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Saskatchewan First Nations and the Province's Resource Future:

The Path to Economic Certainty

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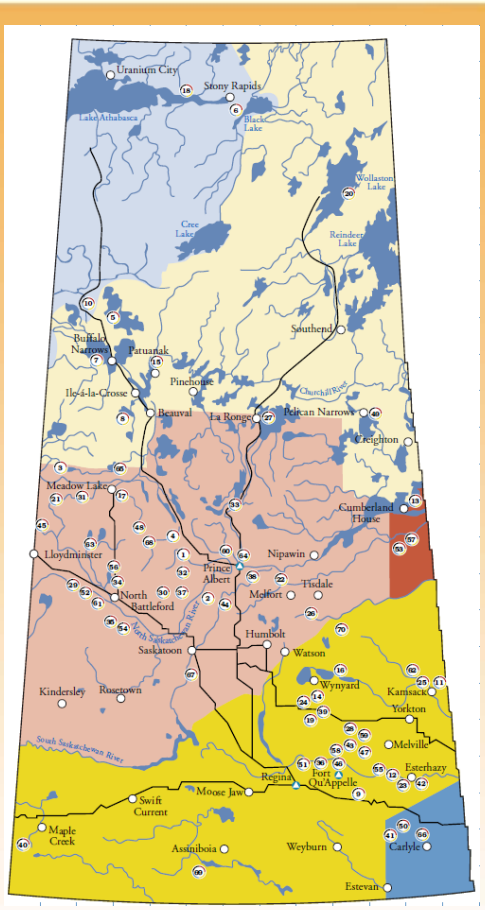
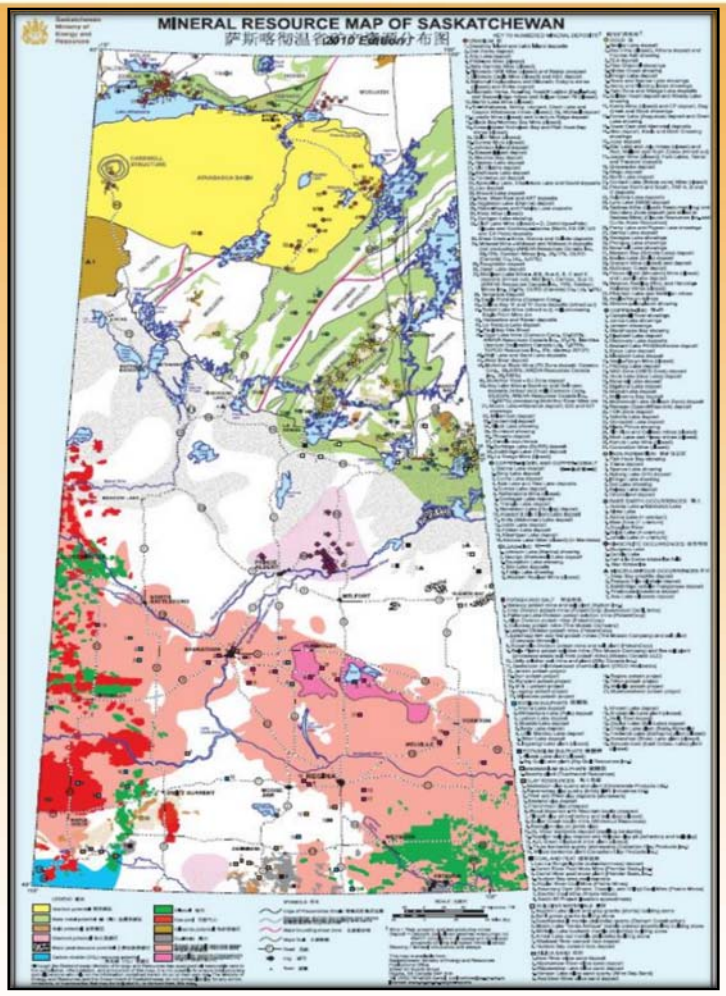
Map of Subsurface Minerals

