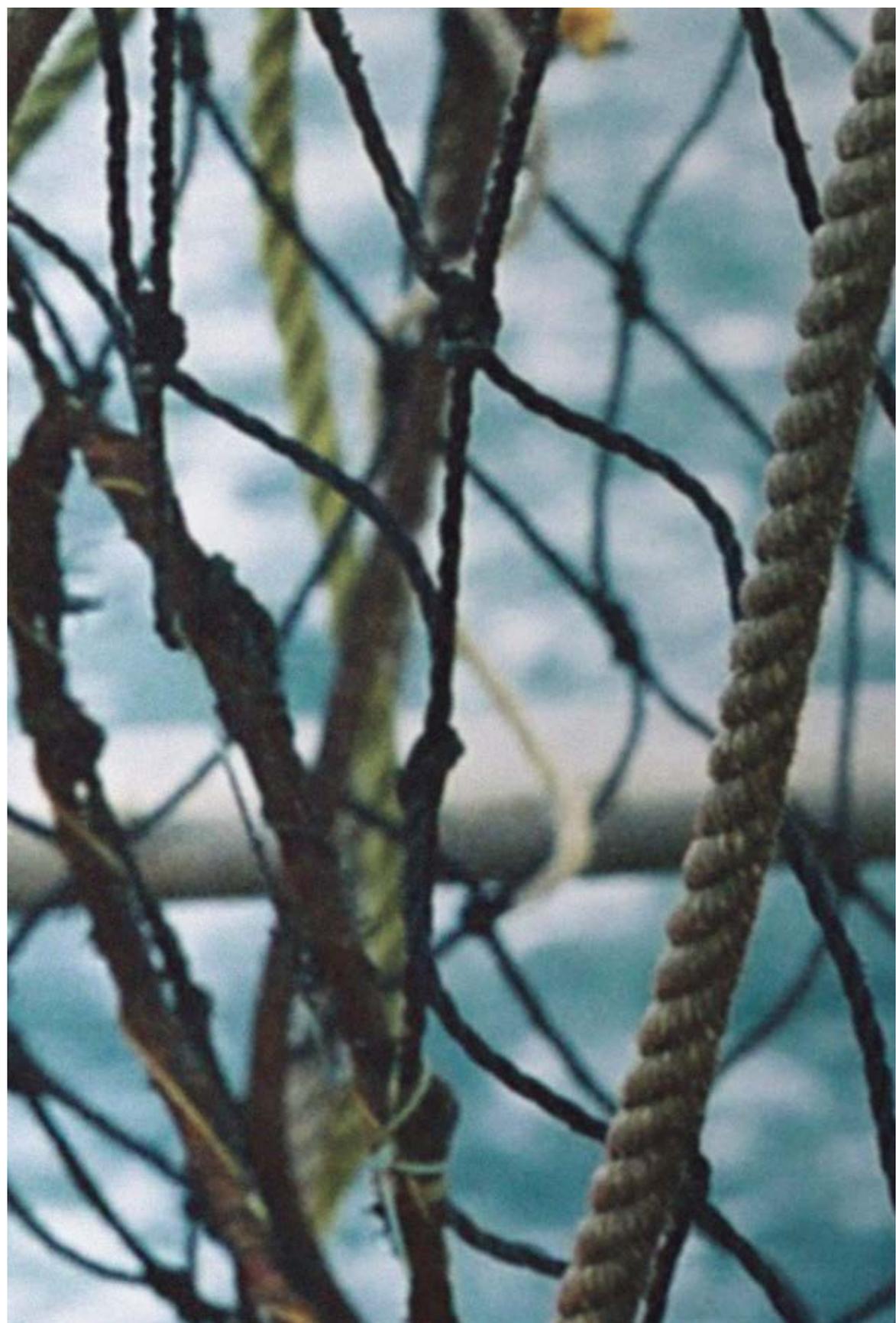


# Canadian Aboriginal Law in 2018

ESSAYS & CASE  
SUMMARIES

Kate Gunn and  
Bruce McIvor

First  
Peoples  
Law



# Preface

This collection of essays and case summaries is our attempt to compile some of the most useful and important decisions from Canadian courts in 2018 on issues related to Indigenous Peoples and Aboriginal law and to comment on some of the important emerging issues.

It is not intended as a comprehensive or authoritative list of all Aboriginal law cases from 2018, nor is every issue covered in depth. Rather, it represents our own idiosyncratic overview of decisions we found particularly notable.

Despite its modest objectives, we hope this collection proves to be a useful guide and resource for Indigenous people, lawyers, students and the general public engaged in the difficult work of decolonization.



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# A Year in Review

JANUARY, 2019

## **In 2018 courts across Canada addressed a number of critical issues for Indigenous Peoples. Some of the highlights are summarized below.**

By Kate Gunn

### *Duty to Consult*

In October 2018, the Supreme Court released its decision in *Mikisew Cree First Nation v. Canada (Governor General in Council)*, 2018 SCC 40 on the issue of whether the Crown's duty to consult is triggered in relation to the development of legislation which could affect Indigenous Peoples' Aboriginal rights and treaty rights. The majority of the Court held that while it is good policy for government to consult with Indigenous Peoples prior to enacting legislation which affects their rights, the duty is not triggered at the legislative development stage. (See our case comment at p17.)

At the Federal Court of Appeal, the decision in *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2018 FCA 153 (CANLII) was a welcome victory for Indigenous groups opposed to the Trans Mountain Expansion project. The Court quashed the approval of the project, in part because it found that the federal government failed to fulfil the duty to consult. The federal government did not seek leave to appeal the decision to the Supreme Court. Indigenous Peoples, industry and the public will be watching in 2019 as the federal government, having now purchased the project, attempts a further round of consultation with Indigenous Peoples.

## *Treaties*

In two significant decisions in 2018, courts considered issues related to Indigenous Peoples' rights and the Crown's obligations in relation to the historic treaties.

In *R. v. Pierone*, 2018 SKCA 30, the Saskatchewan Court of Appeal allowed an appeal and acquitted a status Indian from Treaty 5 who shot a moose on privately-owned lands outside of hunting season. The Court of Appeal concluded, based on the test established by the Supreme Court in *Badger*, that the lands in question had not been put to a use which was visibly incompatible with hunting.

The *Pierone* decision provides positive affirmation of the treaty right to hunt on unoccupied lands not used for a purpose visibly incompatible with hunting, regardless of whether those lands are owned by private parties. At the same time, however, the Province of Saskatchewan has tabled new trespassing legislation which would prohibit

Indigenous Peoples from hunting on privately-owned, unoccupied lands without the landowner's permission. The proposed legislation is at odds with both the Court of Appeal's decision and Indigenous Peoples' understanding of the treaty agreement. (See our case comment p27.)

In *Restoule v. Canada (Attorney General)*, 2018 ONSC 7701, the Ontario Superior Court of Justice found that the Crown has a mandatory, reviewable obligation to increase annuity payments, where economic circumstances warrant, to the Anishinaabe parties to the Robinson Huron Treaty and Robinson Superior Treaty. The issues of whether the Crown breached its duties in interpreting and implementing the treaties, as well as questions of valuation of the annuity payments, will be dealt with at subsequent stages in the litigation.

In reaching its decision, the Court affirmed important principles related to the implementation of treaties between Indigenous Peoples and the Crown.

The Court held that the principle of the honour of the Crown and the doctrine of fiduciary duty impose on the Crown an obligation to diligently implement the treaty promises. In addition, while the Crown may have discretion in how to implement some aspects of the treaty, the discretion must be exercised honourably and is subject to review by the courts.

### **Looking Ahead**

Few, if any, Aboriginal law cases are likely to reach the Supreme Court by 2019. However, lower courts across the country will address a variety of issues related to Indigenous Peoples, rights and lands. Below is a summary of emerging issues that courts are likely to consider in 2019.

### *Modern Treaties vs. Asserted Rights*

In 2018, the British Columbia Supreme Court in *Gamlaxyeltxw v. British Columbia (Minister of Forests, Lands & Natural Resource Operations)*, 2018 BCSC 440 (CANLII) found that the Crown's obligations to an Indigenous group with a modern treaty will take precedence over its obligation to consult with other groups whose rights are not yet recognized by the Crown. The appeal of this decision will be important to watch in light of ongoing criticisms of the BC Treaty Commission and the provincial government's recent announcement to overhaul the treaty process in an effort to expedite treaty negotiations.

### *Aboriginal Rights & Non-Residents*

In *R. v. DeSautel*, 2018 BCCA 131 (CANLII), the BC Court of Appeal granted the Province of British Columbia leave to appeal the decision of the BC Supreme Court that Rick DeSautel,

an American citizen and resident of the United States, was exercising an Aboriginal right to hunt in British Columbia which was protected by section 35(1) of the *Constitution Act, 1982*. The appeal was heard in the fall of 2018, and has yet to be released. The decision raises critical issues related to whether Indigenous Peoples who are not resident in Canada can exercise constitutionally-protected rights on their ancestral lands. These issues are likely to remain unresolved until the case is addressed by the Supreme Court.

#### *Canadian and Indigenous Law*

Increasingly, courts across Canada are grappling with the implications of the interplay between Canadian and Indigenous legal orders. In the final days of 2018, the BC Supreme Court in *Coastal GasLink Pipeline Ltd. v. Huson*, 2018 BCSC 2343 (CANLII)

issued an interim injunction granting Coastal GasLink access to lands to carry out survey activities in relation to its proposed pipeline project through Wet'suwet'en territory, over the objections of Wet'suwet'en hereditary chiefs.

The injunction decision and its implications garnered national attention in January 2019 when RCMP officers took steps to enforce the order, including dismantling a checkpoint and arresting Wet'suwet'en members and supporters who were blocking the company's access. The decision brought to the public's attention previously-ignored distinctions between hereditary leadership and elected band councils, as well as the continued existence and importance of Indigenous legal orders. The case is expected to return to court in 2019, where once again the court will consider whether and how the Crown intends to reconcile with Indigenous Peoples – including on a basis which recognizes and respects Indigenous Peoples' own laws and jurisdiction.



