INDIGENOUS LAW

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INTRODUCTION

Doctrinal vs Critical Perspectives

Doctrinal:

- Applying core legal skills, developing human knowledge.
- Describes what law students, lawyers, and legal scholars usually do.
- Research, synthesize, and propose reforms to the law from an "internal perspective."
- Think/work within its language, structure, and constraints to come up with answers to specific questions based on internal methods for reading statutes, case law, etc.

Critical:

- Less common in law schools and legal practice but adopted by many legal scholars.
- Often it means adopting an "external perspective" to critique the law.
    - For example, applying Indigenous legal theory, feminist theory, or mothers of economists, anthropologists, or sociologists.
    - This is vital to reform, but it won't change the law unless it is internalized.

Aboriginal Law vs Indigenous Law

Aboriginal:

- Describes how Canadian law has developed in response to the pre-exisiting Indigenous societies in the territory over which it is asserted.
    - Developed from common law doctrines and statutory frameworks.
    -
    - Situates Indigenous rights within the constraints of either common law rights or the Canadian constitution but it is generated through encounters with Indigenous peoples so partly formed by Indigenous peoples.
- May be understood as how Canadian law recognizes and positions Indigenous peoples within it.
- It is a "body of law that exists within the Canadian legal system" (TRC)

An Internal View (?)

- When we situate Indigenous peoples wholly within Canadian law and litigate or negotiate their relationships with settler state institutions in this way, are we "closing of… imagination" and managing the encounter between two normative universes "according to the rule book used by only one side" (Christie 2011)
    - Christie describes resistance within the dominant sovereignty framework as a form of impact or harm mitigation.

Indigenous:

- Political systems and laws that govern Indigenous peoples within their own communities.
    - The legal systems of Indigenous nations which have exited long before Europeans came to North America (TRC)

- Indigenous law is diverse; each Indigenous nation across the country has its own laws and legal traditions.

Other Internal Views

- Inuit are "separate meaning-generating communities, living within other larger narrative structures they create"
- Inuit stores may be embedded "within accounts of land and people interrelations predicated on concepts of responsibility and respect" rather than "territorial integrity" and "sovereign authority over land"
- First-order question may be *how* one ant act, not *what body* has rightful authority to act

Indigenous Peoples and Canadian State Law

- Aboriginal law is clearly internal to Canadian law
  - It has developed from common law doctrines like fiduciary duty and Aboriginal title
  - It relates to statutory frameworks like the *Indian Act* and related laws and policies
  - It situates Indigenous rights within the constraints of either common law rights or the Canadian constitution
- But it is generated through encounters between Indigenous peoples and Canadian institutions
  - Thus, it is partly formed by Indigenous peoples

Why Indigenous and Aboriginal should be capitalized?

- Sign of respect
- SCC and DOJ have officially switched to this method
- Professional and expected in legal educations journeys

INDIGNEOUS LAW VS ABORIGINAL LAW

- When we use the word "common law" we usually mean one of two things:
  1) Common law as opposed to civil law, Islamic law, or Indigenous law when comparing legal orders or systems
  2) Judge made lade as opposed to statutory, constituional, or customary law when talking about sources of law within one of these legal orders or systems

  For example, Aboriginal law is part of the common law, at leas true in the second sense. But in the first sense it is part of both Canadian common and civil law.

Who is Indigenous?

- World Council of Indigenous Peoples in 1977: "only Indigenous peoples could define Indigenous peoples"

- Strict definition may exclude vulnerable groups, give cover to states to deny existence, and impose bureaucratic frame that distorts and freezes what should be dynamic and fluid
- Taiaiake Alfred (1999): 'Demands for precision & certainty disregard the reality… that group identity varies with time and place"
- But fuzzy or non-existent definitions and reliance on self-identification as sole criterion can be abused

ILO Convention 169

- The Indigenous and Tribal Peoples Convention, 1989 is an International Labour organization convention
- It is the major binding international convention concerning Indigenous Peoples and Tribal Peoples- forerunner of the *United Nations Declaration on the Rights of Indigenous Peoples*
- ILO No. 169 defines Who is Indigenous as:
    - Tribal Peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community
    - Status is regulated wholly or partially by their own customs or traditions/or by special laws or regulations
    - Peoples regarded as Indigenous on account of their descent from populations which inhabited the country/geographical region at the time of conquest or colonization or the establishment of present State boundaries
    - Who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.

Jeff Corntassel, UVic Prof

Defines Who is Indigenous as follows:

- Peoples who believe they are ancestrally related and identify as descendants of the original inhabitants of their ancestral homelands
- Have their own informal &/or formal political, economic, and social institutions
    - Tends to be community-based
    - Reflects distinct ceremonial cycles, kinship networks and continuously evolving cultural traditions
- People who speak (or once spoke) an Indigenous language, often different from the dominant society's language
- Peoples who distinguish themselves from the dominant society and/or other cultural groups while maintain a close relationship with their ancestral homelands/sacred sites

Indigenous legal traditions are as diverse as the Indigenous communities that generate and sustain them

- Canadian law is "nation-centric" which is reflected in the training and educations of law students

- However, Canada is a nation of shared nations and we must honour legal pluralism through **the rule of law**
- Despite how far we think we have come since contact, "we are still in the age of encounter"

Dr. Hadley Friedland

- In order to be law, norms have to be intelligible, and debatable.
    - This breathes meaning into what and why we have land acknowledgments, especially here in Treaty 6 territory – as the land that AB shares includes the traditional territories, gathering places and homelands of Cree, Dene, Blackfoot, Saulteaux and Metis, just to name a few of the Indigenous peoples who share it.
- This is as true of Indigenous laws as any others but often relegated to the realm of sacred, emotional, or esoteric.
- Indigenous laws are in practice and have been practiced in these lands since time immemorial.
- Law schools are catching up- developing courses that focus on Indigenous peoples and their relationships to Canadian law
- Students still lack exposure to Indigenous legal traditions in the law school environment (ie. Wahkohtowin Lodge)
- This education deficit risks that Indigenous laws will be distorted and subsumed within the common law distortion by law professors and students who are more familiar with Canadian state law and work within its implicit assumptions
- We need to keep in mind that when we are engaging with Indigenous law through Canadian state law that becomes Aboriginal law whether we want to admit it or not.

Indigenous Law v Aboriginal Law

- When we use the word "common law" we usually mean one of two things: 1) common law as opposed to civil law, Islamic law, or Indigenous law when comparing legal orders or systems and 2) judge made law as opposed to statutory, constituional, or customary law when talking about sources of law within of these legal orders or systems
    - **Example:** Aboriginal law is part of the common law, at least true in the second sense. But in the first sense it is part of both Canadian common and civil law.

From Indigenous Laws to the *Indian Act*s

- Initially British relations with First Nations administers via Indian Department for British North America, part of the British Army
    - Treated as independent allies or enemies
- First Indian Acts created in mid-1800s to govern reserves in Upper & Lower Canada, bringing into play definitions of who counts as "Indians" and can occupy reserves
    - Later became tool of 'municipalization'

- Complex issues persist from overlaps and disconnects between Indigenous nations – as defined through shared culture, history, language and legal traditions- and bands recognised under the Indian Acts
- When determining who represents Indigenous rights holders for Crown consultation or negotiating/litigating Aboriginal & treaty rights under s 35(1), Indigenous law & nation-level connections **may** place a key role
- Section 91(24), Parliament authority over First Nations governance systems under the Indian Acts almost as long as it has attempted to define who is and who is not an Indian under these statutes
- In 1869, Parliament enacted through "An Act for the gradual enfranchisement of Indians.." the power to establish an elected band council as well as to remove councillors from office for "dishonesty, intemperance, or immorality"
  - 1869 version of the *Indian Act* sought to phase out hereditary governance systems by allowing for continued tenure of existing "life chiefs" only until their death, resignation, or removal by the federal government (s 10)
  - Aimed to 'civilize' First Nations in older 'settled regions' by imposed European constructs of good governance such as local elections on them
  - Band councils given limited municipal powers to enact minor bylaws over public health, maintenance of peace & order – all subject to federal confirmation
- 1st consolidated *Indian Act* (1876)
  - Still focused on First Nations in eastern Canada, exempting west from many provisions
  - Provided federal government with power to impose elected band council system- set out in detail how system would operate
  - Band council system only imposed where requested still
    - Slight increases in authority were introduced to incentivize this
- Changes brough opposition, but the 1880 *Indian Act* doubled down on council system and provided broader criteria for removal of elected officers
  - Where elective system imposed, the *Act* stripped traditional chiefs of authority unless elected too
  - On West Coast, potlatches and dance ceremonies key to many Indigenous governance systems, used to affirm leadership, social order, territorial rights, and transfer of rights became criminal offences (s 3)
- *Indian Advancement Act, 1884*
  - Increased council powers again to encourage adoption but also increased federal powers to interfere:
    - For example, the federal government could call elections, supervise them, call band meetings, preside over, and participate in them freely

- In 1895, *Act* amended to provide the Minister with power to depose chiefs and councillors even where elective system did not apply due to resistance to federal interference & *Indian Act* in West
- 1880-1897: Hayter Reed, Indian Commissioner
    - Sought to undermine traditional leadership and organization of First Nations in prairies
    - Considered these systems to be "communistic"
    - Chiefs of bands perceived to be disloyal in 1885 were deposed
    - Reed hoped that as other chiefs and headmen died off, their officers must be allowed to lapse
    - Indian agents appointed in every treaty area on prairies, in regions across Canada to enforce government policy
        - Ex. Residential school attendance, allocation of housing, domestic disputes, minor crimes as justices of the peace
- After Riel Rebellion of 1885, when chiefs passed away the federal government might decline to replace them or recognize replacements in order to keep First Nations leaderless and less capable of hostilities (this also created pressure for land surrenders)
    - Example: Chief Kahkewistahaw & 2 headmen died in 1906l federal government refused to acknowledge new leaders until 1911; in 1907 there were large land surrenders
    - Example: Chief Moosomin died in 1902; son elected in 1904 but was not recognized until days after 1909 surrender of some of the most valuable agricultural land in Saskatchewan

Indian Act Governance Today

- Many different First Nations governance systems with differing relations to *Indian Act*:
    - Standard *Indian Act* election provisions
    - Custom elections under custom codes developed by First Nations or even customs that have not been codified
        - This has long been authorized under *Indian Act* as an exception
    - Self government agreements or modern treaties so as to opt out of *Indian Act* governance altogether, although without escaping its legacy for who has status
    - Continued reliance on hereditary system or traditional governance in addition to band governance
    - *First Nations Elections Act* in 2014 (sectoral self-government legislation that reforms *Indian Act* elections)
        - Approximately 40% of First Nations hold elections under *Indian Act* and *Indian Band Election Regulations* still – needs to be held every 2 years
        - INAC oversees appointment, training and support of electoral officers

            - Approves council’s choice of electoral officer or appoints officer if no council present
            - Receives, investigates, & decides on election appeals
        - Candidates/eligible votes have 45 days following election to file appeal with Indigenous Services Canada if they believe corrupt practices took place, Act or Reg were violated and resulted affected, or someone ineligible ran
- *Good v Canada*: Federal Court found INAC Elections Unit **failing to investigate allegations of corrupt practices** and instead requiring community members challenging elections to demonstrates practices on BOP

Alternatives to *Indian Act* Governance

- Community or custom leadership selection processes often set out in election codes developed by First Nations
    - Recognized under *Indian Act* but no role for ISC involvement other than recording outcome of election
    - Each one is unique
- Exists as legacy of early *Indian Acts*, for which custom leadership selection was default and Minister allowed to impose election rules once decided First Nation was “sufficiently advanced or civilized”
- By 1980s, ISC started allowing First Nations to get imposition of election requirements revoked so they could revert to custom
- *First Nations Election Act* allows 4 year terms, also…
    - New mechanisms for elections including advance polls and provisions for automatic recounts
    - Appeals go to federal or provincial courts, not ISC

Indian Act: Too Much or Not Enough?

- Many provisions under *Indian Act* remain almost unchanged after 100+ years
    - Few powers, processes, or checks on authority
    - Example: Power to give out Certificates of Possession (recognition of individual possession of parcels of reserve land)- no guidance on restrictions or considerations for council when deciding; blanket authority for ISC to override or refuse to approve these
- However, newer revisions ensure community involvement and reduce ISC involvement, such as membership rules, requiring majority vote in favour and providing no discretion for ISC to refuse
- Councils have bylaw powers, btu Minister has unlimited power to disallow bylaws dealing with money or tax on reserve and had power to do so for all band bylaws up until 2014; council has not obligations to notify community of proposed bylaws either

"… Lands Reserved for Indians"

- *The Royal Proclamation, 176*
    - Exercise of prerogative powers by British Crown
    - Established western boundaries of North American colonies with respect to Indigenous peoples' lands and declared these inalienable to private settlers
    - Gave British Crown sole right to purchase and extinguish Aboriginal title
    - Similarly, Chief Justice Marshall of USSC ruled doctrine of discovery gave 'discovering' colonial powers exclusive right to purchase Aboriginal title and alienate it to settle 9*Johnson v M'Intosh* (1823))
    - Precedent followed in various British colonies, including Canada and Australia
- Reserves reflect imperative of Royal Proclamation
    - Reserves are for exclusive use and benefit of First Nation
    - Cannot be alienated unless first surrendered to Crown and converted into fee simple
    - Reserves reflect assimilative mission of colonial authorities, which sought for First Nations to adopt sedentary way of life and gradually transfer land holding into private, Weser-style, alienable titles
    - Design an administration of reserves occasionally delegated to missionaries or other religious officials; sometime created via treaty process- where no treaties, imposed without consent
- *Indian Act* prohibited First Nations from accessing land available to settlers via homesteading legislation from 1876 to 1951 (s 70)
- Members could only obtain share of reserve land ("location ticket" now known as Certificate of Possession)
    - Fee simples not available
- Permit system prevent members from selling stock & produce for cash without Indian agent permission (from 1881 until 1960s)
- Following Northwest Resistance/Battle of Batoche in 1885, Canada introduced pass system that required members to obtain written authorization from Indian agents before leaving reserves
- In 1889, peasant farming policy a restricting First Nations farmers to small parcels of land only capable of providing food for family
- Then modern machinery prohibited and even confiscated
- The severalty (defined as the "condition of being separate") policy imposed
    - Promoted sub-division of reserves into smaller plots for individual farmers rather than allowing collective farming of entire reserve
- The aim was to introduce individualism and this undermined the "communistic tribal system"- also created large blocks of "surplus" reserve land
    - After individual allocations, remainder made available for surrenders which then encouraged for alienation to settlers

Non-Member Interests in Reserve Land

- *Indian Act* defines reserves as lands set apart for use and benefit of band but also asserts title remains with Crown (s 2(1))
- 3 ways for non-members to obtain interest in reserve
  1) Surrender
  2) Designation (ie. conditional surrender)
  3) Expropriation
- Section 37 sets out restriction on alienation of reserve land
- Section 38 addresses surrender, including conditional (s 38(2))
- Section 35 allows for expropriation for public purposes by cities, corporations, & statutory authorities but requires federal consent
- Section 28 permits- time limited permit for specific purpose
- Used for pipelines, powerlines, gravel, or timber removal
- Land clearly remains reserve land
- Section 58 permits used for grazing or agriculture and again, land remains reserve

Section 89 of *Indian Act*

- Long-standing barrier to economic development of reserve land
  - S 89: protecting "real and personal property of an Indian or band situated on a reserve" (with exception for designated land)
- Section 29 also states reserve lands are not subject to seizure
- As creditors cannot foreclose upon, execute against, or garnish property of those with "Indian status" on reserve, creditors often unwilling to provide loans or mortgages for property on reserve
- In combination with restrictions for non-member interests, this prevents financing of large, complex developments on reserve
- In 1988, land designation process introduced as work around
  - Land can be designated for particular purpose for 49 or 99 years and complex legal regimes get incorporated into their head leases

INDIAN ACT(S) AND FIRST NATIONS GOVERNANCE

From Indigenous Laws to Indian Acts

- Complex differences and relationships between how Indigeneity and membership in Indigenous nations might be determined through Indigenous laws vs Canadian state law
- Section 35(2) of *Constitution Act, 1982* defines "Aboriginal peoples of Canada" as including "the Indian, Inuit, and Metis peoples of Canada

When determining who benefits from Aboriginal or treaty rights, Indigenous laws may be of key importance:

- Section 91(24) of the *Constitution Act, 1867* affords Parliament constituional competency over “Indians and Lands reserved for the Indians” but does not define either
- Courts interpret s 91(24) to include Inuit and Metis but the *Indian Act* never categorically included Inuit or Metis
    - It defines “Indian status” so as to **constrain status**
        - To limit who can live on reserve and vote in First Nations elections

The legal term “Indian” was first defined in *An Act for the Better Protection of the Lands & property of the Indians of Lower Canada* (1850, s 5:

> “**First**- All persons of Indian blood, reputed to belong to the particular Body or Tribe of Indians interested in such lands, and their descendants. **Second-** All persons intermarried with any such Indians and residing amongst them, and the descendants of all such persons. **Thirdly** – All persons residing among such Indians, whose parents on either side were or are Indians of such Body or Tribe, or entitle to be considered as such. **Fourthly-** All persons adopted in infancy by any such Indians and residing in the Village or upon the lands of such Tribe or Body of Indians, and their descendants.”

Enfranchisement

- Narrowed in 1851 to exclude adoptions and non-Indian men; then extended Canada-wide, but amended so Indian women lost status upon marriage to a non-Indian man
- Enfranchisement is a euphemism for one of the most oppressive policies adopted by the Canadian Government in its history of dealings with Aboriginal peoples.

The *Act to Encourage the Gradual Civilization of Indian Tribes in the Province, and to Amend the Laws Relating to Indians* passed in Upper Canada in 1857:

- Provided for any “Indian” man ale to speak, read, and write either English or French readily and well who was sufficiently advanced in the elementary branches of educations, of good moral character, and free from debt, to become enfranchised.
    - Others not meeting these requirements could seek enfranchisement voluntarily
- This meant they would lose Indian status and the right to live within their culture and family in exchange for gaining Canadian citizenship.
- These men would have the right to vote and were entitled to a parcel of fee simple land

- In 1857 is when there was a more sustained push towards enfranchisement
- Began as part of colonial policy for assimilation of those defined as Indians into European settler society based around concepts of private property ownership and wealth accumulation
- In 1869, the *Gradual Enfranchisement Act* was passed, which automatically enfranchised Indian women wo married non- Indian men
- In 1876, further forms of automatic enfranchisement added to the *Indian Act*

  - For example, if someone with Indian status became a professional, meaning lawyer, doctors, etc, they would be enfranchised and no longer legally treated as an Indian
- Very few induvial sought voluntary enfranchisement under with the *Gradual Civilization Act of 1856* or the *Indian Act* of 1876
  - Possible as few as one person
- From 1918-1922, the federal government became empowered to force anyone who met previously voluntary conditions for enfranchisement to further reduce the number of individuals with Indian status, but law quickly overturned due to significant opposition it faced
- Enfranchisement basically meant renouncing, on behalf of oneself, living and future descendent, of any legal recognition as Indian, including the right to reside in community and to vote for leaders
- BY 1951, Indian blood premise of status under the *Indian Act* was supplanted by the bureaucratic concept of the Indian Register
- Indigenous concepts of belonging and membership was and still is disrupted. These concepts are still very diverse between Indigenous nations
  - Especially destructive for the many that approached this issue from a matrilineal perspective
- Canadian state law imposed strictly patrilineal system divorced from indigenous law and was/is universally applied
- Post 1951 system:
  - If a status "Indian" woman married non-status man she would lose status and the children would have no right to registration
  - If a status Indian man married non-status women, he would retain status and the wife gained status too, regardless of ancestry, which in turn would be passed on to their children
  - SCC upheld this regime in 1974 challenge under the Bill of Rights (*Canada v Lavell*)
  - Sandra Lovelace complaint to the UN Human Rights Committee and the incoming *Charter of Rights and Freedoms* threatened this status quo

Bill C-31

- Canada sought to address blatant discrimination under *Indian Act* as pointed out in UN HR Committee re: Lovelace complaint
- Bill C-31 = Complex and problematic compromise between differing positions put forward by advocacy groups representing First Nations women, advocacy group representing Aboriginal people without status, and the Assembly of First Nations

- These advocacy groups sought for First Nations control over who is deemed "Indian" rather than piecemeal response to gender discrimination in a still flawed system of Crown control over Indian status identity
- Bill C-31 allowed reinstatement of women who lost status via marriage, children enfranchised due to a mother's marriage to a non-status man and others impacted by the infamous double mother rule
- This Bill abolished further possibility of enfranchisement as well

Band Membership vs Indian Status

- Before Bill C-1, those within Indian status automatically entitled to membership of an Indian band that qualified under the *Indian Act*
- Bill C-31 gave bands ability to either stay under previous default rules providing for automatic membership of those with status, or make own rules regarding band membership
- While ISC continues to control who has status and who doesn't for purposes of the *Indian Act*, First Nations get to determine who is member and who is not
    - So long as they respect vested rights of members where membership created under previous default "status= membership" approach to this issue
- Many *Charter* cases, (ex. *McIvor* and *Descheneauz*) that address gender discrimination re: status
    - BUT membership, including ability to vote and reside on reserve, required First Nations consent

Logan v Styres, 1959

> "I am of the opinion that the Six Nations Indians are entitled to the protection of the laws of the land duly made by competent authority and at the same time are subject to such laws. While it may be unjust or unfair under the circumstances for the Parliament of Canada to interfere with their system of internal Government by hereditary Chiefs, I am of the opinion that Parliament has the authority to provide for the surrender of Reserve land, as has been done herein."

- Think parliamentary sovereignty
- "Parliamentary supremacy in Canada is a constituional principle inherited from the UK. This principle upholds the supremacy of the law and Parliament's absolute power to make or abolish any law, without being constrained by previous laws.:
- This is a good example of its harsh application to Indigenous peoples since few voted for the band council
- **Parliament can interfere with systems of internal Indigenous governments even though it is unfair.**
- This case is an example of the law's harsh application to Indigenous peoples.
    - Very few voted for band council.

Delgamuukw v BC, 1997

> "It would be interesting to subject the Court's treatment of Crown sovereignty to the same standard it expects for evidence of Aboriginal self-government. If this approach was followed could it not also be said of Crown sovereignty, as the Court wrote of Aboriginal sovereignty"?

- Is this a double standard?

ABORIGINAL RIGHTS AND TITLE

Summary:

1. Precisely identify right in question – must be properly characterized so evidence fits framing of claim
   - **a.** Look to the nature of the action claimed to be pursuant to Aboriginal right
   - **b.** Nature of impugned regulation, law, or action
   - **c.** Pre-contact practice, custom, or tradition that is relied on.
2. Activity = element of practice, custom, or tradition integral to the distinctive culture of Aboriginal group claiming the right
3. Must show existence of ancestral practice, custom or tradition that was "integral" to distinctive culture or pre-contact society; and reasonable continuity with modern form.

Indigenous Laws to Aboriginal Rights

The Use of Doctrines of International Law

> **"**Since the beginning of the Age of Discovery, European states have engaged relentlessly in the process of divesting indigenous peoples of their lands, and have sought to justify and legitimate this practice through the use of the **doctrines of discover**, occupation, adverse possession, conquest and cession. On the whole, domestic courts have either ignored or generally misapplied and misinterpreted these doctrines in their discussions of "Aboriginal title", thereby upholding the status quo of Aboriginal dispossession."

- **Doctrine of continuity:** In British imperial constituional law "when new territory is acquired the *lex loci* of organized societies… continues at common law" (*R v Van der Peet*)
- European settlement did not terminate laws and interests of Indigenous peoples; they were absorbed into the common law as rights, unless:
  1) They were incompatiable with the Crown's assertion of sovereignty
  2) They were surrendered voluntarily via the treaty process, or
  3) The government extinguished them
  (*Mitchell v MNR*)

Extracting Rights from Indigenous Lifeworlds

- Various Aboriginal (activity) rights have been proven under the *Van der Peet* & *Sparrow* frameworks to date, including:
  - Heiltsuk right to fish & trade herring spawn on kelp in commercial quantities (*Gladstone*)

    - Nuu-chah-nulth right to harvest & sell all species of fish in traditional territory except geoduck (*Ahousaht*)
    - Mi'kmaq & Wolastoqiyik right to harvest wood for domestic use (*Sappier*; *Gray*)
    - Tsilhqot'in rights to hunt/trap birds and animals for food, clothing, shelter, mats, blankets, and crafts; to secure animals for work and transportation; and to trade in skins/pelts
- Most Aboriginal rights have been proven under *Van de Peet* test = rights to engage in particular activities
- However, *Sparrow* framework and fiduciary duty to introduce priority, consultation, and compensation to Crown's allocation decisions

Van der Peet

Facts:

- Sto:lo woman charged with selling 10 salmon caught under food fishing licence.
- Argue that trading system is an integral practice.

Analysis:

> " The court cannot look to those aspects of the Aboriginal society that are true of every human society (for ex. Eating to survive), nor can it look at those aspects of the Aboriginal society that are only incidental or occasional to that society, the court must look instead to the defining an central attributes of the Aboriginal society in question"

- This is a key case on Aboriginal rights
- Accepted Slattery's view that "the law of Aboriginal rights is neither English nor Aboriginal in origin: it is a form of intersocietal law that evolved form long-standing practices linking the various communities"
- Argued that *Van der Peet* test for Aboriginal rights only captures some Indigenous laws, others remain common law rights

Integral to Distinctive Culture Test

- Demonstrate that the practice, custom, or tradition was one of the things which made the culture of the society distinctive – one of the things that truly made the society what it was
- Court cannot look to aspects of society which are true of every human society (ex. Eating to survive), nor can it look to aspects that are only incidental or occasional to that society. It must look to the defining and central attributes of the society in question.

Dissent:

- Doctrine of continuity applies- the *lex loci* of organized societies continues at common law when a new territory is acquired.

Tsilhqot'in Nation

- Described Aboriginal rights as result of translating Indigenous laws, customs, practices, and traditions into 'equivalent modern rights'

Mitchell v MNR

- Indigenous laws were absorbed into the common law as rights unless:
    - Incompatible with Crown's assertion of sovereignty
    - Surrendered voluntarily via the treaty process
    - Extinguished by government

Existing rights con't

- Indigenous Peoples were "already here" when Europeans arrived in North America, "living in communities on the land, & participating in distinctive societies as they had done for centuries" (*Van der Peet*)
- Indigenous Peoples were never conquered by Europeans that arrived in North America (*Haida Nation*)
- Indigenous Peoples gradually became subject to European laws and customs they did not share (*MMF*)

Aboriginal rights= one tool for reconciling pre-existence of Indigenous societies with own laws, practices, customs, and traditions, with powers and authority of Canadian state

Aboriginal Rights as a Legal Category

- Aboriginal rights are collectively held, governing relationship between Indigenous peoples as a whole with the Crown, as opposed to individual rights held under *Charter*, however, the exercise of Aboriginal rights may often have an individual aspect to it (*Behn*)
- At common law:
    - Aboriginal rights could be extinguished by legislation with "clear & plain" intention to do so
- Legislation:
    - No longer true since 1982 entrenchment of "existing' right in s 35
    - Section 52 of *Constitution Act, 1982* clarifies constitutional supremacy extends to *Charter* and s 35
    - Inconsistent laws of no force and effect- but justified infringement possible
    - Example in *R v Derriksan*:

> "On the assumption that… there is an Aboriginal right to fish in the particular area arising out of Indian occupation and that this right has had subsequent reinforcement (and we express no opinion on the correctness of this submission), we are all of the view hat the *Fisheries Act*… were validly enacted [and] have the effect of subjecting the alleged right to the controls imposed by the Act nd Regulations."

R v Sparrow

- Ron Sparrow charged and convicted for fishing with drift net longer than permitted in food fishing license
- Asserted Musqueam fishing right protected by s 35

- Argued that restriction was of no force or effect due to inconsistency
- SCC confirmed Aboriginal rights
- Justiciable and entrenched without further constituional negotiations
- Section 35 protects unextinguished Aboriginal rights and does not create rights
- Rights affirmed in contemporary form, not "their primeval simplicity & vigour"- while no s 1 restriction on s 35 rights, SCC concluded that **an analogous limit was implicit in it**
- SCC took a purposive approach, but invented framework for justifying infringements and avoided the self-regulation argument

"The gist of the argument… is that regulation of the method of fishing is an inherent aspect of the Aboriginal right to fish. If the right is to be kept intact, the regulation must be by the possessors of the right, in this case, the band. It is submitted that there would continue to be consultation between the band and the fisheries authorities. What will be different will be that, where no agreement is reached, the final word will rest with the band…"

Key Framework for Aboriginal Rights:
The SCC in *Sparrow* rejected the Crown's argument that either:

a) Section 35 remains an empty box until contents negotiated; or
b) Section 35 rights defined by pre-1982 regulations

BUT its framework also sidelines self-government dimension.

Steps for framework for Aboriginal Rights (*Van der Peet*)

1. Aboriginal claimant existence of right
    - Crown may argue that right was extinguished prior to 1982
2. Claimant must prove *prima facie* infringement of right:
    a. Is the Crown's limitation of right unreasonable?
    b. Does it impose undue hardship?
    c. Does it deny right holders their preferred means of exercising the right?

- Once claimant succeed on first two points, burden shift to the Crown to justify its infringement of proven right.
    - SCC created 2-part analysis for justification of infringement (an implied *Oakes* test for s 35 rights*):*
        1. Does impugned regulation or law have a compelling and substantial objective? (ex. For conservation of wildlife)
        2. If so, is the limitation justifiable in light of Crown's fiduciary duty?
            - Is it necessary in order to achieve the Crown's goal (ie. rational connection)?
            - Did Crown go no further than necessary to achieve it (ie minimal impairment)?
            - Do the benefits flowing from infringement outweigh the adverse effects on the Aboriginal interest (ie proportionality)?

- And has the Crown consulted and/or compensated for restrictions?

Justification of Infringements (*Sparrow*)

a. Priority: Has the right been given priority over other interests in allocation of the resource in question?
    - In *Sparrow* it was held that the Musqueam's right to fish sockeye for food, social, and ceremonial purposes **must be given priority** over all other forms of fishing after conservation needs have been met
    - In *Gladstone*, while addressing the Heiltsuk's commercial right to harvest herring roe on kelpy, the SCC noted that where rights are not internally limited, **priority should not amount to exclusive fishery**

- Crown must show prioritization of Aboriginal commercial right in how resource has been allocated and how the right is reconciled with other interests
- Indigenous territoriality and self-regulation get sidelined

b. Minimal Impairment: Was the right impacted as little as possible in order or the compelling legislative objective to be met?

- Reasonableness of any particular infringement will depend on **context** which might include urgent situations requiring prompt action (*R v Nikal*)

c. Consultation:
    - *Sparrow* first address the duty to consult as part of its justified infringement analysis and this was greatly expanded upon by the BCCA and several other courts in decisions throughout the 1990s

d. Fair compensation: where Aboriginal right is expropriated then Crown compensation might be owing to the rights holders
    - But little to no law on this 30 years later

What kind of rights are protected?

- In Australia, Indigenous rights are seen as components of the doctrine of "Native title", which is a bundle of rights that might extend to rights of ownership or rights to engage in activities such as hunting, trapping, or even commercial fishing, all within a broader "native title" area.
- **In Canada:**
    - Aboriginal title and rights = disaggregated by SCC in early s 35 jurisprudence of the 1990s
    - Aboriginal title difficult to conceptualize for Indigenous peoples wo left the traditional territories during the colonial period, whereas activity rights still capture and protect practices on lands integral to these Indigenous peoples (ex *R v Adams*)
    - Aboriginal rights may capture language, culture and more, but very little case law beyond harvesting and title rights.

