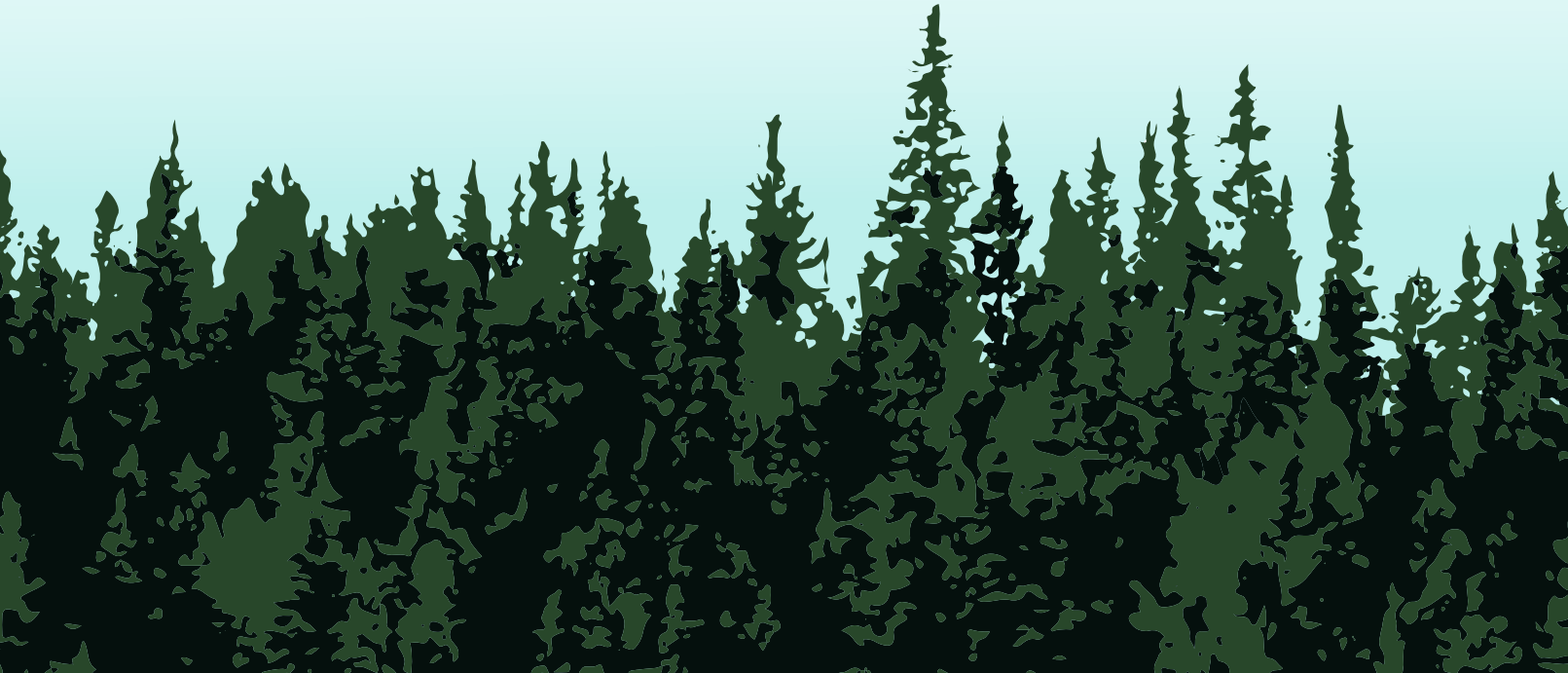
British Columbia Community Forest Association

local people, local forests, local decisions

First Nations Relations:

History is the Context, Shared Decision-Making is the Future



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Moving to Collaborative Management

And Collaborative Governance Over Land in BC

This short document is meant to give you some background information to understand why the Province of BC has been working on the "land question" for a couple of decades now. It all goes back to a simple problem: under Canadian law, Aboriginal title is considered to pre-exist the sovereignty of the Crown. But since BC has made virtually no treaties, the Crown never "extinguished" Aboriginal title. This leaves First Nations in a position to make claims against the Crown using the Crown's own rules – the Canadian legal system – and consistently win.


