Where Indigenous Issues meet Legal Regulation – Ontario, Canada

Primary Author: Shannon McDunnough

Law Society of Ontario | Barreau de l'Ontario

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Indigenous Peoples in Canada

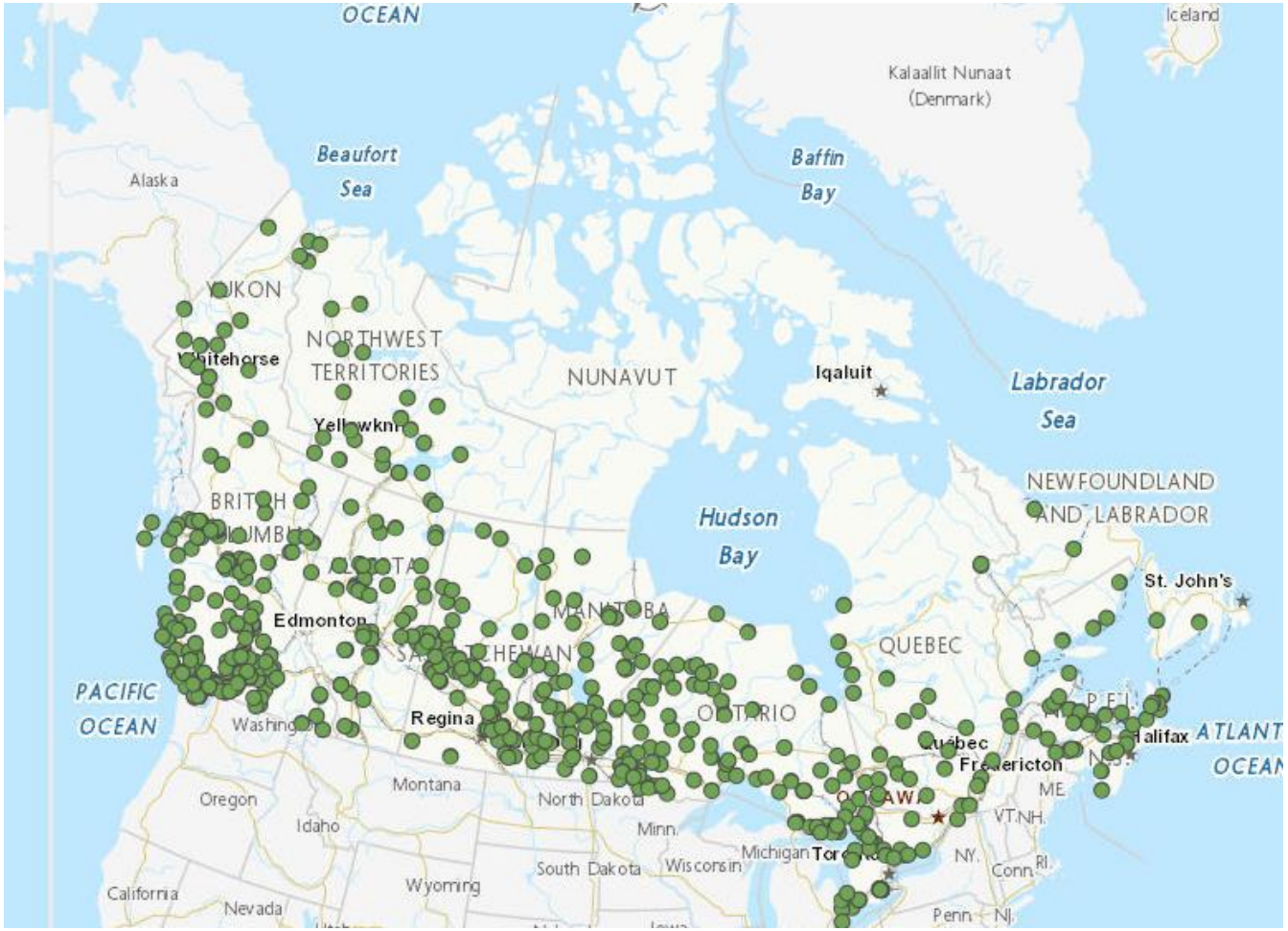
- "Indigenous" is used as an umbrella term for the original inhabitants of the land now called Canada. The term encompasses 3 different Indigenous Peoples within Canada:

  - First Nations
    - Within Canada, there are over 630 First Nations communities representing over 50 Nations and over 50 separate languages. Each community and Nation has their own distinctive history and culture and are by no means homogenous.
    - First Nations individuals are Indigenous persons who are not Métis or Inuit, and they are status or non-status. (Status refers to individuals on the Indian Register, a central government registry. The *Indian Act*, a federal law used to manage and control various aspects of First Nations identity , resources, and Nationhood, sets out who is eligible to be registered on the Indian Register.

