Law Society of Ontario | Barreau de l'Ontario

Indigenous Law Issues 2024

CHAIR

Bernd Christmas, K.C., Senior Counsel
JFK Law LLP

April 3, 2024

Law Society of Ontario | Barreau de l'Ontario

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Law Society of Ontario
130 Queen Street West, Toronto, ON M5H 2N6
Phone: 416-947-3315 or 1-800-668-7380 Ext. 3315
Fax: 416-947-3370
E-mail: cpd@lso.ca
www.lso.ca

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April 1, 2024

Indigenous Law Issues 2024

CHAIR: **Bernd Christmas, K.C.,** Senior Counsel*, JFK Law LLP*

April 3, 2024
9:00 a.m. to 12:30 p.m.
Total CPD Hours = 3 h Substantive + 30 m EDI Professionalism e

Law Society of Ontario
Webcast

SKU CLE24-00401

Agenda

9:00 a.m. – 9:05 a.m.	**Welcome** Bernd Christmas, K.C., Senior Counsel*, JFK Law LLP*
9:05 a.m. – 9:33 a.m.	**Update on Métis Legal Issues** (5 m e) Frank Meness, *Kim Alexander Fullerton, Barristers & Solicitors*
9:33 a.m. – 10:01 a.m.	**Aboriginal Law at the S.C.C. - An Update** (5 m e) Eugene Meehan, K.C., *Supreme Advocacy LLP,* Ottawa (Former Executive Legal Officer S.C.C.)

10:01 a.m. – 10:29 a.m.	**Bill C-53, *Recognition of Certain Métis Governments in Alberta, Ontario and Saskatchewan, and Métis Self-Government Act*** (5 m e) Jason Madden, *Aird & Berlis LLP*
10:29 a.m. – 10:39 a.m.	**Question and Answer Session**
10:39 a.m. – 10:59 a.m.	**Break**
10:59 a.m. – 11:27 a.m.	**UNDRIP and the Implementation Efforts Across Canada** (5 m e) Sara Mainville, *JFK Law LLP*
11:27 a.m. – 11:55 a.m.	**Trends in Indigenous Equity Participation in Projects in Canada** (5 m e) Amy Carruthers, *Fasken Martineau DuMoulin LLP* Sophie Langlois, *Fasken Martineau DuMoulin LLP*
11:55 a.m. – 12:23 p.m.	**First Nations Housing Class Action** (5 m e) Rachel Chan, *McCarthy Tétrault LLP* Alana Robert, *McCarthy Tétrault LLP* H. Michael Rosenberg, *McCarthy Tétrault LLP*
12:23 p.m. – 12:30 p.m.	**Question and Answer Session**
12:30 p.m.	**Program Ends**

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TAB 1

Indigenous Law Issues 2024

Métis in Quebec: The Legal Challenge (PPT)

Frank Meness, M.A., J.D Kim
Alexander Fullerton Barrister & Solicitor Professional Corporation

April 3, 2024

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Métis in Quebec: The Legal Challenge

Law Society of Ontario
Continuing Professional Development
Indigenous Law Issues
April 3, 2024

Frank Meness, M.A., J.D.

Kim Alexander Fullerton
Barrister & Solicitor
Professional Corporation
www.kafbs.ca

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- The opinions expressed in this presentation and on the following slides are solely those of the presenter and not necessarily those of Kim Alexander Fullerton Barrister and Solicitor Professional Corporation.
- Any errors or omissions are solely the responsibility of the author.

INTRODUCTION

- Canada's relationship with the aboriginal peoples is fractured.
- There are formal relationships (i.e. treaties, constitutional recognition) with some and not others.
- This presentation will provide an example of the historical and legal impacts of indigenous identity and its impact on the relationship between different levels of government and neighbouring indigenous nations.
- This presentation will focus on a Métis legal challenge in the Province of Quebec.

QUEBEC SUPERIOR COURT CASE(S)

- Québec (AG) v. Royal Séguin
- Québec (AG) v. Louis Généraux
- Québec (AG) v. Benoît Chamaillard

- All these cases were heard at the same time since all were alleging the same defense.
- The Defendants' sole ground of defence is that they self-identify as Métis, within the meaning of s. 35(2) of the Constitution Act, 1982.
- In their respective defence, the Defendants allege that they are members of the Communaute Métis Autochtone de Maniwaki ("CMAM") and that, as such, they hold hunting, fishing and harvesting aboriginal rights and the accessory right to occupy the land for purposes of exercising those rights;

BACKGROUND – THE PLAYERS

- The plaintiff, the Attorney General of Quebec (AGQ), seeks the dispossession of the defendants who, according to the originating applications, are illegally occupying lands belonging to the Government of Quebec.
- The defendants, Royal Séguin (Mr. Séguin) and Louis Généreux (Mr. Généreux), maintain that they have the right to occupy the lands and to exercise their ancestral rights thereon as Métis.
- They mainly claim the right to hunt and fish and affirm that the cabins they have built serve as shelters, accessories to the exercise of their right to hunt.
- The defendant Benoît Chamaillard did not offer a defense and, for all practical purposes, relies on the Court's decision.

BACKGROUND – THE PLAYERS

- The Métis Native Community of Maniwaki (CMAM) brings together members who have demonstrated that they have Métis or Native ancestry. It supports building the contemporary Métis community. Granted intervener status.
- The Kitigan Zibi Anishinabeg Indigenous community (The “ Anishinabeg ” or KZA) intervenes in the case, following a judgment of the Tribunal of September 30, 2021.
- KZA denies the existence of a historic Métis community and argues that the lands in dispute are the traditional lands of the Anishinabeg.

FACTS

- The underlying proceedings arise from two consolidated applications brought by the Government of Quebec for an eviction order and dispossession of public lands that the Defendants have been occupying without any property right, lease, occupancy permit, or ministerial authorization as required under section 54 of the Quebec Act Respecting the Lands in the Domain of the State, 1999, c. 40, s. 317;

FACTS

- The lands illegally occupied by Defendant Royal Séguin, located north of Lake Chevreuil, and by Defendant Louis Généreux, in a non-subdivided part of the Gatineau River watershed in the vicinity of Lake Bazinet, are situated at the heart of the unceded aboriginal title lands of the Algonquin people of Kitigan Zibi Anishinabeg ("KZA") in the province of Quebec;

ISSUE

- Do the Defendants meet the Supreme Court of Canada's test set out in *Powley* (R. *v.* Powley, [2003] 2 S.C.R. 207, 2003 SCC 43)?

Analysis

- Justice Davis wrote at para. 344 “As to the merit of the AGQ's claim, there is no debate. The three defendants admit to having built hunting camps on state-owned land.
- Thus, the core of the Tribunal's analysis will focus on the defense they propose”.

Analysis

- At para. 345 Justice Davis restates the *Powley* test:
- i. Qualification of law;
- ii. Identification of the historical community holding the rights;
- iii. Establishment of the existence of a contemporary community holding the claimed
- rights;
- iv. Verification of the applicant's membership in the current community concerned;
- v. Determination of the relevant period;
- vi. Was the practice integral to the claimant's distinctive culture?;
- vii. Establishment of continuity between historical practice and the contemporary right
- asserted;
- viii. Has the claimed right been extinguished or not?
- ix. If the claimed right exists, has it been infringed?
- x. Is the infringement justified?

Analysis

- Justice Davis, however, really focuses on test parts ii, iii and iv.
- He finds that despite the layman testimony as well as expert testimony all three Defendants fail on these parts.
- That is, they were unable to show:
- Identification of the historical community holding the rights;
- iii. Establishment of the existence of a contemporary community holding the claimed rights;
- iv. Verification of the applicant's membership in the current community concerned;

Analysis

- At Para 425-427 Justice Davis states, …it should be noted that the defendants must demonstrate not only their Métis status, but also their connection with the historical community.
- For the reasons already discussed, they fail.
- But there is more. The defendant Généreux has no Aboriginal ancestry .

CONCLUSION

- Justice Davis finds that none of the Defendants made their case for protection under s. 35.
- GRANTS the Plaintiff's Motion to Institute Proceedings;
- ORDERS the defendant in continuance of suit, Martin Séguin, to abandon the site which is an integral part of the lands in the domain of the State, namely:
- ORDERS the defendant in continuance of suit, Martin Séguin, to restore the premises within ten (10) days of the date on which this judgment becomes enforceable and, failing that,
- AUTHORIZES the plaintiff to carry out or to have the work required for this purpose carried out at the expense of the defendant in continuance of suit;

CONCLUSION

- DECLARES that, on the tenth day following the date on which this judgment becomes enforceable, all property, both movable and immovable, found on the said site will devolve without compensation and in full ownership, to the domain of the State and, to For this purpose,
- EXEMPTS the plaintiff from serving the notice provided for in article 565 , paragraph 2 of the Code of Civil Procedure (RSQ, c. C-25);
- THE WHOLE with legal costs and expert costs in the amount of $50,000 against the defendant in continuance of suit and the intervener the Communauté Métis Autochtone de Maniwaki.

POST-SCRIPT

- The Defendants have launched an appeal of this decision.
- In August 2023, the AGQ filed a motion to have the appeal dismissed based on without merit.
- KZA supported this motion.
- Parties await the Quebec Court of Appeal decision.

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TAB 2

Indigenous Law Issues 2024

Significant S.C.C. Aboriginal Law Cases: The Last Seven Years

Eugene Meehan, K.C.
Supreme Advocacy LLP, Ottawa
(Former Executive Legal Officer S.C.C.)

April 3, 2024

cpd

Significant S.C.C. Aboriginal Law Cases: The Last Seven Years

by

Eugene Meehan, K.C.

For

"Indigenous Law Issues 2024"
Law Society of Ontario

Bernd Christmas, *JFK Law LLP*
Frank Meness, *Kim Alexander Fullerton*
Jason Madden, *Aird & Berhis LLP*
Sara Mainville, *JFK Law LLP*
Amy Carruthers, **Sophie Langlois**, *Fasken LLP*
Rachel Chan, Alana Robert, Michael Rosenberg, *McCarthy LLP*

April 3, 2024

Notes for listeners/readers

- All S.C.C. judgments are hyperlinked
- If you would wish a copy of any (or all) facta, including very recent LTA filings, email me at emeehan@supremeadvocacy.ca
- (LTA = Leave to Appeal)

Revised April 2, 2024

2017-2024 inclusive.

Supreme Advocacy LLP, Ottawa.
emeehan@supremeadvocacy.ca

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Leaves to Appeal Filed; Not Yet Decided

SCC Appeal Judgments

1. *Southwind v. Canada*, 2021 SCC 28 (July 16, 2021): Flooding

A. Basically what happened

At the beginning of the 20th century, the governments of Canada, Manitoba, and Ontario create a water reservoir in northern Ontario to power hydroelectricity generation.[1] The project advances without the consent of Lac Seul First Nation ("LSFN"), despite repeated warnings about the impact the project would have on the First Nation.[2] One-fifth of LSFN reserve lands are flooded, leaving members "deprived of their livelihood, robbed of their natural resources, and driven out of their home[s]".[3] No compensation is provided.[4]

B. In the Courts Below

Roger Southwind, for himself and on behalf of LSFN members, files a civil claim against Canada for breach of fiduciary duty and obligations under both the *Indian Act* and Treaty 3.[5] The Federal Court determines Canada owes LSFN a fiduciary duty in respect of land reserved under Treaty 3; that Canada breached its obligations.[6] The Federal Court applies the principles of equitable compensation and orders Canada to pay $30M.[7] The decision of the Federal Court considers the value of the land in the 1920s, but, importantly, does not include the value that the land provides to the hydroelectricity project itself.[8]

LSFN appeals to the Federal Court of Appeal on the basis the $30M amount does not appropriately compensate for the loss. A majority of the Federal Court of Appeal dismisses the appeal, finding no error of law or any palpable and overriding error in the Federal Court's decision.[9]

C. S.C.C. holding

A majority of the Supreme Court of Canada agrees with LSFN; finds $30M insufficient compensation because the amount only accounts for the loss of the reserve land without considering the land's value to the hydroelectricity project.[10] The matter is sent back to Federal Court for reassessment.[11] Côté in dissent finds the Federal Court made no reviewable error; that the Federal Court of Appeal was correct to find no basis to interfere with the equitable compensation.[12]

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[1] *Southwind v. Canada*, 2021 SCC 28 at para. 1.
[2] *Southwind v. Canada*, 2021 SCC 28 at para. 4.
[3] *Southwind v. Canada*, 2021 SCC 28 at para. 2; quoting the Federal Court at para. 156.
[4] *Southwind v. Canada*, 2021 SCC 28 at para. 4.
[5] *Southwind v. Canada*, 2021 SCC 28 at para. 35.
[6] *Southwind v. Canada*, 2021 SCC 28 at para. 37.
[7] *Southwind v. Canada*, 2021 SCC 28 at paras. 38-41.
[8] *Southwind v. Canada*, 2021 SCC 28 at para. 10.
[9] *Southwind v. Canada*, 2021 SCC 28 at para. 45.
[10] *Southwind v. Canada*, 2021 SCC 28 at para. 12.
[11] *Southwind v. Canada*, 2021 SCC 28 at para. 13.
[12] *Southwind v. Canada*, 2021 SCC 28 at para. 152.

D. Why important

The Supreme Court of Canada described the obligations imposed on the Crown in the circumstances of First Nations' interests in reserve lands – namely, "loyalty, good faith, full disclosure, and, where reserve land is involved, the protection and preservation of the First Nation's quasi-proprietary interest from exploitation."[13]

The majority also provides a helpful summary of the principles of equitable compensation, which is available in circumstances where the Crown breaches a fiduciary duty in relation to land held for the benefit of Indigenous Peoples.[14]

E. Key quote

"The fiduciary duty imposes heavy obligations on Canada. The duty does not melt away when Canada has competing priorities. Canada was under an obligation to preserve and protect the LSFN's interest in the Reserve. This included an obligation to negotiate compensation for the LSFN on the basis of the value of the land to the hydroelectricity project. Compensation must be assessed on that basis."[15]

2. *R. v. Desautel*, 2021 SCC 17 (April 23, 2021): Hunting

A. Basically what happened

Richard Desautel legally enters Canada from the United States. He shoots a single cow-elk near Castlegar, British Columbia. He is subsequently charged with hunting without a licence contrary to s. 11(1) of the B.C. *Wildlife Act*, and hunting big game while not being a resident of Canada, contrary to s. 47(a) of the *Act*. Mr. Desautel admits the *actus reus* of the offences, but indicates he was exercising aboriginal rights to hunt in the traditional territory of his Sinixt ancestors, a right protected under s. 35(1) of the *Constitution Act, 1982*.[16]

Mr. Desautel is a member of the Lakes Tribe of the Colville Confederated Tribes based in the State of Washington. The Lakes Tribe is a successor group of the Sinixt people. The place where Mr. Desautel shot the elk is within the ancestral territory of the Sinixt.[17]

B. In the Courts Below

In Provincial Court, the Trial Judge applied the test in *R. v. Van der Peet*;[18] found Mr. Desautel was exercising an aboriginal right to hunt for food, social, and ceremonial purposes guaranteed by s. 35(1) of the *Constitution Act, 1982* and that this right was infringed by the provisions of the *Wildlife Act*.[19] The British Columbia Supreme Court (B.C.S.C.) dismissed the Crown's appeal, finding the words "aboriginal peoples of Canada" in s. 35(1) must be interpreted in a purposive

[13] *Southwind v. Canada*, 2021 SCC 28 at para. 64.
[14] *Southwind v. Canada*, 2021 SCC 28 at paras. 65-83.
[15] *Southwind v. Canada*, 2021 SCC 28 at para. 12.
[16] *R. v. Desautel*, 2021 SCC 17 (CanLII) at para. 3.
[17] *R. v. Desautel*, 2021 SCC 17 (CanLII) at para. 4.
[18] *R. v. Van der Peet*, 1996 CanLII 216 (SCC).
[19] *R. v. Desautel*, 2021 SCC 17 (CanLII) at paras. 7-9.

way, to mean Aboriginal peoples who, prior to contact, occupied what became Canada.[20] Unlike the claimant in *Mitchell v. M.N.R.*, Mr. Desautel was not asserting an aboriginal right to cross the border.[21] The B.C.C.A. dismissed the Crown's appeal, finding the rights of Mr. Desautel's community to hunt on their ancestral lands were never voluntarily surrendered, abandoned, or extinguished. Accordingly, the Court of Appeal determined Mr. Desautel has an aboriginal right to hunt in British Columbia.[22]

C. S.C.C. holding

The majority *per* Justice Rowe finds that the scope of the words "aboriginal peoples of Canada" in s. 35(1) includes the modern-day successors of aboriginal societies that occupied Canadian territory at the time of European contact.[23]

In dissent, Justice Côté finds this conclusion "contrary to a purposive analysis of s. 35(1) that examines the linguistic, philosophic, and historical contexts of that provision."[24] Justice Moldaver is "prepared to assume, without finally deciding" that a member of an aboriginal collective outside of Canada may be entitled to claim s. 35(1) protections. Ultimately, Justice Moldaver agrees with Justice Côté that Mr. Desautel did not establish the continuity element of the *Van der Peet* test.[25]

D. Why important

The majority determined that groups whose members are neither citizens nor residents of Canada can be considered "[A]boriginal peoples of Canada", for the purpose of s. 35(1).

Justice Rowe for the majority updated and clarified the *Van der Peet* analysis, making this decision a good reference for future claimants.[26] Justice Rowe also summarized the potential consequences of the Court's decision, as it affects the duty to consult,[27] the justification analysis,[28] aboriginal title,[29] and modern treaties.[30]

The reasons of the majority conclude with an emphatic plea for negotiation as having "significant advantages for both the Crown and Aboriginal peoples as a way to obtain clarity about Aboriginal rights".[31]

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[20] *R. v. Desautel*, 2021 SCC 17 (CanLII) at para. 10.
[21] *Mitchell v. M.N.R.*, 2001 SCC 33; *R. v. Desautel*, 2021 SCC 17 (CanLII) at para. 11.
[22] *R. v. Desautel*, 2021 SCC 17 (CanLII) at para. 12.
[23] *R. v. Desautel*, 2021 SCC 17 (CanLII) at para. 23.
[24] *R. v. Desautel*, 2021 SCC 17 (CanLII) at para. 94.
[25] *R. v. Desautel*, 2021 SCC 17 (CanLII) at para. 143.
[26] *R. v. Desautel*, 2021 SCC 17 (CanLII) at paras. 51-55.
[27] *R. v. Desautel*, 2021 SCC 17 (CanLII) at paras. 72-76.
[28] *R. v. Desautel*, 2021 SCC 17 (CanLII) at paras. 77-79.
[29] *R. v. Desautel*, 2021 SCC 17 (CanLII) at paras. 80-1.
[30] *R. v. Desautel*, 2021 SCC 17 (CanLII) at para. 82.
[31] *R. v. Desautel*, 2021 SCC 17 (CanLII) at paras. 87-92.

E. Key quote[32]

"For the reasons that follow, I am of the view that a consistent development of this Court's s. 35(1) jurisprudence requires that groups located outside Canada can be Aboriginal peoples of Canada. As I will explain, the two purposes of s. 35(1) are to recognize the prior occupation of Canada by organized, autonomous societies and to reconcile their modern-day existence with the Crown's assertion of sovereignty over them. These purposes are reflected in the structure of Aboriginal rights and title doctrine, which first looks back to the practices of groups that occupied Canadian territory prior to European contact, sovereignty or effective control, and then expresses those practices as constitutional rights held by modern-day successor groups within the Canadian legal order. The same purposes are reflected in the principle of the honour of the Crown, under which the Crown's historic assertion of sovereignty over Aboriginal societies gives rise to continuing obligations to their successors as part of an ongoing process of reconciliation."[33]

3. *Newfoundland and Labrador (Attorney General) v. Uashaunnuat (Innu of Uashat and of Mani-Utenam)*, 2020 SCC 4 (February 21, 2020): Court Jurisdiction

A. Basically what happened

The Innu of Uashat and of Mani-Utenam and the Innu of Matimekush-Lac John are two distinct First Nations. They claim to have occupied a traditional territory which straddles the border between the provinces of Québec and Newfoundland and Labrador "since time immemorial".[34] In the early 1950s, mining and railway companies undertake a "megaproject" including multiple open-pit mines, facilities, ports, and railways running through both Provinces.[35]

The First Nations bring a lawsuit against the companies in the Québec Superior Court. They assert a right to the exclusive use and occupation of lands affected by the megaproject, including the right to use and enjoy all the natural resources found on the land. The First Nations allege the megaproject was built without their consent and that the companies have implemented discriminatory policies which impede their movement through the traditional territory.[36] As remedies, the First Nations seek, *inter alia*, a permanent injunction against the companies ceasing all work related to the megaproject, $900M in damages, and a declaration that the megaproject violates aboriginal title and other aboriginal rights.[37]

The companies file motions to strike certain allegations from the First Nations' pleading. For the companies and the Attorney General of Newfoundland and Labrador, a question arises as to

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[32] As a further key quote, Justice Rowe cited *The Queen v. The Secretary of State for Foreign and Commonwealth Affairs*, [1981] 4 C.N.L.R. 86 (E.W.C.A.), in which Lord Denning wrote: "[t]he Indian peoples of Canada have been there from the beginning of time. So they are called the 'aboriginal peoples'".
[33] *R. v. Desautel*, 2021 SCC 17 (CanLII) at para. 22.
[34] *Newfoundland and Labrador (Attorney General) v. Uashaunnuat (Innu of Uashat and of Mani-Utenam)*, 2020 SCC 4 (CanLII) at para. 1.
[35] *Newfoundland and Labrador (Attorney General) v. Uashaunnuat (Innu of Uashat and of Mani-Utenam)*, 2020 SCC 4 (CanLII) at paras. 2-4.
[36] *Newfoundland and Labrador (Attorney General) v. Uashaunnuat (Innu of Uashat and of Mani-Utenam)*, 2020 SCC 4 (CanLII) at para. 6.
[37] *Newfoundland and Labrador (Attorney General) v. Uashaunnuat (Innu of Uashat and of Mani-Utenam)*, 2020 SCC 4 (CanLII) at para. 7.

whether the claim concerns "real rights" over property situated in Newfoundland and Labrador, and, therefore, whether the matter falls under the exclusive jurisdiction of courts in that Province, rather than the Québec Superior Court.[38]

B. In the Courts Below

The Québec Superior Court dismisses the motions to strike and declines to characterize the action as a "real action". As such, the Court determines it has jurisdiction to hear the matter.[39] The Québec Court of Appeal dismisses Newfoundland and Labrador's appeal against this decision.[40]

C. S.C.C. holding

In a 5-4 decision, the Supreme Court of Canada determines the Québec Superior Court has jurisdiction over the claim; the appeal is dismissed with costs throughout.[41] The Supreme Court of Canada also clarifies the nature of aboriginal title. For the majority, s. 35 rights are not simply an amalgam of real rights and personal rights connected to Aboriginal peoples, and so the Appellant's characterization is rejected.[42]

D. Why important

The majority affirmed the special constitutional role s. 96 courts (including the Québec Superior Court) have to play in terms of access to justice. In the specific context of Indigenous claimants and a s. 35 claim,[43] the majority observed that access to justice requires that jurisdictional rules be interpreted flexibly so as not to prevent the assertion of constitutional rights, including traditional rights to land.[44]

E. Key quote

"Moreover, the honour of the Crown requires increased attention to minimizing costs and complexity when litigating s. 35 matters and courts should approach proceedings involving the Crown practically and pragmatically in order to effectively resolve these disputes."[45]

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[38] *Newfoundland and Labrador (Attorney General) v. Uashaunnuat (Innu of Uashat and of Mani-Utenam)*, 2020 SCC 4 (CanLII) at para. 9.
[39] *Newfoundland and Labrador (Attorney General) v. Uashaunnuat (Innu of Uashat and of Mani-Utenam)*, 2020 SCC 4 (CanLII) at para. 12.
[40] *Newfoundland and Labrador (Attorney General) v. Uashaunnuat (Innu of Uashat and of Mani-Utenam)*, 2020 SCC 4 (CanLII) at para. 14.
[41] *Newfoundland and Labrador (Attorney General) v. Uashaunnuat (Innu of Uashat and of Mani-Utenam)*, 2020 SCC 4 (CanLII) at para. 73.
[42] *Newfoundland and Labrador (Attorney General) v. Uashaunnuat (Innu of Uashat and of Mani-Utenam)*, 2020 SCC 4 (CanLII) at para. 36.
[43] Enshrined in Part II of the *Constitution Act, 1982.*
[44] *Newfoundland and Labrador (Attorney General) v. Uashaunnuat (Innu of Uashat and of Mani-Utenam)*, 2020 SCC 4 (CanLII) at para. 50.
[45] *Newfoundland and Labrador (Attorney General) v. Uashaunnuat (Innu of Uashat and of Mani-Utenam)*, 2020 SCC 4 (CanLII) at para. 51.

