File No. 35945

SUPREME COURT OF CANADA
(ON APPEAL FROM THE FEDERAL COURT OF APPEAL)

BETWEEN:

HARRY DANIELS, GABRIEL DANIELS, LEAH GARDINER, TERRY JOUDREY and THE CONGRESS OF ABORIGINAL PEOPLES

APPELLANTS
(Respondents on Cross-Appeal)

- and-

HER MAJESTY THE QUEEN as represented by THE MINISTER OF INDIAN AFFAIRS AND NORTHERN DEVELOPMENT and THE ATTORNEY GENERAL OF CANADA

RESPONDENTS
(Appellants on Cross-Appeal)

-and-

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OPENING STATEMENT

Certainty in the relationship between the Crown and First Nations is a central goal of treaty-making for all parties. Modern Treaties – both those recently confirmed and those in ongoing negotiation – create definitions of the Nations and the people with whom the Crown is entering into final agreements. These delineate those people's rights, and they have done so broadly. In combination with the *Indian Act*, this process results in the creation of different classes of people within a treaty, some of whom do not have status, but should nonetheless have constitutional recognition as "Indians".

The definition of "Indian" for the purpose of s. 91(24) of the *Constitution Act, 1867* must at the least include all people who are recognized as part of a First Nation within a modern treaty. To do so is rational, coherent, and workable. The definition of "Indian" must also become harmonized with the law and principles of s. 35(1) of the *Constitution Act, 1982* and the concept of an "aboriginal people". Doing otherwise causes or perpetuates the creation of arbitrarily defined classes of persons who are recognized as "Indians". This leads to uncertainty, and fails to advance the principle of reconciliation. This Court should recognize that our Constitution is intended to recognize the special status of all aboriginal people. It should not entrench the arbitrary divisions imposed by the *Indian Act* in the Constitution.

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PART I – FACTS

1. The Intervener Te'mexw Treaty Association ("TTA") accepts the facts as stated by the Appellants.

2. TTA is in the process of negotiating a modern land claims agreement in the British Columbia Treaty Process for five First Nations located on southern Vancouver Island: Snaw-naw-as First Nation, Songhees First Nation, T'Sou-ke Nation, Beecher Bay First Nation, and Malahat Nation (the "Te'mexw Nations"). The Te'mexw Nations, surrounded by urban development, are seeking to better protect their culture and exercise their rights, including the right to determine the membership of their communities, in order to better serve both status and non-status members.

3. The Te'mexw Nations signed an Agreement in Principle on April 9, 2015 and are now entering the final stage of treaty negotiations with the negotiation of five separate Final Agreements.

PART II – ISSUES

4. The Federal Court of Appeal declined to declare that non-status Indians are "Indians" within the meaning of s. 91(24) of the *Constitution Act, 1867* on the basis that doing so would lack practical utility.[1]

5. The Intervener TTA advances two submissions in relation to the Court of Appeal's conclusion:

   a. A declaration that non-status Indians are "Indians" has a significant impact on negotiations in the British Columbia Treaty Process, and therefore has practical utility.

   b. This declaration would advance the principle of reconciliation by removing constitutional uncertainty faced by non-status Indians.

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[1] Judgment of Noël, JA, Dawson JA, Trudel JA dated April 17, 2014, Federal Court of Appeal at paras 74-79. [Appellants; Record, Vol. 1, Tab 3, p. 178]

PART III – LAW AND ARGUMENT

A. There is practical utility to a declaration that the definition of "Indians" in s. 91(24) includes non-status Indians.

Overview

6. The parties to modern treaty negotiations recognize that it is not satisfactory to restrict the definition of a First Nation to exclusively those persons with status under the *Indian Act*, when what is at stake is the settlement of past claims, the establishment of modern governance regimes, the regularization of inter-governmental relations, the definition of modern treaty rights, the adjustment or recognition of historic aboriginal and treaty rights, and the institution of a reliable, certain and stable legal framework.

7. In this context, the Crown and First Nations have recognized that it is necessary to define the pre-existing, historical First Nation and to extend "eligibility" for inclusion in the modern post-treaty First Nation beyond the narrowly and arbitrarily defined group of persons with *Indian Act* status. Instead these treaty partners have found that a proper approach to recognizing First Nations should be more expansive and take into account aboriginal ancestry, self-identification and cultural attachment to a community of indigenous people.

