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Métis Legal Issues

Presented by: The Honourable Mr. Justice Ducharme, Jean Teillet and Patricia Barkaskas

June 23, 2020

Who are the Métis?

By Jean Teillet, IPC, OMN, MSC
June 23, 2020
Vancouver Courthouse Library Webinar

Indicia of a People/Culture/Ethnic Group

Six indicators of an ethnic group:

(1) a collective name;

(2) a common myth of descent or an originating story;

(3) a shared history;

(4) a distinctive shared culture;

(5) an association with a specific territory; and

(6) a sense of solidarity.

Stories ***NOT*** Genealogy

- Genealogical connection is about an individual tracing not to another individual, but to an Indigenous collective
- Stories are about the people, the collective *not about an individual's genealogy*
- To be an Indigenous people – there must be a collective that acts as a collective in its own interests
- The stories of the collective are within that people's territory

Métis Nation of the North-West

(1) Métis Nation named itself as a collective "la nouvelle nation" in 1816

(2) Battle of Seven Oaks origin story

(3) shared history of the collective acting repeatedly *as a collective* in its own interests

(4) shared culture – Michif language, dances, music, food, stories

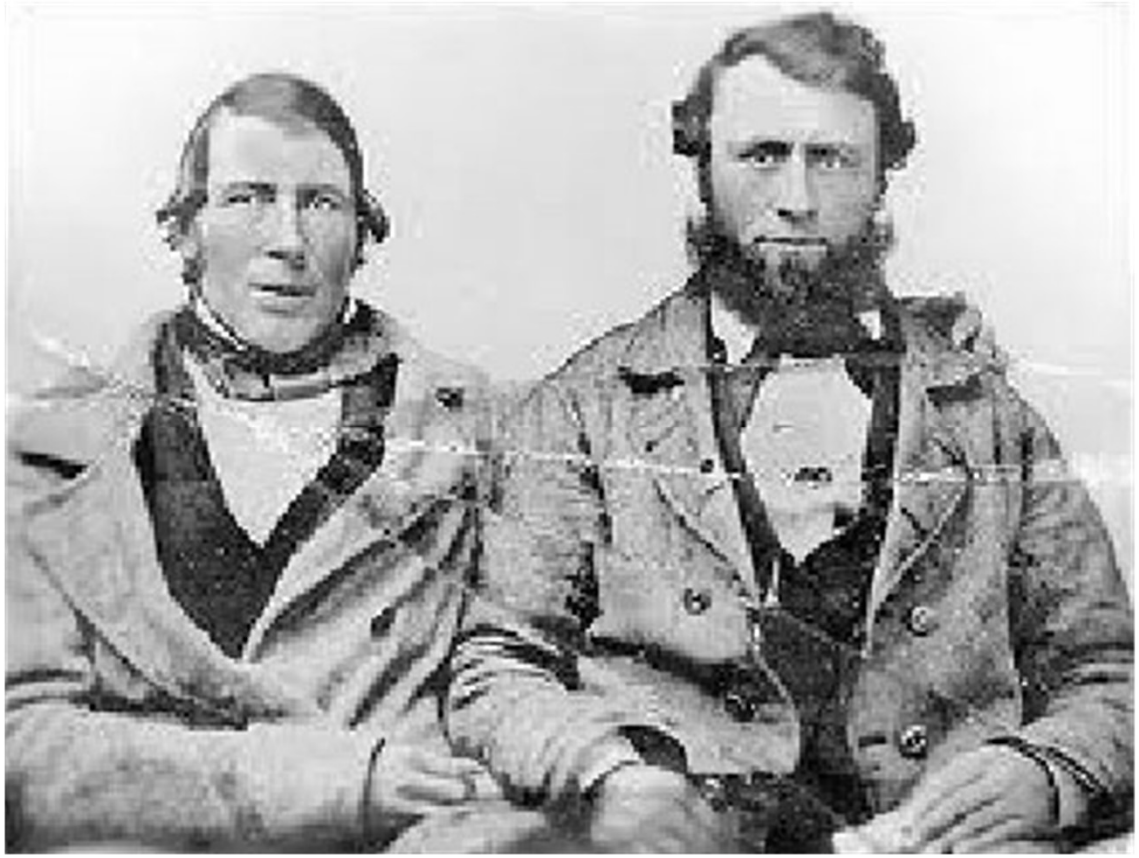
(5) North-West is the traditional territory, their motherland

(6) 200 years of acting in solidarity to protect their land and rights and identity

Historiography

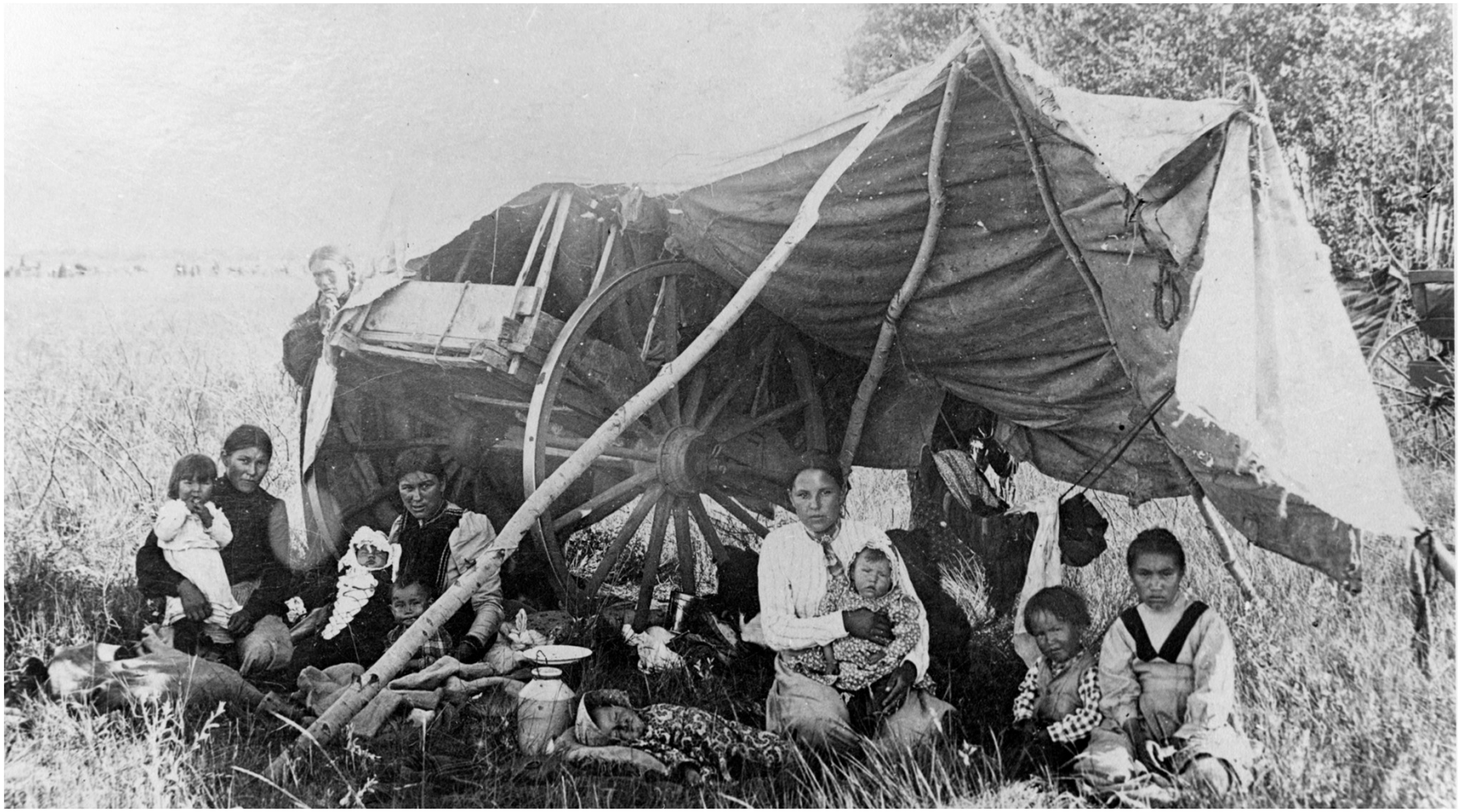
- Stories of the collective that take place within their geographic territory
- The people who are ancestrally connected to, and identified with the stories of collective action *and* whose ancestors lived within their territory are the members of an Indigenous people.
- That is who is within the Indigenous people. It is determined by the group.