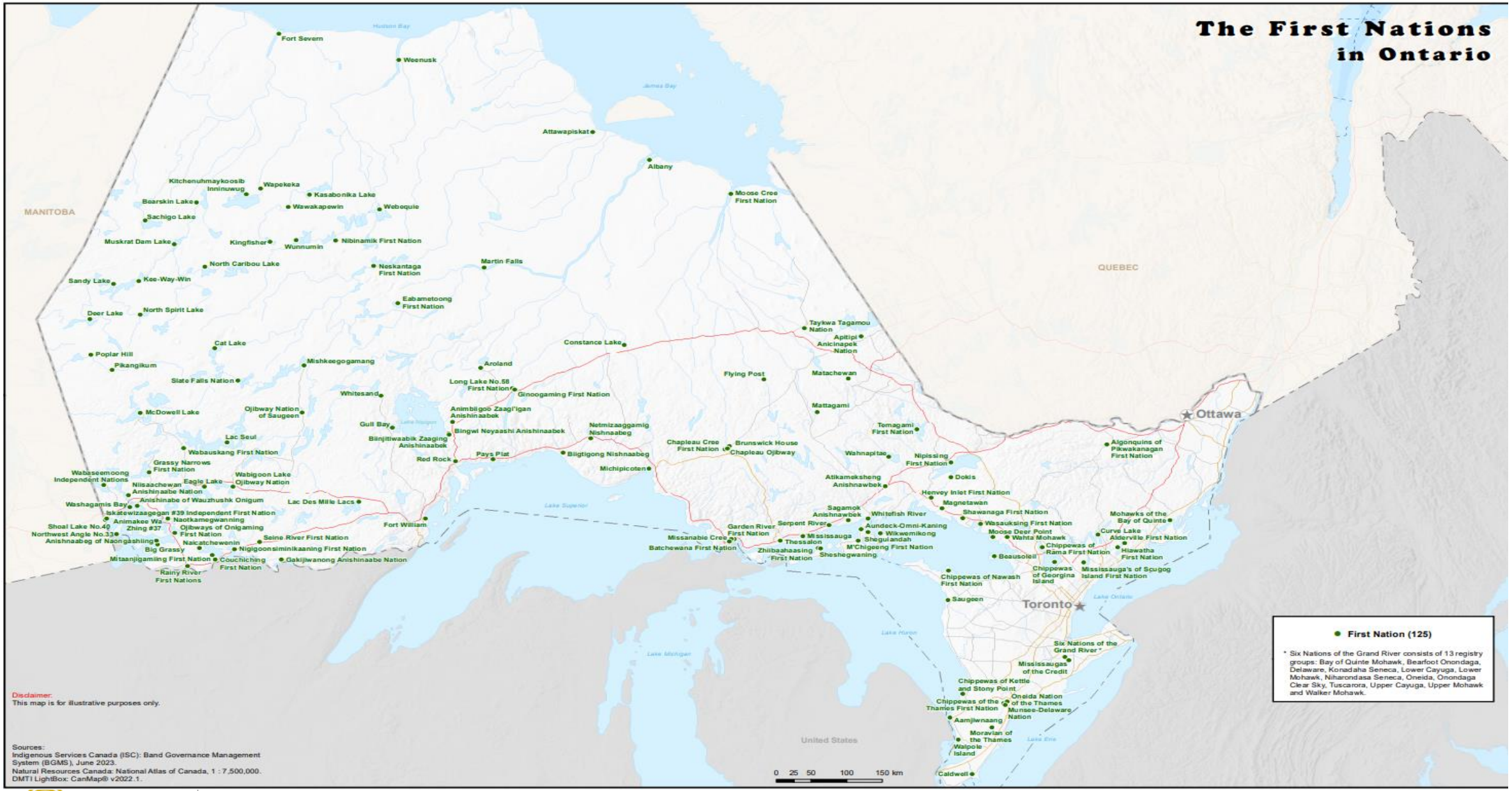
  - Inuit
    - Inuit are the original inhabitants of the Artic territory and are a distinct Indigenous People.
    - The majority of the Inuit population live in 51 communities spread across four self-governing regions located in the Northwest Territories, Nunavut, Northern Quebec, and Labrador. These regions are collectively known as Inuit Nunangat.

