

# Aboriginal Policy: Legal & Constitutional Framework

## Outline:

- 1.0 Introduction**
- 2.0 Constitutional Framework**
- 3.0 Legal Framework**
- 4.0 Emerging Legal Issues**
- 5.0 Integrating Law & Policy**
- 6.0 Summary / Conclusions**
- 7.0 Key Questions**

## **1.0 INTRODUCTION**

The Crown-Aboriginal relationship has been a fundamental element of Canada's legal and constitutional framework since the earliest European/Aboriginal contacts.

The law has both framed the Crown-Aboriginal relationship and evolved with the changing place of Aboriginal persons in Canadian society.

The current legal and constitutional framework is a reflection of nearly 400 years of Crown/Aboriginal interaction which continues to shape modern Crown/Aboriginal relations.

Government policy on Aboriginal issues operates within the legal reality of the historic rights of the Aboriginal peoples.

While Aboriginal law may constrain policy choices in some aspects, the law can also serve as a tool to support and move forward a policy agenda.

## **2.0 CONSTITUTIONAL CONTEXT**

- 2.1 Overview**
- 2.2 Royal Proclamation, 1763**
- 2.3 S.91 (24) Constitution Act, 1867**
- 2.4 S.35 Constitution Act, 1982**
- 2.5 Charter of Rights and Freedoms (a) (b)**

## **2.0 CONSTITUTIONAL CONTEXT**

### **2.1 Overview**

Key elements of the constitutional framework are relevant to Aboriginal policy:

- Royal Proclamation of 1763 acknowledged that Indian tribes have property rights to their traditional lands which must be respected before such lands are opened for settlement
- Section 91(24) Constitution Act, 1867 provides the federal Parliament and government with exclusive authority over Indians and lands reserved for Indians
- Section 35 Constitution Act, 1982 significantly limits the ability of federal and provincial governments to interfere with common law Aboriginal rights and title and rights recognized under historic and modern treaties
- Canadian Charter of Rights and Freedoms is as relevant to Aboriginal Canadians as to other citizens, and provides for a balance between general human rights with those rights specific to Aboriginal persons

### **2.2 Royal Proclamation, 1763**

The unwritten common law incorporates the major tenets of Imperial British policy towards Aboriginal peoples as expressed in the Royal Proclamation of 1763.

As a result, the defining features of the Canadian common law are:

- Aboriginal peoples have collective legal rights derived from their prior occupation of their traditional lands subject to European colonial and then Canadian sovereignty;
- The Crown has a unique fiduciary relationship with Aboriginal People which obliges it to act honourably in any dealings with them; and
- As a result, Aboriginal persons are distinct legally in many respects from other Canadians.

### **2.3 Section 91(24) – Constitution Act 1867**

At the time of Confederation, the primary responsibility for Indian affairs was assumed by the new federal Crown.

As a result, section 91(24) of the Constitution Act, 1867 assigns to the federal government exclusive jurisdiction over Indians and lands reserved for the Indians.

The courts in the 1930's clarified that the Inuit are "Indians" under section 91(24), but debate continues about the boundaries of the section, particularly whether the Metis are included.

Indian reserves clearly fall within section 91(21). The Supreme Court has also found that lands subject to unextinguished Aboriginal title are section 91(24) lands.

Other federal constitutional heads of power are also relevant to Aboriginal policy (ie. Federal spending power, marine fisheries).

The constitutional authority for the federal government to act does not translate into legal duty to act. For example, the federal government has made a policy decision not to legislate with regard to the Inuit.

Exclusive federal jurisdiction under section 91(24) means, however, that provinces cannot legislate or infringe upon certain matters (e.g. Indian status, section 91(24) lands), though provinces can incidentally affect Indians when exercising their section 92 powers.

Provinces with claims to unextinguished Aboriginal title (e.g. Quebec, British Columbia, Atlantic Provinces) face uncertainties about their ability to manage lands and resources subject to claims of Aboriginal title, since lands with such title are section 91(24) lands.

### **2.4 Section 35- Constitution Act 1982**

Section 35 of the Constitution Act, 1982 acknowledges the Indian, Inuit and Metis as Canada's Aboriginal peoples, and recognizes and affirms their Aboriginal or treaty rights which existed in 1982.

Aboriginal rights are legally enforceable rights recognized by Canadian common law which have been recognized and affirmed by section 35.

