Update on Aboriginal and Treaty Rights Decisions

Webinar Presentation

June 18, 2019

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Government of Saskatchewan

Overview

- Duty to Consult
- Métis rights
- *Natural Resources Transfer Agreement, 1930*

Duty to Consult

- Includes a duty to consult and, depending on the circumstances, accommodate.
- Triggered whenever the Crown contemplates decisions that have the potential to negatively impact the exercise of Treaty or Aboriginal rights, or credible claims thereto.
- Trigger = a potential negative impact = a low threshold.

Duty to Consult

- The duty gives rise to obligations on a "spectrum", depending on strength of claim and level of potential impacts.
- The low end may involve, i.e., giving notice, disclosing information and discussing issues.
- Deep consultation may include, i.e., participation in decision-making process itself and/or other accommodations.
- Generally, no "veto" over the Crown's decision.

Some Key Cases

- Rights violations may be justified, in part, based on whether consultations occurred.
  - *R v Sparrow*, [1990] 1 SCR 1075.
- Government decisions are reviewable pending the determination of Aboriginal rights claims.
  - *Haida Nation v British Columbia*, 2004 SCC 73, [2004] 3 SCR 511.

Some Key Cases

- May be triggered when the Crown contemplates "taking up" lands under the numbered Treaties.
  - *Mikisew Cree Nation v Canada*, 2005 SCC 69, [2005] 3 SCR 388.
- Past wrongs and speculative impacts will not trigger a duty.
  - *Rio Tinto Alcan Inc. v Carrier Sekani Tribal Council*, 2010 SCC 43, [2010] 2 SCR 650.

Recent SCC Cases

- *Chippewas of the Thames v Enbridge Pipelines Inc.*, 2017 SCC 41, [2017] 1 SCR 1099:
  - Tribunal decisions (i.e., NEB) are Crown conduct that may trigger the duty to consult.
  - While the Crown may rely on tribunals to satisfy the duty, the duty remains with the Crown.
  - Tribunals with the power to decide questions of law must determine whether the duty has been satisfied.
  - See also: *Clyde River (Hamlet) v Petroleum Geo-Services Inc.*, 2017 SCC 40, [2017] 1 SCR 1069.

Recent SCC Cases

- *Ktunaxa Nation v British Columbia (Forests and Natural Resource Operations*, 2017 SCC 54, [2017] 2 SCR 386:
  - Challenge to a decision to allow a ski resort on mountain home to Grizzly Spirit Bear.
  - Held: the duty to consult did not include a veto, even though the resort would irreparably harm the Nation's relationship to the Spirit Bear.
  - No violation of s. 2(a) of the *Charter*, which protects freedom to hold beliefs, not the object of those beliefs.
  - Pronunciation guide: https://www.first-nations.info/pronunciation-guide-nations-british-columbia.html.