Indigenous Territoriality (Doug Harris)

- SCC has generally defined Aboriginal rights other than title to be site-specific, but there is a less clear relationship with Indigenous territoriality in the sense of Indigenous control over land base and ability to enter into agreements with other Indigenous nations
- Harris argues that SCC approach to Heiltsuk commercial fishing rights in *Gladstone* was problematic because it failed to recognize Heiltsuk territoriality by defining commercial rights as being "without internal limitation"
    - Heiltsuk fishing rights:
        - Internally limited by geographical extent of traditional use and externally limited by claims of neighbouring First Nations and Canada's territorial waters
        - Their own use would be governed by their own laws
- "Law and geography scholars have argued hat territorial or geographic erasure is endemic in the common law tradition; that by failing or refusing to recognizing geographic diversity the common-law courts suppress competing legal orders. The courts, they argue, construct and impose a territorial unity that denies exisiting legal pluralism, foreclosing recognition of other legal order that might modify r operate in conjunction with state law"

R v Van der Peet

- SCC created test for proof of Aboriginal rights short of title
- It focuses on pre-contact practices, traditions, and customs that are "integral" to distinctive Aboriginal society in question
- Sto:lo woman charged with selling 10 salmon caught under food fishing license
- Argued trade in salmon for other goods was integral practice of Sto:lo in pre-contact period
- Trial judge held Sto:lo had no regularized trade system prior to contact and establishment of trade with the HBC
- Also held that pre-contact trade of fish only "incidental" to food fishing
- SCC upheld finding that trade in fish not integral
    - McLachlin dissented that Aboriginal rights extend to ability to draw sustenance from traditional lands and waters

The Royal Proclamation of 1763

- Seen as important 1st step in recognition of Aboriginal title in North America but treaty-making already started
- This signified official claim of King George III following defeat of French in Seven Years War

- Proclamation issues without Indigenous peoples' input but recognized Indigenous possession of territories that were still unceded and unpurchased, prohibiting colonial officials from making grants until Crown resolved Aboriginal title
- Royal Proclamation had legislative effect based on **imperial prerogative powers over colonies**
- Courts have questions application beyond territories "known" to British by 1763
- Regardless, underlying principle of Crown's recognition of pre-existing Aboriginal title that must be ceded and monopoly over granting lands to settlers spread through the common law
    - Example 1: in *Johnson v M'Intosh*, *Cherokee Nation v Georgia,* and *Worcester v Georgia*, (known as the Marshall Trilogy) Marshall CJ of SCOTUS held doctrine of discovery applied in the US and Indigenous peoples= "domestic dependent nations"
    - Example 2: in *Symond*, New Zealand SC held that the doctrine applied and invalidated direct land purchases
    - *Connolly v Woolrish* followed *Worcester* to hold all Indigenous laws, customs, political, and law-making rights survived assertion of Crown sovereignty in full force
- Privy Council in *St Catherine's Milling & Lumber CO* addressed existence of Aboriginal title in Canada
- PC saw it as a **burden** on the Crown's underling title "dependent upon the good will of the Sovereign" and "personal usufructuary" – a right that cold only be surrendered to federal government
- *Calder*: the SCC acknowledged Aboriginal title existed at common law in Canada until Crown validly extinguished, but split evenly on whether the Nisga'a title was extinguished in BC- title found no arise from prior occupation, not the Proclamation
- *Hamlet of Baker Lake*: Justice Mahoney declared existence of *prima facie* Aboriginal title to almost entire Baker Lake area in NWT
    - Only clear and plain intention of extinguishment could extinguish Inuit title and no such statute existed
    - BUT also held federal mining laws validly "abridged" Inuit title and the challenge to law for caribou impacts were dismissed
- *Delgamuukw* (1991 and 1993): Hereditary chiefs of Gitxsan and Wet'suqet'en claimed ownership, jurisdiction, and rights to territories on behalf of houses. This was eventually amended as an Aboriginal title and self-government claim. All claims were dismissed by BCSC, but discussion of duty to consult and harvesting rights. The BCCA expanded these aspects.
- *Delgamuukw* (1997): After clarifying the split between title and activity rights in 1996, SCC refused to determine merits but issues lengthy guidance, opinion on nature and

incidents of title (including beneficial interest, subsurface rights, duty to consult and the need for some consent in some cases, *inter alia*)

- *Marshall; Bernard*
  - Two Mi'kmaq defences based on treaty rights and Aboriginal title
  - Convicted but convictions overturned on appeal and then restored by SCC
  - Aboriginal title rejected for lack of evidence and the SCC issued further clarification of evidence needed to prove Aboriginal title
  - McLachlin Cj wrote for the majority, casting doubt n "semi-nomadic" title right- Lebel J argued for cultural sensitivity
- *Tsilhquot'in Nation*:
  - Basic test in *Delgamuukw* for proof of Aboriginal title confirmed:
    1) Must show s**ufficiently** occupied pre-Crown sovereignty
    2) If present occupation relief upon as proof of situation prior to Crown assertion of sovereignty, must show **continuity** between present and pre-sovereignty occupation
    3) At time of Crown's assertion of sovereignty occupation of land must have been **exclusive**
  - Sufficiency, continuity and exclusivity "provide useful lenses through which to view the question of Aboriginal title… but courts must be careful not to lose or distort the Aboriginal perspective by forcing ancestral practices into the square boxes of common law concepts…"
  - Test for Aboriginal title require examination of Indigenous people's own laws, practices, customs, and traditions
  - SCC released unanimous decision recognizing Aboriginal title over 1700km2 of land in central interior BC
  - Past court cases like *Calder* and *Delgamuukw* commented on theory of Aboriginal title and the potential for it to exist if proven
  - *Tsilqot'in* was the **first** declaration of Aboriginal title's existence in Canadian law as something distinct from site-specific activity rights
  - Aboriginal title provides Tsilhqot'in with:
    - Ownership-like rights to possess, enjoy, and occupy land
    - Right to decide how Aboriginal title land will be used
    - (sole) right to utilize economic benefit of land; and
    - Right to pro-actively use and manage the land
  - Aboriginal title may be territorial, not limited to "intensively occupied areas" like village sites or buffalo jumps as BCCA had determined
  - The test must be applied in culturally sensitive manner (echoing dissent in *Marshall;Bernard*)
  - Evidence must be assessed accounting for distinctions among Indigenous peoples

  - Not restricted to those with land governance that can be analogized with European property
  - Courts must consider historic size, way of life, material resources, and technologies of ancestral group (ie nomadic groups may be able to prove title)
  - Must look at the character of lands as well (ie less productive lands may mean less strict rules for proof of intensive occupation)
  - Tsilhqot'in now incontrovertibly control broad section of traditional territory and own all resources on and under it
  - They have the right to pro-actively use and manage many 100s of km of title land and resourced
  - They have the right to put title land to more uses than just hunting and trapping
  - Gave evidence of traditional land use laws to show they held exclusive title-like interest in their own legal world
  - SCC said Aboriginal title "reflect all pre-sovereignty incident of use and enjoyment that were part of the collective title enjoyed by ancestors"
  - Provincial and federal Crowns can infringe if they first meet the *Sparrow t*est:
    - Valid legislative objective
    - Minimally impar and proportional
    - Consult and accommodate- fairly compensate
- *R v Desautel*
  - Desautel defended against hunting charge based on Aboriginal right of Lakes Tribe as successor to Sinixt rights in Canada
  - Crown argued Sinixt rights did not survive establishment of Canada-US border
  - 1896 legislation prohibiting hunting by non-resident "Indians" and coming into fore of s 35 and assertions of Canadian sovereignty inconsistent with right.
  - Alternatively, argues Lakes Tribe voluntarily drifted away form traditional practice of hunting in BC (no continuity)
  - Trial judge and BCCA rejected argument that US border and colonialism could be relied upon as severing continuity for hunting rights
  - It was held that sovereignty dimensions of any incidental right could be addressed via *Sparrow* framework
- *Newfoundland and Labrador v Uashaunnuat*
  - Important with Aboriginal title because the Innu filed a suit in Quebec and the controversy was whether Quebec had any jurisdiction to hear the whole claim because the land in question was in Newfoundland, Labrador, and Quebec
  - The mega open pit mining project was built without the Innu consent and have request a large amount of damages
  - Th SCC majority dismissed the appeal of the QCCS dismissal of the mining company's motions to strike (so the Innu "won")

    - The case is proceeding to trial and the majority emphasized that Aboriginal claimants should be deferred to in how they have decided to proceed and access to justice concerns must be top of mind.

Summary So Far

How can Aboriginal rights be proven?

First:

- Must precisely identify right in question
- Must be properly characterized so evidence fits framing of claim
- Must look to:
  a. Nature of action is claimed to be pursuant to Aboriginal right
  b. Nature of impugned regulation, law, or action; and
  c. Pre-contact practice, custom, or tradition that is relied on to establish right in question

Second:

- Must prove activity for which protection is sought= element of a practice, custom or tradition integral to the distinctive culture of Aboriginal group claiming the right
- Must show existence of ancestral practice, custom, or tradition hat was “integral” to distinctive culture or pre-contact society; and reasonable continuity with modern form

Hamilton Health Services Corp v DH

- In August 2014, 11 year old girl, JJ, from Six Nations of Grand River was diagnosed with acute lymphoblastic leukemia
- Hamilton Health Services was of the view she needed chemotherapy as she had 90-95% chance of being cured this way, and there were no known survivors that were not treated this way.
- JJ commenced chem but then discontinued it and her mother withdrew consent for further chemo in order to pursue traditional medicine
- The physician contact Child and Family Services to report medical negligence
- The CFS society chose not to intervene and JJ and her mother went to Florida
- Key issue was whether JJ was child in need of protection
- Court heard expert evidence on traditional medicine from a professor and reviewed two papers on traditional medicines of the Haudenosaunee, evidence from the physician with medical practice on Six Nations, and from a practitioner of traditional medicine re: continuity
- DH said to be “deeply committed to her longhouse beliefs and her belief that traditional medicines work”
- Court held that Dh’s decision to pursue traditional medicine for her daughter JJ = Aboriginal right and need not be proven to work under western medical paradigm to constitute a right
- Decision clarified in 2015 by consent rather than appealed

Self-Government under *Van der Peet*

- SCC had insisted Aboriginal right to self-government must be framed within *Van der Peet* test in order to be justiciable
- *Pamajewon*:
  - Shawanaga and Eagle Lake First Nations failed to prove Aboriginal right to govern lottery on reserve
  - Failed to show pre-contact practice that could support modern right to 'regulate high stakes gambling'
  - SCC found broad right to manage use of their reserve lands was too general and narrowly reframed alleged right
- *Gauthier*- Metis self-government right to claim immunity from taxation =too general
- *Samson*- Self-government over reserve land revenue = too general
- *Robertson v HMTQ*
  - Member of Mashteuiatsh Montagnais (Innu) operating fur manufacturing and sale business in family for 4 generations
  - Revenue Quebec initiated audit for GST but was redirected to Innu Council involved in treaty negotiation
  - Eventually sought $1.6 million in GST, penalties and interest
  - Among other things, asserted Innu right of self-government including right to regulate business on territory and impose duties on all transaction or exchanges, including fur trade
  - TCC found Innu right to engage in fur trade via sale of raw furs and self-government right to assign and manage hunting, fishing, and trapping territories, but no infringement of either

Evolving Aboriginal Rights- Logical Evolution

1. Subject matter/method of exercise (*Lax Kw'alaams*)
2. Same sort of activity carried on in the modern economy by modern means (*Marshall*)
3. Qualitative/Quantitative limits- right to gather berries in pre-contact is not a logical evolution to modern right to gather natural gas (*Lax Kw'alaams*)

Consent

First

- *Sparrow* said consultation, minimal impairment, priority etc. would be required for justified infringement but no mention of consent… yet.
- Still a real risk of injunctions pre-trial and how the *sparrow* factors would apply to any given set of circumstances which are very unclear and gives leverage for Impact benefit Agreements, which has been around for several decades.

Second

- *Delgamuukw* said in 1997 that consent would be required to justify at least some infringements of Aboriginal title but there would be a sliding scale based on how much of infringement.

Third

- *Haida Nation* addressed what is required pre-proof.
- Before Aboriginal title is proven, at which point consent could be legally and in fact constitutionally required, consent and accommodation would be needed.
- This provides another option instead of an injunction because injunctions are harder and harder to get as courts realized these trails last years, if not decades, so injunctions could just stop everything in the meantime.

Fourth

- Then *Tsilhqot'in* reiterates all this without saying anything new about consent that wasn't already said in *Delgamuukw*, at least as a substantive aspect of the justified infringement analysis
- However, the SC did go out of its way to provide *obiter dicta* practical advice: get consent first, and then you do not need to worry about duty to consult and justified infringement challenges.
- To the degree that *Tsilhqot'in* said something new about consent, it was to clarify that there could be retroactivity to a declaration of Aboriginal title.
- SCC said that what had been approved prior to the declaration of title could later be deemed no longer consistent with the Crown's fiduciary duty and the Crown my need to revisit its approvals
- Also *obiter dicta* that scared industry into seeking consent in impact benefit agreements to ensure they actually mention consent.
- **Pearl thinks it would be…**
    - More logical to double down on the substantive dimensions of the duty to consult and accommodate and for courts to start to embrace injunctions against.
    - And then on the policy level it is something that can be dealt with through UNDRIP complaint legislation so that consent becomes a prerequisite to approvals.
    - Judicial review is a tool for checking in on the legality of government decision-making
    - Judicial review courts are not willing to impose consent as the requirement because it assumes final certainty around who has rights that may be impacted in a articular area,
    - Duty to consult addresses the situation where there are lots of known unknowns.

TREATY RIGHTS

European Colonialism’s Uncertain Legality

- 1492: Columbus arrives in the Bahamas, possibly in violation of a treaty between Spain and Portugal
- 1493: Pope Alexander VI issues papal bull (*Inter Caetera*) authorizing Spain and Portugal to colonize, convert, and enslave non-Christians and divides Africa and parts of the Americas between them
- 1497: John Cabot makes landfall in Newfoundland
- Throughout the 1500s: Theological, ethical & legal debate about whether or not Spanish conquest is just
    - Juan Gines de Sepulveda argued Aristotle’s writing supported colonizing and enslaving “inferior peoples”
    - Francisco de Vitoria argued Indigenous peoples have natural rights to autonomy, cultural integrity, and property that limited Spain to peaceful evangelization only
    - Reforms included 1537 papal bull prohibiting slavery and recognizing Indigenous property and civil rights and related Spanish laws, but often ignored in the colonies
- 1550s-1603: England establishes plantations in Ireland for loal English settlers, confiscates land and seeks to replace Irish culture, law, language and governance
- 1606-07: English Privy Council declares Irish kin-based property rights legally void and Irish Curt of King’s Bench decides they only survive if consistent with English law
- 1600s: British colonies established sugar production in Caribbean and British settlement in US
- 1670: English King Charles II creates and grants the Hudson’s Bay Company for fur trade monopoly over “Rupert’s Land”
- 1763: King George III issues Royal Proclamation of 1763, recognizing west of Appalachians as Indigenous territory
- 1768: James Cook funded to travel South Pacific and claim land ‘with the consent of the Natives’ or if unoccupied
- 1787: Arthur Philip sent to Australia to take land by force

Canadian Colonialism’s Contested Legality

- 1822-1826: Judges in Upper Canada question their jurisdiction to try an Indigenous man, Shawanakiskie of Odawa Nation, accused of killing an Indigenous woman in an “unsettled” area, but ultimately he is tried for murder
- 1867: Judge Monk of Superior Court of QB rules a fur trader’s first marriage under Cree custom is binding and the “laws and usages” of Indigenous peoples remained in “full force” during fur trade (*Connolly v Woolrich*) and Canadian government created with authority over “Indians and lands reserved for Indians” (s 91(24))

- 1876: Parliament enacts Indian Act for replacement of traditional First Nation governance and assimilation
- 1888: Privy Council decides in St. Catherine's Milling that Ontario has land rights to most of area covered by Treaty as the underlying title to land vested in the Crown
- 1973: SC recognizes Aboriginal title existed in BC but split on whether it was extinguished in *Calder*

Colonialism's Legal Justifications and Limits

Terra nullius**:** A principle of international law justifying a state's occupation of land "belonging to no one" that was invoked to justify settlement of Indigenous peoples' land in Australia and British Columbia without treaties

Doctrine of Discovery: A principle of international law justifying European colonization of foreign, non-Christian territories that recognizes a right for the 'discoverer' to engage in land dealings with the original inhabitants, but those original inhabitants also fall under their protection

Doctrine of Continuity: A principle of British imperial law that upon any conquest or settlement of a foreign territory, the laws & customs of the original inhabitants remain in effect until they are displaced by British law

Possession under property law: presume that private property rights flow from long-time possession of land.

Re Indian Claims

> " The British sovereigns, ever since the acquisition of Canada, have been pleased to adopt the rule or practice of entering into agreements with the Indian nations or tribes in their province of Canada for the cession or surrender by them of what such sovereigns have been pleased to designate the Indian title… and the terms and conditions expressed in those instruments… have always been regarded as involving a trust graciously assumed by the Crown to the fulfillment of which… the faith and **honour of the Crown is pledged**, and which trust had always been most faithfully fulfilled as a **treaty obligation of the Crown.**"

Haida Nation

> "Where treaties remain to be concluded, the **honour of the Crown requires negotiation** leading to a just settlement of Aboriginal claims… Treaties serve to reconcile pre-exisiting Aboriginal sovereignty with assumed Crown sovereignty, and to define Aboriginal rights guaranteed by s 3 of the Constitution Act, 1982. Section 35 represents a promise of rights recognition, and this promise is realized and sovereignty claims reconciled through the process of honourable negotiation."

- Honour of Crown requires negotiation leading to a just settlement of Aboriginal claims where treaties remain to be concluded.

- Treaties serve to reconcile pre-existing Aboriginal sovereignty with assumed Crown sovereignty and to define Aboriginal rights guaranteed by s 35 of the Constitution.

Indigenous Treaty Rights

Historic Treaties: the means by which Europeans reached a political accommodation with the Aboriginal nations to live in a peaceful co-existence and to share the land and resources of what is not Canada (RCAP)

- Historic treaties are usually divided between Pre-Confederation and the so-called "Numbered" treaties
    - Numbered treaties focus on non-Indigenous settlement and resource development in Northern ON, MB, SK, AB and portions of BC< YK, and NWT.
        - Contain similar terms for land surrender, reserve lands, payment and protection of harvesting rights
    - Last of so-called "Historic Treaties" were Treaty 11 (1921) and Williams Treaties (1923)
        - Parliament subsequently amended *Indian Act* to prohibit First Nations from pursing land claims or hiring lawyers to assist with land claims (1927-1951)
        - However, some treaty adhesions occurred during this time
- Peace and Friendship Treaties were based on securing military alliances whereas later Pre-Confederation Treaties included written terms for land surrenders, reserve land, payment, and protection of hunting and fishing rights.
    - In maritimes, these delat with hunting, fishing and other rights in exchange for peaceful relations (no mention of land)

"framed in an unfamiliar legal system & negotiated & drafted in a foreign language"

- Court must recognize cultural and linguistic differences when treaties signed and ensure they're liberally construed with ambiguities and doubtful expressions resolved in favour of Indigenous signatories; must choose interpretation best reconciling interests of both parties at time of singing, including oral histories and written terms (*R v Sioui*)
- Honour of the Crown means treaties interpreted in a way that does not cast doubt on Crown's intentions (*R v Badger*)
- Cannot rely on written provisions alone if demonstrated that verbally concluded treaty was broader (*R v Marshall*)
- Just like Aboriginal rights, importance of historic context to treaty rights means each treaty right is unique to signatory
    - Ex. Tsartlip First Nation has treaty right to hunt under Douglas treaty, which SCC interpreted to include right to hunt at night with aid of illumination (*R v Morris*)
        - This nation has a long history of hunting at night with illumination dating back into pre-treaty period

        - However, Mi'kmaq have been unsuccessful on multiple occasions in seeking to prove similar right to hunt at night- notably, Nova Scotia courts found historical evidence of only *occasional* night hunting by Mi'kmaq (*R v Paul* and *R v Bernard*)
- Treaty rights = negotiated, agreed upon and set out in written and/or oral agreements of Indigenous peoples and Crown
- "An exchange of solemn promises" that are of a sacred nature (*R v Badger*)
- A unique form of legal instrument that Canadian law treats differently from both international treaties (*R v Simon*) and ordinary contract (*R v Marshall*); they are *sui generis*
- With respect to historic treaties, concept of "treaty" = broad enough to embrace almost all engagements between representative of Crown and Indigenous peoples on which latter relief (ex. *White & Bob*)
- Like Aboriginal rights, Treaty rights are usually collective rather than individual (*R v Sundown*)
- May be exercised by individual members of collective, but are managed by collective and defined by Crown-Indigenous relationship
- Europeans and Aboriginal peoples each had their own well-established traditions of diplomacy and treaty-making prior to contact
- Following SCC's split decision in *Calder* (1973), modern land claims era began

Cases:

- *R v Sioui*: Courts must recognize the cultural and linguistic differences when treaties were signed to ensure that ambiguities are resolved in favour of Indigenous peoples.
    - Interpretation must reconcile the interests of both parties at the time of signing, including oral and written terms.
- *R v Badger*: Honour of the Crown means treaties are interpreted in a way that does not cast doubt on the Crown's intentions.
    - Treaties are an exchange of solemn promises that are sacred in nature
    - Treaty rights are subject to regulation by the Crown and if the regulations infringe the rights, they must meet the justified infringement test.
- *R v Marshall*: Cannot rely on written provisions alone if demonstrated that verbally concluded treaty was broader.
- *R v Morris*: Tsartlip treaty right to hunt under the Douglas treaty was interpreted to include hunting at night with the aid of illumination.
- *R v Paul*; *R v Bernard*: Mi'kmaq unsuccessful because NS courts found historical evidence of only occasional night hunting.
    - Indigenous treaties are sui generis from international treaties and contracts (*R v Simon, Marshall*)

  - Treaties are broad enough to embrace almost all engagements between the Crown and Indigenous peoples which were relied on by Indigenous peoples (*Whyte & Bob*)
- *R v Sundown*: Treaty rights are usually collective rather than individual but may be exercised by individual members of the collective.
  - Treaty rights for hunting, trapping, or fishing may also provide reasonably incidental rights such as constructing a hunting shelter.
  - Treaty rights are to be interpreted in the context to specific circumstances surrounding the signing of each treaty.

Treaty Rights

- Different from Aboriginal rights in that these arise form promises in treaties and agreements reached between Indigenous Peoples and the Crown
- Treaties may have extinguished underlying Aboriginal rights and/or title in exchange for specific treaty rights
- But not all treaties deal with land interests and some treaties may not have been negotiated in good faith
- Treaties made between Indigenous peoples and the British Crown before Confederation now considered treaties between Canadian/Provincial Crown and First Nations
- In ON and on Vancouver Island, several "land surrender treaties" signed in exchange for guaranteed activity rights, reserve land, and lump sum payments
- Similarly, numbered treaties cover prairie provinces, northern ON, and parts of the NWT
- Treaties and Aboriginal rights may co-exist
- In *R v Paulette,* Northwest Territories SC doubted that Treaty No 8 and 11 extinguished Aboriginal title to land at issue – led to negotiation of several modern treaties in the NWT
- Ambiguity in treaties must be construed in favour of signatory First Nations
- Treaties are to be construed in the sense in which they would naturally be understood by Indigenous signatories at the time they were signed
- Treaty rights must be allowed to evolve- for ex. Do not limit First Nations to traditional hunting technologies
- No appearance of "sharp dealing" will be sanctioned by courts in the Crown's favour
- Treaty rights for hunting, trapping, or fishing may also provide "reasonably incidental" rights such as a right to construct a hunting shelter (*R v Sundown*)
- Treaty rights are subject to regulation by the Crown and if those regulations infringe on treaty rights, they must met the justified infringement test (*R v Badger*)

Grassy Narrows First Nation

- Dispute over ON licensing clear-cutting activity within Treaty 3 territory
- Grassy Narrows argued that:
  - Clear-cutting license violated their Treaty 3 harvesting rights; and

- ON needed federal authorization to "take up" Treaty 3 lands

- SCC held that ON did not need federal authorization BUT whether or not clear-cutting license constitutes justified infringement of Treaty 3 harvesting rights not yet determined.
- Provincial government can take up treaty lands for project within its jurisdiction (such as mining, logging, oil and gas development, etc)
- BUT first must inform itself of impacts on treaty rights to hunt, fish, and trap and deal with First Nations "with the intention of substantially addressing their concerns"
- If taking up of land leaves First Nation with no meaningful right to hunt, fish, or trap in traditional territories then potential action for treaty infringement will arise

R v Shipman

- Members of Walpole Island First Nation in SW ON convicted of hunting without licenses in NE ON territory of Michipicoten First Nation
- Michipicoten has hunting and fishing rights under Robinson-Superior treaty (185) and appellants sought to shelter their hunting activities under treaty rights of Michipicoten
- ONCA held that Michipicoten treaty right to hunt as Ojibway "have heretofore been in the habit of doing" must be placed in historical, political, and cultural context to clarify common intentions and interests being reconciled at time
- Evidence supported Ojibway custom of sharing resources with others "passing through" with permission and right to grant permission to outsiders
- BUT permission not granted here

"treaty rights are communal; any consent that may be granted must reflect respect for the community of treaty rights holder, which means that any consent granted to share the harvesting **resource must weigh and consider the communal interest.** In order to properly do this, the person capable of granting the consent would normally require the request **in advance** and because Aboriginal custom includes a paramount protection and conservation of harvesting resources, any consent granted would need to weigh and consider this concern"

Interpreting Historic Treaty Rights

- Many rights in historic treaties set out explicitly in writing, but written text does not always include full extent of oral agreements between parties
- Treaty rights are interpreted in context to specific circumstances surrounding singing of each treaty, including specific circumstances of Aboriginal nations that had entered into them (*R v Sundown*)
- Context such as where a treaty signatory Indigenous nation engaged in hunting and fishing and how these activities were conducted can be relevant to how they would have understood the treaties at the time they were signed
- **Context helps courts define where and how treaty rights may be exercised – this has critical important to *Sparrow* test**

- Based on historic context, treaty rights may be found without any explicit reference to them in the written text (*R v Marshall* and *R v Taylor*)
- Surrounding context may also give rise to incidental rights
    - For example, treaty right to hunt might imply a right to travel with hunting equipment to the hunting grounds (*R v Simon*)
    - Or treaty right to hunt might imply right to create hunting shelter if that is how hunting was traditionally conducted by relevant Treaty nation (*R v Sundown*)

Kwakiutl First Nation v BC

- Kwakiutl First Nation asserted Aboriginal title and rights outside of area contemplated by two Douglas Treaties, while also seeking to exercise and secure rights guaranteed by those treaties
- Challenged various forestry decisions of BC government, including removal of private land from forestry tree farm license, which would eliminate consultation opportunities
- From a title perspective, the privatization of Crown land would mean irreparable alienation of Kwakiutl First Nation's resources
- BC entered into Forest and Range Opportunities Agreements with First Nations who have *prima facie* Aboriginal title claims (include resource revenue sharing and timber set asides) but Kwakiutl were denied this based on treaty status
- BCCA held that BC breached duty to consult by failing to engage in consultation "with a view toward accommodation of the Aboriginal title claim" asserted by Kwakutl First Nation and no obligation to participate in consultations premised on assumption they had no rights other than treaty rights
- BC's decisions were "strategic, higher level decisions" that threatened to reduce Kwakiutl First Nation's ability to participate in decision-making that would impact access to land, exercise of harvesting rights and protection of cedar trees
- It would impact on the First Nation's ability to affect policy sufficient to trigger duty to consult
- The denial of eligibility for forestry accommodations agreement highlights impacts of BC's failure to meaningfully consult

Aboriginal and Treaty Rights

- Uncertain when and how Aboriginal and treaty rights co-exist
- Peace and Friendship Treaties did not extinguish Mi'kmaw's pre-exisiting Aboriginal rights to hunt and fish (*R v Marshall*)
- BUT SCC has repeatedly stated Numbered Treaties involve surrender of Aboriginal rights in exchange for treaty rights
- Historic Treaty rights may include harvesting rights, right to trade products of hunting and trapping (*R v Marshall*) or right to engage in spiritual rites (*R v Sioui*) among others
- Many historic treaties also address rights to allocation of reserve lands (ie treaty land entitlement), payment of annuities, and specific commitments like medicine or plows

Claxton v Saanichton Marina Ltd

- Tsawout Nation sought to stop construction of marina and breakwater in Saanichton Bay on Vancouver Island's coast based on impacts to Treaty right to fish under Sannich Treaty of 1852
- 1852 agreement drafted as form of deed by which HBC purported to purchase Tsawout land rights but Governor Douglas was carrying out official imperial policy in doing so and it therefore constituted treaty for purposes of *Indian Act*
- Fishery/fisheries relevant to not only what the right is but also where the right is being exercised by rights holders
- Treaty contained no limitation akin to Numbered Treaties
- Includes right to travel to and from fishery and the protection of the fishery itself

Fort McKay First Nation

- FMFN appealed approval of bitumen recovery project within 5km of Moose Lake reserves as it's negotiating Moose Lake Access Management Plan to address cumulative effects of oil sands development on Treaty 8 rights
- AER address Treaty rights impacts but concluded outstanding negotiations could not justify delay of its approval as Cabinet approval still needed
- Long history of FMFN seeking 10km buffer around Moose Lake from oil sands, including dispute over regional plan
- Review panel for plan held that FMFN likely unable to utilize any of territory for harvesting in "not-too distant future"
- AB premier agreed to protect Moose Lake but not finalize
- AER received Prosper's proposal for bitumen project within 10km buffer zone and initially delayed hearing application until negotiations resolved
- Prosper successfully sought reconsideration decision based on timing and no certainty
- AER's enabling statute prevented it from hearing dispute's over Crown's duty to consult- however, honour of the Crown and other dimensions of public interest = fair game
- Majority of ABCA held AER was obliged to hear and address honour of the Crown-related arguments for why approval should be delayed until negotiations
- Greckol JA concurred in result but provided further guidance – **cumulative effects on Treaty rights must be proactively addressed**
- **"It certainly demands more than allowing the Crown to placate FMFN while its treaty rights careen into obliteration. That is not honourable. And it is not reconciliation."**

Two Schools of Thought, and only one "Answer": It depends

- Every single Numbered Treaty has a clause or provision stating that Treaty First Nations **cede and surrender** their prior rights by entering into treaty
- In a couple cases in the NWT this has been **questioned,** for ex. *Re Paulette*
  - J Morrow heard from people **alive** at the time for treaties 8 and 11 in NWT
  - Overturned on other procedural grounds and it was not a decision on the merits

- Second case was a duty to consult one confirming that the Crown had a DTC regarding Aboriginal title for a Treaty 8 nation in NWT in spite of the "cede and surrender" clause
- There is also a Federal Court decision where Ermineskin and Samson took a run at the cede and surrender clause in Treaty 6 and lost
    - Basically the judge stated the evidence was clear that Treaty 6 First Nations were familiar with the cede and surrender issue because of prior Numbered Treaties that came before them

So, why is this so problematic when the assumption is that Numbered Treaties signatories no longer have Aboriginal Rights? After all, the SC has repeatedly taken for granted that te Numbered Treaties extinguished pre-exisiting Aboriginal rights in exchange for Treaty rights, BUT…

- First Nations consistently put forward that no one agreed t extinguishment
- In the FC decision re Ermineskin and Samson, the judge basically found this to be a modern invention that is now put forward as a consistent position but did not appear in any records prior to the 70s for Treaty 6 First Nations.
- The CA basically said we can ignore that trial level finding as it was unnecessary to the issues being decided- **but** that decision makes it almost impossible to argue credibly in court that Treaty 6's cede and surrender clause can be ignored
- SK, AB, and MB all take the position that because they are intersected by the Numbered Treaties they do not need to worry about Aboriginal title and rights.
- **However,** Metis claims make this a tough position to remain committed to. And it's one that may be the stronger position in court, but it's politically unacceptable to Treaty First Nations
- In any event, at most cede and surrender could address harvesting rights and title rights, which got defined and constrained by Treaty harvesting rights and reserve land entitlement provisions.
- Despite what one school of thought says re extinguishment through the cede and surrender clause, there is no credible argument that Treaty First Nations gave up all other rights including language rights, self government, and spiritual rights.
- To argue this would be to argue that they agreed to cede and surrender their very Indigeneity, which is ludicrous.
- Case like *Blueberry River*, as well as *Mikisew*, make the distinction between Treaty and non-Treaty harvesting rights a subtle one, as do earlier cases that require proof of pre-treaty practices to understand what is contemplated by a treaty right, for example to hunt.
- In the end, the effect of ceding and surrendering rights through the Numbered Treaties is overstated in the prairies as the rubber hits the road when it comes down to resource revenue sharing. For ex. Consulting on rights to collect berries and other innocuous things vs oil extractions, etc.

Two Schools of Thought: Tom Isaac v John Borrows

- Tom Issac provides a foil or challenge to Pearl's view. It is easy to "preach to the choir" but it doesn't change much if one is unable to influence those who may not subscribe to your perspectives.
- But recent case law points to Borrows.

Geographic Limits of Treaty Rights

- As illustrated in *Claxton* and *Fort McKay*, harvesting rights often exist in tension with settlement and resource development within Indigenous peoples' traditional territories
- Where territories are put to uses inconsistent with the exercising of harvesting rights factual geographic limitations are imposed on them reduced animal populations or degraded habitats)
    - Some inconsistent uses impose legal geographic limitations on harvesting, such as public road (*Mousseau),* game preserves (*Smith*), or farming (*Badger*)
- Land use changes could gradually extinguish harvesting rights
- Since taking up of lands over which harvesting rights are exercised limtis amount of land left for harvesting within traditional territories, inching little by little towards loss of any meaningful right, consultation on taking up land **must address cumulative effects** (*Prophet River*)
- The greater the amount of land of an Indigenous nation's traditional territories that is taken up, the deeper the Crown's duty to consult & accommodate concerns over what remains of them (*Dene Tha' FN*)
- Still unclear how much taking up is too much and various treaty infringement claims are exploring this at trial level

Yahey v British Columbia

- In 2015, the Blueberry River First Nation argued that cumulative impacts of oil, gas, forestry, mining, and hydro within their traditional territory left the First Nation with no meaningful way to exercise their Treaty 8 rights
- The Blueberry River case shows just how powerful the historic treaties still are because it basically means they have a freeze on development in one Treaty 8 First Nation's territory unless they consent to it
- **Context such as** where a Treaty signatory of an Indigenous people engaged in hunting and fishing – and how these activities were conducted can be relevant to how they would have understood the treaties at the time they were signed

Mikisew Cree

- Dispute over winter road proposed adjacent to reserve land in Wood Buffalo National Park; road originally planned to intersect Mikisew reserve but after facing opposition, feds re-routed road to run adjacent to reserve land
- Road impact Treaty 8 harvesting rights by breaking up wildlife habitat, allowing access to poachers, roadkill, etc but CoA and SCC held that it would not breach Treaty 8 rights

and require justification of infringement until so much development that **no meaningful right remains**

- SCC did, however, determine Crown owns Mikisew Cree a duty to consult whenever authorizing development within its traditional territory.
- Canada argued Mikisew could hunt anywhere in Alberta by virtue of NRTA so no infringement from road next to reserve; suggested prohibiting hunting in Mikisew territory acceptable so long as decent hunting possible at other end of province
- "One might as plausibly invite the truffle diggers of southern France to try their luck in the Australian Alps, about the same distance as the journey across Alberta deemed by the Minister to be an acceptable fulfillment of the promise of Treaty 8"
- Meaningful right to hunt ascertained in relation to the territories over which a First Nation traditionally hunted, fished, and trapped, and continues to do so today.

Modern Treaties

- Began after *Calder* in 1973/
- How we characterize treaties, treaty rights, and treaty beneficiaries are going to influence how we interpret them, and the scope and limits.
- Sparse wording, interpretation always needed – and TIME: we see a sort of continuity requirement like in Aboriginal rights – Courts have to determine whether a modern activity is a logical evolution or something new and different: *Marshall* and *Bernard*
- Note McLachlin's dissent in *Marshall #1* and *Morris*- Treaty rights are not the only thing logically evolving – not in a vacuum.
- Create legal basis to foster a positive long-term relationship between Aboriginal and non-Aboriginal communities (*Beckman*)
  - Product of lengthy negotiations between well-resourced and sophisticated parties
  - Duty to consult applies to modern land claim agreements if it is required to uphold the honour of the Crown. Reconciliation continues beyond the formal claims resolution.

What about the WOMEN in Aboriginal and Treaty Rights?

- Some commentators have argued that the *Van der Peet* approach to Aboriginal rights – and Treaty rights litigation generally- can be or have been detrimental to Aboriginal women

Economic Component

- Another aspect that is always present, but rarely explicitly addressed in the Court's ratio in these cases is the economic aspect of Treaty rights.
- Interesting when you read the treaty commissioner's report on Treaty 8, how both the Aboriginal groups and the Commissioners were anxious to ensure the Aboriginal groups would retain the ability to be self-sufficient.

