

OLTHUIS KLEER  
TOWNSHEND - LLP

# Federal Legislative Review



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May 1, 2018

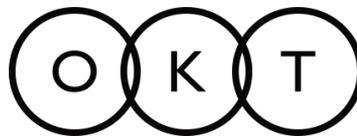
[smainville@oktlaw.com](mailto:smainville@oktlaw.com)

Gatineau QC Meeting

*Special Chiefs Assembly – AFN (Ontario Caucus)*

# The Special Chiefs Assembly

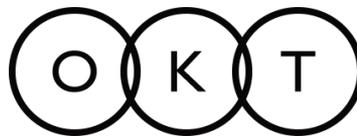
- First Nations, Metis and Inuit Languages Act
- Rights Recognition Framework
- Bill C-262 - UNDRIP
- Bill S-3 (Amendments to the Indian Act)
- Bill C-68, Bill C-69, Bill C-55 and Bill C-74 (Fisheries, IAA, CERA, CNWPA, Oceans, GG)
- Bill C-75, Bill C-58 (Crim Code/Access to Info)



**CHIEFS OF ONTARIO**

# What We Know

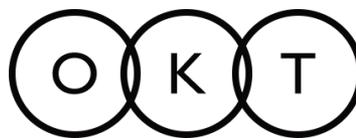
- Legislation is not as easy as this majority government thought it would be (Bill C-69/68)
- Bill C-262 is on government's legislative agenda
- Indigenous Languages Act
- A legal framework for “Recognition of Rights”
- Enabling legislation for the Department of Indigenous Services/Crown-Indigenous Relations and Northern Affairs



**CHIEFS OF ONTARIO**

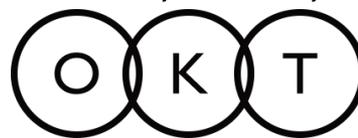
# The Fiscal Talks

- 10 year grants are the apex of the progress
- Own source revenue and “deemed” tax revenue will continue to be basis of certainty for Federal-Indigenous fiscal relations towards self-government
- Substantial equity – there is a cumulative gap created by 2% cap and decades of discriminatory funding
- Why does *the First Nations Financial Transparency Act* still exist?
- What just went to Cabinet re “Fiscal – Modern Treaty” policy framework (Deemed Tax Revenue / s. 87 and own source revenue)



# The 10 Principles

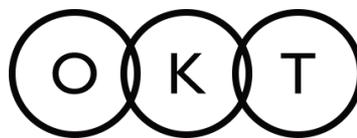
- recognition and implementation of Indigenous right to self-determination
- reconciliation is a fundamental purpose of section 35
- honour of the Crown guides the conduct of the Crown
- Indigenous self-government is part evolving system of cooperative federalism
- Treaties...other constructive arrangements ... have been and are intended to be acts of reconciliation
- meaningful engagement with Indigenous peoples aims to secure their free, prior, and informed consent
- any infringement of section 35 rights must by law meet a high threshold of justification
- require a renewed fiscal relationship, developed in collaboration with Indigenous nations
- reconciliation is an ongoing process that occurs in the context of evolving relationships \*\*\*\*\*
- distinctions-based approach is needed to ensure that the unique rights, interests and circumstances (First Nations, Metis, Inuit)



**CHIEFS OF ONTARIO**

# Clearly Liberal Agenda

- Unilateral approaches (co-drafting v co-development)
- “recognition” implies Court order
- Canadian legislation = “recognition through negotiation”
- Indigenous legal orders and systems of governments must be the path forward not their laws & policies
- This could be long-lasting framework!
- UNDRIP is the Reconciliation framework (not the Ten Principles which is DOJ limited view of s. 35 rights)



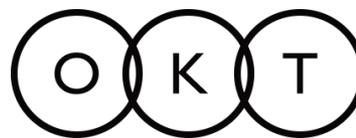
# Consultation to Consent (Section 35 common law) including *Clyde River*

