INDIGENOUS BAR ASSOCIATION

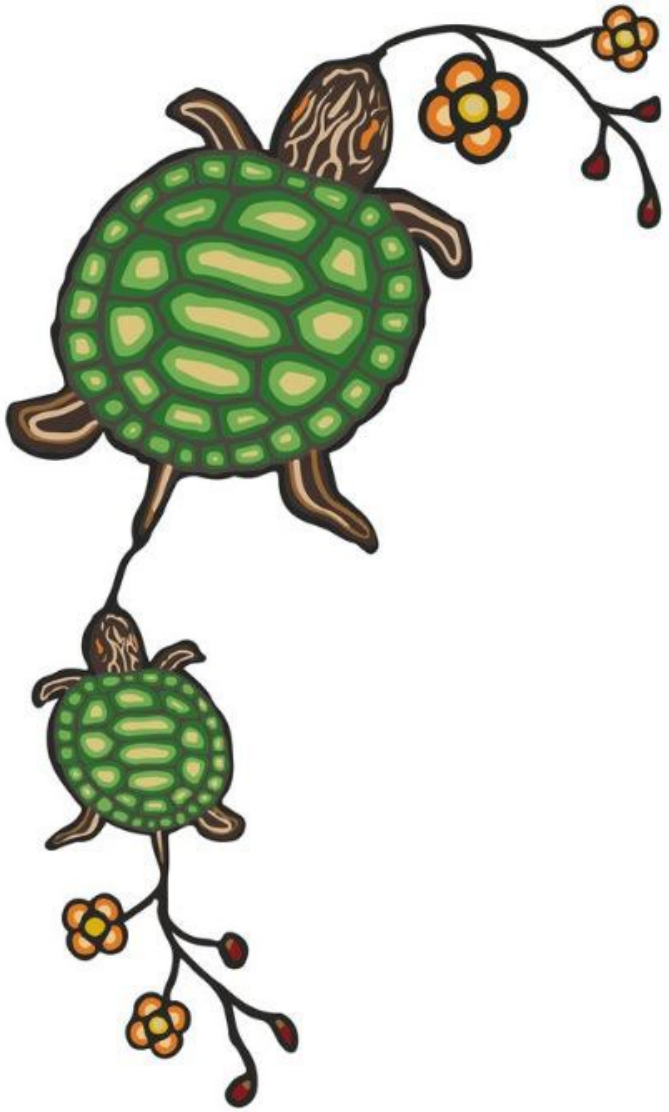
ASSOCIATION DU BARREAU AUTOCHTONE

UNDRIP AND EXERCISING INDIGENOUS JURISDICTION AS A CATALYST FOR NAVIGATING THE POST-INDIAN ACT ERA

June 21, 2023

MEET THE PRESENTER

Drew Lafond



OVERVIEW

UNDRIP: Background and Key Provisions

- Background and introduction
- The right to self-determination;
- The right to socio-economic development;
- The right to lands and resources, and to participate in their development;
- The right to free, prior, and informed consent; and
- The right to shared decision-making.

EXERCISING INDIGENOUS JURISDICTION AS A CATALYST FOR NAVIGATING THE POST-*INDIAN ACT* ERA

- Agriculture
- Water
- Mines and Minerals

UNDRIP BACKGROUND AND KEY PROVISIONS

- UNDRIP was adopted by the UN General Assembly on September 13, 2007, after more than 25 years of negotiation between interested groups and member states of the United Nations.
- Prime Minister Harper adopted UNDRIP in Canada with the proviso that it was an aspirational statement and not legally binding in Canada.
- On June 21, 2021, the *United Nations Declaration on the Rights of Indigenous Peoples Act* (the "*Act*") received royal assent and came into force

UNDRIP BACKGROUND AND KEY PROVISIONS

Members of the IBA, such as Indigenous Peoples Council designate Wilton Littlechild, have been involved in international advocacy since the late 1970s to secure and make space for the recognition of the rights of Indigenous Peoples.