Picturing the NW Métis



Guillaume Sayer & Louis Riel Sr. (circa 1859)

North-West Métis Women and Children

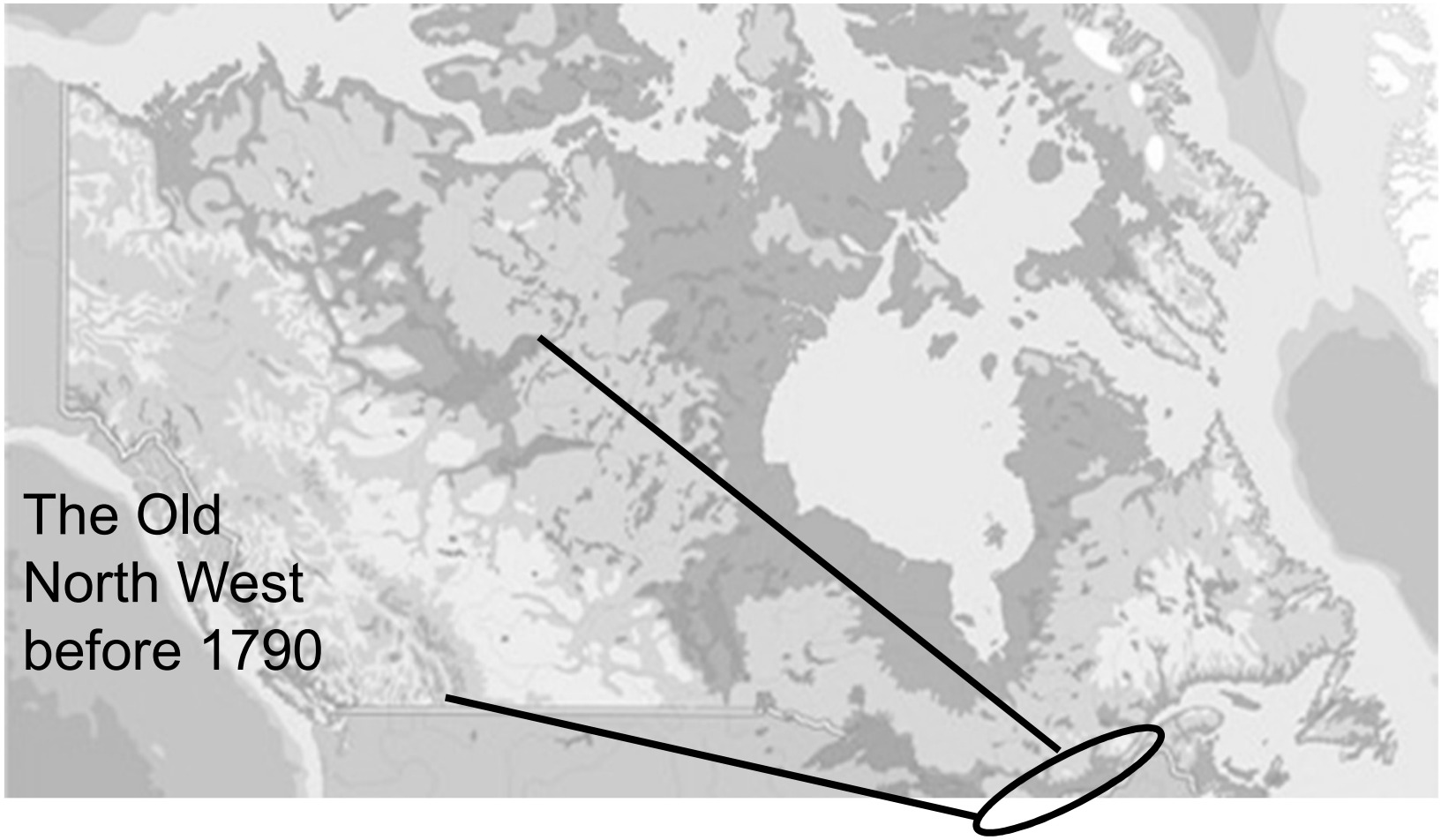


North-West Métis Buffalo Hunter Camp
Milk River, Alberta 1874

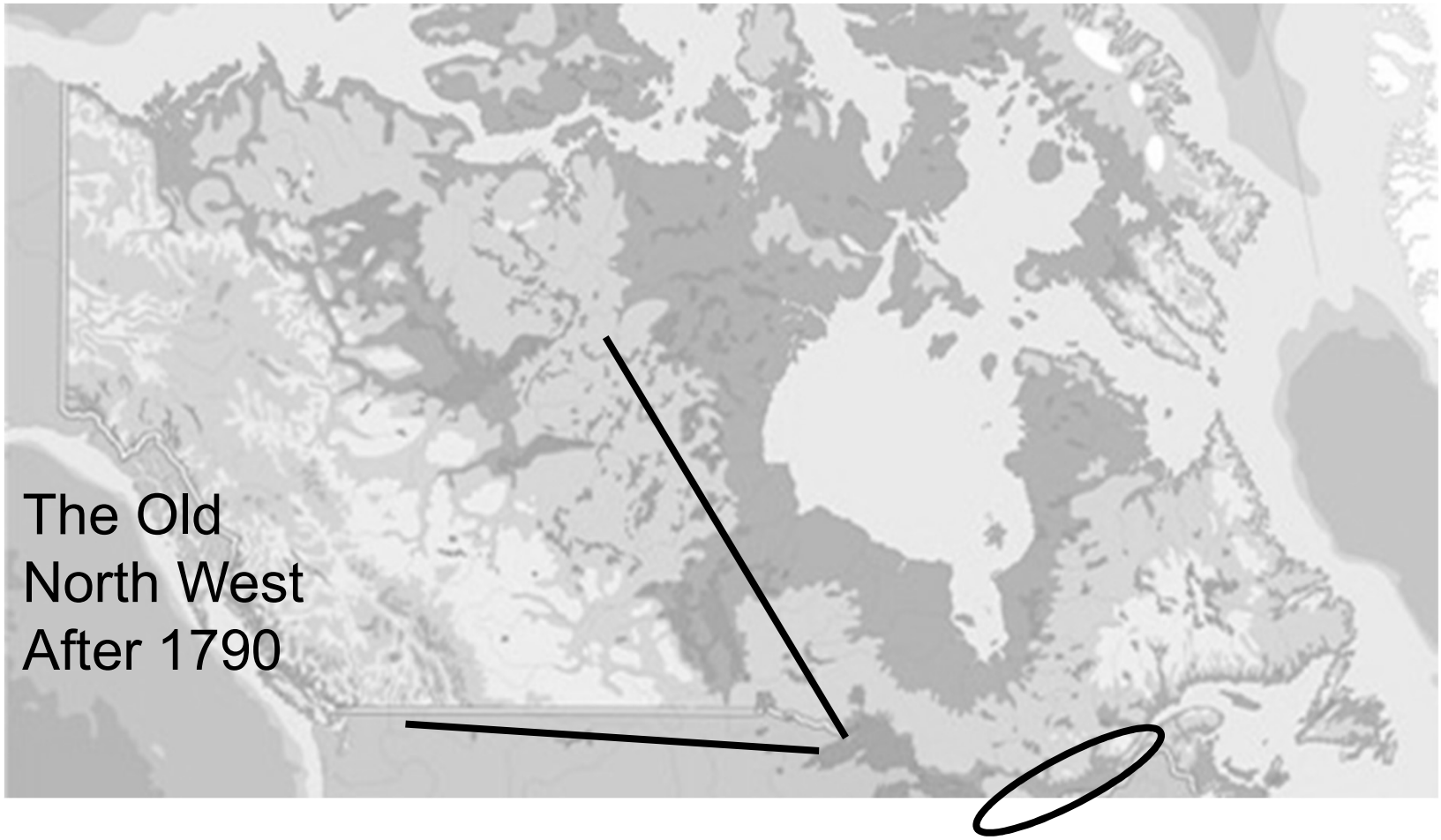
Ethnogenesis of the Métis Nation of the North-West

