights. It is important to point out that the current Canadian softwood lumber negotiating team from **Global Affairs Canada** (formerly **External Affairs**) had a conference call with some Indigenous leaders from BC. From that conference call **Grand Chief Ed John** drafted up a resolution instructing the **AFN** to join Canada's softwood lumber negotiating team. That compromise to join Canada's softwood lumber team was removed along with other changes and **Ed John's** resolution was passed. In addition to that **Chief Ryan Day** from the **Bonaparte Indian Band** made another resolution asking the **AFN** to support the ongoing work the **Interior Alliance** regarding the **Can-**

'Lumber Dispute' conclusion from page 8

ada USA softwood lumber dispute.

Indigenous Peoples from north of the Medicine Line need to ally with our tribes south of the Medicine Line to fight to benefit more from the trees from our territory. The last softwood lumber dispute really hurt a lot of the tribal mill owners. It is by jointly lobbying for our proprietary rights in Washington DC will we be able to put outside pressure on Canada to recognize our ownership of our trees. Last time **INET** spent many weeks lobbying in Washington DC. I remember the first time I lobbied in Washington DC I was told that I was lobbying in the wrong capital and I should be in Ottawa. It really was not until the **WTO** and **NAFTA** accepted our amicus curiae submissions did the USA really take us seriously. Building on what we created in 2000 – 2006 is very important and we will make it even more difficult for Canada to continue to ignore and deny our Aboriginal and Treaty Rights on the ground.

It was the work done last time on the **Canada USA softwood lumber dispute** that caused **Global Affairs Canada** to want to entrap BC Indigenous leaders in the Canada negotiating team. It is also why the province has been working on resource revenue sharing with Indigenous Bands so it can say that Indigenous Peoples are getting paid for their Aboriginal and Treaty Rights. The real problem with that argument is that the formulas used are not based on our Aboriginal and Treaty Rights but on formulas that are based on the province having full jurisdiction over our trees. These problems have to be brought up with our Native American Tribes and the US government when we lobby in Washington D.C.

If Canada is not willing to recognize our rights on the ground then we may have to call for international boycott of Canadian forest products. Canada is exporting $5.9 billion dollars worth of our trees to the United States. We are excluded from benefiting from this money under Canada's subsidy policy to not recognize our Aboriginal and Treaty right on the ground. We need to meet with **Home Depot** and other major buyers of Canada softwood lumber and advise them of the **WTO** and **NAFTA** decisions. We need to ask them to stop buying stolen lumber from Canada. We could advise them that we could take legal action against them if they continue to buy stolen lumber from Canada. We need to learn to defend our proprietary rights or we will be short changed like we have up to now by Canada and the forest industry.

It is no longer adequate to say we own our trees in our Band Hall. We need to say that in Washington DC. We need to say it because we believe it. The future of our grandchildren depends on our courage and our thoughtfulness. This international initiative actually emanated from the logging off the reserve, that **Neskonlith Band** did in 1999 when I was the elected Chief.

"If Canada is not willing to recognize our rights on the ground then we may have to call for international boycott of Canadian forest products"

Arthur Manuel lobbying in 2003 on the Canada USA softwood lumber dispute in Washington, DC, with Deputy Grand Chief Raymond Ferris from the Nishnawbe Aski Nation from northern Ontario.

Grand Chief Ed John, Member First Nations Summit Task Group wanted to be on Canada's Softwood Lumber Agreement negotiating team.

Mapping the "Sufficient, Continuous and Exclusive" Tests From the Tsilhqot'in Decision

By David Carruthers, BES, MSc, MCIP, RPP

It's been over a year since the Supreme Court of Canada's unanimous ruling on the **Tsilhqot'in Case**. When I read the decision, the words of **Chief Justice Beverley McLachlin** jumped off the page. In describing the test for Aboriginal title, she stated that it [occupation] "***must be sufficient; continuous (where present occupation is relied on); and it must be exclusive***" (para 25). As a land use planner and cartographer, these words were read as a challenge.

Thinking about the communities where I work, many of whom are in the comprehensive claims process, I wondered what research products would be needed to meet these three tests. Once this research was assembled, could we reach a reconciliation of title and avoid the Crown's policy of extinguishment?

I've been working for almost 20 years on Aboriginal land management issues with a wide range of experts throughout Canada, on various pieces of land claims research. But I haven't come across a single published study that outlines the must-have shopping list of research products to help in title determination.

