



LITIGATION YEAR IN REVIEW 2016

Information contained in this publication or product may be reproduced, in part or in whole, and by any means, for personal or public non-commercial purposes, without charge or further permission, unless otherwise specified.

You are asked to:

exercise due diligence in ensuring the accuracy of the materials reproduced;

indicate both the complete title of the materials reproduced, as well as the author organization; and

indicate that the reproduction is a copy of an official work that is published by the Government of Canada and that the reproduction has not been produced in affiliation with or with the endorsement of the Government of Canada.

Commercial reproduction and distribution is prohibited except with written permission from the Department of Justice Canada. For more information, please contact the Department of Justice Canada at: www.justice.gc.ca.

© Her Majesty the Queen in Right of Canada,
represented by the Minister of Justice and Attorney General of Canada, 2017

ISSN 2371-8250
Cat. No. J1-19E-PDF

FOREWORD BY THE ATTORNEY GENERAL OF CANADA



As Minister of Justice and Attorney General of Canada, I serve a dual role. My role as Minister of Justice, including my responsibility for legislation and policy that falls within the Justice portfolio, tends to be more visible to Canadians. In my role as Attorney General of Canada, one of my main responsibilities is the oversight of litigation involving the Government of Canada.

In my mandate letter, I was tasked by the Prime Minister to review the Government of Canada's litigation strategy. I was mandated to make decisions to end appeals or positions inconsistent with the Government's commitments, the *Charter of Rights and Freedoms*, or Canadian values. This has been a major focus of my work as Attorney General.

In August 2016, the Prime Minister announced the creation of a Cabinet Committee on Litigation Management. This Committee has enabled Canada's litigation strategy to be better informed by a whole-of-government approach. My discussions with colleagues have assisted in our efforts to obtain a contextual understanding of how departments and stakeholders – as well as ordinary Canadians – would be affected by litigation outcomes. Consideration of the legal and public policy implications beyond the particular case before the court is always at the forefront of my legal analysis as Attorney General.

This Litigation Year in Review 2016 is intended to provide Canadians with some highlights of the progress we made this past year in several important areas of litigation. In reviewing and rethinking the Government's litigation strategy over the course of 2016, I focused on three main themes: respecting the *Charter of Rights and Freedoms*, recognizing the rights of Indigenous peoples, and making decisions consistent with Canadian values.

We have made great strides over the past year as a Government, and I would like to thank the Prime Minister for putting his trust in me to fulfill the duties of the Attorney General of Canada. Many of the important litigation positions highlighted in this year's litigation review were taken on the recommendation and instruction of the minister with policy responsibility for the matter before the courts. For all of their efforts in promoting a principled litigation strategy, I thank my ministerial colleagues.

As we celebrate the 35th anniversary of the *Charter of Rights and Freedoms* in 2017, I look forward to continued progress and success.

The Honourable Jody Wilson-Raybould, P.C., Q.C., M.P.
Minister of Justice and Attorney General of Canada

05 | Introduction—5

06 | Respecting the *Charter of Rights and Freedoms*—6

Citizenship, immigration and refugee litigation—6

Criminal litigation—7

Workers' rights litigation—7

08 | Recognizing the Rights of Indigenous Peoples—8

Respectful litigation—8

Targeted court interventions—10

Reconciliation efforts—11

13 | Making Decisions Consistent with Canadian Values—13

Discontinuance of litigation—13

Settlement—14

INTRODUCTION

The Attorney General is responsible for advancing the public interest through her oversight and conduct of litigation involving the federal government, as well as through the constitutional and legal advice she provides to the Government.

In her mandate letter, the Attorney General was tasked by the Prime Minister to review the Government's litigation strategy, including making early decisions to end appeals or positions that are not consistent with the Government's commitments, the *Charter of Rights and Freedoms* or Canadian values.

In 2016, to fulfil this mandate commitment, the Attorney General carried out her litigation responsibilities with a vision to **Respecting the *Charter of Rights and Freedoms*, Recognizing the Rights of Indigenous Peoples, and Making Decisions Consistent with Canadian Values**. The important litigation positions highlighted below were taken in collaboration with the Minister with policy responsibility for the matter before the courts.





RESPECTING THE CHARTER OF RIGHTS AND FREEDOMS

The Attorney General is responsible for upholding and ensuring compliance with the *Charter of Rights and Freedoms*, which forms part of Canada's constitution. In several important cases, the Attorney General resolved or discontinued Charter litigation in order to recognize and safeguard the rights and freedoms of Canadians. In other cases, she successfully obtained an adjournment in order to allow the Government time to take legislative action.