- Really difficult- nowadays- welfare dependency a serious problem on many reserves, mainstream criticism of pouring funding into black holes, and really racist and demeaning stereotypes.
- In *Horseman,* which preceded *Badger*, the SCC found that the National Resource Transfer Agreement modified Treaty 8 t0 remove any commercial hunting rights.
    - This involves an interpretation where the wording of s 12 of the NRTA is taken extremely literally – only the right to hunt and fish FOR FOOD, rather than a focus on securing a continuance of supply for support and sustenance
- In *Sappier* and *Grey*, there is no Aboriginal Right to Sustenance.
- Commercial rights rarely recognized – much grater ability to justifiably infringe on the part of the government where they are.
- In *Morris,* the SCC explains that while the clear language of s 88 of the *Indian Act* means that generally Treaty rights trump provincial laws, this is subject to the Court's jurisprudence that the province can regulate some Treaty rights (particularly commercial rights)
- In *Marshall,* specific that treaty rights to hunt and gather are limited to the right to do so for a "moderate livelihood", not "the accumulation of wealth"
- In *Horsma*n, NRTA modified treaty 8 to remove commercial hunting rights. Only have the right to hunt for food.

Interpreting Modern Treaties

- 70 historical treaties, negotiated and signed between 1901 and 1928 because…
    - "we are negotiating our way into Canada"
    - "the end of more than a century of humiliation, degradation, and despair"
    - "we kept faith that the rule of law would prevail someday"
    - The government of Canada agreed it was time to build a new relationship, based on truth, respect, and the rule of law"
    - Business interests: desperate for certainty
- These are detailed, sophisticated, read like legislation, and constituional documents that take years to negotiate.
- Self-Governance explicit: focus on governance mechanisms and economic capacity for self-sufficiency and inter-dependence
- Major issues: interpretation and implementation
    - Ex. *Nunavut Tunngavik v CanadaI*
        - Is *Firearms Act* contrary to terms of the NLCA?
        - Crown brought summary judgement application: argued that terms clearly allow this, and "context" less important for interpreting modern land claims agreements- these should be interpreted differently than historic treaties, as the whole context is different.

        - Judge rejects this, says contextual evidence is not only admissible but essential if treaty provisions are going to be afforded a large, liberal and remedial interpretation as required by s 2.9.4 of that agreement
        - Grants interim stay.
    - *Beckman v Little Salmon/Camracks First Nation*: Duty to Consult case
        - Issue: Does duty to consult apply to modern land claim agreements?
        - Answer: yes
            - If it is required to uphold the honour of the Crown. The process of reconciliation "begins with the assertions of sovereignty and continues beyond the formal claims resolution"
            - The Honour of the Crown is part of the process of reconciliation and cannot be discharged by the making of a modern treaty.
        - Modern treaties will not accomplish their purpose if "interpreted by territorial officials in an ungenerous manner or as if it were an everyday commercial contract" and "the duty to consult is derived from the honour of the Crown which applies independently from the expressed or implied intention of the parties"
    - Courts should leave space for the parties to govern together and work out their difference (*Nacho Nyak Dun*)

Nisga'a Final Agreement:

- Criticisms: Non Aboriginal, race based, non-democratic, lack of representation for non-Nisga'a citizens living on this land
- Other Indigenous thoughts: Too limited self-government; too much outside control; custodial arrangement; may as well call it the BC *Indian Act*
- *Campbell v BC*: argues unconstitutional, however, it was upheld. Aboriginal laws not extinguished and now part of the Canadian constitution through s 35.
- *Chief Mountain v Canada*- argues unconstitutional. Supported by the Canadian Constituional Foundation (s 3 – right to vote): "I have rights as a Canadian and a Nisga'a which are best protected under the Canadian Constitution, not a constitution passed by a government controlled by family cliques"
- Got rid of tac exemptions under the *Indian Act*, not *Indian Act* membership – but detailed membership.

The Nunavut Land Claims Agreement

- Issues: lack of education, problems with language education preventing implementation of agreement (goals of 85% public service employees – Init, but only 45% are and official language)
- In 2009, in *Canada v Nunavut Tunngavik Inc*, Canada first agured that the Nunavut should be added as a defendant to the claim, but in the alternative, filed third part

notice. Canada argued the Nunavut government had joint responsibility with Canada for any liabilities (some duties were owed by Nunavut).

- Court added Nunavut as third party. Found that it is evident Nunavut should be party to the litigation.
    - it would be inappropriate to determine Canada's obligations to fund public activities in Nunavut without the presence of the Government of Nunavut.
- NTI "disclaimed any interest in obtaining such relief" – third party position does not entitle them to direct relief, but this does not disentitle Canada to such relief form the Government of Nunavut.

Gamlaxyeltxw v BC

- Minister of Foresters consulted G hereditary chiefs re: total allowable harvest for Nisga'a moose hunters in overlap areas but refused to consult on annual management plan
- Trial judge opted to modify *Haida* test where modern treaties and Aboriginal rights conflict in preference of former over latter
- BCCA held no need to modify *Haida* test
- The Crown's duty to act in conformity with obligations under modern treaty and to implement treaty rights in good faith must be reconciled with duty to consult on asserted rights
- This may limit available accommodations but does not negate the duty to consult
    - Annual management plan regulated only Nisga'a hunted and not G hunters.

DUTY TO CONSULT AND ACCOMMODATE

Sources and Purposes

Source 1: Honour of the Crown; Potential but Unproven Claims

- The honour of the Crown is always at stake in its dealings with Aboriginal peoples: *Haida* (*Badger; Marshall*)
- When treaties not yet concluded, HOC requires "honourable negotiations" leading to "just settlement" of Aboriginal claims: *Haida (Sparrow*)
- Aboriginal people were here when Europeans came and were never conquered: *Haida*
- Honourable negotiations implies a duty to consult with Aboriginal claimants and conclude an honourable agreement reflecting claimant's inherent rights: *Haida*
- Prior to settlement of claims, must uphold HoC meaning that the Crown cannot "cavalierly run roughshod over Aboriginal interests" as that is not honourable (*Haida*)

Source 2: Reconciliation Purpose of s 35 and Honour of the Crown

- Treaties and Exisiting Treaty Rights
    - A matter of "broad general importance" to relations between Aboriginal and non-Aboriginal people, goes to "heart of relationship" (*Mikisew*)
- May be implied from treaty terms

    - Both historic context and inevitable tensions underlying implementation demand a process, the HoC demands the process that is dictated by the Crown acting honourably; *Mikisew*
- Grounded in the HoC, fundamental concept governing treaty interpretation and application; referred to as treaty obligation as far back as 1894 (*Mikisew*)

BUT External to Treaties

- Duty to consult upholds HoC, "a doctrine that applies independently of the expressed or implied intention of the parties" (*Haida; Mikisew*)

Purpose: Reconciliation

- Reconciliation is the fundamental objective of Aboriginal and Treaty Rights (*Mikisew*)
- Reconciliation is not a final legal remedy in the usual sense, rather it is a process flowing from rights guaranteed in s 35 (*Haida*)
- The "need to reconcile prior Aboriginal occupation of the land with the reality of Crown sovereignty" (*Haida*)

Who has Duty to Consult?

- It is a constituional duty to consult that the Crown must engage with Indigenous peoples prior to taking/making any actions/decision that may adversely impact Aboriginal or Treaty rights (proven or asserted)
  - BUT not clear who might represent Indigenous peoples in consultations. Courts point out who may be the most appropriate representative for Crown consultations in order to avoid being considered inadequate. Still a confusing process fraught with complexity despite appearing simple.
    - Same side- also confusing as to who is the appropriate Crown in administrative decision-making
    - Again, the SCC confirmed that the decisions of independent regulatory bodies can engage the Crown's duty to consult – especially if legislated to do so.
    - SCC in *Haida* stated that "the ultimate legal responsibility for consultation and accommodating rests with the Crown and "the HoC cannot be delegated"
    - SCC also made it clear that the Crown includes federal/provincial governments.
- Crown has **executive authority** (*Clyde River*) which means it derives the authority of the executive branch of government (includes governor general, prime/minster/premeiers, federal/provincial cabinets, etc.)
- **Executive authority** In Canada has been organized into a complex array of regulatory agencies and other bodies that operate at arm's length from elected leaders
    - Regulatory bodies operate independently from the Prime Minister/premiers/cabinets BUT are final decision makers that could have adverse impacts on Aboriginal and Treaty right
    - The SCC interpreted the Crown's duty to consult as applying broadly and extending to agencies that would not ordinarily be seen as part of the "Crown"

    - Example: oil and gas pipeline regulated through NED processes in which the federal cabinet makes the final choice, then it is the federal cabinet that acts as the "Crown" and is obliged to fulfill its duty to consult before approving the project.
    - BUT when the NEB is empowered by Parliament to make final decisions, there may not be any formal decision-making role for elected officials that lead the executive branch of government.
- Municipalities are also independent regulatory agencies with a type f governmental authority that creates confusion as to how the Crown's duty to consult should be implemented in practice.
    - Whether or not municipalities have a duty to consult has been controversial since *Haida*. Courts have concluded that municipalities do not have a duty to consult- but the SCC may force courts to revisit many existing legal arguments against municipalities having a duty to consult is untenable (*Clyde River; Chippewas of the Thames*)
    - Municipalities do not have any direct powers provided by the *Constitution (Catalyst Paper*)
        - BUT they have powers via provincial legislation which is **why the SCC has characterized municipalities as "regulatory bodies",** and analogized them with other regulatory agencies that rely on provincial or federal legislation for their powers. (*Catalyst Paper*)
        - Municipal governments are democratic institutions made up of elected representatives who are generally given a broad discretion under provincial law to pass bylaws and serve the people who elected them (*Catalyst Paper*)
- Crown obligations to engage in the duty to consult with Indigenous peoples on Aboriginal and Treaty rights (proven and asserted) that are collective and not individual rights
    - DTC obliges the Crown to consult with right holders as collective rather than individuals (*Behn*). There may be some Aboriginal or treaty rights that individual members of an Aboriginal nation have a vested interest in protecting and therefore may be able to assert as individuals BUT this is the exception not the rule (*Behn*)
- "The collective nature of Aboriginal and Treaty rights implies some way in which decisions on the management of these rights might be made on behalf of all right holders, which in turn provides an important role for Aboriginal governments" (*Campbell*)
- The SCC recognizes that Aboriginal and Treaty right holders **may authorize individuals or organizations to represent them** for the purposes of asserting their s 35 rights (*Behn*)

        - This allows for Indigenous peoples and nations to define for themselves wo will represent them in this governmental capacity.
    - Aboriginal and Treaty rights are in part defined by an Indigenous perspective that includes the "custom, practices, traditions and laws of each Aboriginal people" (*Tsilhqot'in*)
    - An Indigenous nation's laws may determine how Aboriginal and Treaty rights are **internally organized and allocated** between individuals, families, and sub-groups (*William*)
    - These laws are not necessarily static and may change in "accordance with shifting group attitudes, needs, and practices" (*William*)
    - Through the dynamic application of Indigenous peoples' own laws, it is up to the collective to decide who will engage with the Crown (*Spookw*)
- There is uncertainty that inevitably arises when there is more than one organization or individual who claims to represent Aboriginal and Treaty rights holders for the purposes of Crown consultations and negotiations.
- This can even include controversy surrounding the membership of an organization that claims to speak on behalf of rights holders and the scope of membership of the collective itself.
    - **Band Councils**: There are over 600 bands that exercise First Nations governance under the *Indian Act*
        - Canada recognizes elected band councils as the representative governments for members of each band, with many if not most band elections governed by federal statuses and regulations under s 2(1).
        - Although the *Indian Act* has recognized customary processes for leadership selection where bands have complied with certain conditions set by the federal government (*Algonquins of Barriere Lake*)
        - Bands under the *Indian Act* as the proper representatives of Aboriginal and Treaty rights holding collectives – provides convenience and certainty for Crown consultation and negotiations
        - Band have "well-defined membership and a clear political structure" which "makes it possible to definitively identify individuals entitled to exercise Aboriginal rights and allow governments to engage in proper consultation when rights are threatened" (*William*)
            - BUT should not assume that all band councils have been authorized by their members to assert their collective rights.
        - Bands have been historically defined under the *Indian Act* in a way that closely links them to serves (*Papachase*).
            - Reserves are areas of land that have been set aside for exclusive use by First Nations and they are generally governed by band councils under the *Indian Act*.

- Bands under the *Indian Act* have been defined as First Nations collective with a shared interest in one or more reserves (*Papachase*)
- The *Indian Act*, in turn, sets out powers for band councils that are almost exclusively aimed at the management of these reserves (ss 81 and 83).
- The *Constitution Act, 1982* recognizes the rights of Aboriginal peoples under s 35 and makes no explicit mention of bands. First Nations collectives are not always recognized as bands. (*Passamaquoddy*)
- First Nation collectives do not need to qualify as bands under the *Indian Act* in order for them to be recognized as having Aboriginal or Treaty rights (*R v DeSautel*)
- Bands may have members from more than one Indigenous Peoples (*Tsilhqot'in*). For these reasons and more the relationship between bands and Aboriginal or treaty rights holders can be unclear.
- The court in *Manatch* found that whether the band council was the proper representative for their interests was a "serious question that merits examination"
  - BUT rejected the idea that families should be consulted on their own asserted individual or "subnational" Aboriginal rights
  - Only broader collective rights claims have been recognized.

- **Traditional governance structures:**
  - Example: the *Delgamuukw* case was brought by various Gitxsan and Wet'suwet'en hereditary chiefs on behalf f the members of smaller collectives (referred to as "houses" in the litigation) that they represent within the legal traditions of the G and W peoples.
    - The BCSC found that the Aboriginal rights and title asserted by G and W chiefs in that case would have to be "for the benefit of the peoples generally, and not piecemeal for the Chiefs, their House or their Members" (*Delgamuukw*)
  - Court saw the hereditary chiefs as suitable representatives for those broader rights holding collective, at least for the purposes of asserting their Aboriginal rights and title in the courts.
    - The lawsuit proceeded up to the SCC on the basis that the hereditary chiefs were able to assert Aboriginal rights and title on behalf of the G and W nations (*Delgamuukw*)
  - Courts have been reluctant to recognize traditional leadership as having an exclusive right to speak on behalf of First Nations with respect to Aboriginal and Treaty rights if band councils have not expressly recognized this authority in some way.
  - Courts have dealt with situations where individual families have sought separate Crown consultation and negotiations with respect to Aboriginal

or Treaty rights on the basis that they did not accept and elected Aboriginal government organizations as representing them

- **To date all have been unsuccessful.**

- **Aboriginal Organizations:** can create additional issues
  - Example: when a large Aboriginal organization tries to represent the Aboriginal or Treaty rights of multiple member First Nations, especially when their membership includes groups from diverse rights holding collectives.
  - There are many Indigenous political organizations at the provincial level that will advocate on behalf of several Indigenous peoples within a particular Canadian jurisdiction.
  - Where these political organizations have tried to assert Aboriginal or treaty rights in the courts, their legal authority to do so has generally been rejected.
    - Example: The FC found that while the Federation of Sovereign Indigenous Nations counts numerous First Nations with treaty rights among its members, those treaty rights are vested in the individual First Nations themselves and not the FSIN.
    - For this reason, the FC was not willing to recognize the FSIN as an appropriate representative for the purposes of asserting the treaty rights of its member First Nations in court.

Rio Tinto

- Provinces DO; part of the Crown
- Third parties DO NOT; but procedural aspects can be delegated.

The Crown

- The Roel of Tribunals set up by the Crown depends on the powers given to them by the legislature
- Must be expressly or impliedly authorized to consult, must have remedial powers necessary to do what is asked in relation to consultation
- If empowered to determine questions of law, has jurisdiction to determine if there is a duty to consult and if it is met
- Utilities Commission did not have power to consult, but did have power to determine if adequate consultation had occurred.

Clyde River

Who is the Crown?

1) Personification of her majesty, royal prerogatives and privileges
2) Exercise of her legislative role, and as head of executive authority

- Crown is used to symbolize and denote executive power- even though the NEB is not strictly the Crown or an agent of the Crown, as a statutory body holding authority, it acts on behalf of the Crown.
- So once it is excepted a regulatory agency exists to exercise executive power as authorized by legislature, any distinction "falls away"
    - Is the vehicle through which the Crown acts
- Crown conduct and government action are interchangeable, does not matter if NEB or cabinet have final approval.

Behn: Consultation occurs with Aboriginal and treaty right holders as collective rather than idnividuals.

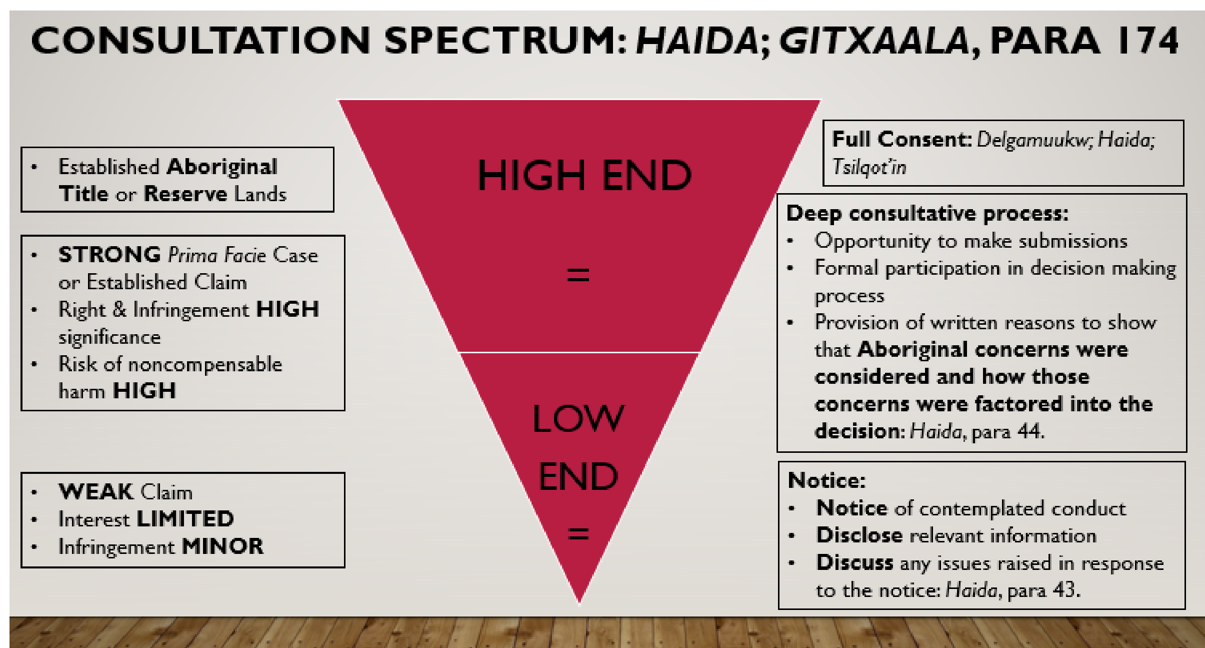
What Triggers the Duty to Consult?

- "When the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplate actin that might adversely affect it" (*Haida*)

Test: *Rio Tinto*

1. Crown's knowledge, actual or constructive, of a potential Aboriginal claim or right,
    a. Credible claim
    b. Actual claim in court, negotiation context, treaty right
    c. Constructive is lands are known or reasonably suspected to be occupied and right is reasonably anticipated.
2. Contemplated Crown conduct and
    a. GOVERNMENT ACTION
3. The Potential that the contemplated conduct may adversely affect an Aboriginal claim or right
    a. An underlying or continuing breach is NOT an adverse impact
    b. Requires a causal connection
    c. Impact is on CURRENT decision only

(Low threshold, almost never argued)



Consultation Spectrum Explained

- High End
  - Established Aboriginal title or reserve lands = full consent (*Deglamuukw, Haida, Tsilhquot'in*)
  - Strong prima facie case or established claim with high infringement, significance and risks of non-compensable harm = deep consultative process (*Haida*)
    - Opportunity to make submissions
    - Formal participation in decision-making process
    - Provision of written reasons to show that Aboriginal concerns were considered and how those concerns were factored into the decision.
- Low End
  - Weak claim with interest limited or minor infringement = Notice of contemplated conduct, disclosure of relevant information, and discussion of any issues raised in response to notice (*Haida*)

Scope and Content; *Haida; Taku River; Mikisew*

Consultation Stage:

- Good faith on both sides is required
- No sharp dealing permitted
- No duty to agree
- No Aboriginal veto pending final proof
- Crown must intent to substantially address Aboriginal concerns when raised (*Delgamuukw; Haida; Mikisew*)

Accommodation Stage:

- Meaningful consultation may require Crown to make changes to its proposed action based on consultation information
- A "process of balancing interests, of give and take."
- "The effect of good faith consultation may be to reveal a duty to accommodate by adapting decisions or policies in response" (*Taku River*)
- "Consultation that excludes from the outset any form of accommodation would be meaningless. The process is not simply one of giving the Indigenous group an opportunity to blow off steam before the Minister proceeds to do what she intended to do all along"
- NOT a duty to accommodate to the point of undue hardship for the non-Aboriginal proponents (*Little Salmon*)

- The Honour of the Crown is a constituional principle BUT “gives rise to different duties in different circumstances” (*Haida*)
- Duty to consult is NOT a constituional right because the content is a spectrum that “varies with circumstances”
  - So, duty to consult is a valuable adjunct to the HoC but it plays a supporting role, and should not be viewed independently from its purpose
  - AND Aboriginal rights exist within the general legal system and admin decision makers often deal with constituional limits
    - **SO**, there is no need to invent a new constituional remedy. Administrative law is flexible enough to give full weight to the constituional interests of the First Nation…
    - Constitutional rights relevant as matter of procedural fairness just as the impact on any other community or individual.

Public Interest

- Where there is a potential adverse impact on title and rights of more than one First Nation, each First Nation is entitled to consultation based upon the unique facts and circumstances pertinent to it (*Gitxaala; Tsleil-Waututh Nation*)
- The public interest and the duty to consult do not operate in conflict. Constituional imperatives supersede other concerns when assessing public interest. In the case of the Board, a project authorization that breaches the constitutionally protected right of Indigenous peoples cannot serve the public interest (*Clyde River; Tsleil-Waututh Nation*)

Gitxaala Nation

- Based on our view of the totality of the evidence, we are satisfied that Canada failed in Phase IV to **engage, dialogue and grapple with the concerns expressed to it in good faith** by all of the applicant/appellant First Nations. **Missing was any indication of an intention to amend or supplement the conditions** imposed by the Joint Review Panel, **to correct any errors or omissions** in its Report, or **to provide meaningful feedback in response to the material concerns raised**. Missing was **a real and sustained effort to pursue meaningful two-way dialog**ue. Missing was someone from Canada’s side empowered to do more than take notes, someone **able to respond meaningfully at some point.**

Bigstone Cree Nation v Nova Gas Transmission Ltd

- Bigstone “was not seriously engaged:
- Deadline extended twice, 3 months out of4 lost due to lack of engagement.
- Finding that complaints “disingenuous” cannot “seriously complain it was not meaningfully consulted”; Canada justified in not agreeing to another time extension
- According to the Major Project Management Office’s [MPMO] records of the two meetings that took place between the representatives of Canada and Bigstone, the

Crown clearly appears to have been open to suggestions of accommodation and mitigation measures. The main concerns and issues raised by Bigstone were explicitly identified, yet Bigstone failed to propose any possible accommodation or mitigation measures to alleviate its apprehensions

Tsleil-Waututh Nation v Canada

Consultation Framework:

Phase 1	Phase 2	Phase 3	Phase 4
Project Description	NEB Hearing	**GIC Considerations**	GIC to Regulatory Approvals

Findings: Design; Unilateral imposition; Funding' Timing = Adequate

- Consultation Process was Reasonable
- The consultation framework selected was sufficient, if properly implemented, to enable Canada to make reasonable efforts to inform itself and consult.
    - Put another way, this process, if reasonably implemented, could have resulted in mutual understanding on the core issues and a demonstrably serious consideration of accommodation.
- BUT Consultation implementation was unreasonable.
    - Phase 3: Only phase to address substance, two way dialogue was possible:
        - The SC's jurisprudence repeatedly emphasise that dialogue must take place and must be a two-way exchange.
    - How the Crown implemented and limited their mandate- representatives only listened to and recorded concerns of Indigenous applicants and transmitting concerns to decision-makers
    - The Crown is required to do more than listen and document concerns
        - On the whole, the record does not disclose responsive, considered and meaningful dialogue coming back from Canada in response to the concerns expressed by the Indigenous applicants
- As a matter of well-established law, **meaningful dialogue is a prerequisite for reasonable consultation.**
    - Where, as in this case, deep consultation is required, **a dialogue must ensue and the dialogue should lead to a demonstrably serious consideration of accommodation.**
    - **The Crown must be prepared to make changes to its proposed actions based on information and insight obtained through consultation.**

Who gets to Consult?

- *DeSautel*: First Nations do not need to qualify as bands under the *Indian Act* for them to be recognized as having Aboriginal or treaty rights

- *Delgamuukw*: Hereditary chiefs are suitable representative for broader rights holing collectives for the purpose of asserting rights and title in court.
- *Manatach*: Families cannot be consulted on their own sub-national Aboriginal rights
- *First Nations of Saskatchewan*: FSIN is not an appropriate representative for asserting treaty rights of its members because the rights are vested in the individual FNs.

Important Notes re: Duty to Consult

- It is forward looking (ie. prospective) and is almost always enforced through an application for judicial review (a summary proceeding that does not involve evidence beyond the decision making record and where damages are not available)
- DTC is only relevant and useful when there is a contemporary decision that can still be modified or changed based on the results of consultation and accommodation.
- Where the damage is already done it is likely too late for more consultation and accommodation to fix things and the remedies will likely have to be retroactive ones that require an action
    - i.e. trial – suing for damages based on an unjustified infringement or a historic breach of fiduciary duty)
- It does get difficult to disentangle the past damage from the contemporary decision.
    - Cumulative effects of resource development are the most obvious example where it is difficult to disentangle past damage form future threats.
        - But even where consultation and accommodation take place in context to cumulative impacts – still forward looking with an emphasis on how the contemporary decision making process and outcome can be modified
        - Not retrospective with a focus on compensation for past harm or permanent court orders like a permanent injunction – the proper route would be to bring an action
            - Most of what courts do is inherently retroactive, determining the legal consequences of past actions. Enforcing the duty to consult and accommodate through judicial review is a rare example of a process aiming to stop breaches of legal rights before they happen based on the realistic prospect of them happening rather than a final decision that they did happen already, hence why the discussion in Haida Nation was focused on the duty to consult and accommodate as an alternative to an interim or interlocutory injunction.
- DTC is meant to ensure that there is a way for the courts to force government decision-makers to take into account potential impacts on rights even when they are still mostly uncertain and this forward-looking obligation gets enforced in a proceeding that cannot provide final factual determinations or compensation

- This is why Indigenous nations always have a potential second try even if they initially fail the convince the courts that consultation and accommodation were inadequate.
  - Blueberry River is a good example. They failed to convince a court inadequate consultation and accommodation had occurred. BUT later won that claim after a ton of evidence w brought forth.

Sui generis (of its own kind)

- Aboriginal rights are distinct from other Canadian rights
- Indigenous perspectives party define these Aboriginal rights and refer to the 'Aboriginal rights holders' customs, practices, traditions, and laws (*Tsilhqot'in*)
- Therefore, Aboriginal rights are called, *sui generis* (*Sparrow*)
- Most of thee rights are distinct to the Aboriginal peoples/nations 'pre-contact customs, practices, traditions, and laws give rise to the right' (*Van der Peet*)
- **Even if one Indigenous nation proves a right to hunt or fish for a particular species, does not mean that other Indigenous nations would share that sane right.**
  - Flipside: Just because an Indigenous nation is unsuccessful in proving the right to fish or hunt a particular species, especially in a commercial context, does not mean other Indigenous nations are incapable of proving that right.
- Each Indigenous nation will have distinct claims based on their evidentiary record (ie. history of their people pre-contact and other distinct cultural histories and legal orders)
  - For ex. Lax Kw'alaams, a Tsimshian First Nation from the northwest coast of British Columbia, tried to prove an Aboriginal right to commercial harvesting and sale of all species of fish within their traditional waters. Their claim was unsuccessful because their historic evidence suggested that Coast Tsimshian people had only extensively traded one specific fish species, the eulachon (*Lax Kw'alaams v Canada*).
  - For ex. five Nuu-chah-nulth First Nations from the west coast of Vancouver Island were able to successfully prove a similarly defined right to harvest and sell almost all species within their own traditional waters in a parallel lawsuit (*Ahousaht v Canada* BCSC). The finding in favour of the Nuu-chah-nulth First Nations was upheld on appeal because their historic evidence was distinguishable from that of the Lax Kw'alaams (*Ahousaht v Canada* BCCA).

Aboriginal Rights Evolve

- To prove an Aboriginal right requires historical evidence of the particular Indigenous people's pre-contact practices, customs, traditions and laws BUT does not mean that the Aboriginal right remain frozen in its pre-contact form (*R v Sappier; R v Gray*)
- The court allows for the logical evolution of an Aboriginal right:
  1. Subject matter/Method of exercise (*Lax Kw'alaams*)
  2. Same sort of activity carried on in the modern economy by modern mean (*Marshall*)

   - Example: SCC says that pre-contact trade in traditionally smoked salmon could provide the basis for a modern right to preparation and sale of a frozen product using modern technology (*NTC Smokehouse*)
3. Qualitative/Quantitative Limits:
   - The degree of evolution regarding pre-contact practices into modern rights = a right to gather berries in pre-contact no logical evolution into a modern right to gather natural gas (*Lax Kw'alaams*)
   - SCC recognizes the Maliseet peoples both engaged in pre-contact practices of harvesting wood
     - This practice was for domestic purposes and was integral to their distinctive cultures. Logically gives rise to a modern right.
     - Both had historic practices of harvesting wood to make temporary shelter, but SCC said that this right must be allowed to evolve into a right to made modern shelters with modern means (*R v Spaiier; R v Gray*)
     - BUT this does not mean modern right to commercially distribute the wood.

Treaty Rights Evolve

- Treaty rights are also not frozen in time and must be allowed to evolve
- A signatory Indigenous nation will have distinct circumstances that assist in defining the scope and content of the treaty rights BUT the exercise of these treaty rights are not limited to historical means (*R v Morris*)
  - Example: Indigenous peoples historically used bows and arrows to hunt but logical evolution would be use of guns and bullets (*R v Simon*)

Aboriginal and Treaty Rights may co-exist

- No one has any certainty to he degree in which Aboriginal and treaty right may co-exist
- BUT the Peace and Friendship Treaties between the Crown and the Mi'kmaq of NS did not extinguish their pre-exisiting Aboriginal right to hunt and fish (*R v Marshall*)
- Again, the SCC repeatedly stated that the Numbered Treaties have a cede and surrender clause where Aboriginal rights were given in exchange for treaty rights (*Mikisew; Grassy Narrows*)

The *Sparrow* Test

Infringements on Aboriginal AND Treaty rights must be JUSTIFIED

- Constituional protection of Aboriginal and treaty rights provides check and balances (limits) on the Crown
- According to the SCC, s 35 essentially permits legal challenges to federal, provincial, and territorial laws/policy objectives to the extent that Aboriginal and Treaty rights are adversely affected (*Sparrow*)

- Aboriginal and Treaty rights are not "absolute"- does not prevent the Crown from passing laws that may affect them, but crown is limited by requiring justification.

What does it mean to Infringe?

- To regulate what has the affect of "being unreasonable, imposes an undue hardship on the exercise of that right, or denies the holders of the right their preferred means of exercising their right" (*Sparrow*)
- This TRIGGERS Crown obligation to justify its actions

What gives rise to Duty to Consult and Accommodate?

- Litigation and negotiations takes decades to resolve the scope and content of Aboriginal and treaty rights.
- As the decades go by, Indigenous peoples needed protection of the traditional territories as they went forward in complex, expensive, and lengthy claims in order to achieve greater recognition of their rights.
- *Delgamuukw* addressed the duty to consult in context to justified infringement of Aboriginal title
- *Adams, Nikal,* and *Sparrow* addressed duty to consult in context to proven Aboriginal activity rights
- But *Haida* made the duty to consult a self standing right that could be asserted and addressed before title and rights have been proven.
- A self-standing claim to a breach of the HoC is merely alluded to in *Mikisew,* but it has mostly been a principle that can give rise to causes of action like duty to consult and breach of fiduciary duty.
- *Ross River* decision suggests legislation that makes consultation impossible could be contrary to s 35 on this basis alone, which could be seen as a breach of HoC since there is no s 35 right to consultation than it is part of ow s 35 rights are recognized and protected.
    - This case is about legislation for recording mineral claims that are over a century odl and just (arguably) inherently inconsistent with the duty to consult. So it is more negligent than evil intentions
- In the *Toronto (City) v Ontario (AG)*, the majority left open the possibility of the HoC being used to invalidate legislation.

Proactive vs Reactive

- The duty to consult originates from the Crown's obligation to justify any infringement of Aboriginal and Treaty rights (*Sparrow*)
- The duty to consult is proactive which means the Crown must engage with Indigenous peoples/nations long before infringements of Aboriginal and Treaty rights are proven.
- Although many different Aboriginal and Treaty rights have been definitievely proven there is a great many more Aboriginal rights that are still pending being proven via courts or settled via negotiation tables

- Because of the complexity, length and costs of either route for proving Aboriginal rights, it is imperative that the HoC requires the duty to consult on potential rights/accommodations for the protection from adverse impacts of Crown decision making.