I recently spoke with a mentor of mine, **Dr. Doug Elias**, and asked him specifically about this. He had a lot to say on the topic. **Dr. Elias**, **retired professor in the Faculty of Management at the University of Lethbridge, Alberta**, has worked on Aboriginal title issues across Canada since the late 1960's.

"research needs to be tailored to each community on a case-by-case basis. But there are some overarching or core research pieces that should be quite common between cases"

Elias told me that the three tests have been around since the 1980's when the **Baker Lake ruling** was decided. But the research needed to meet these tests has been quickly evolving. He published a paper on the topic for the **Ontario Model Forests** in 2002 – which served as a good primer to get me started. It's a bit outdated, but certainly worth the read (need to click on the "***click here to view***" link on their site).

In our conversation, **Elias** first advised me not to oversimplify the onerous task in meeting these tests. "***A mountain of research is needed***", he said. This, despite **Chief Justice McEachern** in **Delgamuukw** cautioning that "***there are limits to how much evidence a party may adduce, and a trial must always be confined within reasonable limits.***" **Elias** noted that research needs to be tailored to each community on a case-by-case basis. But there are some overarching or core research pieces that should be quite common between cases. And many research products can be used to address more than one of the three tests. Here's a summary and a few notes for each:

1. Use and Occupancy Study

A good use and occupancy study might be one of the most important pieces of research to address the three tests. These studies carefully map out where harvesting of plants and animals take place, where there are habitations and fixed cultural sites and where trapping and cultural activities occur within a harvester's living-memory. When done well, these studies demonstrate, in a very defensible way, where and how the land is being used. A great resource for these studies is **Living Proof** by **Terry Tobias**. These studies can also be tweaked to incorporate a time element to capture frequency of use (how often, when, etc.), and changing patterns of use over time, which may prove helpful in dealing with the sufficiency test. But mapping intensity and change of use can be expensive and a very complex undertaking. See for example the **Subsistence Mapping of Nuiqsut, Kaktovik and Barrow study** for what might be involved in designing a study to document subsistence patterns and measuring changes in those patterns over time.

Russell Diabo, Research Director, Adams Lake-Neskonlith Traditional Use Study with the research outputs: Interviewer Notebooks, Casette Tapes and Maps. Circa 1998.

2. Harvest Study

While a use and occupancy study demonstrates where and how the land is being used, a harvest study answers the question, how much is being used? In simple terms, these studies track seasonal harvesting amounts on a house-by-house basis and convert pounds of meat, berries, firewood, etc. into current market values. Of all the studies, the harvest study might prove to

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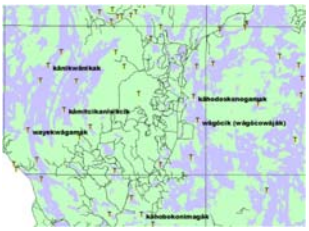
be the most time intensive and difficult to complete. I believe, however, that a rapid-appraisal technique can be used to approximate harvest amounts, producing enough information to help move forward in dealing with the sufficiency test. Research results can also be used when negotiating impact benefit agreements or when developing mitigation strategies to address the displacement of harvesters.



Algonquins of Barriere Lake Toponymy

3. Toponym or Place-Name Study

Naming places is an act of claiming sovereignty, a key reason why the Crown almost entirely deleted or replaced Aboriginal place names from Canada's topographic maps. **Peter Di Gangi, consultant and Director of Policy and Research with the Algonquin Nation Secretariat** (**ANS**), has documented Quebec's "***Toponymical Imperialism***" between 1911 and 1928 where Quebec's Geographic Names Commission removed "***barbarous***" indigenous place names and replaced them with "***cultured***" French toponyms. I've since worked with the **ANS** to build a tool to help put Algonquin names back on their maps through a site titled, **The Land that Talks**.

But naming places is more than just an act of planting flags. Indigenous place-names can help to document kinship and family connections to the land and reveal a profound understanding of local ecology which is important in all three tests of title.