The following examples highlight progress made in 2016 in three prominent areas: Citizenship, immigration and refugee litigation; criminal litigation; and workers' rights litigation.

Citizenship, immigration and refugee litigation

In *Canadian Doctors for Refugee Care et al v Attorney General of Canada*, the Federal Court ruled that the 2012 cuts to the Interim Federal Health Program – which reduced, and in many cases eliminated, the level of health care coverage available to refugees – were unconstitutional. The court characterized the cuts as “cruel and unusual.”

- In December 2015, Canada discontinued its appeal of this decision. By April 2016, the Government had restored refugee health care coverage to pre-2012 levels.

In *The British Columbia Civil Liberties Association et al v Attorney General of Canada*, the applicants challenged the provisions of the 2014 *Strengthening the Canadian Citizenship Act* that allow for the revocation of Canadian citizenship on various grounds relating to national security concerns.

- In February 2016, the parties agreed to adjourn the litigation indefinitely after the Government introduced legislation to amend the challenged provisions in a Charter-compliant manner (Bill C-6).

In *Frank et al v Attorney General of Canada*, the applicants asked the Supreme Court to rule that the denial of voting rights to Canadian residents living abroad for more than five years breached their rights under the Charter.

- In November 2016, the Government introduced legislation to extend voting rights to more Canadians living abroad (Bill C-33). As a result, the Supreme Court agreed to adjourn the hearing until 2018, by which time the Government expects the new legislation to be enacted.

Criminal litigation

In several cases, including *R v Tinker* and *R v Eckstein*, courts have ruled that the 2013 *Increasing Offenders' Accountability for Victims Act* – which increased victim surcharges and made them mandatory – violated section 7 of the Charter.

- Canada withdrew its intervention before the Ontario Court of Appeal in May 2016. The Government introduced legislation in October 2016 that would give judges the discretion to waive the victim surcharge in cases of financial hardship (Bill C-28).

In *Attorney General of Canada et al v Way et al*, the Quebec Court of Appeal found that a 2012 amendment that removed the right to an oral hearing before the Parole Board of Canada was unconstitutional.

- In September 2016, Canada discontinued its appeal of this decision before the Supreme Court.

In *R v R.S.*, the Ontario Court of Appeal held that the provisions of the 2009 *Truth in Sentencing Act* were unconstitutional to the extent that they precluded the accused from obtaining enhanced credit for time served in custody.

- In April 2016, Canada withdrew its application for leave to appeal this decision to the Supreme Court.