8. TTA submits that a consistent approach should be taken in defining the ambit of s. 91(24). A single constitutional definition of "Indians", as a definition for indigenous or aboriginal peoples in Canada, should be informed by ancestry and connection, rather than by an arbitrary blood quantum. This will ensure that there is a logical alignment between the Federal government's jurisdiction over "Indians" and the modern understanding of what constitutes a "First Nation", as well as consistency between different aspects of our Constitution.

9. This approach has utility in the treaty relationship and is required in order to advance reconciliation between the Crown and aboriginal peoples. The Court should reject the idea that our Constitution has the same approach toward Indians as does the *Indian Act*, which, by unilaterally labelling some "Indians" and some not, aims to effect assimilation and has been used to the detriment and stigmatization of aboriginal people.

The modern treaty process seeks certainty and defines First Nation collectivities

10. A treaty is a solemn agreement, constitutionally recognized, that delineates the relationship between the Federal and Provincial Crowns and a First Nation and seeks to create certainty in that relationship.[2] A treaty will describe who constitutes a First Nation and thereby determines who holds the right to extinguish, modify or render non-assertable pre-existing aboriginal and treaty rights, and who is eligible to have a say in ratifying the modern treaty and to enjoy the rights provided in it.

11. As a treaty defines the people whose rights will be affected in the agreement, two central questions in modern land claims negotiations are: (1) who constitutes the "First Nation" with whom the Crown is negotiating a treaty; and (2) what will the relationship between the First Nation and the Federal government be after the new treaty comes into effect.

12. Modern treaties have set out broad definitions of who constitutes a First Nation. These do not limit inclusion in the First Nation to persons who have status under the *Indian Act*. In the Nisga'a Final Agreement, the "Nisga'a Nation" is defined to mean "the collectivity of those aboriginal people who share the language, culture and laws of the Nisga'a Indians of the Nass Area, and their descendants".[3] This group's rights are defined for the purpose of modifying their existing aboriginal rights and title with the coming into effect of the treaty. The Maa-nulth Final Agreement defines who constitutes each of the Maa-nulth collectivities broadly so as to encompass anyone of Maa-nulth ancestry or who has been adopted into the Maa-nulth, and any of their descendants.[4] The Yale First Nation Final Agreement (which is in the process of being ratified) takes an intermediate approach: every present member of the Yale Band is included together with anyone of Yale ancestry who has a "demonstrated attachment" to the Yale First

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[2] *The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s. 35(1); Canada, *Renewing the Comprehensive Land Claims Policy: Towards a Framework for Addressing Section 35 Aboriginal Rights* (Ottawa: Aboriginal Affairs and Northern Development, 2014) ["Comprehensive Land Claims Policy"], p 11. Online:<https://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ-LDC/STAGING/texte-text/ldc_ccl_renewing_land_claims_policy_2014_1408643594856_eng.pdf>

[3] Nisga'a Final Agreement, c. 1, p. 12; *Nisga'a Final Agreement Act*, RSBC 1999, c 2 [Nisga'a Final Agreement].

[4] Maa-nulth First Nations Final Agreement, c. 26, cl. 26.1.1; *Maa-nulth First Nations Final Agreement Act*, SC 2009, c 18; *Maa-nulth First Nations Final Agreement Act*, SBC 2007, c 43 [Maa-nulth Final Agreement]

Nation, together with the descendants of these groups and certain persons who are adopted into the Nations.[5]

13. None of the definitions contained in these agreements describes membership in a First Nation as being limited to persons with status under the *Indian Act*. Canada's Comprehensive Claims Policy discloses that the Crown is engaged in treaty negotiation with "Aboriginal peoples" ("descendants of the original inhabitants of North America"), or "Aboriginal groups" and that the definition of beneficiaries under final agreements will not affect the status of persons under the *Indian Act*.[6]

14. Given the effects of statutory enfranchisement imposed over the history of the *Indian Act*, it is very likely that under these broad definitions there are large groups of people who are part of a "Nation" recognized by a treaty but who do not have status.[7] With the second-generation cut-off rule, which, over time, results in reducing the number of persons eligible for status, this group of non-status persons who are part of a First Nation under a treaty will continue to grow.[8]

15. Declaring that non-status aboriginal people are "Indians" for the purpose of s. 91(24) has utility and significant effect, and creates a more rational and consistent statutory and constitutional framework for governance in the area.