- In the case of UNDRIP itself, Mr. Littlechild began his work on UNDRIP in 1983 when he served as the Chair of the Working Group to Consolidate the Indigenous Draft of the Declaration, thereafter he went on to participate in the Working Group on Indigenous Populations on the Draft Declaration and all inter-sessional working groups, of acting as the co-chairperson.
- Mr. Littlechild's advocacy culminated in the adoption of the United Nations Declaration on Indigenous Peoples Act (UNDA) on June 21, 2021, after serving as a key witness before the Standing Parliamentary Committees concerning Indigenous Peoples to advance the draft UNDA

UNDRIP BACKGROUND AND KEY PROVISIONS

- UNDRIP's purpose is to promote, preserve, and protect the "minimum standards for the survival, dignity and well-being of the indigenous peoples of the world."
- As a declaration, the legal implications of UNDRIP to Canada's common law and constitutional frameworks is a highly complex and nuanced topic. These difficulties are compounded by the approach adopted by the Government of Canada to implement UNDRIP in Canada through the *Act.*
- Canada's courts have, so far, been slow to take up UNDRIP. The *Act* is likely to move this process forward, but the potential for UNDRIP to drive substantive near-term progress in Canada's common law and constitutional frameworks will be limited without widespread political intervention or adoption.

UNDRIP BACKGROUND AND KEY PROVISIONS

- The federal government has committed to implementing UNDRIP within the sphere of its jurisdiction. This is a positive development, but there are flaws to Canada's approach. For example, rather than implementing the whole of UNDRIP as an instrument with binding effect in Canada, the federal government seeks to implement UNDRIP by way of an Action Plan.
- The recently released draft Action Plan lacks clear detail and a robust framework for implementation. Also, the Action Plan applies only to the federal government, leaving gaps in jurisdictions, such as Saskatchewan, where provincial governments are indifferent or opposed to UNDRIP.
- In the result, the potential that exists for UNDRIP and the *Act* to effect substantial meaningful change in the observance of Indigenous rights in Canada is not likely to be immediately realized.

UNDRIP BACKGROUND AND KEY PROVISIONS

Introduction

UNDRIP's 46 articles, which include 75 individual provisions, constitute a comprehensive series of principles and objectives that recognize the individual and collective rights of Indigenous peoples. Given the theme of today's presentation, it is important to focus on the rights that are likely to present the greatest potential to impact legal change in Canada with respect to the management of natural resources. Roughly speaking, these rights can be categorized into the five broad categories:

- The right to self-determination;
- The right to socio-economic development;
- The right to lands and resources, and to participate in their development;
- The right to free, prior, and informed consent; and
- The right to shared decision-making.

UNDRIP BACKGROUND AND KEY PROVISIONS

The Right to Self-Determination

The right to self-determination is broadly recognized in international law as the right of a people “to freely determine their political status and freely pursue their economic, social and cultural development.” The right to self-determination includes the rights of Indigenous peoples “to autonomy or self-government in matters relating to their internal and local affairs” and “the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.” [See Articles 3, 4 and 5]

UNDRIP BACKGROUND AND KEY PROVISIONS

The Right to Socio-Economic Development

The right to socio-economic development is an extension of the right to self-determination. It includes the rights of Indigenous peoples to “maintain and develop their political, economic and social systems or institutions, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities.” In exercising their right to development, “Indigenous peoples have the right to determine and develop priorities and strategies. … In particular, Indigenous peoples have the right to be actively involved in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions” [See Articles 20-1 and 23]

UNDRIP BACKGROUND AND KEY PROVISIONS

The Right to Lands and Resources, and to Participate in their Development

The right to socio-economic development extends to the development of Indigenous lands and resources to which Indigenous peoples also hold a right of ownership. Indigenous peoples have a broad "right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired." Where an Indigenous Nation possesses such lands, territories, and resources, they have "the right to own, use, develop and control" them and to "determine and develop priorities and strategies for their development or use" [See Article 23 and Sub-Articles 26-1 and 26-2]

UNDRIP does not expressly provide that the right to lands, territories, and resources are informed by the terms of treaties (such as numbered Treaties), although "Indigenous peoples have the right to the recognition, observance and enforcement of treaties … concluded with States or their successors…" As an extension to the right to lands and resources, Indigenous peoples also "have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources", and to receive State assistance in doing so. [See Sub-Articles 37-1 and 29-1]

UNDRIP BACKGROUND AND KEY PROVISIONS

The Right to Free, Prior, and Informed Consent (1)

Indigenous peoples have the right to give or withhold their free, prior, and informed consent prior to the State proceeding to carry out certain actions that may impact the rights or interests of Indigenous peoples. Free, prior, and informed consent consists of four interrelated concepts:

- Free: without coercion, intimidation, or manipulation;
- Prior: obtained in advance of planned activities;
- Informed: provided with objective, accurate, and relevant information; and
- Consent: the right to withhold permission.