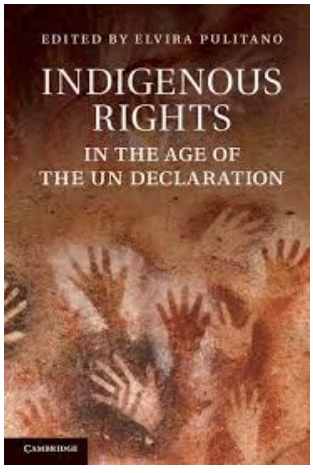
"Naming places is an act of claiming sovereignty, a key reason why the Crown almost entirely deleted or replaced Aboriginal place names from Canada's topographic maps"

4. Indigenous Knowledge (IK) or Traditional Ecological Knowledge (TEK) Studies

This is a tough piece of research. When done well, these studies can help to document sufficiency and continuity of title by demonstrating deep knowledge of place, based on experience, oral history and cultural traditions. **TEK research** is helpful to predict outcomes of change: how, for example, will animal behavior change given a specific change in the environment (mine, oil sands, climate change, etc.). It can also help to document laws or code of ethics in managing resources, all important for the sufficiency determination.

But these studies are difficult to pull off, or pull off well. In a recent conversation with **Terry Tobias, author of Living Proof**, **Terry** noted that very few **TEK studies** published in Canada have documented their methods and that most studies have produced questionable results when it comes down to the reliability or replicability of their findings. **Elias** agrees. He said that, despite just about every land and wildlife program in Canada incorporating traditional knowledge in their policy statements, these organizations have very little to say about best practices in how to do so. "***Platitudes without practice***". You can see this with **Ontario's Moose Management Policy** or **Canada's Species at Risk Act**.

A good recent resource on the subject is a report by **Peter Armitage** and **Stephen Kilburn**, **titled Conduct of Traditional Knowledge Research in the Inuvialuit Settlement Region**. One of the guiding principles from this report in designing a **TEK** or **IK study** is to "***use proper social science research methods, set clear research objectives and restrict research topics so these can be achieved in the time and with the resources available***". Good advice.



5. Documentation of Customary and Traditional Laws

The courts have asked claimants to make their "***Aboriginal systems of governance***" and laws known. **Elias** notes that there are no real best-practices in this field of study but skilled ethnographers should have no problem in pulling this research together. The outcomes from this research will not only help with the sufficiency determination for title, but can also be used for joint or co-management negotiations governing how lands are managed.

6. Archaeology, written history and ethnography

This might be the most straight forward research component, but may entail the most amount of work. **Elias** describes this work as a way to summarize all available research into a narrative that demonstrates the extent of a claimant's territory since the time of con-

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tact (and before), the extent of exclusivity and overlap with neighbours, and a record of the claimants' changing social environment. The research also demonstrate that the claimant is an '***organized society***' and that this society is connected to land. Pretty much all three tests of title will rely on the narrative from this research.

7. Genealogy

Genealogy studies can fall under general ethnographic research, but I've separated it out here because it should be tackled as a stand-alone piece of research. These studies start by asking, "***who are today's members?***" and work backwards from there. This helps to demonstrate the degree to which the community has maintained its continuity of membership over time. This is important for the continuity and sufficiency tests. According to **Peter Di Gangi**, this research is very powerful when connected to the **use and occupancy research** to demonstrate continuity of use.

8. Alienation Study and State of the Territory Report

I added this to the list based on my own experience in working on land issues. White spaces on maps are often interpreted as "***abandoned***" or "***surrendered***". Once we inventory third party use and cumulative impacts in a territory, however, we get a clearer sense of why harvesters may have gone elsewhere (e.g. mining, forest development, aggregates, oil and gas, Crown dispositions, non-native harvesting and tourism, etc.). These studies are also important in negotiating interim relief while Title is being resolved. And these studies can help in determining compensation for impacts.

"good research doesn't speak for itself – it needs to find its way into the hands of a strong leadership, skilled negotiators and experienced legal advisors"

From this list we can clearly see that mapping is a central tool to record, package and tell the story of Aboriginal Title. We can also see that whenever a wealth of information is collected, information management standards are needed to organize and safeguard the research products. And of course, good research doesn't speak for itself – it needs to find its way into the hands of a strong leadership, skilled negotiators and experienced legal advisors.

And what about a budget and timeline to pull all of this research together? I might go out on a limb here. With some legal time thrown into the mix, I would hazard to guess that it would be around **$750,000** to **$1,000,000 and a minimum of three to five years** to pull together, depending on the community and complexity of the case. This could certainly be more if a full harvest study is undertaken, not just a rapid appraisal study. Either way, this is a significant investment, especially when the outcomes for title determination aren't guaranteed.