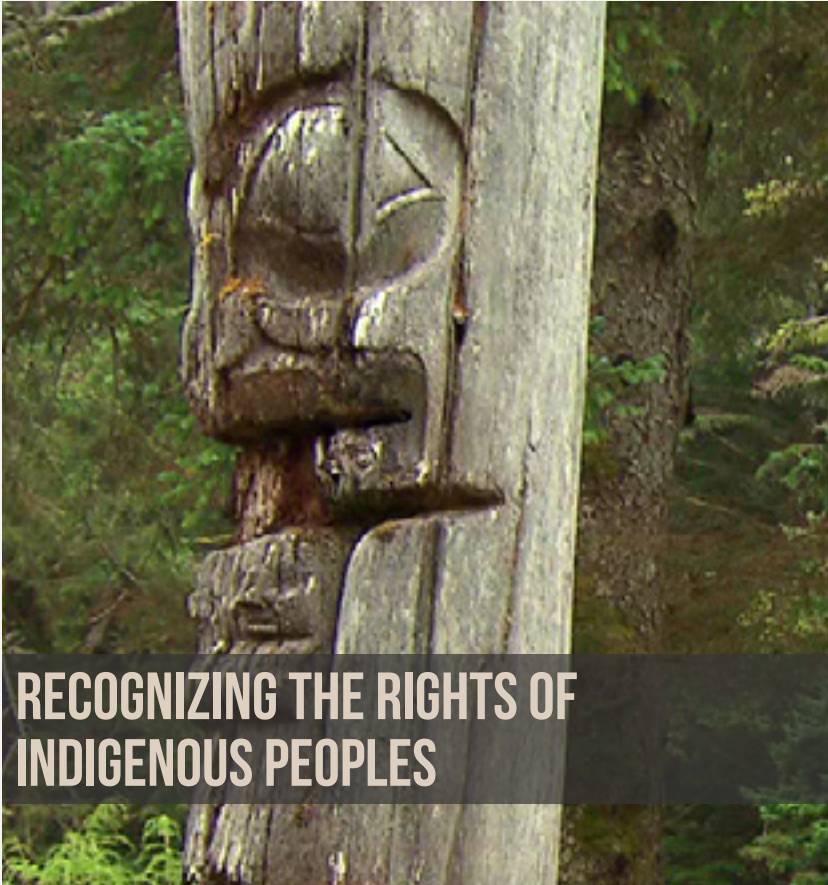
Workers' rights litigation

In *Alberta Union of Provincial Employees et al v Attorney General of Canada*, the 2012 amendments to the *Income Tax Act* – which required labour organizations to file an annual information return with the Canada Revenue Agency (Bill C-377) – were challenged on Charter and other constitutional grounds.

- In November 2015, the application before the Alberta Court of Queen's Bench was adjourned on consent, to allow time for the Government to introduce Charter-compliant legislation. In January 2016, the Government introduced legislation that removed this filing requirement (Bill C-4).

In *PIPSC et al v Attorney General of Canada*, the plaintiffs challenged the previous Government's 2015 changes to the civil servants' sick leave regime (Bill C-59) on the grounds that they interfered with the right to collective bargaining and the right to strike.

- In January 2016, the application before the Ontario Superior Court of Justice was adjourned on consent to allow time for the Government to undertake legislative reform. In February 2016, the Government introduced legislation to repeal the changes to the sick leave regime (Bill C-5).



RECOGNIZING THE RIGHTS OF INDIGENOUS PEOPLES

The Government is committed to a renewed nation-to-nation relationship with Indigenous peoples based on recognition of rights, respect, co-operation, and partnership. This commitment has led to a shift in the way that Canada litigates cases involving Aboriginal rights and title. Respectful litigation, targeted court interventions and reconciliation efforts are three ways the Government's mandate helped to shape the conduct of Indigenous litigation in 2016.

Respectful litigation

The Attorney General, in collaboration with her ministerial colleagues, has directed that litigation with Indigenous peoples be conducted respectfully, in light of the important relationship between the Crown and Indigenous peoples. One example of the change in approach is efforts to **make admissions** wherever possible, including both admissions of fact and admissions relevant to the establishment of Aboriginal rights and title. This results in a narrowing of the issues in dispute, and signals Canada's respect for and recognition of Aboriginal rights. Further, in several cases, Canada has made the decision **not to appeal or seek judicial review**, reflecting an acknowledgement of Canada's responsibility to redress past wrongs.

In *The Council of Haida Nation et al v Attorney General of Canada et al*, the Haida assert Aboriginal title to the lands of Haida Gwaii, and seek recognition of Aboriginal rights in areas that extend beyond Haida Gwaii.

- Canada made meaningful admissions in its pleadings relevant to the establishments of Haida title, including with respect to lands in the Gwaii Haanas National Park Reserve that are currently under Canada's custody and control. Canada also made admissions that the Haida have Aboriginal rights to fish in certain areas for food, social and ceremonial purposes; to harvest cedar for cultural and domestic purposes; and to engage in the incidental trade of dried halibut and clams. Canada highlighted the need to reconcile the public rights of navigation and fishing with the recognition of Aboriginal title.

Excerpt from Canada's pleadings in *Haida Nation* on the issue of Aboriginal rights

“

a. Canada admits that the Haida have an Aboriginal right to fish for food, social and ceremonial purposes in the waters near Haida Gwaii though the area where they possess that right to fish are to be determined;

b. Canada admits that the Haida have an Aboriginal right to harvest cedar for cultural and domestic purposes though the areas where they possess that right to harvest cedar are to be determined; and

c. Canada admits that the Haida engaged in incidental trade of dried halibut and dried clams with other Indigenous people at or shortly after the time of contact with Europeans, but Canada puts the plaintiffs to the proof of whether the trade of dried halibut and dried clams was integral to the distinctive pre-contact Aboriginal society of the Haida and whether such trade was beyond incidental levels. Canada says further that any trade beyond incidental levels would have conflicted with Haida laws.

”

Excerpt from Canada's pleadings in *Haida Nation* on the issue of Aboriginal title

“

3. Canada admits that at the time of the assertion of sovereignty, the Haida exclusively occupied each of the parcels of land which were later set aside as reserves for the Old Massett Village Council and the Skidegate Band Council (the “Haida Reserves”). Canada further admits

4. Canada further admits that at the date of the assertion of sovereignty some or all of the land now known as Gwaii Haanas National Park Reserve of Canada as defined in schedule 2 of the *Canada National Parks Act*, S.C. 2000, c. 32 (“Gwaii Haanas National Park Reserve”) was exclusively occupied by the Haida. Canada further admits that the Haida continuously occupied or maintained a substantial connection to some or all of the lands within Gwaii Haanas

that the Haida have continuously occupied or maintained a substantial connection to the Haida Reserves since the date of the assertion of sovereignty. A list of the Haida Reserves is attached as Schedule “A” to the Claim.