UNDRIP BACKGROUND AND KEY PROVISIONS

The Right to Free, Prior, and Informed Consent (2)

Free, prior, and informed consent applies where traditional lands or resources are to be "confiscated, taken, occupied, used or damaged" and where "adopting and implementing legislative or administrative matters that may affect" Indigenous peoples. As well, "States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources." [See Articles 19, 28-1, and 32-3]

UNDRIP BACKGROUND AND KEY PROVISIONS

The Right to Shared Decision-Making

UNDRIP also recognizes that “Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures”. This right appears to apply to all decisions that might affect any right of Indigenous peoples, which is broader than the limited circumstances in which the right to free, prior, and informed consent might be triggered. The right to shared decision-making should also be understood to be a broader right than the right to grant or withhold free, prior, and informed consent. Participation in decision-making envisions integration within the decision-making process and the ability to meaningfully influence outcomes. Free, prior, and informed consent, however, could in theory be satisfied without any involvement in the processes that determine how projects are designed and governed [See Article 18]

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Giving Effect to UNDRIP

The full implementation of Indigenous rights in Canada, if it is to be achieved at all, requires a paradigm shift in how both the federal and provincial governments seek to regulate matters that may affect the social, cultural, and economic priorities of an Indigenous Nation, as well as the landscapes and resources which exist outside the bounds of an Indigenous Nation but are nonetheless intertwined with its priorities. This is certain to require unprecedented levels of collaboration amongst all levels of government, including Indigenous governments.

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Agriculture

Historically, First Nation reserve lands were an integral component to the sustenance of their agricultural and horticultural economies; however, while Indian agents depicted many First Nations as flourishing agricultural communities, these reports must be read in the context of the Respondent's policies at the time, which were extremely paternalistic and which prohibited First Nations from acquiring sophisticated machinery to advance their farming operations.

- In 1889, Indian Commissioner Hayer Reed adopted an agricultural policy by which farmers were to emulate "peasants of various countries", who kept their operations small and their implements rudimentary.
- Sophisticated, labour-saving machinery was banned, a policy that caused the Mistawasis Band to lose a portion of its crop in 1891.

Report of the Indian Claims Commission, *Mistawasis First Nation Inquiry 1911, 1917 and 1919 Surrenders*, March 2002 at 349 to 350.

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Agriculture

- Restrictive policies under the *Indian Act* persisted through the 20th century and had a devastating impact on the ability of First Nations to succeed at transitioning to a farm economy.
- In particular, the Crown failed to provide agricultural benefits promised under the Treaties, and it provided insufficient or poor quality goods and failed to replace goods taken during the Riel Rebellion. We know that the Treaty promises with respect to agricultural benefits are not frozen in time and a successful transition to a farming economy requires consistent re-evaluation of the requirements for farming over time.
- The significant change in the agricultural economy in the area where my own First Nation, Muskeg Lake Cree Nation, is located is demonstrated by the significant increase in farm size and decrease in the number of farms starting in the mid-1900s to the present day, as reflected in the charts below

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Figure 28 – Average Size of Farms in Leask and Division 16