But if done well, these research products can be used for other applications like helping to inform consultation and accommodation work with the Crown. And for education, cultural rediscovery and outreach. This alone to me is a good return on investment.

[Reprinted from Planlab Website: http://www.planlab.ca/mapping-the-sufficient-continuous-and-exclusive-tests/]

About PlanLab

PlanLab specializes in cultural planning and mapping. We help communities to tell the stories that need to be heard, through good research, strategic analysis, and beautiful maps.

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Trudeau Continues Harper Assault on Human Rights

Prime Minister Justin Trudeau. (Photo courtesy of Adam Scotti, PMO)

BY MATTHEW BEHRENS | JULY 29, 2016

There's something about Justin Trudeau and his PR-spinning Liberal Team that reminds me of the Tennessee Williams character Harvey "***Big Daddy***" Pollitt from Cat on a Hot Tin Roof. Pollitt famously uttered the line:

"***What's that smell in this room? Didn't you notice it, Brick? Didn't you notice a powerful and obnoxious odour of mendacity in this room?... There ain't nothin' more powerful than the odour of mendacity... You can smell it. It smells like death.***"

Mendacity, for those without instant dictionary access, is a code word for behaviour that is disingenuous, two-faced, deceitful, hypocritical. In other words, a term that more and more Canadians will soon be applying to Mr. Trudeau, whose PR perfume will not be able to cover up the mess he and his team are making in Ottawa much longer.

Case in point is a disingenuous crew who call themselves feminists and tout their gay pride credentials while arming misogyny and homophobic violence in Saudi Arabia, where members of the LGBTQ community face execution by a regime bolstered by $15 billion in Trudeau-approved weaponry. Or perhaps there's the "***we love the environment and Indigenous folks***" meme, symbolized by sending lots of Canadians to the Paris climate conference while continuing to do their best to support new pipelines and tar sands expansion, and refusing to implement the **UN Declaration on the Rights of Indigenous People** nor to properly meet the most basic of education funding benchmarks for First Nations youth.

The feminist in the **PMO** has also done little to eliminate the crisis of violence against women in the military. Indeed, it is a Trudeau-appointed War Minister who has refused to release details about the postings of a Canadian soldier and serial sexual assault perpetrator who recently pleaded guilty in Petawawa to six counts of sexual assault. That information would have been vital in tracking down other potential victims of **Derrick Gallagher**, a veteran of one tour in Afghanistan.

Useless platitudes

Like the presidential American cousin with whom an embarrassing bromance has been going on since the election that booted Harper from office, Trudeau has specialized in useless platitudes that, apart from the odd tinkering with the system, has carried on much of Harper's devastating legacy. It's particularly evident in Trudeau's repeated eagerness to whip out his CF-18s and deploy them in eastern Europe and Pacific war games, all the while committing Canadians to a $30-billion outlay in new warships and warplanes while increasing troop numbers on the ground in Iraq.

And as anyone who works with refugees can tell you, after they got their Syrian photo-op, the Liberals have pretty much resorted to the Harper-era level of meanness and pettiness in denying family reunification, continuing to keep refugees and immigrants in jail, refusing to grant ministerial discretion in cases that cry out for such a simple solution, and slowing sponsorships to a trickle.

“there's the "we love the environment and Indigenous folks" meme, symbolized by sending lots of Canadians to the Paris climate conference while continuing to do their best to support new pipelines and tar sands expansion”

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Here at home, Trudeau's **Justice Department** has carried on a legal assault on a number of specific communities. For example, over 400 brave women who are current and former **RCMP officers** filed a class action lawsuit against the systemic misogyny governing the **RCMP** while Harper was still **PM**. Trudeau the "***feminist***" has failed to withdraw Ottawa's opposition to the lawsuit, leaving women suffering from **PTSD** to continue to suffer in a manner documented in the excellent **No One to Tell**, **by former RCMP officer Janet Merlo**.

And while Trudeau proclaims himself the King of Multicultural acceptance, his attack dogs in the state security agencies continue to go after targeted communities while enjoying immunity under the provisions of the repressive **C-51**, which gives them the power to torture, kidnap and indefinitely detain individuals who, for example, refuse to spy on their community or who condemn **CSIS**' abusive practices.