OCTOBER, 2018

# Consent is Not a Four-Letter Word: What Next for the Trans Mountain Pipeline?

By Bruce McIvor

In 1603, on his first voyage to North America, Samuel de Champlain sailed down the St. Lawrence and anchored his ship at the mouth of the Saguenay River, northeast of modern-day Quebec City. Champlain was eager to explore the upper reaches of the Saguenay to establish valuable trade relations. He also hoped to discover a route to the fabled Northwest Passage—but it was not to be. This was Innu territory. Without the consent of the Innu, Champlain could not pass up the Saguenay, and Innu consent was not given.

Over four centuries later, Champlain's encounter with the Innu echoes across the Canadian landscape.

The federal government has enlisted former Supreme Court Justice Frank Iacobucci to salvage its failed consultations with Indigenous Peoples over the Trans Mountain pipeline. While Mr. Iacobucci will no doubt provide excellent advice, the early signs from the federal government are not encouraging. According to Fisheries and Oceans Minister Jonathan Wilkinson, the federal government's primary obligation is not to address Indigenous concerns—it's to satisfy the courts.

All Canadians would be well served if Minister Wilkinson and his cabinet colleagues considered the significance of Champlain's 1603 encounter with the Innu.

During the early years of the European encounter with the Indigenous Peoples of North America, the French prided themselves on their comparatively positive relations with Indigenous Peoples, many of whom became their allies against the British. In large part this relationship was grounded on recognition of the fact that the French were visitors in Indigenous territories. If they wanted to maintain their position, they had to respect Indigenous authority.

Following Champlain's first voyage, relationships with Indigenous Peoples based on recognition, respect and consent were repeated as Europeans moved across the continent from east, west, north and south. It was only after the devastating effects of European diseases and Canada's genocidal practices had taken their cruel toll on Indigenous people that colonizers, greedy to exploit Indigenous lands, were able to systematically disregard the requirement for Indigenous consent.

The principle of consent is also well established in international and Canadian law. The *United Nations Declaration on the Rights of Indigenous Peoples* has enshrined consent as the international standard. The federal government in its *10 principles* respecting its relationship with Indigenous Peoples has endorsed consent-based processes (see principle #6).

At law, the recognition of the requirement for Indigenous consent dates at least as far back as the Royal Proclamation of 1763. More recently, the Supreme Court of Canada in the *Delgamuukw*, *Tsilhqot'in* and *Ktunaxa* decisions has discussed when, under Canadian law, Indigenous consent is either required or, at the very least, is the preferred course of action.

Unfortunately, consent has been confused with ‘veto’, the favourite word of all who seek to marginalize and undermine Indigenous Peoples. In the context of Aboriginal law in Canada, veto refers to sitting on the sidelines and jumping up at the end of the process to arbitrarily play a trump card to stop a proposed project. Consent is something different.

Consent is grounded on two important words: recognition and respect. Recognition and respect for the historical and legal fact that despite having undergone centuries of colonization and genocide, Indigenous Peoples have never relinquished their right and responsibility to make decisions about their lands.

Anyone proposing to enter onto or do something with Indigenous Peoples’ lands and waters should approach them with an open heart and an open mind and seek their consent. Doing so will set the foundation for the meaningful dialogue and process of give and take which the federal government neglected during its failed first attempt to consult on the Trans Mountain pipeline.

Whether or not the Trans Mountain pipeline is ever built is uncertain. What is certain is that until federal and provincial governments abandon the low road of minimalist consultation and stop trying to silence Indigenous people by shouting ‘no veto’, they will continue to sow discord, opposition and distrust. Indigenous Peoples are offering them a better way forward—they should take it.

**Le consentement est fondé sur deux mots importants: reconnaissance et respect.**

OCTOBER, 2018

# Le Consentement n'est pas Un Juron: Qu'advient-il du Pipeline Trans Mountain?

By Bruce McIvor

Translation Pierrot Ross-Tremblay

En 1603, lors de son premier voyage en Amérique du nord, Samuel de Champlain a navigué le long du fleuve St-Laurent et a ancré son navire à l'embouchure de la rivière Saguenay, au nord-est de ce qui est aujourd'hui la ville de Québec. Champlain était désireux d'explorer les tronçons supérieurs de du Saguenay pour y établir de lucratives relations commerciales. Il espérait également y découvrir la route du légendaire passage du nord-ouest – mais cela ne devait pas advenir. Il était en territoire Innu. Sans le consentement des Innus, Champlain ne pouvait pas remonter le Saguenay et les Innus ne lui donnèrent pas leur consentement.

Quatre siècles plus tard, la rencontre de Champlain avec les Innus raisonne encore dans le paysage canadien.

Le gouvernement fédéral a fait appel à l'ancien juge de la Cour suprême, Frank Iacobucci, pour sauver ses consultations manquées avec les peuples autochtones au sujet du pipeline Trans Mountain. Bien que M. Iacobucci sera sans aucun doute de bon conseil, les premiers signes émanant du gouvernement fédéral ne sont pas encourageants. Selon le ministre de Pêches et des Océans Canada, Jonathan Wilkinson, la principale

obligation du gouvernement fédéral n'est pas de répondre aux préoccupations des peuples autochtones, mais bien de satisfaire les tribunaux.

Tous les Canadiens seraient bien servis si le ministre Wilkinson et ses collègues du cabinet considéraient l'importance significative de la rencontre de 1603 entre Champlain et les Innus.

Au cours des premières années de la rencontre européenne avec les peuples autochtones d'Amérique du Nord, les Français se vantaient de leurs relations relativement positives avec les peuples autochtones, dont beaucoup devinrent leurs alliés contre les Britanniques. En grande partie, cette relation était fondée sur la reconnaissance du fait que les Français étaient des visiteurs sur les territoires autochtones. S'ils voulaient maintenir leur position, ils devaient respecter l'autorité des autochtones.

À la suite du premier voyage de Champlain, les relations avec les peuples autochtones fondées sur la reconnaissance, le respect et le consentement se sont répétées au fur et à mesure que les Européens traversaient le continent d'Est en Ouest et du Nord au Sud. Ce ne fut qu'après que les effets dévastateurs des maladies européennes et les pratiques génocidaires du Canada concrétisèrent leur emprise cruelle sur les peuples autochtones que les colonisateurs, avides d'exploiter les terres autochtones, purent systématiquement ignorer l'exigence du consentement des autochtones.

Le principe du consentement est également bien établi dans les lois internationales et canadiennes. *La Déclaration des Nations Unies sur les droits des peuples autochtones* a consacré le consentement comme norme internationale. Le gouvernement fédéral, dans ses 10 principes concernant ses relations avec les peuples autochtones, a entériné les processus fondés sur le consentement (voir le principe n ° 6).

Au Canada, la reconnaissance de l'exigence du consentement autochtone remonte au moins jusqu'à la Proclamation royale de 1763. Plus récemment, la Cour suprême du Canada, dans les arrêts *Delgamuukw*, *Tsilhqot'in* et *Ktunaxa*, s'est demandé quand le consentement des autochtones était requis ou, à tout le moins, la meilleure manière de procéder.

Malheureusement, le consentement a été confondu avec le "veto", le mot favori de tous ceux qui cherchent à marginaliser et à amoindrir les peuples autochtones. Dans le contexte du droit autochtone au Canada, le veto désigne le fait de rester à l'écart et d'arriver à la fin du processus pour jouer arbitrairement un atout en vue de stopper un projet proposé. Le consentement est quelque chose de différent.

Le consentement est fondé sur deux mots importants: reconnaissance et respect. Reconnaissance et respect du fait historique et juridique selon lequel, malgré des siècles de colonisation et de génocide, les peuples autochtones n'ont jamais renoncé à leur droit et à leur responsabilité de prendre des décisions concernant leurs terres.

Quiconque propose d'entrer ou de faire quelque chose avec les terres et les eaux des peuples autochtones doit les aborder ces derniers avec un cœur et un esprit ouverts et chercher à obtenir leur consentement. Cela permettra de jeter les bases d'un dialogue constructif et d'un processus de compromis que le gouvernement fédéral n'a pas réussi à adopter lors de sa première tentative de consultation sur le pipeline Trans Mountain.

Que le pipeline de Trans Mountain soit construit un jour ou non demeure incertain. Ce qui est certain c'est que, jusqu'à ce que les gouvernements fédéral et provinciaux abandonnent la voie de la consultation minimaliste et cessent d'essayer de faire taire les peuples autochtones en criant «pas de veto», ils continueront de semer la discorde, l'opposition et la méfiance. Les peuples autochtones leur offrent une meilleure voie à suivre - ils devraient la prendre.



OCTOBER, 2018

# Change of Direction Required: Case Comment on *Mikisew Cree First Nation v. Canada*

By Bruce McIvor & Kate Gunn

In October 2018 the Supreme Court of Canada released its much-awaited decision in *Mikisew Cree First Nation v. Canada (Governor General in Council)*, 2018 SCC 40.

The Court held that the Crown's duty to consult Indigenous Peoples prior to decisions which could affect their Aboriginal rights and treaty rights does not extend to the development of legislation. According, while it may be good policy for the government to consult prior to enacting legislation, there is no constitutional obligation to consult, and possibly accommodate, Indigenous Peoples about laws which could impact their section 35 rights.

*Mikisew* underscores the limited utility of the duty to consult and accommodate and the necessity for Indigenous Peoples to explore other ways to ensure that their rights and jurisdiction are respected.

## *What it is about*

In 2012 the former federal government introduced two pieces of omnibus legislation into the House of Commons which included significant changes to federal environmental protection legislation. The Crown did not consult Mikisew Cree First Nation about how the amendments could affect their rights under Treaty No. 8 at any stage of the development of the legislation.

*Mikisew* brought an application for judicial review on the basis that the Crown failed to discharge its constitutional duty to consult prior to enacting legislation which would impact Mikisew's treaty rights to hunt, fish and trap.

The Federal Court agreed with Mikisew and granted a declaration that the duty to consult was triggered in respect of the omnibus bill. On appeal, the Federal Court of Appeal found that the lower court erred in conducting a judicial review of the legislative action because in developing policy ministers are acting in a legislative capacity and are therefore immune from judicial review. Mikisew appealed to the Supreme Court.