A coherent policy approach has utility

16. The TTA submits that for modern treaties, statutory frameworks and constitutional law to be coherent, the Court should recognize that federal jurisdiction over "Indians, and lands reserved to the Indians" must extend at least to those people who fit within the definition of a First Nation in a modern treaty, regardless of their *Indian Act* status. This is required in order to address the question of whether the Federal or Provincial government has legislative jurisdiction over the entirety of the collectivity making up a First Nation, irrespective of whether those people have *Indian Act* status or not.

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[5] Yale First Nation Final Agreement, c. cl. 25.1.1; *Yale First Nation Final Agreement Act*, SBC 2011, c 11; *Yale First Nation Final Agreement Act*, SC 2013, c. 25 [Yale Final Agreement].

[6] *Comprehensive Land Claims Policy*, pp 16, 21.

[7] *McIvor v. The Registrar, Indian and Northern Affairs Canada*, 2007 BCSC 827 [2007] 3 CNLR 72 at paras 8-87.

[8] *Indian Act*, RSC., 1985, c. I-5, s. 6; Canada, *Report of the Royal Commission on Aboriginal Peoples: Looking Forward, Looking Back*, Vol 1 (Ottawa: Supply and Services Canada, 1996) [RCAP], part 2, s. 2.2, pp 17-19, 27; RCAP Vol 1, part 9, pp 188-191.

17. The approach taken by the Court of Appeal, in declining to recognize non-status Indians as included under s. 91(24), permits an incoherent and illogical framework for the definition of "Indian" to persist. A declaration that non-status Indians have constitutional status within s. 91(24) has utility, as it resolves a situation where there are multiple categories of "Indian", all of which should have constitutional recognition.

Modern treaties create different categories of "Indians"

18. The people who constitute a "First Nation" in the context of treaty negotiation are those people who have the right to enter into a treaty by voting on it, thereby confirming the agreement with the Crown delineating the rights and obligations of the Nations. Before a treaty is completed, this collectivity will include the people eligible to be enrolled under the final agreement (such as band members, people who identify with the community, those with a substantial connection, and their descendants).

19. Following a completed treaty, a First Nation creates a constitution, which will determine citizenship in the nation. The group of defined Citizens of a First Nation may be even broader than those eligible to be enrolled, and expanded to include persons who were not initially part of the First Nation prior to treaty. As with membership in an Indian Band, neither being part of a First Nation nor having citizenship with that First Nation will necessarily be tied to having status under the *Indian Act*. In each of the Nisga'a, Maa-nulth and Yale Agreements there is an explicit statement that eligibility does not confer the right to be registered as a status Indian or enjoy any of the rights or benefits of being a status Indian.[9]

20. Despite the oft-stated goal of putting the provisions of the *Indian Act* into the past, modern treaties expressly continue the application of the status provisions of the *Indian Act*. For example, transitional provisions concerning tax exemptions extend only to "Indians" and not eligible persons.[10]

[9] Nisga'a Final Agreement, c 20, cl. 2; Maa-nulth Final Agreement, c. 26, cl. 26.1.3; Yale Final Agreement, c.25, cl. 25.1.3.
[10] Yale Final Agreement, c. 2, cl. 2.10.1.

21. The modern Final Agreement framework also notes that programs may be available for "registered Indians or other Indians," which recognizes that the scope of "registered Indians" under the *Indian Act* may not be co-extensive with "Indians" for other purposes.[11]

The effects of incoherence and the creation of categories of Indians are significant

22. Where Federal responsibility over non-status Indians is not recognized in the manner submitted, the legal framework creates multiple and increasingly confusing categories over time. The existence of a distinction between people who have status under the *Indian Act* and the persons who are part of the collective comprising a First Nation in a treaty context has the potential to arise in a number of ways, affecting all parties to a treaty.