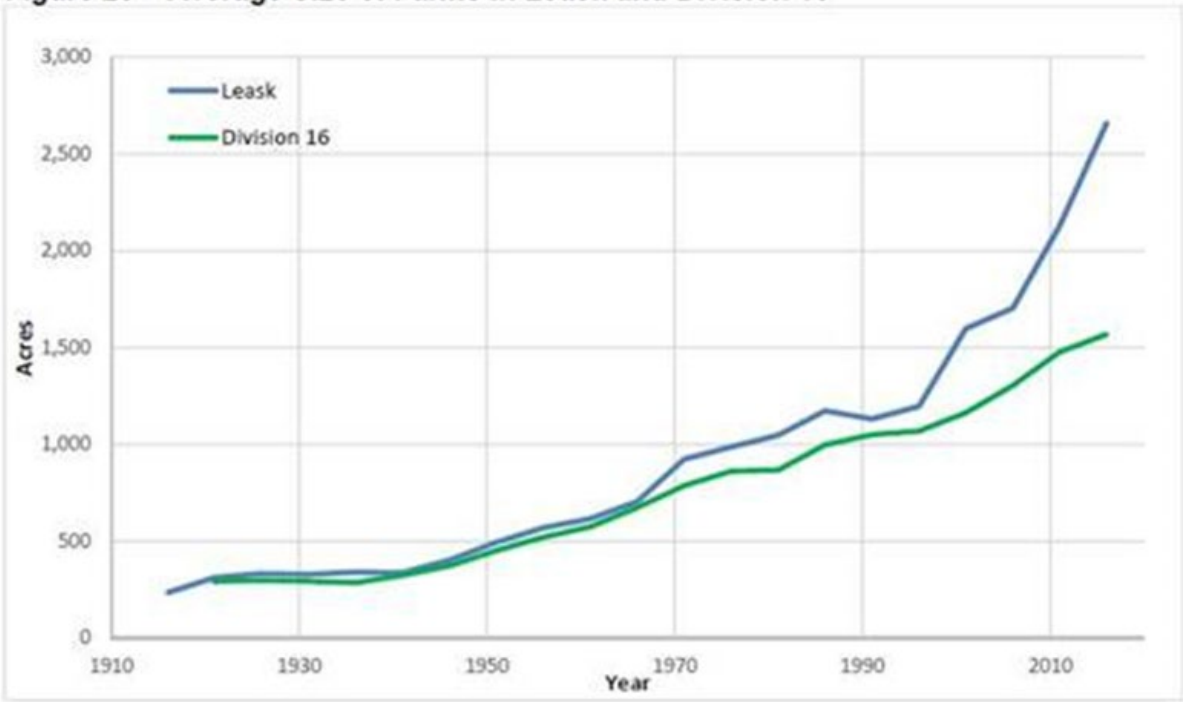

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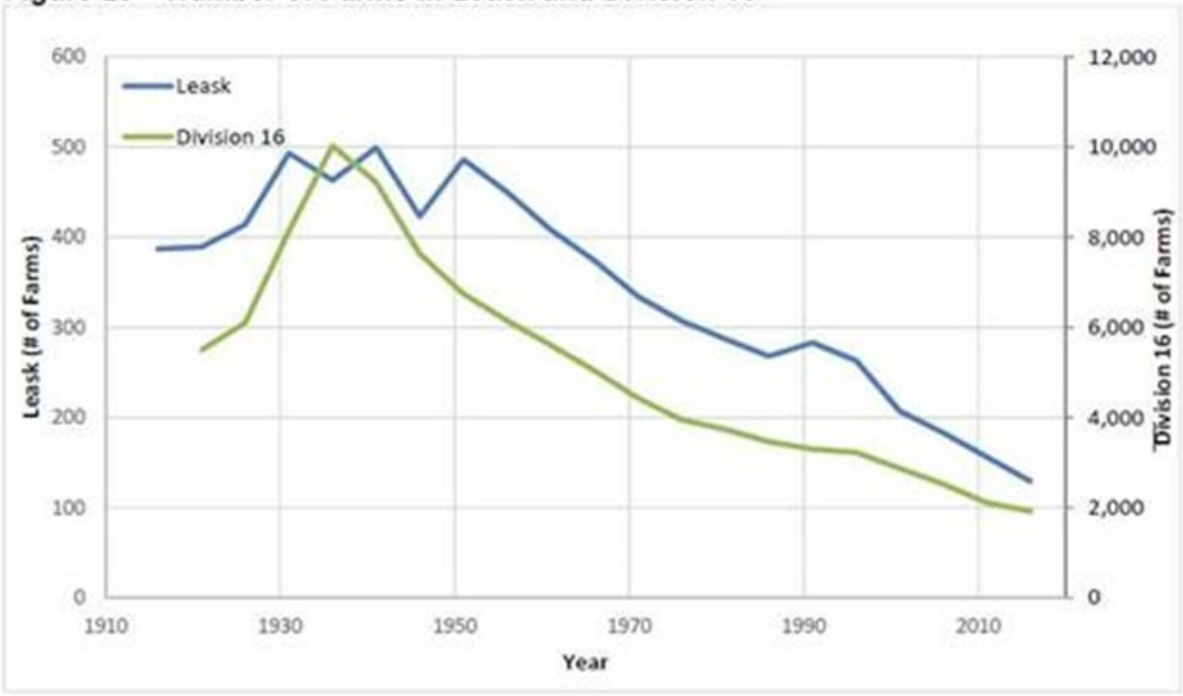
Figure 25 – Number of Farms in Leask and Division 16



