



**CULTURAL HERITAGE
ASSESSMENT BASELINE
Appendix A**

**Fort McKay
Industry Relations Corporation**

March 2010

APPENDIX A: Legal Context

The people of Fort McKay, like other aboriginal peoples, have certain rights which are now protected by the highest law of Canada: the *Constitution Act, 1982*.¹ This includes inherent aboriginal rights and Treaty rights negotiated with the Crown in 1899. Because these rights are Constitutional, they cannot be extinguished by laws made by the legislature of Alberta or by Parliament, or by administrative actions of either level of government. These rights also have priority over non constitutional rights. For example, rights acquired pursuant to a license or approval from a government regulator, or under provincial laws.²

The Metis members of the community also have constitutionally protected rights. Section 35 of the *Constitution Act, 1982* applies to both Indian and Metis peoples:

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

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

Metis constitutional rights have not received much attention by governments in Canada, nor have they been litigated to a significant extent. It is only recently that the Supreme Court confirmed that these rights exist and at minimum, include harvesting rights within a Metis community's traditional territory.³

Community members also have statutory and common law rights. A relevant example is the right of the Fort McKay First Nation to the use and enjoyment of their reserve lands, pursuant to s. 18 of the *Indian Act, R. S. 1985, c. I-5*. This is also an implicit treaty right arising from their treaty entitlement to reserve lands. At common law, the Metis residents of the community's use and enjoyment of their leased lands and privately owned lands is similarly protected against unreasonable interference, by for example, noise, odours and impaired air quality.

It is important to assess the impacts of resource extraction and development on Fort McKay's rights. In order to meet their obligation to prevent extinguishment of their rights, government needs information to monitor the incremental erosion of the conditions necessary for Fort McKay to exercise their rights meaningfully. For example, a secure supply of fish and game. Additionally, the government may not infringe these rights, without legal justification.

¹ Schedule B to the Constitution Act, 1867

² R. v. Sparrow [1990] 1 S.C.R. 1075, at 101-05-1109

³ R. v. Powley, 2003 SCC 43

Justification requires the government to have a valid reason for limiting aboriginal and treaty rights, consult with Fort McKay regarding the limitation, to ensure their rights are given priority, and affected to the least extent possible. Compensation may also be required.⁴ If the constitutional rights of Fort McKay are adversely affected (but not necessarily infringed), the government also has a duty to consult Fort McKay, even if the rights claimed are unclear or not yet proven in a court of law.⁵

In order for consultation to occur, the First Nation and the government first need to identify and understand the extent of the potential adverse effects, and how these may be avoided or mitigated. If the rights are proven (such as treaty rights) or the adverse effects potentially significant, then an accommodation is required which involves reconciling the interests of the First Nation and those of the government. When the Court speaks of interests in this context, it is encouraging the parties to address the values and objectives that underlie their respective rights. Therefore, a valid environmental impact assessment that includes an assessment of the effects on Fort McKay's rights and interests is important to enable this consultation and accommodation to occur, and to ensure the constitutional and other rights of the community are respected.

The perspective of Fort McKay in assessing potential impacts on their community and rights is also crucial to the discharge of these obligations. In the *Mikisew v. Canada* decision, the Court emphasized it is the potential adverse effects on the *meaningful* exercise of the group's rights that is important. The fact that the First Nation has access to other lands to exercise its rights, for example, is not relevant in assessing the potential impact of a project - if the other lands are not ones the First Nation customarily uses.⁶

Aboriginal Rights

By virtue of the fact that the Cree and Dene were living on the land in organized societies, British Imperial law recognized that they had inherent rights, referred to as aboriginal rights and aboriginal title (territorial rights). Pursuant to the doctrine of aboriginal rights the territorial rights, political organizations, laws and customs of the "Indian Tribes" continued after the assertion of British sovereignty of a colony and were recognized by English law.⁷

Aboriginal rights continue to be defined by the courts. The types of rights defined to date include: the right to customary law, the right to fiduciary protection of the

⁴ *R. v. Sparrow* [1990] 1 S.C.R. 1075, at 101-05-1109

⁵ *Mikisew v. Canada* 2005 SCC 69

⁶ *Ibid* paras. 42-48

⁷ *Connolly v. Woolrich* (1867) 17 R.J.R.Q. 75 (QUE. Superior Court)

Crown, the right to cultural integrity, the right to self government and the right to conclude treaties with the Crown.⁸

The right to cultural integrity; and the law’s intent to protect aboriginal cultures, is entrenched in the legal criteria for defining aboriginal rights: Aboriginal groups have the right to engage in present-day activities that are based on the practices, customs and traditions that were integral to their distinctive cultures at the time of European contact.⁹ And that these practices, customs and traditions are protected by the Constitution of Canada in their “modern form and vigour”.¹⁰

Treaty 8

The Fort McKay First Nation is the beneficiary of the rights negotiated on its behalf by Adam Boucher, as “Headman of the Chipewyans” in 1899.