23. In the treaty-making context, one consequence of the denial of Federal responsibility over non-status Indians is that the overall size of the treaty package is determined by reference to the number of status Indians. Federal program funding is limited to status Indians.[12] This means that the number of status versus non-status Indians determines the total size of the funding available to operate the governments and programs that will be administered following treaties for all of the First Nation's citizens. Despite recognition of self-government, treaty-making nations may be forced to limit availability of programs to their members because of Federal refusal to recognize and support non-status persons enrolled as part of those nations.

24. While a concluded treaty would appear to provide certainty, given that Federal and Provincial priorities can shift over time, the existence of multiple definitions of "Indians" gives rise to the potential for statutory gaps to exist. The Federal government may wish to fill these statutory gaps, but with uncertainty around the jurisdictional reach of s. 91(24), it may be limited in its ability to do so. The Federal government may also wish to develop national policies related to treaty implementation. These will be thwarted if they do not extend to all persons caught by a treaty. If there is a change in Provincial policy, this could also create a legislative gap.

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[11] Maa-nulth Final Agreement, c. 1, cl. 1.9.2; Nisga'a Final Agreement, c. 2, cl. 16; Yale Final Agreement, c.2, cl. 2.9.2.

[12] Canada, Band Support Funding Program Policy, Appendix 3 – Responsibilities and Procedures, "Funding" (Ottawa: Aboriginal Affairs and Northern Development Canada, 2014). Online: < https://www.aadnc-aandc.gc.ca/eng/1100100013828/1100100013833> .

25. These gaps have the potential to have a detrimental effect on non-status people eligible for enrollment as part of a treaty nation, as they may not benefit from a Federal policy that is implemented or may be limited in their enjoyment of treaty benefits.

26. As noted in the Trial Judgment, the jurisdictional avoidance of non-status Indians has resulted in the failure of governments to supply services, and has led to non-status Indians facing higher levels of discrimination and social disadvantage.[13] The law should not operate to create this collection of inconsistent categories with significant potential to cause and contribute to prejudice, especially when an alternative approach is readily available and workable.

The approach proposed by TTA is workable and rational

27. Inclusion of all persons eligible for enrollment in the First Nations with whom Canada is or will be in a treaty relationship is a reasonable and workable approach to the scope of the definition "Indian" under s. 91(24).

This approach creates consistency within the Constitution

28. The Constitution, as our supreme law, should provide certainty by having internal consistency. The approach proposed by TTA will tend to better align the category of persons subject to s. 91(24) of the *Constitution Act, 1867* ("Indians") with the group of persons described in s. 35 of the *Constitution Act, 1982* ("aboriginal"). This would include modern land claims agreements as well as historic treaties. This alignment will simplify constitutional categories in a way that leads to less confusion and diminishes the potential for gaps where there are persons who may not be clearly covered by the exercise of either Provincial or Federal jurisdiction.

This approach is more closely aligned with goals of treaty-making including self-definition

29. Expanding s. 91(24) to include all those eligible for enrollment in First Nations who are treaty signatories will further advance the goal of allowing First Nations to articulate who they are. This is a priority for treaty-making nations and is required in order to make advancements toward reconciliation. The definition of "Indians" and who has jurisdiction and bears legislative

[13] Decision of Phelan J. dated January 8, 2013 at paras 84-89. [Appellants' Record Vol. 1, Tab 1, p. 1]

responsibility for that group of people must take a turn toward self-definition, and away from statutory imposition of identity and illegitimate aims of assimilation.[14]

30. Doing so will ensure that treaties address the needs of aboriginal people embarking on final agreements in a manner that is consistent with Canada's constitutional framework. It also permits the parties to treaties to finally "[speak] the same language when they sit around the negotiating table to discuss self-government and constitutional issues."[15]

A broader approach is already used in the treaty context

31. There are well-developed approaches to defining the scope of the eligible collectivity of First Nations in a manner that is not confined to status under the *Indian Act* with reference to general concepts such as ancestry or indigenous cultural concepts such as matrilineal connection[16] or cultural connection.[17] This demonstrates that doing so does not lead to an unmanageable and indefinite definition. Instead, such a definition is possible and practical, and properly requires being sensitive to the existence of a larger aboriginal nation than may be identified by reference to status.

