

Alberta Sovereignty Within a United Canada Act: Overview and Implications

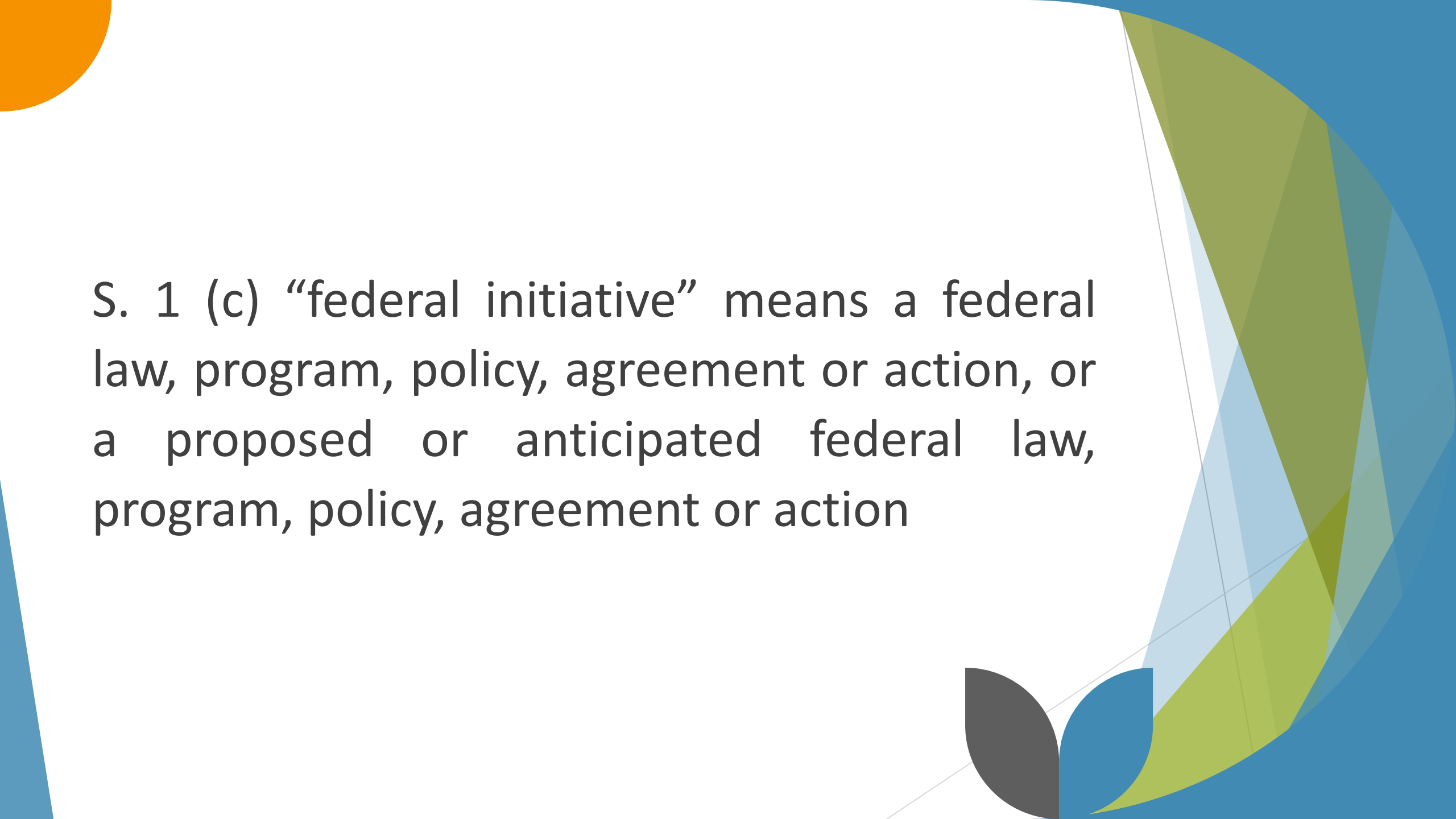
Canadian Institute of Resources Law

Saturday Morning at the Law School

March 18, 2023

Preamble

WHEREAS actions taken by the Parliament of Canada and the Government of Canada have infringed on these sovereign provincial rights and powers with increasing frequency and have unfairly prejudiced Albertans...