#### *What the Court said*

The Supreme Court unanimously held that the ministerial development of legislation cannot be subject to judicial review by the courts.

On the larger question of the application of the duty to consult, the majority of the Court found that the duty is not triggered by the development of legislation, even where it has the potential to affect Indigenous Peoples' Aboriginal rights and treaty rights. Two members of the Court held that the Crown's duty extends to all government decisions, including the development of law.

#### *The Majority*

The majority held that the duty to consult is not triggered by the development of legislation, including because recognizing a duty to consult in the law-making process would require courts to improperly trespass on the legislative arm of government and lead to inappropriate judicial incursion on the workings of the legislature.

The Court also held that recognizing a constitutionally-mandated duty to consult in the process of legislation would be highly disruptive to the legislative process and could "effectively grind the day-to-day internal operations of government to a halt." Consequently, the Court concluded that prior to the enactment of legislation there is no constitutional obligation to consult Indigenous Peoples about how that legislation could affect their Aboriginal rights and treaty rights.

Importantly, the Court emphasized that the fact that the duty to consult was not triggered in relation to the development of legislation did not absolve the Crown of its obligation to conduct itself honourably. The fact that the legislative process is not subject to judicial review should not "diminish the value and wisdom" of consulting Indigenous Peoples prior to enacting legislation that has the potential to adversely impact their Aboriginal rights and treaty rights, even where there is no recognized constitutional obligation to do so.

#### *The Dissent*

Justices Abella and Martin dissented on the issue of whether the duty to consult was triggered in the context of the legislative process.

They held that the honour of the Crown gives rise to a duty to consult that applies to all contemplated government conduct with the potential to affect Aboriginal rights and treaty rights, including legislative action. To hold otherwise would create a void in the honour of the Crown and leave Indigenous Peoples vulnerable to the government carrying out processes that could affect their section 35 rights through legislative rather than executive action.

They also rejected the majority's view that extending the duty to consult to legislative action would be unworkable or cause undue interference by the courts in the legislative process. They noted that in many cases, a declaration in the context of the legislative process would be an appropriate remedy, and that recognizing a constitutional obligation to consult would allow the court to shape the legal framework while respecting the constitutional role of the legislative branch of government.

#### *Why it matters*

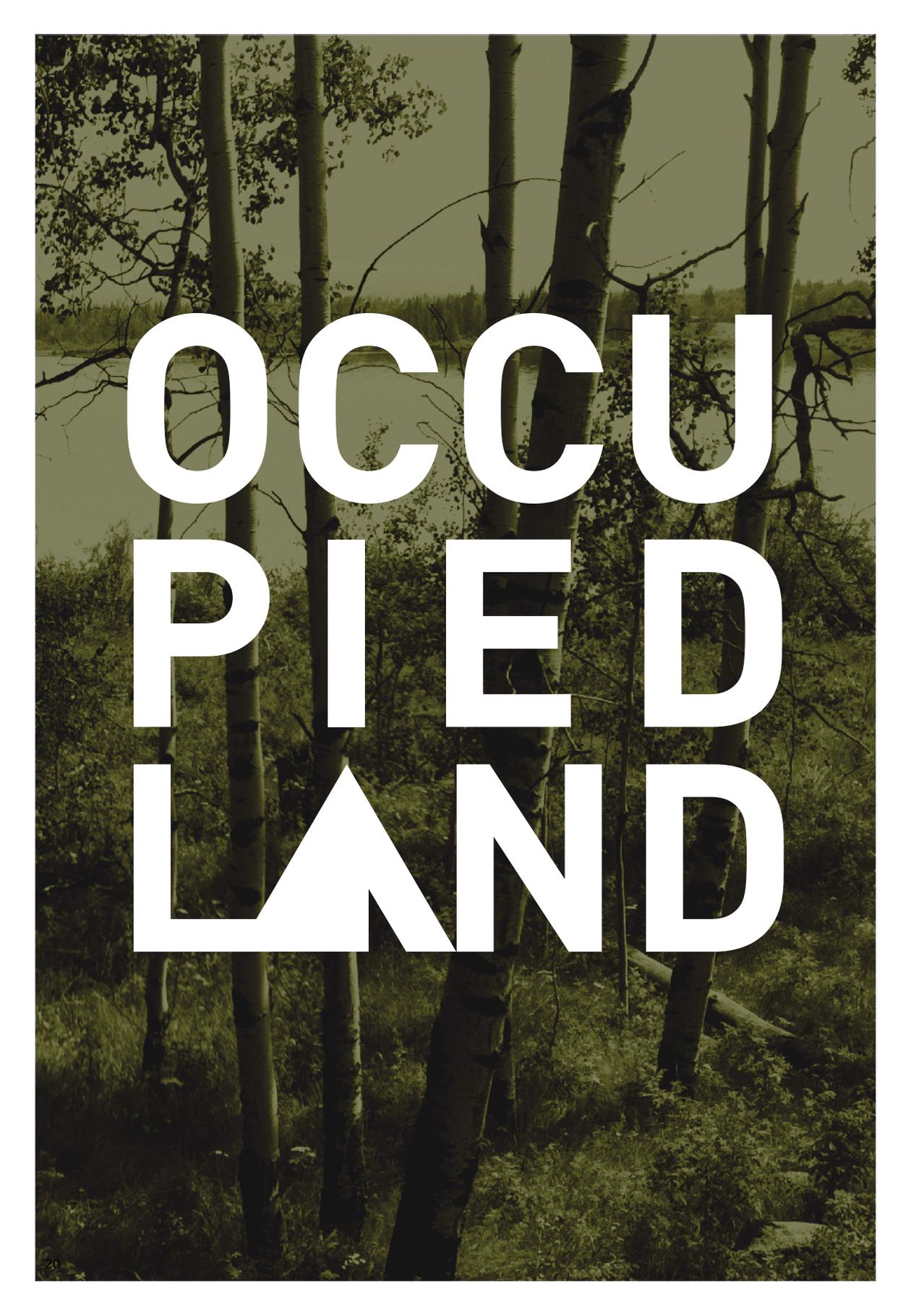
*Mikisew* represents a missed opportunity. Rather than causing disruption and chaos, a decision that the duty to consult applies to legislative development could have set the stage for respectful engagement with Indigenous Peoples about the development of the law, and in turn avoid a multitude of potential legal challenges to legislation that affects Aboriginal rights and treaty rights.

Unlike other jurisdictions (e.g. New Zealand), Indigenous Peoples in Canada have no direct, separate involvement in the development of legislation in Canada. *Mikisew* could have addressed this issue, in part, by affirming a positive obligation on government to consider and substantially address the concerns of Indigenous Peoples while legislation is being developed.

Importantly, it would be an error for federal and provincial governments to assume that, based on *Mikisew*, they can ignore the rights and interests of Indigenous Peoples when drafting legislation. The reasons of both the majority and dissenting judges in *Mikisew* provide strong, clear affirmation that the Crown should engage directly with Indigenous Peoples, both in order to fulfil its obligation to act honourably and to avoid the prospect of future litigation in respect of legislation which infringes the rights of Indigenous Peoples.

While the entire Court in *Mikisew* identified different opportunities for Indigenous Peoples to challenge federal and provincial legislation that affects their constitutional rights, at the end of the day the decision underscores the need for a new path forward.

Indigenous Peoples should not be forced to fight for a place at the table in the development of the colonizers' laws. Real reconciliation requires recognition of Indigenous Peoples' inherent law-making authority and its place within Canada's constitutional order.

A photograph of a forest with tall, thin trees and a body of water in the background, overlaid with large white text. The text is arranged in three lines: "OCCU", "PIED", and "LAND".

# OCCU PIED LAND

FEBRUARY, 2018

# **Saving the Specific Claims Tribunal: Case Comment on *Williams Lake Indian Band v. Canada***

By Bruce McIvor

There are two general categories of negotiated claims in Canada: comprehensive claims which include Aboriginal title, rights and self-government; and specific claims, which are based on specific historical wrongs done to First Nations

## *Background on Specific Claims*

In the 1980s the federal government acknowledged its long history of failing to protect Indigenous Peoples' interests, especially in relation to reserve lands, and that it was unfair that these historical wrongs remained unresolved because of the operation of limitation periods in Canadian law.

Consequently, the federal specific claims process was created. It allows First Nations to file historical claims with the federal government on the hope that Canada will acknowledge an outstanding lawful obligation and negotiate a settlement.

Instead of resolving historical wrongs, the specific claims process spread resentment and cynicism. First Nations worked hard to research and file hundreds of claims that disappeared into a black hole of the federal government's making.

After half-hearted and ineffectual efforts to reform the specific claims process, in 2008 the federal government passed legislation creating the Specific Claims Tribunal, an independent administrative tribunal made up of superior court judges responsible for

making final, binding decisions on the validity of specific claims and the amount of compensation owed First Nations. While there is no appeal of the Tribunal's decisions, the legislation allows for judicial reviews by the Federal Court of Appeal.

*What it is about*

The Colony of British Columbia was founded in 1858 on the unlawful premise that the British Crown owned Indigenous lands and had the right to give away these lands to so-called settlers.

The first step for a settler in acquiring title to Indigenous lands was to file a pre-emption. While most Indigenous land was up for grabs, as far as settlers were concerned, an exception under colonial law and policy was that settlers could not pre-empt occupied Indigenous village sites. This prohibition was routinely ignored by settlers and government officials.

When British Columbia became part of Canada in 1871, the federal government assumed responsibility for creating Indian reserves and the Province of British Columbia agreed to transfer 'Crown lands' as required. This arrangement led to the federal and provincial governments' creation of the Joint Indian Reserve Commission which, through the 1870s and 1880s, travelled the province investigating the status of Indian reserves.

As part of the Commission's work, it came to light that the Williams Lake Indian Band's (WLIB) village site on the shores of Williams Lake had been pre-empted beginning in the 1860s. Instead of insisting that the province cancel the pre-emption, the federal government acquired different lands for the WLIB's reserve.