  - Métis
    - Citizens of the Métis Nation share mixed European and First Nation ancestry, but they also share a common culture, ancestral language, history, and political traditions. Not just dual heritage, but possessing a new cultural identity sprung from dual origins.
    - "Métis" is defined by the Métis National Council as:
      - A person who self-identifies as Métis;
      - Is distinct from other Aboriginal Peoples;
      - Is of historic Métis Nation ancestry; and
      - Who is accepted by the Métis Nation

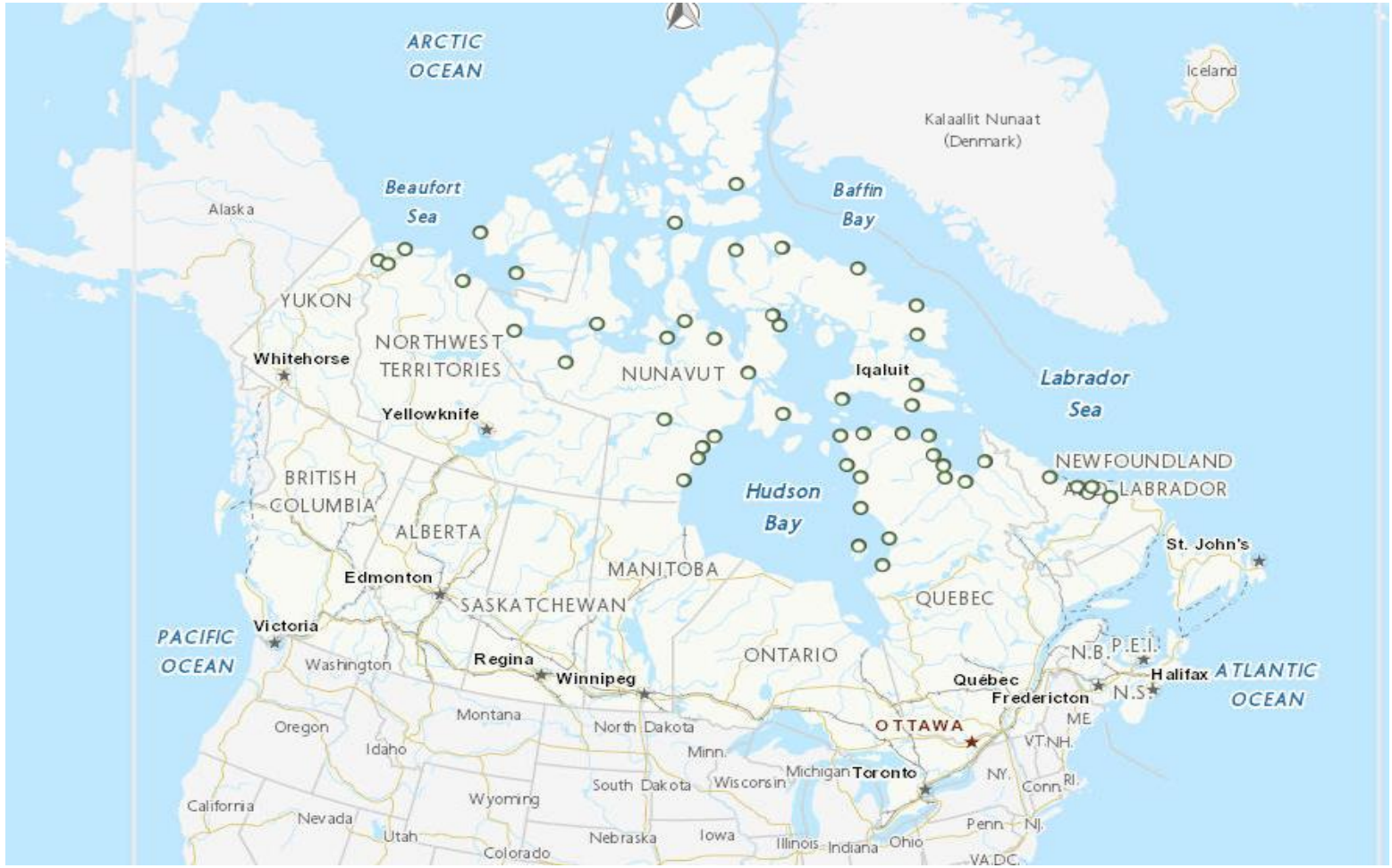
First Nations in Canada



First Nation Profiles Interactive Map (sac-isc.gc.ca)