4. *Mikisew Cree First Nation v. Canada (Governor General in Council)*, 2018 SCC 40 (October 11, 2018): Duty to Consult

A. Basically what happened

Canada introduces two pieces of omnibus legislation having significant effects on Canada's environmental protection regime.[46] The Appellant Mikisew Cree First Nation is not consulted on either of these omnibus bills at any stage of their development or prior to the granting of royal assent.[47] The Mikisew bring an application for judicial review, seeking a declaration that the Crown has a duty to consult them on the development of environmental legislation that has the potential to adversely affect treaty rights to hunt, trap, and fish.[48]

B. In the Courts Below

The Federal Court grants a declaration to the effect that the proposals contained in the omnibus bills had the potential to adversely affect the Mikisew's treaty rights, and that the duty to consult was triggered. The Federal Court determines the Mikisew are entitled to notice of provisions of omnibus bills that reasonably might be expected to affect their treaty rights, as well as an opportunity to make submissions.[49]

The Federal Court of Appeal allows the appeal; a majority finding the Federal Court erred because the actions of a Minister acting in a legislative capacity are immune from judicial review, and that the decision was inconsistent with the principles of parliamentary sovereignty, the separation of powers, and parliamentary privilege.[50]

C. S.C.C. holding

The Supreme Court of Canada determines that the law-making process (i.e. the development, passage, and enactment of legislation) does not trigger the duty to consult. For the Supreme Court of Canada, the separation of powers and parliamentary sovereignty dictate that the judiciary should refrain from intervening in the law-making process.[51]

D. Why important

The Supreme Court of Canada determined that the duty to consult does not apply to the law-making process; that "Crown conduct" only includes executive action or action taken on behalf of the executive.[52] The Supreme Court of Canada also provides a summary of principles relevant to the honour of the Crown and duty to consult, generally.[53]

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[46] *Mikisew Cree First Nation v. Canada (Governor General in Council)*, 2018 SCC 40 (CanLII) at paras. 6-7.
[47] *Mikisew Cree First Nation v. Canada (Governor General in Council)*, 2018 SCC 40 (CanLII) at para. 8.
[48] *Mikisew Cree First Nation v. Canada (Governor General in Council)*, 2018 SCC 40 (CanLII) at para. 1.
[49] *Mikisew Cree First Nation v. Canada (Governor General in Council)*, 2018 SCC 40 (CanLII) at para. 10.
[50] *Mikisew Cree First Nation v. Canada (Governor General in Council)*, 2018 SCC 40 (CanLII) at para. 11.
[51] *Mikisew Cree First Nation v. Canada (Governor General in Council)*, 2018 SCC 40 (CanLII) at para. 32.
[52] *Mikisew Cree First Nation v. Canada (Governor General in Council)*, 2018 SCC 40 (CanLII) at para. 50.
[53] *Mikisew Cree First Nation v. Canada (Governor General in Council)*, 2018 SCC 40 (CanLII) at paras. 20-29.

E. Key quote

"I add this. Even though the duty to consult does not apply to the law-making process, it does not necessarily follow that once enacted, legislation that may adversely affect s. 35 rights is consistent with the honour of the Crown. The constitutional principles — such as the separation of powers and parliamentary sovereignty — that preclude the application of the duty to consult during the legislative process do not absolve the Crown of its duty to act honourably or limit the application of s. 35. While an Aboriginal group will not be able to challenge legislation on the basis that the duty to consult was not fulfilled, other protections may well be recognized in future cases. Simply because the duty to consult doctrine, as it has evolved to regulate executive conduct, is inapplicable in the legislative sphere, does not mean the Crown qua sovereign is absolved of its obligation to conduct itself honourably".[54]

5. *Williams Lake Indian Band v. Canada (Aboriginal Affairs and Northern Development)*, 2018 SCC 4 (February 2, 2018): Definition of "Crown"

A. Basically what happened

In the 19th century, a rapid influx of settlers to British Columbia follows a "gold rush" up the Fraser River to the interior of the colony (as it then was). From roughly 1860 onwards, some of these settlers displace the Williams Lake Indian Band from the site of its village and surrounding lands at the foot of Williams Lake. The Imperial Crown and the Crown in right of Canada do not rectify the situation over the 20 years that follow.[55]

The Williams Lake Indian Band bring a claim for compensation under the federal *Specific Claims Tribunal Act*, for losses arising from these events. The term "Crown" is defined for the purposes of the *Act* as "Her Majesty in right of Canada". However, s. 14(2) of the *Act* states "a reference to the Crown includes the Sovereign of Great Britain and its colonies to the extent that the legal obligation or any liability relating to its breach or non-fulfilment became — or would, apart from any rule or doctrine that had the effect of limiting claims or prescribing rights against the Crown because of passage of time or delay, have become — the responsibility of the Crown in right of Canada."[56] A question arises as to whether the *Act* is intended to capture acts or omissions by the "Crown" in the 1860s.

B. In the Courts Below

The Specific Claims Tribunal concludes the band has a valid specific claim for losses arising from the Crown's acts and omissions; finding that, within the meaning of s. 14(2) of the *Act*, the Imperial Crown breached its legal obligation to the band in relation to the protection of its lands from "pre-emption" and that the Crown in right of Canada breached its fiduciary obligations to the band. This reading of the *Act* projects Canada backwards into the place of the Imperial Crown for certain obligations. Before the Tribunal rules on compensation, Canada brings a judicial review

[54] *Mikisew Cree First Nation v. Canada (Governor General in Council)*, 2018 SCC 40 (CanLII) at para. 52.
[55] *Williams Lake Indian Band v. Canada (Aboriginal Affairs and Northern Development)*, 2018 SCC 4 (CanLII) at para. 1.
[56] *Williams Lake Indian Band v. Canada (Aboriginal Affairs and Northern Development)*, 2018 SCC 4 (CanLII) at para 22.

application. Section 34 of the *Specific Claims Tribunal Act* directs that a decision of the Tribunal is subject to judicial review under s. 28 of the *Federal Courts Act* (i.e. an appeal directly to the Federal Court of Appeal). The Federal Court of Appeal allows Canada's application and dismisses the band's claim. For the Federal Court of Appeal, the "Crown" had not breached a legal obligation to the band in the 1860s; the Crown in right of Canada's eventual allotment of reserve land to the Band cures prior breaches by the Imperial Crown.[57]

C. S.C.C. holding

The majority allows the appeal and restores the Tribunal's decision.[58] The majority determines that, in the face of a statutory definition of "Crown" developed in collaboration with First Nations, it was reasonable for the Tribunal to adopt a view of the circumstances in which a fiduciary obligation imposed on the Imperial Crown "becomes" Canada's responsibility for the purposes of s. 14(2). The majority finds this approach reflects the continuity of the fiduciary relationship between Indigenous peoples and the "Crown" described by Dickson C.J. in *Mitchell v. Peguis Indian Band*.[59]

D. Why important

The Supreme Court of Canada clarified what gets included within the meaning of the word "Crown" in the context of a claim made pursuant to the *Specific Claims Tribunal Act*. The majority also provided a summary of the standard of review applicable to the Tribunal's decisions,[60] the framework for determining whether the Crown owes and breaches a fiduciary obligation,[61] and the content of the Crown's fiduciary obligations.[62]

E. Key quote

"The choice between these two readings — the forward-looking "enforcement mechanism" on the one hand, and the backward-looking "projection" of Canada's obligations for the purpose of identifying fiduciary obligations falling within s. 14(2) on the other — also engages the interpretive principle in *Nowegijick v. The Queen*, 1983 CanLII 18 (SCC), [1983] 1 S.C.R. 29, at p. 36. That principle provides for a large, liberal and purposive interpretation of legislation relating to Aboriginal peoples, with uncertainty to be resolved in their favour. As part of the jurisprudential

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[57] *Williams Lake Indian Band v. Canada (Aboriginal Affairs and Northern Development)*, 2018 SCC 4 (CanLII) at para 6.
[58] *Williams Lake Indian Band v. Canada (Aboriginal Affairs and Northern Development)*, 2018 SCC 4 (CanLII) at para. 42.
[59] *Williams Lake Indian Band v. Canada (Aboriginal Affairs and Northern Development)*, 2018 SCC 4 (CanLII) at para. 131; *Mitchell v. Peguis Indian Band*, 1990 CanLII 117 (SCC).
[60] *Williams Lake Indian Band v. Canada (Aboriginal Affairs and Northern Development)*, 2018 SCC 4 (CanLII) at paras. 26-38.
[61] *Williams Lake Indian Band v. Canada (Aboriginal Affairs and Northern Development)*, 2018 SCC 4 (CanLII) at paras. 43-56.
[62] *Williams Lake Indian Band v. Canada (Aboriginal Affairs and Northern Development)*, 2018 SCC 4 (CanLII) at paras. 90-101.

backdrop to the Tribunal's field of specialization, this principle would have informed the Tribunal's stance on the interpretation of s. 14(2)."[63]

6. *First Nation of Nacho Nyak Dun v. Yukon*, 2017 SCC 58 (December 1, 2017): Duty to Consult

A. Basically what happened

The Nacho Nyak Dun, Tr'ondëk Hwëch'in and Vuntut Gwitchin have traditional territory in the Peel Watershed, which covers approximately 68,000 square kilometers representing 14% of the Yukon.[64] Canada, Yukon, and the Yukon First Nations, represented by the Council for Yukon Indians, enter into an Umbrella Final Agreement ("UFA"), which affects this territory. The UFA terms are incorporated into "Final Agreements" between Canada, the Yukon, and various First Nations including the Nacho Nyak Dun, Tr'ondëk Hwëch'in and Vuntut Gwitchin.[65]

Chapter 11 of the UFA establishes a consultative and collaborative process for the development of land use plans in various regions, including the Peel Watershed. The process is designed to ensure the meaningful participation of First Nations in the management of public resources in "settlement lands" (i.e. land held by the First Nations) and non-settlement lands.[66]

The Yukon Land Use Planning Council establishes the Peel Watershed Planning Commission to develop a Regional Land Use Plan for a portion of the Peel Watershed.[67] After more than four years of research and consultation, the Commission initiates the Chapter 11 land use approval process by submitting a Recommended Plan.[68]

Yukon then proposes making modifications to the Recommended Plan and undertakes a second consultation. Significantly, this second consultation is done without the coordinated involvement of the First Nations.[69] The First Nations object, stating that Yukon's proposed modifications are a rejection of the land use planning process.[70]

B. In the Courts Below

The First Nations seek, *inter alia*, a declaration that Yukon did not properly conduct consultations, as required by Article 11.[71] The Trial Judge finds Yukon breached the UFA process by introducing changes that had not been presented to the Commission and by not conducting its second consultation appropriately. The Trial Judge orders Yukon to re-conduct its second consultation.[72]

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[63] *Williams Lake Indian Band v. Canada (Aboriginal Affairs and Northern Development)*, 2018 SCC 4 (CanLII) at para. 129.
[64] *First Nation of Nacho Nyak Dun v. Yukon*, 2017 SCC 58 (CanLII) at para. 12.
[65] *First Nation of Nacho Nyak Dun v. Yukon*, 2017 SCC 58 (CanLII) at paras. 7-8.
[66] *First Nation of Nacho Nyak Dun v. Yukon*, 2017 SCC 58 (CanLII) at para. 14.
[67] *First Nation of Nacho Nyak Dun v. Yukon*, 2017 SCC 58 (CanLII) at para. 15.
[68] *First Nation of Nacho Nyak Dun v. Yukon*, 2017 SCC 58 (CanLII) at para. 17.
[69] *First Nation of Nacho Nyak Dun v. Yukon*, 2017 SCC 58 (CanLII) at para. 24.
[70] *First Nation of Nacho Nyak Dun v. Yukon*, 2017 SCC 58 (CanLII) at para. 23.
[71] *First Nation of Nacho Nyak Dun v. Yukon*, 2017 SCC 58 (CanLII) at para. 26.
[72] *First Nation of Nacho Nyak Dun v. Yukon*, 2017 SCC 58 (CanLII) at para. 28.

The Court of Appeal allows the appeal, in part, finding Yukon failed to properly exercise its right to propose modifications to the Recommended Plan.[73]

C. S.C.C. holding

The appeal is allowed, in part. The Supreme Court of Canada finds Yukon "usurped the planning process and the role of the Commission";[74] that its conduct was "not becoming of the honour of the Crown".[75] The Supreme Court of Canada returns the parties to the s. 11.6.3.2 stage of the process.[76]

D. Why important

The Supreme Court of Canada clarified the parameters of Yukon's right to modify a Recommended Plan using the Chapter 11 procedure. The Court also affirmed that, when exercising and fulfilling obligations under a modern treaty, the Crown must always conduct itself in accordance with s. 35 of the *Constitution Act, 1982*. Finally, the Supreme Court of Canada cautioned appellate courts against inserting themselves "into the heart of…ongoing treaty relationships between Yukon and the First Nations".[77]

E. Key quote

"Imagined as a conversation, Yukon chose not to propose a point for discussion, but then proceeded to advance its point in the most general terms and only after the discussion had substantially progressed. Had Yukon proposed these specific modifications for increased access and development after it received the Recommended Plan, the communities would have had an opportunity to provide their views in the first round of consultation and the Commission would have had the opportunity to provide its expert response. By ultimately making these changes to the Final Recommended Plan after failing to present them to the Commission in sufficient detail, Yukon thwarted the land use plan approval process."[78]

7. *Anderson v. Alberta,* 2022 SCC 6 (March 18, 2022): Advance Litigation Costs

A. Basically what happened

Beaver Lake Cree Nation brings an application for advance costs to fund litigation under s. 35 of the *Constitution Act, 1982*. The underlying claim is for various declarations, injunctions, and damages/equitable compensation on the basis that the Crown improperly allowed Beaver Lakes' traditional lands to be "taken up" for industrial and resource development, compromising its ability to pursue a traditional way of life.[79]

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[73] *First Nation of Nacho Nyak Dun v. Yukon*, 2017 SCC 58 (CanLII) at para. 29.
[74] *First Nation of Nacho Nyak Dun v. Yukon*, 2017 SCC 58 (CanLII) at para. 57, quoting the Trial Judge's reasons at para. 198).
[75] *First Nation of Nacho Nyak Dun v. Yukon*, 2017 SCC 58 (CanLII) at para. 57.
[76] *First Nation of Nacho Nyak Dun v. Yukon*, 2017 SCC 58 (CanLII) at para. 55.
[77] *First Nation of Nacho Nyak Dun v. Yukon*, 2017 SCC 58 (CanLII) at para. 60.
[78] *First Nation of Nacho Nyak Dun v. Yukon*, 2017 SCC 58 (CanLII) at para. 55.
[79] *Anderson v. Alberta*, 2022 SCC 6 at para. 9.

Beaver Lake estimates the cost of its litigation to be $5M.[80] Although Beaver Lake has access to resources that could potentially be applied to fund litigation, it contends that these must be applied to address other priorities.[81]

The issue to be determined: how a First Nation government applicant may demonstrate "impecuniosity" where it has access to resources that *could* fund litigation, but says it must devote those resources to other priorities.[82] Here, Beaver Lake has more than $3M in unrestricted funds and additional ongoing revenue.[83]

B. In the Courts Below

The Case Management Judge held that Beaver Lake was impecunious; awarded advance costs. The Court of Appeal reversed, holding that there was insufficient evidence to support that conclusion.[84]

C. S.C.C. holding

The S.C.C. concludes that a First Nation government *may* meet the impecuniosity requirement if it demonstrates that it requires resources to meet "pressing needs". The Court also says that such needs are not "the bare necessities of life", but rather, in keeping with "the imperative of reconciliation", ought to be understood in context and from the perspective of the First Nation government.[85]

The S.C.C. allows Beaver Lake's appeal and remits the matter to the Court of Queen's Bench for reconsideration in light of its reasons, particularly with respect to the impecuniosity requirement.[86]

D. Why important

The S.C.C. clarified the application of the framework for assessing claims for advance costs to offset anticipated litigation expenses for public interest litigants (i.e. the framework established in *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71).

The S.C.C. provides a "first principles" outline for equitable jurisdiction over costs at paras. 20-24; discussed the relevance of reconciliation to the advance costs test at paras. 25- 27; and revisits the threshold requirement of impecuniosity from *Okanagan* at paras. 30-40. A detailed description of the judicial role in assessing pressing needs is also provided at paras. 41-52 of the reasons.

E. Key quote

"In assessing impecuniosity, a court must respectfully account for the broader context in which First Nations governments such as Beaver Lake make financial decisions. Promoting institutions

[80] *Anderson v. Alberta*, 2022 SCC 6 at para. 10.
[81] *Anderson v. Alberta*, 2022 SCC 6 at para. 2.
[82] *Anderson v. Alberta*, 2022 SCC 6 at para. 3.
[83] *Anderson v. Alberta*, 2022 SCC 6 at para. 6.
[84] *Anderson v. Alberta*, 2022 SCC 6 at para. 6.
[85] *Anderson v. Alberta*, 2022 SCC 6 at para. 4.
[86] *Anderson v. Alberta*, 2022 SCC 6 at para. 8.

and processes of Indigenous self-governance fosters a positive, mutually respectful long-term relationship between Indigenous and non-Indigenous communities, thereby furthering the objective of reconciliation (*First Nation of Nacho Nyak Dun v. Yukon*, 2017 SCC 58, [2017] 2 S.C.R. 576, at para. 10; *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53, [2010] 3 S.C.R. 103, at paras. 9-10). In the context of the impecuniosity analysis, this means that the pressing needs of a First Nation should be considered from the perspective of its government that sets its priorities and is best situated to identify its needs."[87]

8. *Reference re Impact Assessment Act,* 2023 SCC 23 (October 13, 2023): Environmental protection/impact

A. Basically what happened

In 2019, following a review of the existing federal environmental assessment process, Parliament enacted the *Impact Assessment Act* ("*IAA*") and the Governor in Council made the *Physical Activities Regulations* ("Regulations") under the *IAA*. The *IAA* and the Regulations established a complex information gathering a regulatory scheme, essentially two schemes in one. First, a discrete portion of the scheme – contained in ss. 81 to 91 of the *IAA* – dealt with projects carried out or financed by federal authorities on federal lands or outside Canada. Second, the balance of the scheme – made up of the *IAA*'s remaining provisions and the Regulations – dealt with "designated projects" as defined in the *IAA*.

The impact assessment process for designated projects can be divided into three main phases: the planning phase, the impact assessment phase and the decision-making phase. The planning phase focuses on initial information gathering. The proponent of a designated project must provide the Impact Assessment Agency with an initial project description. The Agency then consults with a number of parties, and decides whether the project requires an impact assessment. In the impact assessment phase, the proponent is required to provide the necessary information or studies to the entity conducting the assessment report, which will be the Agency or its delegate. This phase culminates in the preparation of an assessment report, which sets out the effects that are likely to be caused by the carrying out of the designated project and indicates those that are adverse "effects within federal jurisdiction" and those that are adverse "direct or incidental effects", terms defined in s. 2 of the *IAA*. The assessment report must also take into account numerous mandatory assessment factors listed in s. 22 of the *IAA*. The mandatory factors include changes to the environment or to health, social or economic conditions and the positive and negative consequences of these changes. Finally, during the decision-making phase, the decision maker must determine whether the adverse effects within federal jurisdiction and the adverse direct or incidental effects are in the public interest. If the decision maker concludes that the effects in question are in the public interest, the Minister of the Environment must establish any condition that the Minister considers appropriate in relation to those effects.

The assessment process set forth in ss. 81 to 91 focused on a narrow set of projects: physical activities carried out on federal lands or outside Canada in relation to a physical work that are not designated projects or physical activities designated by regulation, and physical activities designated under s. 87 or that are part of a designated class of physical activities. Sections 81 to

[87] *Anderson v. Alberta*, 2022 SCC 6 at para. 27.

91 did not dictate an impact assessment process but rather required the federal authority that carries out or finances the project to decide if the project is likely to cause significant adverse environment effects. If so, it must then be determined whether these effects are justified in the circumstances.

B. In the Courts Below

Alberta's Cabinet referred two questions to the province's Court of Appeal: whether the *IAA* was unconstitutional, in whole or in part, as being beyond the legislative authority of Parliament under the Constitution; whether the Regulations were unconstitutional, in whole or in part, by virtue of purporting to apply to certain activities listed in Schedule 2 that relate to matters entirely within the legislative authority of the provinces under the Constitution. A majority of the Court of Appeal concluded the *IAA* and the Regulations are *ultra vires* Parliament and therefore unconstitutional in their entirety.

C. S.C.C. holding

The S.C.C. (5:2, in part) allowed A.G. Can.'s appeal.

In summary:

- we are dealing here with a "complex legislative scheme"[88]
- this scheme is unconstitutional in part.[89]
- the scheme is essentially two schemes in one: first, a discrete portion of the scheme — contained in ss. 81 to 91 of the *IAA* — deals with projects carried out or financed by federal authorities on federal lands or outside Canada; in pith and substance, this portion of the scheme directs the manner in which federal authorities assess the significant adverse environmental effects that such projects may have; this portion of the scheme is clearly *intra vires*.[90]
- second, the balance of the scheme — made up of the *IAA*'s remaining provisions and the Regulations — deals with "designated projects" as defined in the *IAA*. The pith and substance of this designated projects scheme is to assess and regulate designated projects with a view to mitigating or preventing their potential adverse environmental, health, social and economic impacts. Parliament has plainly overstepped its constitutional competence in enacting this designated projects scheme. This scheme is *ultra vires* for two overarching reasons: it is not in pith and substance directed at regulating "effects within federal jurisdiction" as defined in the *IAA* because these effects do not drive the scheme's decision-making functions; the Court does not accept Canada's contention that the defined term "effects within federal jurisdiction" aligns with federal legislative jurisdiction; the overbreadth of these effects exacerbates the constitutional frailties of the scheme's decision-making functions.[91]

[88] Para. 5.
[89] *Ibid.*
[90] *Ibid.*
[91] Para. 6.