Soon after the Specific Claims Tribunal opened for business, WLIB filed a claim to its lost village site. The Tribunal eventually decided in favour of WLIB. The federal government took the case to the Federal Court of Appeal which set aside the Tribunal's decision and dismissed the First Nation's claim. WLIB appealed to the Supreme Court.

*What the Court said*

The Supreme Court zeroed in on two issues: (1) how much, if any, deference was owed the Tribunal by a court reviewing one of its decisions?; and (2) did the federal

government, by operation of the Specific Claims Tribunal Act, assume liability for the colonial government's failure to protect the village site?

On the first issue, the Court held that the Tribunal is owed a high degree of deference. The Tribunal is made up of specialized superior court judges responsible for assessing claims steeped in the complexities of fiduciary law and based on complicated and nuanced historical facts. The Court concluded that the Tribunal has a distinctive task requiring significant flexibility. Consequently, a reviewing court must show the Tribunal significant deference when reviewing one of its decisions.

The second issue, i.e. whether the federal government was liable for the colonial government's failure to protect the lands from pre-emption, was hotly debated by the Court. The majority of justices (5) concluded that in this case Canada was liable and while the Tribunal could have provided better reasons, its decision should be restored.

In separate reasons, two of the justices agreed with the majority in most part, but would have sent the matter back to the Tribunal to provide a more detailed explanation as to how the federal government was liable for the wrong of the colony.

A further two justices dissented from the majority's decision and questioned both whether the federal government had breached its fiduciary duty to WLIB and whether it could have inherited responsibility for the colonial government's failure to protect the village site.

In the end, the Tribunal's decision validating WLIB's claim was restored. The Tribunal will now proceed to phase two of the hearing which will decide how much compensation is owed WLIB for the loss of the village site and how the compensation should be apportioned between the federal and provincial governments. Importantly, WLIB may not be able to recover any money owed by the province because an award by the Tribunal is not enforceable against the province.

#### *Why it matters*

The Court's decision is hugely important, not only for First Nations in British Columbia but for the entire country.

There are numerous similar ‘village site’ claims in British Columbia based on the colonial government’s failure to enforce its own laws and the federal government’s failure, after confederation, to protect First Nations’ interests in their lands. These claims, and potentially other claims dating from the colonial period, can now move forward both in the specific claims process and, if need be, at the Specific Claims Tribunal.

Outside of British Columbia, the decision is powerful support for arguments based on the indivisibility of the Crown’s fiduciary obligations to First Nations and the Crown’s obligation to protect specific Indigenous lands. While the decision is informed by British Columbia’s unique reserve-creation process, it will likely play a prominent role in helping settle similar outstanding questions across the country and embolden First Nations to pursue their own claims from the colonial period.

Ultimately the decision is most important for saving the Tribunal. By not only disagreeing with the Tribunal, but by paying it so little regard as to decide the matter itself, the Federal Court of Appeal undercut the Tribunal’s authority, processes and integrity. Had the Supreme Court upheld the Federal Court of Appeal’s decision First Nations would have abandoned the Tribunal en masse.

The Court’s support for the important work of the Tribunal and its conclusion that the Tribunal’s decisions are owed a high degree of deference has breathed new life into the Tribunal. It has restored First Nations’ confidence in the Tribunal’s processes and rekindled hope that the Tribunal will deliver justice to hundreds of First Nations across the country.





DECEMBER, 2018

# Trespassing on Treaty Rights: Saskatchewan's Proposed Restrictions on Access

By Bruce Mclvor & Kate Gunn

The Crown's failure to honour the promises it made to Indigenous Peoples pursuant to the historic treaties is one of the most significant barriers to reconciliation today. This was recently made clear when the Province of Saskatchewan introduced amendments to provincial trespassing laws which would impose new limits on Indigenous Peoples' treaty right to hunt.

Serious questions have already been raised as to whether the new legislation violates Indigenous Peoples' constitutionally-protected treaty rights. Just as critically, if enacted the amendments will contribute to misunderstandings regarding the nature of Indigenous Peoples' treaty right to hunt and increase the potential for further conflict.

## *What it is about*

Between 1871 and 1921 the Crown negotiated a series of treaties with Indigenous Peoples which collectively established the terms on which Indigenous and non-Indigenous people would use and live together on lands throughout much of what is now western Canada.

While the specific provisions of the treaties vary, most provide that the Indigenous parties will have the right to continue to hunt throughout their territory until those lands are "taken up" by the Crown for settlement, mining, lumbering or other purposes. Today this right is recognized and protected under the *Constitution Act, 1982*.

On November 27, 2018 Saskatchewan tabled amendments to the *Trespass to Property Act*, *Snowmobile Act* and *Wildlife Act* which would require all members of the public in Saskatchewan to seek permission from rural property owners before entering privately-owned land. As a result, Indigenous Peoples who hold treaty rights to hunt would now be required to obtain a landowner's consent prior to hunting or face possible charges under provincial law.

#### *Why it is important*

As Indigenous organizations have pointed out, the legislation may be unconstitutional and vulnerable to legal challenge. More than twenty years ago, the Supreme Court of Canada in *R. v. Badger* held that treaty lands will be considered “taken up” where they are put to a purpose which is visibly incompatible with hunting. Examples of lands used for a purpose which is visibly incompatible with hunting include lands where there are roads, buildings, or other indications of private use and occupation.

Importantly, the Court in *Badger* did not find that private ownership of land in itself constitutes a use which is incompatible with the right to hunt. The Supreme Court's definition of the take-up clause has since been affirmed by numerous lower courts, including in 2018 by the Saskatchewan Court of Appeal in *R. v. Pierone*. Saskatchewan's new trespassing legislation, which would prohibit Indigenous Peoples from hunting on privately-owned, unoccupied lands without the landowner's permission, appears contrary to the Court's direction on this issue.

On a more fundamental level, the legislation is at odds with the purpose of the treaties themselves. Indigenous Peoples have consistently maintained that the treaties are about the sharing of the use and benefits of their ancestral lands.

This understanding, for example, was confirmed in the *Grassy Narrows* trial decision, in which the Court concluded that the Crown expressly promised the Indigenous parties to Treaty 3 that they would be entitled to use their territory as they had previously, and that on entering into treaty, both parties expected that the Indigenous and non-Indigenous

use of the lands would be compatible. These findings of fact went unchallenged in the subsequent decisions of the Ontario Court of Appeal and Supreme Court in that case.

Saskatchewan's approach is also troubling in light of the Supreme Court's 2018 *Mikisew* decision. In *Mikisew*, the Court was clear that if the Crown wishes to act honourably and avoid the potential for future legal challenges, it should consult with Indigenous Peoples and address their concerns prior to enacting legislation which infringes their Aboriginal rights and treaty rights.

If Saskatchewan intends to advance reconciliation through the honourable fulfilment of its treaty promises, it should follow this direction and consult meaningfully with the Indigenous treaty parties before proceeding further with proposed legislative amendments which will directly affect the treaty rights of Indigenous Peoples in Saskatchewan.

#### *Looking ahead*

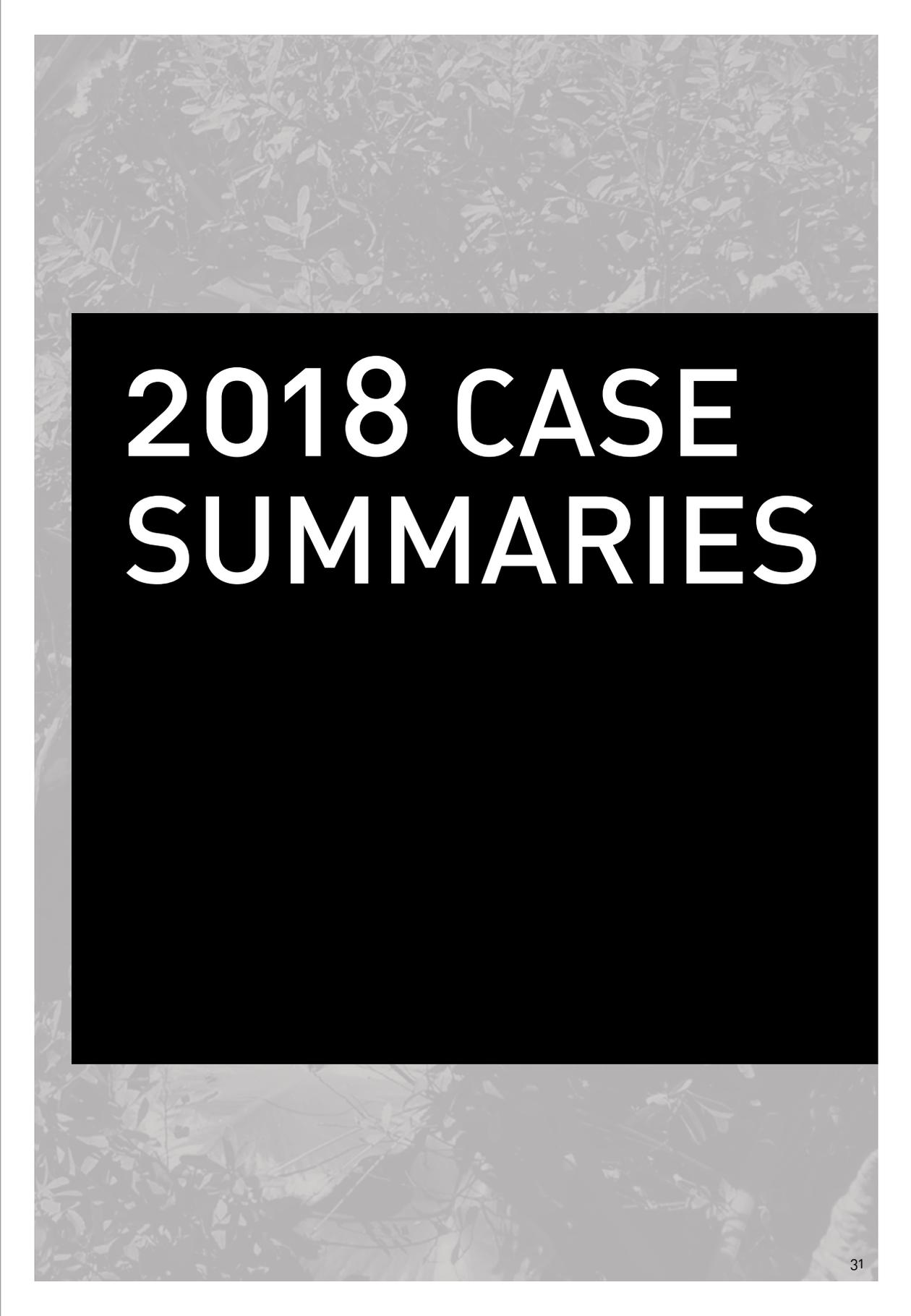
In the recent *Mikisew* decision, Justice Karakatsanis summarized one of the fundamental principles of treaty rights:

...the honour of the Crown governs treaty making and implementation, and requires the Crown to act in a way that accomplishes the intended purposes of treaties and solemn promises it makes to Aboriginal peoples.... Treaty agreements are sacred; it is always assumed that the Crown intends to fulfill its promises. No appearance of "sharp dealing" will be permitted.... (para. 28)

Unfortunately, the current Saskatchewan government appears to have failed to have received the message.