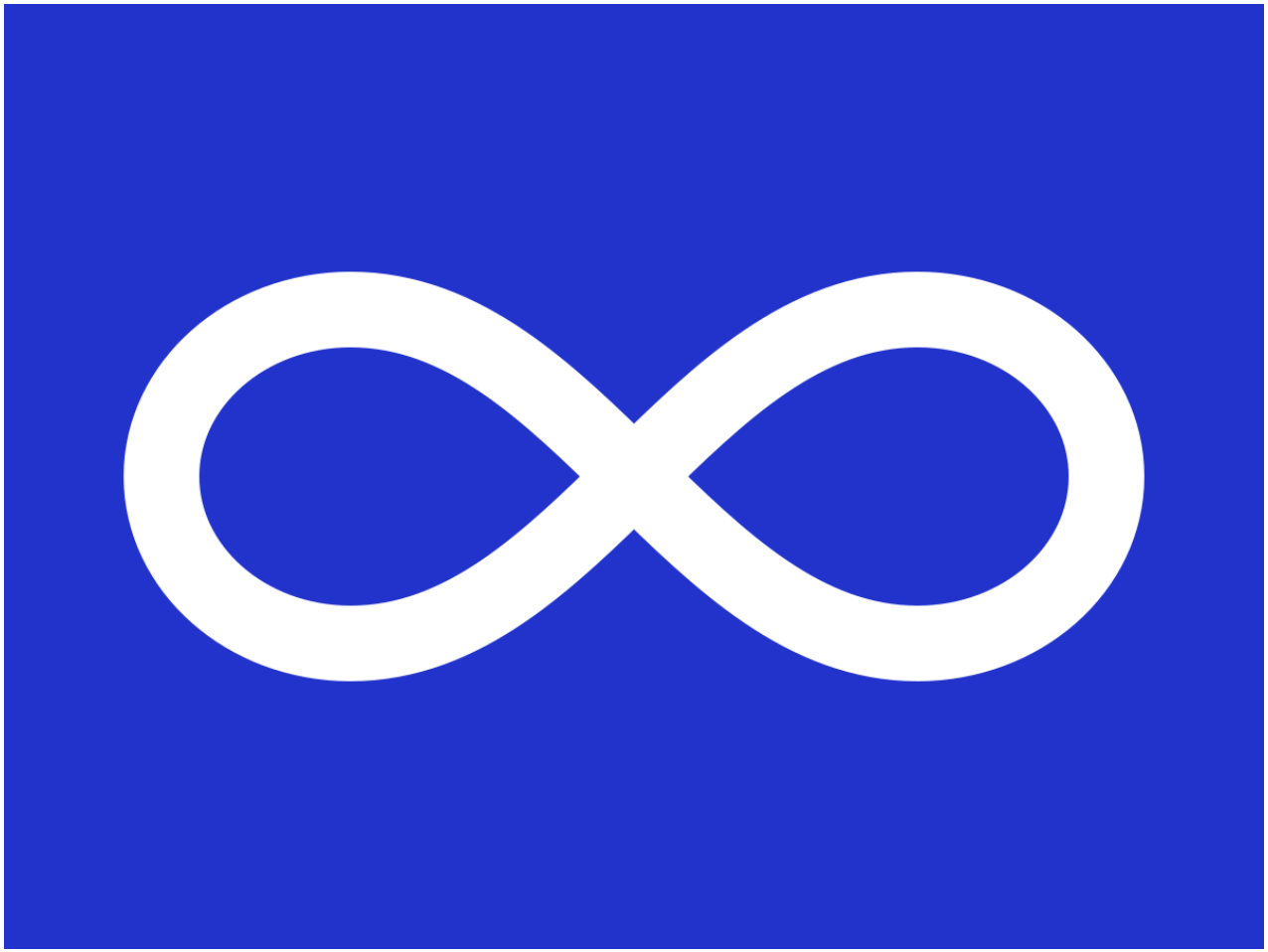
Recent SCC Cases

- *Mikisew Cree First Nation v Canada (Governor General in Council)*, 2018 SCC 40, [2018] 2 SCR 765:
  - Can courts review the legislative process for compliance with the duty to consult? Does the honour of the Crown override the separation of powers?
  - No. Court unanimous that consultations in the legislative process reviewable only in relation to <u>enacted</u> legislation.

Mikisew Cree (con't)

- The court disagreed on the question of remedies for challenges to enacted legislation.
- Four Justices held that consultations reviewable only if a rights violation has been proven, as part of the *Sparrow* justification analysis.
- Three Justices held that, short of a rights violation, the law may develop to allow for other possible remedies, i.e., declaratory relief.
- Two Justices held that laws could be struck down for breaching the duty.

Métis Rights



Métis Rights

- Section 35 of the *Constitution Act, 1982*, protects existing Treaty and Aboriginal rights.
- Recognizes Indians, Inuit and Métis as “aboriginal peoples” of Canada.
- Treaty rights are rooted in solemn agreements.
- Aboriginal rights are rooted in traditional practices (i.e., hunt, fish, trap) integral to the community prior to contact with Europeans, or for the Métis, before European control.

Métis Rights

- The test for determining Métis rights outlined in *R v Powley*, 2003 SCC 43,[2003] 2 SCR 207:
  - Rights are site-specific. Based on practices of a pre-control, historic community.
  - Métis status is based on self-identification; acceptance in the contemporary community; and an ancestral connection to the historic community.
  - In *Powley*, the SCC held that Métis hunting rights exist in and around Sault Ste. Marie, Ontario.