The First Nations in Ontario
MANITOBA
QUEBEC
United States
Ottawa
Toronto
Fort Severn
Weenusk
Attawapiskat
Albany
Kitchenuhmaykoosib Inninuwug
Wapekeka
Kasabonika Lake
Wawakapewin
Webequie
Bearskin Lake
Sachigo Lake
Muskrat Dam Lake
Kingfisher
Wunnumin
Nibinamik First Nation
North Caribou Lake
Neskantaga First Nation
Martin Falls
Sandy Lake
Kee-Way-Win
Eabametoong First Nation
Deer Lake
North Spirit Lake
Cat Lake
Poplar Hill
Pikangikum
Mishkeegogamang
Slate Falls Nation
Aroland
Constance Lake
Long Lake No.58 First Nation
Ginoogaming First Nation
Whitesand
Flying Post
Matachewan
Mattagami
Taykwa Tagamou Nation
Apitipi Anicinapek Nation
McDowell Lake
Ojibway Nation of Saugeen
Animbiigoo Zaagi'igan Anishinaabek
Gull Bay
Bingwi Neyaashi Anishinaabek
Netmizaaggamig Nishnaabeg
Bilinjitiwaabik Zaaging Anishinaabek
Lac Seul
Wabauskang First Nation
Pays Plat
Biigtigong Nishnaabeg
Red Rock
Chapleau Cree First Nation
Brunswick House
Chapleau Ojibway
Wahnapitae
Nipissing First Nation
Temagami First Nation
Algonquins of Pikwakanagan First Nation
Michipicoten
Grassy Narrows First Nation
Wabaseemoong Independent Nations
Eagle Lake
Wabigoon Lake Ojibway Nation
Niisaachewan Anishinaabe Nation
Atikameksheng Anishnawbek
Dokis
Henvey Inlet First Nation
Magnetawan
Washagamis Bay
Anishinabe of Wauzhushk Onigum
Lac Des Mille Lacs
Sagamok Anishnawbek
Whitefish River
Shawanaga First Nation
Iskatewizaagegan #39 Independent First Nation
Animakee Wa Zhing #37
Naotkamegwanning
Fort William
Garden River First Nation
Serpent River
Aundeck-Omni-Kaning
Wasauksing First Nation
Mohawks of the Bay of Quinte
Shoal Lake No.40
Northwest Angle No.33
Anishnaabeg of Naongashiing
Ojibways of Onigaming First Nation
Missanabie Cree
Mississauga
Wikwemikong
Shegulandah
Moose Deer Point
Wahta Mohawk
Curve Lake
Alderville First Nation
Seine River First Nation
Naicatchewenin
Batchewana First Nation
Thessalon
M'Chigeeng First Nation
Chippewas of Rama First Nation
Hiawatha First Nation
Big Grassy
Nigigoonsiminikaaning First Nation
Zhibaahaasing First Nation
Sheshegwaning
Beausoleil
Mitaanjigamiing First Nation
Couchiching First Nation
Gakiijwanong Anishinaabe Nation
Chippewas of Georgina Island
Mississauga's of Scugog Island First Nation
Rainy River First Nations
Chippewas of Nawash First Nation
Saugeen
Six Nations of the Grand River *
Mississaugas of the Credit
Chippewas of Kettle and Stony Point
Oneida Nation of the Thames
Chippewas of the Thames First Nation
Munsee-Delaware Nation
Aamjiwnaang
Moravian of the Thames
Walpole Island
Caldwell
Lake Superior
Lake Michigan
Lake Huron
Lake Erie
Lake Ontario
First Nation (125)
* Six Nations of the Grand River consists of 13 registry groups: Bay of Quinte Mohawk, Bearfoot Onondaga, Delaware, Konadaha Seneca, Lower Cayuga, Lower Mohawk, Niharondasa Seneca, Oneida, Onondaga Clear Sky, Tuscarora, Upper Cayuga, Upper Mohawk and Walker Mohawk.
Disclaimer:
This map is for illustrative purposes only.
Sources:
Indigenous Services Canada (ISC): Band Governance Management System (BGMS), June 2023.
Natural Resources Canada: National Atlas of Canada, 1 : 7,500,000.
DMTI LightBox: CanMap® v2022.1.
0 25 50 100 150 km