If implemented honourably, the terms of the numbered treaties could set the stage for the peaceful co-existence of Indigenous and non-Indigenous people throughout much of Canada, and ultimately, pave the way for reconciliation between Indigenous Peoples and the Crown. However, Saskatchewan's decision to introduce new laws which would further limit treaty rights seems more likely to have the opposite effect.





# 2018 CASE SUMMARIES

***Ahousaht Indian Band and Nation v. Canada (Attorney General)***

2018 BCCA 413

**Aboriginal Rights, Procedure, Interventions**

The BC Court of Appeal granted nine applications for leave to intervene in the Ahousaht Indian Band's appeal from orders made in respect of the justification stage of the trial regarding Ahousaht's Aboriginal fishing rights.

***Ahousaht Indian Band and Nation v. Canada (Attorney General)***

2018 BCSC 633

**Aboriginal Rights, Infringement**

The BC Supreme Court held that the federal government had failed to justify infringements of the plaintiff First Nations' Aboriginal right to a commercial fishery. The decision was the second phase of a two-stage trial regarding the First Nations' right to harvest fisheries resources.

The plaintiff First Nations brought an action claiming an Aboriginal right to harvest fisheries resources,

including for commercial purposes and for sustaining their communities, and that Canada's fisheries regime infringed those rights.

The Court's [decision](#) in phase one was released in 2009. The Court issued declarations that the First Nations had an Aboriginal right to fish for any species of fish within their fishing territories and a right to sell that fish and that Canada's fisheries management regime was a *prima facie* infringement of the First Nations' right to fish. The trial judge left the scope and scale of the right to be determined at a future time.

At phase two, the Court applied the framework for the question of infringement as set out by the Supreme Court in [Sparrow](#) and [Gladstone](#), and held that the *prima facie* infringements found to exist at stage one in large part had not been justified.

The Court also held, based on the Supreme Court's 2011 decision in [Lax Kw'alaams](#), that the Crown was entitled to know exactly what is being claimed before a right is declared, and that the justification analysis required an understanding of the scope and scale of the right. The Court held that the 2009 phase one decision should be interpreted as confirming a right to a

small-scale, artisanal, local, multi-species fishery, to be conducted in a nine-mile strip from shore, using small, low-cost boats with limited technology and restricted catching power, and aimed at wide community participation.

The Court declined to retain an ongoing supervisory role over the fishery.

***Athabasca Chipewyan First Nation v. Alberta***

2018 ABQB 262

**Duty to Consult, Judicial Review, Treaties**

The Athabasca Chipewyan First Nation (ACFN) brought an application for judicial review of a decision of the provincial Alberta Consultation Office (ACO) that the Crown's duty to consult was not triggered in respect of TransCanada's Grand Rapids pipeline project.

The Court held that the ACO had jurisdiction to determine whether the threshold for triggering consultation had been met.

The Court declined to make any declarations regarding whether the duty to consult was triggered because it found that a decision granting the bare declara-

tions requested by ACFN would have no practical effect on the project and that it would be inappropriate to decide whether the duty to consult was triggered without also considering the content of the duty and whether it was met.

The Court held, based on *Mikisew #1*, that a duty to consult does not arise solely as a result of a “taking up” of land in a treaty area and that there is no duty to consult at large for development of treaty lands.

The Court agreed with ACFN that it is insufficient for the Crown to rely solely on maps in determining whether consultation is triggered.

***Beaver v. Hill***  
2018 ONCA 816

**Indigenous Law,  
Procedure**

The Ontario Superior Court of Appeal allowed an appeal in part to allow a member of the Six Nations of Grand River to amend his pleadings in a family law dispute.

Two Haudenosaunee members of the Six Nations of Grand River raised the question of whether a family law dispute should be decided based on

Haudenosaunee laws or pursuant to Ontario’s provincial legislation.

Mr. Hill asserted that he had an Aboriginal and treaty right to have his family law dispute decided based on Haudenosaunee law. In 2017, the motions judge held that the Superior Court had jurisdiction to decide the matter and dismissed the claim without leave for Mr. Hill to amend his pleadings.

The Court of Appeal allowed the appeal in part in order to allow Mr. Hill to amend his pleadings in light of the 2017 decision.

***Benoit v. Federation  
of Newfoundland Indians***  
2018 NLSC 141

**Indian Act Registration**

The Supreme Court of Newfoundland and Labrador granted an application by six founding members of the Qalipu Mi’kmaq First Nation (QMFN) for a declaration that they were entitled to remain QMFN members until the validity of a supplemental agreement relating to enrolment status was determined.

***Bigstone Cree First  
Nation v. Nova Gas  
Transmission Ltd.***

2018 FCA 89

**Duty to Consult, Judicial  
Review, Tribunals**

The Federal Court of Appeal dismissed an application for judicial review by a Treaty 8 First Nation challenging the federal government’s approval of a natural gas expansion project in northern Alberta.

***Canada (Canadian  
Environmental  
Assessment Agency) v.  
Taseko Mines Limited***

2018 BCSC 1034

**Injunctions**

The BC Supreme Court dismissed an injunction petition brought by the federal government to prevent a company from carrying out mining activities pursuant to provincial authorizations.

Canada brought the petition for an order pursuant to the *Canadian Environmental Assessment Act (CEAA 2012)* enjoining Taseko Mines from proceeding with work related to its New Prosperity project pursuant to provincial authorizations. Taseko brought a petition for a declaration that *CEAA 2012* did not apply to work authorized by the province. The Court dismissed Canada’s injunction petition and declined

to grant Taseko's request for declaratory relief.

The key issue was whether the activities authorized in the provincial permit fell within the scope of the New Prosperity project as it was defined in the federal government's decision statement rejecting the project.

In dismissing the injunction, the Court held that an overly broad interpretation of the project definition pursuant to *CEAA 2012* would result in a federal statute catching an "undue amount of provincial mining exploration activity" which would have impractical consequences and be out of step with the purpose of *CEAA 2012* to promote cooperative and coordination of provincial and federal environmental assessments.

***Canada (Canadian Human Rights Commission) v. Canada (Attorney General)***

2018 SCC 31

**Indian Act Registration**

The Supreme Court of Canada upheld decisions of the Canadian Human Rights Tribunal which determined that challenges to the denial of registration under the *Indian Act* should be brought before the courts pursuant to the Charter, not under human rights legislation.

***Council of the Haida Nation v. British Columbia***

2018 BCSC 277

**Aboriginal Rights, Aboriginal Title, Procedure**

A case management judge issued an order severing the Haida Nation's Aboriginal title litigation into two phases.

The plaintiffs previously applied to have the claim severed into two phases. As part of phase one, the Court would determine issues of infringement, justification and related defences in relation to specific interests (referred to as "representative interests") set out in the claim. Phase two would deal with other issues in the claim, including issues of federal-provincial pre-Confederation liability as between the defendants.

The primary issue was whether phase one should include a determination of Aboriginal rights in respect of the entire claim area, or only those pertaining to the plaintiffs' representative interests. The Court found that determining the Aboriginal rights in the area could not be practically disentangled from an evaluation of the alleged

infringements, including the assessment of the justification. Consequently, at phase one, matters related to the plaintiffs' Aboriginal rights would only be decided in relation to the representative interests, not the entire claim area.

***Council of the Haida Nation v. British Columbia (Forests, Lands, Natural Resource Operations and Rural Development)***

2018 BCSC 1117

**Aboriginal Title, Injunctions**

The BC Supreme Court dismissed a petition by the Haida Nation for an interim order staying permits authorizing a company to carry out logging on Haida Gwaii.

The Haida Nation brought the petition to stay the permits after failing to reach consensus on the issue pursuant to its shared decision-making process with the Province of British Columbia.

The Court applied the same three-part test for a stay as that it would for an interlocutory injunction. It found that the Haida Nation had established there was a serious issue to be tried and that there was a reasonable likelihood of irreparable harm if the logging proceeded. However,

the Court dismissed the petition because it found that the balance of convenience favoured the company.

***Cowichan Tribes v. Canada (Attorney General)***

2018 BCSC 647

**Aboriginal Title, Infringement, Procedure**

The BC Supreme Court dismissed an application by the First Nation plaintiffs for further particulars regarding the Crown's justification defences in response to the First Nations' Aboriginal title claim to land within the City of Richmond.

The decision is of particular interest for setting out the Crown's justification arguments for infringing Aboriginal title based on Justice Lamer's criteria in *Delgamuukw*; for raising the question of whether the justification analysis referenced in *Tsilhqot'in* applies to historical infringements; and as to when the duty to consult arises in relation to historical infringements.

***Cowichan Tribes v. Canada (Attorney General)***

2018 BCSC 2254

**Aboriginal Title, Procedure**

The BC Supreme Court granted an application by the Province of British Columbia and Canada for an order making each of the named plaintiffs in a representative action for a declaration of Aboriginal title available for examination for discovery.