D. Why important

Clarification as to what the federal government can/cannot do in the environmental protection area.

E. Key quote

"The notion that both levels of government may legislate in respect of certain aspects of environmental protection, each pursuant to its own legislative competence, is also consistent with the principle of cooperative federalism. This "more flexible view of federalism . . . accommodates overlapping jurisdiction and encourages intergovernmental cooperation" (*Reference re Securities Act*, at para. 57; see also *Reference re Pan-Canadian Securities Regulation*, at para. 17; *Rogers Communications*, at para. 85). However, "[w]hile flexibility and cooperation are important to federalism, they cannot override or modify the separation of powers" or "make *ultra vires* legislation *intra vires*" (*Reference re Securities Act*, at paras. 61-62; *Reference re Pan-Canadian Securities Regulation*, at para. 18; *Rogers Communications*, at para. 39). The division of federal and provincial powers, including more recent additions such as exclusive provincial jurisdiction over non-renewable natural resources under s. 92A, is the product of negotiation and compromise. Courts may not, under the guise of cooperative federalism, "erode the constitutional balance inherent in the Canadian federal state" (*Reference re Securities Act*, at para. 62)."[92]

9. *Reference re An Act respecting First Nations, Inuit and Métis children, youth and families,* 2024 SCC 5 (February 9, 2024): Self-Government

A. Basically what happened

In keeping with commitments relating to the *United Nations Declaration on the Rights of Indigenous Peoples* ("Declaration"), incorporated into Canada's domestic positive law, and in response to the calls to action made by the Truth and Reconciliation Commission of Canada, Parliament enacted the Act respecting *First Nations, Inuit and Métis children, youth and families* ("Act"). The Act established national standards and provides Indigenous peoples with effective control over children's welfare. In ss. 9 to 17, it sets out national standards and principles, which establish a normative framework for the provision of culturally appropriate child and family services that applies across the country. In ss. 8(a) and 18(1), it affirms that the inherent right of self-government recognized and affirmed by s. 35 of the *Constitution Act*, 1982 includes legislative authority in relation to Indigenous child and family services. As well, the Act establishes a framework within which Indigenous groups, communities or peoples may exercise the jurisdiction affirmed in ss. 8(a) and 18(1) of the Act. It also specifies how its provisions and the jurisdiction it affirms will interact with other laws. Section 21 incorporates by reference the laws made by Indigenous groups, communities or peoples and gives them the force of law as federal law, and s. 22(3) states for greater certainty that the laws of Indigenous groups, communities or peoples prevail over provincial laws to the extent of any conflict or inconsistency.

B. In the Courts Below

Following the Act's enactment, the Attorney General of Quebec referred the question of its constitutional validity to the Quebec Court of Appeal, asking whether the Act is *ultra*

[92] Para. 122.

vires Parliament's jurisdiction under the Constitution of Canada. The Court of Appeal held the Act is constitutionally valid except for ss. 21 and 22(3), provisions that give the laws of Indigenous groups, communities or peoples priority over provincial laws; these provisions exceed Parliament's jurisdiction because they impermissibly alter Canada's constitutional architecture. Both A.G. Qué. and A.G. Can. appealed.

C. S.C.C. holding

The S.C.C. (8:0) dismissed the A.G. Qué. appeal, and allowed that of A.G Can.

In summary:

- the Act as a whole is constitutionally valid,[93] as it falls under s. 91(24) ("Indians, and Lands reserves for the Indians").
- nothing prevents Parliament from affirming (as in s. 18(1) of the Act) that Indigenous peoples have jurisdiction to make laws in relation to child and family services.[94]
- and, nothing prevents Parliament from declaring (as in s. 7) its legislative commitment in relation to Indigenous child and family services.[95]
- this is of "signal importance", because no enactment is binding on/affects the Crown except as mentioned/referred to in the enactment.[96]
- and, it is "equally" open to Parliament to affirm that the laws of Indigenous groups/communities/peoples will prevail over other laws in the event of a conflict.[97]

D. Why important

Clarification re jurisdiction in Aboriginal/Indigenous matters.

E. Key quote

"Developed in cooperation with Indigenous peoples, the Act represents a significant step forward on the path to reconciliation… The Act creates space for Indigenous groups, communities and peoples to exercise their jurisdiction to care for their children. The recognition of this jurisdiction invites Indigenous communities to work with the Crown to weave together Indigenous, national and international laws in order to protect the well-being of Indigenous children, youth and families. The pith and substance of the Act, taken in its entirety, is to protect the well-being of Indigenous children, youth and families by promoting the delivery of culturally appropriate child and family services and, in so doing, to advance the process of reconciliation with Indigenous peoples. This important legislative initiative falls squarely within Parliament's legislative jurisdiction under s. 91(24) of the *Constitution Act, 1867*."[98]

[93] Para. 2. See also paras. 37-53.
[94] Para 9. See also paras 56-66.
[95] *Ibid.*
[96] *Ibid.*
[97] *Ibid.*
[98] Paras. 134-135.

10. *Dickson v. Vuntut Gwitchin First Nation*, 2024 SCC 10 (Mar 28, 2024): Non-resident status; *Charter* v. Indigenous rights

A. Basically what happened

The Vuntut Gwitchin First Nation ("VGFN"), a self-governing Indigenous community in the Yukon, concluded a land claim agreement and a self-government agreement, both of which were approved and given effect by federal and territorial legislation. As contemplated by the agreement, the VGFN adopted its own constitution, which provided for certain rights and freedoms for its citizens, rules for the organization of its government, and electoral rules and standards. Among other things, the VGFN Constitution included a residency requirement stating that all Chief and Councillors must reside on the settlement land, in the village of Old Crow in the traditional territory of the Vuntut Gwitchin, or relocate there within 14 days of their election.

A Canadian citizen and a citizen of the VGFN, currently living in Whitehorse, about 800 kilometers south of Old Crow, wishes to stand for election as a VGFN Councillor but says she cannot move to Old Crow if elected, largely because her son requires access to medical care unavailable there. She challenged the residency requirement, asserting that it unjustifiably infringes her right to equality under s. 15(1). VGFN countered that the residency requirement reflects its longstanding practice that its Chief and Councillors live on the Vuntut Gwitchin's traditional territory. The VGFN also said the *Charter* does not apply to it as a self-governing First Nation. Alternatively, it argued that, should the *Charter* apply, the residency requirement does not violate Ms. Dickson's right to equality and, even if it did, the requirement is nevertheless valid as it is shielded by s. 25 of the *Charter*, which the VGFN said upholds certain collective rights and freedoms of Indigenous peoples when those collective rights conflict with an individual's *Charter* rights.

s. 15 (1): Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

s. 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 claims agreements or may be so acquired.

s. 32 (1): This *Charter* applies

> **(a)** to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and
>
> **(b)** to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

B. In the Courts Below

Both the Trial Judge and Court of Appeal held the *Charter* applies to the VGFN; and to its constitution; pursuant to s. 32(1) of the *Charter*; if s. 15(1) is infringed, the residency requirement is shielded by s. 25.

C. S.C.C. holding

A majority (4:3, in part) dismissed the appeal and cross-appeal.

In summary:

- The *Charter* applies to the VGFN "and to its citizens like Ms. Dickson, principally, but not only, because the VGFN is a government by nature".[99]
- For indigenous communities, ss. 32(1) and 25 are intrinsically connected.[100]
- s. 25 provides protection for collective indigenous interests as a social and constitutional good.[101]
- "Properly understood", s. 25 permits asserting individual *Charter* rights, except where they conflict with: aboriginal rights; treaty rights; or "other rights or freedoms" shown to protect indigenous difference.[102]
- Ms. Dickson demonstrated a *prima facie* s. 15(1) infringement, but the VGFN satisfied the S.C.C. that s. 25 protects its residency requirement from abrogation or derogation by her *Charter* right. As the Court wrote, "Tied to ancient practices of government that connect leadership of the VGFN community to the settlement land, the residency requirement protects Indigenous difference and, pursuant to s. 25, cannot be abrogated or derogated from by Ms. Dickson's individual *Charter* right with which it is in irreconcilable conflict."[103]

The S.C.C. added (in its second-to-last paragraph) (of the majority judgment):

> "As for Ms. Dickson's equality claim under Article IV of the VGFN Constitution, which was pleaded in the alternative before the Supreme Court of Yukon, we take due note of

[99] Para. 5. See also paras. 51-58, 101. The S.C.C. added, however, "We expressly refrain from commenting on whether the *Charter* would apply to an Indigenous government exercising an inherent self-government authority untethered from federal, provincial or territorial legislation" (para. 101).
[100] *Ibid.* See also paras. 69-70.
[101] *Ibid.* See also paras. 113-118, 175-183.
[102] *Ibid.*
[103] Para. 6. See also paras. 188-208.

> Newbury J.A.'s observation in the Court of Appeal reasons that, having pursued her claim under the *Charter*, Ms. Dickson may elect hereafter to pursue a similar claim under the VGFN Constitution (par. 157). Since the application of Article IV was not addressed in this Court, we refrain from further comment on this issue."[104]

D. Why important

Clarification of *Charter* v. Indigenous rights. Also clarification as to individual rights v. collective rights.

E. Key quote

"The objective of the broad wording employed in s. 32(1) of the *Charter* is to prevent Parliament, the legislatures, and the federal, provincial, and territorial governments from avoiding their *Charter* obligations by conferring certain of their legislative responsibilities or powers on other entities that are not ordinarily subject to the *Charter* (*Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, at para. 42; *Godbout*, at para. 48; *Greater Vancouver Transportation Authority*, at paras. 14 and 22).

Section 32(1) of the *Charter*, as the entry point for the *Charter*'s application, must be interpreted in a manner that is flexible, purposive, and generous, rather than technical, narrow, or legalistic. Such an approach serves to secure for individuals and relevant collective minorities the full benefit of the *Charter*'s protections and to constrain government action inconsistent with those protections (*R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 344; *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, at p. 156; Hogg and Wright, at §§ 36:18-36:20). The words of s. 32(1) signal that "the *Charter* is confined to government action" and is "essentially an instrument for checking the powers of government over the individual" (*McKinney v. University of Guelph*, [1990] 3 S.C.R. 229, at p. 261)."[105]

11. *R. v. Sharma*, 2020 ONCA 478 (November 4, 2022): Sentencing

A. Basically what happened

The Respondent, Ms. Sharma, a woman of Ojibwa ancestry and a member of the Saugeen First Nation, brought 1.97 kilograms of cocaine into Canada. She confessed that day to the RCMP that her partner had promised to pay her $20,000 to bring the suitcase to Canada. At the time, she was two months behind on rent and facing eviction. Ms. Sharma was 20 years old with no prior criminal record.[106]

B. In the Courts Below

Ms. Sharma pleaded guilty to importing a Sch. I substance contrary and sought a conditional sentence. However, the 2012 amendments to the *Criminal Code* made conditional sentences

[104] Para. 230.
[105] Paras. 44-45.
[106] *R. v. Sharma*, 2022 SCC 39 at para. 5.

unavailable for offences with a maximum term of imprisonment of 14 years or life and for offences prosecuted by indictment, having a maximum term of imprisonment of 10 years and involving the import, export, trafficking, or production of drugs. The sentencing judge held that a conditional sentence was unavailable and dismissed Ms. Sharma's challenges under ss. 7 and 15(1) of *Charter*. Ms. Sharma appealed. A majority of the Court of Appeal for Ontario held that the impugned provisions (*Criminal Code* ss. 742.1(c) and 742.1(e)(ii)) were overbroad under s. 7, and that they discriminated against Indigenous offenders like Ms. Sharma under s. 15(1).[107]

C. S.C.C. holding

The Court, in a 5:4 split (Karakatsanis, Martin, Kasirer and Jamal JJ. dissenting), allowed the Crown appeal, and the sentence at first instance was restored. Sections 742.1(c) and 742.1(e)(ii) of the *Criminal Code* are constitutional. With respect to s. 15(1), Ms. Sharma has not demonstrated that the impugned provisions create or contribute to increased imprisonment of Indigenous offenders for the relevant offences relative to non-Indigenous offenders.[108] With respect to s. 7, the provisions are not arbitrary, and their purpose is to enhance consistency in the conditional sentencing regime by making imprisonment the typical punishment for certain serious offences and categories of offences.[109]

D. Why important

The majority ruled that banning conditional sentences for certain offences can be constitutional. As evident from the dissenting opinion, the majority's decision will not help with the Indigenous overincarceration crisis in the Canadian criminal justice system. The majority also clarified the approach to determining a s. 15(1) *Charter* challenge and, in particular, addressed the evidentiary burden in adverse impact cases.

E. Key quote

"Maximum sentences are a reasonable proxy for the seriousness of an offence and, accordingly, the provisions do not deprive individuals of their liberty in circumstances that bear no connection to their objective."[110]

Leaves to Appeal Granted; Appeal Heard; On Reserve

1. *Jim Shot Both Sides, et al v. R.* 2022 FCA 20 (40153); Leave Granted: February 2, 2023; Appeal Heard: October 12, 2023

On September 22, 1877, the Blackfoot Confederacy and the Crown executed Treaty 7, which established Reserve No. 148, the largest reserve in Canada, the home of the Kainai, or Blood Tribe. Under the Treaty, the size of the reserve was to be established through a formula promising "one square mile for each family of five persons, or in that proportion for larger and smaller families". The Blood Tribe long claimed that the actual size of its reserve did not accord with that promised

[107] *R. v. Sharma*, 2022 SCC 39 at para. 2.
[108] *R. v. Sharma*, 2022 SCC 39 at para. 36.
[109] *R. v. Sharma*, 2022 SCC 39 at para. 111.
[110] *R. v. Sharma*, 2022 SCC 39 at para. 4.

by the Treaty and, in 1980, commenced an action in the Federal Court. The action sat in abeyance until 2016, when the court held phase I of the trial to receive oral history evidence from aging members of the Blood Tribe. Phase II commenced in 2018 to hear fact and expert witness evidence, and to make a determination on liability. At the completion of phase II, the trial judge found the Blood Tribe's claims were discoverable more than six years before the action was commenced in 1980 and, with the exception of a claim for breach of treaty, were time-barred through the operation of the Alberta *Limitation of Actions Act* and s. 39 of the *Federal Courts Act*. The trial judge held an action for breach of a treaty commitment could not be pursued in a Canadian court prior to the advent of s. 35 of the *Constitution Act*, 1982; for the purposes of the limitations statute, time for a breach of treaty claim only began to run in 1982; Canada was in breach of its treaty commitment, and the size of the Reserve was understated by 162.5 square miles. The Crown appealed. The Fed. C.A. allowed the appeal and varied the Federal Court's judgment to state that all claims of the Blood Tribe were time-barred.

2. *Restoule v. Canada (Attorney General)* 2021 ONCA 779;[111] Leave Granted: June 23, 2022; Appeal Heard: November 8, 2023

In 1850, the Chiefs of Anishinaabe bands inhabiting the northern shores of Lake Huron and Lake Superior sign two Treaties with the Crown, providing for the surrender of a large portion of northern Ontario. The Treaties require the Crown to make an annual payment, referred to as an annuity, to the Treaty beneficiaries. A significant issue on appeal is the interpretation of the terms of the Treaties providing for increases to the annuity. In 2001 and 2014, beneficiaries of the Treaties sue Canada and Ontario, alleging breaches of the Treaties' annuity provisions.

The Trial Judge determined:

- that the Crown has a mandatory and reviewable obligation to increase the Treaties' annuities when the economic circumstances warrant; and

- that the Crown must engage in a consultative process and pay an increased annuity amount if there are sufficient Crown resource-based revenues from the territories to allow payment without incurring loss.

At a subsequent stage of the proceedings, the Trial Judge also determines that Crown defences, based on provincial limitations legislation and the principle of Crown immunity, are not applicable to this case. Ontario appeals both decisions. Canada does not appeal. Recognizing the significance of the case, the Court of Appeal appoints a five-judge panel and hears arguments over eleven days.

In its decision, the Court of Appeal unanimously concludes that the honour of the Crown requires the Crown to act honourably in its dealings with Indigenous peoples. The Court also unanimously determined that Ontario's limitations statute does not cover treaty claims and Crown immunity does not apply to this case.

The Majority determines that, in this case, the honour of the Crown requires the Crown to increase the annuities as part of its duty to implement the Treaties diligently. The Majority also finds that

[111] Derived from summary provided by the ONCA: https://www.ontariocourts.ca/decisions/2021/2021ONCA0779overview.htm.

the Trial Judge did not err in her interpretation of the Treaties and made no errors in considering the evidence that would justify the court's interference with this interpretation.

Ontario sought Leave to the S.C.C.[112]

Leaves to Appeal Granted; Appeal Hearing Scheduled

1. *A.G. Québec v. Takuhikan* 2023 FC 267 (40619); Leave Granted October 5, 2023; Appeal Hearing scheduled April 23 & 24, 2024

The Respondent Pekuakamiulnuatsh Takuhikan was a band council within the meaning of the *Indian Act*. It represents the Pekuakamiulnuatsh Innu First Nation, located in Mashteuiatsh on the western shore of Lac Saint-Jean near Roberval. Under tripartite agreements signed over the years with the Government of Canada and the Government of Quebec since 1996, the Respondent is responsible for policing in the community. The tripartite agreements resulted from the adoption by the Government of Canada in 1991 of the First Nations Policing Policy and the First Nations Policing Program, which allowed it and the provinces, territories and First Nations to negotiate tripartite funding agreements in order to establish professional police services responsive to the needs and culture of each Indigenous community. The Respondent brought an action against the Government of Canada, represented by the intervener, A.G. Can., and A.G. Qué., claiming [translation] "reimbursement of the accumulated deficits of Public Security in the community of Mashteuiatsh for the services provided under the agreements on policing in the community of Mashteuiatsh in force for the period of April 1, 2013, to the present date". It would appear the governments continued renewing the tripartite agreements without increasing the money allotted, despite the fact the Respondent had to pay significant amounts retroactively to the members of its police force as a result of an arbitration award, related to the renewal of the collective agreement, that ordered catch-up wage increases for the period of 2009 to 2014. In support of its application, the Respondent alleged Québec and Canada had breached their obligations to negotiate in good faith, to act with honour and to fulfill their fiduciary duties toward it with respect to the funding of its police force.

Leaves to Appeal Granted; Appeal Hearing Not Yet Scheduled

1. *Government of Saskatchewan – Minister of Environment v. Métis Nation – Saskatchewan, et al,* 2023 SKCA 35; Leave Granted December 21, 2023

In 2021, the respondents Métis Nation — Saskatchewan and Métis Nation — Saskatchewan Secretariate Inc. (collectively, "the MNS") brought an application to JR a decision by the Applicant, the Government of Saskatchewan, to issue exploratory mining permits to a resource company. The MNS alleged Saskatchewan failed to discharge its duty to consult in issuing the permits, given the Métis long claimed Aboriginal title and rights (including commercial harvesting rights) to large areas of the Province. Saskatchewan brought an application to strike portions of the MNS's originating notice, arguing the MNS's attempt to bring multiple judicial procedures against the Crown for the same claims constituted an abuse of process. Specifically, Saskatchewan referenced a first action filed by the MNS in 1994, seeking a declaration of title and commercial

[112] If you would like a copy of all/any SCC factum herein, email me at emeehan@supremeadvocacy.ca

rights, which had been judicially stayed in 2005 with leave to apply to lift the stay (although no such attempt had yet been made); and a second action filed by MNS in 2020, challenging Saskatchewan's consultation policy as being unconstitutional because it opposed the recognition of Aboriginal title and commercial rights for the Métis.

The Court of King's Bench granted Saskatchewan's application, and struck portions of the MNS's originating notice that raised issues already covered by the 1994 Action and the 2020 Action. The Sask. C.A. unanimously allowed MNS's appeal, set aside the first decision, and restored the impugned portions of the MNS's originating notice.

Leaves to Appeal Filed; Not Yet Decided

1. *Métis Nation of Ontario, et al v. Chief Kirby Whiteduck, et al,* 2023 ONCA 543, Leave to Appeal filed October 16, 2023

A harvesting conflict between the Métis Nation of Ontario and the Algonquin First Nation. What does the 1990 *Sparrow* decision mean as to "Aboriginal harvesters." *Inter alia* the Algonquins sought declaratory relief that Ontario "must not recognize or purport to recognize any Métis harvesting rights…", and that Ontario breached its duty to consult. The Motion Judge: struck out (without leave to amend) declarations seeking to disprove Métis rights, and barring Ontario from recognizing Métis rights; declined to strike the declaration re Ontario's alleged breach of the duty to consult. The Algonquins appealed, and both Ontario and the Métis cross-appealed. The Ont. C.A.: faulted the Motion Judge for taking the view "only Métis have the status to contest Métis Aboriginal rights"; allowed the Algonquin appeal; dismissed the cross-appeals.

The filed Leave to Appeal sets out the following three issues:

> "**Issue 1**: "Does 'Aboriginal group A' have standing to disprove the Aboriginal rights of 'Aboriginal group B'?
>
> **Issue 2**: Does a court declaration that prevents the Crown from exempting Aboriginal harvesters from enforcement engage prosecutorial discretion? In short, can courts direct the Crown on who to prosecute in Canada?
>
> **Issue 3**: How do you challenge a government decision to enter into a pre-treaty accommodation agreement with an Aboriginal group – by court action or judicial review? (and a subsidiary issue: if the latter, by what standard of review? Correctness, reasonableness, something else?)."

2. *Métis Nation of Alberta Association v. Alberta,* 2022 ABCA 250, Leave to Appeal filed March 22, 2024

The Métis Nation of Alberta ("MNA") and the Government of Alberta chose to negotiate a Métis Consultation Policy, with negotiations starting in 2014. After 5 years of "productive" negotiations, Alberta (following an election) terminated negotiations without providing reasons. MNA applied to JR the decision. Alberta: denied the honour of the Crown or duty to negotiate were engaged; denied negotiating. Application Judge: parties were in negotiations; honour of the Crown and duty to negotiate engaged; but also: set her own novel legal rest for a duty to negotiate; Alberta did not

breach any obligations it had, nor act unreasonably. The MNA and Alberta both appealed. The Alta. C.A. dismissed both appeals. The Leave raises three issues:

- What is the source of the duty to negotiate?
- When is it engaged?
- What is its scope and content?