Inuit Nunangat

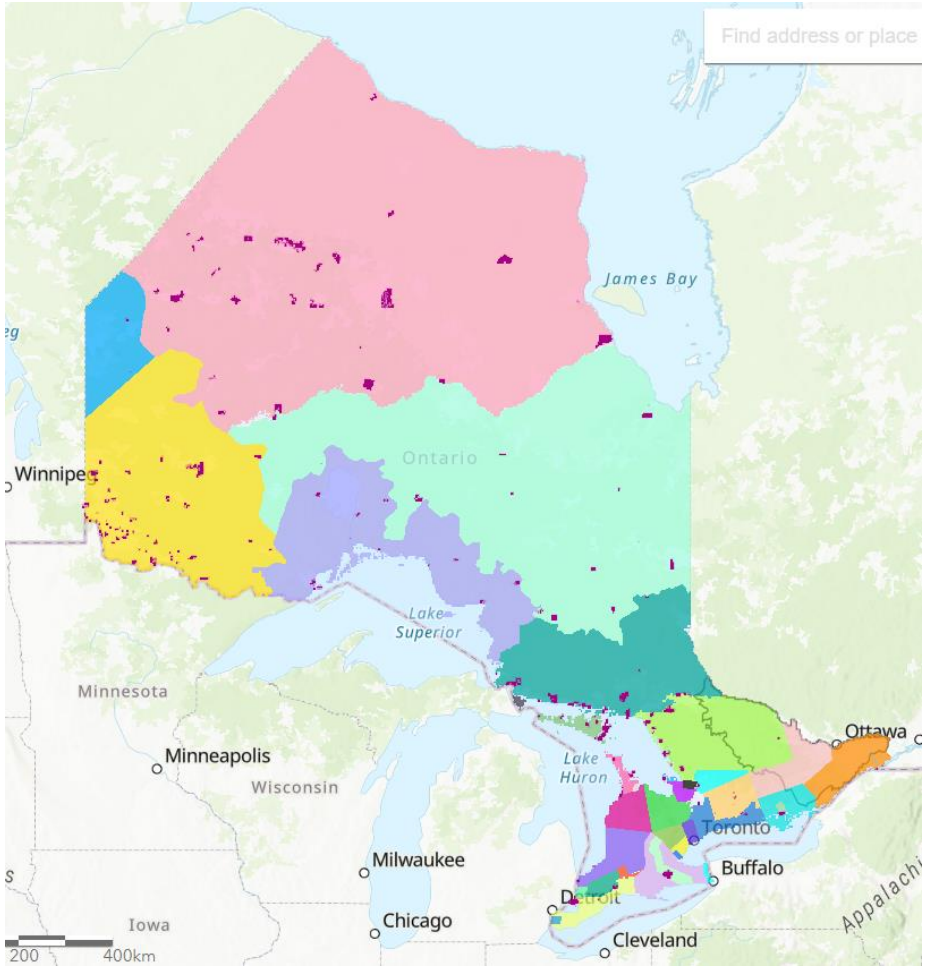


Open Maps Data Viewer (canada.ca)

Métis Nation Territory

Native-Land.ca | Our home on native land

Treaties in Ontario Map



Map of Ontario treaties and reserves | ontario.ca

Some Colonial and Genocidal Policies, Laws, and Impacts of Canada

- "Sixties Scoop"
  - Refers to the mass removal of Indigenous children from their families and placed within the child welfare system that accelerated in the 1960s (although started prior to). Removals were mainly done without the consent of the children's families or communities.
  - Most of these children were placed into non-Indigenous homes.

- Continued over-representation in the child welfare system – "Millenium Scoop"
  - Even after the "Sixties Scoop", Indigenous children are still apprehended from their families in hugely disproportionate numbers compared to the non-Indigenous population.

- Missing and Murdered Indigenous Women, Girls and Two-Spirit People+ ("MMIWG2S+")
  - MMIWG2S+ refers to the crisis of the high and disproportionate rates of violence being perpetrated against Indigenous women, girls and two-spirited people+.
  - The number of Indigenous women missing and murdered between 1980 and 2012 have been estimated as low as 1200 (by the RCMP) to as high as over 4000 (by Indigenous women's groups).
  - Indigenous women and girls over the age of 15 are 3.5 times more likely than non-Indigenous women and girls to be victims of violence and the homicide rate for Indigenous women was almost 4 times higher between 2001 to 2014.
  - A national inquiry into the issue of MMIWG was launched in 2015 and the final report came out in June 2019
  - The final report determined that the high level of violence directed at Indigenous women and girls is "caused by state actions and inactions rooted in colonialism and colonial ideologies."