The Court held that the nature and identify of the Cowichan Nation and its descendants was one of the material issues to be determined at trial, and that one of the purposes of examination for discovery was to obtain information related to material matters at issue in the pleadings. As such, the defendants were allowed an opportunity to obtain evidence to ascertain the scope of the claim by examining each of the named plaintiffs in the action.

***Francis v. Canada***

2018 FC 49

**Costs**

The Federal Court dismissed an application for advance costs brought by a member of Elsipogtog First Nation who had been charged with fishing without a licence.

The Court concluded that Mr. Francis had failed to meet the test for an advanced costs order established by the Supreme Court in *Okanagan* because he had the option of addressing the issue through summary conviction proceedings; he had not explored possible funding options for those proceedings; and he had failed to demonstrate that the case had merit.

The Court emphasized that because Aboriginal rights and treaty rights are collective, in the context of a civil claim it is essential that the applicant have the support of the larger rights-holding group. In this case, Mr. Francis had not demonstrated that Elsipogtog supported his application.

***Gamlaxyeltwx v. British Columbia (Minister of Forests, Lands & Natural Resource Operations)***

2018 BCSC 440

**Aboriginal Rights, Aboriginal Title, Duty to Consult, Treaties**

The BC Supreme Court held that the Crown was not obligated to consult the Gitanyow about decisions which could affect the Gitanyow's asserted Aboriginal title and rights where doing so would be inconsistent with the Crown's

obligations pursuant to the Nisga'a Final Agreement.

In the petition the Gitanyow alleged that the Province of British Columbia failed to adequately consult them about decisions regarding moose hunting in an area subject to their asserted Aboriginal title and rights. The area was also within the Nass Wildlife Area as defined in the Nisga'a Final Agreement.

The Court held that in the context of determining whether the Crown's consultation obligations have been fulfilled to a group with asserted rights which overlap with lands subject to a modern treaty, the Court must ask whether recognizing the Crown's duty to consult would be inconsistent with its duties and obligations under the treaty. If recognizing the duty to consult in respect of an asserted claim is incompatible with the Crown's obligations under a modern treaty, the treaty will take precedence.

Under this modified version of the duty to consult the Court concluded that the Crown had adequately met its duty to consult the Gitanyow in respect of one of the decisions under review, and that imposing that duty did not have the potential to negatively affect the Nisga'a's treaty rights.

The Court concluded that the Crown's duty to consult was not triggered in respect of the other decision under review because requiring the Crown to consult the Gitanyow would be inconsistent with its obligations under the treaty.

### ***Giesbrecht v. British Columbia***

2018 BCSC 822

#### **Aboriginal Title, Procedure**

The BC Supreme Court dismissed an application by the plaintiff Kwikwetlem First Nation to strike out portions of the Crown's response to its claim for Aboriginal title.

In its Aboriginal title claim the First Nation sought the cancellation or transfer of ownership of parcels of land held by third parties and Metro Vancouver. In response, the Province of British Columbia and Metro Vancouver submitted that the First Nation's Aboriginal title had been "displaced" by grants of fee simple. The Court found that it was not plain and obvious that the defences would fail, and dismissed the application to strike.

### ***Gift Lake Métis Settlement v. Alberta (Aboriginal Relations)***

2018 ABQB 58

#### **Métis, Division of Powers**

The Alberta Court of Queen's Bench held that provisions in the *Métis Settlement Act* ("MSA") were not invalid based on the doctrine of interjurisdictional immunity.

Three individuals who were members of the Gift Lake Métis Settlement had their memberships terminated after each registered under the *Indian Act* to access health benefits. They sought a declaration that provisions in the MSA were outside provincial legislative competence because they were laws in relation to "Indians or Lands reserved for the Indians" under section 91(24) of the *Constitution Act*.

The Court found that the membership provisions in the MSA were not invalid due to the principle of interjurisdictional immunity because they did not impair the federal government's ability to legislate in relation to Aboriginal or Métis people in Canada.

***Kaska Dena  
Council v. Canada***

2018 FC 218

**Fiduciary Duty,  
Procedure, Treaties**

The Federal Court dismissed a motion by the Kaska Dena Council (KDC) for summary judgement in respect of certain aspects of relief claimed in its action against Canada.

The KDC commenced an action against Canada in which it sought declarations that during preceding negotiations Canada had formally recognized that the Aboriginal and rights of the Kaska Dene to their ancestral lands had not been dealt with by Treaty 8, and that Canada had constitutional authority to negotiate treaties and land agreements with Indigenous Peoples in British Columbia whose lands had never been dealt with by treaty or superseded by law. The KDC brought an motion for summary judgment after Canada filed its amended statement of defence.

The Court held, based on the Supreme Court's decision in *Wewaykum*, that provincial cooperation was necessary where a treaty or land claims agreement required the setting of land

in a province. The Court held that it was not possible to determine the existence of a fiduciary duty or the nature of that duty from the fact that Canada had agreed to accept a claim for negotiation. The Court held that bad faith might have been established if Canada changed its position in order to delay or end the negotiations, but that without a trial there was insufficient evidence to determine the motivation and reasoning behind the decision.

***Kaska Dena  
Council v. Yukon  
(Attorney General)***

2018 YKSC 3

**Procedure**

The Supreme Court of Yukon ordered a defendant First Nation to provide further particulars regarding its position that the plaintiff First Nation had no standing to bring its action.

The Kaska Dena Council (KDC) had filed a claim against Yukon seeking a declaration that Yukon had a duty to consult and breached that duty prior to issuing hunting licenses and tags in Kaska Dena territory. Liard First Nation (LFN) was added to the action as a defendant and challenged the standing of the KDC to bring the claim on behalf of some members of the Kaska Nation. KDC brought

an application for further particulars in relation to Liard's claim that it did not have standing to bring the claim on behalf of members of the Kaska Nation.

The Court held that under the applicable rules, a party could not be ordered on an application for particulars to clarify its legal position. However, it also found that KDC was entitled to be informed of the case they have to meet and know what evidence they have to be prepared with, and ordered LFN to provide further particulars as to why KDC and its members had no standing to bring the action.

***K'omoks First Nation v.  
Thordarson and Sorbie***

2018 BCPC 114

**Indigenous Law**

The BC Provincial Court granted an application by the K'omoks First Nation to prosecute two individuals who violated the First Nation's Land Code by way of a Criminal Code Information in provincial court.

***Mi'kmaq of P.E.I. v. Province of P.E.I. et al.***

2018 PESC 20

**Judicial Review,  
Duty to Consult**

The Supreme Court of Prince Edward Island dismissed a challenge by the Mi'kmaq of P.E.I. to the sale of a provincially-owned golf course, hotel and campground based on an alleged failure to fulfil the duty to consult.

The Court rejected the idea that any transfer of lands to which there was a title claim would automatically trigger the duty to consult. After reviewing [\*Haida, Rio Tinto\*](#) and the Musqueam downtown offices [\*case\*](#), the Court observed that a conveyance of lands is a legal action that does not on its own cause any physical or structural change to the land which would trigger the duty to consult. The Court held that while consultation in this case was “not perfect” the Crown had done enough to discharge its obligations.

***Mikisew Cree First Nation v. Canada (Governor General in Council)***

2018 SCC 40

**Duty to Consult,  
Honour of the Crown**

The Supreme Court held that the Crown's duty to consult Indigenous Peoples prior to decisions which could affect their Aboriginal rights and treaty rights does not extend to the development of legislation.

For further analysis see [\*Change of Direction Required: Case Comment on Mikisew Cree First Nation\*](#) at p17.

***Miller c. Mohawk Council of Kahnawà:ke***

2018 QCCS 1784

**Indigenous Law**

The Quebec Superior Court found that provisions of the Kahnawà:ke Membership Law which required members of the Mohawk Nation of Kahnawà:ke who marry a non-indigenous person to leave the Kahnawà:ke reserve or territory were contrary to the *Charter*.

The Court held that the *Charter* applied and that the impugned provisions were discriminatory and inoperative under sections 7 and 15. The Court ordered that the Mohawk Council

of Kahnawà:ke convene a Council of Elders to review and decide whether the plaintiffs' membership should be reinstated.

***Namgis First Nation v. Canada (Fisheries, Oceans and Coast Guard)***

2018 FC 334

**Duty to Consult,  
Injunctions**

The Federal Court dismissed a motion for an interlocutory injunction by Namgis First Nation regarding a fish farm license. The Court found that Namgis had established a serious issue to be tried and a risk of irreparable harm, but that the balance of convenience favoured the respondents.

***Nuchatlaht v. British Columbia***

2018 BCSC 796

**Aboriginal Title,  
Procedure**

The BC Supreme Court ordered the plaintiffs in an action for a declaration of Aboriginal title to provide particulars of the material facts on which they intend to rely to prove their claim.

The Court noted that given the historical nature of an Aboriginal title claim it may be difficult to ascertain the distinction between facts

and evidence, but that proper particulars are still required in Aboriginal title proceedings. The Court refused to grant the Crown's request for an order prohibiting the plaintiffs from relying at trial on non-particularised facts.

***Pastion v. Dene Tha' First Nation***

2018 FC 648

**Indigenous Law**

The Federal Court dismissed an appeal by Dene Tha' First Nation of a decision of the First Nation's Election Appeal Board.

The Court found that the Appeal Board's decision was reasonable and deserved deference. In making its decision, the Court reviewed the principles governing the Federal Court's intervention in First Nation governance matters. It described the Appeal Board as an example of the exercise of "Indigenous laws" around self-government.

The Court stated that Indigenous people are in the best position to decide some legal issues. The Court suggested that custom election laws might be better referred to as "Indigenous legislation," that it was open to a First Nation to "blend" Western and Indigenous legal traditions and that the Court should respect the First Nation's choice to do so.

***Pictou Landing First Nation v. Nova Scotia (Aboriginal Affairs)***

2018 NSSC 306

**Duty to Consult, Honour of the Crown, Judicial Review, Treaties**

The Supreme Court of Nova Scotia granted an application by Pictou Landing First Nation for judicial review of a decision by the Province of Nova Scotia not to consult with the First Nation about whether it would fund the construction of a new effluent treatment facility.