NEWS

B.C. pauses plans to amend Land Act

'We need a bit more time to help make it work and bring people in': water, land, resource stewardship minister

Concerns raised over B.C.'s Land Act amendments

Changes to give First Nations shared decision making powers over land use

Vaughn Palmer: Changes to Land Act are huge, despite B.C. minister's claims

Nathan Cullen tried to suggest that the pending change in the provincial Land Act were no big deal. He sees it flowing naturally from the passage, back in 2019, of the Declaration Act, incorporating the principles of the UN Declaration on the Rights of Indigenous Peoples.

B.C. walks back Land Act amendments, says further engagement needed to show 'real benefits'

B.C. scraps proposed changes to Land Act amid consultation, controversy

B.C. has decided not to proceed with proposed amendments to the Land Act after holding a series of meetings with stakeholders

Newspaper headlines

Successive governments from the right and the left have made a series of attempts to deal with the land question in BC. They are forced to, because Canada's own courts have decided time and again that First Nations in BC have underlying title that precedes Crown sovereignty. As the judge in the Saik'uz case put it in 2022, Crown sovereignty "is simply a legal fiction to justify the de facto seizure and control of the land and resources formerly owned by the original inhabitants of what is now Canada."[1] These attempts have included the Modern Treaty Process, more recent Reconciliation Agreements, the Declaration on the Rights of Indigenous Peoples Act, and of course Bills 23 and 28 in 2021, which amended forest legislation and brought in Forest Landscape Planning. As the Province implements these changes, First Nations are beginning to reassert their ability to make decisions over lands that they never surrendered, and increase the legitimacy of decisions that British Columbians are making together.

[1] *Thomas and Saik'uz First Nation v. Rio Tinto Alcan Inc, 2022 BCSC 15.*

The Basics of Aboriginal Title in BC

Perhaps the most important document for understanding Aboriginal title is the Royal Proclamation of 1763, made at the end of the Seven Years' War. In it, Britain's King George stated that Aboriginal title exists, and that all land beyond the colonies would be considered owned by Aboriginal peoples until ceded by treaty.[2] The Royal Proclamation itself is actually mentioned in Section 25 of the Charter of Rights and Freedoms.

Europeans and Indigenous people trading furs

Joseph Trutch

But BC has almost no treaties, which were the legal mechanism through which the British and then Canadian Crown could extinguish or modify Aboriginal title. The Colony of British Columbia's first Lieutenant Governor, James Douglas, made a number of treaties with First Nations on Vancouver Island.

However, his successor, Joseph Trutch, the first Lieutenant Governor of the Province of BC, halted treaty making and even resurveyed the reserves set up by Douglas, reducing their size by 91%.[3] Trutch was famously racist even for his time. He described Indigenous people as "utter savages," prone to wanton violence. To him, they were the "ugliest and laziest creatures" he had ever seen.[4]

[2] *https://indigenousfoundations.arts.ubc.ca/royal_proclamation_1763/*
[3] *Fisher, Robin (1971). "Joseph Trutch and Indian Land Policy". BC Studies. 12: 3–33.*
[4] *Quoted in Abbott, George (2017), "Persistence of Colonial Prejudice and Policy in British Columbia's Indigenous Relations: Did the Spirit of Joseph Trutch Haunt Twentieth-Century Resource Development?" BC Studies. 194: 39–64*

Of course Joseph Trutch's decision is only one in a long line of segregationist, racist laws meant to dismantle First Nations' decision-making structure, disrupt their culture, and steal their land. Many of us have heard of these stories, whether they are the wanton abuses of Indian Residential Schools or the denial of basic freedoms contained in early versions of the Indian Act. We don't often hear about how First Nations have continually advocated for their jurisdiction and rights.

Education as Colonial Propaganda

If you were educated in BC's public schools in the last part of the twentieth century, you wouldn't really have heard about Joseph Trutch. But you would have heard ideas similar to Trutch's, dressed up a bit to be more palatable. In Our Land: Building the West, the Grade 10 social studies textbook in the BC Curriculum throughout the 1990s, students were told that "for bottles of cheap rotgut [whisky]" First Nations people traded "valuable buffalo robes, furs, horses, food, and some even their wives and daughters," and that "many deaths and murders had followed drinking sessions in Native camps."[5] BC's official educational instruments reinforced the myth of Indigenous inferiority, and taught young British Columbians that First Nations simply crumbled under the inevitability of European dominance. The lesson here is clear: colonial propaganda has produced a common perspective that First Nations advocacy is illegitimate, and only in recent years is that perspective starting to change.