- Over-incarceration in the criminal justice system
    - The Indigenous population consists of only about 5% of the population
    - Today more than 30% of inmates in Canadian federal prisons are Indigenous. The Indigenous inmate population has grown by nearly 41% in the decade between 2013 and 2023, and the non-Indigenous inmate population has decreased by 16.5% in this same time period.
    - The figures are even worse for Indigenous women: Currently Indigenous women make up half of the female prison population.
    - Indigenous inmates are more likely to be sent to maximum–security facilities, more likely to be placed in solitary confinement, and are more likely to be involved in incidents involving “use of force.”

(Statistics are from the Office of the Correctional Investigator)

- The residential school system
    - A school system set up by the Canadian Government and Christian churches that forcibly removed Indigenous children from their homes and communities for the purpose of assimilating them to Settler-Colonial culture. Approx. 150,000 Indigenous children were forced to attend residential schools.
    - Overall goal was “to kill the Indian in the child.” Emotional, physical, and sexual abuse was common – 90%-100% of children.
    - The odds of dying were 1 in 2 in the early years of residential schools: influenza and tuberculosis were the primary killers, fueled by neglect, lack of food, overcrowding, and poor building construction that assisted disease contagion. Overall, the odds of dying in a residential school: 1 in 25. Odds of dying for Canadian soldiers in WWII: 1 in 26.
    - Caused and/or contributed to devastating and far-reaching consequences which continue today such as: poor educational training; loss of language and culture; dislocation from community; family disruption; sense of worthlessness and high rates of suicide; intergenerational effects pass onto descendants even if they themselves did not attend residential school
    - The last residential school closed in 1996.

Gladue Policy handbook

- The Law Society has recognized the importance of licensing and retaining Indigenous licensees to assist in increasing the public's access to legal services provided by Indigenous licensees and has recently created a formal policy directing staff to apply the principles of two Supreme Court of Canada decisions, *R. v. Gladue* and *R. v. Ipeelee* when reviewing regulatory matters - something which was previously done but in an ad hoc manner.

- Background of *Gladue*: In the 1990s the Federal Government of Canada began to consider overhauling the sentencing provisions in the *Criminal Code*, and in 1996, the *Criminal Code* section on sentencing was revised to include sentencing guidelines

- The federal government recognized that Indigenous Peoples in Canada were over-represented in the criminal justice system and when the sentencing provisions of the Criminal Code were overhauled in 1996, these a new sentencing guideline Section 718.2(e) , which directed the following to sentencing judges:
  - "All available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders."

- *R. v. Gladue* ultimately was the first SCC case about what s. 718.2(e) actually means and how to apply this section when sentencing Indigenous offenders.

- In sentencing Indigenous offenders, the SCC in *Gladue* determined that courts must consider:

  (a) the unique systemic or background factors which may have played a part in bringing the particular Indigenous offender before the courts; and

  (b) the types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular Indigenous heritage or connection.

- *R. v. Ipeelee* reaffirmed and expanded upon the principles of R. v. Gladue. Collectively principles from both cases and other cases that follow are known as "Gladue principles"

Quick Overview of Gladue Principles

- The term “Gladue principles” refers to a sentencing framework that requires those in the criminal justice system to recognize that Indigenous people face direct and systemic discrimination within said system, and to be aware of the treatment of Indigenous people, both historically and presently, that has resulted in “lower educational attainment, lower incomes, higher employment, higher rates of substance abuse and suicide, and of course higher levels of incarceration for Aboriginal peoples”: *Ipeelee* (para. 60). Using a Gladue sentencing framework can assist in efforts to apply the law more fairly.
- One must take into account the unique systemic or background factors which may have played a part in bringing the Indigenous offender before the courts. A direct causal connection is not needed.
  - This includes factors which courts should take judicial notice of.
- One must consider the types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of their particular Indigenous heritage or connection.
- Traditional Indigenous culture typically gives priority to restorative approaches to sentencing over deterrence.
- It is appropriate to attempt to craft the sentencing process and the sanctions imposed in accordance with the Indigenous perspective.
- Applies to all Indigenous persons and to all offences, no matter how serious the offence.