- Children of the fur trade and marriages between Ojibway or Cree women and the Voyageurs.
- Successive generations of intermarriage created a unique culture in the North West.
- Critical cohort is the generation born in the 1790s.
- By the time they become adults there are enough of them that everyone recognizes them as a separate group. They name themselves the “Bois-Brûlés” and call themselves “La Nouvelle Nation”

the North West – Before 1790



the North West – After 1790



Victory of the Frog Plain-1816

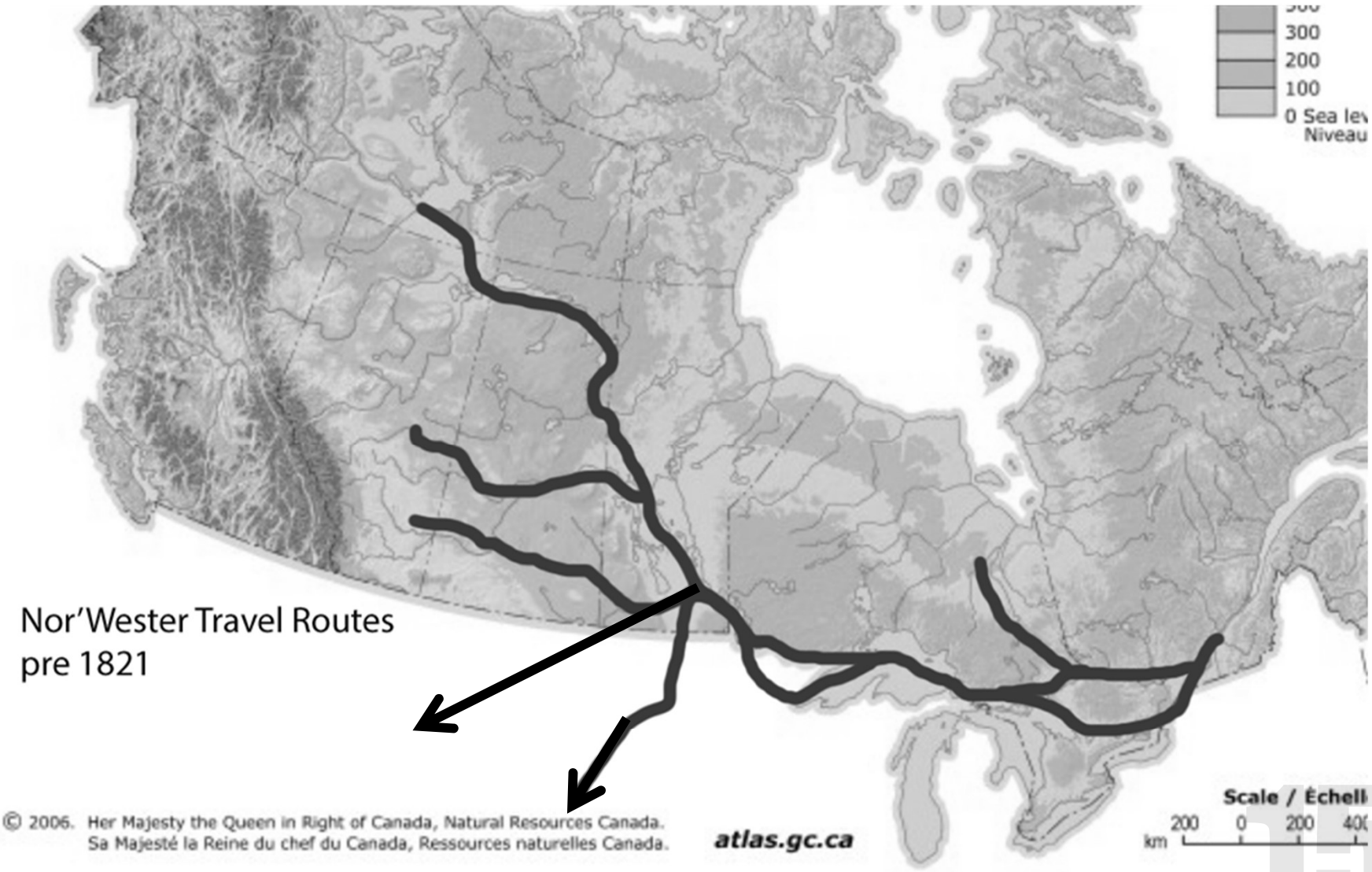
- The Métis were an *ethnie* (a culture & a people) by 1816
- What changed in 1816 – they took political action to change the power forces in the North-West.
- This action changed them from a passively evolving people into a political entity – a nation.
- Once any people evolves into a political entity – they never go back.
- The Victory of the Frog Plain (what *lii Zanglais* call the Battle of Seven Oaks) is the origin story of the Metis Nation of the North-West.

After 1816

Two major events change the geography of the Métis Nation

1.the Hudson's Bay Company & North-West Company merge in 1821.

2.the move onto the Plains (beginning in 1804) to create a lifestyle and economy around the buffalo hunt.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Nor'Wester Travel Routes
pre 1821
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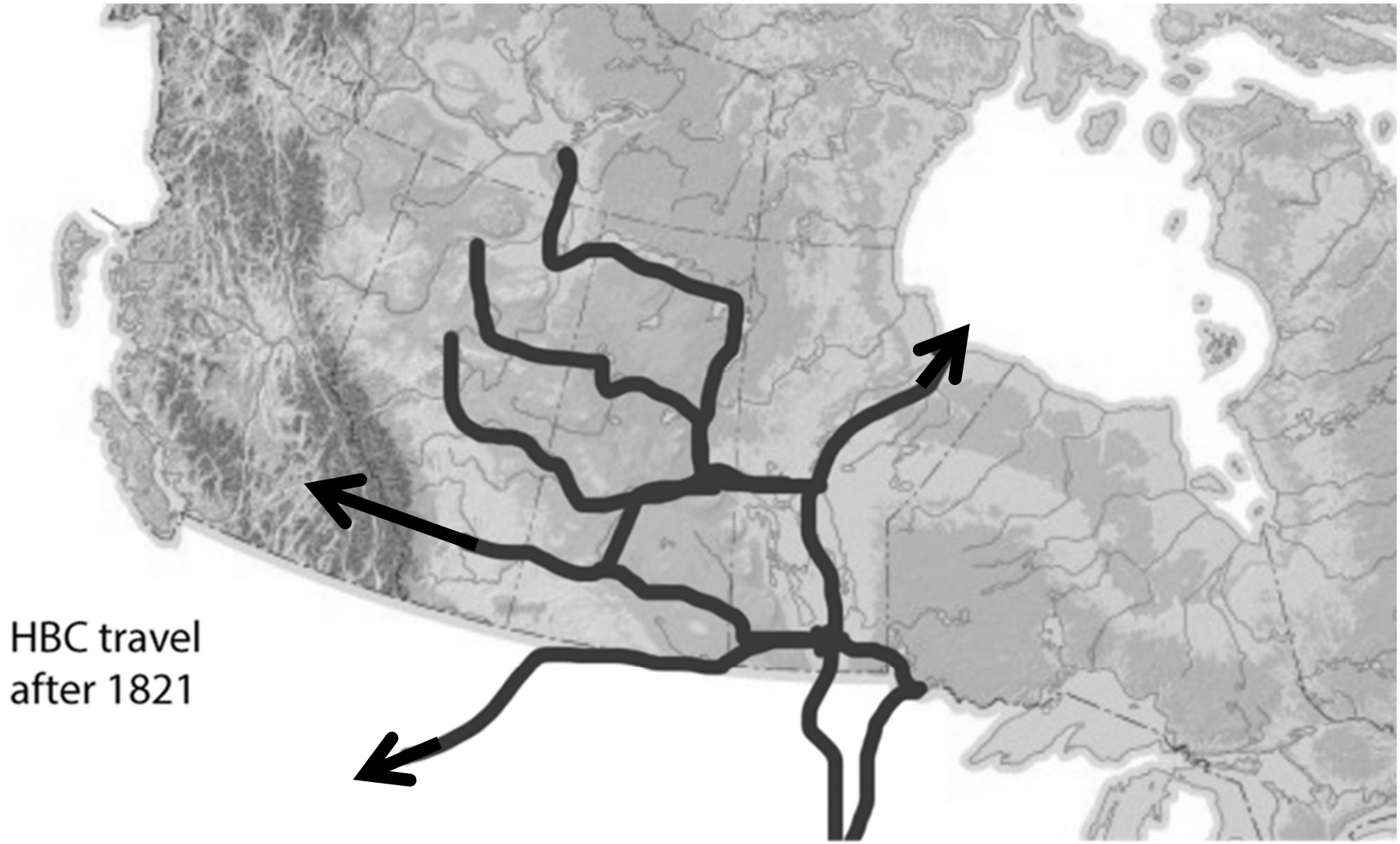