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Agriculture

- A significant increase in the size of viable farms in Canada required a change of approach by Canada to ensure agriculture remained viable for First Nations. The provision of hand tools and animal drawn implements were no longer appropriate as the size of viable farms increase

- Canada failed to assist First Nations in the face of the changing agricultural economy including the significant increase in farm size, mechanization and requirements for access to capital. This led to a decline in First Nations' ability to continue to viably farm, as it had limited access to the capital required for a modern farming operation

- At the present time, Muskeg Lake Cree Nation has only one member who continues to farm; the Nation does not have its own independent farming operation. Due to the government of Canada's policies, which are inimical to First Nations, many agriculture lands on reserve are primarily farmed by off-reserve farmers and First Nations are excluded from these economic opportunities

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Agriculture

- Specific claims are now a tool for redress, and have taken the form of “land surrender” claims or “cows and ploughs” claims. This is only the beginning of the process.
- The transition to a modern economy will be difficult and nuanced.
- One example is the “Bridge to Land, Water, Sky” project currently being undertaken by Muskeg Lake Cree Nation and Mistawasis Nehiyawak, in partnership with the University of Saskatchewan. The goal of the project is to reimagine a farming system where farmers and First Nations work towards a common goal of improved livelihoods and productive, biodiverse, climate-resilient farmlands

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Water

- Aboriginal or Treaty water rights may provide First Nations with certainty in terms of the quality and quantity of water they are entitled to; however, Treaty water rights will not provide a quick solution for First Nations facing serious water issues. None of the Numbered Treaties contain express water rights clauses and Canadian courts have yet to address the question of Treaty water rights

- Province of Alberta faces an increasing number of serious water issues

    - The South Saskatchewan River Basin, which provides water to all of the communities from the areas around the Red Deer River to as far south as the Canada/US border, is over-allocated to the point where the environmental health of many of it rivers are under significant stress, enough stress to prompt Alberta to close the region to any new water licenses.
    - In Central Alberta, the Battle River and its watershed are straining to meet the growing demands of that region. There are also increased demands on the Red Deer River, the only river that remains open for water licenses in the south.
    - Rapid growth of the resource sector in Northern Alberta is set to test the limits of the Athabasca River system.

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Water

- There may be a basis for Treaty water rights in Canadian law, however, the uncertainty around these rights is also sharpened by governmental opposition to Aboriginal and Treaty water rights. For instance, in the case of Alberta, the province's traditional position has been clear and blunt:

    - *The position of the Crown in right of Alberta is that such alleged water rights and alleged rights to river beds [on reserves], if they ever existed, were extinguished by competent legislation of, and executive action by, the Crown in right of Canada.*

    - *The Crown in right of Alberta further takes the position that by the provisions of the Constitution Act, 1930 and the Alberta Natural Resources Amendment Act, 1930, the water right and rights to review beds passed to Alberta along with the constitutional jurisdiction over such rights. Such rights are now subject to the provisions of the Alberta Water Resources Act (Water Act), and the Alberta Public Lands Act*

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Water

- In early 2023, Indigenous Services Canada released a draft of the Proposal for An Act respecting drinking water, wastewater and related infrastructure on First Nation lands (the “Proposed Act”). The Proposed Act consists of 27 provisions that are principally concerned with water rights and the delivery of water services on First Nation lands. The Proposed Act establishes a framework through which First Nation governing bodies can enact their own laws regarding the delivery of water services on their respective lands.
- The Federal Government’s continued engagement on the Proposed Act focuses on four priorities: the recognition of Aboriginal rights, the sustainable provision of funding for safe drinking water and wastewater services, the protection of source water, and finally, the ongoing engagement on water issues that affect First Nations.