On the next page, you can see a list of colonial legislation meant to interrupt the lives of First Nations people, prevent them from accessing their lands, stop them from using the colonial court system to defend themselves, interrupt their own governance systems, and prevent them from competing in the economy. You will also see a number of actions taken by First Nations – going all the way back to contact in BC, and extending through to current times – to defend themselves, appeal to previous promises from the Crown, and gradually build back their political and legal power. We are seeing the fruits of this labour now. A few things to note about this list:

1. The Potlatch was outlawed because it was – and is – not just a cultural event but a legal process, for the many BC nations who practice it. The threat it posed was clear, since it was a governance system deeply rooted in the communities that practice it and stretching back thousands of years. The Potlatch is not only a way to redistribute wealth: it is a way for people to witness contracts, for leaders to make new laws, and for new leaders to be given titles.

2. The colonial governments legislated First Nations out of those industries in which they thrived – for instance, by prohibiting their participation in the commercial fishery between 1888 and 1923. This was a clear attempt to remove First Nations from competition against non-Indigenous settlers in these industries.

3. Between 1927 and 1951, it was illegal for First Nations to hire lawyers or even convene meetings to discuss land questions. The Federal government's restrictions on First Nations' access to the Crown's own legal system demonstrate the shaky ground that Canadian sovereignty is built on, particularly here in BC.

Showing of masks at Kwakwaka'wakw potlatch, BC, 1914

[5] *Quoted in Furnis, Elizabeth, The Burden of History, p. 59. Vancouver: UBC Press, 1999.*

Key events in Canadian and BC Colonial History

Below is a short list of some key events in Canadian and BC colonial history. It is by no means exhaustive; its intent is to illustrate that for every move meant to dispossess Indigenous peoples of their land or rights, there were extensive counter-moves by Indigenous peoples themselves.

- 1763: Royal Proclamation
- 1850s and 1860s: BC Gold Rush
- 1860: James Douglas Proclamation
- 1864: Chilcotin War
- 1867: Joseph Trutch resurveys James Douglas reserves, reducing their area by 91%.
- 1876: Indian Act made law
- 1884: Residential schools are included in the Indian Act
- 1884: Traditional Indigenous practices such as the Potlatch and Sundance are outlawed
- 1887: Nisga'a Delegation to Victoria to discuss land question
- 1888–1923: Aboriginals are excluded from commercial fishing
- 1899: Treaty 8 is signed, covering northeastern BC, parts of northern Alberta, and the southern Northwest Territories
- 1910: Secwepemc Chiefs meet Prime Minister Wilfred Laurier in Kamloops, advocating for improved relations with settlers
- 1913: Nisga'a submit petition to privy council in London requesting assistance in securing their rights
- 1927: Organizing meetings and hiring lawyers to dispute land claims are made illegal
- 1951: Prohibitions on the Potlatch and Sundance, and on hiring lawyers, are removed from the Indian Act
- 1951: Status Indian women who married non-status men lose their status
- 1960: Status Indians gain the right to vote
- 1969: The White Paper is introduced, proposing to eliminate Indian Status
- 1970: Citizens Plus (The Red Paper) is published, rejecting the White Paper
- 1980–1981: The Constitution Express organizes to protest the lack of Indigenous representation in the patriation of the Constitution
- 1982: Aboriginal Rights are secured in the newly patriated Canadian Constitution (Sections 25 and 35)
- 1985: Bill C-31 allows many women who lost their status to regain it – but still includes a formula for removing status
- 1988: McLeod Lake Indian Band wins its first injunction
- 1991: The BC Claims Task Force Report kicks off modern treaty making in BC
- 1996: The last federally operated residential school closes
- 1999: McLeod Lake Indian Band adheres to Treaty 8
- 1999: Nisga'a Treaty is signed (negotiations began in 1973)
- 2004: The Haida case requires the Crown to consult with First Nations if activities could impact Aboriginal rights and title
- 2005: The New Relationship policy is rolled out in BC, paving the way for reconciliation negotiations
- 2006: The New Relationship Trust initiative is established to help BC First Nations build wealth
- 2019: The Declaration on the Rights of Indigenous Peoples Act (DRIPA) becomes law in BC
- 2022: Tahltan Central Government and the Province of BC finalize the first decision-making agreement under DRIPA
- 2024: BC government recognizes Haida title

Treaties, Reconciliation Agreements,

And the *Declaration Act*

The changes being made to decision-making in BC, beginning in the 1990s with the Modern Treaty Process, are all responses to Joseph Trutch's fateful decision to ignore Aboriginal title. Through the last half of the twentieth century, First Nations in BC and across Canada were claiming political, legal, and moral victories. Of particular significance were wins at the Supreme Court of Canada which laid out the rules for claiming Aboriginal title and put Indigenous histories on the same legal footing as colonial documents.