## Low End of Spectrum

- Notice
- Disclose Information
- Time to respond
- Discussion of issues raised
- Address concerns raised
- Consider Alternatives within project planning
- Consultation process (pre-consultation)

## To Higher End of Spectrum

- Participation funding
- Mitigation of impacts
- Negotiating benefits to mitigate impacts
- Proven rights – negotiate consent based decision-making
- If no consent, Crown must justify any infringements of rights
- Specific accommodation package (higher end)



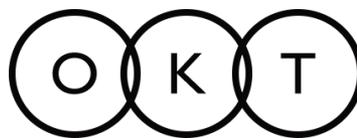
# Mikisew Cree and Consultation

The case (to be decided sometime in future) has two issues:

- (1) whether the Court could intervene in the legislative process by imposing a legal obligation on the Crown to consult; and
- (2) whether the duty to consult was triggered in this case, and specifically whether Mikisew's rights and interests were adversely affected by the 2012 (Harper Omnibus) Bills.

Duty to Consult: (1) the Crown must have knowledge of the rights; (2) there must be Crown conduct; (3) there must be the **potential for adverse impacts** from the Crown conduct.

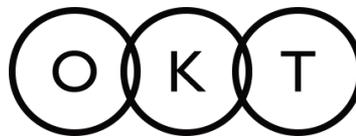
Separation of Powers (Legislative, Executive, Judiciary)



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# Charlottetown Accord

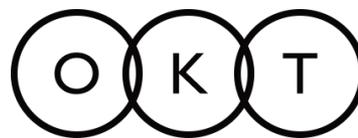
- Aboriginal peoples would have a third order of government with heads of power, analogous to provinces/federal government
- Aboriginal governments would be subject to “peace, order and good government” and would be subject to judicial review with regard to the *Charter of Rights and Freedoms*
- 3 year implementation window before self-government could be litigated, encouraging parties to negotiate aspects of the self government agreement.
- Ontario approved Accord 50.1% yes, 49.9% No (First Nations in Ontario did not approve the Accord)



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# The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government

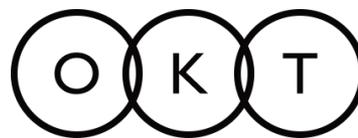
- Very constrained policy, and it is still in force
- 1995 (Chretien Government) – “draw down” powers within self-government evolution
- 30 areas that Canada agrees that Aboriginal governments “may” exercise jurisdiction.
- Does not allow First Nations to unilaterally implement self-government, but instead mandates implementation only through negotiated agreements



**CHIEFS OF ONTARIO**

# The Royal Commission on Aboriginal Peoples (RCAP) 1996

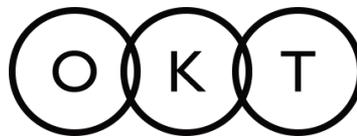
- A royal proclamation and companion legislation to implement the renewed relationship
- Activity to rebuild Aboriginal nations and develop their own constitutions and citizenship codes, leading to their recognition through legislation *Aboriginal Nations Recognition and Government Act*
- Canada wide framework for a third order of government – negotiation of new/renewed treaties
- Create two ministries: Ab Relations / Ab Services



**CHIEFS OF ONTARIO**

# Truth and Reconciliation

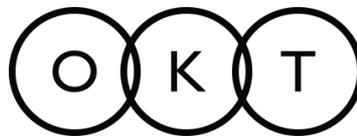
- Supports RCAP recommendations (last slide)
- Adopt the UN Declaration on the Rights of Indigenous Peoples as the Reconciliation framework
- Repudiate the Doctrine of Discovery / Terra Nullius
- Reconciliation – not at the rights level, but at the **society level** – Nation to Nation – ensure Indigenous legal orders co-exist
- Calls to Action 45, 50, 51, 52



**CHIEFS OF ONTARIO**

# Federal Recognition of Rights Legal Framework

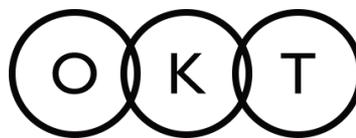
- February 14, 2018 Parliamentary speech
- National engagement sessions are underway
- Spring 2019 draft legislation, likely to be “opt-in”
- Another unilateral announcement with unknown “co-development” standards with First Nations
- Replacement of Comprehensive Claims and Inherent Rights Policy
- Nation-building funding (\$20 m) in Budget 2018



**CHIEFS OF ONTARIO**

# UNDRIP as Reconciliation Between Two Societies

- Article 18: Indigenous peoples have the right to participate in decision making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision making institutions
- Article 19: States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative and administrative measures that may affect them.
- Article 32 (2): States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.