Law Society of Ontario | Barreau de l'Ontario

TAB 3

Indigenous Law Issues 2024

Leaving the "Legal Lacuna": Métis Self Government and Bill C-53 (PPT)

Jason Madden
Aird & Berlis LLP

April 3, 2024

cpd

Leaving the "Legal Lacuna": Métis Self-Government and Bill C-53

For: Indigenous Law Issues 2024
April 3, 2024

By: Jason Madden, Partner
Co-Chair Indigenous Practice Group

AIRD BERLIS

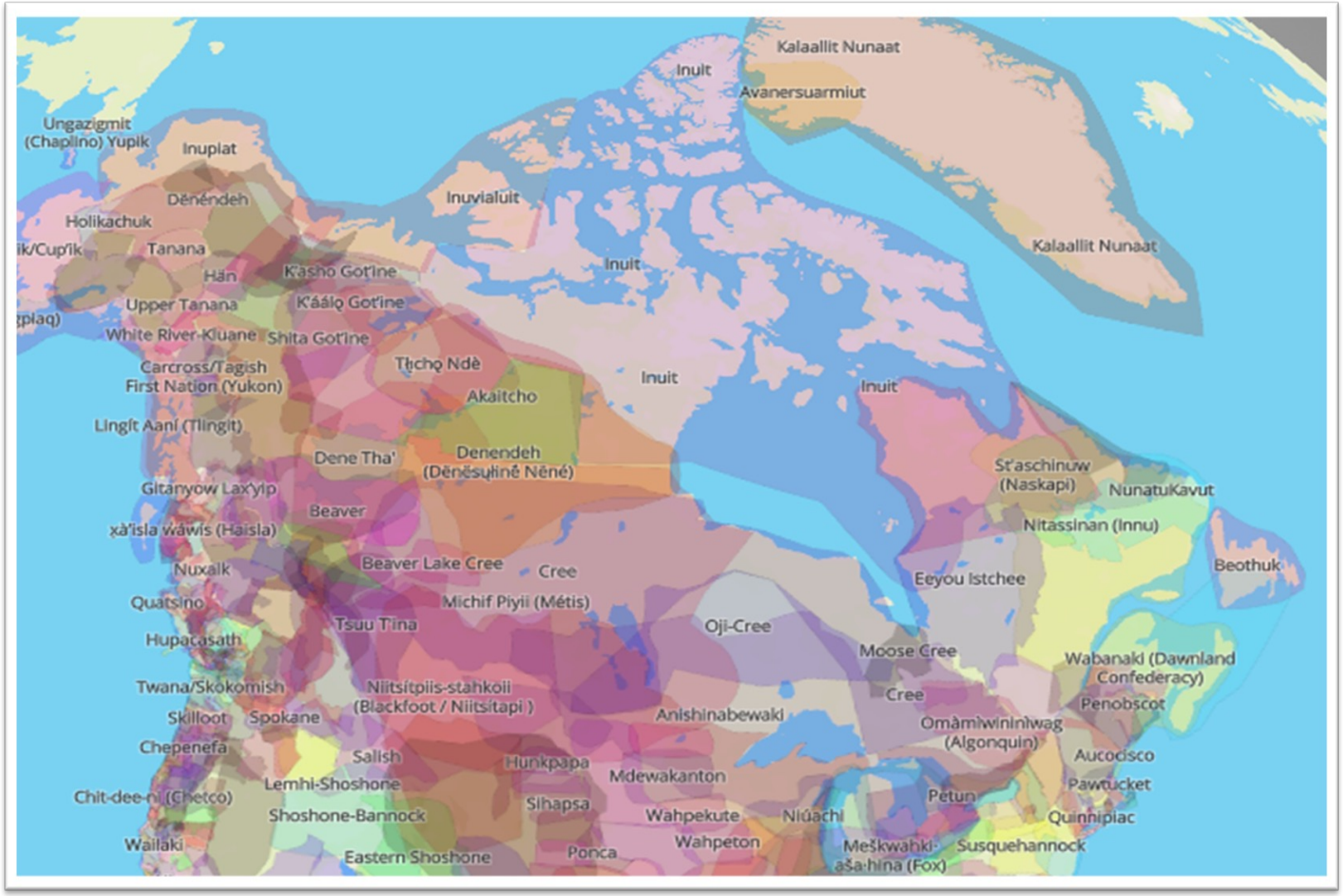
The History and Context for the Métis “Legal Lacuna”

Setting the Stage for "Canada" …

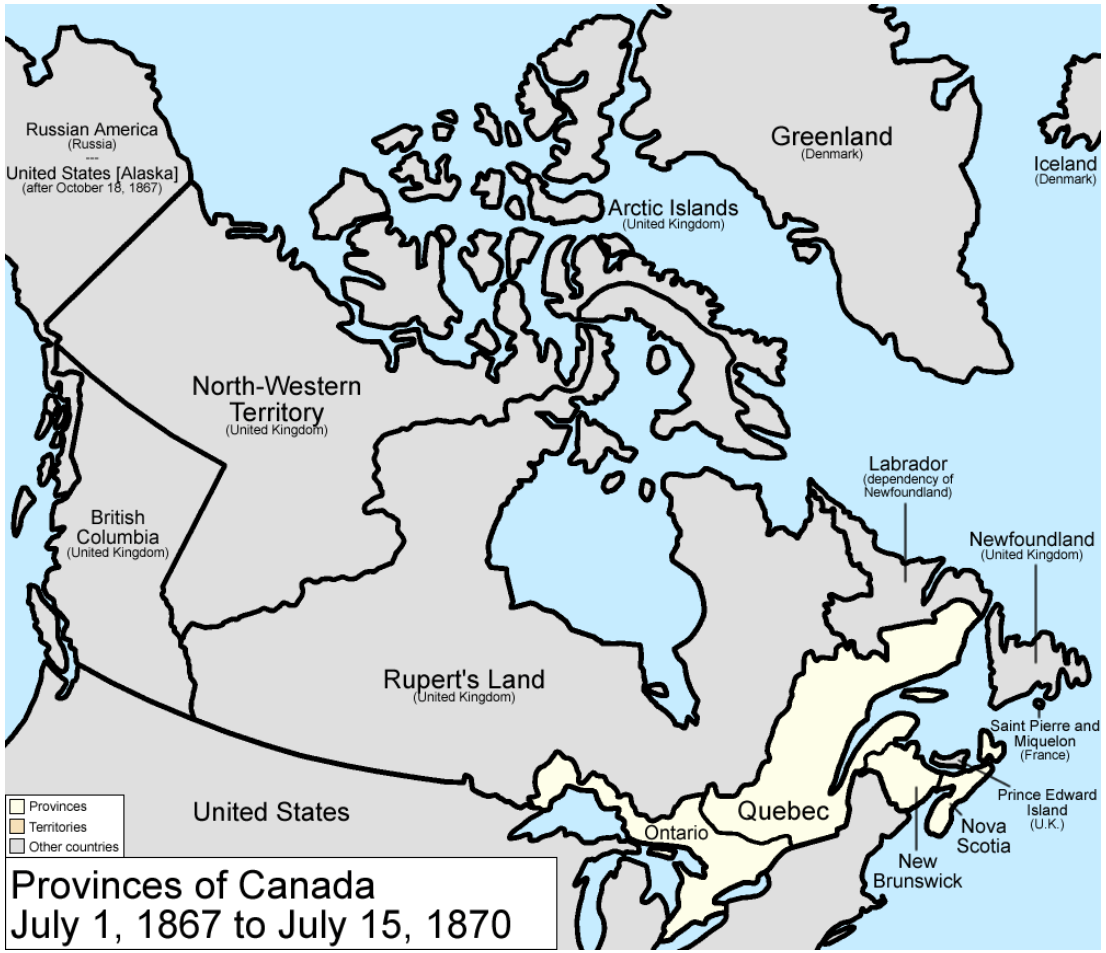
"Canada is a young nation with ancient roots. The country was born in 1867, by the consensual union of three colonies — United Canada (now Ontario and Quebec), Nova Scotia and New Brunswick. Left unsettled was whether the new nation would be expanded to include the vast territories to the west, stretching from modern Manitoba to British Columbia. The Canadian government, led by Prime Minister John A. Macdonald, embarked on a policy aimed at bringing the western territories within the boundaries of Canada, and opening them up to settlement." (*Manitoba Métis Federation v. Canada*, [2013] 1 S.C.R. 623 at para. 1)

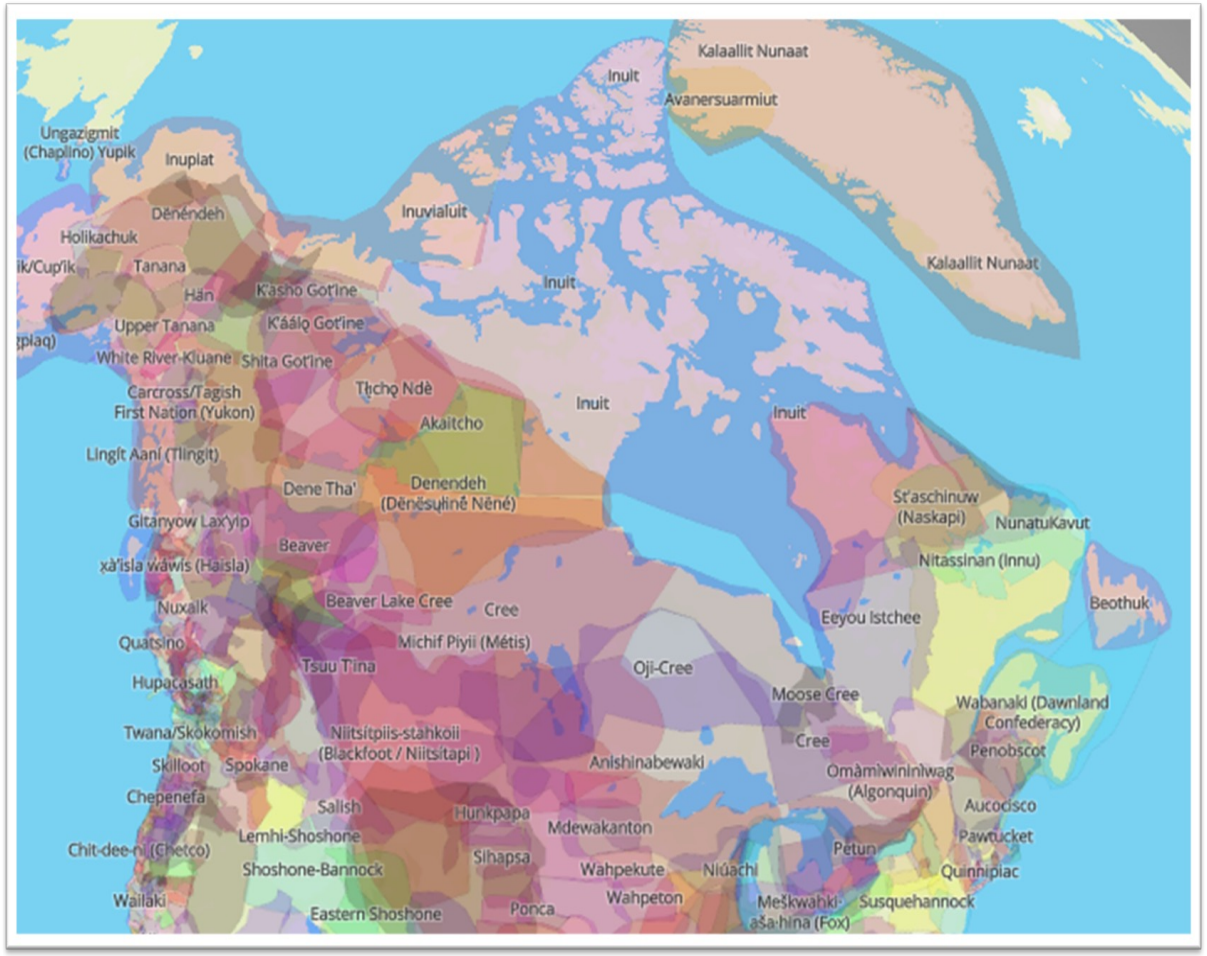
The “Young Nation”

The “Ancient Roots”



Two Very Different Realities…





Canada's Expansion Into "The North-West"

"This meant dealing with the indigenous peoples who were living in the western territories. On the prairies, these consisted mainly of two groups — the First Nations, and the descendants of unions between white traders and explorers and Aboriginal women, now known as Métis. The government policy regarding the First Nations was to enter into treaties with the various bands, whereby they agreed to settlement of their lands in exchange for reservations of land and other promises… **The government policy with respect to the Métis population… was less clear.**" (*Manitoba Métis Federation v. Canada*, [2013] 1 S.C.R. 623 at paras. 2 to 4)

First Encounters With ‘Halfbreeds’ in Ontario (1800s)

- Petitions from Halfbreeds in Penetang in 1830, 1832 and 1833. In 1840, “the undersigned half breeds residing in Town of Penetanguishene,” petition:

  “That your Petitioners are generally speaking, in poor circumstances, and that they do not share in any advantage in presents issued to the Indians and a number of the half breeds, from the Sault St. Marie and other places on the shores of Lake Huron have done for the last two years…”

- Indian Officer Samuel Jarvis commented on February 1, 1840:

  “Upon every occasion that I have visited the Lake Huron tribes an appeal has been made to me to remove the disability imposed upon the Class of Half-Breeds not only by the elder members of the Indian Communities but also by the Half-Breeds themselves…”

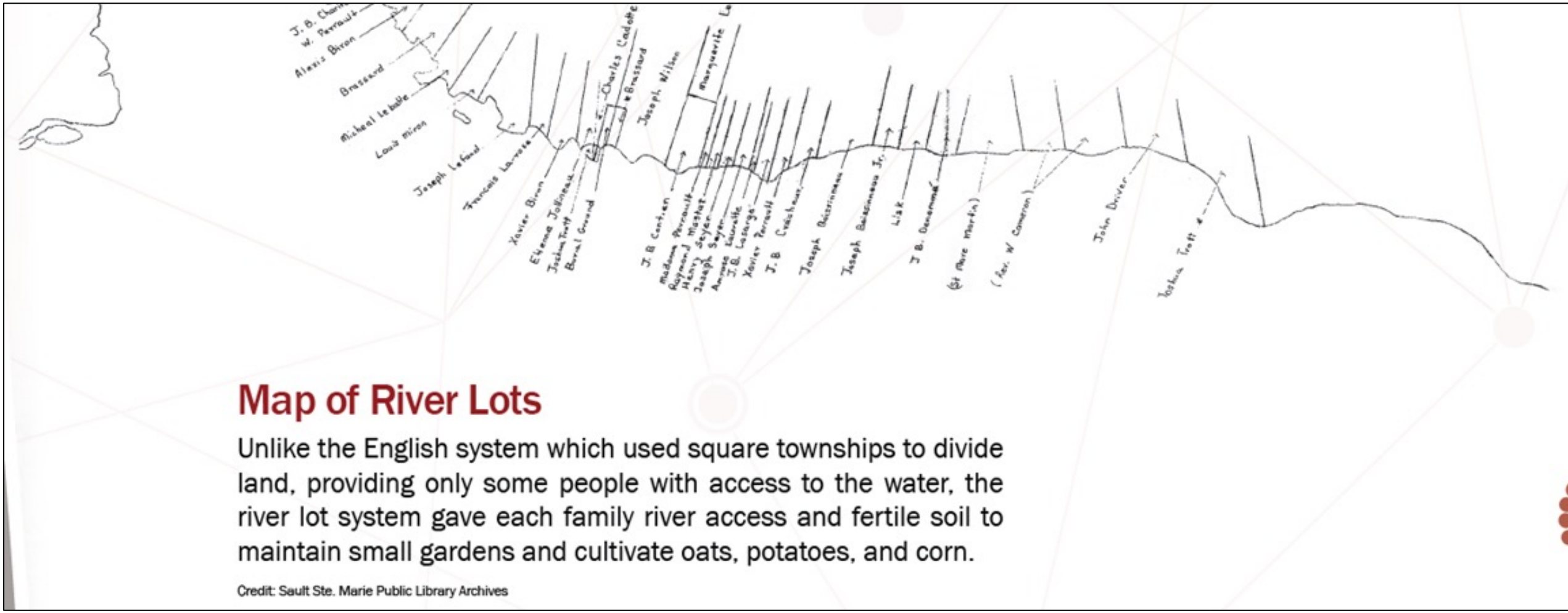
The ‘Halfbreeds’ & the Mica Bay Uprising (1850)

- In 1850, the ‘Halfbreeds’ in Sault Ste. Marie region participate in the Mica Bay Uprising with the Anishinaabe. The also retain a lawyer and attempt to be included in treaty negotiations.

- While unsuccessful in their attempts to be included in the treaty, they secure assurances from Commission Robinson in relation to their river lots---a promise ---that is subsequently ignored leading to further petitions.

- Over 150 years later, the Supreme Court of Canada unanimously finds that this Métis communities continues to exist and has “pre-existing” Aboriginal rights protected by s. 35 of the *Constitution Act, 1982* in *R. v. Powley*.

The ‘Halfbreeds’ River Lot System at the Sault



Map of River Lots

Unlike the English system which used square townships to divide land, providing only some people with access to the water, the river lot system gave each family river access and fertile soil to maintain small gardens and cultivate oats, potatoes, and corn.

Credit: Sault Ste. Marie Public Library Archives

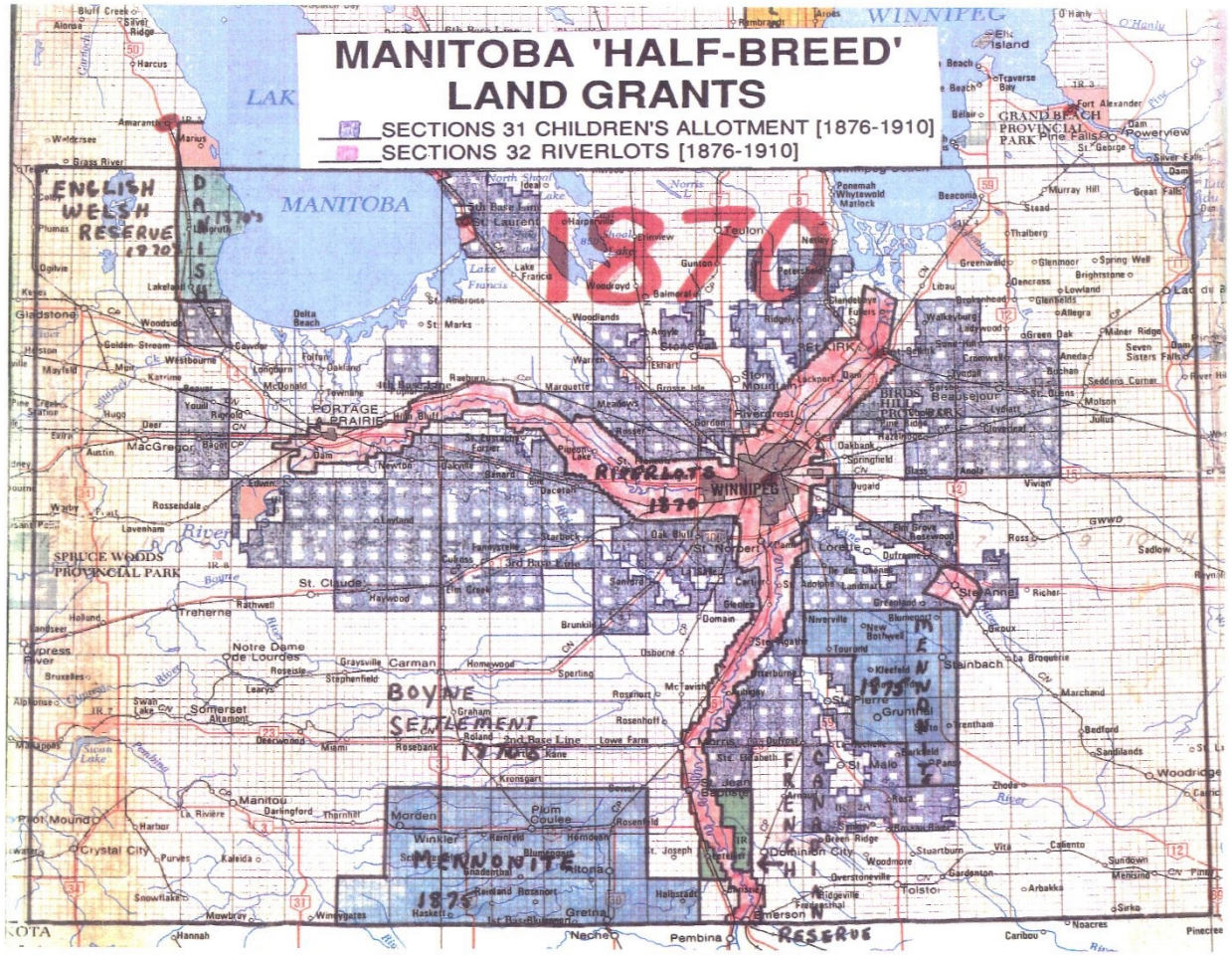
‘Halfbreeds’ in Northern Lake Superior Region (circa 1850)

- More “Halfbreeds” are identified as Robinson travels further north to Lake Superior to complete the Robinson-Superior Treaty. He specifically enumerates these Métis families in his journal.

- Métis in the northern Lake Superior region are also excluded from treaty-making, but are a known presence. They submit petitions --- as ‘Halfbreeds’ --- with ‘Indians’ from locations such as from Lake Nipigon.

‘Halfbreeds’ In The Historic Treaty Making Process in Ontario (1850 to 1905)

The ‘Halfbreeds’ at the Red River (Manitoba)



“… towards the extinguishment of the Indian Title to the lands in the Province, to appropriate a portion of such ungranted lands, to the extent of one million four hundred thousand acres thereof, for the benefit of the families of the half-breed residents… ” – *Manitoba Act, 1870*, s. 31

The Métis Perspective

"When the Government of Canada presented itself at our doors it found us at peace. **It found that the Métis people of the North-West could not only live well without it… but that it had a government of its own, free, peaceful, well-functioning, contributing to the work of civilization** in a way that the Company from England could never have done without thousands of soldiers. **It was a government with an organized constitution whose junction was more legitimate and worthy or respect, because it was exercised over a country that belonged to it.**"

- Louis Riel, 1885

Canada's Perspective

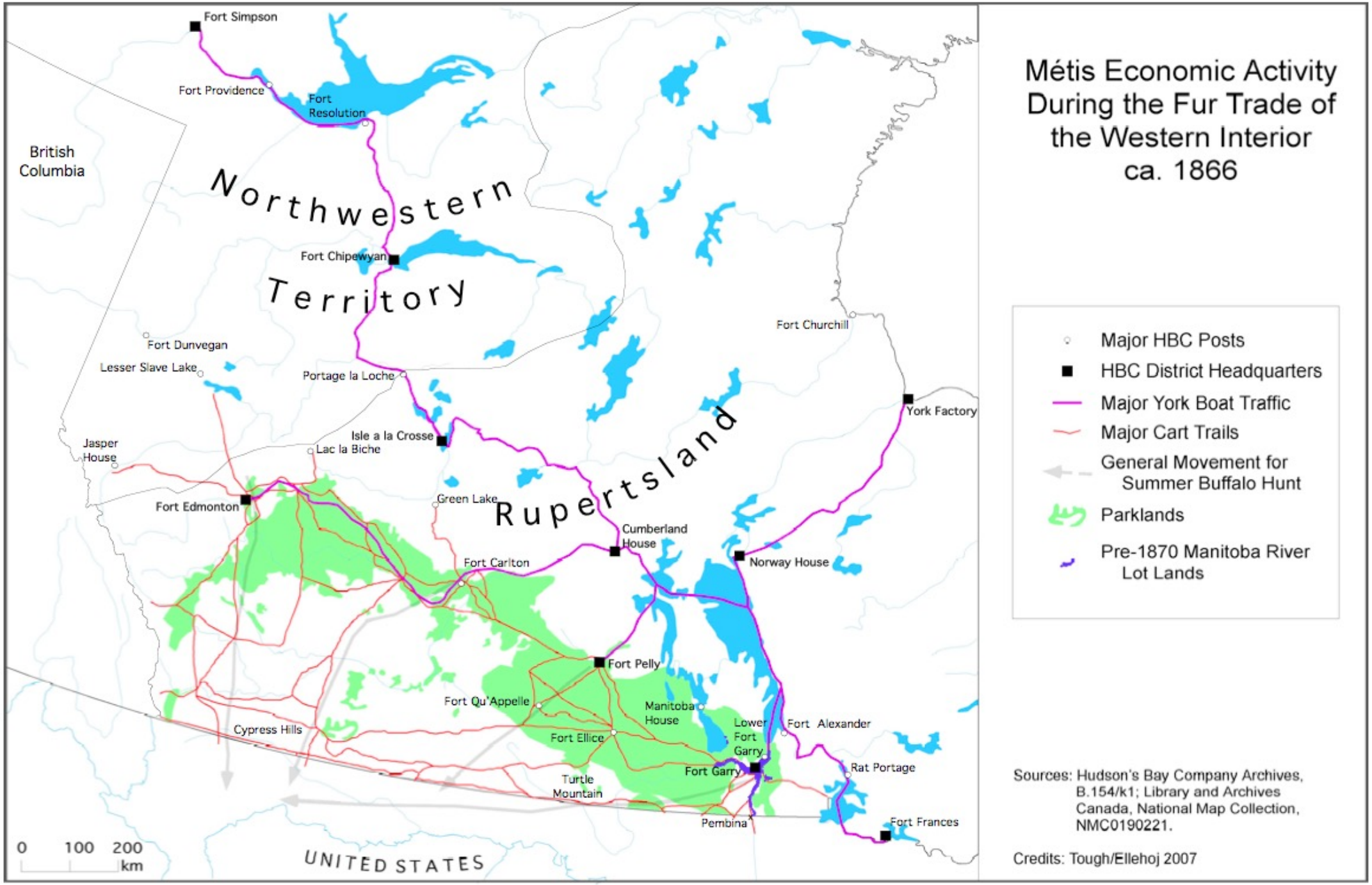
"... it will require a considerable management to keep those wild people quiet. In another year the present residents will be altogether swamped by the influx of strangers who will go in with the idea of becoming industrious and peaceable settlers."