"while Trudeau proclaims himself the King of Multicultural acceptance, his attack dogs in the state security agencies continue to go after targeted communities while enjoying immunity under the provisions of the repressive C-51"

Trudeau's contempt for Muslims

Nowhere is Trudeau's contempt for certain members of Canada's Muslim community more apparent than in his government's continued insistence on refusing to follow up on its own resolution calling for a just settlement in the cases of three Canadian citizens -- **Abdullah Almalki, Ahmad El Maati and Muayyed Nureddin** -- who were tortured in Syria and Egypt while Liberal **Jean Chrétien** was in power. Two judicial inquiries found the Liberal government of the day -- which includes many of the veteran MPs who are part of Team Trudeau -- complicit in this torture, and yet a dozen years after the men came home, they still have received no apology, no compensation, and certainly no hope that changes have been introduced to prevent happening to others what befell them.

The **2009 Parliamentary resolution** supported by the Liberals called on Ottawa to officially:

> "***[A]pologize to Messrs. Almalki, Abou-Elmaati and Nureddin; allow compensation to be paid to Messrs. Almalki, Abou-Elmaati and Nureddin as reparation for the suffering they endured and the difficulties they encountered; and that the Government of Canada do everything necessary to correct misinformation that may exist in records administered by national security agencies in Canada or abroad with respect to Messrs. Almalki, Abou-Elmaati and Nureddin and members of their families.***"

The resolution also called on Canada to issue a:

> "***[C]lear ministerial directive against torture and the use of information obtained from torture for all departments and agencies responsible for national security. The ministerial directive must clearly state that the exchange of information with countries is prohibited when there is a credible risk that it could lead, or contribute, to the use of torture.***"

Ottawa was complicit in the torture abroad of, right to left, Abdullah Almalki, Ahmad Abou Elmaati and Muayyed Nureddin. Their torture in Syria and Egypt was recognized in an official inquiry. (TOM HANSON / CP FILE PHOTO)

While the **Harper government** famously issued torture directives allowing its state security agencies to engage in complicity in such nefarious and illegal acts, the **Trudeau government** has done nothing to discard them, nor to implement the recommendations they supported in 2009. Trudeau's refusal to repeal **C-51** and its very clear complicity in torture provisions means more cases like this will be bound to occur.

In addition, while the Liberals in 2009 acknowledged that the men were tortured, their position now remains that the men have to once again prove it as part of their ongoing civil suit. Despite two very lengthy judicial inquiries, the Liberals are refusing to accept their findings.

Indeed, as **Andrew Mitrovica** writes in **Ricochet**:

> "***[A]s part of discovery process related to the civil suit, Justice Department lawyers again 'cross-examined' at length not only Almalki, but also his wife, two oldest children and his elderly***

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> ***mother. Almalki says an RCMP officer -- tied to the now discredited original probe of him -- was present throughout several of the interviews. As well, government lawyers wanted to cross-examine his frail 91-year-old father in person, but agreed, reluctantly and at the last moment, to conduct the questioning in writing. 'My family has been re-traumatized,' Almalki said.***"

Such brutally heartless decisions have been made by **Trudeau's Justice Minister, Jody Wilson-Raybould**. Like his father, Trudeau the younger is enamoured of Canada's state security agencies and has no qualms about bowing to their every command. Veteran peace campaigners will no doubt recall how the **RCMP** regularly infiltrated and disrupted peace groups in the early 1980s who were resisting the Trudeau government decision to build and test cruise missiles in Canada. Such dirty tricks were part of what led to the creation of **CSIS** in the first place, and now Justin Trudeau is carrying on the family tradition.

Trudeau fights returnees from torture

In yet another mendacious act that speaks to Trudeau's contempt for the human rights of returnees from torture, on June 14, the Trudeau government appealed a Federal Court ruling that found disclosure of certain key documents in the torture cases could proceed even in the unlikely event it would reveal **CSIS** "***sources***" from 14 years ago. Claiming national security privilege, Trudeau's lawyers have insisted that **CSIS** should enjoy absolute impunity in whatever it does. This issue arose under the Harper government with the case of secret trial detainee **Mohamed Harkat** of Ottawa (originally imprisoned on secret allegations via the signature of **Liberal MP Wayne Easter**. **Harkat** is now fighting a Trudeau government that seeks to deport him to torture in Algeria). When **Harkat's case** made it to the Supreme Court, the judges ruled **CSIS** did not enjoy absolute class privilege, even in closed, secret sessions with only lawyers and a judge present.