The rights arise from the customs, practices and traditions practiced by Aboriginal peoples before the arrival of the Europeans, including their prior use and occupation of land and resources.

Section 35 rights are collective, in the sense that an Aboriginal community holds the rights, even if they are commonly enjoyed by individuals (e.g. Fishing rights).

Treaty rights arise from solemn agreements between Aboriginal peoples and the Crown's representatives. Treaties can be historic (e.g. 18<sup>th</sup> c. "peace and friendship" treaties, 19<sup>th</sup> c. land cession treaties) or modern (e.g. James Bay and Northern Quebec Agreement, Nisga'a Final Agreement).

Section 35 clarifies that rights created or recognized through modern land claims settlements are also protected as treaty rights.

Section 35 marked as a major change in the law, and since 1982, imposes an onerous burden on both provincial and federal governments to justify infringements of Aboriginal and treaty rights.

Where infringements can be justified (e.g. resource conservation, national interests), compensation may be required to affected Aboriginal groups.

Many legal issues remain in evolution (e.g. scope and content of inherent right of self-government, identity of persons entitled to enjoy rights, calculation of compensation for infringements of rights).

## **2.5 (a) Charter of Rights and Freedoms (Sections 15)**

Section 15 provides that "every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination".

Section 15 (2) clarifies that the equality rights do not prevent laws, programs or activities designed to assist disadvantaged individuals or groups.

While section 15 is the basis for many significant court decisions on Aboriginal matters, it is not only Charter section raised in litigation or relevant to Aboriginal policy (e.g. Mobility rights, Freedom of expression, Freedom of conscience and religion).

Section 15 protects the rights of individual Aboriginal persons or groups of individuals, while section 25 permits the Courts to balance such rights with the rights of Aboriginal peoples.

Section 15 is increasingly used with success as a powerful tool for Aboriginal persons challenging government decisions which restrict programs, services or benefits to some, but not all, Aboriginals

In contrast, section 15 challenges to Aboriginal programs by non-Aboriginals are less likely to succeed.

### **2.5(b) Charter of Rights and Freedoms (Section 25 & 28)**

Section 25 is a mechanism for reconciling conflicts between the protection of individual rights in the Charter (including section 15 equality rights) and the Aboriginal, treaty or other rights of Aboriginal peoples.

For the most part, these latter rights are rights of Aboriginal groups, even if they are commonly exercised by individuals.

Section 28 of the Charter and section 35(4) of the Constitution Act, 1982 position gender equality as a paramount value in any conflict of rights.

## **3.0 LEGAL CONTEXT**

### **3.1 *Historical Role of Courts***

### **3.2 *Key Messages***

### **3.3 *Indian Act***

### **3.4 *Ongoing Role of Courts***

## **3.1 Historical Role of Courts**

Although modern treaties, statutes and even international treaties shape Aboriginal law, the Courts have traditionally and will continue to influence the legal framework by interpreting the common law, statutes and the Constitution.

The relative powerlessness and vulnerability of Aboriginal groups until modern times meant that they were not active participants in many court cases affecting their interests.

All the same, Court decisions from the 19<sup>th</sup> and early 20<sup>th</sup> c. framed important principles about the nature of Indian title in reserves and the Crown/Aboriginal relationship in general.

Late 20<sup>th</sup> c. courts have recognized the distinctiveness of Aboriginal societies within Canada, and elaborated on the implications for government policy of Aboriginal and treaty rights.

Cases on government operational decisions, particularly under the Indian Act, have enabled the Courts to expand considerably the content of the Crown's fiduciary duties

The courts generally view Aboriginal peoples as a seriously disadvantaged group within Canadian society.

The courts will step in to fill what they see as a policy void if Aboriginal peoples are disadvantaged even further by an absence of government policy.

However, where the Courts attempt to fill in a policy void in response to Aboriginal demands, they are ill-equipped to design policy. As a result, the Courts leave many issues unresolved for the government to address (e.g. aftermath of Marshall).

Recently, the Supreme Court has signalled the need for accommodation by both Aboriginals and non-Aboriginals to define their respective places within a coherent Canadian sovereignty and society.

### **3.2 Key Messages from Courts**

The courts have given key messages to governments:

Aboriginal societies with their own traditions, customs and practices pre-date the Europeans in Canada and they have survived in modified forms to the present day.