Post-*Powley* Decisions

- *R v Laviolette*, 2005 SKPC 70, 267 Sask R 291:
  - A rights-bearing Métis community exists in northwest SK, in and around the triangle of Green Lake, Ile a la Crosse and Lac la Biche (AB).
  - Familial connections show that the community included Meadow Lake.
  - European control by 1912, based on township surveys that affected traditional Métis practices.

Post-*Powley* Decisions

- *R v Belhumeur*, 2007 SKPC 114, 301 Sask R 292:
  - Rights-bearing Métis community exists in the Qu'Appelle Valley "and environs", which includes the City of Regina.
  - European control occurred between 1882 and the early 1990's. No question that a Métis community existed in that area before European control.

Post-*Powley* Decisions

- *R v Goodon*, 2008 MBPC 59, 234 Man R (2d) 278:
  - The Métis community in the Turtle Mountain area is part of a larger rights-bearing community in southern Manitoba.
  - The community's economic life was based on hunting and mobility. "Community" not based on any particular "settlement".
  - European control occurred around 1880, following Treaties, surveying and influx of settlers.

Post-*Powley* Decisions

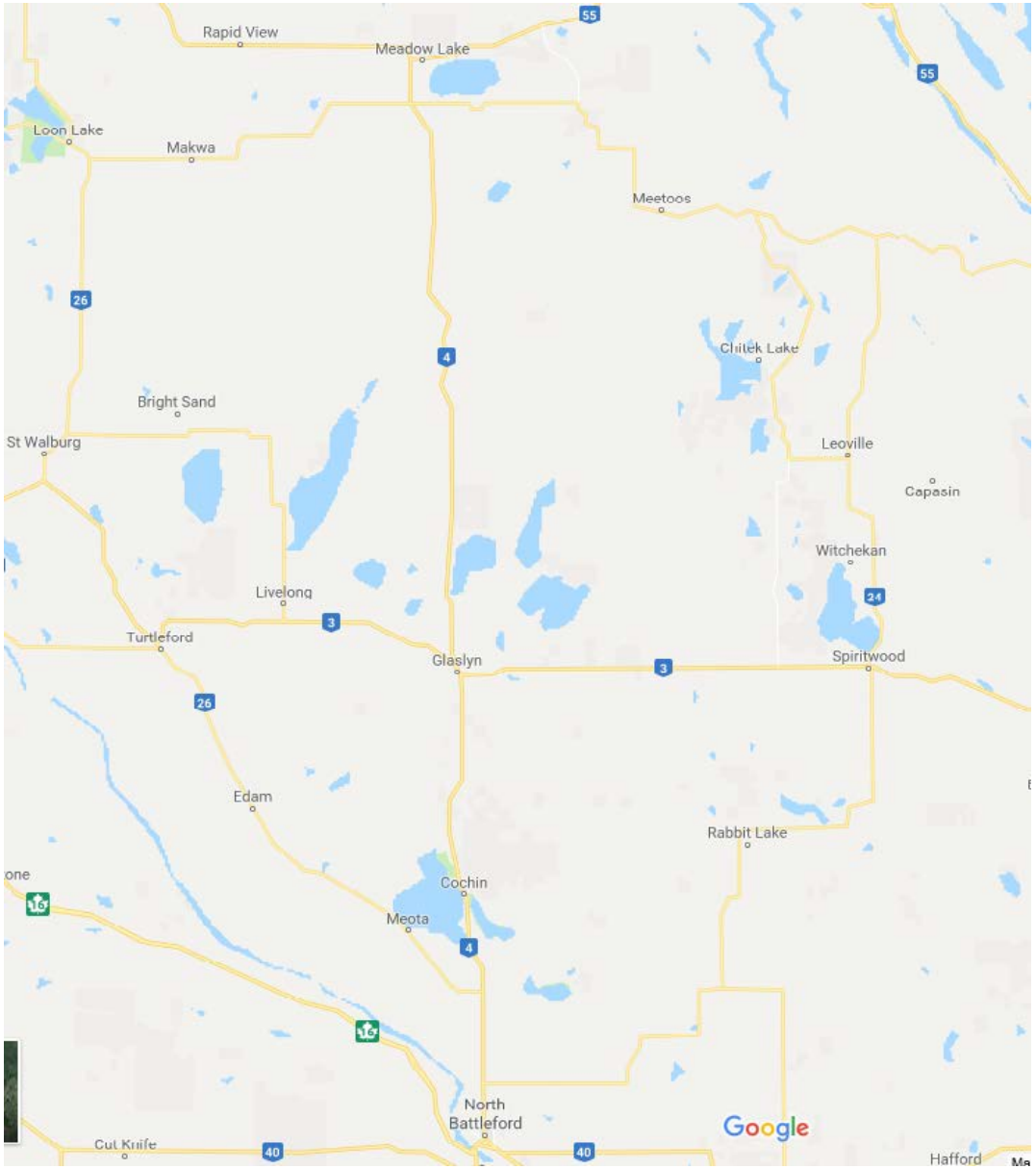
- *R v Hirsekorn*, 2013 ABCA 242, 81 Alta LR (5th) 1, leave to SCC denied, [2013] SCCA No. 398:
  - No Métis right to hunt in environs of Cypress Hills, AB. The nomadic buffalo-hunting Métis on the plains did not venture into that area due to the presence of the Blackfoot.
  - Only after NWMP arrival between 1874 and 1878 did the Métis community hunt in the area.
  - The "site-specific" area for the right may be larger for nomadic communities.