The Court found that consultation was triggered in relation to the funding decision because if the Province financed the project it would have a tangible interest in the success of the facility, which would set the stage for further strategic, higher-level decisions which could result in new adverse effects on the First Nation's treaty rights.

The Court also noted that in the context of a facility which had already had significant environmental effects on lands subject to a treaty, the honour of the Crown required that even the appearance of sharp dealing be avoided when consulting about further impacts on treaty rights.

***Pimicikamak et al. v. Manitoba***

2018 MBCA 49

**Duty to Consult, Infringement, Judicial Review, Procedure, Treaties**

The Manitoba Court of Appeal upheld decisions dismissing an application for judicial review by the Cross Lake Band of Indians and Pimicikamak and that some of the applicants' affidavits were inadmissible.

The judicial review related to a decision by Manitoba and Manitoba Hydro to enter into a settlement agreement with the Cross Lake Community without fulfilling the Crown's duty to consult. The applicants argued that in the context of the Crown "taking up" lands under treaty the Crown was required to consult and accommodate them so as to justify infringements of their Aboriginal rights and treaty rights.

Relying on *Grassy Narrows, Mikisew #1* and the 2017 Federal Court of Appeal decision in *Prophet River*, the Court found that it was unnecessary to apply an infringement analysis in the context of a determination of the adequacy of consultation in the context of a proposed taking up by the Crown pursuant to treaty.

The Court held that the affidavits were not necessary to demonstrate procedural unfairness or to fill gaps in the consultation record, and that the applicants had had an opportunity to provide the information in the course of consultation but failed to do so.

### ***R. v. Boyer***

2018 SKPC 70

#### **Aboriginal Rights, Fiduciary Duty, Métis**

The Provincial Court of Saskatchewan convicted two of three individuals charged with unlawful hunting and fishing who claimed they held harvesting rights as Métis and as “Indians” under the *Natural Resources Transfer Agreement* (NRTA), and acquitted the third.

The Court found that the Métis are not included in the term “Indians” in the NRTA, and that the failure to include the Métis did not constitute a breach of Canada’s fiduciary duty.

The Court applied the test established by the Supreme Court in *Powley* and found that two of the accused were guilty because the areas in which they were harvesting were not areas in which a

Métis community existed on the date on which the Crown established effective control. The Court found the third accused not guilty on the basis that he was hunting in an area which was in close proximity to identifiable Métis communities which existed at the date of effective control.

### ***R. v. DeSautel***

2018 BCCA 131

#### **Aboriginal Rights, Infringement**

The BC Court of Appeal granted the Province of British Columbia leave to appeal the [decision](#) of the BC Supreme Court that Rick DeSautel, an American citizen and person of Sinixt ancestry, was exercising an Aboriginal right to hunt in British Columbia.

The Sinixt are an Indigenous people whose ancestral lands include the Arrow Lakes region in British Columbia. Many individuals who identify as Sinixt today reside south of the border in Washington State.

In 2010, DeSautel was charged under provincial legislation for hunting without a licence and without being resident in British Columbia. At [trial](#), the Court found that DeSautel was exercising an Aboriginal right to hunt within the meaning of section 35(1) of

the *Constitution Act, 1982* and acquitted him of the charges.

The Supreme Court of British Columbia upheld the trial decision. The Court held that constitutional protections under section 35(1) are not limited to Indigenous people who are Canadian citizens or who reside in Canada, and that it was unnecessary to consider whether DeSautel’s right to hunt was incompatible with Crown sovereignty because the question of whether the right includes a right to cross the international border did not arise on the facts of the case.

The Court granted the Province leave to appeal, including on the issues of whether constitutional protections under section 35 extend to an Aboriginal group that does not reside in Canada, and whether, in determining if an Aboriginal person who is not a citizen or resident of Canada has an Aboriginal right to hunt in British Columbia, it is necessary to consider the incidental mobility right of the individual and its compatibility with Crown sovereignty. The appeal was heard in September 2018.

## **R. v. Lamb**

2018 NBQB 213

### **Aboriginal Rights, Indian Act Registration**

The Court of Queen's Bench of New Brunswick vacated the conviction of a Caucasian woman who was also a status Indian and member of the Burnt Church First Nation for hunting moose out of season.

The Court concluded that a new trial was necessary because the trial judge had failed to consider evidence regarding the legislative history related to the acquisition of Indian status by non-Indigenous women.

## **R. v. Martin**

2018 NSSC 141

### **Aboriginal Rights, Duty to Consult, Honour of the Crown**

The Supreme Court of Nova Scotia allowed the Crown's appeal in part of a decision staying charges against two individuals convicted of fishing in contravention of an Aboriginal Communal Fishing License.

The Court found that in the circumstances of that case, the Crown had a duty to consult the Waycobah First Nation prior to taking enforcement action

in respect of the fishing licenses, and that the duty had been discharged.

The Court found, based on the Honour of the Crown, that there was a duty to consult in relation to enforcement which existed independent of Department of Fisheries and Ocean's policy. The Court found the Crown's reliance on a "technical defence troubling in the context of the goal of reconciliation," and held that in the context of assessing whether the duty to consult exists, "technical and administrative defences are to be discouraged."

## **R. v. Pierone**

2018 SKCA 30

### **Treaties**

The Saskatchewan Court of Appeal allowed an appeal of a conviction of a status Indian charged with shooting a moose outside of hunting season.

The accused, a status Indian from Treaty 5, shot the moose in Treaty 4 in a dry slough on private lands. At [trial](#), the Court held, based on the Supreme Court decision in *Badger*, that the slough was not land that had been "taken up" pursuant to Treaty 4, i.e. put to a visible incompatible use, and therefore the accused had a right of access to hunt without the owner's express

consent. The Court of Appeal agreed and held that the Crown had not proven beyond a reasonable doubt that the land had been put to a visible incompatible use. Leave to appeal to the Supreme Court of Canada was dismissed.

See our case comment on [Trespassing on Treaty Rights: Saskatchewan's Proposed Restrictions on Access](#) at p27.

## **Restoule v. Canada (Attorney General)**

2018 ONSC 7701

### **Fiduciary Duty, Honour of the Crown, Treaties**

The Ontario Superior Court of Justice found that the Crown has a mandatory, reviewable obligation to increase annuity payments, where economic circumstances warrant, to the Anishinaabe of the upper Great Lakes region as promised pursuant to the Robinson Treaties.

The decision was the first stage in a three-stage trial. At stage one, the issues before the Court related to whether the Crown was obligated to increase the annuity amount in certain economic circumstances.

The Court held that the treaties included an affirmative promise to augment the annuities if the revenue received from the territories allowed the Crown to do so without incurring a loss, and

that as such, the Crown has an obligation to increase the treaty annuities in certain economic circumstances.

The Court found that the principle of the honour of the Crown and the doctrine of fiduciary duty impose on the Crown an obligation to diligently implement the treaty promises, and that while the Crown may have discretion in how to implement some aspects of the treaty, the discretion must be exercised honourably and is subject to review.

The issue of whether the Crown breached its duties to purposively and diligently interpret and implement the treaties, as well as questions of valuation, will be dealt with at a subsequent stage in the litigation.

Subsequently, Ontario filed a Notice of Appeal of both the decision and the cost order.

### ***Squamish Nation v. British Columbia (Environment)***

2018 BCSC 844

#### **Division of Powers, Duty to Consult, Judicial Review**

The BC Supreme Court dismissed the Squamish Nation's petition for an order setting aside the Province of British Columbia's decision to issue an Environmental Assessment

Certificate (EAC) for the Trans Mountain project.

The Squamish Nation brought an application for judicial review challenging the Province's issuance of the EAC without fulfilling its duty to consult.

The Court found that the Province's options in relation to the issuance of the EAC were constrained by the constitutional division of powers and the federal-provincial equivalency agreement for the project assessment, and that the Province could only consult within its constitutional limitations. The Court held that because the duty to consult is upstream of environmental assessment legislation it does not alter the constitutional division of powers between the federal and provincial governments. As such, the Province's decision to issue the EAC was within the range of reasonable outcomes and entitled to deference.

### ***Tsleil-Waututh Nation v. Canada (Attorney General)***

2018 FCA 153

#### **Duty to Consult, Tribunals**

The Federal Court of Appeal quashed the federal government's approval of the Trans Mountain

pipeline expansion project.

In November 2016 the Governor in Council issued an Order in Council in which it accepted the recommendations of the National Energy Board, and directed that the Board issue a certificate of public convenience and necessity approving the construction and operation of the project, subject to conditions. Several applications for judicial review of the project approval were consolidated into a single proceeding.

The Court held that the Board had failed to consider impacts of the project from marine shipping in its report, and as a result, Canada should not have relied on the Board's report as basis for approving the project. The Court further held that Canada had failed to fulfil the Crown's duty to consult with Indigenous Peoples at Phase III in the consultation process (i.e. after the Board's report but prior to the decision to approve the project).

In its decision the Court held that:

» in carrying out consultation the Board is required to consider impacts on Aboriginal rights and treaty rights, not just environmental impacts of the project;

- » existing limitations on Indigenous rights, including limitations arising from cumulative effects or historical events, are relevant in determining the scope of the duty to consult; and
- » Canada can rely on the Board to carry out consultation on its behalf; however, if the Board is unable or unwilling to consult adequately the Crown must take further steps to fill in the gaps.

***Wells v. Canada  
(Attorney General)***

2018 FC 483

**Indian Act Registration**

The Federal Court ordered that an enrolment committee established under the Agreement for the Recognition of the Qalipu Mi'kmaw Band reconsider its decision denying two applications for membership.

***West Moberly  
First Nations v.  
British Columbia***

2018 BCSC 730

**Injunctions,  
Procedure, Treaties**

The BC Supreme Court granted preliminary applications brought by the defendants, the Province of British Columbia and BC Hydro, in advance of the

hearing of the West Moberly First Nations' injunction application to stop work on the Site C hydroelectric project. The Court ordered further and better particulars to West Moberly's statement of claim and ruled that some of West Moberly's affidavits were inadmissible.