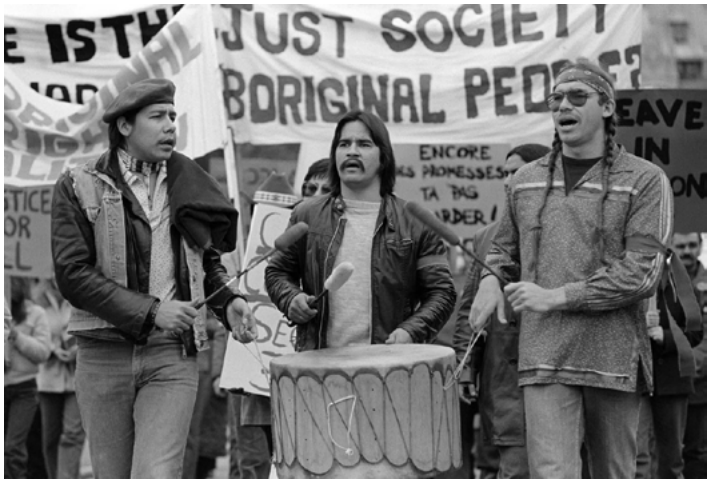
Harry Strom, Harold Cardinal and Jean Chrétien, 197

The Province's aim when it comes to modern treaty making, contemporary reconciliation negotiations, and the big changes to decision-making we are seeing in BC is simple: **a predictable investment climate**. Predictability can only develop through negotiations with First Nations. As has been demonstrated in various Supreme Court decisions, such as the Tsilhqot'in case, First Nations have Aboriginal title to their territory; if BC doesn't negotiate, it will have far less say about what happens to land under Aboriginal title. And negotiations are far more efficient and cost-effective than going through the courts.

Changes to decision-making around forestry combine these predictability concerns with a recognition that the previous decision-making regime favoured volume-based licence holders over public input into decision-making. Bills 21 and 23 have aimed to increase Indigenous participation in forest management while still maintaining decision-making authority of provincial systems, such as the office of the Chief Forester. These bills have also made space for Indigenous Governing Bodies under Section 7 of the *Delaration Act*.

Other changes are attempting to go further. The proposed amendments to the *Land Act* that were introduced and then dropped early in 2024 would have enabled Indigenous Governing Bodies to enter into joint decision-making with the Province when it comes to Crown land.

Indigenous Governing Bodies are defined in the *Declaration on the Rights of Indigenous Peoples Act* as entities that are "authorized to act on behalf of Indigenous peoples that hold rights recognized and affirmed by Section 35 of the *Constitution Act*, 1982."[6]



Protesting elimination of Aboriginal rights in proposed Constitution, November 16th, 1981

With the *Land Act* amendments, the Province was attempting to enable Indigenous peoples to be partners in decision-making over land that, according to the Canadian court system, they still hold title to. By recognizing Indigenous Governing Bodies in the *Declaration Act*, the Province is also acknowledging that the Chief and Council system may not be adequate to serve as the sole representative of Indigenous peoples in BC, and may need to be supplemented with traditional systems of governance.

We should mention that joint decision-making as proposed in the failed *Land Act* amendment, as resulting from other negotiations, and which may be incorporating into Forest Landsape Planning is not a veto – it does not give one party the power to block a final decision.[7] Rather, it is about collaborating to make decisions, and recognizing a mutual obligation to consult one another when these decisions arise. However, it does increase the accountability of the Crown, effectively removing its ability to make unilateral decisions regarding lands over which – as we have been arguing – it does not have full authority.

These changes are not about remedying historical injustice, and are not the result of one political party's ideology. They are about legitimate decision-making and secure, predictable access to resources. Even though BC is in possession of the land, the government doesn't have the receipt through treaties, and so needs to reconcile its claims to authority with the very real and legally demonstrated Aboriginal title.