3 Basic Principles:

1. Crown must make all "reasonable" efforts to inform and consult an Indigenous group before infringement on Aboriginal or Treaty rights
2. Duty to consult with Aboriginal title ranges from 'mere duty to discuss where the infringement is minor' to a duty to obtain 'full consent' prior to more serious infringements
3. Duty to consult encourages negotiations to accommodate an Aboriginal or treaty right BUT if no agreement, Crown may justify infringement

Capacity Funding

- Availability of capacity funding is a dire need- from either the Crown or resource development proponents for Indigenous peoples to engage in consultation activities (*Clyde River; Chippewas of the Thames*)
- The Chippewas were provided with the funding necessary for them to complete a traditional land use study setting out a pipelines impacts on their Aboriginal and Treaty rights, and this was highlighted as integral to the Court's finding that this consultation process had been legal sufficient (*Chippewas of the Thames*)
- The Inuit of Clyde River, on the other hand, were forced to prepare scientific evidence for submission in the environmental assessment process with their own funds, and this was highlighted by the SCC as being indicative of the inadequacy of the consultation process (*Clyde River*)
- Courts have recognized that "appropriate funding is essential to a fair and balanced consultation process, to ensure a level playing field" (*Platinex*)
- Courts have found it reasonable for Indigenous Peoples to refuse to engage in Crown consultation processes where they have not yet been provided with any capacity funding in support of this (*Enge*)
- Courts have also found it reasonable for Indigenous Peoples to be reluctant to dedicate their own resources to engaging in consultation where they are not a proponent for a particular development project (*Saugeen Nation*)
  - Where the expenses involved in a consultation process arise due to a proponent's desire to pursue a particular project for gain, the Crown should not expect the Aboriginal parties to consultation to absorb the costs that they incur as a result of these consultation activities (*Saugeen Nation*)

Funding:

- *Chippewas of the Thames*: FN were provided with funding to complete traditional land use study

- *Clyde River*: Inuit forced to prepare scientific evidence on their own funds – highlighted by SCC as being indicative of the inadequacy of the consultation process
- *Plantinex*: Appropriate funding is essential to a fair and balanced consultation process, to ensure a level playing field.
- *Enge*: Reasonable for Aboriginal peoples to refuse to engage in consultation processes where they have no been provided with capacity funding.
- *Saugeen Nation*: Reasonable to be reluctant of providing own resources when not a proponent for a particular development project.

Sufficient Timelines

- *Ktunaza Nation*: Adequacy of consultation is not determined by the length pf the process but it may be a factor to be considered.
    - Time should not be overemphasized.
- Prematurely ending Cron consultation due to external timing pressures when there are still outstanding items to be discussed may seen as a breach of the Crown's duty to consult (*Squamish Nation*)
- In some jurisdictions, including SK, there are consultation policies that set out timeframes for consultation activities, and in some cases these timeframes may even bet set out in legislation.
- It is important to remember that the Crown's DTC is a constituional obligation that "lies upstream" of both legislation and government policy (*West Moberly*)
- Where legislation does not allow for adequate consultation it may be found to be constitutionally invalid (*Gitxaala Nation*)
- The Crown will be obliged to provide other opportunities for consultation and accommodation in order to fulfill its constitutional obligation to consult or it may need to more systematically amend its legislation or policy framework to fill these gaps (*Clyde River*)
- For these reasons, time limits set out in policy or legislation should not be overemphasised as placing constraints on the consultation process.

METIS RIGHTS

History of the Metis

- Fur trade and European men marrying Indigenous women
- Indispensable part of expansion that eventually led to Confederation
- In 1880's offered a choice: either identify as First Nations and live treaty or be given "script" in exchange for land or money
- Many Metis did not qualify for treaty
- The scrip system was faulty and full of corrupt dealings hat split up even young children, so many opted for the money

- Many Metis joined other Metis communities to push further west, some settling in Batoche, in what is now SK and other areas in what is now mostly central SK and AB; some went further up to northern AB
- Many struggled in abject poverty, living in tents on the long strips of near Crown roads, or what is known as "road allowances"
- They became known as Road Allowance peoples- Signa Daum Shanks writes extensively about this from a legal perspective, and Marie Campbell has a personal memoir, "Half Breed"
- Batoche Resistance instead of "Rebellion" and Louis Riel
- Exclusion of Metis (SCC) from NRTAs
- The eventual development of the Metis Settlements in AB

R v Secretary of State for Foreign & Commonwealth Affairs

- When Canada Bill was still before UK Parliament – the Indian Association of Alberta, Union of New Brunswick Indians and Nova Scotian Indians sought court declaration that Treaties and other obligations were still owed by Her Majesty in right of Her Government in the UK in spite of constituional patriation.
- Lord Denning held that the *Royal Proclamation of 1763* and the Treaties created binding obligations on one single and indivisible Crown of UK
- BUT by Imperial Conference of 1926, the Crown was separate and divisible into self-governing dominions, provinces, and territories
- Obligations of UK Crown transferred to the Crown in right of Canada and could only be enforced against Crown in right of Canada within Canadian courts

Section 91(24) of *Constitution Act, 1867*

- At Confederation in 1867, "Indians and Lands reserved for the Indians" subjected to federal power under s 91(24)
- Loosely parallels situation in US where Indigenous peoples recognized as "domestic dependent nations" subject to plenary powers of Congress but sheltered from state powers and regulations but even less recognition of rights here
- Particularly prior to s 5(1) and even now s 91(24) is invoked to shelter First Nations' rights, lands and governance from provincial regulation and authority
    - For example, reserve lands governed by the *Indian Act* and any bylaws issues pursuant to the *Act,* thereby limiting the jurisdictional space for any provincial regulation of these lands

Who are the "Indians" under s 91(24)?

- In 1939, SCC issued *Reference whether "Indians" includes "Eskimo",* to resolve dispute between Quebec and federal government over level of government responsible for Inuit in northern Quebec
- In early 1930s fur prices collapsed and caribou were scarce leading to wide-spread starvation for Inuit in Labrador, Nunavik, and elsewhere across Arctic

- Federal government had briefly recognized Inuit in the *Indian Act* before transferring authority to the NWT
- Canada provided relief to Inuit across country from 1930 to 192 but sought reimbursement from QB for its share; QB sought judicial reference to challenge this expense
- SCC ruled Inuit were "Indians" for purposes of s 91(24) based on various historic references to Inuit as an "Indian tribe" in documents from 1760 up to Confederation in 1867
- Canada first sought appeal to Privy Council but dropped it with onset of WWII; Canada considered returning Inuit to *Indian Act* or creating specific Act to address Inuit but ultimately did neither and had no comprehensive Inuit policy
- In fact, the 1951 amendment to *Indian Act* stated that any references to "Indian" in Act did not include "Eskimos"
- Inuit also gained right to vote in 1950 whereas First Nations people did not receive this same civil right until 1960

Do Metis Fall under s 91(24)?

- Metis have struggled for recognition as "Indians" to share in legal protections only available to First Nations
    - Ex. ***R v Blais***: SCC rejected Metis man's claim that Metis hunting protected under MB's NRTA
        - Blais convicted of hunting deer out of season on unoccupied Crown land
        - Rather than arguing complex s 35 right claim with extensive historic evidence tracing existence and rights of Metis collective from pre-Crown control up to present day- Blais argued for hunting rights under NRTA
        - NRTA protects continuing right of "Indians" to hunt, trap & fish for food on unoccupied Crown lands (simpler route to desired goal)
        - MBQB, MBCA, and SCC agreed historic evidence suggested "Indians" in context to NRTA did not include Metis
        - Metis treated as different group from Indians in MB for purposes of delineating rights and protections
    - Terms "Indian" and "half-breed" used to refer to separate and distinguishable groups from mid-1800s through period in which MRTA was enacted and negotiated – difference was confirmed by NRTA reference to "Indian Reserves"
    - While NRTAs in AB, SK, and MB make it unnecessary for First Nations to prove harvesting rights to hunt, trap, and fish ia historical evidence, Metis left with *Powley* test that was also articulated by SCC in 2003.

Daniels v Canada

- Metis successful in lobbying for inclusion within definition of 'Aboriginal peoples" in s 35(2) of *Constitution Act, 1982*

- BUT not covered by *Indian Act* and no special comprehensive policy regime, either provincial or federally, to provide for issues that courts have generally not treated as being "rights-related" such as health care or social services
- *Daniels* sought to clarify this in manner analogous to the 1939 reference on whether Inuit constitute "Indians" for purposes of s 91(24)
- Sought declarations that: 1) Metis and Non-Status Indians= "Indians" under s 91(24); 2) federal Crown owes fiduciary duty to Metis and Non-Status Indians; and 3) Metis and Non-Status Indians are owed the duty to consult and negotiate
- FC held "Indians" under s 91(24) includes all Indigenous peoples within Canada but declined to grant the 2nd and 3rd declarations that were sought
- FCA narrowed scope of 1t declaration and held only Metis who meet *Powley* criteria fall in s 91(24); and Non-Status Indians need case-by-case analysis
- Appellants, including the Congress of Aboriginal Peoples, sought to restore 1st declaration's broader scope AND sought 2nd and 3rd declaration again. The Crown cross-appealed against the entire case and the Metis who meet the *Powley* test
- SCC decision largely restored justice Phelan's decision for FCF, making Metis under s 91(24) broader than *Powley*
- SCC found declaratory relief has practical utility as both federal and provincial governments had denied having legislative authority over Non-Status "Indians" and Metis, with federal and provincial governments refusing to assume legislative authority over either group based on alleged lack of constituional capacity
- This resulted in "these Indigenous communities being in a jurisdictional wasteland with significant and obvious disadvantaging consequences
- Ending jurisdictional "tug-of-war" had undeniable salutary benefit in terms of clarifying who these groups could turn to for policy redress with respect to policy gaps they face; they should know who to lobby first and foremost
- SCC: no consensus on who is Metis or Non-Status- but no need
- Cultural and ethnic labels do not lend themselves to neat boundaries
- Metis can refer to descendants from Red River Settlement or can be used as "general term for anyone with mixed European and Aboriginal heritage" with some "mixed-ancestry communities" identifying as Metis and others as Indian
- Definitional contours of 'Non-Status Indian' also imprecise as could refer to individuals who no longer have status under *Indian Act* or those who have never been recognized as "Indians" by federal government in the first place
- Rather than resolving definitional ambiguity, the SCC said that s 91(24) should include all Indigenous peoples, including Non-Status Indians and Metis
- Some Metis highly critical of *Daniels* for 'racializing' Metis and adding fuel to the fire of disputes between the Metis National Council and the Metis Federation, while many individuals self-identifying as Metis who do not meet *Powley* definition celebrate it

- *Powley* and s 35 directed at question of collective rights but 91(24) has broader purpose re: "federal government's relationship with Canada's Aboriginal peoples" and federal government's protective authority extends to all those alienated from their communities.

Metis Rights

- Aboriginal rights refer to the legal rights that Aboriginal peoples continue to hold under Canadian law by virtue of their customs, practices, traditions, and laws that pre-date European colonization.
- **Metis rights are modern rights sourced in Metis cultures prior to effective European control.**
- The Metis are one of the three main groups of Aboriginals peoples with constitutionally recognized and protected rights in Canada.
- Metis rights are generally treated no differently than any other Aboriginal peoples' rights.
- However, some unique issues arise due to the implications of the mixed ancestry of the Metis, who trace their origins to both European and First Nations lineages, or in the case of the Labrador Metis, European and Inuit lineages. (*Newfoundland and Labrador v Labrador Metis Nation*)
- By virtue of this mixed ancestry, Metis cultures are by definition post-contact cultures (*R v Powley*)
- Whereas the Aboriginal rights held by First Nations or Inuit will be defined by the pre-contact practices, customs, traditions, and laws, of their ancestors, the Aboriginal rights of the Metis are defined based on their ancestors' practices, customs, traditions and law "prior to the time of effective European control" over their traditional territories.

Metis Identity Issues

- Courts recognize the rights of many but not all self-identified Metis peoples
- The SC has concluded that there are multiple Metis peoples in Canada, each comprised of a distinctive community of individuals with mixed ancestry that have developed their own customs, way of life, and recognizable group identity separate from their First Nations or Inuit and European forebears.
- However, not all individuals with mixed Indigenous and European ancestry can claim the benefit of Aboriginal rights as Metis
- Only Metis communities with a distinctive collective identity, living together in the same geographic area and sharing a common way of life can claim sigh rights
- Only Metis communities that emerged with these characteristics prior to "effective European control" over their traditional territory will have constitutionally recognized Aboriginal rights.

- Canadian courts have acknowledged the existence of distinctive, Aboriginal rights-holding Métis communities in Ontario (ex *Ibid*), Manitoba (ex *R v Goodon*), and Saskatchewan (ex *R v Laviolette*).
- On the other hand, Canadian courts have so far rejected claims to the existence of Aboriginal rights-holding Métis communities in Quebec (ex *Québec c Corneau*), New Brunswick (ex *R v Castonguay & Faucher*), Nova Scotia (ex *R v Babin*) and British Columbia (ex *R v Willison*).

Metis Settlements

- Judicial construction of Metis peoples' legal identity especially re Metis Settlements of AB
- (1938) AB established a land base for Metis and non-status Indians through the *Metis Population Betterment Act* (1942).
- After the Red River (1869) and Northwest (including Batoche) Resistances (1885) Metis persons moved on west and north to preserve their communities.
- As far back as 1876, Indigenous women who married non-Indigenous men (and the children of these marriages) lost *Indian Act* status and could not reside on reserves.
- What ended up happening to these Non-Status Indians persons was to reside on the road allowances, usually near their former reserves. The *Metis Population Betterment Act* was the government's response to the "jurisdictional wasteland" caused by Parliament's inaction and to the impoverishment of Metis and non-status Indians within Alberta's boundaries
- The Métis settlements for the most part includes land that can be used for agricultural purposes, but some northern lands are more heavily wooded. Some have oil and gas resources within a settlement, which factors in greatly the politics of that settlement.
- The *Metis Settlements Act* is provincial so it does challenge federal exclusive jurisdiction over Indians, which now includes the Métis and Non-Status Indians (*Gift Lake Métis Settlement v Alberta (Aboriginal Relations),* 2019 ABCA)
- Metis title cannot be claimed for Metis Settlements because they originated after effective control (*R v Powley*)
- In the 1960s, a civil action was initiated by the Metis settlements to oppose the elimination of their settlements, an action undertaken by AB for the purpose of acquiring exclusive rights to oil and gas resources located on the settlements.
- The Metis Settlements Appeal Tribunal has jurisdiction to hear the Metis members matters in a Settlement, especially in relation to the land

Cunningham v Alberta (Metis Settlements Land Registrar)

- The *Metis Settlements Act* establishes membership requirements for the purpose of establishing and maintaining a Metis land base
- Although unfortunate, Cunningham is not eligible to have Indian status and be a member of the Peavine Metis Settlement (aka double dipping)

- Mr. Cunninghmam spent almost his entire life on the Peavine Metis Settlement, including having a home and raising a family.
- However, he applied for Indian status in 1988. Although immediately regretting the decision, he was unable to get his Indian status revoked.
- Cunningham requested a judicial review of a 2018 decision of the Registrar of the Metis Settlements Land Registry, alas the appeal here was dismissed. The reasons for this decision is the conflict of Mr. Cunnigham's Indian status membership made 27 years ago.
- The Registrar did confirm that when the Peavine Metis Settlement approved Cunnigham's application for membership in 1991, the council acted contrary to s 78(2)© of the *Metis Settlements Act* because Cunningham was ineligible to become a member under s 75.
- The *Métis Settlement Act* establishes membership requirements for Métis Settlements for the purpose of establishing a Métis land base, as reflected in the Membership List maintained and updated by the Registrar.
- The legislation was held to be constitutional by the Supreme Court of Canada (*Alberta (AAND) v Cunningham*, [2011] 2 SCR 670).
- The *Métis Settlements Act* does not establish eligibility or membership criteria for other purposes (*L'Hirondelle v Alberta (Minister of Sustainable Resource Development)*, 2013 ABCA 12).
- The problem is that the different existing legislative schemes exclude an Indian, except for certain exceptions which are not applicable to Cunningham, from membership in a Métis settlement (*Gift Lake Métis Settlement v Alberta (Aboriginal Relations)*, 2019 ABCA 134).
- The Registrar is neither required to address each and every piece of evidence nor to address each and every aspect of Cunningham's history and relationship with the Peavine Métis Settlement.

NEGOTIATING WITH THE CROWN

- The **honour of Crown** is an unwritten constituional principle that aims to reconcile the pre-colonial sovereignty of Indigenous peoples with the Crown's assertion of sovereignty over them and *de facto* control of lands and resources formerly in their control (*Haida*)
- The Crown cannot passively wait for Indigenous people to prove the existence of constitutionally protected rights once a claim is being seriously pursued, instead, they have a duty to negotiate the content and scope of those rights, and obligation placed on them by the HoC (*Haida*)
- The HOC requires potential rights embedded in Aboriginal rights claims to be "determined, recognized, and respected" and that "this, in turn, requires the Crown, acting honourably, to participate in processes and negotiation" (*Haida*)

Three propositions:

1. Consultation is not negotiation
2. Alberta's ongoing failure to negotiate Metis consultation and harvesting policies with the Metis Nation beaches the HoC
3. Political disagreements between constituents of the Metis Nation should not be used to unjustly end negotiations with the Metis Nation.

Historic Context

- "by 1980 the Metis were firmly established across the West and South into what was to become the US" (*Pockington*)
- "the Metis population – which, in 1870, compromised 85 percent of the population of what is now MB" (*MMF*)
- "Settlers began pouring int the region, displacing the Metis social and political control. This led to the resistance and conflict" (*MMF*)
- Red River "Resistance" of 1870 and "Louis Riel Rebellion" of 1885 - "Metis were political [and military] forces to be reckoned with" (*Pockington,* p.4).
- "Red River Metis migrated after 1870 to all parts of the area that was to become Alberta, but especially to the central and northern regions, there to join Metis who had migrated to the area much earlier in the century" (*Pockington*, p.5).
- "[B]y 1880 the last of the great buffalo herds had been slaughtered" (*Pockington*, p.5).
- "At the end of the nineteenth century, most of the Metis were living in scattered bands [sic], landless, disease ridden, and without hope of pursuing their traditional manner of life. The circumstances of the Alberta Metis were especially grim in the central and north-central regions … in the central regions [of Alberta] game was scarce, prohibitively expensive fishing licences were required, and white settlement was spreading remorselessly. The majority of Metis were reduced to squatting [sic] on the fringes of Indian reserves and white settlements and on **road allowances**" (*Pockington,* p.7).

Scrip

- To resolve the conflict and assure peaceful annexation of the territory, the Canadian government entered into negotiations with representatives of the Metis-led provisional government of the territory. The result was the *Manitoba Act*, which made MB a province of Canada" (*MMF*)
- "… as a solemn constitutional obligation to the Métis people of Manitoba aimed at reconciling their Aboriginal interests with sovereignty, it engaged the honour of the Crown. This required the government to act with diligence in pursuit of the fulfillment of the promise… Canada failed to implement s.31 as required ... " (*MMF*).

What is now Alberta?

- In 1930, land and natural resources transferred to provinces under *Natural Resources Transfer Agreement*, and land was opened up by the province for settlement. 1930s Depression was terrible.

- In 1932, the Métis Association of Alberta (MAA) was successful in lobbying the provincial government to establish a royal commission (the Ewing Commission). The Commission refused to consider the failure of Scrip, ignored Métis not in poverty and shunned any solutions based on Métis peoplehood (*MAA*).
- Finding the Métis destitute and constitutionally unable to keep up with the demands of modern life thrust upon them by the influx of white settlers [sic], the commission deemed that they had a right to "look to the white man… for help." The cheapest and most effective answer was to transition Métis to faming colonies (*Ewing).*
- In 1938, the province passed the *Metis Population Betterment Act, 1938.* The Act gave effect to the *Ewing Commission* report, and allowed the government to set aside land as a form of welfare program where it was in the "public interests" (*O'Byrne*).
- Settlements were chosen by the "*Buck Commission",* which did include two MAA executives (*MAA*).
- While the *Act*'s preamble spoke of "conferences and negotiations" with "representatives of the [Mé]tis population" on their establishment, there is little evidence this occurred (*O'Byrne*).
- Of the 12 Parcels that were turned into Metis Colonies (later "Settlements) , 4 were later rescinded.
- Disappointed with the paternalistic and limited approach of the *Metis Population Betterment Act, 1938,* including its lack of a rights-based approach, the limited role created for the MAA and the lack of autonomy for the settlements from government, the MAA pulled back politically (*O'Byrne* citing *Bell and Robinson*).
- The MAA reinvigorated its lobbying efforts in the 1960s – leading to 1984 McEwan Report, which recognized that the land has "always been important to the Métis" (*O'Byrne*).
- In 1989, the Federation of Metis Settlement Association (now the Metis Settlements General Council (MSGC)) and the GoA agreed to a political accord which led to several pieces of legislation aimed at increasing local autonomy of the settlements and quieting a claim against Alberta over mismanagement of natural resource revenues held in trust (*O'Byrne*).
- The *Constitution of Alberta Amendment Act* recognizes the Métis were present in the province before it was established, that it is desirable for the settlement lands to be available to preserve and enhance Métis culture and identity and enable the Métis to attain self-government under the laws of Alberta.
- Title was granted to the Metis Settlements General Council (MSGC) – 1.25 million acres.
- The *Metis Settlements Accord Implementation Act* indemnifies the GoA of present or future actions in law or equity for acts relating to the establishment of the settlements.
- MSGC is now in self-government talks with Canada (Population of 5632 in 2018)
- Since 1928, the Métis Nation of Alberta (MNA) (formerly MAA) has "governed the Métis within Alberta"

- MNA Mandate: “To be a representative voice on behalf of Métis people within Alberta … promote … the pursuit of self-determination … “
- Membership: 47,000 (of 114,000 who identify as Métis in AB)

Natural Resource Transfer Agreement

- *R v Badger*: NRTA did not extinguish treaty 8 right to hunt for food. Hunting for food was protected and expanded. Justified infringement test is *Sparrow*
- *R v Horseman*:
    - NRTA extinguished and replaced treaty 8 – must abide by the *Wildlife Act*
    - Original treaty 8 included hunting for commercial purposes
    - Quid pro quo- lost commercial right but area of hunting expanded, means expanded and no limits to season or type of game.
    - Even if not palatable to unilaterally extinguish a right today, it was withing government power.

What is a Metis Community for the Purposes of Metis Rights in Alberta?

R v Powley

- First judicially imposed definition of Metis identity
- Test for whether an individual has Metis rights:
    1) Identify as Metis
    2) Ancestral connection to historic community,
    3) Accepted by contemporary community in same geographic area.
- Metis community is a group of Metis with 1) a distinctive collective identify, 2) living together in the same geographic area, and 3) sharing a common way of life/
- Evidence must include proof of shared customs, traditions, and collective identity. Some evidence of continuity and stability between historic and contemporary community is also required, keeping in mind Metis communities historically lacked formal political structures.
- Hunting and fishing integral to distinct character of historic and contemporary regional community in and around.
- The future definitions of a Métis individual or community for the purposes of s.35, must be, in part, negotiated between Métis and the Crown.
- “long term, a combination of negotiations and judicial settlement will more clearly define the contours of the Métis right to hunt” (para 50).
- SCC emphasized it was not purporting to “set down a definition of who is Métis for the purposes of asserting a claim to s.35.” Instead, it identified “the important components of a future definition” (para 30).
- SCC agree government “cannot simply sit on its hand and then defend its inaction because the nature of the right or the identity of the bearers of the right is uncertain” governemna have an obligation to make serious effort to deal with the question of Metis rights.

- The SCC declined to decide if the community it recognized in and around Sault Ste. Marie was also a people.
- It also declined to decide if the much larger rights-bearing Métis community that was found to exist by the trail judge (said to extend hundreds of kilometers in every direction from Sault Ste. Marie and consist of nearly twenty thousand square kilometers) was a people.

Regional vs Site-Specific Metis Communities

- In *Laviolette*, t the trial judge rejected that Green Lake and Meadow lake were separate site-specific communities. Instead, they found a "regional" rights bearing community throughout northwest Saskatchewan that extend to Lac La Biche in Alberta (paras 23-24, 27-30). The Métis had a regional unity, supported by trade and various institutions (such as boat brigades and Red River cart trails) and kinship ties as well as a growing sense of national identity (paras 24, 34).
- "[d]id the historic Métis community include the [in the Cypress Hills and environs] area within its ancestral land or traditional hunting territory [before effective European control in 1874]? In this case, the answer is no" (*Hirsekorn*, para 8).
- "What is not clear … is whether there was essentially one regional Métis community across the prairies at this point in history … or more than one community encompassing slightly smaller regions (*Hiresekorn*, para 63). "I conclude that the historical rights bearing community of the plains Métis are best considered as regional in nature, as opposed to settlement-based" (*Hirsekorn*, para 63).
- "A community of Métis people has resided in and around Fort Chipewyan since its inception [in 1788]" (*Fort Chip,* para 235).
- While a regional community was recognized in *Laviolette*, a "new legal fiction" was created. "The regional community could have just as easily been expanded [to a much larger area]" (*Madden*, p.211).
- "These "communities" … often prove to have arbitrary boundaries that fail to recognize how Métis populations overlap and are indivisible" (*Madden*, p.211).
- "[R]ecognized regional Métis communities are better than a settlement-by-settlement approach … [and are] sometimes proposed by the Métis themselves as calculated decision to secure legal victories" (*Ibid*, 213).
- "These constructs are often imperfect, and rarely align with Indigenous peoples' own laws or how our people may choose to exercise their inherent jurisdiction and rights if free from the constructs and constraints of the Canadian legal system" (*Ibid*, 213).
- "I often do not have the luxury of sacrificing progress in the name of perfection when our own people are being charged and harassed for exercising their constitutionally-protected rights, when resource development projects threaten Indigenous lands, culture, and way of life or when leaders want to see tangible results for their people" (*Ibid*, 213).

Recognizing Metis Rights in AB

1972 – MNA Regions Created

1987 – MNA/Alberta Framework Agreement (Core Funding)

1990 – *Constitution of Alberta Amendment Act,* 1990

2000 – Strengthening Relationships (Alberta Recognizes Indigenous People have Inherent Rights)

2004 – Interim Métis Harvesting Policy

2007 – First Nations Consultation Policy / Métis Credible Assertion Policy (Powley Test)

2007 – Métis Harvesting in Alberta Policy (160km circles around 8 Settlements and 17 "communities")

2008 – MNA/Alberta 10-Year Framework Agreement

2018 – Métis Harvesting in Alberta Policy Update & side implementation agreements with MNA and MSGC

July 2018 – Cabinet agrees-in-principle to new standards for Métis communities – combines *Powley* and *Fort Chip* into 4-part test – requires one representative per community (*Enge*?), makes information requirements easier to meet, aligns harvesting and consultation policies

Nov/Dec 2018 – GoA publicly releases draft Métis Consultation Policy

2019 – MNA/Canada *Métis Government Recognition and Self-Government Agreement* (waiting on constitution vote and legislation)

2019 – MSGC/Canada Framework Agreement for Advancing Reconciliation

2019 – AB provides MNA Regions $1.69 million in capacity funding to begin implementing draft consultation policy

2019 – UCP Government unilaterally cancels negotiations on Métis Consultation Policy and and reverts to relying on existing Credible Assertion Policy over concerns that a new policy is not a priority for industry and concerns from MNA locals and "other Métis organizations" that MNA is not representative of their communities

2020 – Fort McKay Community Association has Credible Assertion of a rights-bearing Métis community recognized by Alberta

2020 – Six former MNA Locals break form MNA and form Alberta Métis Federation

2022 – *Métis Nation of Alberta Association v Alberta (Indigenous Relations),* 2022 ABQB 6 – Court finds:

- duty to consult MNA on Métis consultation policy was "low" – no "self-government" yet
- reasonable to rely on existing Credible Assertion Policy in 2019
- declaratory relief of a duty to negotiate in good faith with MNA not available because MNA is seeking pronouncement on validity of its contested claim to be voice of Métis in Alberta

2022 – Lac St. Anne Métis Community Association has Credible Assertion of a rights-bearing Métis community recognized by Alberta

INDIGENOUS PEOPLES AND THE *CHARTER*

- *R v Secretary of State for Foreign and Commonwealth Affairs*: Denning held that obligations of UK Crown transferred to Crown in right of Canada and binding obligations could only be enforced in Canada courts against Canadian Crown.

Section 91(24) & Interjurisdictional Immunity (IJI)

- Invoked to shelter FN rights, lands, and governance from provincial regulation and authority.

IJI "is engaged when **legislation from one level of government impairs the core competence** of a matter, or a vital aspect of an undertaking whose activities falls within the exclusive jurisdiction of the other level of government- The effects of the doctrine is to cloak the non-enacting jurisdiction with immunity from the enacting jurisdiction's legislation by reading down the legislation to render it inapplicable to the non-enacting jurisdiction or the activities of the undertaking" (*Vancouver International Airport Authority v BC*)

- *Canadian Western Bank v AB*: "constituional doctrine must facilitate, not undermine what this Court has called 'co-operative federalism'" = courts must favour overlap
- *Sechelt Indian Band v BC*: Sechelt has a self-government agreement with an enabling Act to transform reserve land into fee simple, which in turn allows for registration of interests under the BC Torrens land title system
  - Sechelt can 'occupy' the field of residental tenancy via self-government agreement by enacting its own law but had not yet done so.
  - If land leased under the *Indian Act*, terms for rent increase is likely governed under the head lease with the Minister in which the terms of the *Indian Act* likely conflict with the BC residential mobile home tenancy law
  - Argued that BC tenancy law applied to fee simple lands, but BCCA found that they remained "lands reserved for the Indians" for s 91(24) purposes, as set out in s 31 of Sechelt Indian Band Self-Government Act so **interjurisdictional immunity**
- *Derrickson v Derrickson*

- W applied under provincial family law for 50% interest in properties on reserve held by H under Certificates of Possession or for compensation in lieu of division.
  - SCC held that BC *Family Relations Act* must be read down to preserve their constitutionality in relation to lands on reserves
  - Federal paramountcy prevents land-related orders because of *Indian Act* provisions.
  - FRA directly conflicts with the *Indian Act*- only federal government can own reserve lands
  - Compensatory order is okay when no division of real property
  - Notes: this case disregards violence against Indigenous women and the realities faced by them.
- *Cardinal v AB*
  - Reserves are not federal enclaves in the middle of provincial jurisdiction
  - Provincial legislation is the same as anywhere else as long as within s 92 authority.
- *Dick v R*: Provincial law automatically applies to "Indians" if it does not touch their "Indianness"
- *Daniels*
  - Contrary to its position, federal Crown assumed it could legislate over Metis as "Indians"
    - Banning alcohol
    - Residential schools
    - 1980 document expressing confidence in constituional authority to legislature over Metis
  - Jurisprudence supports s 91(24) including the Metis

Jordan's Principle

- Jordan's Principle & *First Nations Child and Family Caring Society v Canada* litigation:
  - Each province and territory has its own child and family services law and standards that provides services within its jurisdiction, but on reserve there are complex agreements in place between Indigenous Services Canada, provinces/territories, and various Indigenous agencies.
- INAC funds Indigenous agencies and/or provincial/territorial governments to provide child and family services on reserve
- Cindy Blackstock led human rights complaint, alleging ISC discriminates on basis of race and/or national or ethnic origin by providing inequitable and insufficient funding on reserve
- After lengthy proceedings, initial rejection followed by judicial review and ISC reprisal against Blackstock, ultimately complaint was found to be made out

- Blackstock awarded maximum HR damages of $25,000.00 in which she donated every cent to FNCFCS; many more decisions since then
- Jordan River Anderson, young boy from Norway House Cree Nation in Manitoba, died in 2005 after denial of opportunity to live outside hospital setting due to jurisdictional disputes
- "Jordan's Principle" was unanimously adopted in motion of House of Commons in 2007 as a child-first principle: if government service is available to all other children, government or department of first contact must pay for service and then seek reimbursement

Individual vs Collective Rights: Lifeworlds Colliding?

- *Thomas v Norris*:
  - Thomas, a 35 year-old member of Lyackson First Nation living in Duncan, BC, and working as longshoreman was forcibly seized and taken from his friend's home
  - Thomas was transported to Somenos Long House of Cowichan Nation nearby and was "falsely imprisoned" in the house for 4 days and "forced to go through the initation ceremonies, or traditions, required in order to become a spirit dancer of the House"
  - Thomas sued members of Cowichan who initiated him for assault, battery and wrongful confinement
  - He allegedly suffered injuries requiring hospitalization due in part to a pre-existing ulcer
  - Court held that civil rights, including inviolability of the person, superseded any Aboriginal rights and if this was traditional right, it was only the residue of tradition after civil rights subtracted
- *Apsit v Manitoba Human Rights Commission*
  - Association of wild rice growers in MB sought to wuash the Human Rights Commission's approval of special "affirmative action" program
  - This program granted "bands, treaty Indians, and all persons of Native ancestry" the option of firt refusal on licenses for growing and harvesting wild rice
  - MBQB found this to be on its face inconsisten with s 15(1) of the *Charter* by favouring Indigenous people over other residents of MB
  - But converted the application for judicial review into an action so that a trial could address whether the Human Rights Commission could demonstrate that the plan for favoruing Indigenous wild rice growers fits within the exception for ameliorative programing that was carved out through section 15(2)

Section 15 of *Charter*

- Section 15(1): "Every individual is equal before and under the law and has the right to the equal protection 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."

- Section 15(2): "Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions or disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."

Section 15 & Indigenous Peoples

- *Lovelace v Ontario*:
    - The ON government and First Nations entered into negotiations with the goal of partnering in development of the first reserve-based commercial casino, Casino Rama, in ON
    - The casino's proceeds were to be only distributed to the First Nations registered under the *Indian Act*
    - Unrecognized groups sought to challenge the project as contrary to s 15(1), succeeding at first but with this decision overturned on appeal and that appeal was upheld by the SCC
    - SCC found that s 15(1) has dual purposes of preventing discrimination and ameliorating conditions of disadvantage (substantive equality); confirmed s 15(1) applies to ameliorative programs; exclusion of Metis communities and unrecognized First Nations = constituional because it targeted their different needs
    - **Issue:** Is the exclusion of non-band Indigenous communities a violation of the appellant's equality rights under s 15? **NO.**
        - Although the appellant and respondent were from Indigenous communities that have identical histories of discrimination, poverty, and systemic disadvantage, a contextual analysis shows an "almost precise correspondence" between the casino project and the needs and circumstances of bands.
    - S 15(2) Analysis shows clear ameliorative purpose in Casino project, supporting bands to achieve self-government and self-reliance.
    - Redress historical disadvantage and enhance dignity and recognition of bands in Canadian society AND ensures compliance with strict regulations
    - So, it is complaint with s 15(1) of the *Charter* and exclusion does not undermine purpose because it is NOT BASED ON A MISCONCEPTION of their actual needs, capacities, and circumstances.
- *R v Kapp*
    - Aboriginal Fisheries Strategy created after *Sparrow* decision included 3 pilot sales fisheries where only First Nations could fish commercially within a 24 hour period

- Non-Indigenous commercial fishers against band members given exclusive fishing license. They argued this was discrimination based on race.
- **Issue:** Can s 15(2) of the *Charter* operate independently of s 15(1) to protect ameliorative programs from claims of discrimination?
- **Judicial and factual history-**
  - Fishing central part of the culture
  - *Sparrow, Van der Peet* definitely a DTC, but no commercial right to fish
  - Government decided important to negotiate an agreement to ameliorate economic disadvantage and increase participation in commercial fishing by Indigenous groups.
- Substantive equality rather than formal equality – an inherently comparative concept.
- Both s 15(1) and s 15(2) central purpose is to combat discrimination:
  1) Prevents governments from making distinctions that perpetuate group disadvantage and prejudice, or impose disadvantage on the basis of stereotypes; and
  2) Focus on enabling governments to combat existing discrimination through affirmative actions.
- Distinguished between difference and discrimination, **not every distinction is discriminatory.**
- How to interpret relationship between (1) and (2)? Interpretive aid? Exception?
  - Third option- if impugned program meets the criteria of s 15(2), unnecessary to conduct a s 15(1) analysis at all – as these should be read as working together to promote substantive equality
  - Section 15(1) cannot be read in a way that finds an ameliorative program aimed at combatting disadvantage to be discriminatory.
  - **If the government establishes the program is ameliorative, the appellants claim of discrimination must fail.**
- Test: A program does not violate s 15 equality guarantee if the government can demonstrate that:
  1) The program has an ameliorative or remedial purpose, and:
     - Look at purpose and effect, not the actual effect.
     - Need not be the sole purpose
     - Can't be designed to restrict or punish behaviour.
  2) The program targets a disadvantaged group identified by enumerated or analogous grounds
     - Disadvantaged "connotes vulnerability, prejudice, and negative social characterizations."
     - Must be specified and identifiable disadvantaged group, not broad social assistance programs.