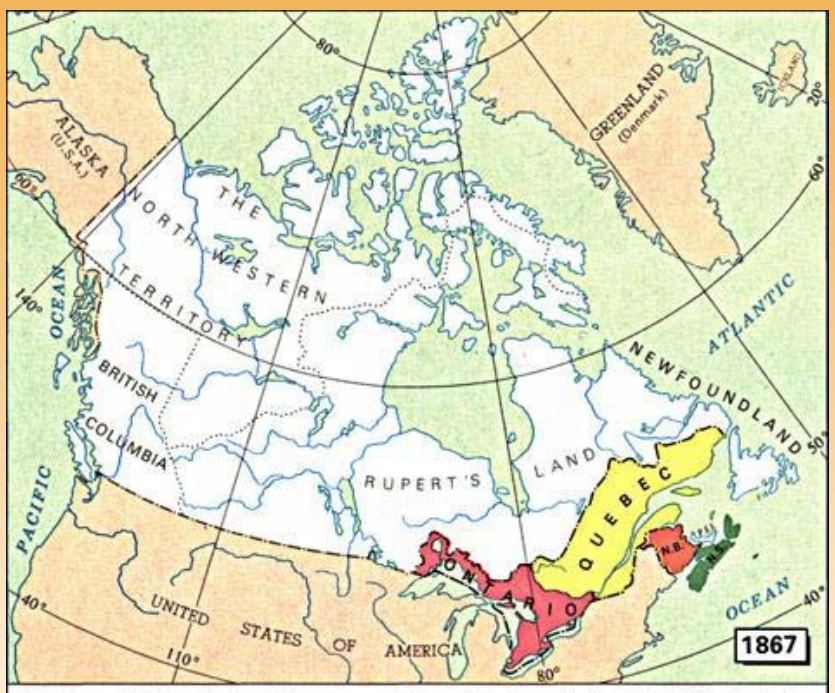




Events Leading to *BNA Act*

- In 1864 the colonies of Canada, Ontario, Quebec, Nova Scotia and New Brunswick met in Quebec to discuss federally uniting into one dominion under the British Crown

- *British North America Act* enacted July 1, 1867



New Brunswick, Nova Scotia and Canada are united in a federal state, the Dominion of Canada, by the British North America Act (July 1, 1867). The province of Canada is divided into Ontario and Quebec. The United States of America proclaims the purchase of Alaska from Russia (June 20).

Summary of Major Events

- Doctrine of Discovery – Holy See / United Nations (racist doctrine)
- *Terra Nullius* – "land belonging to no people"; 1992 *Mabo* decision (ruled unjust and discriminatory)
- *1763 Royal Proclamation*
- 1867 *British North America Act:* Section 91(24) (federal fiduciary trust)
- 1870 Imperial Order in Council
- 1874 – Treaty Four: 'depth of a plow'
- 1876 – *Indian Act* enacted (consolidation of *Gradual Civilization Act*, 1857 & *Gradual Enfranchisement Act*,1869)
- 1905 – Province of Saskatchewan formed
- 1930 *Natural Resource Transfer Agreement*
- 1982 – *Constitution Act:* sections 25 and 35
- 1997 – S.C.C. ruling in *Delgamuukw* (aboriginal title exists and is a right to the land itself)
- 2004 – S.C.C. ruling *Haida* and *Taku* (honor of Crown; reconciliation; duty to consult and accommodate)
- 2005 – *Mikisew (*first S.C.C. ruling to apply the principles established in *Haida* and *Taku*)
- 2007 – *United Nations Declaration on the Rights of Indigenous Peoples* (UN Declaration)
- 2013 – UN Special Rapporteur on the Rights of Indigenous Peoples (unnecessarily adverserial)
- 2014 – concerns raised in media Feb. 28th: AANDC spent $106 million in litigation for 2012-13 year

Acquiring the Northwest Territories

1870 Imperial Order in Council

NWT shall be admitted into and become part of the Dominion of Canada upon the terms and conditions set forth in the first hereinbefore recited Address [attached as schedule "A"]...

Schedule " A" (Dec. 17, 1867)

And furthermore, that, upon the transference of the territories in question to the Canadian Government, the claims of the Indian tribes to compensation for lands required for purposes of settlement will be considered and settled in conformity with the equitable principles which have uniformly governed the British Crown in its dealings with the aborigines.