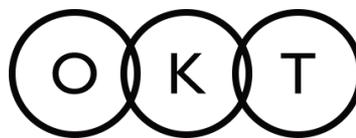


**CHIEFS OF ONTARIO**

# Section 35 as a Full box of Rights

- Consent – started with Royal Proclamation/ Treaty at Niagara regarding “Indigenous territory”
- *Sparrow* in 1990: (Section 35) “also affords aboriginal peoples constitutional protection against provincial legislative power.” And, “clarified other issues regarding the enforcement of treaty rights” ...quoting Professor Noel Lyon:

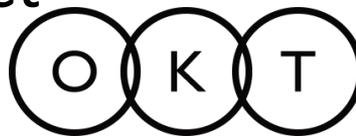
...the context of 1982 is surely enough to tell us that is not just a codification of the case law on aboriginal rights that had accumulated by 1982. Section 35 calls for a just settlement for aboriginal peoples. **It renounces the old rules of the game under which the Crown established courts of law and denied those courts the authority to question sovereign claims made by the Crown.**



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# Cooperation, Collaboration, Joint Decision-Making

- Bill C-68 (Fisheries) and Bill C-69 (Impact Assessments, Canadian Energy Regulator, Canadian Navigable Waters Protection Acts)
- Assessment of a “reflection of the 10 principles” is how Canada inspects for implementation of the UNDRIP commitment
- Education – MC (Memo to Cabinet) collaboration
- Collaborative Co-development tables with the Assembly of First Nations
- Indigenous Languages Act

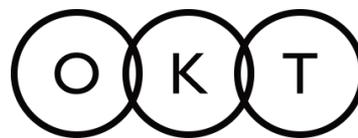


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# Unstructured Discretion

I am of the view that the same approach should not be adopted in identifying infringements under s. 35(1) of the Constitution Act, 1982 . In light of the Crown's unique fiduciary obligations towards aboriginal peoples, Parliament may not simply adopt an unstructured discretionary administrative regime which risks infringing aboriginal rights in a substantial number of applications in the absence of some explicit guidance. If a statute confers an administrative discretion which may carry significant consequences for the exercise of an aboriginal right, the statute or its delegate regulations must outline specific criteria for the granting or refusal of that discretion which seek to accommodate the existence of aboriginal rights. In the absence of such specific guidance, the statute will fail to provide representatives of the Crown with sufficient directives to fulfil their fiduciary duties, and the statute will be found to represent an infringement of aboriginal rights under the Sparrow test.

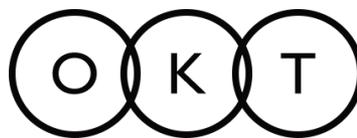
*R. v. Adams*, [1996] 3 SCR 101 at para. 54



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*In Canada, law must cease to be a tool of dispossession and dismantling of Aboriginal societies. It must dramatically change if it is going to have any legitimacy with First Nations...Until Canadian law becomes an instrument supporting Aboriginal peoples' empowerment, many Aboriginal people will continue to regard it as a morally and politically malignant force. A commitment to truth and reconciliation demands that Canada's legal system must be transformed. It must ensure that Aboriginal peoples have greater ownership of, participation in, and access to its central driving forces. Canada's Constitution must become truly a constitution for all of Canada. Aboriginal peoples need to become law's architects and interpreters where it applies to their collective rights and interests.*

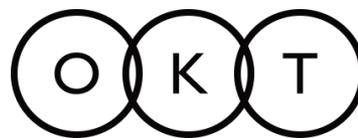
Executive Summary, Truth and Reconciliation Commission Final Report (page 205).



