CHALLENGES OF THE TREATY RELATIONSHIP

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In discussing the topic which I have chosen for my presentation today, I would like to focus on two central themes. The first is the unique nature of the "made in Canada" approach to defining treaty relationships between Aboriginal people and the Crown adopted by our courts in light of our particular history. The second is the nature of the important challenges facing both government and Aboriginal people in resolving certain fundamental issues which have emerged in this relationship. These issues include the interpretation of treaties signed between the Crown and Canada's Aboriginal people, the question of "undiscovered treaties", the consideration of who is a beneficiary of a treaty, and commerciality of treaty rights.

Elements of the "Made in Canada" Approach

Canadian jurisprudence relating to the interpretation of treaties has consistently emphasized the unique historical context in which our treaties have been negotiated and concluded. The courts have avoided drawing analogies with other areas of law which, while possibly convenient, are inappropriate.

For example, the Supreme Court of Canada has clearly decided that it is not appropriate to compare Aboriginal treaties in Canada to international treaties, at least with regard to their creation and termination. In *R.* v. *Simon*, Chief Justice Dickson made the following statement, which has been cited in numerous subsequent cases:

> While it may be helpful in some instances to analogize the principles of international treaty law to Indian treaties, these principles are not determinative. An Indian treaty is unique; it is an agreement *sui generis* which is neither created nor terminated according to the rules of international law.[1]

It is my submission that the reluctance of the courts to apply rules respecting interpretation of international treaties to treaties signed between the Crown and Canada's Aboriginal people, and other elements of the "made in Canada" approach which I will outline below, have worked in favour of the Aboriginal people.

The courts have developed liberal rules of interpretation as well as a strong level of protection for treaty rights based on both s. 35 of the *Constitution Act,*

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[1]*R.* v. *Simon* (1986), 24 D.L.R. (4th) 390 at 404 [hereinafter *Simon*].

1982[2] and s. 88 of the *Indian Act*[3]. In the case of s. 35 of the *Indian Act*, the application of the *Sparrow* test[4] for constitutional protection of Aboriginal rights to treaty rights situations will likely mean that these rights will be protected from government interference unless a strict justification test is met. Section 88 of the *Indian Act* adds an additional level of protection in providing that provincial laws will be held inapplicable if they conflict with the terms of a treaty.

A practical example of where provincial laws will defer is the *Simon* case which I have mentioned. This case arose in Nova Scotia, and the Supreme Court of Canada eventually held that a provincial prohibition on possession of firearms and ammunition was inapplicable to a member of the Shubenacadie band as being in conflict with his treaty rights.

The courts have established that treaties are to be interpreted in a liberal manner with doubtful expressions being resolved in favour of the Indians.[5] This principle is further buttressed by s. 35 of the *Constitution Act, 1982* which ensures that rights must be interpreted in a generous and liberal fashion. The courts have also adopted a flexible approach in determining whether a particular instrument is a treaty in the first place.[6]

The courts have displayed a willingness to recognize Indian perspectives and culture. Histories and oral traditions as well as surrounding circumstances have been taken into account in interpreting treaties where the terms thereof are ambiguous,[7] albeit not to contradict the terms where they are clear.

In the *Sioui* case the Supreme Court relied heavily on Indian perceptions of authority in making a determination that General Murray had the capacity to conclude a treaty on behalf of the Crown. In both *Simon* and *Sioui* the perception of the Indians as to the nature of the transaction was also a key element in determining the existence of a treaty. Finally, the courts have recognized that Indians should not face an impossible burden of proof in establishing beneficiary status under treaties, taking into account the fact that written records were rarely kept by Indians.

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[2]*Constitution Act, 1982*, being Schedule B of the Canada Act 1982 (U.K.), 1982, c.11 [hereinafter *Constitution Act, 1982*].

[3]R.S.C. 1985, c. I-5 [hereinafter *Indian Act*].