- Prime Minister

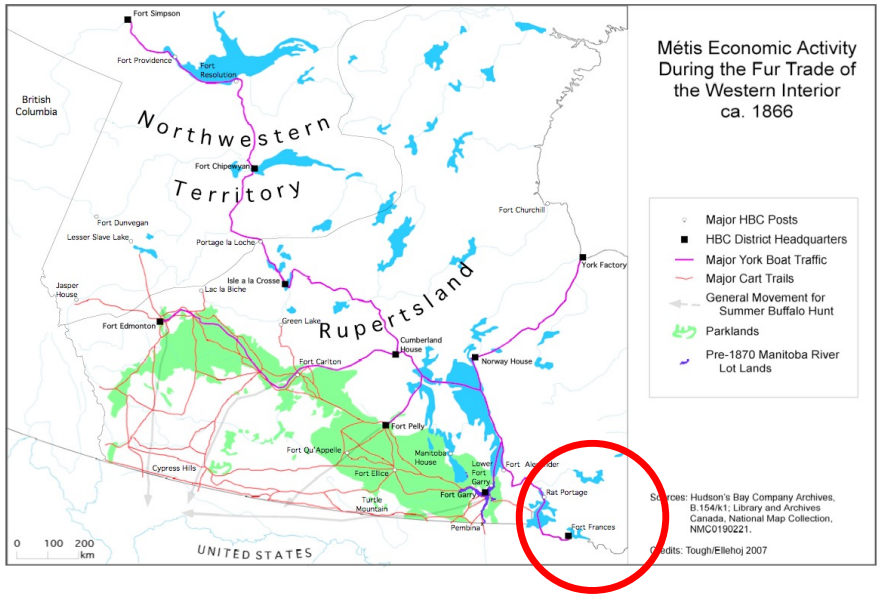
Sir John A. MacDonald, 1869

Métis Outside the Red River Settlement (1870)

[210] Around the time of the negotiations [of the *Manitoba Act 1870*], the Métis population of the Red River Colony numbered roughly 9,000. **The Métis population in the territories outside the Colony [the Red River Settlement], though smaller, was still significant;** it numbered more than 2,000: *Historical Atlas of Canada*, vol. II, *The Land Transformed: 1800-1891* (1993), at plate 35; Prov. Ct. reasons, at para. 303. **The Métis communities outside the Colony included Lac-la-Biche, Peace River, Saint-Albert and Slave Lake, which were well-established and dynamic** (Prov. Ct. reasons, at para. 303). The Métis who settled in these outlying areas maintained strong family ties to the settlement in Red River and travelled frequently to the Colony. In fact, there was extensive travel throughout the territories generally, as trading activities, along with the bison hunt, were mainstays of the economy. The Métis often wintered in different locations across the territories (*Caron v. Alberta*, [2015] 3 S.C.R. 511).

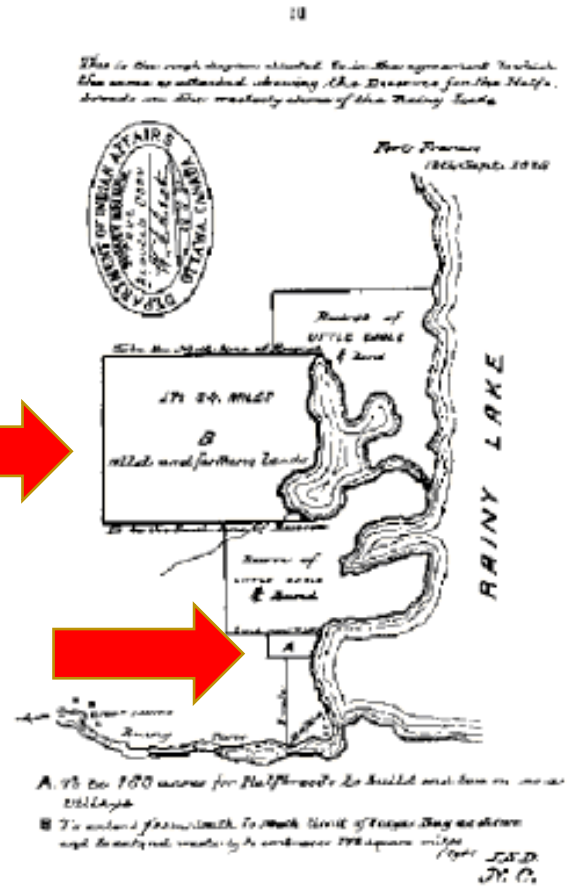

Métis Economic Activity During the Fur Trade of the Western Interior ca. 1866
Major HBC Posts
HBC District Headquarters
Major York Boat Traffic
Major Cart Trails
General Movement for Summer Buffalo Hunt
Parklands
Pre-1870 Manitoba River Lot Lands
Sources: Hudson's Bay Company Archives, B.154/k1; Library and Archives Canada, National Map Collection, NMC0190221.
Credits: Tough/Ellehoj 2007
Fort Simpson
Fort Providence
Fort Resolution
British Columbia
Northwestern Territory
Fort Chipewyan
Fort Churchill
Fort Dunvegan
Lesser Slave Lake
Portage la Loche
York Factory
Isle a la Crosse
Lac la Biche
Jasper House
Rupertsland
Fort Edmonton
Green Lake
Cumberland House
Fort Carlton
Norway House
Fort Pelly
Fort Qu'Appelle
Manitoba House
Lower Fort Garry
Fort Alexander
Cypress Hills
Fort Ellice
Fort Garry
Rat Portage
Turtle Mountain
Pembina
Fort Frances
0 100 200 km
UNITED STATES

The ‘Halfbreeds of Rainy Lake & River’ Treaty Adhesion (1875)



“That the said Half-breeds, keeping and observing on their part the terms and conditions of the said treaty shall receive compensation in the way of reserves of land, payments, annuities and presents, in manner similar to that set forth in the several respects for the Indians in the said treaty; …”

- Adhesion to Treaty #3 (1875)



A Confluence of Events Post-1875 to Defeat the Halfbreed Adhesion's Promise: The Indian Act & New Federal Policy

The Halfbreed Adhesion Text (1875)	Canada's "New" Position (1876)
"That the said Half-breeds, keeping and observing on their part the terms and conditions of the said treaty shall receive compensation in the way of reserves of land, payments, annuities and presents, in manner similar to that set forth in the several respects for the Indians in the said treaty."	"For this purpose Mr. Pither should meet the Halfbreeds and explain to them that the Department cannot recognize separate Halfbreed Bands."

‘Halfbreeds’ Outside the Red River Settlement (1878-1885)

- 84 petitions were sent between 1878 to 1885 from the Métis in the South Saskatchewan River region for their lands and rights outside the postage stamp province.

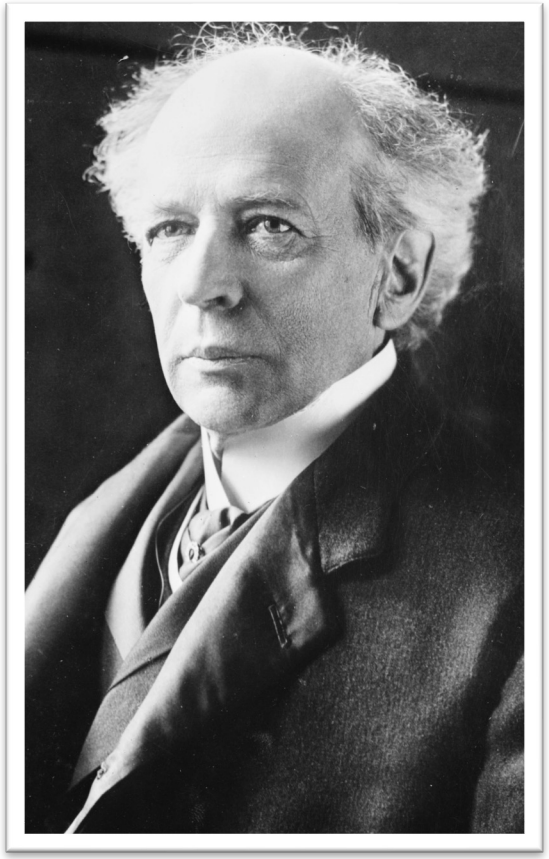
- A sample of a petition from Gabriel Dumont to the Prime Minister:

  “We are poor people and cannot afford to pay for our land without utter ruin… In our anxiety we appeal to your sense of justice… and beg you to reassure us speedily, by directing that we shall not be disturbed from our land.”

- The Bill of Rights for the Métis in the Northwest (1884) the Revolutionary Bill of Rights (1885) leading to the ‘La Guerre Nationale’ (including the battles at Duck Lake, Tourond’s Coulee and Batoche as a part of the Northwest Resistance) in 1885.

The Battle of Batoche & the 'Halfbreed' Scrip System (1885)

The “Promise” of Halfbreed Scrip



"**We determined at the outset, when we acquired the territory of the Hudson Bay Company, that we would treat the half-breeds as we would the Indians – that is, as first occupants of the soil.** It has been the policy of the British Government from time immemorial not to take a possession of any lands without having in some way settled with the first occupants and giving them compensation…”

Prime Minister Wilfred Laurier

8146

DOMINION OF CANADA

8146

Department of the Interior

This is issued as called for by Certificate from No.

Issued by the North West Half Breed Commission.

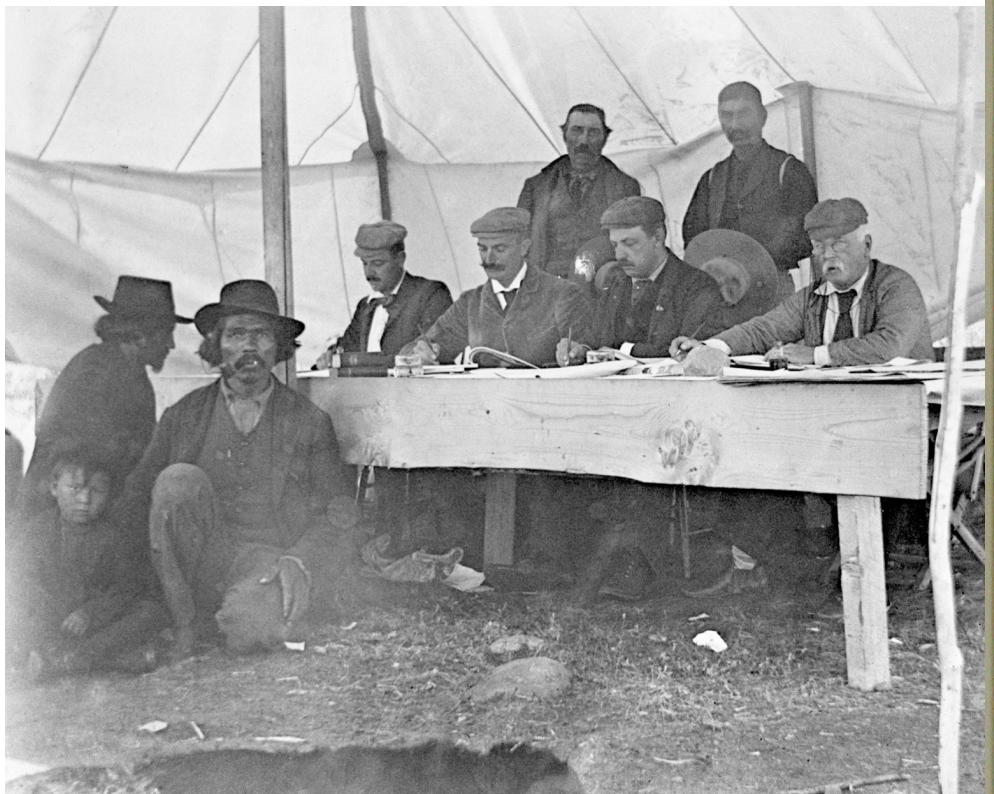
The Bearer hereof is entitled to an allowance of One hundred and sixty Dollars in any purchase

$160.00 OF DOMINION LANDS: $160.00

Issued at the Department of the Interior at Ottawa, this Twenty-first day of October, 1885

under the authority of an order of the Hon. the Privy Council dated the 20th March, 1885 as amended by the order of the 15th April 1885 and in accordance with the provisions of sub-sec. 6 Sec. 31 46 Vic. Chap 17

Entered



Form A. allowed for scrip 136 ISSUED

HALFBREED CLAIMS COMMISSION.

TREATY 10.

Before James Andrew Joseph McKenna, of the city of Winnipeg, in the Province of Manitoba, Esquire, duly appointed and sitting as Commissioner at Isle a la Crosse, in the Province of Saskatchewan, to investigate claims of Halbreeds in the territory situated partly in the Province of Saskatchewan and partly in the Province of Alberta, and lying to the east of the territory covered by Indian Treaty numbered 8, and to the north of the territories covered by Indian Treaties numbered 5 and 6, personally came and appeared Eli Roy, claimant, who being duly sworn, deposes as follows :—

Question 1. What is your name?

Answer. Eli Roy

Question 2. Where do you reside?

Answer. here

Question 3. How long have you lived there and where have you lived previously?

Answer. always lived here

Question 4. Where were you born?

Answer. here at Isle a la Crosse

Question 5. When were you born?

Answer. 25 yrs ago

Question 6. What is your father's name?

Answer. Francois Roy

Question 7. Is he a Whiteman, a Halfbreed or an Indian?

Answer. ~~Marie La~~ Half Breed

Question 8. What was the name of your mother before her marriage?

Answer. Marie Lariviere

Question 9. Is she a Whitewoman, a Halfbreed or an Indian?

Answer. Half Breed

Question 10. Have you ever received land or scrip in extinguishment of your Halfbreed rights?

Answer. no

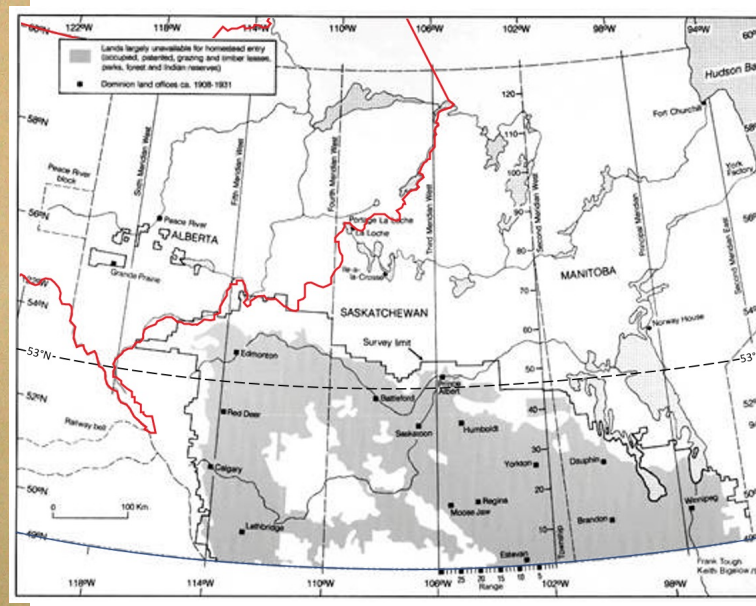
Question 11. Did you ever apply for land or scrip before to-day? If so, when and where?

Answer. no

Question 12. Are you now or have you ever been a member of any Indian Band, or in receipt of Indian Treaty Money, or did you ever receive commutation of same?

Answer. no

[OVER.]



"A Sorry Chapter" in Canada's History …

"… the history of scrip speculation and devaluation is a sorry chapter in our nation's history…" *R. v. Blais*, [2003] 2 SCR 236, para 34.

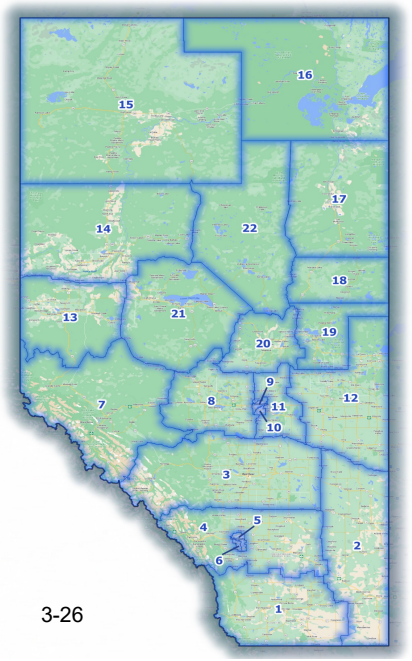
Further reading on the Métis scrip system is available here.

The Remaining Métis Weapon: "Organize"

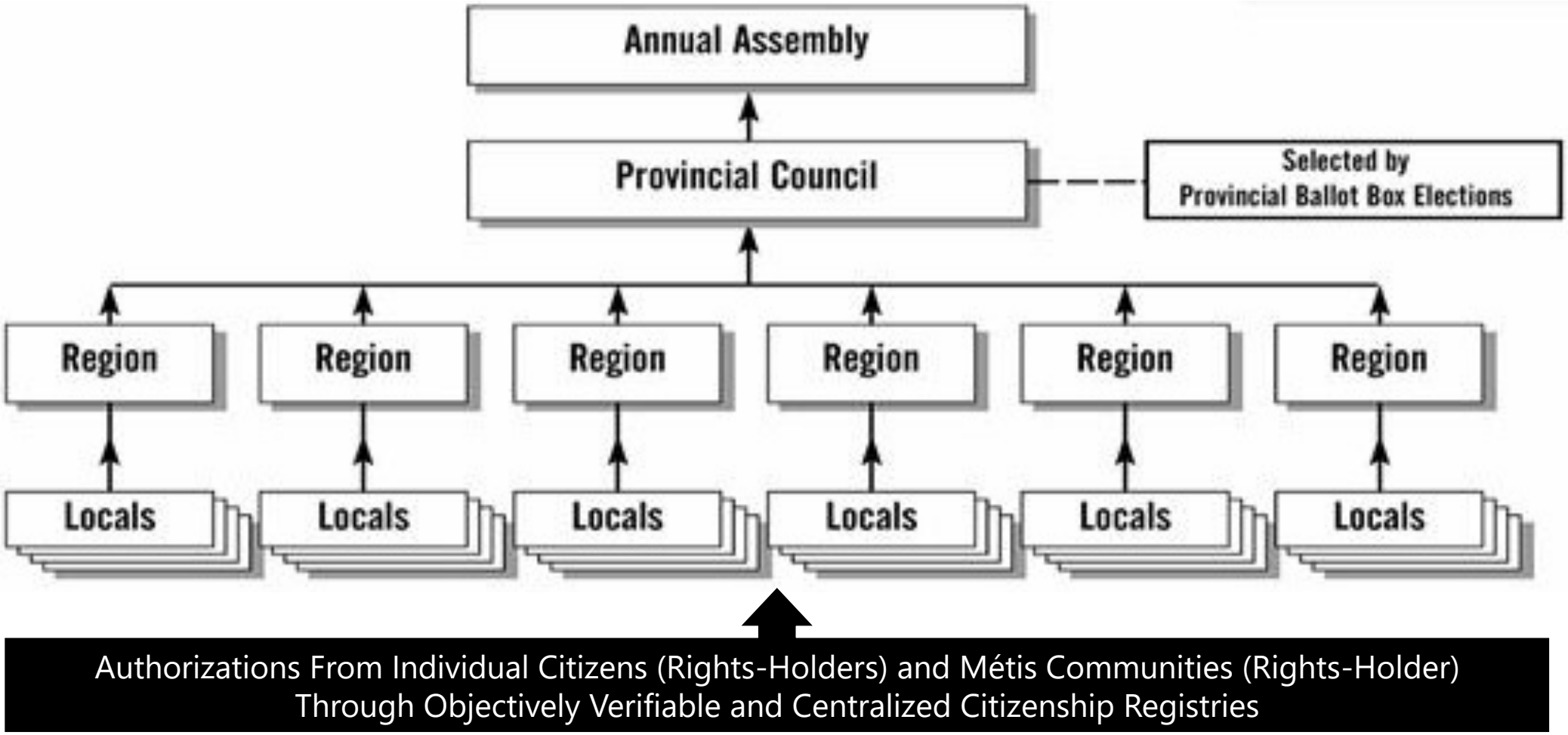
"The Métis have no other weapon except organization. In order that they might learn to understand their interest their position, to pursue their policy, it is necessary… and at all costs to reorganize the advanced and interested elements of the Métis… The Métis Association has been the organizer of our struggles --- it has in its ranks the most devoted section of our people, ready to sacrifice and able to view the struggle not only in its immediate ramifications but in its ultimate aim of re-establishment of our Métis people."

- Métis Leader Jim Brady

Métis “Organization” in Alberta



Contemporary Métis Governments (Conceptually)



Understanding the “Legal Lacuna”

The "Legal Lacuna"

[7] "The Crown did not apply to the Métis its policy of treating with the Indians and establishing reservations and other benefits in exchange for lands. … However, Métis communities were not given a collective reservation or land base; they did not enjoy the protections of the *Indian Act* or any equivalent. **Although widely recognized as a culturally distinct Aboriginal people living in culturally distinct communities, the law remained blind to the unique history of the Métis and their unique needs**… Their aboriginality, in a word, was not legally acknowledged or protected." (*Alberta v. Cunningham*, [2011] 2 SCR 670 at paras. 7 and 66)

"Governments Slowly Awoke to This Legal Lacuna"

"**Governments slowly awoke to this legal lacuna**… The landscape shifted dramatically in 1982, with the passage of the *Constitution Act, 1982*. In the period leading up to the amendment of the Constitution, Indian, Inuit and Métis groups fought for constitutional recognition of their status and rights. Section 35 of the *Constitution Act, 1982* entrenched existing Aboriginal and treaty rights and recognized three Aboriginal groups — Indians, Inuit, and Métis. **For the first time, the Métis were acknowledged as a distinct rights-holding group.**" (*Alberta v. Cunningham*, [2011] 2 SCR 670 at paras. 8 and 33)

Constitution Act, 1982, Section 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.