National Park Reserve since the date of the assertion of Crown sovereignty. Canada puts the plaintiffs to the proof of which part(s) of Gwaii Haanas National Park Reserve were exclusively occupied by the Haida at the assertion of Crown sovereignty.

”

In its January 2016 ruling in *First Nations Child and Family Caring Society of Canada et al v Attorney General of Canada*, the Canadian Human Rights Tribunal found that Canada has discriminated against Indigenous children on reserves by not funding welfare services on First Nations reserves at the same level it funds these services elsewhere.

- Following this ruling, Canada did not seek judicial review. Canada instead took action to begin the process of remedying the historic discrimination.

In *Gitxaala Nation et al v Attorney General of Canada*, the Federal Court of Appeal heard eighteen separate challenges to the decisions that allowed the construction of the Northern Gateway Pipeline. The Federal Court of Appeal allowed some of the challenges, which necessitated reconsideration of the approvals.

- Following this decision, Canada announced that it would not seek leave to appeal to the Supreme Court. In December 2016, the Government announced that it would not approve the Northern Gateway Pipeline.

In *Ignace et al v Attorney General of Canada et al*, the Secwepemc Nation seeks to prevent a proposed open-pit copper and gold mine southwest of Kamloops on the basis of a declaration of Aboriginal title to the Stk'emlupsemc Te Secwepemc Territory in British Columbia (which includes the City of Kamloops).

- In furtherance of its commitment to reconciliation, Canada's defence does not plead extinguishment or abandonment, and pleads limitations, laches and acquiescence in a limited fashion. The claim underscores the merits of a government-wide approach to addressing the underlying causes of the claim.

To further the Government's commitment to a renewed nation-to-nation relationship, the Attorney General's respectful approach to Indigenous litigation and pleadings has been implemented on a national basis.

Targeted court interventions

On occasion, and where the public interest supports it, the Attorney General of Canada may intervene in a court case in order to provide a distinct legal or constitutional perspective that may not be addressed by the parties to the dispute. This role is most commonly exercised before the Supreme Court. In 2016, the Attorney General sought leave to intervene in two important Indigenous cases.

In *Ktunaxa Nation Council et al v Minister of Forests, Lands and Natural Resource Operations (British Columbia), et al*, the Ktunaxa First Nation are challenging the approval of a ski resort on lands in British Columbia that they consider to be sacred and of paramount spiritual importance. The case raises the interplay between the rights of Indigenous peoples under section 35 of the Constitution and their religious and spiritual freedoms guaranteed under section 2(a) of the Charter.

- Canada's intervention encourages the Supreme Court to recognize that sections 2(a) and 35 are distinct yet equally important constitutional protections, which must be considered independently as informed by Indigenous perspectives. Canada further argues that freedom of religion is broad enough to protect diverse Indigenous spiritual beliefs, including those involving a connection to land.

Canada's positions in relation to the questions in issue are:



a) Protections for religious freedom under s. 2(a) and Aboriginal rights under s. 35 are distinct and each is separately relevant to assessing the Ktunaxa's claims.

c) Aboriginal rights with a spiritual or religious foundation are protected by s. 35.

b) A purposive and contextual interpretation of s. 2(a), which allows for protection against interference with religious beliefs and the vitality of religious communities, should be adopted so as to include Indigenous spiritual beliefs. Competing interests relevant to the statutory objectives are balanced in the proportionality analysis.

d) Sections 2(a) and 35 are distinct, but complementary, coherently working together to promote fundamental constitutional values.



Canada also sought leave to intervene in *First Nation of Nacho Nyak Dun, et al v Government of Yukon*, a Yukon case involving the development of land use plans in the Peel Watershed, on the traditional territory of the Nacho Nyak Dun, Tr'ondëk Hwëch'in and Vuntut Gwitchin First Nations.

- Canada will seek to assist the court by making submissions on the principles that should apply to the interpretation of the comprehensive land claim agreements between the Nacho Nyak Dun, Tr'ondëk Hwëch'in and Vuntut Gwitchin First Nations and the Governments of Canada and of the Yukon, without taking a position as to how the principles ought to be applied in the particular case.