Post-*Powley* Decisions

- *R v Langan*, 2013 SKQB 256, 425 Sask R 42:
  - Whether Métis rights can be exercised in the environs of San Clara, MB, including area of Duck Mountain, Yorkton and Lake of the Prairies.
  - San Clara emerged around 1906 from a diaspora of Métis from Red River and North Dakota.
  - Not an historic community because it post-dated European control, which was no later than 1885.

Post-*Powley* Decisions

- *R v Boyer*, 2018 SKPC 070 (under appeal):
  - How far south does the rights-bearing Métis community of northwest SK extend?
  - *Laviolette* revisited.
  - Also an NRTA case (discussed below).


Rapid View
Meadow Lake
Loon Lake
Makwa
Meetoos
Chitek Lake
Bright Sand
St Walburg
Leoville
Capasin
Witchekan
Livelong
Turtleford
Glaslyn
Spiritwood
Edam
Rabbit Lake
Cochin
Meota
North Battleford
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Hafford
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R v Boyer (con't)

- Held:
  - Métis rights claims must be based on regional communities, not one "Métis Nation".
  - In this case, the community's rights extend to the area just south of Green Lake.
  - European control: 1876-1881. Based on Treaty No. 6; Indian Reserves; NWMP; land surveys; Territorial capital at Battleford. Overturned *Laviolette* date of control, which was 1912.

Natural Resources Transfer Agreement, 1930 ("NTRA")

NTRA

- Three separate agreements, largely identical.
- Constitutionalized as schedules to the *British North America Act, 1930*, 20-21 Geo. V, c 26 (UK).
- Affected the transfer of Crown lands and minerals from Canada to SK, AB and MB.
- Purpose was put those provinces in a position of equality with the other provinces.
- Also addressed issues such as pre-existing Crown dispositions, railway lands, national parks, Indian reserves and Indian harvesting rights.