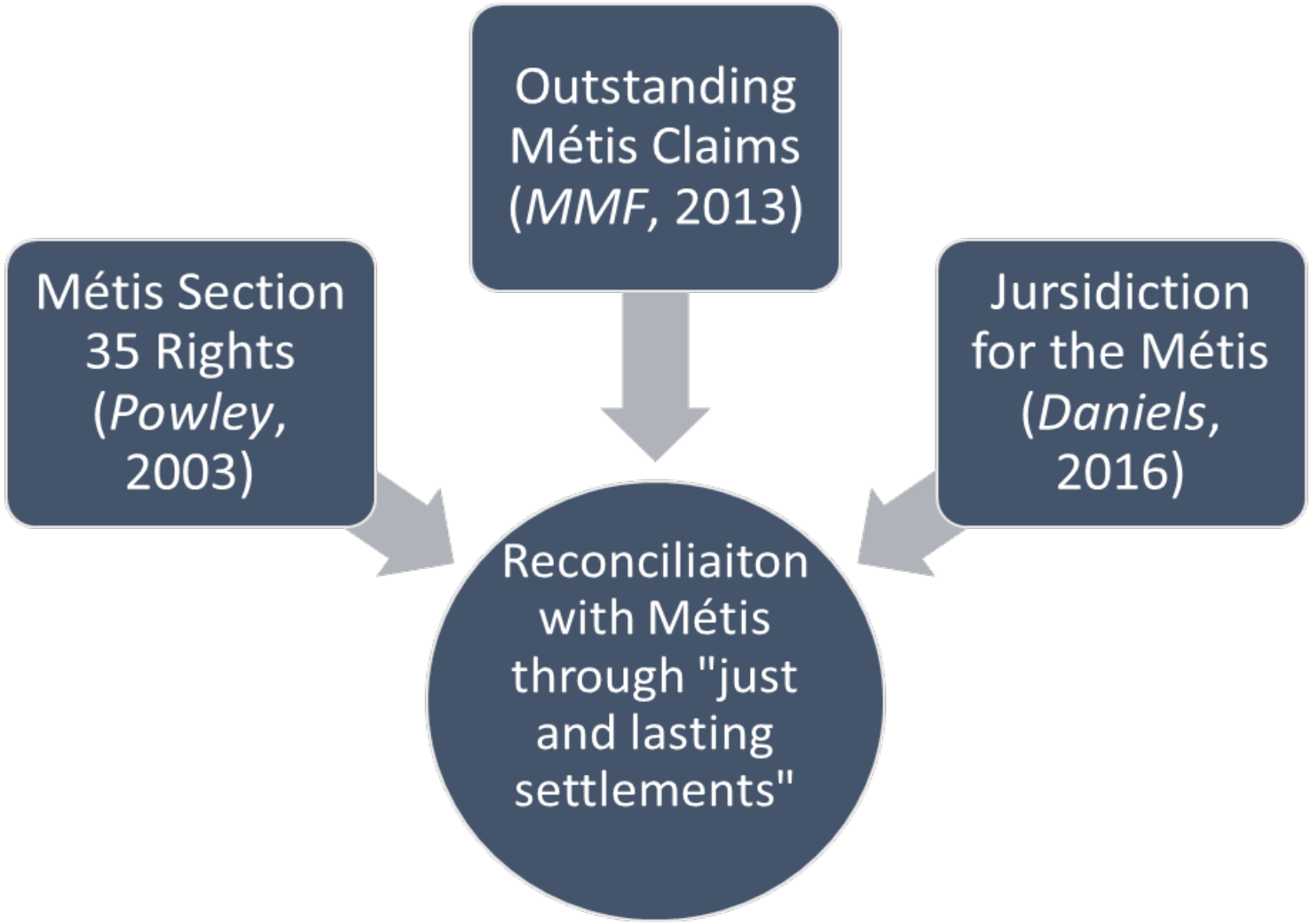
(3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.

The Many False Starts in Implementing Section 35

- The failed Constitutional Conferences mandated by Section 37 [Late 1980s]
- The Charlottetown Accord and the Métis Nation Accord [Early 1990s]
- The Federal Response to the Royal Commission on Aboriginal Peoples [Late 1990s]
- The Kelowna Accord [2005]

The Métis “Hunt for Justice” in the Courts

The “Trifecta of Métis Law”

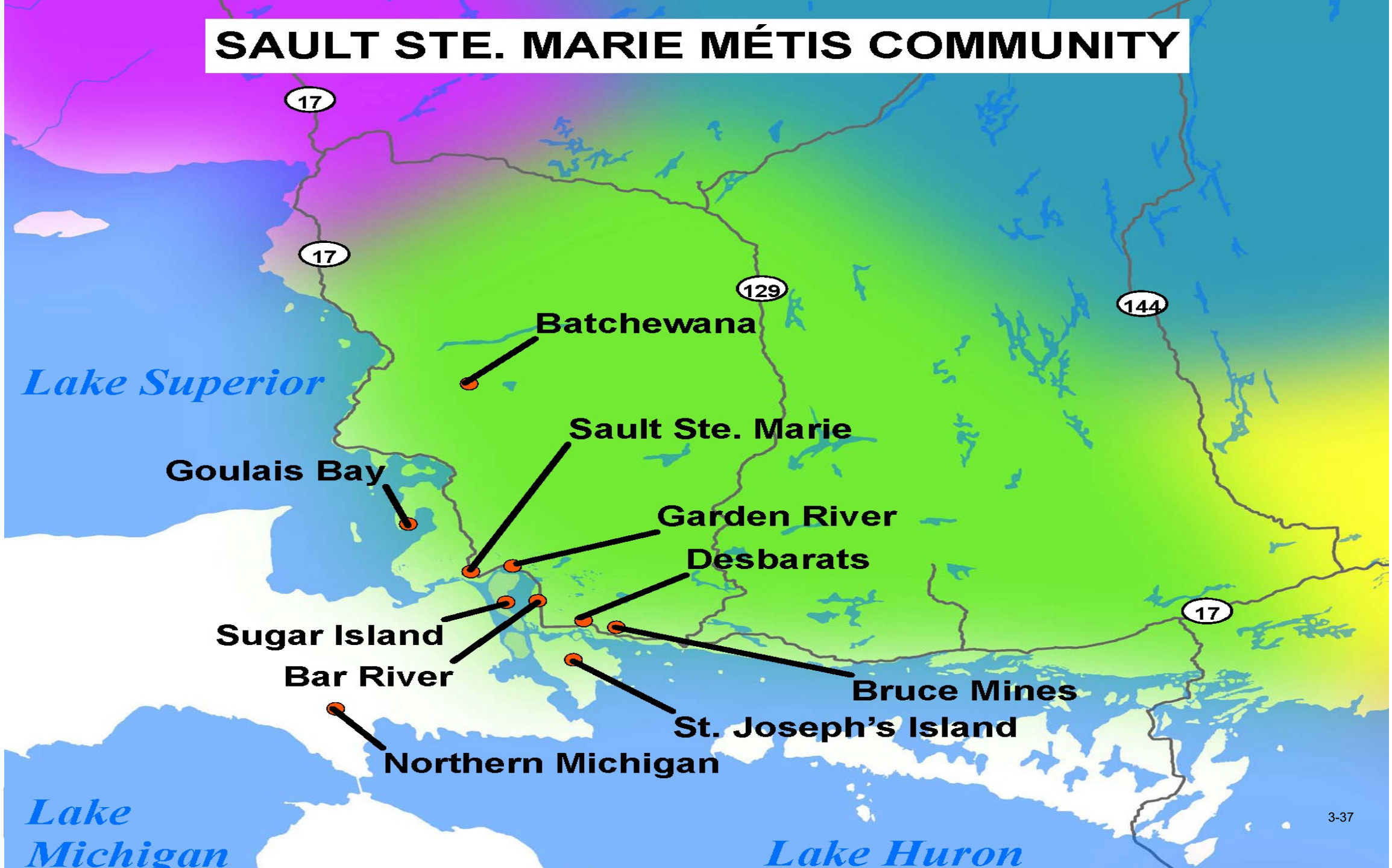


R. v. Powley:
Métis Section 35 Rights

R. v. Powley, [2003] 2 S.C.R. 207

[10] "**The term "Métis" in s. 35 does not encompass all individuals with mixed Indian and European heritage;** rather, it refers to distinctive peoples who, in addition to their mixed ancestry, developed their own customs, way of life, and recognizable group identity separate from their Indian or Inuit and European forebears. Métis communities evolved and flourished prior to the entrenchment of European control, when the influence of European settlers and political institutions became pre-eminent."

[17] "The inclusion of the Métis in **s. 35 represents Canada's commitment to recognize and value the distinctive Métis cultures, which grew up in areas not yet open to colonization**, and which the framers of the *Constitution Act, 1982* recognized can only survive if the Métis are protected along with other aboriginal communities."


SAULT STE. MARIE MÉTIS COMMUNITY
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144
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Batchewana
Lake Superior
Sault Ste. Marie
Goulais Bay
Garden River
Desbarats
Sugar Island
Bar River
Bruce Mines
St. Joseph's Island
Northern Michigan
Lake Michigan
Lake Huron

Not All Métis Are From The Red River

[11] “The Métis of Canada share the common experience of having forged a new culture and a distinctive group identity from their Indian or Inuit and European roots. This enables us to speak in general terms of “the Métis.” **However, particularly given the vast territory of what is now Canada, we should not be surprised to find that different groups of Métis exhibit their own distinctive traits and traditions.** This diversity among groups of Métis may enable us to speak of Métis “peoples,” a possibility left open by the language of s. 35(2), which speaks of the “Indian, Inuit and Métis peoples of Canada.”

Registries, Negotiations, No Hierarchy of Rights & The Special Aboriginal Relationship to the Land

[29] "While determining membership in the Métis community might not be as simple as verifying membership in, for example, an Indian band, this does not detract from the status of Métis people as full-fledged rights-bearers. **As Métis communities continue to organize themselves more formally and to assert their constitutional rights, it is imperative that membership requirements become more standardized so that legitimate rights-holders can be identified.**"

[50] "In the longer term, a combination of **negotiation and judicial settlement will more clearly define the contours of the Métis right** to hunt, **a right that we recognize as part of the special aboriginal relationship to the land**."

"Recognizing" Métis Communities through Litigation

- *R. v. Laviolette* – 2005 (Northwest Saskatchewan)
- *R. v. Belhumeur* – 2007 (Southeast Saskatchewan)
- *R. v. Goodon* – 2009 (Southwest Manitoba)
- *R. v. Hirsekorn* – 2011 (Southern Alberta)

No Historic Métis Communities: Quebec, the East Coast and Elsewhere

- The are now over 30 court cases where Metis rights have not been established in Quebec and the East Coast (i.e., no historic Métis community established).

- For example, in one Quebec case: "[a]ll of this information taken together failed to reveal any objective evidence pointing to a historic collectivity, on the territory in question, having any particular form of social organization distinguishing it from either the first inhabitants or the Euro-Canadians that followed. Nothing allowed individuals of mixed ancestry to be distinguished from their biological authors, … not a behavior, thought, or interest in anyway different and unique to a group that was neither native nor white."

R. v. Vautour, 2010 NBPC 39

[56] Dr. von Gernet offers examples where in other parts of Canada, anthropologists have identified mixed-blood families that had evolved over time into new and distinctive aboriginal communities through a process known as ethnogenisis. Perhaps the best-known are the Métis communities of the 'old Northwest' that emerged in the late 18th and early 19th century. … [A]ll those historic communities could be connected to some of the modern Métis communities that exist today in parts of what are now Northern Ontario, Manitoba, Saskatchewan and Alberta.

[57] According to Dr. von Garnet our historical experience with mixed marriages is quite different. In the Maritime region there are two communities of which much has been said in this case whose long-term historical existence as separate communities with a distinct identity seems indisputable: The Mi' kmaq and the Acadian. The question which Dr. von Garnet turned to is whether intermarriages between these two ethnic groups ever led to the creation of a third 'Métis community' with its own particular culture and identity. The short answer is no.

Manitoba Metis Federation v. Canada: Métis Claims Against the Crown

Manitoba Metis Federation Inc. v. Canada, [2016] 1 SCR 99

[140] "What is at issue is a constitutional grievance going back almost a century and a half. So long as the issue remains outstanding, the goal of reconciliation and constitutional harmony, recognized in s. 35 of the *Constitution Act, 1982* and underlying s. 31 of the *Manitoba Act*, remains unachieved. The ongoing rift in the national fabric that s. 31 was adopted to cure remains unremedied. **The unfinished business of reconciliation of the Métis people with Canadian sovereignty is a matter of national and constitutional import**."

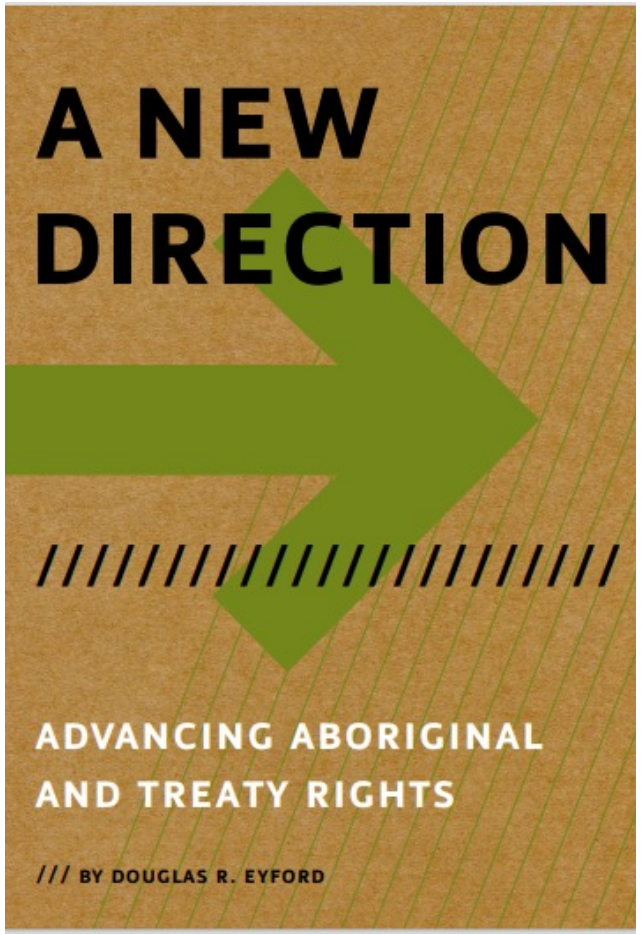
Daniels v. Canada:
Jurisdiction to Deal with the Métis

Daniels v. Canada, [2016] 1 S.C.R. 99

[19] Section 91(24) of the Constitution Act, 1867 "is about the federal government's relationship with Canada's Aboriginal peoples" and "… **Métis are "Indians" under s. 91(24) and it is the federal government to whom they can turn**."

[37] "The constitutional changes, the apologies for historic wrongs, a growing appreciation that Aboriginal and non-Aboriginal people are partners in Confederation, the Report of the Royal Commission on Aboriginal Peoples, and the Final Report of the Truth and Reconciliation Commission of Canada, all indicate that **reconciliation with all of Canada's Aboriginal peoples is Parliament's goal**."

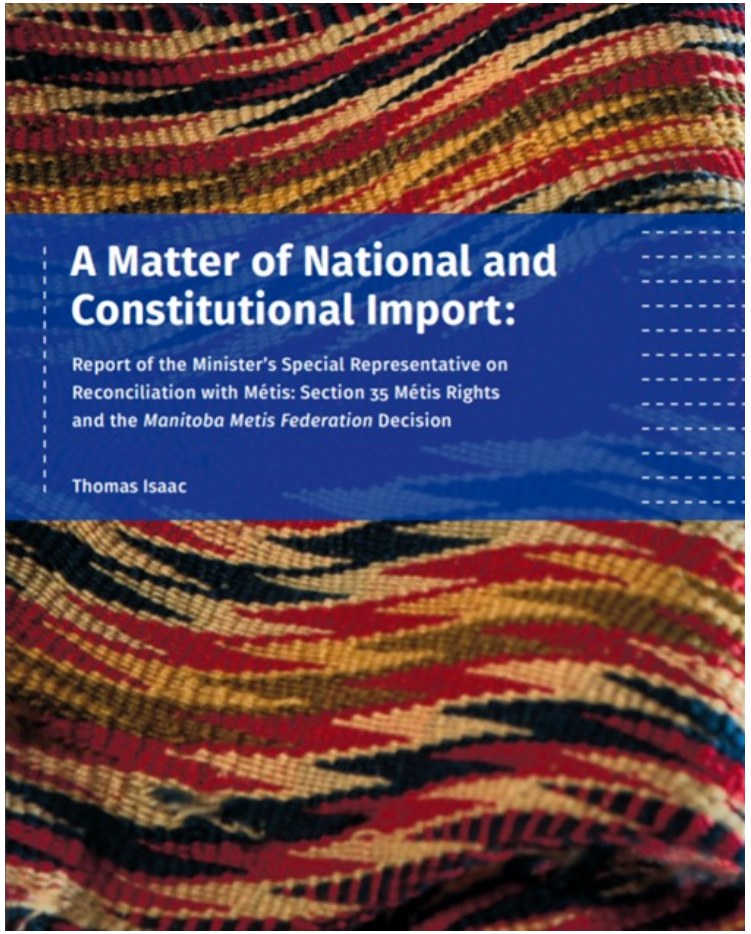
Ministerial Special Representative on Comprehensive Claims Policy (2015)



Recommendations

- Canada should develop a reconciliation process to support the exercise of Métis section 35(1) rights and to reconcile their interests.
- Canada should establish a framework for negotiations with the Manitoba Métis Federation to respond to the Supreme Court of Canada's decision in *Manitoba Métis Federation v. Canada*, 2013 SCC 14.

Ministerial Special Representative Report on Métis Rights (July 2016)



"It is recommended that Canada, with INAC taking the lead role, engage with Métis on developing a Section 35 Métis rights framework in whatever fora appropriate and should take a flexible approach to ensure a reasonable, transparent and broad engagement. The MNC and its Governing Members, along with the Métis Settlements and the Métis Settlements General Council, should be core to any federal engagement on these matters."

Recommendation No. 16

United Nations Declaration on the Rights of Indigenous Peoples

Article 4: Indigenous peoples, in exercising their right to self-determination, **have the right to autonomy or self-government in matters relating to their internal and local affairs**, as well as ways and means for financing their autonomous functions.

Article 5: Indigenous peoples have the **right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions**, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.

Article 18: Indigenous peoples have the right to **participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures**, as well as to maintain and develop their own indigenous decision-making institutions.

R. v. Desautel, 2021 SCC 17

[86] "In my view, the authoritative interpretation of s. 35(1) of the *Constitution Act, 1982*, is for the courts. **It is for Aboriginal peoples, however, to define themselves and to choose by what means to make their decisions, according to their own laws, customs and practices.**"

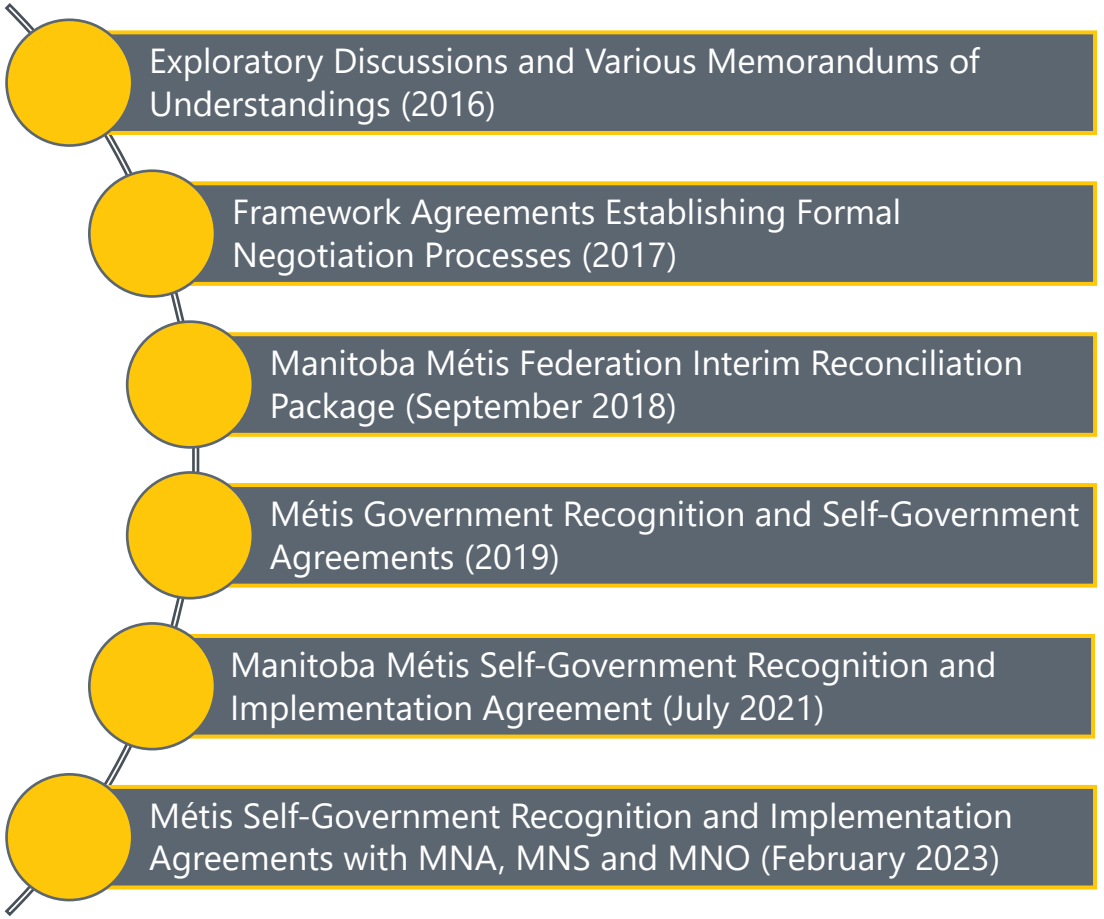
Leaving the “Legal Lacuna” …

The Métis Struggle

[70] "The history of the Métis is one of struggle for recognition of their unique identity as the mixed-race descendants of Europeans and Indians. **Caught between two larger identities and cultures, the Métis have struggled for more than two centuries for recognition of their own unique identity, culture and governance**. The constitutional amendments of 1982 and, in their wake… signal that the time has finally come for recognition of the Métis as a unique and distinct people."

Exploratory Discussions, Frameworks, Formal Negotiations & Self-Government Agreements

- To overcome the "legal" and "policy" lacunas within the federal system, Métis have made use of the Recognition of Indigenous Rights and Self-Determination ("RIRSD") discussion tables to deal with Métis priorities.
- In addition, various federal Cabinet mandates have been co-developed with and secured for Métis groups from Ontario westward to implement their visions for self-determination. Central to this work has been the recognition of Métis self-government to end the "legal lacuna" when it comes to Métis governments.



Métis Government Recognition and Self-Government Agreements (2019)

- On June 27, 2019, the Métis Nation of Alberta (MNA), the Métis-Nation Saskatchewan (MNS) and the Métis Nation of Ontario (MNO) signed Métis Government Recognition and Self-Government Agreements with Canada

Manitoba Métis Self-Government Recognition and Implementation Agreement (2021)

- In July 2021, Canada and the MMF signed an "incremental" agreement that commits the parties to working towards a self-government treaty protected by section 35 of the *Constitution Act, 1982*.