        - Not all members of group need to be disadvantaged if group as whole is.
    - Application:
        - Crown has established a credible ameliorative purpose
        - Correlates to actual economic and social disadvantage
        - "The disadvantage of Aboriginal people is indisputable"
    - The majority held that the Crown had established valid ameliorative purpose under pilot sales fisheries
    - Bastarache J, dissenting, said it should be decided under s 25
        - A shield from *Charter* rights abrogating or derogation from communal Aboriginal rights. He said s 25 prevents the *Charter* from diminishing collective rights and freedoms including more than just s 35 rights.
- Very little case aw on s 25 or even s 15(2)
- Case law on s 15(1) has invoked concept of substantive equality to define unconstitutional discrimination narrowly so fear of "reverse discrimination" from 1980s has been muted since then.
- *Cobiere v Canada*:
    - Group of non-resident members of Batchewana Indian Band challenged s 77(1) of *Indian Act*, which required Band members to be "ordinarily resident" on reserve to vote in Band elections
    - Despite Borrows and Rotman not including it in the latest edition of their text, *Cobiere* is still good law. But it is important to note that it was about the *Indian Act*, not custom codes.
    - Where First Nations choose to discriminate against off-reserve members, courts may no be more willing to see a role for s 15(2), as seen in last year's case *Cikson v Vuntut Gwitchin First Nation*, on a Gwich'in law forcing the chief to move to Old Crow
    - But for First Nations hat follow *Indian Act* band membership, the SCC in *Corbiere*: "Aboriginality-residence (off-serve band member status" is a unique and immutable characteristic that amounts to analogous ground under s 15.
- Off-reserve members have important interests in Band governance and the denial of the right to vote amounts to the perpetuation of historic disadvantage and treats them as less worthy because they live off-reserve
- Mixed case law on how this applies to First Nations' own laws (*Linklater v Thunderchild,* 2020 FC 1065)
- *Taypotat v Kakewistahaw First Nation* (2015) – court upholds band election law that says chief and council must have a grade 12 education - not perpetuating arbitrary disadvantage given whole of the code, which includes residency requirements.
- *Alberta v Cunningham*, [2011] 2 SCR 670: member of the Métis community in Alberta recognized under *Metis Settlements Act* (MSA) opted to register as status Indian to obtain medical benefits under *Indian Act*

- However, MSA provided that voluntary registration under *Indian Act* precludes membership in Métis Settlement under MSA
- Court upholds exclusion of status Indians from membership provisions of the Métis settlement because clearly an ameliorative purpose, like *Kapp* and *Lovelace*.
- Had membership revoked; argued MSA provision = unconstitutional under s 15(1)
- SCC found MSA = ameliorative program protected by s 15(2) of Charter, which allows Crown to assist one group without being paralyzed by necessity to assist all
- MSA directed at enhancement and preservation of identity, culture and self-government of Métis by establishing Métis land base in Alberta

- *CCAS of Hamilton v GH*, 2016 ONSC 6287: A17 month old boy was apprehended at birth by Catholic Children's Aid Society and has been in foster care since then
  - Society commenced protection application to obtain Crown wardship without access to the boy's parents
  - The boy's father argued his son is Métis and should benefit from same provisions allowing special protections for "Native" children under *Child & Family Services Act*, but did not meet statutory requirements
  - The boy's father challenged under-inclusivity via s 15(1)
  - Court considered unique circumstances of Metis, including unique disadvantages:
    - Exclusion from *Indian Act*
    - Vulnerability to assimilation
    - Compromised ability to protect relationship to homelands
    - Section 15(1) found to have been infringed
- *Dickson v Vuntut Gwitchin*:
  - Member of Vuntut Gwitchin First Nation who lives in Whitehorse sought declaration that the residency requirement in FN's Constitution was inconsistent with s 15(1) of *Charter*
  - YKSC held that *Charter* applies to the FN's Constitution and laws
  - *Charter* rights and the right to self-government must be reconciled.
  - YKSC declined to find residency requirement itself breached *Charter* right to equality, but did not hold that the 14-day requirement for relocation to be severable breach of equality rights
  - In the alternative, YKSC held that s 25 provides space for the FN to protect, preserve, and promote identity of citizens through unique institutions, norms, and government practices.
- *Ktunaxa Nation v BC*:
  - Section 2a of the *Charter*

- **Issue:** A ski resort, will drive the Grizzly Bear Spirit from Qat'muk, this would remove the basis of their beliefs and render their practices futile.
- This claims falls outside the scope of s 21= the right to hold religious beliefs and the freedom to manifest them.
- Goes on to cite international law instruments to show how freedom of religion is conceived around the world
- Claimant must demonstrate:
  1) That they sincerely believe in a practice or belief that has a nexus with religion; and
  2) That the impugned state conduct interferes, in a manner that is non-trivial or non-insubstantial with their ability to act in accordance with that practice or belief.

- Finding: No dispute at to 1), but 2) is not met – not freedom to hold belief or manifest that belief, but to "protect the presence of the Grizzly Bear Spirit"
- This was a novel claim, and therefore the court declines the invitation to extend the scope of the right – does not protect the OBJECT of the belief - JUST freedom to believe, freedom to worship NOT spiritual focal point of worship.
- **Does not fall within the parameters of s 2a**
- SCC dismissed the appeal

Section 25 of *Charter*

The guarantee in this Charter of certain rights and freedoms shall not be construed as to abrogate or derogate from any [A]boriginal, treaty or other rights or freedoms that pertain to the [A]boriginal 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.

- Peter Hogg on s 25: "It is an interpretative provision, included to make clear that the *Charter* is not to be construed as derogating any Aboriginal, treaty or other rights or freedoms that pertain to the Aboriginal peoples of Canada. In the absence of s 25, it would perhaps have been arguable that rights attaching to groups defined by race were invalidated by s 15 (the equality clause) of the *Charter*"
- Section 35 was deliberately kept out of the *Charter* to avoid s 1
- Section 25 designed to insulate s 35 rights form the *Charter*, in particular equality.

Section 2(a) and Indigenous Peoples

- *Ktunaxa Nation v BC*: Argued ski resort breached freedom to religion.
  - Claimant must demonstrate:
    - Sincere belief with nexus to religion

        - Impugned state conduct interferes in a non-trivial manner
    - 2a does not protect the object of the belief

INDIAN ACT, IDENTITY AND BILL C-31

- Section 91(24) gives the federal government jurisdiction over Indians and lands reserved for Indians
- The historical analysis by the SCC in *Daniels* found this provision to be aimed:
  1. The fed taking over the British Crown's historic obligations to Indigenous peoples; and
  2. The feds consolidating the power they needed to expand the country westward into Indigenous territory with the railway and such.
- Since it sits on an equal footing with other heads of power, the tough question is: How to reconcile them all without the feds just using s 91(24) to displace all provincial heads of power with respect to Indigenous peoples?
- Traditionally, for on reserve issues the courts were strong on IJI and paramountcy so long as laws were land oriented, including even the matrimonial property law piece.
- While there was fuzziness about non-land issues, s 88 of the *Indian Act* provided a fallback to ensure provincial legislation had a backup justification if courts took too strong a view of s 91(24).
- Now the SCC has taken us to the opposite extreme as it is no longer clear what falls at the core of s 91(24) for the purposes of IJI post-*Tsilhqot'in* and *Grassy Narrows*.
    - We at least know s 35 rights do not.
    - Maybe still reserve land? But then how is it not a problem for Alberta to have Metis land legislation from an IJI perspective?
    - So IJI does not seem to be doing much work if any now. And more recently we've seen attacks on s 91(24) as a route to federal paramountcy, especially in the QBCA case on the federal CFS legislation.
    - Some courts are going even further in stripping s 91(24) of all content, such as the ABCA deciding it does not provide a basis for the federal impact assessment law because this would allow for overreach into the provincial sphere.
- So, what does s 91(24) do nowadays? Depending on what the Supreme Court of Canada decides in its appeals from those two references, maybe something still but based on the reasoning of the Quebec and Alberta Courts of Appeal, possibly not a whole lot.
    - At the very least, s 88 of the *Indian Act* is just vestigial now. But who knows what the latest configuration of the SCC will say on this.
    - This area of the law is a confusing mess.
- Cooperative federalism could – and perhaps should – help work out the differences here. But when provincial governments object to that, as seen in the AB and QB reference, the courts are forced to weigh in and try to draw jurisdictional lines.

- The QBCA was so disinclined to uphold the federal CFS legislation on the basis of s 91(24) that they suggested *Pamajewon* should be overturned to provide a self government basis for a First Nations' own CFS law.
- **Substantive equality** is the animating norm for s 15 of the *Charter* and human rights statues (*Fraser v Canada*)
  - In contrast to formal equality, substantive equality presumes pre-existing disadvantages need to be ameliorated and differences must be accommodated to avoid adverse treatment of protected groups.
  - Note: the inviolability of the individual supersedes any Aboriginal right
- Substantive equality emphasizes discriminatory effects or impacts, whether intentional or not, and it means recognizing that identical treatment may adversely impact members of protected groups.
- The disadvantages of Indigenous Peoples is uncontroversial
- The central purpose of both s 15(1) and (2) is to combat discrimination
- Distinguished between difference and discrimination, not every distinction is discriminatory

Indian Act Sex Discrimination in Canada

- The *Indian Act* has purposely skewed the fairness and distribution of Indian status to men and their descendants as opposed to women and their descendants
- Early definitions of an Indian was defined as "a male Indian, the wife of a male Indian, or the child of a male Indian"
- 1876-1985, Indian women were all if not near prevented from transferring their Indian status to their children.
- Transference of status was from a male parent. Indian women also lost status when they married a non-Indian.
- On the other hand, Indian men who married non-Indians kept their Indian status and even transferred status to their non-Indian wives.
- The *Indian Act* has been amended times and only partially removed sex discrimination from the status registration provisions. This is problematic because…
  - Exclusion from status prevents Indigenous women and their children to access federal programs and services intended for registered Indians, for ex. Post-secondary education and uninsured health benefits.
  - Result in the denial of Band membership and related benefits, including residing on reserve with family/community, access to on reserve education, housing, training, cultural programs, etc.
  - Denies their political voice: cannot run or vote for leadership positions.
  - Denies Indigenous identity- divided families and creates a significant barrier to accessing Elders, language speakers, and community ceremonies.

Background on "Lesser Status"

- Consequences of marital breakdown, on reserve lands governed by the *Indian Act*, prior to December 16, 2014:
    - A spouse could sell an on-reserve family home without the consent of the other spouse and keep all the profit
    - A spouse who holds the interest in the family home could bar the other spouse from their on-reserve family home
    - In the case of domestic violence, a court could not order a spouse to leave a family home situated on reserve, even on a temporary basis.

Derrickson v Derrickson

- Mrs. D claimed property rights as a spouse
- She asked the court to declare the she had a half interest in her husband's Certificates of Possession, by applying provincial matrimonial law
- SCC found that provincial law could not be applied to change the property interest Mr. Derrickson had to the land under the *Indian Act*
- Mrs. D alternatively requested a court order that would require her husband to pay her a sum of money equal to one-half of the value of the CP
- SCC made this order- payment of money did not change any individual property rights on reserve land

Paul v Paul

- Mrs P asked the court for an order granting her an "interim" order of exclusive possession of the family home
- SCC found that the provincial law could not be used to grant an order for interim possession of a matrimonial home situated on reserve lands

Legislative Gap

1. The division of powers between the federal and provincial governments meant that provincial/territorial laws could apply to matrimonial property on reserves but could not be used to change interests in real property on reserves (collective or individual)
2. The federal government has jurisdiction pursuant to s 91(24) of the Constitution in regards to "Indians and lands reserved for Indians", but there was no federal legislation addressing this matter
3. The jurisdiction of First Nations respecting matrimonial real property was not recognized by the federal government

Bill S-2: *Family Homes on Reserves and Matrimonial Rights or Interests Act*

- Legislation passed 2013
- Act is divided into two parts:
    - First Nation Law Making Mechanism (into effect 2013)
    - Provincial Federal Rules (into force 2014)

- 12-month period was set out to provide time for First Nations to develop their own laws before the federal law takes effect
- First Nation Jurisdiction to Establish Matrimonial Real Property Laws
- First Nations may establish their own matrimonial real property (MRP) laws
- Content and structure of these MRP laws requires only an agreement between the members of a First Nation and the First Nation government
- First Nation must gain support for the MRP law from members through a fair and democratic process
- Once approved, it will apply on the reserve lands of that First nation and the federal provisional rules will NOT APPLY
- Provisional Federal Rules: Right to Occupancy
  - Equal entitlement to occupancy of the family home until they cease to be spouses or common law partners
- Provisional Federal Rules: Emergency Protection Order
  - In cases of domestic violence or abuse, a court can bar a spouse or CL partner from the family home, for up to 90 days
- Provisional Federal Rules: Family Home
  - Court can grant a spouse or CL partner exclusive occupation of the family home for a specific period of time
  - Family home cannot be sold without the consent of both parties
  - Upon death, the surviving spouse or CL partner can continue living in the family home for up to 180 days, and can apply for half of the value of the matrimonial interests or rights as an alternative to inheriting the matrimonial real property from the deceased's estate.
- Provisional Federal Rules: Division of On-Reserve Matrimonial Interests or Rights
  - In the event of separation, divorce or death, each spouse or CL partner must share equally in the value of the family home and any other matrimonial interests or rights
  - Court may order the transfer of matrimonial interests and rights from one party to the other along with, or instead of, financial compensation
  - A court can enforce written agreements that set out the amount that each spouse or CL partner is entitled to receive
- Provisional Federal Rules: Representations to the Court
  - *Act* recognizes the diversity of values and practices among First Nations regarding individual interests in reserve lands
  - Provides for First Nations to be notified in regard to any proceeding under this *Act*, except in the case of emergency protection and confidentiality orders
  - Where collective interests in lands are engaged, the FN may make representations to the courts about the cultural, social and legal context relevant to the proceeding

This legislation DOES NOT:

- Allow non-Indians and non-member to gain permanent rights to reserve land
- Allow First Nation non-members to make money from the value on reserve land
- Allow the Minster of ISC or the department to have any role in reviewing, cancelling, disallowing, or altering First Nation laws.

Critiques of Bill S-2

- Does not address the complex socio-economic issues impacting First Nation families, ex. Housing shortages
- Does not provide enough time or resources for First Nations to create and implement their own laws
- Does not provide an effective way for community members in remote areas to access the courts to enforce the new rules
- Does not address the inadequacy or access to justice issues on many reserves

Canada (AG) v Lavell

- Ms. Corbiere, an Anishinaabe women from the Wikwemikong Unceded Indian Reserve in Ontario, married David Lavell in 1970, who is a non-Indigenous man. Because of s 12(1)(b) of the *Indian Act*, Cobiere Lavell lost her Indian status.
- Commonly referred to as the “marrying out” clause, Indian status women would also lose the ability to pass on their status to their children. Indian status men were not affected by this clause.
- Under section 12(1)(b), women who sought divorces from status husbands had their status revoked; only way a woman might regain status was to (re)marry a status man.
- Lavell filed a claim against the Crown that this in violated the 1960 Bill of Rights
- She lost at trial but won her appeal. At the SCC level, it was considered with the *R v Bedard* case in 1973, which had similar facts.
- Both women in the cases faced extreme resistance from their Indigenous communities. Even the AFN at the time said they were being “selfish and anti-Indian” for challenging s 12(1)(b).
- **Issue:** Is section 12(1)(b) of the *Indian Act* inoperative due to section 1(b) of the Canadian *Bill of Rights*?
    - That the *BoR* is not effective to render inoperative legislation, such as 12(1)(b) of the *Indian Act,* passed by the Parliament of Canada in discharge of its constituional function under s 91(24) of the *BNA Act*, to specify how and by whom Crown lands reserved for Indians are to be used.
    - That the *BoR* does not require federal legislation to be declared inoperative unless it offends against one of the rights specifically guaranteed by s 1, but where legislation is found to be discriminatory, this affords an added reason for rendering it ineffective; and

- That equality before the law under the *BoR* means equality of treatment in the enforcement and application of the laws of Canada before the law enforcement authorities and the ordinary courts of the land, and no such inequality is necessarily entailed in the construction and application of s 12(1)(b)
- **Result:** Unfortunately, the SCC overturned the FCA 1973 decision, as the *Bill of Rights*, did not invalidate the *Indian Act*.
- In 2018, she was honoured as a member of the Order of Canada for her unrelenting activism for Indigenous women and children.

Lovelace v Canada

- Sandra Lovelace, a Maliseet woman, took the state of Canada to the United Nations Human Rights Committee in 1981.
- This embarrassed Canada internationally, and with the three claims of Lavell, Beranrd, and Lovelace respectively, was enough to get s 12(1)(b) of the *Indian Act* impugned
- This set the foundation for Bill C-31

Background:

- Individual complaint made under the Optional Protocol to the International Covenant on Civil and Political Rights – of which Canada is a party to
- Violation of article:
  - 2(1): ... undertakes to respect and to ensure to all individuals ... the rights recognized ... without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status"
  - 3 [U]ndertake to ensure the equal right of men and women to the enjoyment of all civil and political rights ...
  - 23(1) and (4) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State; ... shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution...
  - 26 **All persons are equal before the law and are entitled without any discrimination to the equal protection of the law** ... law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination...
  - 27 In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.
- Article 27 most directly applicable to the complaint
- By being denied the legal right to reside on the reserve, Lovelace had been denied the right guaranteed by article 27 to **persons belonging to minorities to**

enjoy their own culture and to use their own language in community with members of their group

- Given Lovelace's situation, it does not seem denying her right to reside on the reserve is reasonable, or necessary to preserve the identity of the tribe.

Bill C-31

- Section 35 was amended in 1983 so that Aboriginal and treaty rights would be guaranteed regardless of gender under the law
- Following the decision and a series of Constituional conferences, the federal government acted to amend the *Indian Act*- Bill C-31

Status under Bill C-31

"Full" – Registered under 6(1)	Parent's Registration	6(1) = 6(1)	6(1) = 6(2)	6(2) = 6(2)
	Child Registered As:	6(1)	6(1)	6(1)
"Half" – Registered under 6(2)	Parent's Registration	6(1) = NS		
	Child Registered As:	6(2)		
"Non" – Not able to register as status	Parent's Registration	6(2) = NS	NS = NS	
	Child Registered As:	NS	NS	

McIvor Decision

- Sharon McIvor challenged the residual discrimination that persisted after Bill C-31 *Indian Act* amendments
- Argued that s 6 of the *Indian Act* was discriminatory and violated s 15(1) of the *Charter* because it treated the descendants of Indian women who married non-Indian men differently from the descendants of Indian men who married non-Indian women
- BCCA found s 6 of the *Indian Act* to be discriminatory
    - Ordered a judgement declaration ss 6(1)(a) and 6(1)(c) to be of no force and effect
    - Suspended the declaration for a 1 year period
    - Gave Canada 1 year to amend, which resulted in Bill C3 *Gender Equity in Indian Registration*.

Bill C-3

- Bill amended the provisions of the *Indian Act* found to be unconstitutional in *McIvor*
- Allows eligible grandchildren of women who lost status as a result of marrying non-Indian men to register as status Indians

Will Exclude:

- Grandchildren born prior to Septermb4, 1951 who are descendants of status woman who married out
- Descendants of Indian women who co-parented in common law unions with non-status men, and the illegitimate female children of male Indians
- Real issue is that the Federal government is unilaterally changing the definition of who is and who is not an "Indian"- all without the consent of the First Nations people

Therefore:

- Intended to strike a balance to grant Indian status for women who had "married out" and Indigenous people who lost status under the "double-mother rule" but qualified to be reinstated under B C-31
- Bill C-3 amendment to *Indian Act* registration sections flagged in *McIvor* still resulted in ongoing discrimination
- Courts only deal with what has been brought in front of them, so other provisions in the *Indian Act* pre-1985 that cause some Indigenous women and their children to still lose or have lost status.

Descheneaux

- Three women from Odanak First Nation challenged the *Indian Act* registration provisions and the limitations of Bill C-3 in addressing discrimination
- The discrimination before the Court was:
  - First cousins, depending on the grandparent's gender and if married a non-Indian before 1985
  - "Illegitimate" male and female siblings that were born between the *Indian Act's* 1951-1985 amendments.

Criticisms of *McIvor* and *Descheneauz*:

- Lots of people were unhappy with *McIvor* and *Descheneaux* decisions, as well as the reforms in 1985 to eliminate gender discrimination without any rule for "takebacksies" where non-Indigenous women gained full status. As controversial as this critique is, it is a classic case of liberalism vs Indigenous self determination.
- Another criticism is that despite how unjust it was to "bake" gender discrimination into the *Indian Act* pre-1985, these decisions are seen as allowing many people with no community connection and little blood quantum to get Indian status because of their ability to frame their claims around historic gender discrimination
- Whereas those born after 1985 are stuck with the second generation cut off that ruthlessly eliminates status after two generations of procreating with non-Indigenous people.
- This tension goes right back to the 1970's and it is one of the reasons why NWAC has often fought against AFN (formerly the Indian Brotherhood).
- AFN has been hardline on this being something for First Nations to determine for themselves whereas NWAC is aware that patriarchy has been adopted even if it is not

consistent with Indigenous legal traditions so today's self-determination will likely be contrary to Indigenous women's best interests.

- Because of this complex political debate from a few generations ago there seems to be no "win" in *McIvor* or *Descheneaux* for Indigenous collectives, but instead a win for a lot of individuals who may or may not be recognized by their communities.
- The status determination process is horrible but we can't just critically chalk this up to "evil INAC/ISC" behind it as many First Nations have gone to court to fight the repatriation of those who gained status in the 1985 amendments, as well as *post-McIvor.*
- Unsure if there have been similar actions post-*Descheneaux* but I at least can say that I've never heard of a single First Nation clamouring for more people to have status on INAC's lists as this waters down per capita payments from land claim settlements and is often perceived as a threat to Indigenous governance as they worry about people they don't know being suddenly allowed to vote.
- Obviously custom membership codes and election codes can address this, but INAC/ISC will still keep it's own list for certain purposes as they don't want to be accused of discriminating.
- The *Descheneaux* case has a good discussion in context to the s 1 analysis that helps provide context for why most First Nations are keen to keep status very restrictive.

INDIGENOUS WOMEN AND GENDER ISSUES

Primer on the Purpose of Inquiries

- Distinct adminsrttaive tribunal function
- Considered for decades to be the best avenue to approach the issues facing Indigenous peoples and communities
- The flexibility of Terms if Reference that are constructed from Orders in Council an be quite broad, which attractive to research and consultation being conducted in Indigenous communities
- There have been 450 Federal Inquiries into issues effecting Indigenous peoples since Confederation
- Key commission of inquiries into Indigenous issues in contemporary Canadian society:
    - Royal Commission on Aboriginal Peoples
    - Truth and Reconciliation Commission of Canada
    - National Inquiry into Missing and Murdered Indigenous Women and Girls
- One of the leading knowledge sources for inquiries is Ed Ratushny's "The Conduct of Public Inquiries: Law, Policy and Practice"
- Inquiries are called usually in response to public pressure demands and has the end desire of restoring the public's faith in the nations "good governance:

- An inquiry's findings are to provide a government with insight as to how it should eventually inform legislature/policies
- Justification of inquiries are public policy through popular pressure
- To date, an inquiry's recommendations (for ex. Calls to Action TRC; Calls to Justice NIMMIWG) are not binding on governments
- Media representation is the main source of informing the public of what inquiries are and what they are intended to do, despite public access to most if not all published reports at an inquiry's conclusion.
- Few understand the environment from which an inquiry is created. The Executive, or "Privy Council", is what we have chosen to retain from the British Crown's influence in our Canadian affairs. It is a rare significance of authority and is only used for specific reasons such as a lack of confidence brewing over what should be under administrative control.
- "In times of public questioning, stress and concern they provide the means for Canadian(s) to be apprised of the conditions pertaining to a worrisome community problem and to be a part of the recommendations that are aimed at resolving the problem." - Ed Ratushny
- Commissions of inquiry are a creature of statute that are brought into existence with the authority of this Executive branch.
- Although subject federally to the *Inquiries Act* - or a province's version of this Act, "The appointment of such a commission is the creation of "an organism of the Executive branch of government… Even though it may hold hearings, it is not a branch of the judiciary but fulfills Executive or administrative functions."
- Inquiries are governed by their Terms of Reference and it is the Order in Council that determines what goes in those terms and its subsequent limits.
- It is important that a commission stays within the bounds of their terms of reference as that in turn directs their mandates. If an inquiry does not go where the Terms of Reference has at its bounds, or begins to lose its compass the government can be swift to reel it in.
- "The Executive branch, through its chosen Executive instrument" is likened unto a mirror as an inquiry is perceived as a tool for a government to reflect upon itself.
- This is a double-edged sword in the sense that if the government does not like what it sees, or too much dysfunction is exposed, the inquiry can be ordered out of existence just as quickly as it was created.
- "Since it is entirely a creature of the Executive's Order in Council, a commission's Terms of Reference may be changed or it may be completely abrogated at any time, by another Order in Council. But to do so normally would invite adverse political consequences because of the public expectations aroused by the commission's creation." - Ratushny
- This has had its fair share of occurrence.

- For ex. The Somalia Inquiry was to investigate the horrific events that took place at an army base where a Somali teenager, Shidane Arone, was beaten for hours resulting in death.
    - What was disturbing was that the unit that these events took place in was well aware of the beating but did nothing to interfere.
    - The "government terminated the Somalia Inquiry at the very time when it was about to examine some of the higher levels of accountability in government." There was no political backlash for this decision, so it seemed the government in power at the time was correct in determining that it was better for them to pull the plug, then let loose in the public the reasons for the lack of accountability.
- However, even if the findings of an inquiry are not unsavory to a government, the courts can overrule an inquiry's overreach of jurisdiction.
- What is important is the "**public healing therapy**" that goes into the workings of an inquiry's "social function" and that along with recommendations that verbalize a watchdog for change is what gives inquiries their value.
- This tool is elevated as more than a "witch hunt" to appease public outcry, and an inquiry should not be flushed as soon as deterioration in a governing body is exposed.
- Justice Antonio Lamer stated: "There is no doubt that commissions of inquiry at both the federal and provincial levels have played an important role in the regular machinery of government [and] in particular to serve to supplement the activities of the mainstream institutions of government."

Royal Commission on Aboriginal Peoples (1996)

- Multi-volume report o f great detail on a variety of Indigenous issues that was informed from various Indigenous perspective and worldviews
- Governments have yet to implement may of the recommendations even today
- Although the discussions from such diverse Indigenous worldviews debated the use of words like "sovereignty" and what self-government meant to them, they were "unanimous in asserting that they have an inherent right of self-determination arising from their status as distinct or sovereign peoples"
- RCAP also proposed for changes to the *Indian Act*
- Builds on the Penner Report that proposed a "tri-federalism" model where "Indian First Nations [are[equivalent to provinces" rendering them immune to provincial law, and when a conflict does occur, federal paramountcy would prevail" and would "recreate the original partnership that Indians have never ceased to call for"
- Sákéj Youngblood Henderson was inspired by RCAP with his work on proposing "Treaty federalism"

British Columbia Missing Women Commission of Inquiry

- To inquire into and make findings of fact on police investigations between 1977 and 2022 of missing women from the Downtown Eastside of Vancouver, and the decision of the Criminal Justice Branch in January 1998 to stay proceedings against Robert Pickton
- Recommend necessary changes to investigations of missing women and multiple homicides, including where the involve coordination of more than one investigating organization
- Set up a vulnerable witness protection protocol
- Involved Elders in ceremonies at public meetings
- *The Forsaken Report* - 4 volumes with 63 recommendations on:
    - restorative measures;
    - equality-promoting measures;
    - measures to enhance the safety of vulnerable urban women;
    - measures to prevent violence against Indigenous and rural women;
    - improved missing person policies and practices;
    - enhanced police investigations, regional police force, effective multi-jurisdictional policing, increase police accountability to communities, and;
    - measures to assure the women's legacy

Truth and Reconciliation Commission

- Indian Residential Schools Settlement Agreement (IRSSA) as an agreement between the First Nations survivors of residential schools and the Government of Canada.
- A key term of the IRSSA was the establishment of the TRC
- During the IRSSA process, there was a lot of insensitive treatment of Survivors, including re-traumatization and dismissal of personal stories racked up against each other and even comparing severity.

In its Final Report, the TRC made it clear that Indian Residential Schools operated pursuant to law, but also that the law - its culture and practice - could operate to sustain harm against survivors.

"The criminal prosecution of abusers in residential schools and the subsequent civil lawsuits were a difficult experience for Survivors. The courtroom experience was made worse by the fact that many lawyers did not have adequate cultural, historical, or psychological knowledge to deal with the painful memories that the Survivors were forced to reveal. The

lack of sensitivity that lawyers often demonstrated in dealing with residential school Survivors resulted, in some cases, in the Survivors' not receiving appropriate legal service. These experiences prove the need for lawyers to develop a greater understanding of Aboriginal history and culture as well as the multi-faceted legacy of residential schools."

~ The Truth and Reconciliation Commission of Canada

41. We call upon the federal government, in consultation with Aboriginal organizations, to appoint a public inquiry into the causes of, and remedies for, the disproportionate victimization of Aboriginal women and girls. The inquiry's mandate would include:

i. Investigation into missing and murdered Aboriginal women and girls.

ii. Links to the intergenerational legacy of residential schools.

Statistics on Indigenous Women and Girls

- 3.5 times more likely to experience violence than non-Indigenous women
- 3 times more likely to experience domestic violence – now termed "interpersonal violence" – than non-Indigenous women
- 54% of Indigenous women reported severe domestic violence as compared to 37% of non-Indigenous women
- Indigenous women are 3 times more likely to have been recently assaulted by a spouse
- 27% of Indigenous women experienced 10+ assaults by same offender as compared to 18% of non-Indigenous women.
- 1,100+ still missing – frightening when Indigenous women are 5 times more likely to be killed or 'disappear' as opposed to non-Indigenous women
- 600+ unsolved murders
- +30% of federally incarcerated women; 87%(SK), 83% (MB), 54% (AB), 29% (BC) of provincially incarcerated women
- Earn $5000 less than non-Indigenous women a year
- Unemployment at 17% for Aboriginal Women
- Over 40 unsolved murder cases of women, mostly Indigenous, form the inner city in Edmonton.

Indigenous Women and Girls

- Historical *Indian Act* sex discrimination is a root cause of high levels of violence against Indigenous women and the "existing vulnerabilities that make Indigenous women for susceptible to violence" (*Missing and Murdered Indigenous Women in British Columbia's* Final Report)
- "Addressing violence against women is not sufficient unless the underlying factors of discrimination that originate and exacerbate the violence are also comprehensively

addressed" – Inter-American Commission on Human Rights on Canada's international human rights obligation

- Some explanations re Canada's reluctance for not eliminating all the sex discrimination from the registration provisions of the *Indian Act*:
    - The government must consult those affected.
        - Criticism: "The government has been "consulting" on how to eliminate sex discrimination since the 1970's"
        - Should not use "the duty to consult" as an excuse for delaying the implementation of rights
        - The duty to consult is intended to facilitate the fulfillment of human rights, not to serve as an obstacle or delaying tactic.
    - The 6(1)(a) all the way amendment would entitle 80,000 to 2 million more Indian women and their descendants to Indian status.
        - Criticism: 'fear mongering' by Minister Bennett/INAC officials – numbers not backed up by factual scenarios - tactic does not belong in a Nation-to-Nation relationship based on respect for Indigenous rights, including the rights o Indian women and children.
    - Necessity from a s 91(24) standpoint
    - Traditional Indigenous communities are patrilineal
    - Protection against non-Indigenous men

National Inquiry into Missing and Murdered Indigenous Women and Girls (2016-2019)

- Federal government announced the National Inquiry into MMIWG as a key government initiative to end the disproportionally high levels of violence against Indigenous women and girls
- The goal of the Inquiry was to investigate and report on the systemic causes of all forms of violence against Indigenous women and girls and to examine the underlying social, economic, cultural, institutional and historical causes that contribute to the ongoing violence and particular vulnerabilities.
- The Final Report "Reclaiming Power and Place" had contributions from thousands of people all over Canada
- 231 Individual Calls for Justice in four areas, including:
    - Calls for Justice for All Governments
    - Calls for Justice for Industries, Institutions, Services and Partnerships
    - Calls for Justice for All Canadians
    - Calls for Justice specific to Inuit, Métis, and 2SLGBTQQIA+

Indigenous Legal Research Unit at UVic and Indigenous Law Toolkits

- On Indigenous legal orders "Law is something that people do – and it has to be practical and useful to life – otherwise, why bother?" – Dr. Val Napoleon

- Gender Inside Indigenous Law Toolkit - “on-the-ground engagement with Indigenous communities and Indigenous law, it has become evident that there is need for tools that can help people in communities practically navigate local questions of gender and sexuality.”
- “Serious concerns about articulating, head on, relations of power, gender stereotyping and essentialization, constraining gender roles, fairness, and equality as well as overt oppressions experienced in the form of sexualized and intimate partner violence.”
- The toolkits “promote access to justice surrounding gender issues and identify and address legal needs around these concerns within Indigenous law in Indigenous communities.”