HBC travel
after 1821

Métis Nation

Métis Nation in Canadian Legal History

We can trace the Métis Nation through the multiple Commissions of Inquiry. The following are just a sample:

- Coltman Inquiry-1816
- Select Committee – 1869-70
- Infant Lands Inquiry-1881
- Scrip Commissions-1885-1924 (Manitoba Commission; North-West Half-breed Commission; Alberta/Assiniboia and Saskatchewan/Manitoba Commissions; and the Manitoba and North-West Territories Commission; Commissions set up during negotiations of Treaties 5, 8, 10 and 11)
- Ewing Commission – 1934

Métis Nation in 19th Century Canadian Legal History

- Trials following the Battle of Seven Oaks -1818 (*R v Brown, Boucher, et al*)
- Council of Assiniboia – first land claim; first claims of "native rights" (*McDermott v Fayant et a*l 1847; *HBCo v Sayer et al* 1849;
- *Métis Nation v Thomas Scott, 1870*
- *R v Ambroise Lépine*,1874; *R v André Nault and Elzéar Lagimodière* 1875
- *R v Garneau and Vandal (Military Court, 1885)*
- *24 men charged with treason-felony 1885*
- *R v Louis Riel* 1885 (high treason)

Common Misconceptions

- Seen only as Red River Métis.
- All Métis all died on the gallows with Louis Riel.
- Try to divide them into English half-breeds vs. French Métis and say these are separate peoples.
- Miss the connection between the fur traders in the boreal forest to the buffalo hunters.
- The Métis of the North West were not seen as a people.

NW Métis - An Invisible Society

- The Métis Society of the North West was largely invisible to those who were not members of the society.
- It is not that no one knew about the Métis.
- The Métis were seen as individuals not as a people or a distinctive culture.
- 10 reasons why the NW Métis are largely invisible to Euro-Canadians & First Nations

1st Reason the NW Métis are invisible as a people

No one wants a mixed-race people to exist.

- because no one wanted to recognize the existence of a mixed race people as a result of which there were only two identity options in Canada – white or Indian.

2nd Reason the NW Métis are invisible as a people

Métis was understood to be a transient identity

- The theory that mixed race peoples are transient is revealed in a number of theories of identity formation and dissolution, which envision the Métis as a people who bridged the “primitive” and modern worlds - generally cast in the middle of those models as "half-savage and half-civilized"

- The assumption is that when the “primitive” component dissolved - the Métis ceased to exist.

- Much of the literature stereotypes the Métis as primitive people unable or unwilling to adjust to civilized life and capitalist society.

3rd reason the NW Métis are invisible as a people

Canadian maps do not show Métis communities, place names, trails or cultural sites or boundaries

The erasure suggests they were never there – or at the very least – they are not there now.

4th reason the NW Métis are invisible as a people

Michif - the hidden language of the Métis.

- Language is a key marker in identifying a people
- Michif was not identified until the 1960s
- Michif was primarily used internally. Rarely in public.
- Cree was the Indigenous *lingua franca* of trade on the Prairies; French was the European *lingua franca*.
- Michif was not usually needed in public because the Métis were all bilingual or trilingual.

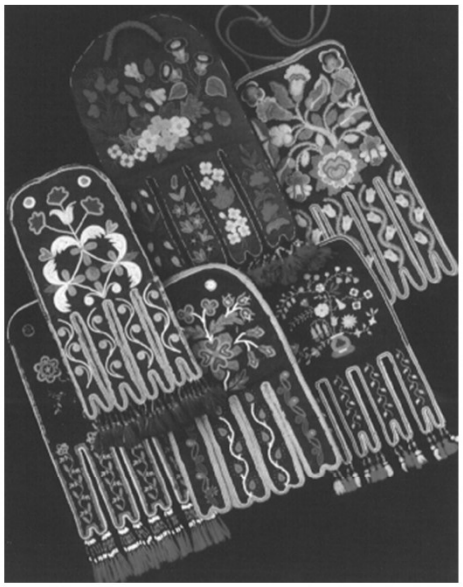
5th reason the NW Métis are invisible as a people

The Métis are not phenotypically distinct.

6th reason the NW Métis are invisible as a people

- **French** - *michif, métis, gens libre, hommes libre* and *bois brûlé*.
- **English** - freemen, half-breed, country-born and mixed blood.
- **Sioux** - flower bead work people.
- **Cree** - *âpihtawikosisân*. *Kosisân,* means 'of the people'. *Apihta* means 'half'

  otipêyimisowak - the independent ones
- **Chippewa** - *wisahkotewan niniwak* meaning 'men partially burned'
- **Odawa** - *aayaabtawzid* or *aya:pittawisit* meaning 'one who is half.'
- **Indigenous Sign Language** – man with a hat & symbol for a cart



7th reason the NW Métis are invisible as a people

A strong incentive and disinclination to publicly identify as Métis following the events of 1870 and 1885.

Bounty, jail sentences, rapes, hangings are powerful deterrents.

8th reason the NW Métis are invisible as a people

Mobility

Métis have always been highly mobile.

"Settlers" only saw Métis as they passed through and didn't see the mobility or the numbers or the culture.

Outsiders rarely saw the large camps on the plains

Métis tended to avoid "dead zones" (settlements) and rarely visited or stayed long

Settler culture rarely saw the Métis acting together.

9th reason the NW Métis are invisible as a people

Legal Changes Affecting Métis Identity

Changes to the definition of "Indian" in the Indian Act over time have removed thousands from their First Nation identity and off reserves. Many sought shelter (sometimes for generations) in Métis communities and families. Result is confusion between "non-status Indians" and Métis

Daniels decision has left the impression that self-identification and a genealogical connection (no matter how distant) is sufficient to claim Métis identity. Result is confusion because tens of thousands are newly claiming to be Métis.

10th reason the NW Métis are invisible as a people

Latest Trends in Genealogy and DNA

- Genealogy is now the passion of many people, especially in Quebec. Many believe that if they find an 'ever-so-great Indian grandmother,' sometimes 400 years in the past, this is sufficient to claim Métis identity.

- DNA companies will identify individuals as x% "native american ancestry". Many believe that this qualifies them to be "Métis".