[4]See *R.* v. *Sparrow*, [1990] 1 S.C.R. 1075 [hereinafter *Sparrow*].

[5]See *Simon*, *supra*, note 1.

[6]*R.* v. *Sioui*, [1990] 1 S.C.R. 1025 [hereinafter *Sioui*]; *R.* v. *Côté*, (17 May 1993), 500-10-000308898 (Que. C.A.) [hereinafter *Côté*].

[7]See *R.* v. *Taylor* (1981), 34 O.R. (2d) 360 (C.A.).

While many Aboriginal people would likely argue that the courts should lean further toward their preferred interpretation of treaty rights, it is my submission that the courts have constructed a "made in Canada" approach which is fair, and offers strong legal protection for treaty rights. It is also important that the courts have developed a solution which is flexible in adapting to the varied situations of treaty groups in Canada. We must also recognize that the law in this area is still developing, and that additional clarification will be obtained as future cases are decided.

The Emerging Challenges

Notwithstanding the guidance that the courts have provided, certain important questions remain which will present challenges for federal and provincial governments and Aboriginal people alike.

1. Are there many "undiscovered" treaties?

In the *Sioui* case, the Supreme Court of Canada took a liberal approach to determining the existence of a treaty. They concluded that a document given to the Hurons by a British military officer which guaranteed, among other things, safe passage to their territory, was a treaty. Similarly in the *Côté* case, promises made by a British superintendent for Indian Affairs, in the same period as events in the *Sioui* case were unfolding, were found to constitute a treaty. While these cases may have expanded the list of treaties from that era beyond that which governments may have contemplated, they did not, I would think greatly expand the range of modern agreements and instruments which will now fall into the category of treaties.

In the *Sioui* case, Mr. Justice Lamer, as he then was, stated "... what characterizes a treaty is the intention to create obligations, presence of mutually binding obligations and a certain measure of solemnity."[8]

The courts in both *Sioui* and *Côté* closely examined the surrounding circumstances in assessing whether this test was met. In both cases, the commitments of the British representatives were made in time of war. This appeared to have a direct bearing on the nature of the understanding of both parties.

While more of the type of instruments considered in *Sioui* and *Côté* may remain to be brought forward, the test which the courts have developed is not likely to extend to a broad range of agreements between governments and

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[8] *Supra*, note 6 at 1044.

Aboriginal people. In particular, present-day administrative agreements which are commonplace between Indian bands and the government will not likely fall into this category. It is my belief that the courts will look for a treaty to set out fundamental aspects of the relationship between governments and Aboriginal people as opposed to merely administrative or operational understandings.

2. Who is a beneficiary of a treaty and what is the role of the collectivity?

The question of who is a beneficiary of a treaty and what, if any, is the role of the collectivity are matters on which the courts have provided little guidance. These issues increase in importance as the off-reserve population increases. In the recent *Fowler* case, the New Brunswick Provincial Court was prepared to recognize that an individual was a treaty beneficiary notwithstanding the fact that he was not a registered Indian or member of an Indian band. The court found that the particular individual had a substantial connection to the treaty group in question.[9]

While the law may be leaning towards a recognition that individuals with a "substantial connection" to the successor of the original treaty group can qualify for beneficiary status, there is little to direct us on the question of what factors are determinative in establishing their substantial connection. Further, it is unclear whether the Indian collectivity concerned can deny treaty benefits to individuals who have this "substantial connection" or regulate, in any way, the exercise of those benefits by the individual. This issue raises complex questions of balancing the individual and collective aspects of treaty rights as well as Aboriginal rights. The courts may be as uncomfortable in dealing with such questions in terms of a traditional legal analysis as they have been in dealing with the nature of Aboriginal title.

Superimposed on these legal questions are factual and historical ones such as the scope of the original treaty rights and the extent of the treaty area. While the courts will inevitably have to deal with some of these issues, it is incumbent on governments and Aboriginal people to work out solutions which will hopefully avoid a plethora of expensive and time-consuming litigation. Increased cooperation between Indians, non-status Indian groups and governments is clearly needed.