S. 1 (c) “federal initiative” means a federal law, program, policy, agreement or action, or a proposed or anticipated federal law, program, policy, agreement or action

RESOLUTIONS

3 If, on a motion of a member of Executive Council, the Legislative Assembly approves a **resolution** that

- (a) states that the resolution is made in accordance with this Act,
- (b) states that, **in the opinion of the Legislative Assembly**, a federal initiative
 - (i) **is unconstitutional** on the basis that it
 - (A) **intrudes into an area of provincial legislative jurisdiction** under the Constitution of Canada, or
 - (B) **violates the rights and freedoms of one or more Albertans under the *Canadian Charter***, or
 - (ii) **causes or is anticipated to cause harm to Albertans** on the basis that it
 - (A) affects or interferes with an area of provincial legislative jurisdiction under the Constitution... or
 - (B) interferes with the rights and freedoms of one or more Albertans under the *Canadian Charter of Rights and Freedoms*

RESOLUTIONS continued..

(c) sets out the nature of the harm, if the resolution states that, in the opinion of the Legislative Assembly, a federal initiative causes or is anticipated to cause harm to Albertans, and

(d) identifies a measure or measures that the Lieutenant Governor in Council should consider taking in respect of the federal initiative, the Lieutenant Governor in Council may take the actions described in section 4.

Powers of the Lieutenant Governor in Council (LGIC)

4(1) If the Legislative Assembly approves a resolution described in section 3 the LGIC, **to the extent that it is necessary or advisable in order to carry out a measure that is identified in the resolution, may, by order,**

- (a) **if the LGIC is satisfied that doing so is in the public interest,** direct a Minister responsible for an enactment as designated under section 16 of the *Government Organization Act* to, by order,
 - (i) **suspend or modify the application or operation** of all or part of a regulation authorized by that enactment, subject to the terms and conditions that the LGIC may prescribe, or
 - (ii) **specify or set out provisions that apply in addition to, or instead of,** any provision in a regulation authorized by that enactment, subject to the approval of the LGIC,
- (b) **direct a Minister** to exercise a power, duty or function of the Minister,

Powers of the LGIC...

(c) **issue directives to a provincial entity** and its members, officers and agents, and the Crown and its Ministers and agents, in respect of the federal initiative.

(2) A directive issued in accordance with subsection (1)(c) may be general or particular in its application.

(3) Where there is a conflict or inconsistency between

(a) an order made or an order that is directed to be made under subsection (1), and

(b) a provision of a regulation to which the order relates, **the order prevails to the extent of the conflict or inconsistency**

Constitutional Issues

- Separation of Powers
- Federal-Provincial Division of Legislative Powers
 - *Constitution Act 1867*, (think provincial “property and civil rights” jurisdiction)
 - Judicial review on “patent unreasonableness” rather than legal “correctness” standard
- “Henry VIII” Powers and the Rule of Law

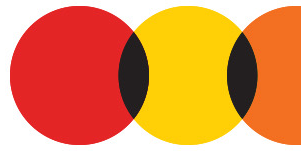
Thank you!

The Alberta Sovereignty Within a United Canada Act

Robert Hamilton
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Outline



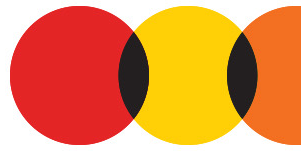
1. Indigenous Opposition
2. Immediate impacts: treaty infringement
3. Immediate impacts: the duty to consult and accommodate
4. Prospective impacts: treaty infringement
5. Prospective impacts: duty to consult and accommodate
6. Legal vs political obligations

Indigenous Opposition



“We take offence to Danielle Smith's forthcoming sovereignty act and outright reject it.” Arthur Noskey, Grand Chief of Treaty 8.

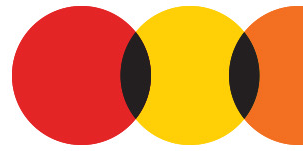
Indigenous Opposition



“Alberta has no jurisdiction over treaty lands. Although the bill says very little, what is clear is Bill 1 attempts to open the door to many dire possibilities ... If resource development is limited to protect the land and the province deems it to be harmful to Alberta, then those limitations could be removed. It is being said that Bill 1 is just part of a political game. That may be true, but we see it as a disguised attempt to disregard treaty and as a way to gain unlawful access to our land without restrictions.”