Métis in Canadian Law

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

  91. It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say … (24) **Indians, and Lands reserved for the Indians**

- Section 31, *Manitoba Act, 1870*, 33 Victoria, c3

  31. And whereas, it is expedient, towards the extinguishment of the Indian Title to the lands in the Province, to appropriate a portion of such ungranted lands, to the extent of one million four hundred thousand acres thereof, **for the benefit of the families of the half-breed residents**, it is hereby enacted, that, under regulations to be from time to time made by the Governor General in Council, the Lieutenant-Governor shall select such lots or tracts in such parts of the Province as he may deem expedient, to the extent aforesaid, and divide the same among the children of the half-breed heads of families residing in the Province at the time of the said transfer to Canada, and the same shall be granted to the said children respectively, in such mode and on such conditions as to settlement and otherwise, as the Governor General in Council may from time to time determine.

- Section 35 of the *Constitution Act, 1982*

  (1) The existing aboriginal and treaty rights of the aboriginal **peoples** of Canada are hereby recognized and affirmed.

  (2) In this Act, "aboriginal **peoples** of Canada" includes the Indian, Inuit and **Métis peoples** of Canada.

SCC and Métis

- *R. v. Powley*, 2003 SCC 43 – s. 35 *Constitution Act, 1982*
- *Manitoba Metis Federation v. Canada (Attorney General)* 2013 SCC 14 – s. 31 *Manitoba Act*
- *Daniels v. Canada (Indian Affairs and Northern Development)* 2016 SCC 12 – s. 91(24) *Constitution Act, 1867*

R. v. Powley 2003 SCC 43

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

[13] The inclusion of the Métis in s. 35 is based on a **commitment to recognizing the Métis and enhancing their survival as distinctive communities**. The purpose and the promise of s. 35 is to protect practices that were historically important features of these distinctive communities and that persist in the present day as integral elements of their Métis culture.

Manitoba Metis Federation v. Canada (Attorney General) 2013 SCC 14

- [9] We conclude that s. 31 of the *Manitoba Act* constitutes a constitutional obligation to the Métis people of Manitoba, an Aboriginal people, to provide the Métis children with allotments of land. The immediate purpose of the obligation was to give the Métis children a head start over the expected influx of settlers from the east. **Its broader purpose was to reconcile the Métis' Aboriginal interests in the Manitoba territory with the assertion of Crown sovereignty over the area that was to become the province of Manitoba ... a solemn constitutional obligation to the Métis people of Manitoba aimed at reconciling their Aboriginal interests with sovereignty, it engaged the honour of the Crown**. This required the government to act with diligence in pursuit of the fulfillment of the promise. On the findings of the trial judge, the Crown failed to do so and the obligation to the Métis children remained largely unfulfilled. The Métis claim based on the honour of the Crown is not barred by the law of limitations or the equitable doctrine of laches. We therefore conclude that the Métis are entitled to a declaration that Canada failed to implement s. 31 as required by the honour of the Crown.

Daniels v. Canada (Indian Affairs and Northern Development) 2016 SCC 12

[35] The term "Indian" or "Indians" in the constitutional context ... has two meanings: a broad meaning, as used in s. 91(24) , that **includes both Métis and Inuit and can be equated with the term "aboriginal peoples of Canada"** used in s. 35 , and a narrower meaning that distinguishes Indian bands from other Aboriginal peoples.

[42] **There is no doubt that the Métis are a distinct people** ... In commenting on the unique history of the Métis, th[is] Court [has] noted that they are "**widely recognized as a culturally distinct Aboriginal people** living in culturally distinct communities"...

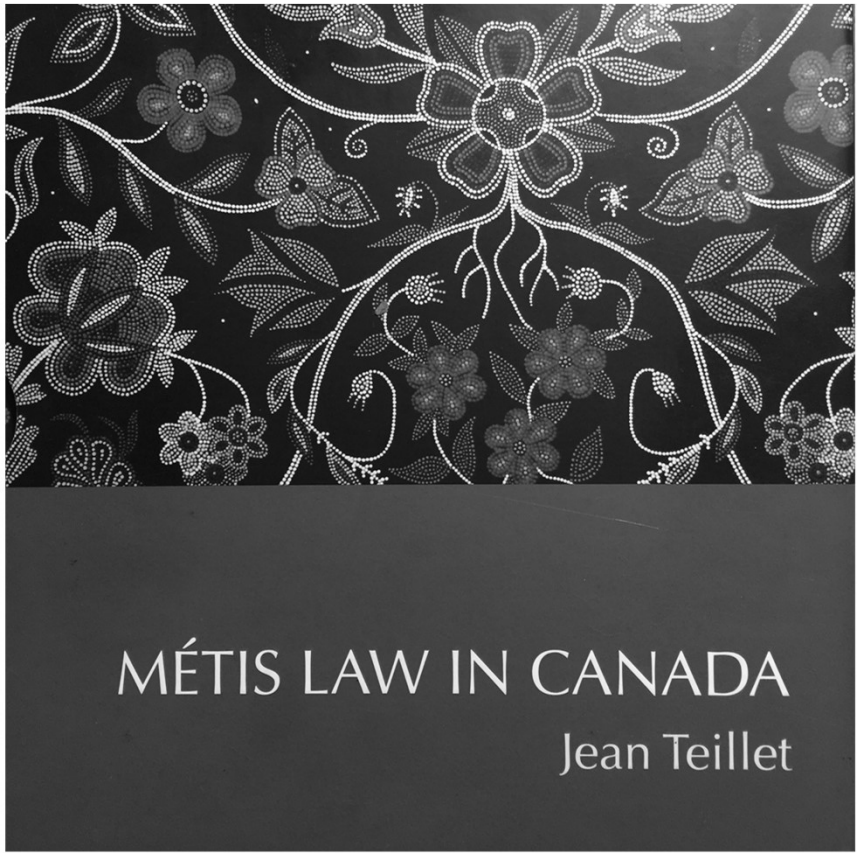
[48] In *Powley* ... the Court ... suggested three criteria for defining who qualifies as Métis for purposes of s. 35(1): **1. Self-identification as Métis; 2. An ancestral connection to an historic Métis community; and 3. Acceptance by the modern Métis community.**

[49] The third criterion — community acceptance — raises particular concerns in the context of ... Section 91(24) ... [which] is about the federal government's relationship with Canada's Aboriginal peoples. This includes people who may no longer be accepted by their communities because they were separated from them as a result, for example, of government policies such as Indian Residential Schools. There is no principled reason for presumptively and arbitrarily excluding them from Parliament's protective authority on the basis of a "community acceptance" test.

Conclusion

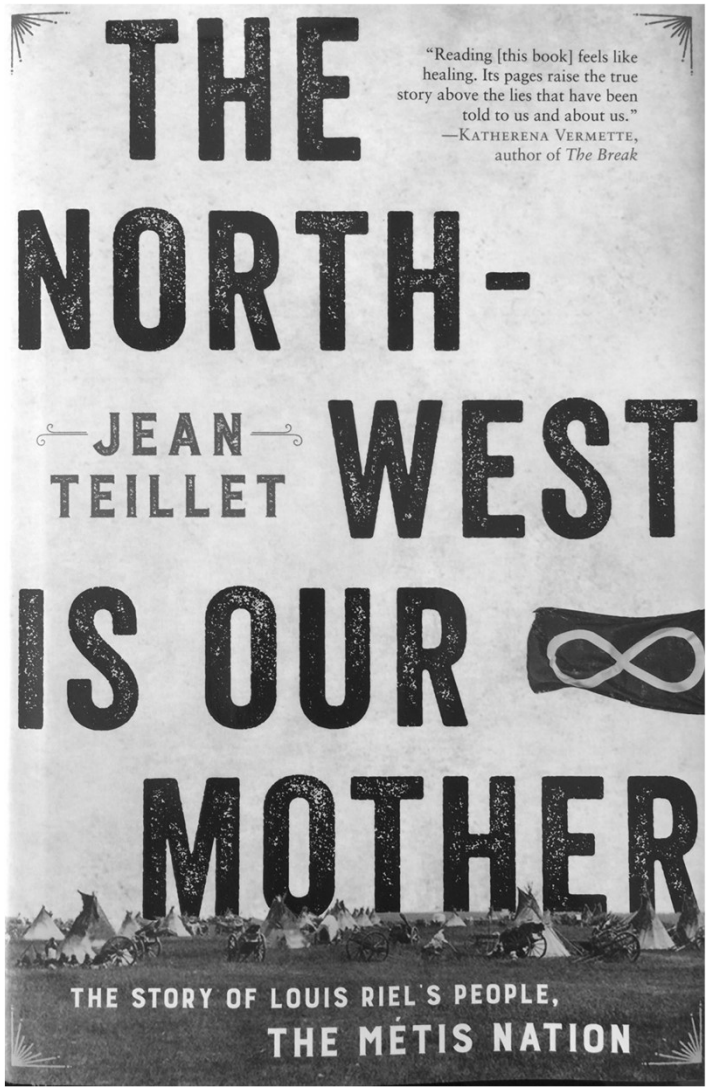
- These 10 reasons contribute to the confusion about who the Métis are.
- We need to implement policies that deal with the “race-shifting” that is currently taking place
- Canadians generally have a limited understanding of Indigenous peoples. Their understanding of the Métis Nation of the North-West is even more limited.
- Métis Nation