***West Moberly  
First Nations v.  
British Columbia***

2018 BCSC 1835

**Injunctions, Treaties**

The BC Supreme Court dismissed an application for an interlocutory injunction by West Moberly First Nations regarding the construction of the Site C hydroelectric project.

The Court concluded that the balance of convenience favoured not granting the application because West Moberly's chances of succeeding in its underlying claim to halt the entire project were not strong, and because the proposed injunctions would cause irreparable harm to BC Hydro, project stakeholders and other First Nations. The Court found that this potential for irreparable harm was compounded by the fact that the injunction application was brought two and half years after construction on the project had commenced.

***Williams Lake Indian  
Band v. Canada  
(Aboriginal Affairs  
and Northern  
Development)***

2018 SCC 4

**Fiduciary Duty, Specific  
Claims, Tribunals**

The Supreme Court of Canada upheld the [decision](#) of the Specific Claims Tribunal that both the Colony of British Columbia and Canada breached their legal and fiduciary obligations to the Williams Lake Indian Band by failing to protect the Band's village lands from pre-emption by settlers.

For further analysis see [Saving the Specific Claims Tribunal: Case Comment on Williams Lake](#) at p21.

***Yahey v.  
British Columbia***

2018 BCSC 278

**Costs, Infringement,  
Procedure, Treaties**

The BC Supreme Court granted an application by Blueberry River First Nations for an order staying its obligation to pay court hearing fees in respect of its treaty infringement claim against the Province of British Columbia pending the determination of a separate decision before the BC Court of Appeal.





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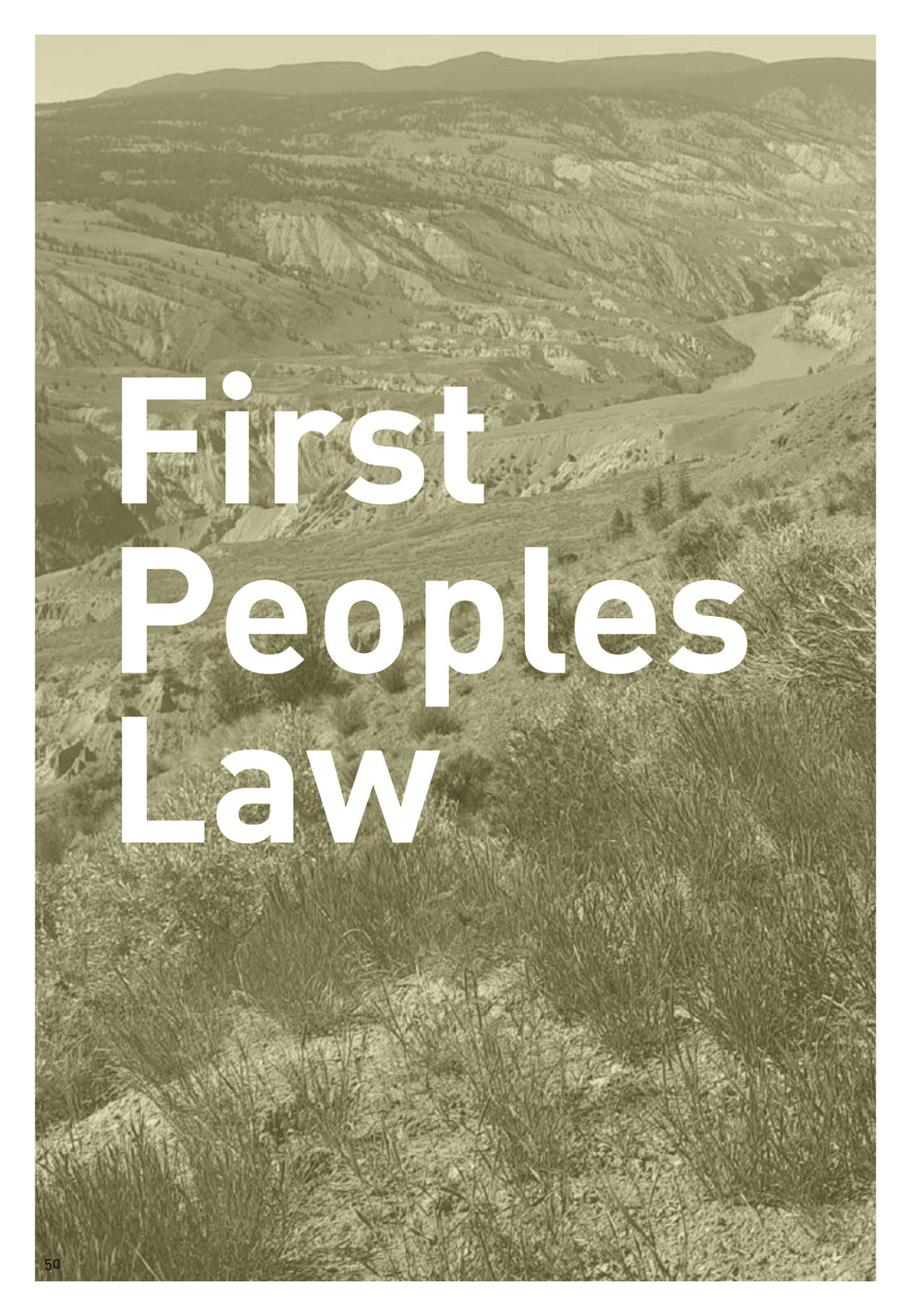
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# First Peoples Law

# First Peoples Law

First Peoples Law is a law firm dedicated to protecting and advancing the rights of the Indigenous Peoples of Canada. We do this through providing the highest quality legal services while actively participating in public debate and education. Our objective is to play a meaningful role in Indigenous Peoples' ongoing struggle for a more respectful and equitable world for themselves and their children.

# Kate Gunn

Kate Gunn is an associate at First Peoples Law Corporation. She represents Indigenous Peoples on issues related to the advancement and protection of their Aboriginal title, rights and treaty rights.

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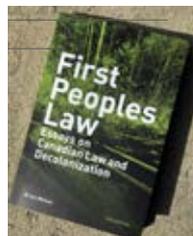
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For more of Bruce's essays, download his book for free at [firstpeopleslaw.com](http://firstpeopleslaw.com).

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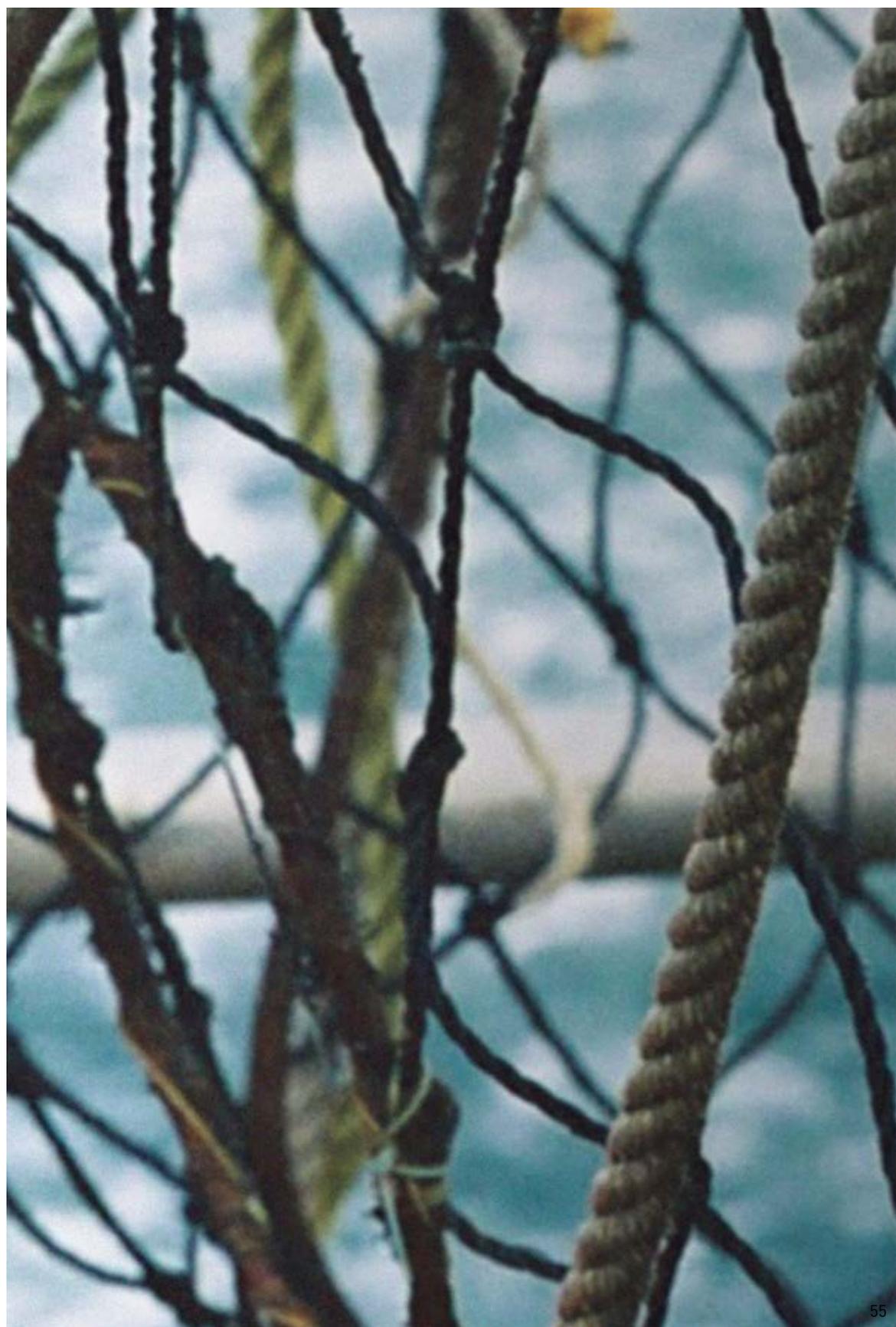
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