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Water

- Section 35 of the *Constitution Act, 1982* is recognized and affirmed as it relates to water, wastewater and infrastructure on First Nations land, including legislative authority to administer First Nation laws. As well, the *Charter* is said to apply.

- Interestingly, there is a provision which stipulates that four Federal environmental laws are to prevail over the First Nation law. Those Acts are the *Fisheries Act*, the *Migratory Birds Convention Act, 1994*, the *Canadian Environmental Protection Act, 1999* and the *Species at Risk Act* and of regulations made under those Acts. Those limitations would require consistency in the general outcomes of the First Nation law.

- It is interesting to note that the Proposed Act does not include a provision speaking to conflicts between a First Nation's law and the laws or regulations of a province. This was included in subsection 22(3) of Bill C-92, the constitutionality of which was recently the subject of a constitutional challenge argued by the Province of Quebec before the Supreme Court of Canada. The outcome of that court case is still pending.

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Water

- In the case of Muskeg Lake Cree Nation, the First Nation completed a Source Water Protection Plan in August of 2019 in partnership with the North Saskatchewan River Basin Council and the University of Saskatchewan
- The purpose of the Source Water Protection Plan is to outline the challenges that the First Nation faces with respect to their water quality, governance and how the Plan can be used as a decision support tool in minimizing the risk of contamination to source water
- Most importantly, the critical component needed to implement the Plan was an increase in social capacity through public education and community engagement that builds community trust and buy-in into the Plan. The success of the Plan depends on its implementation as it allows the First Nation's members to see the progress made and to increase their sense of ownership

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Mines and Minerals

- Prior to 1982, it was open to the Crown to unilaterally amend or extinguish Aboriginal and Treaty rights.
- One example of this is the *Natural Resources Transfer Agreement* ("*NRTA*"), which was an agreement between the federal and Saskatchewan governments that had the effect of transferring control over the natural resources of the province from the former to the latter. It also had the effect of unilaterally amending the Treaty rights of Indigenous peoples in Saskatchewan. The numbered Treaties in Saskatchewan guaranteed to Indigenous peoples the continued ability to hunt, fish, trap, and gather within the territorial boundaries of each Treaty.
- A direct legal challenge to the *NRTA* is fraught with obstacles and many approaches which could be employed by First Nations could potentially do more harm than good to Aboriginal and Treaty rights.
- The more pertinent question is how the Crown acquired the ability to unilaterally extinguish Aboriginal and Treaty rights prior to 1982, and in the case of the Treaties, whether Aboriginal title of First Nations was ever surrendered or extinguished (particularly below the "depth of the plough").

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Mines and Minerals

As explained by John Borrows:

> It is not clear why the Court accepted the Crown's point of view regarding extinguishment. It could have held that extinguishment has always been unconstitutional, regardless of the date the Crown claimed to exercise this power. After all, the body deciding Sparrow is the Supreme Court of Canada – it did not have to accept lower court opinions about extinguishment. In the same case the Court held that Section 35(1) was "not just a codification of the case law on aboriginal rights that had accumulated by 1982." The Court could thus have deviated from the case law and rejected historical acts of extinguishment.
>
> The Court's approach to the 'idea' of extinguishment also seems contrary to the trajectory of contemporary rights discourse. Extinguishment is not an acceptable part of international Indigenous human rights law. Not does extinguishment have a place in general Canadian Charter jurisprudence. It is difficult to imagine that courts would sanction past extinguishment of rights to religion, association, life, liberty, security, equality and the like before the Charter came into being. One wonders why it was so easy for the Court to accept the extinguishment of Aboriginal rights without detailed explanation

Q&A

THANK YOU

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