Indigenous women and girls, there are complex issues that are hard to talk about given the dynamics within certain communities.

- “These assumptions have influenced the perpetuation of violence against Indigenous women and girls and their everyday experiences of gendered oppression. **Negative assumptions on the lawlessness of Indigenous communities has allowed for Indigenous women and girls to be perceived as particularly vulnerable and easy targets for oppressive practices or outright violence.** Further, these assumptions have obscured the mechanisms within communities to resolve disputes and to protect community members from violence.” - Professor Darcy Lindberg

Self-Governance: US Examples

Hopi Family Relations Ordinance, Subchapter 1, Sec. 3.01: The Hopi Tribal Council finds that:

a) Many persons are subjected to abuse and violence within the family and clan setting;

b) Family members are at risk to be killed or suffer serious physical injury as a result of abuse and violence within the family and clan setting;

c) Children suffer lasting emotional damage as direct targets of abuse and violence, and by witnessing the infliction of abuse and violence on other family and clan members;

d) The elderly Hopi residents are at risk for abuse and violence, the lack of services available for these citizens and the changing family structure indicates that laws are necessary to insure the protection of elders within the family and clan setting, and in their caretaking settings;

e) All persons have the right to live free from violence, abuse, or harassment;

f) Abuse and violence in all its forms poses a major health and law enforcement problem to the Hopi Tribe;

g) Abuse and violence can be prevented, reduced, and deterred through the intervention of law;

h) The legal system’s efforts to prevent abuse and violence in the family and clan setting will result in a reduction of negative behavior outside the family and clan setting;

i) Abuse and violence among family and clan members is not just a "family matter," which justified inaction by law enforcement personnel, prosecutors, or courts, but an illegal encounter which requires full application of protective laws and remedies;
j) An increased awareness of abuse and violence, and a need for its prevention, gives rise to the legislative intent to provide maximum protection to victims of abuse and violence in the family and clan setting; and
k) The integrity of the family and clan. Hopi culture and society can be maintained by legislative efforts to remedy abuse and violence.

The Oglala Sioux Tribe Domestic Violence Code is construed to promote the following:
1. That violence against family members is not in keeping with traditional Lakota values. It is the expectation that the criminal justice system respond to victims of domestic violence with fairness, compassion, and in a prompt and effective manner. The goal of this code is to provide victims of domestic violence with safety and protection.
2. It is also the goal to utilize the criminal justice system in setting standards of behavior within the family that are consistent with traditional Lakota values and, as such, the criminal justice system will be utilized to impose consequences upon offenders for behaviors that violate traditional Lakota values that hold women and children as sacred. These consequences are meant as responses that will allow offenders the opportunity to make positive changes in their behavior and understand "wolakota."
3. The prevention of future violence in all families through prevention and public education programs that promote cultural teachings and traditional Lakota values so as to nurture nonviolence within Lakota families and respect for Lakota women.

Criminal Justice System and *Gladue*

"What is important to realize is that, for many if not most Aboriginal offenders, the current concepts of sentencing are inappropriate because they have frequently not responded to the needs, experiences, and perspectives of Aboriginal people or Aboriginal communities." (*Gladue*)

Why is the Criminal Justice System called by some the "new Residential School System"?

- Large majority of Indigenous population are youth, for ex. 2016 almost 42.5% of the Indigenous population in SK are youth compared to 22.9% non-Indigenous population.
- In 2016/2017, of youth 12-17, 92% of incarceration admission were Indigenous males and 98% Indigenous females
- This is in correlation with Indigenous children and youth over-represented in the foster care system in SK.
- In 2011, approx. 87% f all foster children aged 14 and under in SK were Indigenous although 27.4% of SK's overall population of children aged 14 are Indigenous
- This is significant because SK has the highest proportion of Indigenous children in foster care for any province in 2011 before the NWT (but larger Indigenous population)

Sentencing Principles s 718 of the *Criminal Code*

- Sentencing should consider systemic issues and cultural backgrounds of Indigenous peoples
- *R c Mountor*: Aboriginal perspective is broader than that of a single Aboriginal person, it should be understood as the perspective of the community having regard to its laws, practices, customs, and traditions.
- Highly Discretionary: case by case approach, and "sentencing ranges/categories" guided by two main principles "proportionality" and "parity"
- Objectives of sentencing:
  - Punitive: Denunciation; Deterrence; Separation
  - Restorative: Rehabilitation; Reparation; Promotion of Responsibility

Section 718.2(e) of the *Criminal Code*

- 1996 Parliament amendment to the CC- s 718.2(e) is to pay particular attention to the systemic issues and cultural backgrounds of Indigenous Peoples
- "[A]ll available sanctions, other than imprisonment,
  - Reasonable in the circumstances
  - Consistent with the harm done to victims/community
  - Particular attention to the circumstances of Aboriginal offenders."

R v Gladue

- Jamie Tanis Gladue at age 19 was a young Indigenous mother who stabbed her partner twice, killing him. He mocked her during her birthday party after she confronted him for his adultery with her older sister.
- She expressed remorse and had a number of mitigating factors, but the judge still sentenced her to 3 years imprisonment for manslaughter, as deterrence and denunciation was focused on.
- BY the time her appeal made its way to the SCC, she already served her time, but the Court made a framework t accommodate the unique circumstacnes and the different methodology for judges to use when sentencing INdingneous peoples.
- Over-incarceration of Inidgenous peoples is a nation wide problem, the praries being the most alarming concern.

Accommodative Sentences Pre-*Gladue* Framework

- *Stare decisis* stabilizes the *Gladue* two-pronged approach in sentencing principles of Indigenous peoples and its remedial purpose (Ralston, *Gladue Principles*)
- As far back as the 19th century there has been jurisprudence on the **distinct circumstances of Indigenous peoples** and how they should be accommodated under Canadian state law.
  - *The King v Phelps* (1823) – sovereignty land claim
  - *Sheldon v Ramsay* (1852) – Crown seizure of land from a white man who committed treason

- *Connolly v Woolrich* (1867) – validity of Cree marriage
- *Sero v Gault* (1921) – Indigenous sovereignty land claim
- *R v Itsi* (1966) – supplying alcohol to a minor
- *R v Esagok* (1971) – geographical distance and cultural differences taken into account for an Inuit offender
- *R v Fireman* (1971) – contextual approach used again for a Cree man's manslaughter sentence

Systemic Discrimination

- The differentiation of Indigenous peoples from non-Indigenous peoples in early jurisprudence was still oppressive and discriminatory.
- Language and Access to Justice barriers (*Indian Act(s)*)
- **Shift from unique circumstances surrounding Indigenous peoples to "moral blameworthiness" in criminal jurisprudence**
- Not until the 1990's was there a solid shift to be more inclusive of Indigenous perspectives including justice initiatives

Indigenous (Aboriginal) Perspectives

- "short-hand expression" for Indigenous peoples' laws, practices, customs and traditions, and collective perspectives informed by these sources (Ralston; *Tsilhqot'in Nation*)
- *R c Montour*: The Aboriginal perspective is broader than that of a single Aboriginal person; rather, it should be understood as the perspective of the community having regard to its laws, practices, customs, and traditions
- *R v Gladue*: Courts are directed to "attempt to craft the sentencing process & the sanctions they impose in accordance with the [A]boriginal perspective.

Substantive Equality & Systemic Discrimination

- *R v Williams*: SCC acknowledges widespread racism has translated into systemic discrimination in the criminal justice system against Indigenous persons
- *R v Gladue*: SCC finds indigenous overincarceration to be (in part) produced by systemic discrimination through reliance on factors like employment & housing stability that disproportionately impact indigenous persons; "The fundamental purpose of s 718.2(e) is to treat Aboriginal offenders fairly by taking into account their differences
- *R v Ipeelee*: SCC reiterates that judges must "ensure that systemic factors do not lead inadvertently to discrimination in sentencing"
- *R v Le*: Judicial notice that members of racial minorities have disproportionate contact with police and criminal justice system; higher rates of distrust.

The SC Trilogy: *Gladue, Wells, Ipeelee*

- Anyone familiar with *Gladue* ill be well-acquainted with these cases, but they are worth revisiting from time to time

- For ex. In *Gladue* the SCC explained that systemic and background factors are important because they help explain why an Indigenous person is before the courts, but it also said they relate to why jail may be less appropriate, pointing to cultural differences and racism in prisons
- Also in *Gladue* the SCC said courts should attempt to craft both the sentencing process and the sanctions imposed to **conform to the "Aboriginal perspective",** which usually refers to the collective perspectives of Indigenous nations reflected in their customs, practices, traditions and laws; do most *Gladue* reports provide detailed information regarding these perspectives?
    - It may be that there are aspects of each case that judges, counsel, and even *Gladue* report writers rarely emphasize or engage with
- What is usually the main focus in the criminal justice system and Indigenous peoples is systemic discrimination: "practices or attitudes that have, whether by design or impact, the effect of limiting an individual or group's right to the opportunities generally available because of attributed rather than actual characteristics (*CN v CHRC*)
- Substantive equality provides philosophical premise and animating norm to both s 15 of the *Charter* and human rights statues (*Fraser v Canada*)

Substantive Equality:

- The "animating norm" for s 15 of the *Charter* and human rights statues (*Fraser v Canada*)
- Emphasizes discriminatory effects (intentional or not) and recognizes identical treatment may impose adverse impacts on members of certain groups
- In contrast to formal equality, substantive equality presumes pre-existing disadvantages need to be ameliorated and differences must be accommodated to avoid adverse treatment of protected groups
- *Ewert v Canada*: "discrimination experienced by Indigenous persons, whether as a result of overtly racist attitudes or culturally inappropriate practices, extends to all parts of the criminal justice system" and "to be remedied by accounting for the unique systemic and background factors affecting Indigenous peoples, as well as their fundamentally different cultural values and world views"
- *R v Barton*: SCC provides guidance on jury instructions where a victim's Indigeneity may trigger systemic biases, prejudices, and stereotypes.

The *Gladue* Analysis:

- Judges are required to consider in their remedial role along with sentencing principles in the *Criminal Code* s 718(e):
    1) The unique systemic or background factors which may have played a part in bringing the particular Aboriginal offender before the courts; and

2) The types of sentencing procedures and sanctions which may be appropriate in the circumstances of the offender because of his or her particular Aboriginal heritage or connection

R v Whitehead

"S 718.2(e) requires sentencing courts to give effect to substantive equality concerns when crafting a fit sentence- consider how the proportionality of a sentence is affected by the individualised circumstances of each offender- and (under the parity principle) also consider the ways in which those offenders' circumstances differ and might commend a different sentence other than jail"

The *Gladue* Report

- There is yet to be any standardized national training for *Gladue* report writers. It is frequently decided against, as the diversity of Indigenous communities and individual lived experience has such variance.
- In the last few years, most Pre-Sentence Reports take into consideration *Gladue* factors in sentencing accused who identify as Indigenous
- However, there has been recently published a very comprehensive synthesis of case law, funded by the BC First Nations Justice Council and authored by Professor Ben Ralston, on the *Gladue* principles that could be used by judges, lawyers, *Gladue* report writers, and others.

What is the role of *Gladue* Reports?

- In *Gladue,* the SCC anticipated that Indigenous people's unique circumstances would receive "special attention" in pre-sentence reports, including representations from Indigenous communities
- In *Ipeelee*, the SCC endorsed the practice of obtaining *Gladue* reports that canvas these unique circumstances in detail.
- Of particular relevance to the Gladue sentencing analysis are:
    - Unique systemic & background factors that may have played a part in bringing someone before the courts;
    - Types of sentencing procedures & sanctions that may be appropriate based on their particular heritage or connection
- Judges seem to except that *Gladue* reports will assist with information responsive to both of sets of circumstances & they have emphasized that the second category of factors is at least as important as the first
- **Providing full details is critical**

Providing responses from the Judiciary of *Gladue* Reports:

- When Gladue reports give an Indigenous person an opportunity for introspection and critical contemplation of their personal history, placing personal circumstances in context to family history, territorial connections and community history, thereby informing their sense of identity and self-worth.

- When they make extensive use of direct quotes from various collateral interviewees to faithfully bring diverse voices into the courtroom without filtering or interpreting them

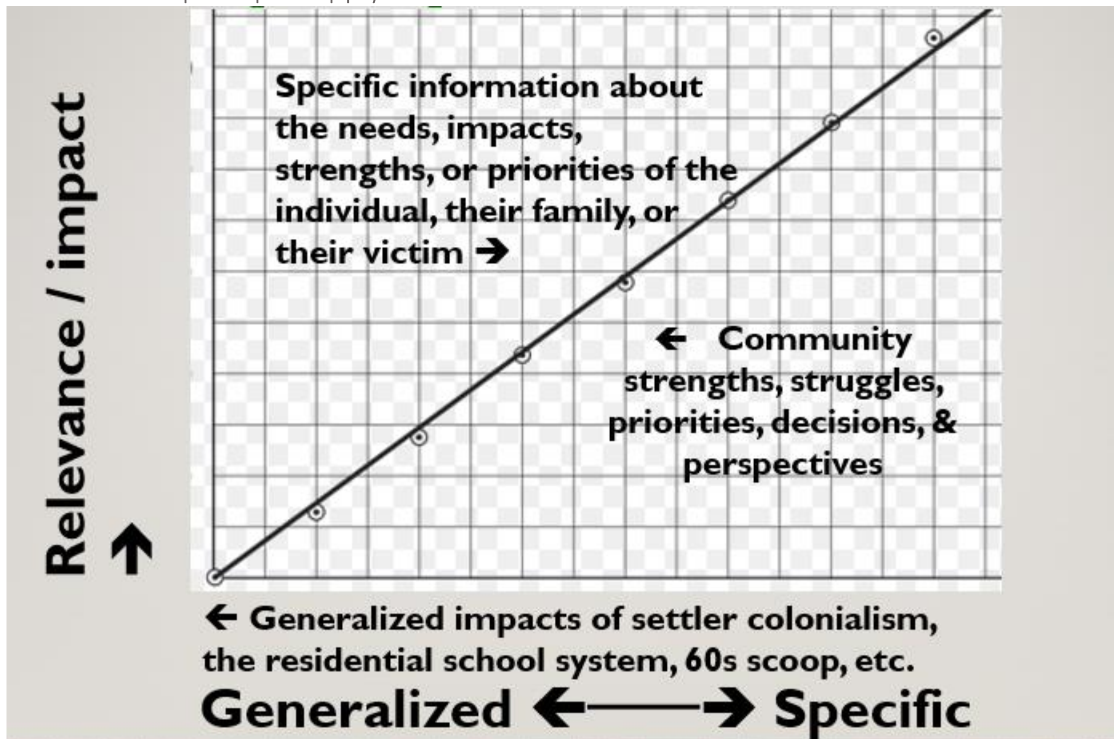
Criticisms from the Judiciary of *Gladue* Reports:

- When Gladue report writers fail to obtain and review previous court reports to ensure any contradiction between the two sources of information have been clarified in interviews
- When it presents personal opinions or analysis from the report write rather than objective information gathered for the court
- When the report suggests the writer does not see their role as that of an objective third party collecting information for the court (ex. Calling the subject the "client")
- When key or controversial details provided by the Indigenous person being sentenced are not verified or corroborated via collaterial interviews or other sources of information
- When information is not consistently and transparently linked to the source of that information
- In the worst cases, passages were allegedly cut and pasted from earlier reports, but attributed to new interviewees!

Gladue Report Writers

- Some basic guidelines for *Gladue* report writers is that they must not argue the law
- However, they should know what judges think makes a *Gladue* report useful and what they hope to find in the reports
- Summarized research results most relevant to *Gladue* report writers:
  1) Plain language summaries of key cases
  2) Judicial guidance
  3) Courts and the role of *Gladue* reports
  4) Types of systemic and background factors
  5) Alternative sentencing processes and sanctions
  6) *Gladue* principles: new contexts and different needs in different legal contexts

What *Gladue* principles apply?



"While there are a myriad of thoughtful and practical approaches to mitigating the miseries of the current criminal justice system, the TRC Final Report calls for something different: A transformation. Over the years, I have listened carefully to many legal professionals… In response I offer the following five strategies to overcome some of the recurrent barriers to respectful and productive engagement with Indigenous legal traditions within the criminal justice system:

1) Address Absences and Assumptions;
2) Return to First Principles;
3) Distinguish Principles from Practices;
4) Defer to Indigenous Jurisdiction and Justice Program Decisions When Possible, and
5) Seek Guidance and Support from Urban Indigenous Organizations when Possible"

- Dr Hadley Friedland

Emerging Trends in the *Gladue* Analysis:

1. Vulnerable Victims

- *R v Barton*, Final Report into MMIWG and amendments to the *Criminal Code* have brought more attention to the vulnerability of Indigenous victims, especially women/girls.
- *R v Friesen*: Recognition that Indigenous children (among others) face disproportionate levels of violence, including sexual violence – this is relevant to sentencing; *Gladue* still applies to an Indigenous offender

- *R v AD*: Systemic and background factors of the Indigenous victim do not disentitle the offender to a *Gladue* analysis, but the victim's vulnerability can be aggravating
- *R c LP*: Majority took account of ss 718.04 & 718.201 in *Criminal Code* regarding vulnerability of Indigenous victims and found that the trial judge failed to weigh them; dissent regarding under-implementation of *Gladue*
- *R v Kolola*: In sentencing an Inuk offender, the Court sought to balance *Gladue* factors against sleeping and unconscious women in Nunavut
- *R v A(M)*: An Inuk woman received absolute discharge for breaching no-alcohol bail condition when she had called RCMP for help in domestic violence situation; noted systemic issues Inuit women face as victims, including disproportionate rates of victimization, distrust of police and lack of social services; noted disturbingly similar case one year prior – did not want to send message to Inuit women of "call at your own peril"
- *R v Doering*: Police constable sentenced to 12 months imprisonment for failing to provide necessaries of life and criminal negligence causing death of Indigenous woman who died while in police custody; systemic discrimination against Indigenous women formed broader context for sentencing
- *R v McKay*: Attention to systemic/background factors of both an Indigenous offender and an Indigenous victim; significant and central enough to make rehabilitation the key sentencing principle- Indigeneity of victims cannot be ignored but does not negate *Gladue* analysis either
- Bradley Barton convicted of manslaughter after SCC upheld ABCA decision to set aside acquittal and order a new trial

2. Other Systemic Discrimination

- *R v Le*: SCC took judicial notice that members of racial minorities have disproportionate contact with police and criminal justice system; higher rates of distrust
- Systemic discrimination against Black Canadians recognized as relevant to sentencing- in Ontario, the Black Legal Action Centre in Toronto was disappointed with the outcome in *Morris* appeal argued before Court of Appeal as not taking a hard enough stance
- The NSCoA decision in *Anderson* met with more favourable treatment and another case deals similar principles to Black Canadians (*R v Martin*)
- **Not necessarily extends the *Gladue* principles but they analogized the appropriate analysis for Black offenders and systemic racism against them to *Gladue*.**

3. Indigenous Identity Issues

- The SCC has been reluctant to set clear parameters around who counts as Indigenous for the purposes of the *Gladue* principles, nothing that they at least extend to all Metis, Inuit, and First Nations individuals (whether or not they are "registered"- ie. Status)
- Without an evidentiary basis the *Gladue* principles cannot be meaningfully applied so more than self ID will still be required

- For *Gladue* report writers - focus on collecting and synthesizing case-specific information and leave it to counsel and the courts to argue about whether the principles apply to borderline identity cases
- However, some lower courts have expressed the following:
  1. More than just self-ID is needed to apply them; there must be information **linking** the person being sentenced to any broader statements about settler colonialism's general impacts;
  2. But lack of knowledge about Indigenous heritage or connection could be itself an important Gladue factor in many cases, and;
  3. Community connections and circumstances of their communities matter even if few individual factors
- *R v Taylor:* "The inquiry, by necessity, requires the sentencing judge to consider whether systemic and background factors have impacted the offenders own life experiences – in other words, whether the offender has 'lifted his life circumstances and Aboriginal status from the general to the specific"
- *R v Hamer*: "It is **not the role of this Court to serve as a gatekeeper** to Indigenous identity or to specifically comment on whether or not Mr. Hamer is Indigenous. He has identified that he is. **It *is* the role of this Court, however, to evaluate relevant information** about the significance of a person's Indigenous identity and the individual's circumstances as an Indigenous person. In this case, there was no relevant information or evidence about Mr. Hamer's Indigenous circumstances to evaluate."
- *R v Young*: Non-Indigenous man charged with cocaine trafficking offence, resides in Haida community and identifies as Haida – *Gladue* analysis not strictly applicable but restorative justice approach nevertheless appropriate
- *R v Antione*: Non-Indigenous woman with status from marrying a First Nations man who lived on reserve, charged fraud against First Nation employer; invoked *Gladue* and sought sentencing circle; Court found no systemic factors but personal background still relevant.
- *R v Golding*: Non-Indigenous man charged with possession of child pornography; *Gladue* letter detailed connection to Pikwakanagan despite non-Indigenous parents; step-mother is Indigenous and grew up partly on reserve, but he was banned after sexually assaulting his half-sister in grade 9; similar approach to *Antoine* applied

4. Indigenous Laws

- Each Indigenous nation, community, family, or individual could have relevant perspectives or worldviews that are informed by their experiences of colonialism, their laws and culture.
- However, sentencing judges will want more than just general descriptions of these (it is not enough to simply answer what; you should clarify who, where, when, and the how of alternatives)

- Indigenous laws form part of common law; ie doctrine of continuity applies in Canada (*Mitchell v MNR*)
- Indigenous laws increasingly applied outside s 35 litigation to governance disputes (*Spookw v Gitxsan Treaty Society; Big River First Nation v Agency Chiefs Tribal Council Inc; Linklater v Thunderchild First Nation*)
- Indigenous laws and family law mattes (*JEO v MD*; *CFS v MA*)
- Legal academics are developing methodologies for engagement with Indigenous laws, but not yet seeing this reflected in case law, however but stay tuned!

Gladue Analysis and Bail

- In a bail hearing, sentencing principles like rehabilitation, deterrence and denunciation are not yet relevant as the Indigenous person seeking bail is still entitled to be presumed innocent
- Instead, courts want to be sure that bail criteria, conditions and release plans do not perpetuate systemic discrimination against Indigenous persons
- For example by requiring a surety for someone alienated from family and community in an urban area, requiring an impoverished person to provide a large financial pledge, or imposing impractical no-contact or no-alcohol conditions in small, tightknit communities
- The Supreme Court has repeatedly recognized disproportionate adverse impacts of bail considerations on Indigenous accused (see *Gladue*, *Ipeelee*, *Summers*, *Myers*, and *Zora*)
- Applying the Gladue principles in bail proceedings could also mean carefully calibrating release conditions to avoid perpetuating systemic discrimination (*R c Dubé*, 2019 QCCQ 7985)
- It could also mean accommodating Indigenous perspectives in relation to bail considerations (*R v Jaypoody*, 2018 NUCJ 36)
- For example, an Indigenous accused's criminal record may need to be contextualized in light of systemic and background factors (*R v Papequash*, 2021 ONSC 727)
    - "For someone with this history and present life circumstances, a better release plan than the one proposed to me is unlikely. Thus, the question is: to help fix the problem of the over-incarceration of Indigenous peoples and yet meet the legal test for bail, is this enough?"

CANADA AND *UNDRIP*

"When we look up to the sky on a clear night for constellations, I sometimes think, '**what if all the stars mattered**?' When we think of the laws we commonly see being used in Canada, we have been taught to search for legal meaning based on the Canadian law, **yet in the background lies seemingly infinite stories, characters and teachings outlined by Indigenous peoples in their legal traditions**. Indigenous people have relied upon their specific legal orders to maintain good relations with each other, to settle disputes, to set out obligations with each

other, and to interact with other nations around them." – Prof Darcy Lindberg (Gender Inside Indigenous Law Toolkit)

United Nations Declaration on the Rights of Indigenous Peoples [*UNDRIP*]

- There was an anti-imperialism movement post WWII, where "reconciliation" began to be associated with decolonization and self-determination, in public international law.
- In a nutshell, this movement in international law is premised on the Westphalian idea of sovereignty of existing nation states.

Background

- Decolonization and anti-imperialism post WWII was simple for many countries. African countries wanted self-rule and to punt out European powers, as did Middle Eastern and Southeast Asian countries.
- Settler colonial states and Indigenous peoples were the unsolvable puzzle. Colonizers were the majority and were not going anywhere. They were generally open to equality for Indigenous people as citizens, in theory at least. But self-determination and secession were off the table for minorities subsumed within nation states, as opposed to nation states subject to imperialism.
- This essentially was the basis for why the *United Nations Declaration of the Rights of Indigenous Peoples UNDRIP* was needed, among other reasons.
- In September, 2007, the General Assembly of the United Nations voted for the adoption of UNDRIP as it was hailed as a necessary and relevant instrument that would provide a universal standard for the rights and wellbeing of all Indigenous peoples around the world.
- 144 nation states voted in favour, and only 11 chose to abstain.
- Only four countries: Canada, Australia, New Zealand and the United States of America [CANZUS] applied for **permanent objector status** - despite the general global perception of these countries as free democracies and upholders of human rights.
- Almost a decade later, all four countries reversed their decision, with Canada coming fully on board in considering its implementation as late as 2016.
- Part of the difficulty with grasping the concept of decolonization in Canada may be due to the lack of reference to the decolonization movement that occurred internationally.
- Post World War II, there was a significant effort through the United Nations to eliminate racism and end colonization. This was quite a radical movement at the time and it was clearly not without challenges.
- In 1946, this trajectory was set in motion by an impressive Canadian legal scholar, John Humphrey.
- Humphrey drafted the *Universal Declaration of Human Rights*, which was credited by Eleanor Roosevelt as creating "the Magna Carta for all mankind".

- Interestingly, the government of Canada initially opposed this legal document, as it was concerned that it would "give rights to Communists, Jehovah's Witnesses, Japanese Canadians and Aboriginal Canadians".
- The drafting of other important international covenants followed, such as:
    - The *International Covenant on Civil and Political Rights*, that states at Article 1:

        > "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."

    - *The International Covenant on Economic, Social and Cultural Rights*
    - *The International Convention on the Elimination of All Forms of Racial Discrimination*
    - *The Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples*
- This legal transformation from colonialism and racism to self-determination and inherent human rights in a new international legal order culminated in the drafting of the *UNDRIP* itself.
- The Special Rapporteur of the United Nations, Miguel Alfonso Martinez came to Canada in 1989. He concluded in his 1999 report that the British treaties with the Indigenous peoples here are international in nature and criticized countries like Canada for denying it.
- Special Rapporteur Martinez' final report influenced the UNDRIP, notably Article 37, which reads:

  "Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors and to have States honour and respect such treaties, agreements and other constructive arrangements."

Articles: A Closer Look

- Preamble, Articles 1&2
    - Right to Enjoyment of Human Rights and Equality
        - Aboriginal people have the same human rights as everyone else
        - Right to be treated equally, which does not mean being treated the same
        - Aboriginal people's cultures and differences are to be celebrated
- Articles 3-6, 20, 33-36, and 41
    - Right to Self-Determination and Indigenous Institutions
        - Right to work with the Canadian government to negotiate their relationship with Canada
        - Right to their own institutions
        - Aboriginal people get to participate in Canadian politics
        - Right to participate in international forums

Example: Greenland was a colony of Denmark before becoming a constituent country of the Danish Kingdom. In 2009, the Act on Greenland Self-Government came into force; its preamble states:

“Recognising that the people of Greenland is a people pursuant to international law with the right of self-determination, the Act is based on a wish to foster quality and mutual respect in the partnership between Denmark and Greenland.”

- Articles 7-9 and 33.
  - Right to Life, Integrity and Security
    - Right to live and be secure
    - Canadian governments are not supposed to interfere with Aboriginal cultures
    - Right to be free from racial discrimination
    - Right to set their own membership rules

  Example: The Kenyan government evicted the Endorois people from their traditional land and homes around the Lake Borgoria area in order to develop tourist facilities.

  In 2010, the African Commission on Human and People’s Rights found that this eviction violated the Endorois’ rights to freedom of property, religion, health, culture and natural resources and ordered Kenya to restore their historic lands and provide repatriation.

  The Commission expressly drew upon UNDRIP in its decision.

- Articles 11-13
  - Right to Culture, Religious, and Linguistic Identity
    - Right to all their cultural items (stories, artwork, songs, etc)
    - Governments should work with communities to return items that have been taken away
    - Right to perform their ceremonies and other religious activities
    - Right to speak their language
    - Right to traditional knowledge

  Example: The Haida Repatriation Committee (HRC) is a volunteer organization dedicated to bringing home the remains of ancestors, grave materials and ancient Haida treasures from museum and private collections around the world.

  The HRC researches and identifies where Haida ancestors and cultural materials are located; contacts and negotiations with institutions for the return; and ensures that the remains of ancestors are safely brought home for burial

- Articles 14-16
  - Right to Education, Public Information, and Employment
    - Right to an education
    - The education Aboriginal people receive should respect and promote Aboriginal people's own culture
    - Aboriginal people must be able to teach their traditional ways of life
    - Right to have their own TV, radio, and newspapers

  Example: The Aboriginal Peoples Television Network (APTN) produces and airs programs made by, for and about Indigenous peoples; 56% of the programming is in English 16% in French and 28% in a variety of Indigenous languages.

  APTN is available in approximately 10 million Canadian homes and is aimed at both Indigenous and non-Indigenous audiences.

- Articles 3-5, 10-12, 14, 15, 17-19, 22, 23, 26-28, 30-32, 36, 38, 40, and 41
  - Right to Participate in Decision-Making and Free, Prior and Informed Consent
    - Aboriginal communities must be able to participate in making any decision that affects their lives
    - Aboriginal people have the right to make their decisions according to their own decision-making processes
    - Consent should be given in free, prior, and informed way

  Example: In 2011, Peru adopted the Law of the Right to Prior Consultation to Indigenous or Native Peoples. Article 2 states:

  "It is the right of Indigenous peoples or [N]ative to be consulted previously about the legislative or administrative measures that directly affect their collective rights, on their physical existence, cultural identity, quality of life or development. Also appropriate is to make consultation on plans, programs and national and regional development projects that directly affect these rights."

- Articles 17, 20, 21, and 23.
  - Economic and Social Rights
    - Right to improvements in areas of health, education, employment, housing, vocational training and retraining, sanitation and social security
    - Right to develop and run social programs
    - Right to continue hunting, fishing, and other traditional means of earning a living

  Example: In 2011, the Canada-First Nation Joint Action Plan was announced & identified some of the following priority areas for action:

    - building effective and appropriate governance structures;
    - empowering individuals through access to education and opportunity;

        - enabling sustainable and self-sufficient communities;
        - creating conditions to accelerate economic development opportunities;
        - and respecting the role of First Nations' culture and language
- Preamble, Articles 25-27, 29, 30, and 32
    - Right to Lands, Territories, and Resources
        - Right to their lands, territories, and natural resources
        - Rights to the lands they now live on and use and rights to areas they traditionally lived on and used

    Example: The Belize government had allowed the use of Maya traditional land for logging and oil exploration with the Indigenous Maya peoples' consent.

    The government refused the Maya peoples' property rights, arguing that since the Maya villages were developed after British sovereignty, the Maya could not establish a continuous connection to the land.

    The Belize court eventually ruled in favour of the Maya claimants and found that the government failed to take into account the customary patterns of use and occupancy of the Maya people to the land;

    This was the first court to apply UNDRIP after its adoption by the General Assembly.