Métis Law in Canada



- Available in a loose-leaf box set
- Contains a full discussion of the sociology and history of the Métis
- Also contains a case law summary of all Métis rights law.
- Updated regularly
- $150+tax

The North-West is our Mother



Popular history

Follows the Métis Nation story from 1790-2018

Available at local bookstores or online from Amazon or Indigo in hardcover or as an ebook

R. v. GLADUE

By Mr. Justice Ducharme and Patricia Barkaskas

Section 718.2(e)

(e) all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.

Jamie Gladue – the story of an Indigenous woman who did not benefit from Gladue

- Jamie Gladue – young Cree/Métis woman who stabbed her common law partner who died as a result
- She entered a plea to manslaughter in BCSC and was sentenced to three years in prison
- First case at the Supreme Court of Canada considering s. 718.2(e) of the *Criminal Code*
- SCC did not change her sentence, but the unanimous decision recognized the approach of the sentencing judge was inadequate and failed to properly consider s. 718.2(e)
- In *Gladue* the SCC discussed the responsibilities of counsel and the sentencing judge re: s. 718.2(e) & Aboriginal offenders

Has *Gladue* worked?

- On a micro level no doubt it has made a difference in the lives of some indigenous offenders, victims and their communities.
- On a macro level it has failed – indigenous offenders, including Métis, are over prosecuted and over-incarcerated

Who is to Blame?

- Judges
- Defence Lawyers [and those who fund them]
- Crowns

WHAT DID THE COURT SAY?

Systemic Discrimination Against Indigenous People

In 1999 at para 61 of *Gladue* the Supreme Court said:

the excessive imprisonment of aboriginal people is only the tip of the iceberg insofar as the estrangement of the aboriginal peoples from the Canadian criminal justice system is concerned. Aboriginal people are overrepresented in virtually all aspects of the system. As this Court recently noted in R. v. Williams, [1998] 1 S.C.R. 1128, at para. 58, there is widespread bias against aboriginal people within Canada, and "[t]here is evidence that this widespread racism has translated into systemic discrimination in the criminal justice system".

Is it a Re-Affirmation of Existing Sentencing Principles or is it Remedial?

- The Crown argued that the section was merely a statement of existing sentencing law.
- The Court strongly rejected that view:

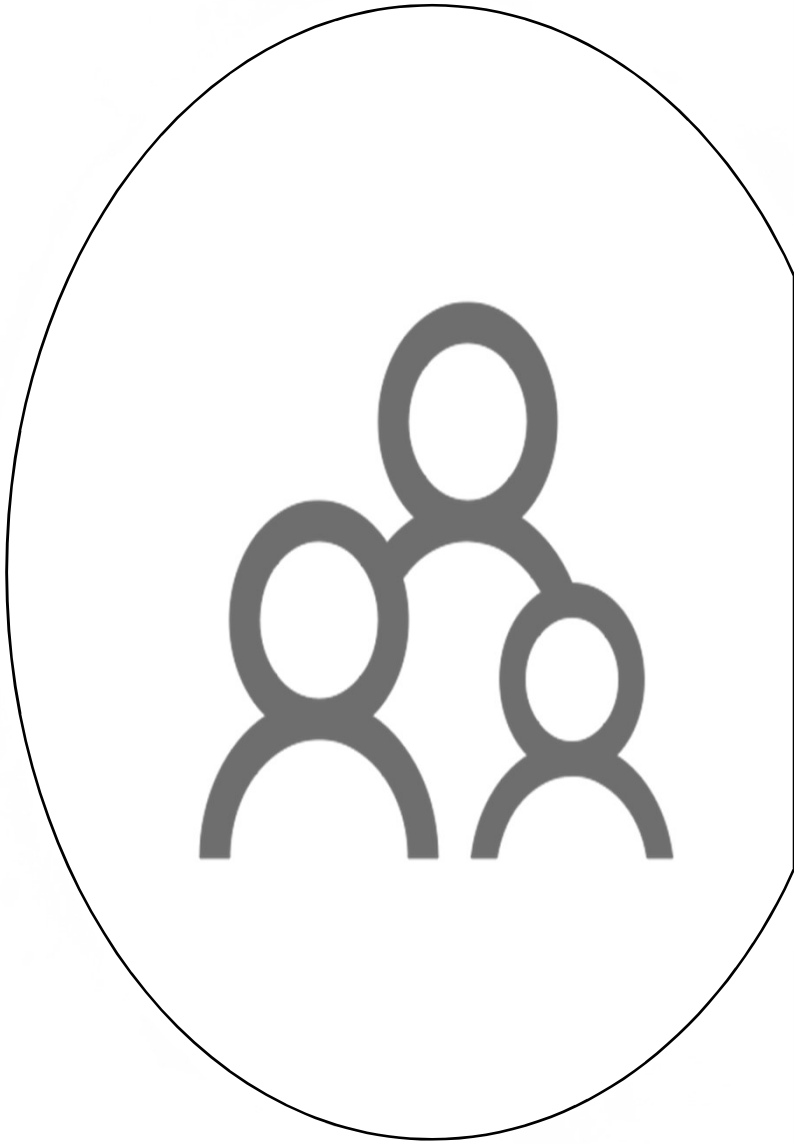
33 “What s. 718.2(e) does alter is the method of analysis which each sentencing judge must use in determining the nature of a fit sentence for an aboriginal offender.”

34 “s. 718.2(e) creates a judicial duty to give its remedial purpose real force.”

Who Are Aboriginal People for the purposes of s. 718.2(e)?

[90] The class of aboriginal people who come within the purview of the specific reference to the circumstances of aboriginal offenders in s. 718.2(e) must be, at least, all who come within the scope of s. 25 of the Charter and s. 35 of the Constitution Act, 1982. … **Indians** (registered or non-registered), **Metis** and **Inuit**.

[91] Section 718.2(e) applies to all aboriginal offenders wherever they reside, whether on- or off-reserve, in a large city or a rural area.



Purpose of the Section

51 “A review of the problem of overincarceration in Canada, and of its peculiarly devastating impact upon Canada's aboriginal peoples, provides additional insight into the purpose and proper application of this new provision.”

64 “These findings cry out for recognition of the magnitude and gravity of the problem, and for responses to alleviate it. The figures are stark and reflect what may fairly be termed a crisis in the Canadian criminal justice system. The drastic overrepresentation of aboriginal peoples within both the Canadian prison population and the criminal justice system reveals a sad and pressing social problem. It is reasonable to assume that Parliament, in singling out aboriginal offenders for distinct sentencing treatment in s. 718.2(e), intended to attempt to redress this social problem to some degree. The provision may properly be seen as Parliament's direction to members of the judiciary to inquire into the causes of the problem and to endeavour to remedy it, to the extent that a remedy is possible through the sentencing process.”