Aboriginal peoples today have legal rights, now recognized in the Constitution, derived from their traditions, customs and practices, particularly their prior occupation of their traditional territories.

The Crown has a unique fiduciary relationship with Aboriginal peoples which obliges it to act honourably in any dealings with them.

The honour of the Crown must be respected in carrying our obligations undertaken as legally enforceable rights through treaties between the Crown and the Aboriginal peoples.

The Crown can assume legally enforceable fiduciary duties to act in the best interests of Aboriginal peoples in some instances, particularly statutory duties to protect Indian lands and assets.

The protection of Aboriginal and treaty rights by section 35 of the Constitution Act, 1982 imposes a heavy burden on governments to justify interference with such rights.

Section 35 reflects the need to reconcile with the Canadian constitutional framework the prior existence of Aboriginal societies with the modern reality of Canadian sovereignty and society.

Negotiation, rather than confrontation through the courts, is the preferred route to reconcile the interests of Aboriginals and governments acting on behalf of non-Aboriginal Canadians.

### **3.3 Indian Act**

The Indian Act is the key statute which has defined federal government relationships with individual Indians and First Nations since the late 19c. It sets out rules governing Indian status, band membership, local governance on reserves, and rules regarding individual estates, and land use decisions.

The Indian Act continues to require the involvement of the Minister of Indian Affairs in many aspects of reserve decision-making (e.g. approval of by-laws; election supervision; land use decisions)

The federal government will continue to face large contingent liabilities arising from the historical and current application of the Indian Act, which will continue to engage complex legal and policy questions concerning accountability, representation and governance

### **3.5 Ongoing Role of Courts**

The courts will continue to influence the legal and constitutional context in many key respects.

The courts have yet to definitively pronounce on several relevant constitutional provisions (e.g. Section 25 Charter)

Similarly, the Courts continue to define the nature and content of Aboriginal rights and title and to clarify the scope of the Crown's duties under both historic and modern treaties.

Finally, historic and current operational decisions under existing laws and policies (e.g. Indian Act) risk giving rise to new conflicts which afford the Courts further opportunities to shape the law.

## **4.0 EMERGING LEGAL ISSUES**

### **4.1 *Introduction-Key Legal Issues***

### **4.2 *Equality Rights and Distinctions***

### **4.3 *Federal / Provincial Responsibilities***

### **4.4 *Aboriginal Governance***

### **4.5 *Aboriginal & Treaty Rights as Economic Rights***

## **4.1 Key Legal Issues**

### **Introduction**

A number of key legal issues on the 5-10 year horizon are likely to impact upon Aboriginal policy development:

- Equality rights / Distinctions
- Federal / provincial powers
- Aboriginal governance
- Aboriginal & Treaty rights

## **4.2 Equality Rights / Distinction**

Equality rights claims under section 15 Charter of Rights and Freedoms will shape the ability of government to sustain distinctions between Aboriginal peoples (e.g. Indian v. Metis & non-status Indians)

Similar issues for distinctions among various Aboriginal groups (e.g. on-reserve v off-reserve Indians, Indian band members v. non-members)

Related issues of gender equality in the treatment of Aboriginal women in the legislation, programs, policies and services of both Aboriginal and non-Aboriginal governments.

## **4.3 Federal / Provincial Responsibilities**

The extent of federal jurisdiction and responsibility over persons and lands covered by section 91(24) Constitution Act, 1867

The ability of provinces to manage their lands and resources where subject to Aboriginal rights/title claims

Issues about federal v. provincial/territorial responsibility for programs and services for their Aboriginal citizens



Potential for different federal/provincial views on the degree of certainty required for section 35 rights following the ratification of modern treaties.

#### **4.4 Aboriginal Governance**

The legal nature and scope of the inherent right of self-government for Aboriginal collectives, including its relationship to the Canadian constitutional framework (e.g. federal and provincial jurisdictions).

The application to Aboriginal governments of the principles of modern governance, including those reflected in the Charter (e.g. public accountability & proposed First Nations Governance Act).

The political rights of non-Aboriginal people subject to Aboriginal governance and Aboriginal people resident outside their home communities.