Schedule " B" (March 29, 1869)

That upon the transference of the territories in question to the Canadian Government it will be our duty to make adequate provision for the protection of the Indian tribes whose interests and well-being are involved in the transfer, and we authorize and empower the Governor in Council to arrange any details that may be necessary to carry out the terms and conditions of the above agreement. (Emphasis added)

The North-West Territories (Rupert's Land and the North-Western Territory) are acquired by Canada from the Hudson's Bay Company. From part of them Manitoba is created as the fifth province.

1865-1870 Summary

- 1866 U.S. House of Representatives passed General Bank's Annexation Bill which authorized acquiring the Hudson's Bay Co. for $85 million.
- Colonies united in 1867 out of fear that U.S. wanted to acquire British North America.
- U.S. acquires Alaska in 1867 – Canada's fears heightened that U.S. will acquire NWT. Canada writes to Britain requesting NWT be transferred to Canada and makes sweeping promises re: Indians.
- Major difference between pre- and post-confederation treaties: Canada's duty was enshrined in the 1870 Imperial Order. Simply relying on its past practices would not be sufficient. The Indians' claims would have to be heard and settled in conformity with equitable principles which have uniformly governed the British Crown in its dealings with aborigines. Canada was duty bound to make adequate provision for protection of Indian tribes whose interests and well-being are involved in the transfer.

Scope of Constitutional Duty

Purpose of 1870 Imperial Order in Council was to:

- thwart U.S. settlement
- secure peace & friendship with the Indians
- make adequate provisions for protection of the Indians whose interests and well-being were involved in the transfer of the lands
- prevent harassment of the settlers.

1870 Imperial Order in Council reads:

> Upon the transference of the territories…, the claims of the Indian tribes to compensation for lands required for purposes of settlement will be considered and settled in conformity with the equitable principles which have uniformly governed the British Crown in its dealings with the aborigines
>
> …upon the transference of the territories in question to the Canadian Government it will be our duty to make adequate provision for the protection of the Indian tribes whose interests and well-being are involved in the transfer

Treaty Four

- Commission for Treaty Four established pursuant to 1874 Order in Council which states, in part:

…His Excellency the Governor General for the purpose of making Treaties during the current year with such of the Indians Bands as they may find it expedient to deal with…

The Minister… recommends that the Commissioners… confer with the Lieutenant Governor of the North West Territories on the subject of the Treaties, and that, in the event of permanent annuities being granted to the Tribes with whom Treaties may be made, such annuities should not be fixed at a higher rate than those sanctioned by the Treaties already concluded with the Indians of the North West.

- Saulteaux First Nations refused to enter into substantive negotiations with Treaty Commissioner, upset their territory was "sold" by Hudson's Bay Co. to Canada without their consent. Once negotiations were underway, Treaty Four Elders have consistently said their forefathers agreed to share the land 'to the depth of a plow.' (See OTC website)

- Treaty Four surrender clause:

The Cree and Saulteaux Tribes of Indians… do hereby cede, release, surrender and yield up to the Government of the Dominion of Canada, for Her Majesty the Queen, and Her successors forever, all their rights, titles and privileges whatsoever, to the lands included within the following limits…

And further, Her Majesty agrees that Her said Indians shall have right to pursue their avocations of hunting, trapping and fishing throughout the tract surrendered, …saving and excepting such tracts as may be required or taken up from time to time for settlement, mining or other purposes…

Modern Day Treaties

Modern Treaties include resource and revenue sharing provisions for subsurface rights:

- 1992 – BC Treaty Commission – facilitate negotiation of treaties; accept First Nations into treaty process; assess when parties are ready to start negotiations. Treaty making process no longer viewed as being concluded "quickly" but rather building treaties incrementally; treaties will be more durable and build better relationships.

- *2000 – Nisga'a Final Agreement Act* negotiated agreement between Nisga'a Nation, Government of British B.C. and Government of Canada; Nisga'a Treaty is the first modern-day treaty in B.C.

- 2005 – S.C.C. in *Haida* and *Taku* held goal of treaty making to reconcile aboriginal rights with other rights and interests; not a process to replace/extinguish rights; "Reconciliation is not a final legal remedy in the usual sense"; expected outcomes are "just settlements" and "honourable agreements".