They reject the idea that this means that Judges show pay more attention to Indigenous offenders than non-Indigenous offenders BUT

37 “sentencing judges should pay particular attention to the circumstances of aboriginal offenders because those circumstances are unique, and different from those of non-aboriginal offenders.” And “there is something different about aboriginal offenders which may specifically make imprisonment a less appropriate or less useful sanction.”

38 – Two things (1) a restraint in the resort to imprisonment as a sentence; and (2) a recognition by the Judge of “the unique circumstances of aboriginal offenders.”

65 Judges “determine most directly whether an aboriginal offender will go to jail, or whether other sentencing options may be employed which will play perhaps a stronger role in restoring a sense of balance to the offender, victim, and community, and in preventing future crime.”

What Does It Mean

The "Circumstances of Aboriginal Offenders“

These include most particularly:

(A) The unique systemic or background factors which may have played a part in bringing the particular aboriginal offender before the courts; and

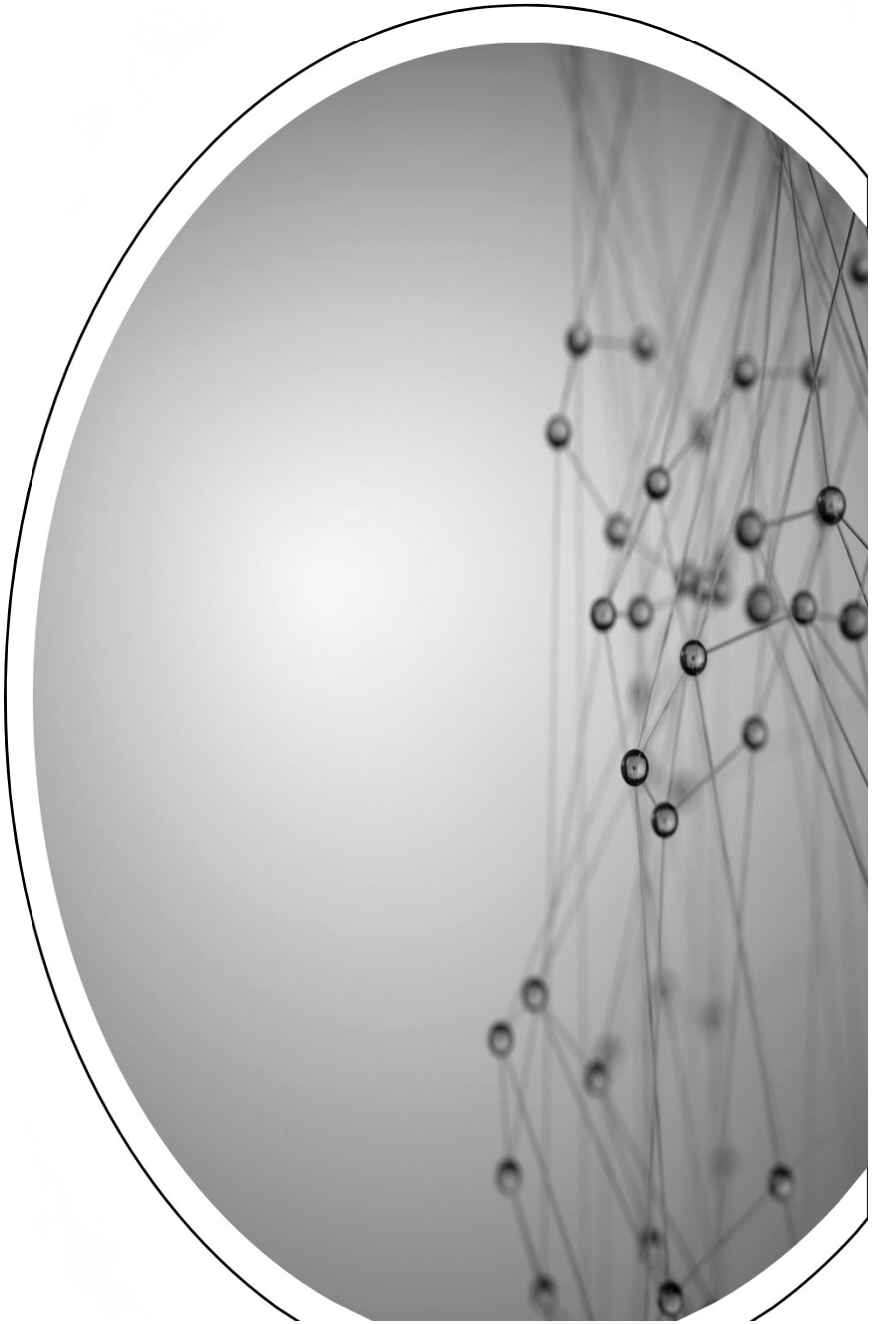
(B) The types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular aboriginal heritage or connection.

Systemic and Background Factors

67 Years of dislocation and economic development have translated, for many aboriginal peoples, into low incomes, high unemployment, lack of opportunities and options, lack or irrelevance of education, substance abuse, loneliness, and community fragmentation. These and other factors contribute to a higher incidence of crime and incarceration.

68 circumstances of aboriginal offenders differ from those of the majority because many aboriginal people are victims of systemic and direct discrimination, many suffer the legacy of dislocation, and many are substantially affected by poor social and economic conditions.

68 aboriginal offenders are … more adversely affected by incarceration and less likely to be "rehabilitated" thereby, because the internment milieu is often culturally inappropriate and regrettably discrimination towards them is so often rampant in penal institutions.



Appropriate Sentencing Procedures and Sanctions

70 A significant problem experienced by aboriginal people who come into contact with the criminal justice system is that the traditional sentencing ideals of deterrence, separation, and denunciation are often far removed from the understanding of sentencing held by these offenders and their community … most traditional aboriginal conceptions of sentencing place a primary emphasis upon the ideals of restorative justice. This tradition is extremely important to the analysis under s. 718.2(e).

71 ... In general terms, restorative justice may be described as an approach to remedying crime in which it is understood that all things are interrelated and that crime disrupts the harmony which existed prior to its occurrence, or at least which it is felt should exist. The appropriateness of a particular sanction is largely determined by the needs of the victims, and the community, as well as the offender.

Appropriate Sentencing Procedures and Sanctions

74 Sentencing judges should not conclude that the absence of alternatives specific to an aboriginal community eliminates their ability to impose a sanction that takes into account principles of restorative justice and the needs of the parties involved. Rather, the point is that one of the unique circumstances of aboriginal offenders is that community-based sanctions coincide with the aboriginal concept of sentencing and the needs of aboriginal people and communities. It is often the case that neither aboriginal offenders nor their communities are well served by incarcerating offenders, particularly for less serious or non-violent offences. Where these sanctions are reasonable in the circumstances, they should be implemented. In all instances, it is appropriate to attempt to craft the sentencing process and the sanctions imposed in accordance with the aboriginal perspective.

Appropriate Sentencing Procedures and Sanctions

- Section 718.2(e) requires the sentencing judge to explore reasonable alternatives to incarceration in the case of all aboriginal offenders. Obviously, if an aboriginal community has a program or tradition of alternative sanctions, and support and supervision are available to the offender, it may be easier to find and impose an alternative sentence. However, even if community support is not available, every effort should be made in appropriate circumstances to find a sensitive and helpful alternative.
- If there is no alternative to incarceration the length of the term must be carefully considered.

How Should the Judge Proceed?

- The offender can always waive consideration of Gladue factors

83 But where this is not done "In all instances it will be necessary for the judge to take judicial notice of the systemic or background factors and the approach to sentencing which is relevant to aboriginal offenders.