- Chief Darcy Dixon

Immediate Impact of the Act

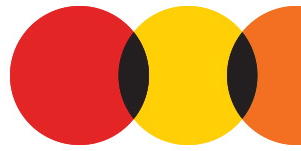


Interpretation

2 Nothing in this Act is to be construed as

- (a) authorizing any order that would be contrary to the Constitution of Canada,
- (b) authorizing any directive to a person, other than a provincial entity, that would compel the person to act contrary to or otherwise in violation of any federal law, or
- (c) abrogating or derogating from any existing aboriginal and treaty rights of the aboriginal peoples of Canada that are recognized and affirmed by section 35 of the *Constitution Act, 1982*.

Immediate Impact of the Act - Infringement



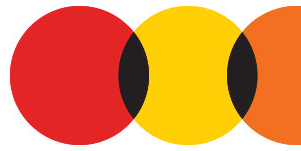
“Provincial laws of general application ... should apply unless they are unreasonable, impose a hardship or deny the title holders their preferred means of exercising their rights, and such restrictions cannot be justified pursuant to the justification framework”

- *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at para 151

“The doctrine of interjurisdictional immunity does not preclude the Province from justifiably infringing treaty rights”

- *Grassy Narrows First Nation v Ontario (Natural Resources)*, 2014 SCC 48 at para 53.

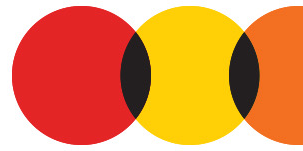
Immediate Impact of the Act - Infringement



“the impugned provisions should be considered in accordance with the principles set out in *R v Sparrow*, to determine whether they constitute a *prima facie* infringement of the Treaty rights as modified, and if so, whether the infringement can be justified.”

- *R v Badger*, [1996] 1 SCR 771 at para 37.

Immediate Impact of the Act - Infringement



Justification of infringement

First step: If the aboriginal right has not been extinguished, can the claimant show a *prima facie* infringement? (onus on claimant)

1. Is the limitation unreasonable?
2. Does it pose undue hardship?
3. Does the regulation deny rights holders the preferred means of exercising their right?

Second step: If a *prima facie* infringement is shown, then can it be justified? (onus on Crown)

1. Is there a valid objective on the part of the Crown?
2. Is the government employing means which are consistent with their fiduciary duty to the aboriginal nation at issue?

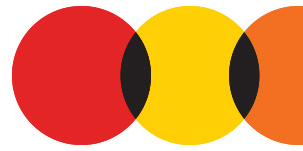
Was the infringement as minimal as possible?

Were their claims given priority over other groups?

Was the effected aboriginal group consulted?

If there was expropriation, was there fair compensation?

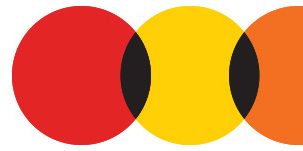
Immediate Impact of the Act – Duty to Consult



“The foundation of the duty in the Crown’s honour and the goal of reconciliation suggest that the duty arises when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it”

- *Haida Nation v British Columbia (Minister of Forests)*,
2004 SCC 73 at para 35.

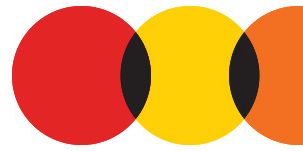
Immediate Impact of the Act – Duty to Consult



Mikisew Cree First Nation v Canada (Governor General in Council), 2018 SCC 40

“the law-making process — that is, the development, passage, and enactment of legislation — does not trigger the duty to consult. The separation of powers and parliamentary sovereignty dictate that courts should forebear from intervening in the law-making process. Therefore, the duty to consult doctrine is ill-suited for legislative action” (para 32).

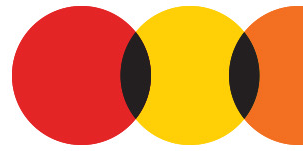
Immediate Impact of the Act – Duty to Consult



Mikisew Cree First Nation v Canada (Governor General in Council), 2018 SCC 40

“Applying the duty to consult doctrine during the law-making process would lead to significant judicial incursion into the workings of the legislature, even if such a duty were only enforced post-enactment. The duty to consult jurisprudence has developed a spectrum of consultation requirements that fit in the context of administrative decision-making processes. Directly transposing such executive requirements into the legislative context would be an inappropriate constraint on legislatures’ ability to control their own processes” (para 38).