There is no countervailing federalism principle

32. The expanded scope of Federal legislative competence proposed is not outweighed by a countervailing federalism concern. This approach to s. 91(24) is consistent with the modern view of the division of powers as an enabling federal mechanism. As stated in *Tsilhqot'in*, the purpose of interjuridictional immunity is is to ensure that the two levels of government are able to operate without interference in their core areas of exclusive jurisdiction. As there, that goal is not implicated here by the broader approach submitted.[18]

33. Historically one of the concerns about an overly broad description of s.91(24) jurisdiction was the potential unpredictable effects of the application of interjurisdictional immunity. The concern that traditionally existed was that an overly expansive Federal power could lead to unforeseen gaps due to its displacement of Provincial legislative power. The approach advanced

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[14] RCAP Vol 1, part 9, s. 12, pp 314-315; *R v Powley*, [2003] 2 SCR 207, 2003 SCC 43 [*Powley*] at paras 30-34.
[15] RCAP Vol 1, part 9, s. 13, p 318.
[16] Nisga'a Final Agreement, c. 20, cl.1.
[17] Yale Final Agreement, c. 25, cl. 25.1.1.
[18] *Tsilhqot'in Nation v. British Columbia*, [2014] 2 SCR 256, 2014 SCC 44 [*Tsilhqot'in*] at paras 141, 149.

by TTA instead has the benefit of enabling the Federal government to establish policies and fill gaps without countervailing fear that this will conflict with Provincial legislative regimes. Here there is a good policy reason to take an expansive view, which is required under s. 91(24).

34. In the modern context, this Court, beginning with *Canadian Western Bank*[19] and *Lafarge*[20] and most recently with *Tsilhqot'in*[21] and *Grassy Narrows*[22] has substantially limited the doctrine of interjurisdictional immunity, especially with respect to matters such as lands, resources, property and civil rights in the provinces. As such, there is little to no risk that adopting a broader view of the Federal legislative jurisdiction will create unforeseen gaps in Provincial legislative authority or Provincial regulatory regimes.

B. A declaration that non-status Indians are included in the definition under s. 91(24) advances the principle of reconciliation

35. Modern treaties are tripartite agreements where all three parties pledge themselves to ensure that the treaties are implemented in accordance with their terms and the honour of the Crown. The goal of reconciliation is furthered where both levels of non-indigenous government have the ability to ensure that the commitments made in the treaty are implemented, in particular to the benefit of all of those peoples whose rights have been adjusted, modified or affected by the modern treaty. In this way, the Crown (represented by both governments) is enabled to act without forcing First Nations to have recourse to the courts or dispute resolution in the event that one level of government fails to properly implement the treaty.

36. The approach proposed by the TTA also advances the goal of reconciliation by giving more comprehensive recognition to aboriginal people without focusing on the arbitrary and historically discriminatory definition of status adopted in the *Indian Act*. Doing so would shift the emphasis in understanding of what it means to be an "Indian" away from the narrow statutory definition focused exclusively on blood quantum, toward the concept of aboriginality reflected in s. 35(1), which is sensitive to ancestral connection, current connection to the community, self identification and culture.[23]

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[19] *Canadian Western Bank v. Alberta*, 2007 SCC 22.
[20] *British Columbia (Attorney General) v. Lafarge Canada Inc*., [2007] 2 SCR 3, 2007 SCC 22.
[21] *Tsilhqot'in* at paras 138-141, 149, 152.
[22] *Grassy Narrows First Nation v. Ontario (Natural Resources),* [2014] 2 SCR 447, 2014 SCC 48 at para 53.
[23] *Powley* at para 30.