Gladue Expansion

- Since *Gladue* was released, the principles within have been applied in other contexts besides criminal sentencing:
  - Bail hearings; *R. v. Brant,* [2008] O.J. No. 5375; *R. v. Robinson*, 2009 ONCA 205
  - Extradition Proceedings: *United States of America v. Leonard,* 2012 ONCA 622 at paragraph 60
  - Civil Contempt Hearings: *Frontenac Ventures Corp. v. Ardoch Algonquin First Nation*, 2008 ONCA 534
  - Ontario Review Board Hearings: *R v. Sim*, 2005 CanLII 37586
  - POA matters
  - Law Society Tribunal Hearings: see LSUC v. Robinson, 2013 ONLSAP 18
    - In making its decision, the Tribunal in Robinson accepted that Gladue principles apply in the LSUC context, even though the purpose of regulatory proceedings is different from criminal proceedings and overincarceration is not an issue, noting:

      > . . . we recognize that the objective of maintaining the reputation of, and public confidence in, a self-regulating legal profession differentiates the role of hearing panels from sentencing judges. All that being said, hearing panels are concerned with the seriousness of misconduct or conduct unbecoming and circumstances that offer aggravation or mitigation. They are concerned with the culpability or moral blameworthiness of the licensee, and any facts that bear on those issues. They are concerned about the character of the licensee who appears before them. And they are concerned about crafting dispositions that meet the required objectives while promoting access to justice for everyone, including of course, the Aboriginal community. The latter is especially true for the Aboriginal community and others whose access to justice has been deeply problematic.
      >
      > None of the above concerns are incompatible with maintaining public confidence in the legal profession. Indeed, consideration of unique systemic and background factors, as they reflect upon the seriousness of a licensee's conduct, and his or her culpability or moral blameworthiness, is necessary to enhance respect for, and confidence in our profession and the self-regulation of all of its members. (paras. 72-73)

How to Apply *Gladue* in Regulatory matters- start with assessing the unique systemic and background factors

- When assessing the appropriate outcome of a complaint regarding an Indigenous licensee or the good character investigation of an Indigenous licensing candidate, attention must be given to the unique systemic and background factors that may have played a part in why the licensee or licensing applicant is in the regulatory process, or that may pertain to what is the appropriate outcome.
    - Licensees and licensing candidates are asked at the outset that if they are Indigenous to consider identifying themselves as such to staff. If they do so identify, they are then to be given opportunities to provide information on systemic and background factors applicable to them. When doing so, the licensee/licensing candidate is made aware that answering that answering any questions or providing any further information related to their Indigeneity is also completely voluntary.
- Staff working on these cases are to be knowledgeable of government/colonial policies/laws that have led to disproportionate rates of marginalization, socioeconomic disparity, and the undermining of collective and individual identity amongst Indigenous Peoples. Staff are also expected to do research into the history and present circumstances of the licensee's/licensing candidate's Nation/communities/background if not already known.
- Once it has been determined what unique systemic and background factors may apply, regulatory staff then assess the case through that lens and assess if alternative outcomes should apply.

Some of the unique systemic and background factors that staff may come across are:

- Loss of cultural identity, language, traditions;
- Governmental/colonial policies leading to community and cultural dislocation including, but not limited to, policies resulting in the loss/denial of status and/or band membership;
- Physical separation from community contributing to community and cultural dislocation, ex: a licensing applicant needed to move away from Nation to attend school or a licensee needs to live far from their Nation due to employment;
- Individual and/or intergenerational experiences of unemployment and/or low income;
- Family care obligations due to impact of governmental/colonial policies;
- Difficulty finding employment, mentors, articling positions, or other advancement opportunities;
- Individual, intergenerational, and/or community impacts of substance abuse;
- Suicide ideation or attempts;
- Experiences of violence and abuse;
- Experiences of discrimination and/or racism, both systemic and direct;
- Individual and/or intergenerational impacts of residential and day schools;
- Individual and/or intergenerational impacts of child apprehension and adoption, including cross-cultural adoption;
- Difficulty accessing and/or completing education;
- Systemic factors contributing to a criminal record or distrust of police/justice system; and
- Past and current alienation from the justice system.

Assess What Outcomes Should Apply

- Once the unique systemic and background factors that may exist have been assesses, what outcomes are appropriate in the circumstances needs to be assessed, keeping in mind those factors and the following questions/factors:

1. Does the nature of their practice assist Indigenous Nations/communities/individuals?

    - The Law Society Tribunal has recognized that Indigenous people are over-represented in the criminal justice system and that they face access to justice issues in all areas of the law. The Tribunal determined that Indigenous lawyers providing legal services to Indigenous clients is a benefits to the public and to the justice system.