Mikisew Cree First Nation v Canada (Governor General In Council), 2018 SCC 40



Conclusions:

9-0 that the Federal Court did not have jurisdiction to hear the judicial review

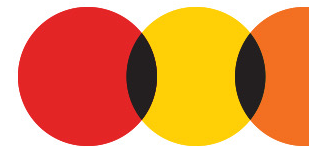
7-2 that there is no duty to consult in the legislative process

5-4 that the honour of the Crown applies to parliamentary activities

9-0 that prior consultation would be a factor in assessing the justifiability of any legislative infringement of s.35 rights.

**Note: because of the first conclusion, the latter three were all technically given in obiter*

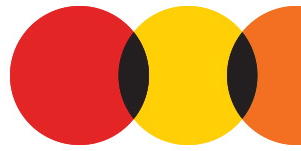
The Honour of the Crown and other duties?



“...it is worth noting that the duty to consult is not the only means to give effect to the honour of the Crown when Aboriginal or treaty rights may be adversely affected by legislation. Other doctrines may be developed to ensure the consistent protection of s.35 rights and to give full effect to the honour of the Crown through review of enacted legislation.”

- *Mikisew Cree First Nation v Canada (Governor General in Council)*,
2018 SCC 40 at para 45.

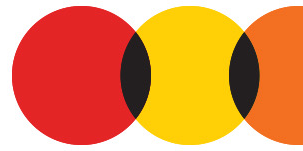
Immediate Impact of the Act – s.88?



General provincial laws applicable to Indians

88 Subject to the terms of any treaty and any other Act of Parliament, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that those laws are inconsistent with this Act or the *First Nations Fiscal Management Act*, or with any order, rule, regulation or law of a band made under those Acts, and except to the extent that those provincial laws make provision for any matter for which provision is made by or under those Acts.

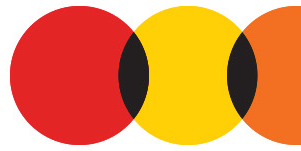
Prospective Impacts - Infringement



“Treaty 8 guarantees the Indigenous signatories and adherents the right to continue a way of life based on hunting, fishing and trapping, and promises that this way of life will not be forcibly interfered with. Inherent in the promise that there will be no forced interference with this way of life is that the Crown will not significantly affect or destroy the basic elements or features needed for that way of life to continue.”

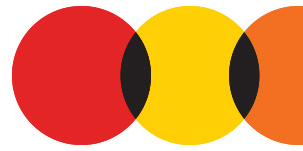
- *Yahey v British Columbia*, 2021 BCSC 1287

Prospective Impacts - Infringement



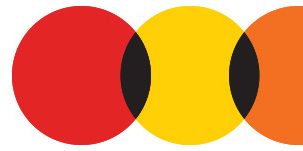
An infringement occurs “where the Crown has taken up land in bad faith or has taken up so much land that no meaningful right to hunt remains” (*Mikisew* at para 48).

Prospective Impacts - Infringement



The effect of the taking up clause “cannot be that the Crown’s right to take up lands can eclipse Blueberry’s meaningful rights to hunt, fish, and trap as part of its way of life” (at para 532). The clause does not provide “an infinite power to take up lands” (*Yahey* at para 534). Further, “[i]t is illogical and, ultimately, dishonourable to conclude that the Treaty is only infringed if the right to hunt, fish, and trap in a meaningful way no longer exists” (*Yahey* at para 514).

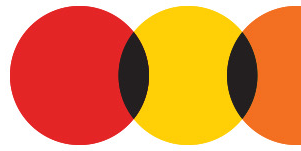
Prospective Impacts – The DTCA



“This description of the various and distinct aspects of Crown authority (and also, it follows, Crown conduct) affirms that the exercise of Crown authority in enacting legislation (“assenting, refusing assent to, or reserving legislative or parliamentary bills”) is legislative. It is not an instance of “Crown conduct” — that is, executive conduct — which can trigger the duty to consult.”

- *Mikisew*, at para 133 (Brown J., dissenting on another point)

Legal vs Political Obligations



"I've been on the phone, of course, with First Nations leaders across the province and a lot of the concerns are around just calling it the sovereignty act. Like, what does that mean? ... In fairness, there's not a lot of clarification around what that means. Should we have done more consultation? Absolutely."

- Rick Wilson *Indigenous Relations Minister*