- Preamble, Article 37
    - Treaties, Agreements and Other Constructive Arrangements
        - Treaties are the basis for the relationship between Canada and Aboriginal peoples
        - Governments must respect and uphold all Treaties and other types of agreements made with Aboriginal peoples
- Articles 22 and 44
    - Indigenous Women's Rights
        - Indigenous women are entitled to all the rights in the Declaration
        - Governments must work with Indigenous peoples to end violence against Indigenous women

    Example: In September 2016, the Canadian government launched the *National Inquiry into Missing and Murdered Indigenous Women and Girls*

    The mandate of the Inquiry's Commissioners is to "examine and report on the system causes of all forms of violence against Indigenous women and girls in Canada by looking at patterns and underlying factors"

Summary of UNDRIP Rights

- **Right to Enjoyment of Human Rights and Equality**
    - Aboriginal people have the same human rights as everyone else

- Right to be treated equally, which does not mean being treated the same
- Aboriginal people's cultures and differences are to be celebrated

- **Right to Self-Determination and Indigenous Institutions**
  - Right to work with the Canadian government to negotiate their relationship with Canada
  - Right to their own institutions
  - Aboriginal people get to participate in Canadian politics
  - Right to participate in international forums
- **Right to Life, Integrity, and Security**
  - Right to live and be secure
  - Canadian governments are not supposed to interfere with Aboriginal cultures
  - Right be free from racial discrimination
  - Right to set their own membership rules
- **Right to Culture, Religious, and Linguistic Identity**
  - Right to all their cultural items (stories, artwork, songs, etc.)
  - Governments should work with communities to return items that have been taken away
  - Right to perform their ceremonies and other religious activities
  - Right to speak their language
  - Right to traditional knowledge
- **Right to Education, Public Information, and Employment**
  - Right to an education
  - The education Aboriginal people receive should respect and promote Aboriginal culture
  - Aboriginal people must be able to teach their traditional ways of life
  - Right to have their own TV< radio, and newspapers
- **Right to Participate in Decision-making and Free, Prior and Informed Consent**
  - Aboriginal communities must be able to participate in making any decision that affect their lives
  - Aboriginal people have the right to make their decisions according to their own decision-making processes
  - Consent should be given in a free, prior, and informed way
- **Economic and Social Rights**
  - Right to improvements in areas of health, education, employment, housing, vocational training and retraining, sanitation, and social security
  - Right to develop and run social programs
  - Right to continue hunting, fishing, ad other traditional means of earning a living
- **Rights to Land, Territories and Resources**
  - Right to their lands, territories, and natural resources

  - Rights t the lands they now live on and use and rights to areas they traditionally lived on and used.
- **Treaties, Agreements, and Other Constructive Arrangements**
  - Treaties are the basis for the relationship between Canada and Aboriginal peoples
  - Governments must respect and uphold all Treaties and other types of agreements made with Aboriginal peoples
- **Indigenous Women's Rights**
  - Indigenous women are entitled to all the rights in the Declaration
  - Governments must work with Indigenous peoples to end violence against Indigenous women

UNDRIP: Bill C-15

- Bill C-15- or the "*United Nations Declaration of the Rights of Indigenous Peoples Act*" is an interpretive aid
- Created in December 3, 2020 is a push by Parliament to approve UNDRIP as a consultation framework
- The TRC used UNDRIP as its reconciliation framework and is foundational in what Bill C-15 is meant to acknowledge for Indigenous self-determination.
- According to the DOJ:
  - If passed, this legislation would not change Canada's existing duty to consult Indigenous groups, or other consultation and participation requirements set out in other legislation…
  - The Bill does not create new obligation or regulatory requirements for industry
  - Bill C-15 does not immediately change any operations, policies, or laws, related to the Department of Fisheries and Oceans or the Canadian Coast Guard
  - Nothing in the federal legislation would prevent provinces or territories from developing their own plans and approaches for implementation of the Declaration, or require them to do so.
- From the OKT firm's website summary:
  - "Overall, the Bill, if passed, would not make any direct substantive changes in Canadian law.
  - It would initiate a process that might lead to such substantive changes. The process would also apply to federal laws only. It would not affect provincial laws.
  - If provincial laws are to be made consistent with UNDRIP, this would require a separate process with each province." (BC is working on this as we speak

INDIGENOUS SELF-DETERMINATION AND CHILD WELFARE

Issues involve 5 Complicating Factors that reflect today's complicated reality:

1. Historical and Social Context
    - A long history of loss
    - Prior to the 1950s- no child welfare services on reserves (federal enclave- neither government wanted to fund)
    - The sixties scoop= example of a bus pulling up and taking all the children, 80 children taken out of a community of 500
    - Residential Schools
        - Statistics average about 3x the amount of children in the child welfare system as there were in residential schools at the height of the Residential Schools System
    - 1 in 3 Indigenous children in care
        - Care is rarely a good place to be, often out of the drying pan, into the fire
        - Seen as part of a continuum of settler colonialism by many – assimilation, cultural loss, thereby a continuation of residential schools policy
2. Racism and Cultural Heritage
    - In *Van de Perre v Edwards*, judges may take some notice of "racial facts" and "sensitive issues" do not always make judicial notice possible
    - Individual stories map on to histories of racism and colonialism
    - Usually linked to positive identity, self-esteem, confidence. Coping skills for being non-white in a racist society
    - Loss of culture. Indigenous heritage a factor, but not determinative (*H(D) v M(H))*.
    - In *Racine v Woods*- suggested that the important of cultural heritage abates in time. Probably the right decisions for this child, but the ratio is problematic.
3. Community Survival
    - Push to keep Indigenous children within Indigenous communities
        - Mentioned in every child welfare legislation across Canada
    - Increasing Indigenous/community control over child welfare delivery
        - Ex. 18 delegated agencies in AB
    - Marlee Kline proposes the criteria for evaluation is how many children stay in or return to community.
        - BUT it is not that simple:
            - Best interests of the child is a controversial test- almost undoubtedly connected to the best interests of the community in most cases, BUT then the individual losses must be a community loss as well
            - There is more than one way for a community to lose a child.
4. Poverty
    - Neo-liberal trend of devolution and privatization of children services

- Responsibility for delivering services and outcomes delegated without corresponding to:
    a. Responsibility for characterizing the issues; and
    b. Resources for supporting work of care and alleviating conditions of poverty that form context.
- The long battle between provinces and feds about child welfare on reserves prior to 1960s – was about neither wanting to fund them
    - Funding 22% less for children on reserve than off reserve- implications (secondary, preventative services not available). Case going up right now- challenging the dismissal of human rights complaint by First Nations Family and Children Caring Society of Canada, Cindy Blackstock.
    - Ex. Case where child is almost re-apprehended due to unsafe conditions - no heat in rented trailer, mom turns on oven and opens up door to heat trailer = unsafe, dangerous to child (could be burned). Judge relents, of course, this is tough situation, but she should know better…how? What could she do?
    - Material conditions of poverty continue to form context.
- No room for mistakes, no room for crisis, or just “s$&# happening”. Constant low-grade stress, and always on the brink (“I don’t know what I would have done if not for… answer – you would have been evicted, you would live on the street, etc.)
- Many custody cases where economic stability precludes the Indigenous parent; many children in kinship care where there is simply not enough adequate housing etc.

5. Community Traumatization
    - Massive, intergenerational trauma
    - Unprecedented levels of violence experienced by Indigenous families and communities in this generation
    - Hollow Walters Project, or Rupert Ross Article – 60-80% have experienced serious sexual abuse/assault and 30-40% offenders.
    - Hylton report for Aboriginal Healing Foundation – all available evidence shows rates of violence and sexual offending is as much as 5 times higher than Canadian rates - maybe even higher.
    - Lateral violence, current endangerment, organic brain damage and youth growing up incapable of feeling empathy for others. Suicides, assaults, homicides, gangs, alcohol, drugs.
    - Real human beings, vulnerable children caught up in the difficult challenges of turning ideals into reality
    - Who do you think would be more likely to seek out their community as an adult?

- Some Indigenous youth in care that Dr. Hadley Friedland worked with - didn't realize white people got abused or could even be abusers – associated their identity with their abuse – this was reinforced by the racist messages pervasive in our society.
- No matter how uncomfortable speaking about this is, blindness to or silences about the losses of children cannot be the answer either. Learning to speak honestly and openly about the difficult realities is an important part of restoring right relations.
- These are tragic choices - How we think and speak about this in the immediate, non-ideal worlds does matter - no right answers, simply choosing between sufferings
- Generally – addressing systemic racism, understanding and connections within broader systems (positive signs).
- Building capacity within communities – for children to be safe, loved and cared for by their own families the ideal- how do we concretely build toward this aspiration?
- The navigation out of the oppressive practices of the past, through the pain of children in the present, illustrates some of the hardest yet most vital work of reconciliation.

Racine v Woods

- Case came out just post-*Charter*
- SCC began to place emphasis on children being connected to their Indigenous cultures
- But in this case the Court stated that "the importance of culture diminished over time and that bonding to adoptive or foster parents becomes more important" when the non-Indigenous foster family applied for adoption of the child apprehended from a 60's scoop survivor
- Controversial because this child eventually wen ton to suffer addictions and was removed from her adopted family and placed in care **– which then the question became is this still good law?**

S(EG) v Spallumcheen Band Council

- The Court accepted that a by-law by a First Nation over road Provincial child-welfare laws
- Bylaws no longer have to be approved by the government to have force, but they do have to be published, and comply with the Charter and human rights legislation
- Prof Naomi Metallic considers these by-laws to be viable for First Nations to reassert control over their own matters especially with child welfare- now and not later
- This is an exercise of Indigenous self-determination

Jane Doe v Awasis Agency of Manitoba

- 13 year old girl had her adoption overturned and, against her will, forced to move to an isolated reserve in Northern MB
- There were language barriers as she could not speak Dene and was confined and raped repeatedly by male members of the household
- Attempted suicide twice, was hospitalized for venereal disease
- What are the best interests of the child? “Since there is no infallible method of selecting the best caregiver or caregivers, one is really seeking to choose the least damaging options available”

Dr. Friedland “Intergenerational Injustice”

- The latest research on childhood victimization strongly suggests that strengthening norms and enforcement of norms against intimate violence correlates positively with reduced rates of such violence
- This leads Dr. F to ask: what if the opposite is also true? What if part of the massive intergenerational trauma and violence today is linked to the erosion of Indigenous legal traditions, which, while not perfect, would appear to have worked well enough for thousands of years prior to European contact?
- “Because violence and vulnerability are issues all societies face, logic alone dictates **Indigenous societies had ways to deal with these issues prior to the arrival of Europeans**. Logically, these legal traditions must have provided principled ways to address social problems and order human affairs.”
- “Crucially, these legal traditions, like all legal traditions, also provide a specific way of not just solving, but articulating and reasoning through social problems in the first place.”
- At the heart of her work with revitalizing Indigenous laws with communities, she asks:
    - How do we protect those we love from those we love?
    - How do we support the work of care?
    - How can we draw on internal strengths and intellectual resources to build the current capacity of Aboriginal communities to be safe, healthy loving places for families and children to flourish within?

“The massive intergenerational trauma, extreme levels of social dislocation and distress, the unprecedented levels of violence, death, addiction and vulnerability in Indigenous communities and among Indigenous peoples –

Would it be more realistic, and productive, to start calling this intergenerational injustice, rather than intergenerational trauma?”

Self-Determination

- Article 3 of UNDRIP provides for this right for Indigneous peoples ‘to freely determine their political status and freely pursue their economic, social, and cultural development”

This is very different from the individualization of minority rights in existing nation states.
- Settler colonialism erases the distinctions of Indigneous nationhood. Self-determination is very important as Indigenous peoples are each very distinct from each other. Canada is a nation of shared nations. It is important to account for differing perspectives of diverse Indigneous peoples in all levels of society, especially in child welfare.

How the TRC used *UNDRIP* Principles

- The TRC in both its 2015 Final Report, used the *UNDRIP* as a reconciliation framework to assist Canada with moving forward in all levels of society. The TRC endored that *UNDRIP* provided "the necessary principles, norms, and standard for reconciliation to flourish in twenty-first-century Canada"
- The TRC highlighted the need for every Canadian to understand their responsibilities as Treaty partners and that it is a practice that we must engage in all facets of our daily lives. An example is the recent legislation that is in the process of changing our legal landscape here in Canada.

Bill C-92: *An Act Respecting First Nations, Inuit and Metis Children, Youth and Families*

- Bill C-92 received Royal Assent as recently as January 2020
- The TRC's first five of its 94 Calls to Action focused on "Child Welfare"
- Among the list required to meet this CTA, includes "providing adequate resources to enable Aboriginal communities and child-welfare organizations to keep Aboriginal families together where it is safe to do so, and to keep children in culturally appropriate environments, regardless of where they reside.
- Requirement for "[e]nsuring that social workers and others who conduct child-welfare investigations **are properly educated and trained about the potential for Aboriginal communities and families to provide more appropriate solutions to family healing**."
- The First Nation, Tk'emlúps te Secwépemc discovered over 200 unmarked graves on the grounds of the Kamloops residential school
    - This was the beginning of many Indigenous communities organizing other excavations, and many communities have plans – with the help of federal funding – to undergo future excavations of residential school grounds in search of children who never made it home.
    - AG Kim Murray, Mohawk of Kanehsatake, was appointed (June 8, 2022) by the federal government to be the "Independent Special Interlocutor for Missing Children and Unmarked Graves and Burial Sites associated with Indian Residential Schools"
    - She is mandated to work very closely with Indigenous nations, communities across Canada, specifically surrounding the unmarked burials and steps forward.
    - Cowessess First Nation did their own investigation into unmarked graves at the Marieval Indian Residential School, operated by the Roman Catholic Church from

1899 to the 1980s. Up to 751 remains were found with GPR, Chief Cadmus Delorme reframed this tragedy that had the potential to retraumatize an entire community, and instead focused on how Cowessess intends to become a leader on child welfare.
    - CFN developed their own legislation in March, 2021, the *Miyo Pimatisowin Act* was the result of Bill C-92, that was passed in 2019, becoming federal law.
- Bill C-92 has mandatory requirements for Indigenous Child and Family Services or CFS. It is the first statute to recognize and affirm **Indigenous jurisdiction over CFS** and an Aboriginal right protected under s 35.
    - CFN has implemented plans for the Chief Red Bear Children's Lodge
    - 19 children have already been returned to the community, formally in care.
    - Reintroduced 9 children from all over the province of SK that have Indigenous roots to the First Nation.
    - These children have had the opportunity to meet family members, Elders and the rest of the community.
- Wahkohtowin Law and Governance Lodge - leader in community engagement by having their researchers work with a communities' needs.
    - For ex. the **Compliance Guide for Social Workers and Service Providers** is a toolkit that breaks down in plain language what the mandatory requirements by law are now when considering the **best interests of the Indigenous child**.
    - "It includes the importance of ongoing relationships for Indigenous children and should be considered in light of the *cultural continuity* and *substantive equality* principles."
    - "Err on the side of communication."

Mainstream Images from the "Imaginary Indian":

1. **The Vanishing Canadian**- Indigenous Peoples as dying off, fading away, disappearing.
2. **The Noble Injun** – Indigenous Peoples as wiser, better, more noble and brave than others or child-like, innocent, children of the forest (modern- environmentally noble).
3. **The Savage Injun** – Indigenous Peoples as inherently violent, uncontrollable, cruel.
4. **Red Coats and Redskins** – Indigenous Peoples as lawless, child-like; RCMP "bringing law and order" to the west.
5. **Cowboys and Indians** – Indigenous Peoples as the "other", the "bad guys" or foil for the hero in the westerns.
6. **Performing Indians** – Indigenous Peoples as defined by pow-wows, regalia, "tricks" to entertain non-Indigenous people.
7. **Celebrity Indians & Plastic Shamans** – Indigenous Peoples who buy into and invent themselves to cash in on the stereotypes.
8. **A Good Injun is a Dead Injun** – Referring to the thoughtless violence and slaughter of Indigenous Peoples in films, and an self-explanatory racist comment

9. **The Groovy Indian** – Indigenous Peoples as idealized by 'hippies' – intrinsically peaceful, ecologically friendly, in tune with nature and people
10. **The Bureaucrat's Indian** – Indigenous Peoples as viewed through government lenses as a problem, or people that need to be administered.
11. **The Indian Princess** – Indigenous women as Pocahontus, wild, sexualized, with the shadow side of this being dehumanizing slurs and epidemic of sexualized violence.
12. **The Wise Old Elder** – Older Indigenous Peoples as wiser and more able to solve problems and teach than older non-Indigenous people

THE TRUTH AND RECONCILIATION COMMISION

"When the school is on the reserve the child lives with its parents, who are savages; he is surrounded by savages, and though he may learn to read and write his habits, and training and mode of thought are Indian. He is simply a savage who can read and write. It has been strongly pressed on myself, as the head of the Department, that Indian children should be withdrawn as much as possible from the parental influence, and the only way to do that would be to put them in central training industrial schools where they will acquire the habits and modes of thought of white men."

~ Sir John A. MacDonald, Prime Minister of Canada, 1883 in a speech to the House of Commons

History of the Residential Schools System

- From 1880 to 1996, Indian residential schools were in operation throughout Canada.
- The Government of Canada knew when it was first proposed, there was no funds to even minimally operate them – so they were church run and basically labour camps
- Shift in policy and the development of law form treaty-making to white racial supremacy (Darwinism, etc) was the turn taken in the mid 1880s.
- 1857 - *The Gradual Civilization Act* included a framework for the assimilation of Indigenous peoples who wished to become British citizens. This "enfranchisement process" had the intent to civilize the savage lifestyles of Indigenous communities.
- *Constitution Act, 1867* – the Federal government had the authority to legislate and make policies over "Indians and Lands reserved to them."
- 1869 – *The Gradual Enfranchisement Act*
- Consolidation of all previous Acts into the first *Indian Act* in 1876
- Following Richard Henry Pratt's lead in the United States, the "pioneer" for this policy, coined the quote, "Kill the Indian, save the man." Carlisle Indian Industrial School in Pennsylvania was among the most infamous and was first established in 1879.
- Duncan Campbell Scott then made it compulsory that children attended the residential school system from1880 onwards.
- After an enormous class action suit, the 2006 Indian Residential Schools Settlement Agreement resulted in a former apology by the federal government in 2008 by then Prime Minister Harper.

Truth and Reconciliation Commission

- The TRC was established as a part of the settlement between the Government of Canada and the survivors of the Indian Residential School System (IRSS)
- The original purpose of residential schools was to remove and assimilate Indigenous children, thereby undermining Indigenous cultures, legal orders, and governance.
- The final report of the TRC memorializes this history, and provides us with Calls to Action to learn from the past as we go forward in a future of reconciliation.
- "Intergenerational trauma from the effects of residential schools continues to impact Indigenous families and communities. Children who survived residential schools returned to their communities and had difficulty reintegrating. As well the federal government continues to maintain inequitable housing, water, education, healthcare, fire protection, and child welfare. This agitates trauma and makes it very difficult to heal without an equitable standard of living. This makes it dangerously easy for non-Indigenous peoples to perceive Indigenous peoples as inherently damaged or what Eve Tuck coins as a "damage centered narrative".
    - Call to Action #27: Ensure that lawyers receive appropriate cultural competency training
- "The criminal prosecution of abusers in residential schools and the subsequent civil lawsuits were a difficult experience for Survivors. The courtroom experience was made worse by the fact that many lawyers did not have adequate cultural, historical, or psychological knowledge to deal with the painful memories that the Survivors were forced to reveal. The lack of sensitivity that lawyers often demonstrated in dealing with residential school Survivors resulted, in some cases, in the Survivors' not receiving appropriate legal service. These experiences prove the need for lawyers to develop a greater understanding of Aboriginal history and culture as well as the multi-faceted legacy of residential schools."
    - Call to Action #28: We call upon law schools in Canada to require all law students to take a course in Aboriginal people and the law, which includes history and legacy of residential schools, *UNDRIP*, Treaty and Aboriginal rights, Indigenous law, and Aboriginal-Crown relations. Skill-based training in intercultural competency, conflict resolution, human rights, and anti-racism.

INUIT RIGHTS

Background and Review

- In early 1930s fur prices collapsed and caribou were scarce. Led to wide-spread starvation for the Inuit in Labrador, Nunavik, and elsewhere across Arctics
- In 1939, SCC issued *Reference whether "Indians" includes "Eskimo",* to resolve dispute between the province of QB and the federal government over level of government responsible for Inuit in northern QB

- Basically, Canada said Inuit were not Indians; QB said Inuit were Indians
- Federal government had briefly recognized the Inuit in the *Indian Act* before transferring authority to NWT
- Canada provided relief to the Inuit across the country from 1930 to 1932 but sought reimbursement from QB for its share
- QB sought judicial reference to challenge this expense
- SCC ruled Inuit were "Indians" for purposes of s 91(24) based on various historic references to the Inuit as an "Indian tribe" in documents from 1760 up to Confederation in 1867

- Canada first sought appeal to Privy Council but dropped it with onset of WWII
- Canada considered returning the Inuit to the *Indian Act* or even creating a specific Act to address the Inuit but ultimately did neither and thereby had no comprehensive Inuit policy
- In fact, the 1951 amendment to the *Indian Act* stated that any references to "Indians" in the *Indian Act* did not include "Eskimos"
- Inuit gained right to vote in 1950 whereas First Nations people did not receive this same civil right until 1960

Section 35

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 Metis peoples of Canada.

Section 91(24)

- Does 91(24) include Inuit (Eskimos)?
- 1939 Reference re: "Indians" took a historic documentation approach BUT the Inuit were not asked who they are
- Note also the racist nature of the judgement and the assumption that the Inuit peoples who lived in Rupert's Land and the NWT when Canada bought the land from the HBC would pass to Canada like property in a contract.
- Still exclusion from *Indian Act*

Exiles in the High Arctic and Relocations

- Between 1953-1955, the RCMP removed a community of Inuit from Inukjuak and Mittimatalik (now known as Nunavut) to the High Arctic Islands on the pretense of better living conditions, but the underlying reasoning behind this policy was to further Canadian sovereignty in the Arctic because of the Cold War
- This led to disastrous living conditions for the Inuit relocated (could not build igloo and froze in canvas tents with some bison coverings), and resulted in the needless, forced separation of close-knit families.

- The wildlife was limited if not depleted in these areas, causing some Inuit to scavenge for food – some even in the dumps behind military posts
- High penalties for hunting beyond a strict ration of the only available wildlife, food confiscated if caught scavenging and funds from trapped pelts sold rerouted to Canada's "Eskimo Loan Fund" instead of back to the hunters
- The 1960's saw an increase in non-Inuit men due to RCMP posts and bars increased alcohol consumption with direct increases in domestic violence and sicknesses (for ex. Tuberculosis)
- Eventually in the 1970's and 1980's there was federally funded initiatives to have the Inuit relocate back to more southern areas, and again split up families
- RCAP informed the foundation for the Federal government's "Reconciliation Agreement" but came with a catch for Inuit accessing the $10million in funds
- Other colonial abuses have made their impact on the Inuit, including the residential schools and the mass slaying of sled dogs
- Naming is extremely important (great spiritual significance) for the Inuit – were given numbers on "dog tags" that had to be carried with them at all times

****Story of Kikkik who kills Ootuk and walks across the Arctic with her kids.**

Land Claims

- Inuit of Nunavik and the James Bay and Northern Quebec Agreement (1975)
- Inuvialuit (1984)
- Inuit of Nunavut (1993), (Territory,1999)
- Labrador Inuit Agreement (2005)
- Nunavik Off-shore Agreement (2006)
- **The Nunavut Land Claims Agreement (NLCA); Or Nunavut Final Agreement**
  - Signed in Iqaluit in 1993, and then ratified and came into force that same year – parties included the Tungavik Federation of Nunavut (TFN), the Government of Canada and the NWT
  - Largest geographic area of any land claim agreement
  - Approx. 23,000 Inuit beneficiaries in the Nunavut Settlement Area - territory of Nunavut (1999)
  - Approx.1.9 million square kilometers - 1/5 of Canada, includes adjacent offshore areas

Inuit Law

- Although the Nunavut government established under the Nunavut Land Claims Agreement is fashioned after a modern Western form of government, there is a unique opportunity to incorporate Inuit law and world view into Nunavut governance
- *Inuuqatigiitsiarniq* – respecting others, relationships and caring for people
- *Tunnganarniq* – fostering good spirit by being open, welcoming and inclusive
- *Pijitsirniq* – serving and providing for family or community, or both

- *Aajiiqatigiinniq* – decision making through discussion and consensus
- *Piliriqatigiinniq* or *Ikajuqtigiinniq* – working together for a common cause
- *Qanuqtuurniq* – being innovative and resourceful
- An Inuit Creation Story:
    - The story of Aakulugjuusi and Uumaarniittuq is an Inuit creation story that demonstrates the importance of arctic wildlife to the Inuit, and the significance of the interconnection between animals and Inuit
    - It is not surprising then that "harvesting wildlife" is fundamental to Inuit life and cultural identity.

Inuit *Qaujimajatuqangit*

- Includes many dimension that involve the application of tirigusuusitt (prohibitions)
- It involves a number of concepts for guiding Inuit society and providing meaning and order.

Inuit Civilization

- One of the most adaptive technologically advanced civilisations in the world.
- A unique people, with a distinctive history, culture and language.

Nunavut Wildlife Act, s NU

- Inuit law and knowledge is incorporated into the *Nunavut Wildlife Act*
- For example, s 1(f) referentially incoproates traditional Inuit law as part of the Act.

Maligao and Piquajao

- Wildlife management involves Inuit maligaq, which requires Inuit to take good care of wildlife (manage)
- This responsibility includes following certain principles of piqujag such as respecting wildlife and not abusing them
- The importance of wildlife and respect for wildlife cannot be underestimated
    - Indeed, in the NTI case, the court noted that it is a core defining cultural activity.

The Nunavut Wildlife Management Board

- Has responsibility under the Wildlife Act to issue permits for hunting polar bears.
- There are certain prescribed weapons. A spear and harpoon are not approved under the legislation.
- The NWMB has authority under the Land Claims Agreement to modify or remove these types of restrictions.

Kadlak v Nunavut

- Noah Kadlak – wanted to hunt a polar bear with a spear, as was traditional in his family - Minister said this was a public safety issue
- J Filpatrick determined that the Minister's decision was unconstitutional as the NLCA is constitutionally protected and that the justification of public safety failed Standard of Review on Correctness (high);

- Valid Legislative Objective – Yes; Minimal Interference – No
- "The outright prohibition of a traditional Inuit harvesting activity is a drastic step. It is a step of last resort."
- Mr. Kadlak wished to hunt polar bear in the time honored manner of his people using traditional methods which included relying on the spear and harpoon.
- This is a very dangerous way of hunting polar bear.
- Mr. Kadlak applied to the NWMB to get permission to go on the traditional hunt.
- The Board granted permission based on certain conditions.
- Minister of Sustainable Development intervened and informed the NWMB that such as application is to be denied because it is an unwarranted risk to "public safety" under s 5.3.3 of the Agreement
- NWMB reconsiders its decision but nonetheless affirms its original position
- Minister again refuses permit

Judicial Review

- The social and legal context of the Nunavut Land Claims Agreement must be taken into account
- **The provisions of the Agreement are to be afforded a large and liberal interpretation** with an understanding of the significant importance of the Inuit rights to hunt to culture and identity.

Justification

- Public safety is to be interpreted broadly as capturing the public safety of Mr. Kadlak and that it is a "valid" legislative objective.
- The *Sparrow* criteria built into Article 5.3.3 of the Land Claim:
    - The Minister must first consider whether other reasonable conditions could effectively address the legitimate public safety concerns arising from the activity before imposing an outright prohibition
    - Although the NWMB imposed conditions to ensure safety and still allow the activity, the Minster did not and the matter was sent back to the Minister for reconsideration.

Nunavut Tunngavik Inc v Canada (AG)

- NTI brought a claim against the universal application of the *Firearms Act* on behalf of the NLCA beneficiaries
- NTI (along with Nunavut's government) mandate is to uphold the economic, social, and cultural wellbeing of the Inuit
- This Act would infringe on this well-being, as the Inuit have rights guaranteed to them under the NLCA – the Court agreed with NTI and granted an interim stay to prevent the "irreparable" harm that would occur if the Act was applied
- When the *Firearms Act* was introduced, the Nunavut Tunngavik Incorporated was concerned about its impact on Inuit hunting rights.
- NTI sought an interlocutory stay of the Act's application to Nunavut beneficiaries.

- In doing so, the government of Nunavut intervened on behalf of NTI.

Summary Judgment Application

- Canada brought a motion to dismiss
- Argued that there was no genuine issue, Canada argued against a contextual analysis f the Land Claims Agreement

Application for an Interlocutory Stay Test:

1. Serious question to be tried?
    - The positions offered as to how you interpret “firearms control” is serious and an important question that could have serious implications for Inuit beneficiaries.
2. Irreparable harm?
    - The Court examines the nature of Inuit life and how firearms licensing may negatively impact Inuit hunters
    - Arguments by the Crown: no longer important and other food available
    - The court painted a picture of what it is like to live in such a harsh environment, and likewise how such communities will be disproportionately negatively affected by the firearms licensing regime.
3. Balance of Convenience?
    - The public interest in seeking to reduce misuse of firearms and the violence that they can inflict is a very important and worthy public interest.
    - There is also the public interest, as advocated by the Inuit Government, of seeing to the hounour of the Crown in upholding important treaty rights and the important Inuit interests of harvesting wildlife that may be negatively impacted.
    - **The Court decided that the interests of the Inuit and hence Nunavut outweighed the public interest of firearms protection.**

LEGAL ORDERS AND THE NARRATIVE ANALYSIS METHOD

Inherent Tensions

- Issues concerning Aboriginal rights to resources falls under the larger doctrine of Aboriginal rights
- This body of jurisprudence is based on the court’s interpretation of s 35 of the *Constitution*- “Existing Aboriginal and Treaty Rights are hereby recognized and affirmed”

An Ethical Dilemma

- Since 1982, we have come to learn that the doctrine of Aboriginal and Treaty rights is fundamentally flawed because it reinforces a position of inferiority and inequality.
- The foundational justification of Crown sovereignty upon which the doctrine is based and all legal manifestations that derive from it such as Aboriginal title and Aboriginal rights are in violation of fundamental human rights principles as they apply to the rights of the nations Indigenous to North America.

An Ethical Obligations

- As lawyers we must do nothing that will further harm our clients
- As lawyers advocating on behalf of an Indigenous nation or community/government in relation to the use and/or protection of natural resources **must understand** that the choice of law has broad political and human rights implications
- For ex. domestic Canadian state law, international human rights law of Indigenous Peoples or Indigenous Peoples own Legal Orders

Indigenous Women

A History of Manifest Discrimination

- Contemporary circumstances and marginalization of Indigenous women
- Compounded race and sex discrimination
- Historical role of men and women
- Impact of the *Indian Act*
    - Enfranchisement Objectives
    - Matrimonial Property issues, etc.
- Bill C-31 (A Pandora's box)
    - Continued sex discrimination (*McIvor*)
    - Bill C-3

Traditional Roles of Women

- Indigenous societies varied across North America as to the nature of gender relations
- Many were Matrilineal in nature and in some cases only women could appoint (vote) for leaders (for example the Haudenosaunee Confederacy)
- Women and men had different roles, but neither gender was devalued. Many Indigenous societies held to a social structure of gendered complimentarily.

Introduction of Paternalism and Gendered Racism

- Unfortunately, the colonial attitudes about women have been internalized by their own communities
- Some Indigenous communities have internalized differential treatment against women to the point that they argue that such treatment is a “traditional” custom of their community (*Sawridge*)
- Unlike European societies, many indigenous societies were matrilineal.

Truth and Reconciliation

Barriers and Challenges to Reconciliation

- Internal Reconciliations: Structural, relational, and individual levels
- External Reconciliations: Structural, relational, and individual levels

How do Indigenous people recover, learn, and practice their own legal traditions in a context where:

- The sovereignty and jurisdiction of Indigenous Nations has been denied, undermined, and is till legal unacknowledged?
- Historic injustice that continue to date and continue to impact Indigenous communities
- The massive intergenerational trauma, extreme levels of social dislocation and distress, the unprecedent levels of violence, death, addiction, and vulnerability in Indigenous communities and among Indigenous peoples?

Statistics, Reports show Indigenous Peoples are overrepresented, incarcerated, and victimized.

- Failure of the Canadian Justice System:
  - "The justice system has failed ... Aboriginal people on a massive scale" *Manitoba Justice Inquiry* (1991).
  - *R v Barton* 2019 SCC 33: "Our criminal justice system holds out a promise to all Canadians: everyone is equally entitled to the law's full protection and to be treated with dignity, humanity, and respect. Ms. Gladue was no exception. She was a mother, a daughter, a friend, and a member of her community. Her life mattered. She was valued. She was important. She was loved. Her status as an Indigenous woman who performed sex work did not change any of that in the slightest. But as these reasons show, the criminal justice system did not deliver on its promise to afford her the law's full protection, and as a result, it let her down — indeed, it let us all down"

Forced Diversity or Treaty Responsibility? The Difference between Systemic Inequality and Using a "deficit lens"

- In the past, and somewhat still occurring in the present, sociological research sued a deficit discourse to inform research projects that in turn informed the development of policy.
- This deficit discourse typically portrays Indigenous peoples as disadvantaged or lacking in their capacity to address challenges; but attributes these issues to individual choices as opposed to systemic inequalities. This is referred to as using a "deficit lens"

However, this does not mean ignoring the disadvantages that many Indigenous communities face that are rooted in systemic inequalities.

- The "Trauma Narrative" keeps the public gaze on intergenerational trauma to explain violence and victimization against women and children in Indigenous communities
- Focuses on massive social upheaval inflicted deliberately or recklessly by colonial mechanisms.
- We can acknowledge colonial damage and immense social suffering but we need to also focus on Indigenous agency and judgment
- **Narratives of Despair**" (Dr. Val Napoleon)
- **"Emotional Bloodletting"** Audra Simpson
  - Indigenous Peoples painful current realities are political and results from *injustice*, rather than as individual - resulting from *pathology*

- This paradigm shift is **essential for Indigenous resurgence**

What does the Trauma Narrative Miss?

1. Canadian State Law as Government Oppression + Disordering,
2. A way to affirm individual agency and afford dignity and respect to individual and group decision-making about horrible subjects nobody really wants to talk about, in terrible circumstances of vulnerability perpetuated by current state laws, polices and practices.
3. A way to imagine Indigenous peoples as more than a blank slate, being oppressed and suffering, and instead drawing on internal strength and resources to respond to current violence and social suffering.

Indigenous Legal Traditions: Methods of Engagement

- Various methods of engagement ask different critical questions
  - What methods:
    - Best align with the Legal Research Assistant's current capacities?
    - Are more or less appropriate based on Legal Research Assistant's role?
    - Are practicable in the short term or take long term or life-long work?
    - Will achieve what the client needs and wants most effectively?
  - How does each method address:
    - The legal research assistant; objectives given the reality of the resources available?
    - Challenges of intelligibility, accessibility, equality, applicability, and legitimacy?
    - Issues of relevance, utility?
    - Issues of negative and positive stereotypes?
- Known and emerging forms of methods of engagement with Indigenous legal traditions:
  - Linguistic Methods
    - Revitalization of languages in order to understand from within the worldview
  - Meta-principle/language bundle
    - Indigenous Law
      - Elder Maria Campbell: "Each word is a bundle"
      - Default method in practice
      - Justice Fletcher / US tribal judges
      - In Canada, some legislation attempts to incorporate Indigenous legal concepts or principles
      - Several Nunavut statutes (Inuit Qaujimajatuqangit) including the *Sustainable Development Goals Act*, SNS 2019, c 26 (Netukulimk)
    - Cree Reclaiming the Language of Law
      - Wahkotowin (relationality and interdependence)
      - Education, guidance and support

        - Case by case reasoning
    - Cree Legal Responses
        - Healing
        - Separation or avoidance (temporary or permanent)
        - Supervision
        - Natural and spiritual consequences
        - Acknowledging responsibility
        - Reintegration
        - Incapacitation
        - Retribution
  - Word-parts
    - Morphemes "smallest grammatical units of speech"
  - Word clusters/group
    - Revealing worldview
    - Researchers do this all the time with "saturation points" in groups studied for quantitative data from qualitative methods used to get a perspective to inform statistics that in turn form policies
  - Place names/toponomy
    - Origin/region of meaning
    - Law and geography
- Chief Justice of Tribal Court and Professor Matthew Fletcher
  - Chief Justice of the Poarch Band of Creek Indians Supreme Court"
    - Also sits as an appellate judge for the Grand Traverse Band of Ottawa and Chippewa Indians, the Mashpee Wampanoag Tribe, the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians, the Pokagon Band of Potawatomi Indians, the Hoopa Valley Tribe, the Nottawaseppi Huron Band of Potawatomi Indians, the Santee Sioux Tribe of Nebraska
    - Director of the Indigenous Law and Policy Center.
    - Director and Instructor of Pre-Law Summer Institute for American Indian students
    - Tulalip Tribes Professor of Law at Michigan State University College of Law
    - A member of the Grand Traverse Band, located in Peshawbestown, Michigan.
  - Professor Matthew Fletcher
    - Flethcer, "The Ghost Road: Anishiaabe Responses to Indian-Hating"
      - "Since at least the Declaration of Independence, where American colonists condemned the British for enabling "merciless Indian savages" to undermine colonial interests, American Indian law

and policy has been driven by Indian-hating. Indian-hating dominates the philosophical foundations of anti-American Indian rhetoric that too often drives Indian law and policy. [He uses] [t]raditional Anishinaabe (Odawa, Ojibwe, Bodewadmi) stories or teachings, known as Aadizookaanaan, that helps to reorient law and policy from an Indian perspective."