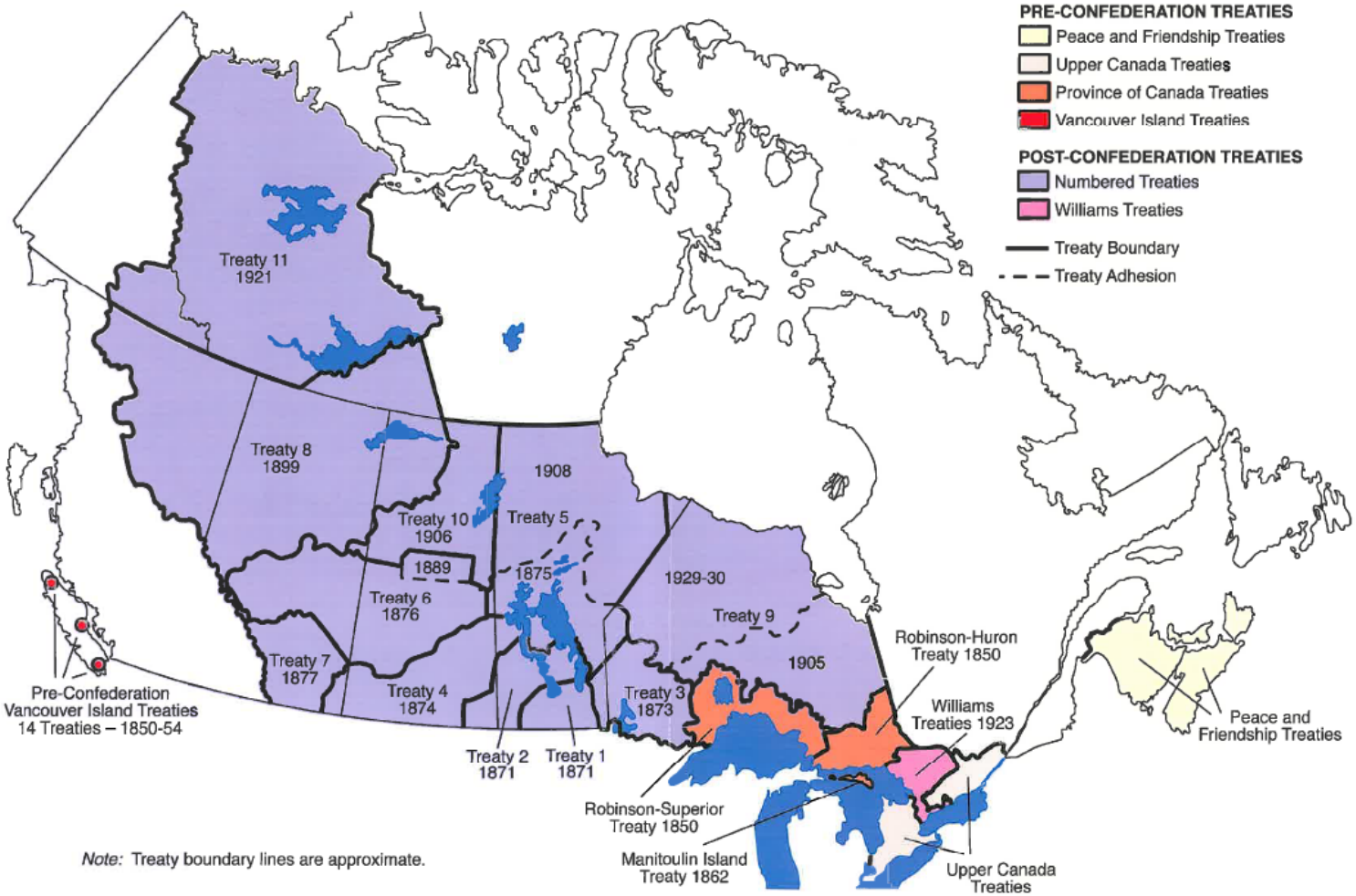
NRTA – paragraph 12

*In order to secure to the **Indians of the Province** the continuance of the supply of game and fish for their support and subsistence, Canada agrees that the laws respecting game in force in the Province from time to time shall apply to the **Indians within the boundaries thereof**, provided, however, that the said Indians shall have the right, which the Province hereby assures to them, of **hunting, trapping and fishing for food at all seasons of the year on all unoccupied Crown lands or on any other lands to which the said Indians have a right of access**.*

NRTA – paragraph 12

- Intended to secure a continued supply of game and fish for Indians “of” the Province.
- Provincial game laws apply, subject to rights to hunt, trap and fish “for food”.
- Applies to “unoccupied Crown lands” and lands to which Indians have a “right of access”.
- Applies to Indians “within” the province.
- Merged and consolidated Treaty rights: *R v Horseman*, [1990] 1 SCR 901.