Canadians are attached to the narrative that Canada is a fair country. We are now facing the truth that this was not the case, and is not the case. We have an opportunity to build a new relationship, to live up to the ideal of fairness, and to make decisions that are viewed as legitimate both by the colonial system and by First Nations decision-making systems. When it comes to moving forward under this new reality in BC's community forests, these new relationships are going to be key to success.

[6] *https://irshdc.ubc.ca/files/2020/03/UNDRIP_Article2_GoverningBodies.pdf*
[7] *https://www.wcel.org/blog/setting-record-straight-bcs-proposed-land-act-amendments*

Aboriginal Rights in the Constitution

Aboriginal Rights are incorporated into the Constitution in two places: sections 25 and 35. Section 25 incorporates the Royal Proclamation, and Section 35 recognizes and affirms existing aboriginal and treaty rights – but does not define them. Originally these rights would have been defined through subsequent constitutional conferences, but these all failed. These rights have been the subject of a number of court cases, and flow from Aboriginal peoples' use and occupation of their traditional lands. They exist prior to being recognized by the Constitution or the Crown. Generally they include the right to use resources for food, social, and ceremonial purposes; the right to self-determination; and the right to practice culture and religion. These sections are reproduced below for reference.

25. The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including:

a. any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and
b. any rights or freedoms that now exist by way of land claim agreements or may be so acquired.

35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

(2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.

(3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.

(4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

Ts'Peten - or Gustafsen Lake, BC - in Secwepemec territory

Aboriginal Rights in Case Law

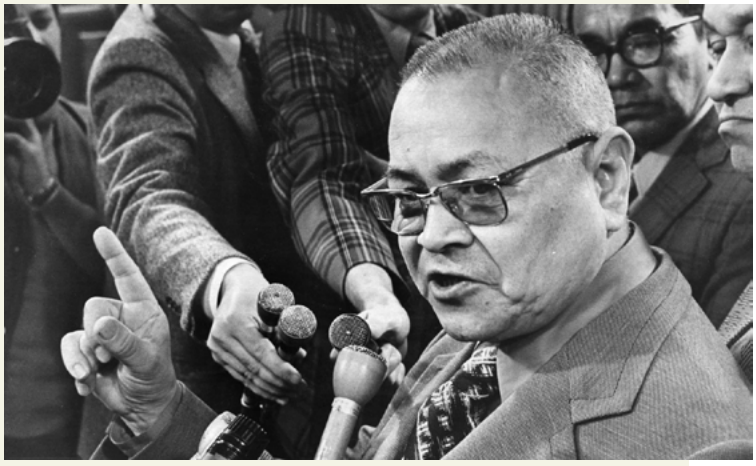
Since the inclusion of Aboriginal rights in the Constitution, First Nations have been winning a litany of court cases using rules that are not their own, in pitched battles against a very well-resourced government. Many of these cases come from BC. Here are five that are of importance when we're discussing how decision-making, particularly over lands and resources, is changing in BC.

The Sparrow case was brought by Ronald Sparrow after he was arrested for fishing with a net that was too large for his licence. This case established a test for determining First Nations' right to harvest.

In the Delgamuukw case, Gitxsan hereditary Chief Delgamuukw and Wet'suwet'en hereditary chief Gisday'wa (Alfred Joseph) asserted their right to traditional territory totalling 58,000 square kilometres. This case saw the court accept oral history as testimony, and set out the test for asserting Aboriginal title – but it did not grant the title the chiefs sought for their people. Instead it directed them to reapply under the rules set out – after a court process that began in 1984 and lasted until 1997.

It's important to note here that the first trial judge, Allan McEachern, misquoted Hobbes and described pre-contact First Nations life as "nasty, brutish, and short" – ignoring both historical and contemporary accounts of the rich legal and cultural traditions of the Wet'suwet'en and Gitxsan, and harkening back to the racist views of Joseph Trutch.

The Haida case was decided in 2004 – and it's thanks to this case that we have the referrals process that you are all familiar with. In a nutshell, it says the Crown must consult with Aboriginal people who have a claim over land, even if it has not been proven, in the case where activities could affect that claim. When those activities significantly affect the claim, there must be accommodation.