- Fletcher Process
  - First, the tribal court judge must "identify an important and fundamental value identified by a word or phrase in the tribal language" (a primary rule)
  - Next, that primary rule is applied by the judge to the Anglo-American or intertribal secondary rule "as necessary to harmonize these outside rules to the tribe's customs and traditions"

Navaj Nation v Rodriquez

- Interpretation of Navajo Bill of Rights, which protects suspects from being "compelled … to be a witness against themselves" – Tribal Judge held that "Navajo police officers must give Miranda warnings (right to counsel) to every suspect in custody"
- *"Hazhó'ógo* applied to find that police owed a similar right to Miranda"
- "Fundamental tenet of how we must approach each other as individuals…"
- "The intent is to remind those involved that they are Nohookàà Diné'é, and that therefore patience and respect are due" and "is an underlying principle in everyday dealings with relatives and other individuals, as well as … our government institutions. Modern court procedures … [should be] conducted in *hazhó'ógo* in mind."

Methods Continued

- Community Embedded Method:
  - "Indigenous laws and legal orders may continue to function and flourish just beneath the visible surface…at an implicit and informal level." – [a method of] unpacking "a way of life" or "the way things are. "
  - "Moving from focus on the practice itself to the philosophical basis of the practice allows us to see more clearly the norms that are at work, the ways that those norms are contested, and the dispute management mechanisms, or local laws, that mediate this contestation.
  - Local law "locates law in the on-the-ground, day-to-day self-governance performed by Aboriginal people according to Aboriginal laws."
  - Identify day to day expressions of local law in the community – examine "what gives those practices meaning" and ask about the reasons behind people's actions – how people make decisions, conduct themselves, obligations, aspirations, critiques, conflicts etc.

- Extrapolate how local legal principles and obligations may be applied elsewhere – local governance, other issues or conflicts.
- Initiate critical and rigorous internal discussions about local laws, as laws.
- Example: the Wahkohtowin Law and Governance Lodge:
  - Sustainable, community-engaged, and interdisciplinary unit – located in the Faculty of Law, University of Alberta
  - Supports Indigenous communities' goals to identify, articulate, and implement their own laws and governance.
  - Develop, gather, amplify, and transfer wise practices, promising methods and research tools.
  - Produce useful and accessible practical governance resources and public legal education.

Shifting Thinking and Perspectives

In order to work with Indigenous law, it is helpful to shift how we think about law and how we think about Indigenous people. Canada's colonial story is powerful, so is Canada's story about Canadian law. There are negative stereotypes and ways of thinking about Indigenous peoples inside these overall Canadian assumptions

- The First Shift
  - A shift in assumptions so we can move past stereotypes in Canadian history and materials
    1. Reasoning and Reasonable: Indigenous peoples were and are reasoning peoples with reasonable social and legal orders
    2. Present Tense: Use present tense to talk about and consider Indigenous law today so it is not relegated to the past.
    3. Particular: Think about Indigenous laws as a particular response to universal human issues.
    4. Assumptions: The notions or thoughts we have about the world that we take for granted and do not usually talk about. Sometimes we have to look underneath and behind our assumptions to figure out why we think and do certain things. Only be unpacking assumptions do they become transparent. They have to be visible in order to challenge and change them.
- The Second Shift
  - To move past the usual generalizations about Indigenous peoples so that we can see and work with Indigenous law
  - This is not to say that the general questions are not important, but if you only ask general questions, you will only get general answers rather than something practical and usable

Professor John Borrows

Sacred Law

- Laws that are understood to be based on spiritual principles, from the Creator; creation stories, or revered ancient teachings.
    - For example, the Numbered Treaties can be thought of as a sacred agreement, creating Canada.

Natural Law

- Laws that are understood to be literally "written on the earth". Legal reasoning, guidance, standards of judgment and analogies developed based on close observations of, and experiences interacting with, the physical world, including the land, landmarks, water, animals, natural cycles and natural consequences.
    - For example, one can look at the cycle of milkweeds and butterflies or an ancient grizzly creating a landslide.

Deliberative Law

- Laws developed through people talking with each other. This is the 'proximate source' of most Indigenous laws, as all other sources still require human interpretation and implementation.
- Law is a conversational process, on that occurs over generations and includes methods of deliberation, debate, persuasion, re-examination, and revision, based on the entire body of knowledge available.
- KEY to resisting fundamentalist and dogmatic practices and ensuring laws remain relevant
    - For example feasts, circles, some band council, and community decisions.

Positivistic Law

- Legal rules, regulations and teachings that people follow based solely on their perception of the authority of the person or persons proclaiming them.
- This is dangerous if this source operates without other sources, as it can become a list of "dos and don'ts" or even oppression in any tradition. Realistically, it is hard to untangle law and politics – in states, and in small communities.
    - For example rules based on what a king, a powerful leader, or a respected Elder says should be the rule.

Customary Law

- Legal practices developed through repetitive patterns of social interactions, or special routines, procedures, or conduct that relies on the unspoken or intuitive agreements about how relationships should be regulated and what conduct appropriate within a given community
    - For example customary adoption; wearing a suit in court, and offering tobacco to Elders.

Human and Social Issues Analytical Framework

- **Legal Processes:** Characteristics of legitimate decision-making/legal processes
  - Authoritative Decision makers: who has the final say?
  - Procedural Steps: What were the steps involved in determining a response or action?
- **Legal Responses and Resolutions:** What principles govern appropriate responses to legal/human issues?
- **Legal Obligations:** What principles govern individual and collective responsibility? What are the *shoulds*?
- **Legal Rights:** What should people be able to expect from others?
  - Substantive Rights
  - Procedural Rights
- **General Underlying Principles:** What underlying or recurrent themes emerge in the stories that might not be captured above?

Environmental Issues Analytical Framework

- **Legal Processes**
  - **Territorial Protocols and Practices:** How do people demonstrate respect for each other's territories?
  - **Harvesting Protocols and Practices:** How do people demonstrate respect for the natural resources they are harvesting?
- **Procedural Steps for Making and Maintaining Agreements or Resolving Conflicts:** What steps do people take to resolve conflicts and/or establish and maintain agreements for appropriate access to stewardship of natural resources between families or groups?
- **Authoritative Decision-makers:** Who has the final say? Where and over what resources?
- **Relationships, Responsibilities, and Rights**
- **Consequences, Enforcement and Teaching**
  - Education, Enforcement, and Natural and Spiritual consequences uphold and reinforce principles
- **General Underlying Principles:** What underlying or recurrent themes emerge in the stories that might not be captured above?
  - General Principles are foundational or animating, and may inform all other principles
- Legal Principles and Processes, such as protocols, practices, procedures and decision-makers all serve to help people to decide how to balance relationships, responsibilities and rights with, of and to land and environment, other territorial groups and community in a principled and legitimate way

Child and Family Wellbeing Analytical Framework

- **Guiding Principles: Best Interests of the Child:**

  - What does a child or youth need in order to grow up into a healthy adult?
- **Families as Core Societal Institution:**
  - What are the consequences for the community/society when children and youth are:
    a. Loved, nurtured, cared for, protected?
    b. Maltreated?
- **Prevention, Intervention, and Practice:**
  - Decision-Making Process
  - Asks who are important people to involve in decision-making regarding children and youth?
  - What procedural steps are important for reaching a good decision?

Narrative Analysis Method or the "Friedland Framework"

- Indigenous law stories used in the "Narrative Analysis Method".
- This method was developed by Dr. Hadley Friedland, and is used in Wisdom Workshops in assisting Indigenous communities in revitalizing their legal traditions
- It assists in respectfully engaging with Indigenous legal orders upon invitation
- Bracket as opposed to "holding/or conclusion"
- Where there are people, there is law.

Challenges to Reconciliation

- Internal Reconciliations: Structural, relational, and individual levels
- External reconciliations: Structural, relational, and individual levels,
- How do Indigenous people "recover, learn, and practice their own legal traditions" in a context where:
  - The sovereignty and jurisdiction of Indigenous Nations has been denied, undermined, and is still legally unacknowledged?
  - Historic injustices that continue tot date, and continue to impact Indigenous communities
  - The massive intergenerational trauma, extreme levels of social dislocation and distress, the unprecedent levels of violence, death, addiction and vulnerability in Indigenous communities and among Indigenous peoples?
  - Would it be more realistic, and productive, to start calling this intergenerational injustice, rather than intergenerational trauma?

Trauma Narrative or Deficit Discourse

- Statistics, Reports: overrepresented as incarcerated and as victimized
- Failure of the Canadian Justice System:
  - "The justice system has failed… Aboriginal people on a massive scale" (*Manitoba Justice Inquiry*)
  - *R v Barton*: "Our criminal justice system holds out a promise to all Canadians: everyone is equally entitled to the law's full protection and to be treated with

dignity, humanity, and respect. Ms. Gladue was no exception. She was a mother, a daughter, a friend, and a member of her community. Her life mattered. She was valued. She was important. She was loved. Her status as an Indigenous woman who performed sex work did not change any of that in the slightest. But as these reasons show, the criminal justice system did not deliver on its promise to afford her the law's full protection, and as a result, it let her down- indeed, it let us all down"

- **Trauma narrative:** primary counter-narrative to dominant ones explain violence and victimization against women and children in Indigenous communities as an aspect of intergenerational trauma, resulting from massive social upheaval inflicted deliberately or recklessly by colonial mechanisms.
  - Acknowledges colonial damage and immense social suffering, reintroduces some crucial context, but does not capture Indigenous agency and judgment, nor seriously challenges Dominant Media narratives of depravity and incapacity
- **Narrative of Despair**: how to visualize realities for those unaware but not foreclose or render invisible and unexamined other narratives within both state and Indigenous societies and legal traditions?
- **Emotional Bloodletting:** As Mohawk scholar Audra Simpson notes, naming and deconstructing people's painful current realities as political and resulting from injustice, rather than as individual and resulting from pathology, is essential for Indigenous resurgence. She resists narratives that "keep us in our place as wounded subject" and sees trauma discourse as problematic where it "pathologizes politics, the necessity of critique"

POLICY MAKING AND NEGOTIATIONS WITHIN UNCERTAIN AND CONTESTED PARAMETERS

Reconciliation, Litigation and Collective Narratives

- The federal government's partnership with churches over running of residential school system ended in 1969, at which point control started to be transferred to First Nations in the south
- Most residential schools closed by mid-1980s, but some stayed operational until as late as 1996 in SK and elsewhere
- Generations that did not attend still face intergenerational and collective harms
  - For example interruption of cultural transmission and parenting skills, loss of land-based knowledge, practices and skills, loss of language, culture, and spirituality linked to other social dysfunction and pathologies or "anomie"
- Very little attention to residential school system until Chief Phil Fontaine went public with his own experiences of abuse in 1990, opening the door for many others to follow

- Royal Commission on Aboriginal Peoples established in 1991 & held over 178 days of public hearings in 96 communities & this provided venue for survivors to testify about abuses
- In 1996, RCAP documented these harms in part and called for public inquiry exploring residential school abuses in greater detail
- BUT the federal government at the time neither apologized nor ordered any commission in its response to RCAP's many findings
- Survivors pushed for justice through criminal prosecutions, civil litigation, and eventually a form of an ADR (alternative dispute resolution) was established for this
- However, none of these mechanisms addressed the broader systemic issues
- Chief Phil Fontaine at the time was elected National Chief of the Assembly of First Nations (AFN) and commenced negotiations with church and federal government
- Class actions sprung up across Canada as well, all setting stage for the Indian Residential Schools Settlement Agreement (IRSSA)
    - Common Experience Payment (CEP) = compensation for all survivors based on years of attendance at identified schools
    - Independent Assessment Process (IAP) = adjudicated process for hearing and deciding individual claims and compensating those who survived sexual assaults and "serious physical assaults"
    - IRSSA also created $125M Aboriginal Healing Fund, which provided the $60M needed for the establishment of the Truth and Reconciliation Committee
- The IRSSA was accepted by courts as the resolution for class actions filed across Canada
- Courts and the federal government started the acknowledgement that residential schools aimed to destroy language and culture of Indigenous peoples and served broader colonial goal of "cultural genocide"
- The Truth and Reconciliation Commission (TRC) was similar to other commissions (form of public inquiry) in terms of having an official state mandate as a **temporary quasi-judicial fact-finding body**
- TRC was unique, however, as only truth commission of its time created as part of settlement of litigation
- Truth commissions elsewhere tend to be created by new regimes to investigate past regimes
- Kim Stanton: "Were it not for the enormous financial cost to the government of continuing to defend against the class actions, the TRC would not exist in Canada" ("Settling the Past?" 2011)
- Steve Cooper doubted whether Prime Minister Stephen Harper would have apologized on behalf of Canada and recognized the genocidal objective of the residential schools **but** for the IRSSA
- Any other class actions settling the past and changing narratives?

Robert Hamilton on “Interstitial Federalism”

- Indigenous peoples’ law-making practices are federal in nature as they contribute to constituional distribution of sovereignty as between different levels of government beyond the *BNA Act*
- Some First Nations are using *Indian Act* by-law making power to expand jurisdiction to encompass regulation of production
    - For example sale of cannabis on reserve
- Some Indigenous peoples have declared tribal parks based on Indigenous laws and sovereignty - only later have provincial and federal governments recognized these under their own laws
- Indigenous law and decision-making bodies all challenge colonial assumptions about rigid assignment of exclusivity in *BNA Act*, perhaps especially modern treaties and joint management bodies
- Modern treaties may be framed as “negotiated federal order in which Indigenous nations assume jurisdiction on the basis of their inherent rights, a path to self-determination that clearly delineates the relationship between the treaty nation’s government and other members of the federation”
    - This includes institutions of shared governance like Indigenous courts and co-management bodies
    - Negative/critical framing of modern treaties as assimilation and incorporation into colonial governance;
    - Delegated authorities seen as equivalent to municipal governance;
- Yes - incorporated into Canadian federation but in subservient constitutional position
- *Chief Mountain* (2007 BCCA 483): Constitutionality of Nisga’a Agreement upheld as delegation of provincial and federal powers under *BNA Act* and entrenched in s 35 subject to the *Sparrow* test
- In absence of modern treaties, co-management institutions end up being negotiated and operationalized in the shadow of s 35 rights litigation, including the duty to consult and accommodate
    - For ex. West Coast Aquatic on Vancouver Island provides a forum for multi-party, consensus-based decision-making between representatives of federal, provincial and regional governments, Nuu-chah-nulth First Nations, commercial, recreational and Indigenous harvesters, aquaculture industry, forestry and more
    - Issues arise if decisions of co-management bodies not given respect they deserve by Crown decision-makers, but dispute resolution mechanisms and regulatory functions can ensure these amount to more than just co-management
    - Through this, “co-jurisdiction” becomes realistic possibility
    - Heiltsuk-Haida Peace Treaty and Buffalo Treaty explored as two examples of Indigenous jurisdiction expressed through treaty-making on nation-to-nation level between Indigenous nations

    - Val Napoleon identified this as one of 3 levels for reconciliation
- Unist'ot'en injunction case followed by negotiations between hereditary chiefs, federal and provincial government to recognize Wet'suwet'en title and rights, including self-government
- SCC expresses view of courts as lacking competence over Crown-Indigenous constitutional relationship, but negotiations don't always take place after s 35 rights claims adjudicated
- Hamilton argues courts **must unwind case law** for practices of interstitial federalism to flourish
- In context to judicial review of First Nations governance dispute, Justice Grammond stated: "Indigenous decision-makers are obviously in a better position than non-Indigenous courts to understand Indigenous legal traditions. They are particularly well-placed to understand the purposes that Indigenous laws pursue." (*Pastion v Dene Tha' FN*, 2018 FC)
- Grammond & Favel JJ of FC call for "judicial forbearance" in reviewing decisions of Indigenous decision-makers

Judicial Forbearance: Should Courts butt out?

- In context to judicial review of First Nations governance dispute, Justice Grammond stated: "Indigenous decision-makers are obviously in a better position than non-Indigenous courts to understand Indigenous legal traditions. They are particularly well-placed to understand the purposes that Indigenous laws pursue" (*Pastion v Dene Tha' First Nation*)
- SCC similarly calls for judicial forbearance in disputes between Indigenous peoples and the Crown re: implementation of modern treaties (*Nacho Nyak Dun v Yukon*)
- What risks do the avoid or engage this what? Can we imagine a woke Crown?
    - "Because of the Crown's history of failure and the present form of statutory or regulatory consultations, many questions arise about the effectiveness of the duty of constitutional consultation. Will the duty of consultation be an extension of the quibbling and abeyance (internal to the colonial narrative) or will the Crown perform this duty in good faith (external to the colonial narrative)? Will the agents of the Crown listen? Who is to police the consultations? What does it mean for our quest for dignity and respect in Canada? The future is pregnant with these unresolved questions and shared responsibilities."

Principles Respecting the Government of Canada's Relationship with Indigenous Peoples

1. All Indigenous relations based on recognition and implementation of right to self-determination, including right to self-government
2. Reconciliation = fundamental purpose of section 35
3. Honour of the Crown guides all dealings with Indigenous peoples

4. Indigenous self-government is apart of cooperative federalism
5. Treaties and other arrangements = acts of reconciliation
6. Meaningful Indigenous engagement aims to secure FPIC
7. Respecting and implementing section 35 rights = essential
8. New fiscal relationship required
9. Reconciliation = ongoing and evolving process
10. Distinctions-based approach is needed

Consultation, Accommodation, and Negotiation

- The duty to consult and accommodate is closely related to the duty to negotiate; all three are discussed in *Haida Nation*
- In *Marshall #2*, SCC noted that resource conservation and management and fisheries allocation raise complex issues for both Mi'kmaq who seek to exercise commercial harvesting rights and governments seeking to justify regulating these rights
- Factual context and merits of justification vary resource to resource, species to species, community to community, and time to time
- Accommodation of Mi'kmaq treaty rights may be best resolved through consultation and "negotiation of a modern agreement for participation in specified resources by the Mi'kmaq rather than by litigation"

Aboriginal Fisheries Strategy (AFS)

- After the *Sparrow* decision was handed down by the SCC, the Fisheries and Oceans Canada (DFO) launched the Aboriginal Fisheries Strategy (AFS) in 1992
- The AFS applies if DFO manages fishery and there is no modern treaty in place
- DFO periodically negotiates AFS agreements to determine conditions for INdingeous food, social, and ceremonial fishing (FSC), such as locations, species, and total allowable catch
- AFS agreements address communal licenses for commercial fishing
- Licenses are obtained through voluntary retirement of commercial licenses and new lcienses that do not add to level of overall fishing effort – and support fishin co-manageemnt arrangeemnts fo stock assessment, habitat management, etc
- However, overall allocation numbers are set by Cabinet and individual allocations are imposed in absence of agreement

R v Martin

- Two members of Waycobah First Nation in Nova Scotia both charged with fishing in contravention of Aboriginal Communal Fishing License
- Admitted contravention of license but argued this was exercise of Abroignal right t fish for food and right was unjustifiably infrined by communal license conditions
- Waycobah annually entered into AFS Agreements for FSC allocations since 1994, this agreement was in place at time of fishing activities giving rise to charge and fishing not authorized in area

- Crown admitted *prima facie* infringement of fishing right but argued AFS Agreement either displaced need for *Sparrow* analysis or met *Sparrow* test for justified infringement
- NSPC held *Sparrow* test presumptively met and this will only be displaced by evidence of bad faith negotiation of agreement

Coastal First Nations Great Bear Initiatives Society

- Coastal First Nations (CFN) = incorporated society negotiating land and resource issues outside of treaty process on behalf of Gitga'at'. Gitxaala, Haida, Heiltsuk, Kitasso, Xia'xais, Nuxalk, Wuiknuxv, and Metlakatla First Nations in northwest BC
- CFN supports member First Nations in marine and land use planning within Great Bear Rainforest area of Central Coast, negotiates resource revenue sharing, implements ecosystem-based management practices, and supports capacity-building
- CFN helps coordinate as between neighbouring First Nations to ensure ability to present united positions to Canada and BC
- And to manage differences between their positions without the Crown being able to engage in 'divide and conquer' strategy

Yahey v BC

- Blueberry River First Nation argues so much land within its traditional territory has been taken up pursuant to treaty 8 that it no longer has meaningful treaty rights to hunt, trap, and fish
- Among other things, BC applied for disclosure of any impact benefit agreements, capacity funding agreements, revenue sharing agreements, cooperation agreements, joint ventures, or other arrangements with industry re: traditional territory.
- BC applied for traditional land use studies and research as well
- BCSC ordered production of agreements between Blueberry River FN and industry where no objection to projects made
- This may be relevant to the argument that they acquiesced in or benefitted from industrial developments they challenged at trial

Domestic Implementation of UNDIP

- UNDRIP calls on states in consultation and cooperation with Indigenous peoples to take appropriate measures, including legislative measures, to achieve its ends
- Hudson discusses federal statues claiming to reflect UNDRIP re: Indigenous languages, child and family services, and environment impact assessment; Indigenous governing bodies and coordinating agreements contemplated but still unclear what Bill C-15 implementation will look like
- BC has similar approach of agreement-making with chosen representatives of Indigenous peoples but also setting clearer standards that UNDRIP will be standard for environmental assessment
- Talk of some agreements providing Indigenous veto too

- Will there be clear boundaries between purely political questions and legal questions in this are of practice? Stay tuned.

Hupacasath First Nation v Canada

- Although HFN also briefly stated in its Application that Canada's duty to consult also arises from the Crown's fiduciary obligations towards First Nations Peoples and UNDRIP… I agree with the Respondents that the question of whether the alleged duty to consult is owed to HFN must be determined solely by application of the *Haida* test… in a press released issued by AANDC, UNDRIP is described as "an aspirational document"… HFN did not make any submissions or lead any evidence to the contrary"

Loukacheva on the Arctic Council and "Law-Making"

- Arctic Council (AC) has no legal personality separate from 8 Arctic member states; cannot develop legislation or conclude treaties with other subjects of international law as a result
- Yet AC facilitates development of various non-legally binding but still normative instruments like strategic plans, programs of action, guidelines, and planning guides for Arctic meant to help with harmonization of domestic laws of Arctic states
- What AC does do is initiates agreements, provides platform for negotiations and is driving force in drafting of agreements signed by members
- Inuit Circumpolar Council, NGO representing Inuit in Russia, Greenland, US and Canada, this in turn influences AC's positions
- High Arctic marine protected areas = just one example of the need for law-making beyond nations' sovereign territorial claims

Policy-Making and Negotiations in Aboriginal Law: Remaining Questions for Years to Come

- To what extent does the Doctrine of Discovery, the Doctrine of Continuity, the entrenchment of s 35, and the various tests under s 35 (*Sparrow*, *Haida*, *Van der Peet*, *Powley*, *Delgamuukw*, etc.) set clear parameters for accommodation of Aboriginal and Treaty rights through negotiated agreements?
- What about the territorial sovereignty claims of nation states?
- To what extent do these issues all place constraints on Indigenous Peoples' aspirations and the Crown's institutional imagination that frustrate the goal of reconciliation?
- To what extent do courts play a positive role in facilitating a respectful relationship between Indigenous peoples and the Crown and to what extent do they damage this relationship?
- **There are no easy answers for lawyers, judges, or politicians**

JURISDICTIONAL ISSUES

Jurisdiction over Indian Reserves: *Dick v R*

- All powers have a "basic, minimum and unassailable content" like the :integral to a distinctive culture" test
    - Example: is killing a deer something at the "core of Indian-ness" such that provincial legislation would be *ultra vires*? Hard to imagine that If this does not, what would?
- *Cardinal* holds that, apart from evidence, provincial game laws do not apply to *Indians qua Indians,* therefore, they apply to Indians.
- If provincial law applies to Indians without touching their Indian-ness, like traffic legislation, they automatically apply, *ex proprio vigore* ("of its own force")
- If provincial law, in intent or effect, applies to Indians regulating them *qua* Indians, then s 88 applies

Baker Lake

- After *Calder* was decided, the Inuit of Baker Lake brought a claim for Aboriginal title and were successful
- In rendering the decision, Justice Mahoney imposed 4 criteria for establishing Aboriginal title:
    - Organized society
    - Occupation of specific territory
    - Occupation was exclusive
    - Occupation established at time sovereignty asserted

Summary of principles of Aboriginal title pre- *Delgamuukw*

- It is an inherent right (Not dependent on its recognition by legislation or Crown act) (*Calder,* affirmed in *Guerin*)
- It is a *sui generis* right to occupy land, the underlying title belonging to the Crown (*Guerin*)
- It is inalienable except to the Crown, whereupon surrender a fiduciary duty attaches to the Crown …

Delgamuukw

- One of the most complex and lengthy trials in Canadian history
- The Gitskan and Wet'suewet'en people claimed ownership and jurisdiction over their traditional territories
- Hereditary chiefs of Gitxsan and Wet'suwet'en claimed ownership, **jurisdiction** and rights to territories on behalf of *Wilp* (houses)
- Eventually amended as Aboriginal title and self-government claim; all claims were dismissed by BCSC, but for discussion of duty to consult and harvesting rights; BCCA expanded these aspects

Trial Court:

- Justice McEachern (BCSC), 1991: After describing that the "[A]boriginal life in the territory was, at best 'nasty, brutish and short', he held that the plaintiffs failed to prove their claims.
- At most, they had a right to continue to use unoccupied Crown land for sustenance purposes subject to the general law of the province.

British Columbia Court of Appeal:

- The Majority found that the plaintiffs possessed Aboriginal title defined as the sum of the individual Aboriginal rights that could be claimed.
- But right to self-government extinguished by the *BNA Act*, 1867.
- J Lambert for the minority found in favor of the plaintiffs. He held that Aboriginal title is a general right to occupy (with modifications and limitations). He also found that they possessed a limited form of self-government.

SCC:

- After clarifying split between Aboriginal title and activity rights in 1996, the SCC refused to determine merits but issued lengthy guidance, opining on nature and incidents of title . This included beneficial interest, subsurface rights, duty to consult and need for consent in some cases, *inter alia*
- Delgamuukw commented on the theory of Aboriginal title and the potential for it to exist if proven
- Important for "jurisdictional issues" as it was the first declaration of Aboriginal title's existence in Canadian law as something distinct from site-specific activity rights

Parties Positions:

- Appellants argued that Aboriginal title was akin to a fee simple interest.
- Respondents argued that Aboriginal title was no more than the bundle of rights to engage in activities which are themselves Aboriginal rights.
- According to CJ Lamer, however, Aboriginal title falls in between the above two extremes.

Pleadings Irregularity:

- The change of the plaintiff's claim from "ownership" and "jurisdiction" to "Aboriginal title" and "self-government" was not prejudicial to the defendants because the trial judge made a *de facto* amendment to permit Aboriginal rights claims other than ownership and jurisdiction.
- However, the change in claim from individual House claims to two amalgamated collective claims did cause prejudice to the defendants because that issue was simply not addressed at trial. Therefore, a new trial is the proper remedy.

Oral Histories:

- Justice Lamer found that McEachern erred in not admitting or not giving independent weight to the Plaintiff's oral histories by failing to follow the principles laid down in Van der Peet.

- Trial courts are to approach the rules of evidence in light of the evidentiary difficulties inherent in adjudicating aboriginal claims.
- “The laws of evidence must be adapted in order that this type of evidence can be accommodated and placed on an equal footing with the types of historical evidence that courts are familiar with …”

Nulitu,o CFS Society v BC Union

- Dealt with provincial laws of general application
- No dispute that province has power over child welfare, or that federal government can enact labour regulations. Question is: do labour relations fall under federal jurisdiction because dealing with First Nation children and families?
- Labour relations are not under either head of power, but accepted that they are presumptively a provincial power with the federal government **having jurisdiction only by way of exemption**.
- Construction Maltcalm Functional test: depends on the nature of operation – “nature, operation and habitual activities to see if it is a federal undertaking” and seen as “An example of **flexible and cooperative federalism** at work and at its best.”

Sechelt Indian Band v bC

- Sechelt has self-government agreement with enabling Act to transform reserve land into fee simple, which in turn allows for registration of interests under the BC Torrens land title system
- S can occupy the field of residential tenancy via self-government agreement by enacting own law but had not yet done so
- If land leased under *Indian Act*, terms for rent increase likely governed under head lease with Minster and the terms of *Indian Act* likely conflict with the BC residential mobile home tenancy law
- Argued that BC tenancy law applied to fee simple lands, but BCCA found they remained “lands reserved for the Indians” for s 91(24) purposes, as set out in s 31 of *Sechelt Indian Band Self-Government Act* so **interjurisdictional immunity**

Jordon’s Principle

- Payment disputes within and between federal and provincial governments over services for First Nations children are not uncommon.
- First Nations children are frequently left waiting for services they desperately need, or are denied services that are available to other children. This includes services in education, health, childcare, recreation, and culture and language.
- Jordan's Principle calls on the government of first contact to pay for the services and seek reimbursement later so the child does not get tragically caught in the middle of government red tape.

Daniels v Canada

- Historically, s 91(24) meant ALL Indians – (para 25) "Only by having authority over all Aboroginal peoples could the westward expansion of the Dominion be facilitated." It would have been impossible to accomplish expansionist agenda if "Indians" under s 91(24) did not mean Métis.
- Contrary to its position, federal Crown has at times assumed it could legislate over Métis as "Indians"
- 1894: Banning the sale of intoxicating liquour to Indians or any person "who follows the Indian way of life."
- 1899 onward: Residential Schools – "even those of mixed blood" eligible, policy applied haphazardly, but provincial schools refused to admit Métis students, so IRS only choice, the federal government directly funded some residential and industrial schools for Métis, many Métis children were also sent to IRS under federal authority ("no place for the Métis Nation)

Another Inherent Tension with Jurisdictional Issues

- The developments in Aboriginal and Treaty rights law has led to an inherent conflict over resource use and protection governance.
- Government and Courts generally deny the validity of "jurisdictional component" of a protected Aboriginal right to a resource.
- It is generally assumed that Federal and Provincial governments are the only valid regulator.
- Yet, this ignores the presence of Indigenous legal traditions that have for centuries addressed questions of resource use and conservation in their legal traditions.

Statutory Laws

- Will always supersede common law where there is a conflict.
- The evolution of common law and statutory law can as a general rule co-exist, but there is conflict between the common law and statutory law (including regulations of which Band by-laws are an example or delegated regulatory power under *the Indian Act*)
- However, in some cases, if a statutory regime is considered exhaustive of the field and comprehensive in nature leaving no gaps for common law, then the common law may be considered extinguished and not even allowed to co-exist. (e.g. Human Rights Legislation)

Statutory Interpretation:

- Ambiguity, vague language or gaps in a statute may make it difficult to know for certain whether a statutory provision applies to a client's specific facts.
  - Causes:
    - Deliberative choice to use vague language
    - Didn't anticipate alternative interpretations of language
    - New unanticipated situations have arisen.
  - Techniques for Interpretation
    - Combine plain meaning, purposive approach, and the golden rule

        - “The words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament” (*Barrie Public Utilities v CCTC*)
    - Process for Interpretation
        - First determine if a word is defined in the Act (usually at the very beginning or at the beginning of sections of the Act) http://laws.justice.gc.ca/en/I-5/
        - Second, determine if previous court cases have already interpreted the relevant statutory provision (or similar ones in other jurisdictions), or if cases have judicially defined terms in the common law which can aid interpretation (for ex. *Brown v BC*) In terms of definitions, law dictionaries are sometimes referred to by the court for assistance.
        - See also any general interpretation legislation of the jurisdiction http://laws.justice.gc.ca/en/I-21/index.html
        - Second, determine *legislative intent.*
            - If there is no statement of purpose:
                - Look to the legislative history which include parliamentary debates and Committee reports. (Check for Legislative Summary reports)
                - Look to the legal and policy context at the time of enactment (including Interpretation Acts)
                - Review Official Guides to Interpretation
                - Consider a “paradigm case” and any inferences about legislative intent that occur from applying the paradigm case to the statute

Jurisdictional Issues: Urban Reserves

Pros and Cons

Pros:

- Enhance economic development opportunities
- Rural reserve communities can take advantage of business opportunities that would not normally exist back home on the reserve.
- Increased jobs and revenue will benefit all urban band members.
- **Empowerment**
    - Strengthens a First Nation’s ability to govern their own affairs and to control the development and use of the lands as the see fit (albeit within the confines of the *Indian Act*).
    - Possibilities for increased governing authority as self-government powers become recognized under Treaty or self-government agreements.

- Urban reserves can be places for First Nation institutions to better meet the needs of urban members.
  - For example: education offices, child welfare offices and reserve-urban transition services can be located on such lands and serve a growing urban Indigenous population.
- Although the issue of residential urban reserves has not arisen in per se in some cities such as Winnipeg, but they exist elsewhere, and they could in the future provide residential housing for members.
- It could create a sense of solidarity and strengthen community culture and pride and help off-set the assimilative pressures of urban living.
- **City Perspective**
  - City will gain by partnering with Indigenous governments in developing the city and its economic base.
  - Promotes overall harmonious City-Indigenous relations

Cons:

- Potential diversion of capital and resources from rural community to urban community.
- Possible business disadvantages because it is harder to secure finances.
- In addition, developments on reserve must have Indian Affairs approval which can cause delays restricting the business opportunities that may come along and require quick action.
- Potential ghettoization is a concern.
- **City Perspective**
  - Jurisdiction issues: The city will lose jurisdiction over the urban reserve. It will no longer be subject to city by-laws and no longer be required to pay city taxes.
  - However, this issue can be addressed by municipal – band by-law compatibility agreements.
  - Financial and cost issues: Service Agreements can ensure that the city does not suffer financially.
  - Urban reserves will still need sewage, fire, police services…
  - Service agreements can be entered into between the band and the city whereby the band would pay for such services.

Jurisdictional Cooperation

Some agreements in Saskatchewan provide for an equivalent grant to the city to represent the amount the land would normally provide the city by way of property tax revenues.

Agreement also often require businesses to pay business taxes and license fees as well.

- In terms of businesses, there may be some minor tax advantages due to tax exemptions for income on reserves.
- Status Indians employed on reserve do not have to pay income tax, so a business could split the difference and same some costs that other neighborhood businesses would have to pay.
- GST is also exempt for Status Indians buying goods on reserve.