Understanding the treaty rights of Fort McKay is complex and cannot be ascertained solely from reading the treaty text. The legal rights and obligations that flow from an Indian treaty depend not just on its wording, but also from the oral promises and assurances made at the time of the negotiations. The interpretation is informed by the purpose and intent of both the Crown and Indian people for entering into the treaty, and the historical, political and cultural context of the treaty.¹¹ In addition, the Courts have ‘read into’ treaties implied and ancillary rights as necessary to give effect to the intent of the parties and the assumption that the Crown intends to act honourably in its dealings with aboriginal peoples under its protection.¹²

The negotiation of Treaties was the legal mechanism by which the Crown sought to extinguish aboriginal title to lands. The Dominion of Canada had no need of the lands in the Peace Athabasca District for settlement and therefore its interest in extinguishing aboriginal title to the lands did not crystallize into action until 1899. The specific impetus for Treaty 8 was the potential for conflict as prospectors travelled through the region on their way to the Yukon gold fields.¹³ The government was also aware of the oil and mineral resources in the region and was

⁸ *R. v. Van der Peet* [1996] 2 S.C.R. 507 (S.C.C.); *R. v. Sioui* [1990] 1 S.C.R. 1025 (S.C.C.); *Mitchell v. M.N.R.* [2001] 1 S.C.R. 911 (S.C.C.); *R. v. Pamajewon* [1996] 2 S.C.R. 821 (S.C.C.); Canada, *The Government of Canada’s Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self Government* accessed at www.ainc-inac.gc.ca/a\ldc\ccl\pubs\sg\sg-en

⁹ *Van der Peet*, *supra*

¹⁰ *R. v. Sundown* [1999] 1 S.C.R. 393 (S.C.C.)

¹¹ *R. v. Badger* [1996] 1 S.C.R. 771 (S.C.C.); *Benoit v. The Queen* 2002 F.C.T. 243 (Fed. T.D.); reversed on other grounds [2003] C.N.L.R. 20 (Fed. C.A.); leave to Appeal refused (2004) 330 M.R. 200 (S.C.C.); *R v. Marshall* [1999] 3 S.C.R. 456 (S.C.C.)

¹² Karin. Buss and Catherine Bell *The Promise of Marshall on the Prairies* (2000) 63 Saskatchewan Law Review 668-700

¹³ A.E. Forget to Department of Indian Affairs, 12 January 1898, NAC, RG10, vol. 3848, file 75236-1; Charles Mair, *Through the Mackenzie Basin* (Toronto: William Briggs, 1908), at 23

interested in securing control over them.¹⁴ No one anticipated that settlement of non-aboriginal peoples would occur in any significant extent in the region, at least not for many, many years. As a result the Treaty Commissioners who negotiated Treaty 8 had little difficulty in assuring the Indians of the territory that the Treaty would not change their way of life, that they could continue using the lands that they had always done, and would not be confined to reserves.¹⁵ The Dominion government was also anxious not to incur any significant costs, and wanted to encourage and enable the Indian people to continue to be economically self sufficient, by selling their furs, hunting, farming, working as boatmen, and so on.¹⁶

For their part, the Cree and Chipewyan ancestors of the people among Fort McKay were primarily concerned about protecting their liberty and freedom and sought assurances that their ability to support themselves would not be threatened.¹⁷ The Treaty Commissioners repeatedly assured the Indians, that the treaty would protect their liberty, their autonomy, and no one would force them to adapt to new lifestyles or to live on reserves and they could continue to make their living as they chose. In their report of the negotiations, the Treaty Commissioners linked the Indian peoples request to preserve their mode of life with their concerns regarding forced taxation and military service and assured them that the government would not interfere with their mode of life and that the treaty would not open the way to taxation nor would Indian peoples be forced to serve in the Armed Forces.

The essence of the treaty negotiations was the assurance sought, and granted, that the people of Fort McKay would be free to pursue their way of life and free to chose to earn their living though their traditional pursuits or by participation in the economy of the European settlers, or a combination of these (as many were already doing by 1899).

Treaty 8 confirmed and vested some of the aboriginal rights of the people of Fort McKay, such as hunting, fishing and trapping and guaranteed new rights such as the right to reserve land and to education.¹⁸ The aboriginal rights of the Cree and Dene continued after the Treaty, to the extent they were not expressly extinguished by the Treaty.¹⁹ Treaty 8 did not expressly address specific cultural rights, but clearly guaranteed to the Indian people the right to maintain their freedom and cultural integrity by promising them their right to their ‘usual vocations’ and ‘way of life’ and right to use the land “as if they had never entered into the treaty”.

¹⁴ P.C. 52, 26 Jan. 1891, NAC, RG10, vol. 3848, file 75236-1

¹⁵ Holmes to Young, 4 April 1899, P.A.A. A281, Item 149; Circular letter from David Laird, 3 Feb. 1899, NAC, RG10, vol. 3848, file 75,236-1

¹⁶ Canada, *Treaty No. 8*, made June 21, 1899 and adhesions, reports, etcetera (Ottawa, Queen’s Printer, 1966); ; Charles Mair, *Through the Mackenzie Basin* (Toronto: Charles Briggs, 1908)

¹⁷ Lynn Hickey, Richard Lightening and Gordon Lee, “T.A.R.R. Interviews with Elders Program” in Richard Price, Ed. *The Spirit of the Alberta Indian Treaties*, 107; Charles Mair, p. 54-55

¹⁸ Van der Peet, supra at para. 229; *Badger v R*, supra; Treaty 8, supra.

¹⁹ Van der Peet, supra. At para 227

The nature and extent of the aboriginal and treaty rights of Indian and Metis continues to be defined through negotiation and court decisions. The law is clear that the perspective and understanding of aboriginal people is critical to defining these rights, ascertaining their meaning and significance and protecting them.²⁰

²⁰ Nowegijick v. The Queen, [1983] 1 S.C.R. 29; R. v. Marshall; R. v. Bernard, 2005 SCC 43; Sparrow supra.