    - A restorative/rehabilitative approach to the matter may be better to ensure that the benefit of an Indigenous licensee diligently serving Indigenous clients can continue. However, restorative/rehabilitative outcomes are not only available to Indigenous licensees who serve Indigenous clients – this is just one factor of many to consider

2. The importance of licensing and retaining Indigenous licensees

    - The Law Society, as policy, recognizes the importance of licensing and retaining Indigenous licensees in order to assist in increasing the public's access to legal services provided by Indigenous licensees. The Tribunal has also determined that "legal services regulation plays an important role in ensuring that the public has better access to legal service provided by Indigenous licensees."

3. What is the “public interest” in the matter, noting that Indigenous Peoples and their perspectives are also part of the “public interest”?

   - Indigenous cultures tytypically gives priority to restorative approaches over deterrence. However, it would be incorrect to assume that in every regulatory situation with an Indigenous licensee or licensing applicant, Indigenous Nations/communities/individuals would prefer the Law Society take a restorative approach.

4. What are rehabilitative or restorative regulatory outcomes that may reduce the risk of recurrence?

   - When determining risk, the unique systemic and background factors assessed earlier can assist. It needs to be determined that in light of the unique systemic and background factors regarding the individual, what is needed to actually manage and potentially reduce risk?

   - Some examples of rehabilitative/restorative outcomes, although the list is not exhaustive, are as follows:

     - A circle (talking, sharing, restorative, healing, etc…) instead of an ITA or regulatory meeting;
     - An undertaking to engage in mandatory educational activities;
     - An undertaking to attend counselling/engage with an Elder;
     - Working with a Mentor for a period of time (see LSO’s Coach and Advisory Network for example);
     - A referral to practice review; or,
     - Robust regulatory guidance with recommended educational program

5. If a matter goes to a conduct application and ends in a finding of misconduct, what penalty should be sought?
   - See *LSO v. McCullough,* 2022 ONLSTH 63 for example – After receiving a Gladue report, the Law Society agreed with the licensee that there were exceptional circumstances present to divert from a presumptive penalty of revocation for misappropriation, and that a suspension was an appropriate penalty.

Gladue Reports

- A Gladue report is a type of pre-sentencing report that is usually prepared for criminal courts. These reports include information about an Indigenous person's background and possible recommendations of what an appropriate sentence might be based on that individual's context. Although used primarily in criminal court, Gladue reports have been used in other contexts, including at the Law Society Tribunal.
- These reports can be very helpful in providing information regarding unique systemic and background factors, and appropriate outcomes, for regulatory employees to consider at all stages of the regulatory process

When Should a Glaudue Report be Requested

- The question of whether a Gladue report would be helpful will typically arise during the litigation stage of a conduct application or licensing hearing, however, Gladue reports can also be helpful at the investigation stage of a matter, particularly if there is a possibility for a unique outcome.
- Before a Gladue report can be commissioned, a few requirements have to be met:
    - The licensee/licensing candidate must be willing to admit some or all of the conduct in issue OR a finding of misconduct has been made by the Tribunal
    - The licensee/licensing candidate must be willing to participate in the Gladue report process
        - Gladue reports are extensive and detailed reports which can recount painful history and can involve very personal interviews with and feedback from the licensee/licensing candidate and their family, friends, and community. Many licensee/licensing candidates may not wish to participate because of this, and it should not be held against them if they decline to participate.
    - The matter must either be at the litigation stage or there must be at least a possibility that the matter could be transferred to litigation for a conduct application or Good Character hearing. If a matter is on its face likely to close with something less than a conduct application/Good Character hearing, it is likely that a Gladue report is not warranted.

Privacy and Gladue Reports

- Gladue reports may contain extremely sensitive information regarding the licensee/licensing applicant and their family members. Gladue reports have unfortunately been used in other contexts inappropriately to the individual's detriment. For example, in the criminal context, Gladue reports have been improperly used for assessing risk in correctional facilities, something the reports were never meant to be used for.
- It's important that Gladue reports are not disseminated widely and only used for the purpose they are intended for. During a conduct/Good Character proceeding, if a Gladue report is tendered as evidence, litigators are to request a non-public order of the report. Even when a non-public order is granted, litigators are to anonymize third party names and identifying information to limit unnecessary dissemination of third-party information - even to the hearing panel.
- With a non-public order in place on the Gladue report, it's important to let the hearing panel know that the non-public order is being requested for just the report itself and not necessarily all the information contained within the report. The hearing panel needs to be able to provide public reasons explaining why they made their decision and that will invariably mean they will need to refer to content within the report in order to provide fulsome reasons. The non-public order is just intended to prevent public access to the report itself.