#### **4.5 Aboriginal & Treaty Rights as Economic Rights**

The use of historic harvesting rights protected by section 35 as the basis for sustainable modern economies within a globalized economy

Related challenge for the Courts to balance competing Aboriginal and non-Aboriginal commercial needs to limited natural resources such as marine fisheries

The nature and content of Aboriginal title if modern treaty making fails to resolve unsettled claims

The scope and content of any compensation payable by governments for past infringements of Aboriginal or treaty rights

### **5.0 INTEGRATING LAW & POLICY**

**5.1 *Introduction***

**5.2 *Policy shaping Law***

**5.3 *Legal Disputes as Opportunities***

**5.4 *Strategic Litigation***

#### **5.1 Introduction**

The key legal issues emerging in the next 5-10 years create a choice for the federal government:

- Respond to the issues framed by others (e.g. Aboriginal groups, Provinces) with the consequent risk that federal policy objectives are subject to a constantly changing legal environment shaped by the priorities of others, or
- Proactively manage legal issues strategically to support and advance government policy objectives.

Recent and future work on the policy options for making distinctions among Aboriginal groups is an example where the law and policy are being integrated into a proactive federal strategy to manage the legal issues raised by section 15 of the Charter.

Policy choices which are informed and supported by the law can bridge and reconcile the Aboriginal and government agendas.

In practical terms, the law can become a tool to support and move the government's policy agenda forward in three respects:

- 1. Use government policies to help shape the law;**
- 2. Consider potential or litigation disputes with Aboriginal groups as opportunities to advance government policy objectives;**
- 3. Use strategic litigation on Aboriginal law to attempt to advance policy goals.**

## **5.2 Policy Shaping Law**

Coherent and legally-supported policies can help to shape Aboriginal law in two ways:

1. Offering Aboriginal claimants policy alternatives to litigation, and
2. Encouraging the Courts to see that they are not acting in a policy vacuum since the government has consciously addressed Aboriginal concerns.

**(e.g. Aboriginal Fishing Strategy for B.C. First Nations food and ceremonial purposes had reduced prosecutions and civil litigation on Aboriginal and treaty rights to fish)**

**(e.g. Comprehensive and Specific claims Policies have encouraged many First Nations to use negotiations to address their claims to rights, rather than direct action or litigation)**

### 5.3 Legal Disputes as Opportunities

Settling disputes about the legal rights of Aboriginal peoples can give rise to opportunities for both settling the disputes and improving the socio-economic conditions of Aboriginal persons and communities.

**(e.g. negotiation and implementation of Nisga'a Final Agreement in B.C. built capacity of Nisga'a Nation and equipped them to make major socio-economic progress and to build relationships with non-Aboriginal neighbours and governments)**

**(e.g. approach to settlement of litigation and specific land claims of Peigan First Nation in Alberta has equipped them to make significant socio-economic progress in partnership with industry and governments)**

### 5.4 Strategic Litigation

The strategic use of litigation can help to advance policy goals, especially by helping to clarify the legal framework for the policy options open to the government.

**(e.g. Mitchell decision on custom duties; residential schools test cases clarifying the respective roles and legal responsibilities of the various defendants)**

An important initiative in this respect is the Department of Justice Legal Risk Management Framework with particular emphasis on the following features:

- Legal risk identification and management, including contingency planning, which focuses on identifying policies that may be at risk and moving to reduce those risks.
- Encouraging policy –based alternatives to litigation as the means to resolve disputes involving Aboriginal persons.
- Choosing strategic opportunities in litigation to encourage the Courts to respect a comprehensive policy framework, rather than allowing litigation to lead policy development.

## **6.0 Summary**

Canada faces and will continue to face a heavy historical burden by virtue of the legal and policy choices made over the past centuries, and this has legal consequences

Aboriginal and treaty rights must be respected, and governments bear a heavy burden of jurisdiction for any infringements

Courts have indicated a willingness to step in to fill a policy void, but courts do not provide detailed policy prescriptions, and courts continue to push governments and First Nations to negotiate rather than litigate

The key legal issues emerging in the next 5-10 years create a choice for the federal government between simply responding to the grievances raised and directions set by the courts, or proactively managing legal issues to support policy.

## **7.0 Key Questions**

1. Aboriginal and treaty rights must be respected. Which elements of a federal response to the "Aboriginal rights and grievances agenda" can provide a strategic opportunity to attempt to advance policy objectives?
2. What are the opportunities to make policy choices to reduce litigation or reduce contingent liabilities of the federal government?
3. Where are the appropriate places to use the courts for strategic interventions, to clarify the law or shape the policy debate?

## Legal and Constitutional Context

### Role of Constitution in Aboriginal Affairs