Location of Historical Treaty Boundaries in Canada



This map is based on information taken from the Geo Access Division maps.

Notable Cases

- *R v Frank*, [1978] 1 SCR 95:
  - Para 12 did not extinguish rights of SK Treaty No. 6 Indians from hunting in Treaty No. 6 area in AB.
  - Para 12 includes Indians hunting within provincial boundaries, even if they not resident of the province.
- *R v Horseman*, [1990] 1 SCR 901:
  - Para 12 extinguished Treaty commercial harvesting rights but expanded the area for harvesting to include the entire province.

Notable Cases

- *R v Badger*, [1996] 1 SCR 771:
  - "right of access" includes private lands not visibly incompatible with hunting.
- *R v Blais*, 2003 SCC 44, [2003] 2 SCR 236:
  - Métis do not have hunting rights as "Indians" under the Manitoba NRTA.

Recent Sask Cases

- *R v Pierone*, 2018 SKCA 30, leave to appeal to SCC denied, [2018] SCCA No. 259:
  - Treaty No. 5 Indian from MB hunting in Treaty No. 4 territory near Swift Current on private lands.
  - Shot a moose aiming down into a 60 x 70 meter slough. Approx. 70 meters off a grid road, situated within a stubble field. No posted "no hunting" signs. No fences. No residences in the immediate area. No consent obtained from landowner.
  - Was there a right of "right of access" under para 12 in that the lands were visibly compatible with hunting?

R v Pierone (con't)

- Held: whether land is visibly compatible is a question of fact determined on a case-by-case basis. Not a legal "test".
- Burden of proof: the accused first puts the Treaty rights defence "into play" with evidence that he or she is a Treaty and status Indian hunting on unoccupied land.
- Then the Crown's burden to prove beyond a reasonable doubt that the land was visibly incompatible with hunting.
- Court held that it was visibly compatible to hunt in the slough, but not in the surrounding stubble field.

R v Boyer, supra

- Do the Métis have harvesting rights as “Indians” under para 12 of the SK NRTA?
- SCC says “no”in *R v Blais, supra,* in relation to the hunting clause in the MB NRTA.
- In *Boyer*, the Defence expert’s opinion was that Canada intended to include the Métis in para 12.
- Also, in *Daniels v Canada,* 2016 SCC 12, the SCC found that Métis are “Indians” under s. 91(24) of the *Constitution Act, 1867*.

R v Boyer (con't)

- The Court did not accept the expert opinion:
  - Even if Canada intended to include the Métis in para 12, no evidence that the Provs shared that intent.
  - Paras 10-12 fall under common heading "Indian Reserves", which concern Treaty Indians.
  - *Daniels* does not assist the accused. The SCC held that the NRTA involves a different interpretive exercise than the *Constitution Act, 1867*.

R v Green

- Does para 12 confers rights to all “status” Indians in Canada to hunt in SK?
- Accused are *Indian Act* “Indians” and members of the Six Nations First Nation in southern Ontario, with hunting rights in Ontario under the 1701 Albany Deed.
- Accused were charged with illegal hunting in SK. They claim hunting rights as “Indians” under para 12.

R v Green (con't)

- The case involves interpreting *Frank*, *supra*.
  - At issue in *Frank* was whether a Treaty No. 6 Indian from SK could hunt in Treaty No. 6 territory in AB. Did the NRTA limit the right in this way?
  - The Court says "no", but in broad language that appears to say that all "Indians" in Canada have NRTA hunting rights.

R v Green (con't)

- In *Green*, the Accused rely on *Frank* as a complete answer: "Indians", regardless of residence, have NRTA hunting rights.
- "Indians" in para 12 includes all Indians that satisfy the *Indian Act* definition as of 1930.

R v Green (con't)

- The Crown argued that para 12 protects Treaty rights in SK, MB and AB that existed prior to the NRTA. The NRTA did not create new rights.
- Also argued that *Frank* simply affirmed that the NRTA did not reduce the areas in which pre-existing Treaty rights could be exercised.
- *Green* is the first case in which these issues are directly before any court.
- Heard in Regina Prov Ct on May 22, 2019. Decision to be released on July 31.

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