**CHIEFS OF ONTARIO**

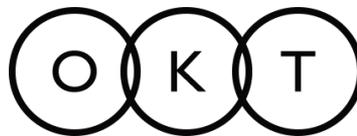
# UN DRIP is the floor of rights not the “aspirations” of Indigenous peoples

- Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development. (Article 3)
- Art 4: Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.
- Article 46: Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity...contrary to... territorial integrity or political unity of sovereign and independent state...



# Article 26

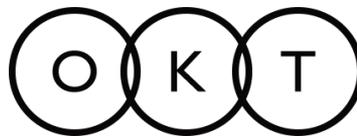
- Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.
- Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.
- States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.



**CHIEFS OF ONTARIO**

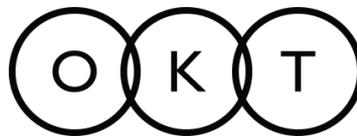
# Article 28

- Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.
- Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress.



# The Aboriginal Nations Recognition and Government Act (RCAP)

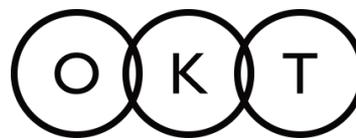
- Once the Constitution is approved the Nation would apply to the lands and treaties tribunal for recognition (referendum would approve)
- The Act would be opted into (Indian Act opt out)
- Provisions about lands, resource and fiduciary obligation would be negotiated with other governments.
- First Nations standards could replace *Charter of Rights and Freedoms*



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# **BILL S-212: An Act providing for the recognition of self-governing First Nations of Canada (this bill died on paper)**

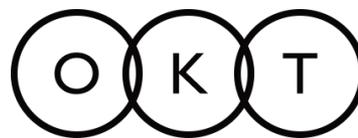
- Preamble: UNDRIP, Inherent RSG
- SELF-GOVERNMENT
- Self-government Proposal
- Community Approval and Certification by Verifier
- Recognized First Nations
- Transitional Provisions
- Law-making Powers
- Publication and Proof of First Nation Laws
- Enforcement of First Nation Laws
- Administration of Justice
- PART 2
- FIRST NATION LANDS
- PART 3
- FISCAL RELATIONS
- PART 4
- ORGANIZATIONAL OPTIONS
- PART 5
- GENERAL
- Rights and Liabilities
- Liability
- Immunity and Judicial Review
- General Provisions Respecting Laws
- Amendments to Acts
- Saving
- Regulations



**CHIEFS OF ONTARIO**

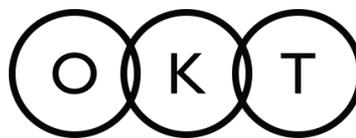
# 0.2% of Land in Canada

- First Nation citizens and their governments expect lands to be returned to them
- RCAP volume 2, Chapter 4 (recommendations)
- 2.4.5 – Negotiations Amount / Quality of Lands
- 2.4.11 – Category I lands (exclusive ownership)
- 2.4.12 – Category II lands (shared/treaty lands)
- 2.4.13 – Category III lands (Crown lands)



# The Legislative Time-frame

- End of September – drafting begins within the Government (engagements are 1 x per group)
- Spring 2019 release of Bill
- Parliamentary process (3 readings HofC, (committee process likely) 3 readings in the Senate)
- Will Bill C-262 be law?
- Will there be consequential amendments to other laws?
- Will Canada co-draft with the National Indigenous Organizations? (AFN, MNC, ITK)



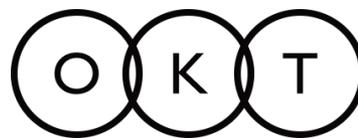
# QUESTIONS? Miigwetch!

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Much Appreciation to the Regional Chief Isadore Day *Wiindawtegowinini*, PC Members, DGC Gord Peters and several Chiefs in Ontario who discussed many concerns and ideas with me!



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