While the Court found that **CSIS sources** did not enjoy informer privilege, they declared there is no "***unlimited ability to interview and cross-examine human sources.***" They fretted that if **CSIS** sources had to testify, even in secret session, this may have a chilling effect on the agency's "***ability to recruit new sources.***" This concern is bizarre, considering ongoing reports from targeted communities indicating that most potential **CSIS** "***sources***" would hardly be reliable since they are coerced into spying in exchange for status in Canada. Indeed, one source in the **Harkat case** appears to have had special inspiration to continue producing "***intelligence***" because he carried on a torrid affair with the **CSIS agent** handling him.

Not happy with that finding, the Harper government introduced **C-44**, the **Protecting Canadians from Terrorists Act** (sic), better known as the Protecting Informers Who Don't Tell the Truth Act. Based on this legislation, the Trudeau government has been arguing against disclosing key documents to **Almalki, El Maati and Nureddin** because it is concerned about the potential for identifying informants from 14 years ago.

The Federal Court originally ruled that the government could not apply **C-44** retroactively in the torture cases, but this was overturned by the Federal Court of Appeal with the full support of the Trudeau regime. The Federal Court of Appeal, using the technical language of the law to justify the unjustifiable, conceded that the new law changes "***the rules of the game to the disadvantage of***" the torture returnees. The judges then say in one of those wonderfully mendacious moments of sheer naiveté or willful blindness that "***it is also important to keep in mind that the legislator is presumed to know the law and how it has been applied.***"

Preferential option for the powerful

In a preferential option for the powerful, the Trudeau government argued, and the Federal Court of Appeal agreed, that disclosure in these proceedings "***could have a direct impact on the life and security of human sources.***" What they fail to acknowledge is that denial of the truth about why these men were tortured, and holding spies accountable, also speaks to the most basic human rights that have been violated in the returnees' cases.

While this case drags on, another recent state security case that received little attention allows the **RCMP** and **CSIS** to carry on their usual abuse of human rights in vulnerable communities. Again, the Trudeau government chose to fight this on the wrong side. In this instance, seven months after the Parliament Hill shooting, a person in Ottawa had their home invaded and materials seized by the **RCMP**, which carried with it a warrant allowing it to seize "***any document, data and/or Internet search history related to Islam.***" Other search terms looked for included the Government of Canada, "***combat politics,***" and the **Canadian Armed Forces**. All legal searches, for those wondering...

The individual whose house was raided was not charged, nor informed of why possession of any document related to Islam could be connected to a crime. Among the items seized by the **RCMP** were recordings of recitations of the Holy

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Quran. Seeking answers, the person sought a copy of the **Information to Obtain** (**ITO**) in support of the warrant, which had been sealed by the Ontario court. This was denied because the court maintained the individual failed to demonstrate that the order was unlawful.

In a December 2015 court hearing, a judge found that the rights of a non-accused person to know why their home was subject to a raid and seizure of materials was not the same as those of an accused person. The judge also found that the burden of proof that the search warrant was obtained unlawfully is on the individual who was subject to the raid. But how can that be proven when the information needed to prove that is sealed and beyond reach?

In addition, what inflammatory allegations are in that sealed packet of information to obtain a search warrant that could be harmful to the individual? After all, it appears to have been connected -- without any explanation -- in some way to the Parliament Hill shootings, and under **C-51**, a whole range of government agencies can be sharing this information freely not only amongst themselves but with foreign agencies as well. This does not bode well for the individual in question, especially when it comes to overseas travel and the potential for detention and interrogation. In other words, the very issues still being raised by **Almalki, El Maati and Nureddin**, and still being resisted by the Trudeau government.

There was an effort to have this important case heard by the Supreme Court of Canada. But **Trudeau's Justice Dept.** had other ideas, and fought the motion to have it heard by the country's highest court. It was refused.

Those still intoxicated by the dream of a world without Harper don't want the fresh perfume of Trudeaumania to be erased by the cold, hard facts of reality. But so many Canadians' refusal to acknowledge that Trudeau continues to carry on the Harper era assault on human rights (one that is not unique to Harper, but which was also very much a part of earlier Liberal regimes) simply adds to the collective trauma experienced by so many of the assault's victims.

Yes, Virginia, there is an odour in Ottawa. And that stench is mendacity.

Matthew Behrens is a freelance writer and social justice advocate who co-ordinates the Homes not Bombs non-violent direct action network. He has worked closely with the targets of Canadian and U.S. 'national security' profiling for many years.

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