- N.B. failure to do so constitutes an error in law: *R. v. Kakekagamick*, 81 O.R. (3d) 664 at para 31

83 it will be extremely helpful to the sentencing judge for counsel on both sides to adduce relevant evidence. Indeed, it is to be expected that counsel will fulfil their role and assist the sentencing judge in this way.

How Should the Judge Proceed?

- 84 However, even where counsel do not adduce this evidence, where for example the offender is unrepresented, it is incumbent upon the sentencing judge to attempt to acquire information regarding the circumstances of the offender as an aboriginal person. Whether the offender resides in a rural area, on a reserve or in an urban centre the sentencing judge must be made aware of alternatives to incarceration that exist whether inside or outside the aboriginal community of the particular offender. The alternatives existing in metropolitan areas must, as a matter of course, also be explored. Clearly the presence of an aboriginal offender will require special attention in pre-sentence reports. Beyond the use of the pre-sentence report, the sentencing judge may and should in appropriate circumstances and where practicable request that witnesses be called who may testify as to reasonable alternatives.

The Need for a Report

- Gladue reports are produced for the court, for either bail or, more commonly sentencing hearings

- Purpose is to paint a complete picture of the Aboriginal offender, by including information about her/him background and Aboriginal community, and the specific circumstances that brought her/him before the court

- Each report tries to detail the effects that colonization has had on the subject as well as his or her family and community, sometimes going back several generations

- Intended to put the subject's particular situation into an Aboriginal context, so that the judge can come up with a sentence that meaningfully considers alternatives to incarceration and may emphasize rehabilitation

GLADUE REPORTS: Production and Delivery in Select Canadian Programs

What is A Gladue Report?

Gladue reports help judges to make more informed decisions about whether jail is really the best option in an Indigenous person's case. A Gladue report provides the judge with information about an Indigenous person's unique situation. It also gives information about reasonable alternatives to jail like restorative justice programs. The Supreme Court of Canada has told judges that in an Indigenous person's case they must consider regular sentincing principes and then also...

Residential Schools

Loss of cultural identity

Displacement & Disposession

Child Welfare System

Among other things, a Gladue report describes how these factors effected the person who the judge is considering.

Why Do We Need Gladue Reports?

In Canada, Indigenous persons are disproportionately incarcerated. They make up only 5% of the population,

but almost 40% of the prison population.

When judges do consider Gladue factors, they are less likely to rely on prison as part of a person's sentence. This increases use of conditional sentences and can improve access to...

Drug treatment programs

Healing circles

Supportive housing

Mental health supports

Select Gladue Report Production Services in Canada

Who can qualify to receve Gladue report services?

All Indigenous persons qualify for Gladue report services

Qualifying criteria are not uniform across the jurisdiction

Services may be limited by additional qualifying criteria

How much funding is available for the production of Gladue Reports?

No funding caps limit the number of reports that can be produced each year

Sources and funding are not uniform across the jurisdiction

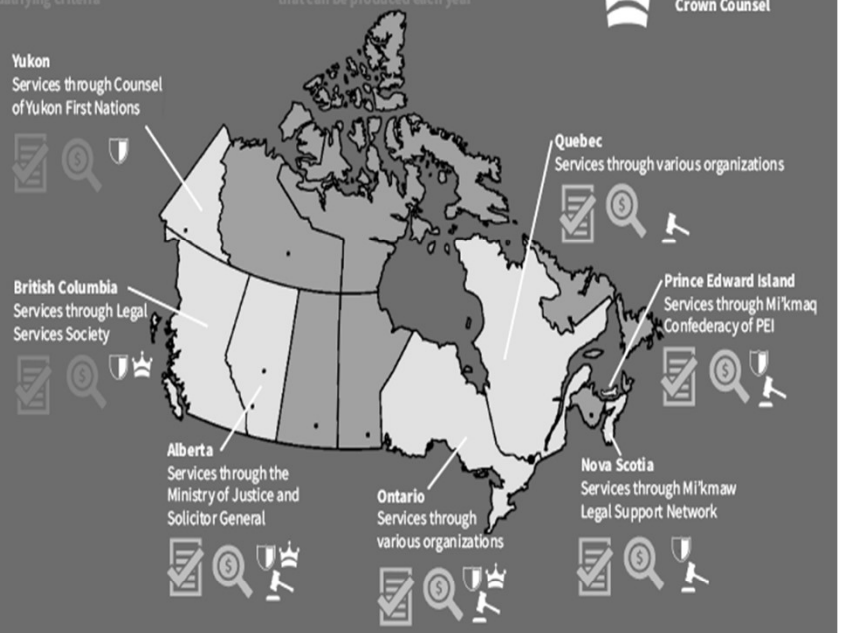
Funding caps limit the number of reports that can be produced each year

Who may order or request Gladue report services for a case?

Judge

Defence*

Crown Counsel



To find out more about the importance and availability of Gladue report writing services accross Canada

please visit www.icclr.org/Gladue and read the full report:

Production and Delivery of Gladue Pre-sentence Reports: A Review of Selected Canadian Programs

This study was completed by the International Centre for Criminal Law Reform (ICCLR). ICCLR is a member of the United Nations Crime Prevention and Criminal Justice Programme Network. The study was funded by the Law Foundation of British Columbia and conducted in collaboration with the Ministry of the Attorney General of BC and the Legal Services Society.

* In some jurisdictions Gladue reports are requested by either Defence Counsel or self-represented individuals. However, in every jurisdiction it is an Indigenous person's right to have the Gladue factors considered.

www.ICCLR.org

Limit Re Serious offences

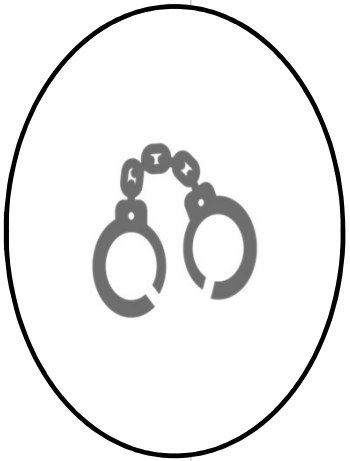
- Nothing in the Code speaks of serious offences BUT:

78 we do not mean to suggest that, as a general practice, aboriginal offenders must always be sentenced in a manner which gives greatest weight to the principles of restorative justice, and less weight to goals such as deterrence, denunciation, and separation. It is unreasonable to assume that aboriginal peoples themselves do not believe in the importance of these latter goals, and even if they do not, that such goals must not predominate in appropriate cases. Clearly <u>there are some serious offences and some offenders for which and for whom separation, denunciation, and deterrence are fundamentally relevant.</u>

Limit Re Serious offences

33 “it will generally be the case as a practical matter that particularly violent and serious offences will result in imprisonment for aboriginal offenders as often as for non-aboriginal offenders.”

79 Yet, even where an offence is considered serious, the length of the term of imprisonment must be considered. In some circumstances the length of the sentence of an aboriginal offender may be less and in others the same as that of any other offender. Generally, the more violent and serious the offence the more likely it is as a practical reality that the terms of imprisonment for aboriginals and non-aboriginals will be close to each other or the same, even taking into account their different concepts of sentencing.



BUT the Gladue analysis be performed in all cases involving an aboriginal offender, regardless of the seriousness of the offence: *Kakekagamick* at para 38

Not an Automatic Discount

88 But s. 718.2(e) should not be taken as requiring an automatic reduction of a sentence, or a remission of a warranted period of incarceration, simply because the offender is aboriginal. See also para 93

- It may not always mean a lower sentence for an aboriginal offender. The sentence imposed will depend upon all the factors which must be taken into account in each individual case. The weight to be given to these various factors will vary in each case. At the same time, it must in every case be recalled that the direction to consider these unique circumstances flows from the staggering injustice currently experienced by aboriginal peoples with the criminal justice system. The provision reflects the reality that many aboriginal people are alienated from this system which frequently does not reflect their needs or their understanding of an appropriate sentence.