Reconciliation efforts

The Attorney General recognizes that litigation is, by its nature, an adversarial process, and cannot be the primary forum for broad reconciliation and renewal of the Crown-Indigenous relationship. She has instructed her litigators to work closely with their departmental clients to explore avenues for reconciliation both within the litigation process and in out-of-court forums. As a result, Canada is now engaged in good-faith settlement negotiations in relation to some of its most complex and long-standing litigation with Indigenous peoples.

In parallel to the litigation in *The Governor General in Council et al (Canada) v Chief Steve Courtoreille*, Canada has engaged the Mikisew Cree in an out-of-court dialogue to stimulate federal thinking on potential ways to enhance the role of Indigenous peoples in federal decision-making and resource development.

Canada's pleadings in Indigenous litigation generally acknowledge the overriding objective of reconciliation with Indigenous peoples, signaling a new era in Canada-Indigenous relations.

Excerpt from Canada's pleadings in *Ignace and Gottfriedson v Attorney General of Canada et al*

“

2. The Attorney General must respond to this Claim in accordance with the rules of practice applicable to pleadings in a matter of this nature and consistent with her duties and functions in the conduct of litigation for or against the Crown in right of Canada. As set out in the ministerial mandate letters, the Government of Canada will pursue

reconciliation and is committed to a renewed nation-to-nation relationship with Indigenous Peoples based on recognition of rights, respect, co-operation and partnership. The Attorney General and the Government of Canada must work in other contexts beyond pleadings to achieve the fulfilment of those commitments.

”

”

Canada is engaged in the creation of a new national approach to litigation involving the historic taking of reserve lands for railway purposes (including *Blood Tribe v Canada*, *Semiahmoo Indian Band v Canada*, and *Southern Manitoba Railway et al v Canada*). Previously, Canada had taken a reactive, case-by-case approach by responding to litigation when it was launched.

- Canada's longterm objective is to restore remediated former railway lands to reserve status. Consistent with the Indigenous litigation strategy review, Justice has established a working group to develop proposals for a more comprehensive and proactive approach to assessing the inventory of railway takings and their current status, and to work with First Nations, affected federal departments, and railway companies to restore former railway lands to First Nations, while addressing challenges, including environmental remediation.



In the first year of its mandate, the Government settled or discontinued a number of important cases where it determined that the continued pursuit of litigation was not consistent with Canadian values.

MAKING DECISIONS CONSISTENT WITH CANADIAN VALUES

Discontinuance of litigation

In *Canada v Ishaq*, the Federal Court of Appeal ruled that the previous Government's refusal to allow Ms. Ishaq to wear her niqab during her citizenship ceremony was unlawful.

- In November 2015, Canada withdrew its application for leave to appeal to the Supreme Court.

In *Khadr v Bowden Institution*, the Alberta Court of Queen's Bench granted bail to Omar Khadr pending his challenge to the United States' decisions that resulted in his sentence of imprisonment in Guantanamo Bay.

- In February 2016, Canada abandoned its appeal of the decision to the Alberta Court of Appeal.

When the Attorney General took office, four separate Federal Court applications by Canada were proceeding against eight First Nations to compel them to comply with the *First Nations Financial Transparency Act*.

- In December 2015, all applications were suspended and the withheld funding was released.

In *Descheneaux v Attorney General of Canada*, the Quebec Superior Court determined that certain sections of the *Indian Act* were discriminatory against women as a result of the differential treatment of grandchildren of women who married a non-Indian, compared to grandchildren in the male line.

- In February 2016, Canada discontinued its appeal before the Quebec Court of Appeal with a view to introducing legislative amendments after appropriate consultation. Bill S-3 was introduced in October 2016, which will remedy the gender-based discrimination.

Settlement

Canada signed a settlement agreement which is now before the Federal Court for approval to settle two separate proposed class action lawsuits, *Merlo v Attorney General of Canada* and *Davidson v Attorney General of Canada*, which alleged gender-based discrimination, bullying and harassment of female RCMP members and public service employees who worked at the RCMP between September 16, 1974 and the date of court approval. In conjunction with the settlement, the RCMP Commissioner issued a formal apology and Minister Goodale made a public statement noting that the settlement demonstrates Canada's commitment to ensuring that all women serving as RCMP members, employees and cadets can feel safe and respected.

Canada settled five consolidated class actions, *Anderson et al v Attorney General of Canada*, brought on behalf of former day students at five residential schools in Newfoundland and Labrador, which were not included in the Indian Residential Schools Settlement Agreement.