37. The statutory tool of designating who is or is not an "Indian" under the *Indian Act* is one way the Crown has perpetuated forms of control and assimilation. The Canadian government pursued policies of cultural genocide and assimilation "because it wished to divest itself of its legal and financial obligations to Aboriginal people and gain control over their land and resources. If every Aboriginal person were 'absorbed into the body politic,' there would be no reserves, no Treaties, and no Aboriginal rights." [24]

38. Over time, through negotiation and legislative reform, the arbitrary statutory distinctions created by the *Indian Act* should be curtailed rather than imposed in additional legal settings. The category of "Indian" has never been reflective of actual communities or of the needs of aboriginal peoples.[25] There is no reason to remain attached to that definition for constitutional purposes.

39. The *Indian Act* definition cannot provide the way forward for recognition and reconciliation with aboriginal people. Instead, s. 91(24) jurisdiction must delineate Federal responsibility in a manner that encompasses all the people the Crown is responsible to as "Indians", including those who do not have recognized status, in particular those who are members of First Nations under treaties.

PART IV – SUBMISSION CONCERNING COSTS

40. TTA submits that it should be neither liable for nor entitled to costs.

PART V – ORDER SOUGHT

41. TTA asks that it be given leave to make oral submissions of 10 minutes in length at the hearing of the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated the 27th day of July, 2015

Agent for Counsel for the Intervener, Te'mexw Treaty Association

[24] RCAP Vol 1, part 6, s. 8, pp 180-183; Canada, Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (Ottawa: Library and Archives Canada Cataloguing in Publication, 2015), pp 3, 57.

[25] RCAP Vol 1, part 6, s. 8, pp 180-181.

PART VI - AUTHORITIES

DESCRIPTION	PARAGRAPH NO.
CASES	
British Columbia (Attorney General) v. Lafarge Canada Inc., [2007] 2 SCR 86, 2007 SCC 23	34
Canadian Western Bank v. Alberta, [2007] 2 SCR 3, 2007 SCC 22	34
Grassy Narrows First Nation v. Ontario (Natural Resources), [2014] 2 SCR 447, 2014 SCC 48	34
McIvor v. The Registrar, Indian and North Affairs Canada, 2007 BCSC 827	14
R v Powley, 2003 SCC 43	29. 36
Tsilhqot'in Nation v. British Columbia, 2014 SCC 44	32, 34

PART VII – SCHEDULE OF STATUTES

DESCRIPTION STATUTES	PARAGRAPH NO.
Constitution Act, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11	10,
Indian Act, RSC 1985, c I-5	14,
Maa-nulth First Nations Final Agreement Act, SBC 2007, c. 43	12
Maa-nulth First Nations Final Agreement Act, S.C. 2009, c. 18	12
Nisga'a Final Agreement Act, RSBC 1999, c 2	12
Yale First Nation Final Agreement Act, [SBC 2011] Chapter 11	12
Yale First Nation Final Agreement Act, SC 2013, c. 25	12

PART VIII – SCHEDULE OF SECONDARY SOURCES

DESCRIPTION	PARAGRAPH NO.
SECONDARY SOURCES	
Canada, Band Support Funding Program Policy, Appendix 3 – Responsibilities and Procedures, "Funding" (Ottawa: Aboriginal Affairs and Northern Development Canada, 2014). Online: < https://www.aadnc-aandc.gc.ca/eng/1100100013828/1100100013833>	23
Canada, Truth and Reconciliation Commission of Canada, *Honouring the Trust, Reconciling for the Future: Summary of the final Report of the Truth and Reconciliation Commission of Canada* (Ottawa: Library and Archives Canada Cataloguing in Publication, 2015)	37
Canada, Renewing the Comprehensive Land Claims Policy: Towards a Framework for Addressing Section 35 Aboriginal Rights (Ottawa: Aboriginal Affairs and Northern Development, 2014) ["Comprehensive Land Claims Policy"], p 11. Online:<https://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ-LDC/STAGING/texte-text/ldc_ccl_renewing_land_claims_policy_2014_1408643594856_eng.pdf>	10, 13
Canada, Report of the Royal Commission on Aboriginal Peoples: Looking Forward, Looking Back, Vol 1 (Ottawa: Supply and Services Canada, 1996)	14, 29, 30, 37, 38
Maa-nulth First Nations Final Agreement	12, 19, 21
Nisga'a Final Agreement	12, 19, 21, 31
Yale First Nation Final Agreement	12, 19, 20, 21, 31