3. How are rights to be interpreted?

While the favourable principles of interpretation of treaty rights to which I have referred go some way to satisfying Aboriginal concerns, the fact remains that some treaty groups insist that they do not accommodate the original "spirit and intent" of these treaties. The arguments, as I understand them, are to the effect that the

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[9] *R.* v. *Fowler*, [1993] 3 C.N.L.R. 178.

Indians of the time understood that much more was implicit in the terms of the treaties and that, in particular, they were not relinquishing rights such as self-government.

To date, the courts, while directing that treaties be interpreted generously, have expressly refused to contradict terms where they are unambiguous. With respect to modern land claims agreements, there is a suggestion in the recent *Eastmain* case that favourable canons of construction applied to older treaties should not be applied blindly to modern land claims agreements where Indians were in a better bargaining position.[10]

The now-defunct *Charlottetown Accord* created a process to deal with these issues.[11] It is evident that a process of discussion on these fundamental issues is preferable to adversarial litigation in the courts as a method to work out the details of what is essentially a new relationship.

4. Do treaties contain any commercial element?

With regard to this question, the courts have not made any general statements, preferring instead to concentrate on the particular terms of the treaties which allegedly support the commercial right. In the *Horseman* case, for example, the Supreme Court of Canada was prepared to accept that the treaty originally contained a commercial element based on the clause of the treaty coupled with evidence of surrounding circumstances.[12] In the *Vincent* case, however, the Ontario Court of Appeal found that the provisions of the Jay Treaty which referred to the "Indians passing or repassing with their own proper goods" did not confer a right to import in commercial quantities.[13] In the case of the Maritimes, the "truck house" clause of the Treaty of 1752 is argued by some to support the notion of commercial rights of hunting and fishing.

In considering issues of commerciality it is also relevant to determine whether such commercial rights may have been extinguished by the operation of federal legislation or whether, at least after 1982, they have been regulated in a fashion which satisfies the justification test set out in the *Sparrow* case.

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[10]*Eastmain Band* v. *Canada*, [1993] 1 F.C. 501 (C.A.).

[11]The proposed final text of the *Charlottetown Accord* is reproduced in J. Bakan & D. Scneidermain, eds, *Social Justice and the Constitution: Perspectives on a Social Union for Canada* (Ottawa: Carleton University Press, 1992).

[12]*R.* v. *Horseman*, [1990] 1 S.C.R. 901.

[13]*R.* v. *Vincent* (1993), 12 O.R. (3d) 427 (C.A.).

Conclusion

In this brief overview, I have attempted to show that, while we have had general guidance from the courts, many important questions remain to be answered. These issues will be resolved in future either by litigation or negotiations. It is perhaps inevitable when people differ on interpretation of rights that the courts will be asked to pronounce. Litigation, as we all know, is expensive as well as time-consuming. This is particularly the case with treaty and Aboriginal rights issues which are bound up with complex questions of history as well as law.

While the courts will deal with questions which are put to them, they have sent a strong message that negotiations are the preferred method of dealing with these questions. This was evident in the recent decision of the British Columbia Court of Appeal in *Delgam'uukw*, where the parties were effectively sent back to the negotiating table to establish the precise content of the rights at issue. It was also suggested in that case that negotiations were the proper forum for dealing with self-government.[14]

My personal opinion has always been that negotiations are the route to success. While Aboriginal people may legitimately claim, in certain instances, that negotiations have not produced results, it is my firm belief that the climate is changing. Although the *Charlottetown Accord* was not approved by the people of Canada, it nonetheless stands as an example of Aboriginal representatives and governments reaching agreement on a range of difficult matters. The increasing number of land claims settlements also, in my view, point to a better future for Aboriginal - government relations.

[14] *Delgam'uukw* v. *British Columbia*, [1993] 5 W.W.R. 97.