- The Agreement provides upfront recognition of the MMF's representativeness and current self-government, including Canada's commitment that it will not "challenge or support a challenge to a Manitoba Métis Law" in specific jurisdictions set out in the agreement (ss. 17-34).

- The MMF Agreement contemplates federal implementation legislation for the self-government treaty after it has been ratified as opposed to the upfront legislation committed to in the agreements with the MNA, MNS and MNO.

Métis Government Recognition and Self-Government Implementation Agreements (2023)

- On February 23 & 24, 2023, the Métis Nation of Alberta (MNA), the Métis-Nation Saskatchewan (MNS) and the Métis Nation of Ontario (MNO) signed Métis Government Recognition and Self-Government Implementation Agreements with Canada

Metis Settlements General Council v. Canada (Crown-Indigenous Relations), 2024 FC 487

[62] Two dimensions of recognition are present in the Agreement. **First, section 35 rights, most importantly self-government, are said to be inherent, in the sense that they exist independently of their recognition by the Agreement.** The Agreement recognizes them and sets out certain modalities of their implementation, but does not create them. **Second, Indigenous communities pre-exist legislation that grants them rights or status.** In this sense, recognition is the process by which the state chooses the Indigenous communities whose rights it will acknowledge, as well as the identity of the bodies the state will acknowledge as representing them. In both cases, by resorting to the legal technique of recognition, the Agreement is based on the idea that Indigenous communities and their rights find their legitimacy in Indigenous legal orders instead of Canadian law.

Metis Settlements General Council v. Canada (Crown-Indigenous Relations), 2024 FC 487

[63] Usually, courts recognize rights or legal situations, while the legislative and executive branches of the state create them. Recently, however, Parliament has adopted legislation that recognizes self-government, instead of creating Indigenous governments and delegating discrete powers to them: [Bill C-92]; … The Agreement at issue in this case uses the same legal technique.

[64] While recognition is branded as progress, one must not forget that a significant aspect of the process is that the legislative or executive branches of the state choose which Indigenous communities or which rights to recognize. Given current realities, granting or withholding recognition has significant impacts on a community's ability to exercise its rights. Even though a community can theoretically resort to the courts, legislative and executive recognition is "very meaningful on the ground": *Bill C-92 Reference*, at para 60.

Introduction of Bill C-53 (2023)

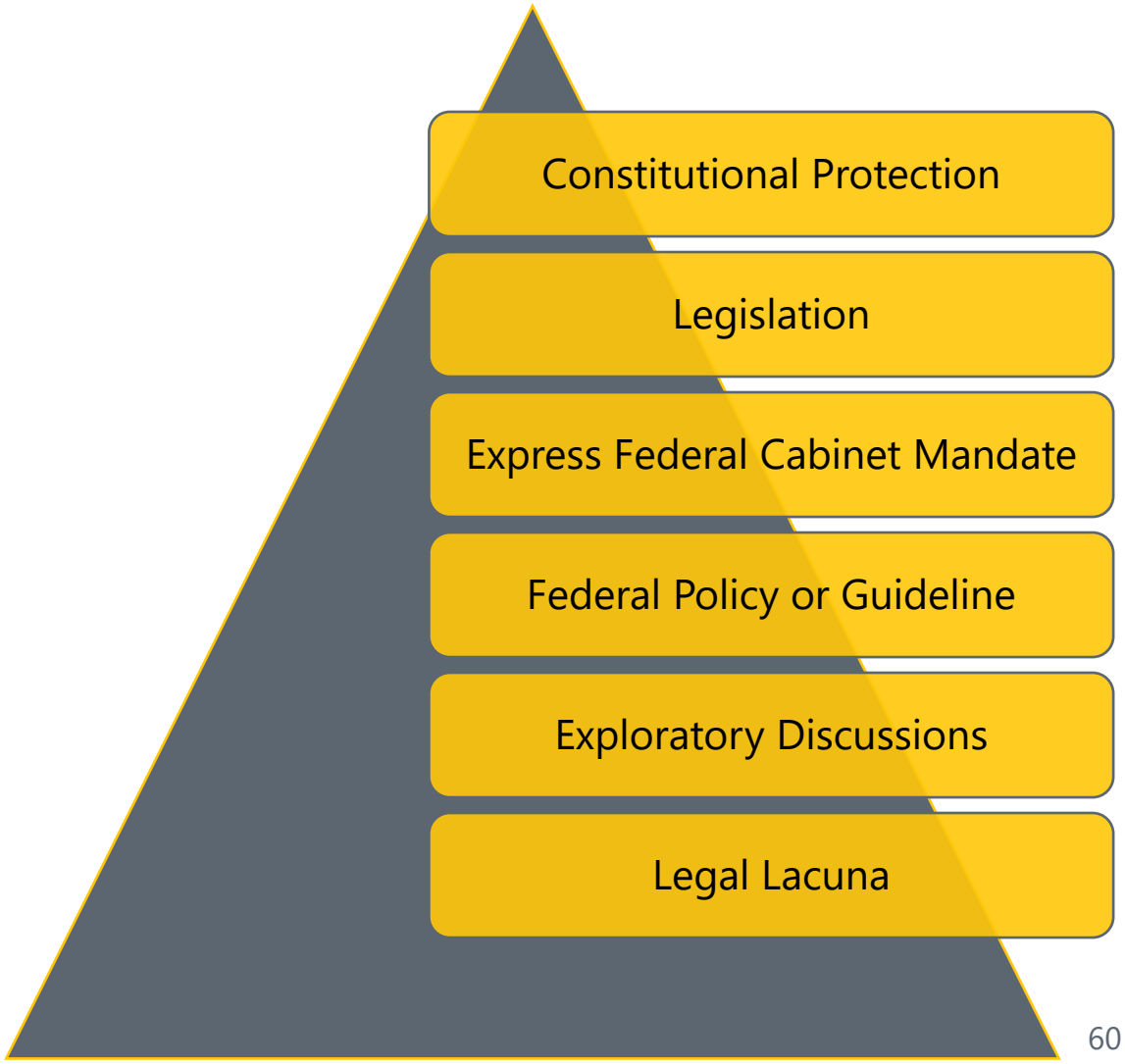
- On June 28, 2023, Bill C-53:

An Act respecting the recognition of certain Métis governments in Alberta, Ontario and Saskatchewan, to give effect to treaties with those governments and to make consequential amendments to other Acts is introduced into Parliament

Overcoming the “Lacuna” and “Lucy” Through “Law”

- The idea behind the upfront Federal Recognition Legislation is to avoid “Lucy” lifting the football from the Métis (yet again) in the future.

- The legislation provides immediate federal recognition and a legal base upon which future negotiations can take place that will give effect to a future self-government treaty once mutually agreeable requirements are met.



The Purpose of Bill C53

1. advance, through government-to-government relationships, the recognition of the distinct identities, cultures and governance structures of the Métis;
2. advance the recognition of the right to self-determination, including the inherent right of self-government recognized and affirmed by section 35 of the *Constitution Act, 1982*, of certain Métis collectivities and the recognition of the authority of Métis governments to act on behalf of those collectivities;
3. provide a framework for the implementation of treaties entered into by Métis governments and His Majesty in right of Canada; and
4. contribute to the implementation of the United Nations Declaration on the Rights of Indigenous Peoples.

“Recognition” in the Legislation (Section 8)

- “The Government of Canada recognizes that a Métis government set out in column 1 of the schedule is an Indigenous governing body that is authorized to act on behalf of the Métis collectivity set out in column 2 opposite that Métis government and that the Métis collectivity holds the right to self-determination, including the inherent right of self-government recognized and affirmed by section 35 of the *Constitution Act, 1982*.”

Framework for Giving Legal Effect to Future Self-Government Treaties (Sections 5-7 & 11-12)

- These sections provide that a future core self-government treaty with one of the Métis governments can be given legal force through an Order in Council made under the legislation (once all requirements under the 2023 agreements are met).

- Sections 11 and 12 provide that future Supplementary Self-Government Agreements (i.e., additional jurisdictions) could be given legal effect as well.

Bill C53 Amendment (Tabling Treaties)

- "4.1 (1) If a treaty is entered into by a Métis government and His Majesty in right of Canada, the Minister of Crown-Indigenous Relations must cause to be tabled in each House of Parliament a copy of the treaty on any of the first 10 days on which that House is sitting after the treaty is entered into.
- (2) After it is tabled, the treaty stands referred to the standing committee of each House of Parliament that normally considers matters relating to Indigenous peoples.
- (3) For the purpose of subsection (2), *Indigenous peoples* has the meaning assigned by the definition *aboriginal peoples of Canada* in subsection 35(2) of the *Constitution Act, 1982*."

Bill C53 Amendment (Other Métis Groups)

- "8.1 For greater certainty, nothing in this Act is to be construed as abrogating or derogating from the right to self-determination of a Métis collectivity that has not authorized a Métis government set out in column 1 of the schedule to act on its behalf, including the inherent right of self-government recognized and affirmed by section 35 of the *Constitution Act, 1982*."

Bill C53 Amendment ("Indigenous Governing Body")

- "(2) In subsection (1), *Indigenous governing body* means a council, government or other entity that is authorized to act on behalf of an Indigenous group, community or people that holds rights recognized and affirmed by section 35 of the *Constitution Act, 1982* and, for greater certainty, includes a Métis government."

Metis Settlements General Council v. Canada (Crown-Indigenous Relations), 2024 FC 487

[10] For a long time, the only form of Indigenous government recognized by the federal government was the Indian band, a form of local government created by the *Indian Act*, RSC 1985, c I-5. Most Indian bands are now known as First Nations. Largely for practical reasons, it has often been assumed that local First Nations are the holders of aboriginal rights recognized by section 35.

[11] Until recently, the federal government did not pay attention to Métis claims and did not even recognize that the Métis fell under its constitutional jurisdiction. For this reason, there is no legislation similar to the *Indian Act*. While the enactment of section 35, in particular its paragraph (2), was a victory for the Métis, issues of definition and representation remained unsettled. There was no accepted definition of which individuals could exercise Métis rights and of which Métis collectives were the holders of section 35 rights.

[17] Because Parliament did not enact comprehensive legislation regarding the Métis and did not impose membership criteria and local political structures as it did for First Nations, the Métis were left to organize themselves politically. They did so at the local, regional and provincial level and, beginning in 1983, at the national level.

Metis Settlements General Council v. Canada (Crown-Indigenous Relations), 2024 FC 487

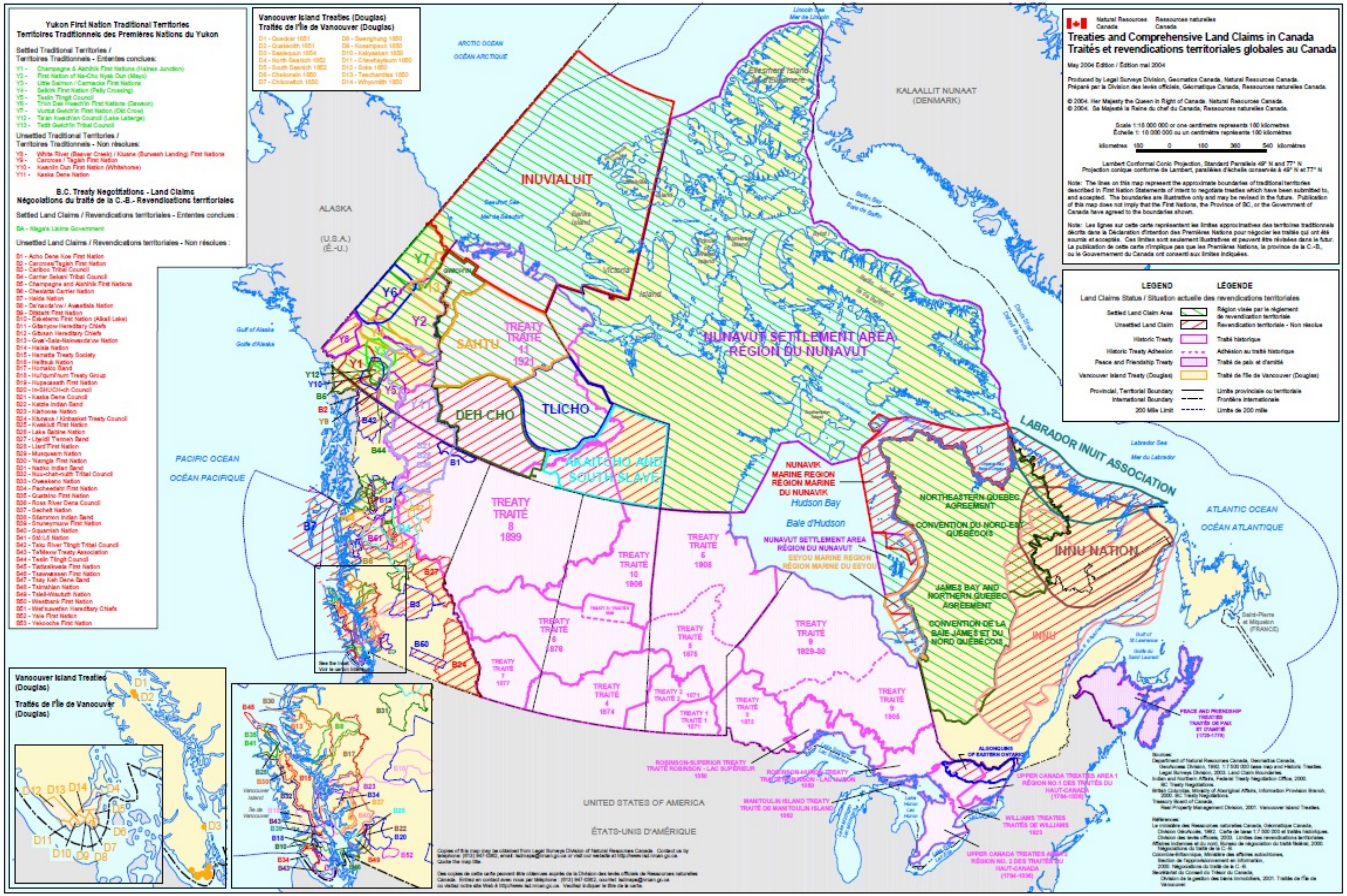
[52] Pursuant to the promise made in the Agreement, the Minister of Justice tabled Bill C-53 in Parliament on June 21, 2023. Its long title, *An Act respecting the recognition of certain Métis governments in Alberta, Ontario and Saskatchewan, to give effect to treaties with those governments and to make consequential amendments to other Acts*, reveals, in reverse order, the Bill's two main components.

[53] First, sections 5 to 7 provide for the statutory validation of treaties to be concluded between Canada and certain Métis governments. Other than the fact that they contemplate the validation of future treaties instead of treaties that have already been signed, these provisions closely follow the language used by Parliament to validate previous treaties; see, for example, the *Nisga'a Final Agreement Act*, SC 2000, c 7; or the *Nunavik Inuit Land Claims Agreement Act*, SC 2008, c 2.

[54] Second, sections 8, 8.1 and 9 provide for the recognition of Métis governments. …

Metis Settlements General Council v. Canada (Crown-Indigenous Relations), 2024 FC 487

[70] In my view, the MNA's submissions overstate the links between the Agreement and Bill C-53. It is true that the Agreement contemplates the introduction of legislation in Parliament. The Agreement, however, is a binding contract that has effect independently of Bill C-53. While the preamble of Bill C-53 references the Agreement, the proposed legislation does not give the Agreement the force of law. Instead, it will give the force of law to treaties that have not yet been negotiated. In addition, as noted above, Bill C-53 recognizes that the Métis Nation within Alberta holds the right to self-government recognized and affirmed by section 35 of the *Constitution Act, 1982*.


Treaties and Comprehensive Land Claims in Canada
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Natural Resources Canada
Ressources naturelles Canada
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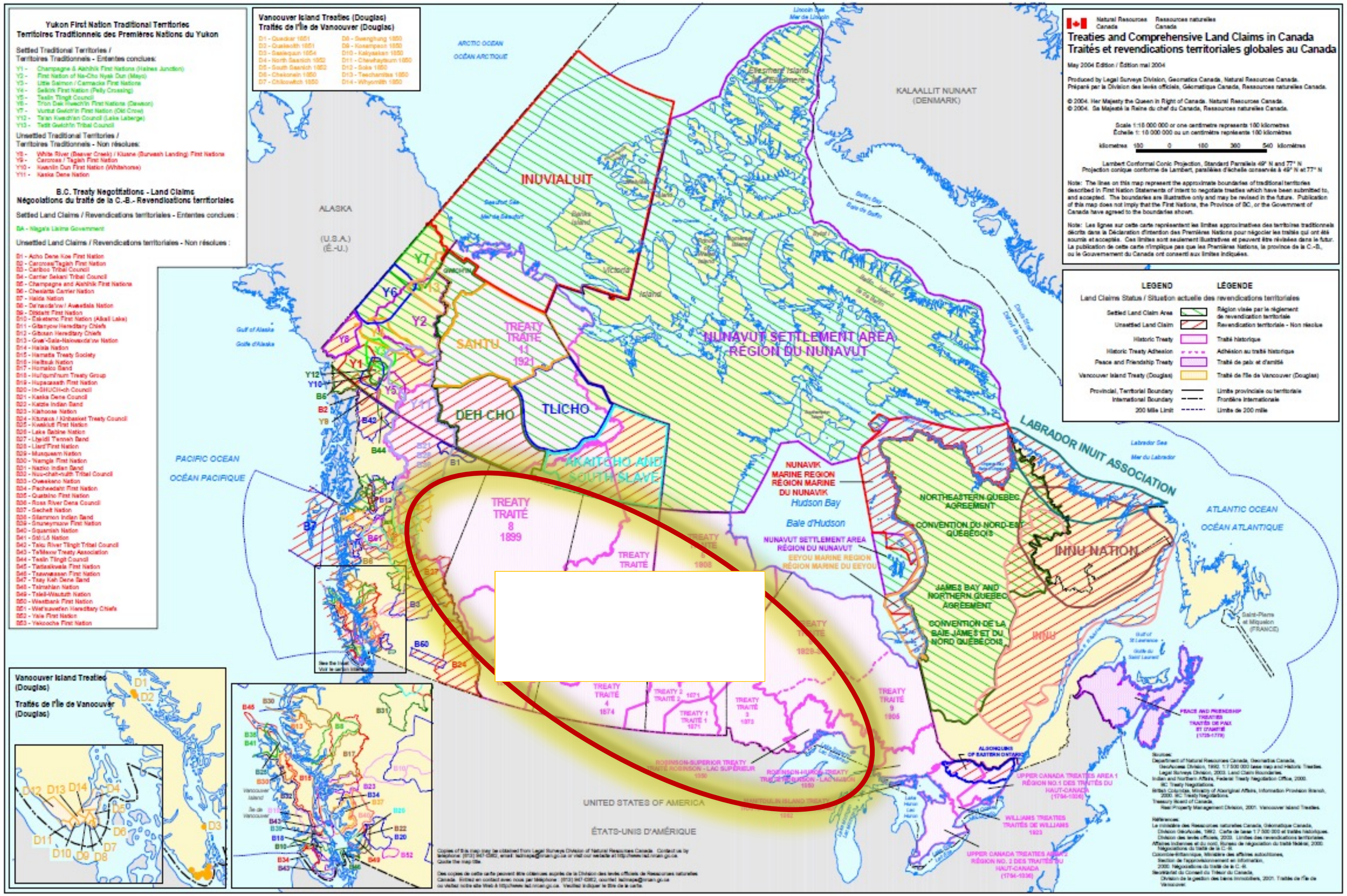
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ÉTATS-UNIS D'AMÉRIQUE

Questions and Discussion

Contact

Jason Madden
Partner & Co-Leader Indigenous Practice Group
E jmadden@airdberlis.com
T 416.637.7983

Law Society of Ontario | Barreau de l'Ontario

TAB 4

Indigenous Law Issues 2024

UNDRIP and its Implementation in Canada – Key Points & Resources

The *United Nations Declaration on the Rights of Indigenous Peoples* & Implementation Efforts Across Canada (PPT)

Sara Mainville
JFK Law LLP

April 3, 2024

cpd

UNDRIP and its Implementation in Canada – Key Points & Resources

Sara Mainville, *JFK Law LLP*

This document supplements the PowerPoint presentation on the topic of implementation in Canada of the *United Nations Declaration on the Rights of Indigenous Peoples* ("UNDRIP"). It provides a summary of information with references/resources. The scope of the presentation and supporting document is limited to government and judicial developments and does not extend to implementation efforts within the private sector and specific industries/professions, though these are also important sites of implementation.

UNDRIP and Canada – Timeline

- 1970s-2007: 30 years of negotiations between Indigenous peoples, the United Nations, and member-states of the United Nations.[1]
    - Including active participation from representatives of Indigenous peoples across Canada.[2]
- September 13, 2007 General Assembly vote in favour of UNDRIP.
    - 143 votes in favour, 11 abstentions, 36 absences (one of which later indicated intention to have voted in favour), 4 votes against (Canada, the United States, Australia, and New Zealand).[3]
- 2009-2010: The four states that voted against UNDRIP issue statements supporting it.
    - Canada's statement calls UNDRIP an aspirational and non-binding instrument.[4]
- 2015: The Truth and Reconciliation Commission of Canada issues its reports and Calls to Action.[5] It states that full adoption and implementation of UNDRIP will advance reconciliation in Canada, and specifically it does the following:
    - Calls on the following to adopt UNDRIP as a framework for reconciliation: federal, provincial, territorial, and municipal governments (Call #43); church parties to the Settlement Agreement, and all other faith groups and interfaith social justice group (Call #46); and the corporate sector in Canada (Call #92).
    - Calls on the Government of Canada to develop a national action plan, strategies, and other concrete measures to achieve the goals of UNDRIP (Call #44).
- May 2016: Canada issues a statement announcing Canada's full support of UNDRIP, without qualification.[6]

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[1] See Brenda L Gunn, *Overcoming Obstacles to Implementing the UN Declaration on the Rights of Indigenous Peoples in Canada*, 2013 31-1 *Windsor Yearbook on Access to Justice* 147, at p. 148, 2013 CanLIIDocs 60, <https://canlii.ca/t/7j0>

[2] *Ibid*, at p. 149.

[3] *Ibid*., at p. 151.

[4] Government of Canada, *Archived - Canada's Statement of Support on the United Nations Declaration on the Rights of Indigenous Peoples* (November 12, 2010), available on-line: <https://www.rcaanc-cirnac.gc.ca/eng/1309374239861/1621701138904>.

[5] All reports of the Truth and Reconciliation Commission of Canada and a document listing its Calls to Action can be found on the website of the National Centre for Truth and Reconciliation: <https://nctr.ca/records/reports/>.