- 2005 – S.C.C. in *Mikisew* unanimously extended Crown's obligation to consult and accommodate aboriginal interests to include existing treaty rights. Reconciliation does not end with a treaty; continuing duty to consult and perhaps accommodate, where treaty rights might be adversely affected.

- 2014 – NWT Intergovernmental Resource Revenue Sharing Agreement signed Feb. 27, 2014 by the Territorial Government and five (5) Aboriginal Governments; sets out terms and conditions for sharing resource revenues from NWT public lands, guaranteeing Aboriginal Governments will get up to 25% of all royalty revenue – an unprecedented sharing arrangement in Canada.

Indian Act Amended in 1927

- 1927: Indian Act was amended to prevent anyone (Aboriginal or otherwise) from soliciting funds for Indian legal claims without a special license from the Superintendent-General. This effectively prevented any First Nation from pursuing Aboriginal land claims or having access to legal counsel. Subsection 149A of *Indian Act* stated:

  ``Every person who, without the consent of the Superintendent General expressed in writing, receives, obtains, solicits or requests from any Indian any payment or contribution or promise of any payment or contribution for the purpose of raising a fund or providing money for the prosecution of any claim which the tribe or band of Indians to which such Indian belongs, or of which he is a member, has or is represented to have for the recovery of any claim or money for the benefit of the said tribe or band, shall be guilty of an offence and liable upon summary conviction for each such offence to a penalty not exceeding two hundred dollars and not less than fifty dollars or to imprisonment for any term not exceeding two months.``

- Not until 1951 that attempts to pursue land claims were no longer prohibited by law.

Natural Resources Transfer Agreement

Section 1 of the *NRTA* states:

> 1. In order that the Province may be in the same position as the original Provinces of Confederation…the interest of the Crown in all Crown lands, mines, minerals (precious and base) and royalties derived therefrom within the Province…shall… belong to the Province, subject to any trusts existing in respect thereof… [emphasis added]

In *R.* v. *Horseman [1990] 1 SCR 901* at p. 934, Justice Cory questioned the power of the federal government to enact the *NRTA:*

> … although it might well be politically and morally unacceptable in today's climate to take such a step as that set out in the 1930 Agreement without consultation with and concurrence of the native people affected, nonetheless the power of the federal government to unilaterally make such a modification is unquestioned and has not been challenged in this case. [emphasis added]

Treaty Four Issues

Did Canada discharge its Constitutional Duty in 1874?

- 1870 Imperial Order in Council established a duty and set a standard.
- 1874 Imperial Order in Council established Treaty Commission – were instructions contained within consistent with *Royal Proclamation 1763* and 1870 Imperial Order?
- Can Treaty Four be interpreted consistent with First Nations' understanding they were sharing surface rights to "depth of the plow" and, as land was "taken up" for other purposes, Treaty Four First Nations were to be compensated pursuant to 1870 Imperial Order in Council?
- If Treaty Four "surrender clause" has effect of extinguishing Treaty Four First Nations' "claims" within meaning of 1870 Imperial Order, did Canada meet its constitutional duty to make adequate provision for protection of Indian tribes whose interests and well-being are involved in the transfer? If not, did it breach its constitutional and/or fiduciary duty pursuant to *Royal Proclamation 1763* and 1870 Imperial Order in Council?

Treaty Four Issues – Continued

Did Canada discharge its constitutional duty in 1930?

- Was the *1930 National Resource Transfer Agreement (NRTA)* consistent with the 1870 Imperial Order in Council?
- Did the Federal Government breach its fiduciary obligations to Indians when they unilaterally passed the *NRTA*?
- Did the *NRTA* affect the rights (aboriginal rights, aboriginal title, constitutional rights or treaty rights) of the Treaty Four First Nations?
- If so, did Canada consult with the Treaty Four First Nations and obtain their consent? If there was consultation, was it adequate?
- Can the *NRTA* be interpreted consistent with the 1870 Imperial Order and Treaty Four First Nations' understanding they were sharing surface rights to the "depth of the plow" and as land was "taken up" for other purposes (i.e. subsurface rights), Treaty Four First Nations were to be compensated pursuant to 1870 Imperial Order?

THANK YOU

Chief Perry Bellegarde

Federation of Saskatchewan Indian Nations