Frank Arthur Calder, OC, Nisga'a politician, chief, businessman

The Tsilhqot'in case from 2014 was the first case to use the test laid out in Delgamuukw, and the result was confirmation of Aboriginal title over 1,750 square kilometres. This did not extinguish the Crown's title – but it did grant the right to decide how the land would be used. This case really pushed the government of BC to begin negotiating more honestly with First Nations, in part to avoid long, drawn-out court cases that they were likely to lose.

Finally, we should mention the Yahey decision or Blueberry case, which demonstrated that even though an individual consultation or referral could be acceptable on its own, there could be cumulative impacts of resource licencing. There are a number of processes underway across the province to deal with cumulative effects, including Environmental Stewardship Initiatives.

Resources for Further Learning

Doctrine of Discovery

- The Doctrine of Discovery and its grip on Indigenous lands (video, APTN)
  https://www.youtube.com/watch?v=hGDUYYGqOz4
- Indigenous Title and the Doctrine of Discovery (blog post, Indigenous Corporate Training)
  https://www.ictinc.ca/blog/indigenous-title-and-the-doctrine-of-discovery
- Dismantling the Doctrine of Discovery (report, Assembly of First Nations)
  https://www.afn.ca/wp-content/uploads/2018/02/18-01-22-Dismantling-the-Doctrine-of-Discovery-EN.pdf

Aboriginal Rights and Title

- Indigenous Foundations, UBC
  https://indigenousfoundations.arts.ubc.ca/
- How UNDRIP Changes Canada's Relationship with Indigenous Peoples
  https://www.youtube.com/watch?v=-Tq7Mnlavqs
- Indigenous Rights in One Minute (blog series, First Peoples Law)
  https://www.firstpeopleslaw.com/public-education/indigenous-rights-in-one-minute
- Prelude to the Treaty-Making Process (Chapter 1, Treaty Talks in British Columbia: Negotiating a Mutually Beneficial Future, Second Edition. Christopher McKee. UBC Press, 2000)
  https://www.ubcpress.ca/asset/12452/1/9780774805865.pdf
- Dancing Around the Table (National Film Board documentary on the First Ministers' Conferences on Aboriginal Constitutional Matters, 1987)
  https://www.nfb.ca/film/dancing_around_the_table_1/

Renewed Relationships and Land Governance

- Towards Accountable Relationships and Relationship Building with Indigenous Peoples and Communities. (blog post, Dr. Cash Ahenakew, UBC Faculty of Education)
  https://blogs.ubc.ca/ahenakewcrc/towards-accountable-relationships/
- Land governance: Past. Present. Future. (video series, David Suzuki Foundation)
  https://www.youtube.com/playlist?list=PLK1TK6eY3GAjZMYQjEGwcnWcsZYbMChpf
- Setting the Record Straight on Land Act Amendments (West Coast Environmental Law)
  https://www.wcel.org/blog/setting-record-straight-bcs-proposed-land-act-amendments

Professional Development and Training

- Walking in the Footsteps of Our Ancestors: McLeod Lake Indian Band Cultural Awareness Training (self-directed online course)
  https://www.mlib.ca/courses/cultural-awareness-training/
- San'yas Indigenous Cultural Safety Training Program (online training, Provincial Health Services Authority)
  https://sanyas.ca/
- Indigenous Relations Academy (online and in-person training)
  https://www.indigenousrelationsacademy.com/
- Indigenous Canada (Massive Open Online Course, University of Alberta)
  https://www.ualberta.ca/admissions-programs/online-courses/indigenous-canada/index.html

Anti-Indigenous Racism Primer

- Why do Indigenous topics cause such emotional discomfort? (video, TVO)
  https://www.youtube.com/watch?v=MtaqRVI-JAk
- What non-Indigenous Canadians need to know (video, TVO)
  https://www.youtube.com/watch?v=b1E-3Hb1-WA
- How to change systemic racism in Canada (video, TVO)
  https://www.youtube.com/watch?v=j-xAloD75dQ
- Key Concepts in Anti-Indigenous Racism (Toronto Metropolitan University)
  https://pressbooks.library.torontomu.ca/ediinpractice/chapter/key-concepts-in-anti-indigenous-racism/
- Tool for Building Stamina in Anti-Racism Practice (handout, National Child Welfare Institute, US)
  https://ncwwi.org/document/tool-for-building-stamina-in-anti-racism-practice-moving-from-protection-to-connection-2/

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