[6] Government of Canada, *News Release: Canada Becomes a Full Supporter of the United Nations Declaration on the Rights of Indigenous Peoples* (May 10, 2016 – New York, NY), available on-line:

- December 2020: Bill C-15, *An Act respecting the United Nations Declaration on the Rights of Indigenous Peoples*, introduced
- June 2021: Bill C-15 receives Royal Assent and *An Act respecting the United Nations Declaration on the Rights of Indigenous Peoples* (UNDA) becomes law
- June 2023: Canada finalizes and publishes its action plan, required under UNDA
- February 2024: Supreme Court of Canada states UNDA incorporates UNDRIP into Canada's domestic positive law[7]

UNDRIP and Canada – Status

- From "aspirational"[8] document with at best a role in statutory interpretation through the presumption of conformity[9] to "incorporated into the country's domestic positive law."[10]
    - Questions remain about what this current status – only recently pronounced by the Supreme Court of Canada – actually means.[11]

Key Implementation Efforts Across Canada

- Federal legislation with a stated purpose of contributing to implementation of UNDRIP
    - UNDA[12]
    - *An Act respecting First Nations, Inuit and Métis children, youth and families*[13]
        - Recently upheld by the Supreme Court of Canada as constitutional[14] on an appeal from a reference decision of the Court of Appeal of Quebec.
    - *Indigenous Languages Act*[15]
    - *Sechelt Indian Band Self-Government Act*[16] (via amendments introduced in 2022[17])

<https://www.canada.ca/en/indigenous-northern-affairs/news/2016/05/canada-becomes-a-full-supporter-of-the-united-nations-declaration-on-the-rights-of-indigenous-peoples.html>.

[7] *Reference re An Act respecting First Nations, Inuit and Métis children, youth and families*, 2024 SCC 5 (CanLII), at para 15, <https://canlii.ca/t/k2qhn#par15>, retrieved on 2024-03-14

[8] E.g. Aboriginal Affairs and Northern Development Canada 2010 press release (*supra* note 4) and quoted in part in *Hupacasath First Nation v. Canada (Foreign Affairs),* 2013 FC 900 (CanLII), [2014] 4 FCR 836, at para 51, <https://canlii.ca/t/g0c4g#par51>

[9] E.g. *Nunatukavut Community Council Inc. v. Canada (Attorney General)*, 2015 FC 981 (CanLII), at para 103, <https://canlii.ca/t/gkqq5#par103>

[10] *Reference re An Act respecting First Nations, Inuit and Métis children, youth and families*, 2024 SCC 5 (CanLII), at para 15, <https://canlii.ca/t/k2qhn#par15>, retrieved on 2024-03-14

[11] For a good discussion on this, see Nigel Bankes and Robert Hamilton, "What Did the Court Mean When It Said that UNDRIP 'has been incorporated into the country's positive law'? Appellate Guidance or Rhetorical Flourish?" (28 February 2024), online: ABlawg, <http://ablawg.ca/wp-content/uploads/2022/02/Blog_NB_RH_UNDRIP_Incorporation.pdf>.

[12] *United Nations Declaration on the Rights of Indigenous Peoples Act*, SC 2021, c 14, <https://canlii.ca/t/554bd>

[13] *An Act respecting First Nations, Inuit and Métis children, youth and families*, SC 2019, c 24, <https://canlii.ca/t/544xh>.

[14] *Reference re An Act respecting First Nations, Inuit and Métis children, youth and families*, 2024 SCC 5 (CanLII), <https://canlii.ca/t/k2qhn>

[15] *Indigenous Languages Act,* SC 2019, c 23, s. 5(g).

[16] *Sechelt Indian Band Self-Government Act,* SC 1986, c 27, <https://canlii.ca/t/55h59>

[17] *An Act to give effect to the Anishinabek Nation Governance Agreement, to amend the Sechelt Indian Band Self-Government Act and the Yukon First Nations Self-Government Act and to make related and consequential amendments to other Acts*, SC 2022, c 9, <https://canlii.ca/t/55h10>

- Provincial/Territorial legislation with a stated purpose of contributing to implementation of UNDRIP:
    - BC's *Declaration on the Rights of Indigenous Peoples Act*[18]
    - Northwest Territories' *United Nations Declaration on the Rights of Indigenous Peoples Implementation Act*[19]

- Some other provincial laws of note:
    - *Mi'kmaw Language Act*[20]
    - BC's *Child, Family and Community Service Act* (which does not have an explicit purpose of implementing UNDRIP but does state the Act must be interpreted and administered in accordance with the principle that "Indigenous peoples have an inherent right of self-government, including self-determination, that is recognized and affirmed by section 35 of the *Constitution Act, 1982* and by the United Nations Declaration on the Rights of Indigenous Peoples"[21]).

- Some provincial-First Nation agreements of note in British Columbia
    - Two consent decision-making agreements regarding, respectively, two specific mining projects, between the province and the Tahltan Nation pursuant to section 7 of BC's *Declaration on the Rights of Indigenous Peoples Act*:[22]
        - Tahltan Nation-B.C. *Declaration Act Consent Decision-Making Agreement for Eskay Creek Project*[23]
        - Tahltan Nation-B.C. *Declaration Act Consent Decision-Making Agreement for Red Chris Porphyry Copper-Gold Mine Project*[24]
    - *Xwulqw'selu Watershed Planning Agreement* between B.C. and Cowichan Tribes establishes new co-managements structures and processes[25]

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[18] *Declaration on the Rights of Indigenous Peoples Act*, SBC 2019, c 44, <https://canlii.ca/t/544c3>
[19] *United Nations Declaration on the Rights of Indigenous Peoples Implementation Act*, SNWT 2023, c 36, <https://canlii.ca/t/564ch>
[20] *Mi'kmaw Language Act*, SNS 2022, c 5, <https://canlii.ca/t/55hxl>
[21] *Child, Family and Community Service Act*, RSBC 1996, c 46, s 4.1, <https://canlii.ca/t/84dv#sec4.1>
[22] *Declaration on the Rights of Indigenous Peoples Act*, SBC 2019, c 44, s 7(1)
[23] Agreement available on-line: <Decision-Making Agreement under the Declaration on the Rights of Indigenous Peoples Act (00697194.DOCX;37) (gov.bc.ca)>. See also B.C. press release, "Tahltan Central Government, B.C. make history under Declaration Act" (June 6, 2022), available on-line: <Tahltan Central Government, B.C. make history under Declaration Act | BC Gov News>.
[24] Agreement available on-line: <declaration_act_consent_agreement_for_red_chris_with_tahltan.pdf (gov.bc.ca)>. See also BC Press Release, "Tahltan Nation, B.C. sign historic consent-based decision-making agreement" (November 1, 2023), available on-line: <https://news.gov.bc.ca/releases/2023ENV0061-001707>.
[25] Agreement available on-line: <2023-05-12_xwulqwselu_watershed_planning_agreement_-_cowichan_tribes.pdf (gov.bc.ca)>.

- *Blueberry River First Nations Implementation Agreement* [26] which sets out a new approach to resource management and treaty rights in Blueberry River First Nations' territories, in response to the ruling in *Yahey v British Columbia*. [27]

- Some municipal government efforts:
  - Vancouver:
    - City of Vancouver passed a motion in March 2021 to establish a UN Declaration Task Force, which was established in partnership with the Musqueam Indian Band, Squamish Nation, and Tsleil-Waututh Nation.
    - In October 2022, the Task Force presented its report, *City of Vancouver's UNDRIP Strategy*.[28]
  - Saskatoon:
    - City of Saskatoon adopted UNDRIP in 2022.[29]

- Action plans to achieve the objectives of UNDRIP, developed pursuant to legislated requirements:
  - Federal action plan[30]
  - B.C. action plan[31]

- Recent judicial decisions of note
  - *Reference re An Act respecting First Nations, Inuit and Métis children, youth and families*, 2024 SCC 5[32]
    - Discusses the process of "legislative reconciliation" as contributing to implementation of UNDRIP
    - States UNDRIP has been incorporated into Canada's domestic law
    - Quotes extensively from *UNDRIP Implementation: Braiding International, Domestic and Indigenous Laws*.[33]
  - *Gitxaala v British Columbia (Chief Gold Commissioner)*, 2023 BCSC 1680[34]
    - Finds that B.C.'s *Declaration on the Rights of Indigenous Peoples Act*: does not implement UNDRIP into B.C's domestic law; does not, by requiring B.C.

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[26] Province of British Columbia, *Blueberry River First Nations Implementation Agreement* (18 January 2023), online: <https://www2.gov.bc.ca/assets/gov/environment/natural-resource-stewardship/consulting-with-first-nations/agreements/blueberry_river_implementation_agreement.pdf>.
[27] *Yahey v British Columbia*, 2021 BCSC 1287 at para 1884
[28] Available on-line: <https://council.vancouver.ca/20221025/documents/p1.pdf>.
[29] https://sktc.sk.ca/city-of-saskatoon-adopts-the-united-nations-declarations-on-the-rights-of-indigenous-peoples/
[30] https://www.justice.gc.ca/eng/declaration/un_declaration_EN1.pdf
[31] https://www2.gov.bc.ca/assets/gov/government/ministries-organizations/ministries/indigenous-relations-reconciliation/declaration_act_action_plan.pdf
[32] *Reference re An Act respecting First Nations, Inuit and Métis children, youth and families*, 2024 SCC 5 (CanLII), <https://canlii.ca/t/k2qhn>,
[33] *UNDRIP Implementation: Braiding International, Domestic and Indigenous Laws*. Waterloo, Ont.: Centre for International Governance Innovation, 2017. Available on-line: <https://www.cigionline.org/publications/undrip-implementation-braiding-international-domestic-and-indigenous-laws/>.
[34] *Gitxaala v British Columbia (Chief Gold Commissioner)*, 2023 BCSC 1680 <https://canlii.ca/t/k0cbd>

to take all measures necessary to make its laws consistent with UNDRIP, create justiciable rights; and can be used as an interpretive aid.[35]

- *R. c. Montour*, 2023 QCCS 4154[36]
  - Used UNDRIP to revisit the section 35 Aboriginal rights test in *Van der Peet*, adopting the following words of Professor John Borrows: "[…] UNDRIP's embrace by the Canadian government fundamentally changes the character of the debate surrounding Indigenous law and governance. *Van der Peet and Pamajewon* should be overturned; *stare decisis* should not be a straitjacket that condemns the law to stasis, particularly when such stasis continues to tear the fabric of constitutional reconciliation as it relates to Indigenous peoples."[37]
- *George v. Heiltsuk First Nation*, 2022 FC 1786:
  - "As this Court is increasingly called upon to create space for Indigenous law within our jurisdiction, the Court will endeavor to delineate its jurisdictional boundary in a manner that is respectful of Indigenous peoples and their legal traditions, while taking into account their assertion of self-government and the Government of Canada's endorsement of the UNDRIP through the federal UNDRIPA."[38]

[35] *Ibid*., at para 14 <https://canlii.ca/t/k0cbd#par14>
[36] *R. c. Montour*, 2023 QCCS 4154, <https://canlii.ca/t/k0wzd>
[37] At para 1235
[38] *George v. Heiltsuk First Nation*, 2022 FC 1786, at para 76.

The *United Nations Declaration on the Rights of Indigenous Peoples* & Implementation Efforts Across Canada

LSO CPD Program: Indigenous Law Issues

April 3, 2024

Sara Mainville, JFK Law LLP

Outline

1. What is UNDRIP
2. Historical trajectory in Canada
3. Sites/Levels of Implementation
4. Federal Implementation
   A. Federal Act: A tool of transformation?
   B. Federal Action Plan
5. Potentially transformative impact of litigation on colonial regimes

UNDRIP – a law reform tool

- The United Nations Declaration on the Rights of Indigenous Peoples ("UNDRIP") is a UN declaration (itself non-binding) but consists of many binding international legal principles.
  - Representatives of Indigenous peoples across Canada actively participated in its development, negotiations.

- UNDRIP is intended to set out the minimum standards for recognition of the collective and individual rights of Indigenous peoples. UNDRIP rights include, e.g., the:
  - Right to self-determination (arts 3, 4, 5)
  - Right to participate in decision-making and maintain institutions (arts 18, 19, 34, 40)
  - Right to make decisions over traditional territory (arts 26, 29)
  - Right to free, prior and informed consent (arts 19, 32)
    - Can be understood as procedural right that is key to realizing substantive rights in UNDRIP
  - Right to culture (arts 8, 11, 25)
  - Right to maintain and protect Indigenous knowledge (art 31)

Sara Mainville smainville@jfklaw.ca

JFK LAW LLP Key Milestones in Canada (Federal)

- 2007: Canada is one of four UN member states to **vote against UNDRIP** at the UN General Assembly (along with the U.S., Australia, and New Zealand)
- 2010: Canada makes a statement expressing **qualified support** of UNDRIP, referring to it as "aspirational"
- 2015: **Truth and Reconciliation Commission** calls on all colonial governments (federal, provincial, territorial, and municipal), faith groups and interfaith social justice groups, and the corporate sector to **adopt UNDRIP as a framework for reconciliation** (Calls to Action # 43, 46, 92)
- 2016: Canada issues a statement expressing **unqualified support** of UNDRIP
- June 2021: ***An Act respecting the United Nations Declaration on the Rights of Indigenous Peoples*** (UNDA) becomes law
- June 2023: Canada publishes its "co-developed" **action plan**, required under UNDA
- February 2024: **SCC** states **UNDA incorporates UNDRIP** into Canada's domestic positive law

Sites/Levels of Implementation

- Federal
- Provincial
- Territorial
- Municipal
- Judicial
- Corporate
- Civil society, professions
- Faith groups
- …

Presentation focuses on federal & judicial; supplementary material highlights additional info re. provincial, territorial, and municipal implementation efforts

Sara Mainville smainville@jfklaw.ca

Examples of Crown Implementing Legislation

- BC = *Declaration on the Rights of Indigenous Peoples Act*, SBC 2019, c 44
- NWT = *United Nations Declaration on the Rights of Indigenous Peoples Implementation Act*, SNWT 2023, c 36
- Canada = *United Nations Declaration on the Rights of Indigenous Peoples Act*, SC 2021, c 14 ("UNDA")

UNDA: Canada's UNDRIP law

United Nations Declaration on the Rights of Indigenous Peoples Act ("**UNDA**") requires Canada ***to act on the following 3 legal obligations, all to be carried out in consultation and cooperation with Indigenous peoples:***

Section 5: Canada must take "all measures necessary" to ensure **consistency** of "the laws of Canada" with UNDRIP.

Section 6(1): Canada must develop and implement an action plan to **achieve the objectives of UNDRIP**
Section 6(2)-6(6) prescribes legal requirements of Action Plan

Section 7: Canada must prepare an annual report for each fiscal yar on the progress of work completed under sections 5 and 6

UNDA does not create new rights. UNDA is a federal law that does not create legally binding obligations on provinces or territories.

Sara Mainville smainville@jfklaw.ca

Section 5: Consistency

- Unclear at this point when/if Canada will implement a coordinated, systematic review of current laws and any new bills; and what role, decision-making power Indigenous peoples will have.
- Who's definition of consistency?
  - E.g. federal report on engagement indicates many "Indigenous partners" thought the *Impact Assessment Act* needed to be amended to become consistent with UNDRIP, but Canada made statements indicating it thinks that Act is already consistent…
- What is encompassed by "the laws of Canada"?
  - 1989 SCC decision considered this term as it appears in the test for determining jurisdiction of Federal Court, found "the common law of aboriginal which underlies the fiduciary obligations of the Crown" is a "law of Canada": *Roberts v. Canada*, 1989 CanLII 122 (SCC), [1989] 1 SCR 2

Section 6: UNDA 2023-2028 Action Plan

On June 21, 2023, the *United Nations Declaration on the Rights of Indigenous Peoples Act Action Plan (the "**Action Plan**")* was tabled in the House of Commons and the Senate.

Action Plan Measures to Implement: **181 total**

- Chapter 1: 111 Shared (FN – Métis – Inuit) measures
- Chapter 2: 19 First Nation measures
- Chapter 3: 22 Inuit measures
- Chapter 4: 13 Métis measures
- Chapter 5: 16 Indigenous Modern Treaty Partner measures

Sara Mainville smainville@jfklaw.ca

A tool of transformation?

Legal requirement of Action Plan: "to achieve the objectives of UNDRIP" (s. 6(1)) = implement UNDRIP in Canada.

However, action plan falls short in several ways, e.g.:

1. **Defining "free, prior and informed consent"**: FPIC is ambiguous when a nation-state's sovereignty cannot be disrupted.
2. **Provinces without an UNDRIP Act**: UNDA only applies to federal legislation and industry.
3. **Ambiguous goals and timelines**: UNDA does not provide concrete goals or timelines for implementation.
4. **"Take all measures necessary to ensure that laws of Canada are consistent with the Declaration":** UNDA explicitly recognizes that not all laws will be brought into alignment (Measures #21 and #85-87)
5. **Indigenous Jurisdiction**: no concrete commitment to change Canada's system of laws and constitutional framework to make space for the co-existence of pre-existing Indigenous laws.

Additionally, important questions regarding implementation funding.

- Recent announcement of significant ISC, CIRNA budget cuts does not bode well.

Common Law Direction: Bill C-92 (2024 SCC 5)

- UNDRIP incorporated into Canada's law
- No common law recognition of inherent self-government rights

- A Crown government can legislate recognition of Indigenous rights as being constitutionally protected and this binds the Crown government (but not the courts); implications of such action:
  - The Crown government must diligently implement the rights and broadly interpret them;
  - The rights are not automatically protected by section 35 of the *Constitution Act, 1982;*
  - The Crown government can adopt Indigenous law as a Crown law (incorporate by reference), which gives it the same force as the Crown law in Canada's system of laws (e.g. if federal government does this, Indigenous law has force of federal law and will prevail in face of conflict with provision of a provincial law).
- SCC refers to this as process of legislative reconciliation (drawing from Naomi Metallic)

Sara Mainville smainville@jfklaw.ca

Appeal of Montour – QC CA

[1235] The Court adopts the following words of Prof. Borrows:

[…] UNDRIP's embrace by the Canadian government fundamentally changes the character of the debate surrounding Indigenous law and governance. *Van der Peet and Pamajewon* should be overturned; stare decisis should not be a straitjacket that condemns the law to stasis, particularly when such stasis continues to tear the fabric of constitutional reconciliation as it relates to Indigenous peoples.

[1236] Aboriginal rights are dependant on the judicial interpretation of s. 35(1). As the Supreme Court said in Reference re Same-Sex Marriage, a progressive interpretation "ensures the continued relevance and, indeed, legitimacy of Canada's constituting document". There is a real risk that, by putting stare decisis above all other considerations, the Constitution will cease to represent the fundamental values of Canadian society.

JFK Law LLP has officers in Victoria, Vancouver, Calgary, Six Nations, and Toronto

Law Society of Ontario | Barreau de l'Ontario

TAB 5

Indigenous Law Issues 2024

First Nations Housing Class Action (PPT)

Statement of Claim - ST. THERESA POINT FIRST NATION and CHIEF ELVIN FLETT on his own behalf and on behalf of all members of ST. THERESA POINT FIRST NATION and SANDY LAKE FIRST NATION and CHIEF DELORES KAKEGAMIC on her own behalf and on behalf of all members of SANDY LAKE FIRST NATION v. AGC

H. Michael Rosenberg
McCarthy Tétrault LLP

Alana Robert
McCarthy Tétrault LLP

Rachel Chan
McCarthy Tétrault LLP

April 3, 2024

cpd

First Nations Housing Class Action

Indigenous Law Issues Conference – April 3, 2024

Michael Rosenberg
Partner

Alana Robert
Associate

Rachel Chan
Associate

Claim Details

— Class action claim launched June 2023 against federal government

— Failure to address housing crisis on reserve

— Charter of Rights and Freedoms violations

    — s. 7 - life liberty and security of person

    — S. 15 – equality

    — S. 2(a) and 2(c) – freedom of religion and assembly

— Seeking $5 billion dollars in damages and policy change

— Summary judgment Spring 2025

St. Theresa Point First Nation

— Overcrowding

— Structural Defects

— Mold

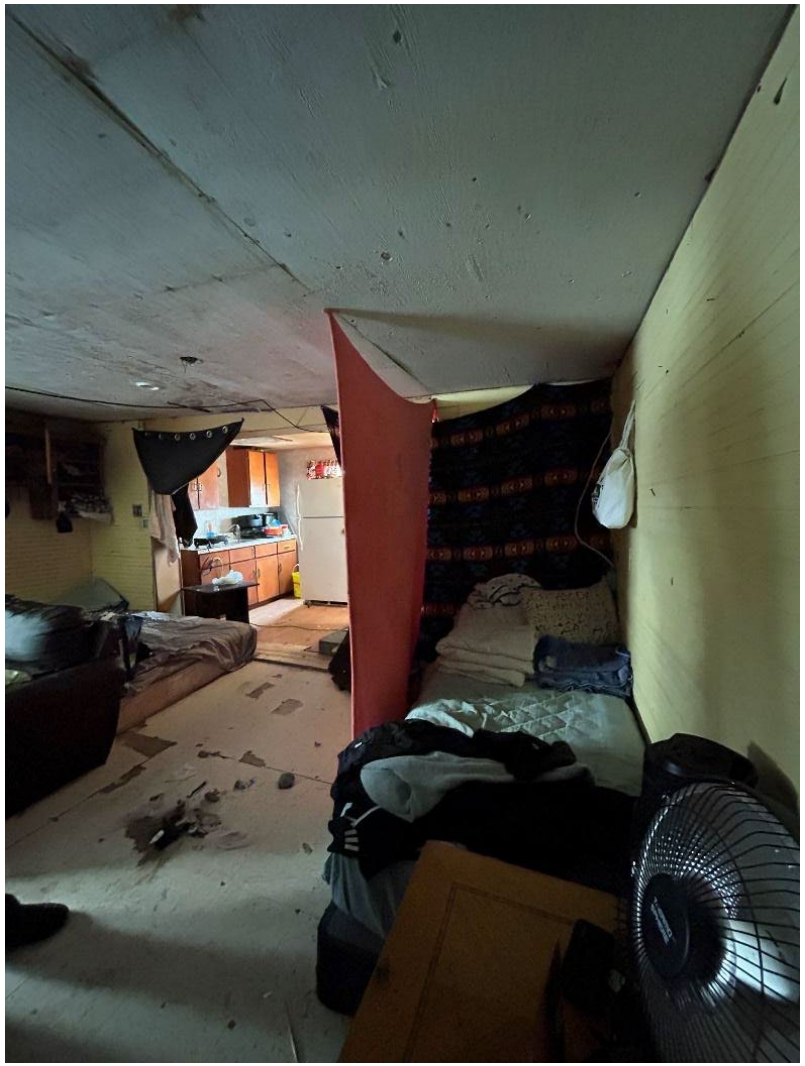
— Pests

— Water Access

— Plumbing

— Heating

— Electrical



Impact of Inadequate Housing

— Physical and mental health

— Respiratory illness and susceptibility to disease

— Homelessness and displacement

— Domestic violence and targeted violence

— Educational and economic outcomes

— Cultural and spiritual Impacts

Class Members

— Representative Plaintiffs:

    — St. Theresa Point First Nation (Manitoba)

    — Sandy Lake First Nation (Ontario)

— Conditions:

    — Overcrowded

    — Need of major repairs

Federal Responsibility

— Section 91(24) *Constitution Act 1867*

— Exclusive authority over “Indians and Lands reserved for Indians”

— *Indian Act* - reserve land is owned by the Crown

— Reserve housing is federally funded via CMHC and ISC

— Federal government recognizes “huge gap” in funding

First Nations Housing Class Action

Statement of Claim

ST. THERESA POINT FIRST NATION and CHIEF ELVIN FLETT on his own behalf and on behalf of all members of ST. THERESA POINT FIRST NATION and SANDY LAKE FIRST NATION and CHIEF DELORES KAKEGAMIC on her own behalf and on behalf of all members of SANDY LAKE FIRST NATION v. AGC

Link: T-1207-23 (mccarthy.ca)