

## Aboriginal Rights in Canada, Background Information

In Canada, Aboriginal Rights are rooted in the Constitution Act, 1982, and in Common Law.

### 1. The Constitution Act, 1982

**Section 25 reads as follows:**

**25.** The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including

- a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and
- b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.

**Sections 35 and 35.1 read as follows:**

**35** (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

(2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.

(3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.

(4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

**35.1** The government of Canada and the provincial governments are committed to the principle that, before any amendment is made to Class 24 of section 91 of the "*Constitution Act, 1867*", to section 25 of this Act or to this Part,

(a) a constitutional conference that includes in its agenda an item relating to the proposed amendment, composed of the Prime Minister of Canada and the first ministers of the provinces, will be convened by the Prime Minister of Canada; and

(b) the Prime Minister of Canada will invite representatives of the aboriginal peoples of Canada to participate in the discussions on that item.

### 2. Treaty Issues

Accordingly, treaty issues are sources of contentions. First Nations in Canada have signed agreements with the Crown, called treaties. There are three groups of treaties: Pre-Confederation Treaties, Numbered Treaties, and Modern Treaties (Land Claims).

*Pre-Confederation Treaties* include: King George III's Royal Proclamation of 1763 and those treaties negotiated in Canada before Confederation. Also included are The Robinson Treaty of 1850 (Treaty No. 13) and the additions to The Robinson Treaty which are known as Treaty No. 12 and Treaty No. 14.

*Numbered Treaties* are the Treaties numbered 1 to 11 which were negotiated between 1871 and 1877 with First Nations peoples across Canada.

The third group of treaties is known as *Modern Treaties*, which consist of land claims negotiated according to **Canada's Land Claims Policy** established in 1973. The Land Claims Policy recognizes two broad classes of claims - comprehensive claims and specific claims.

### 3. Comprehensive Claims

Comprehensive land claims are based on the assertion of continuing Aboriginal title to lands and natural resources. Comprehensive claims settlements are negotiated to clarify the rights of Aboriginal groups to lands and resources, in a manner that will facilitate their economic growth and self-sufficiency. Settlements are intended to ensure that the interests of

Aboriginal groups in resource management and environmental protection are recognized, and that claimants share in the benefits of development.

These rights and benefits usually include:

- 1) full ownership of certain lands in the area covered by the settlement;
- 2) guaranteed wildlife harvesting rights;
- 3) guaranteed participation in land, water, wildlife and environmental management throughout the settlement area;
- 4) financial compensation;
- 5) resource revenue-sharing;
- 6) specific measures to stimulate economic development; and
- 7) a role in the management of heritage resources and parks in the settlement area.

### **3.1 The Comprehensive Claims Process**

There are six stages in the comprehensive claims process.

1. Submission of a statement of claim or statement of intent to negotiate. In British Columbia, the process begins when the First Nation files a Statement of Intent to negotiate which is accepted by the British Columbia Treaty Commission;
2. Preparation for negotiations;
3. Initial negotiation, when issues are identified for discussion;
4. Substantive negotiation, when issues are discussed to produce the Agreement-In-Principle (AIP) that contains all the features of the eventual settlement;
5. Finalization, when all parties formalize the agreement needed in the AIP to produce a Final Agreement and the agreement is enacted by settlement legislation;
6. Implementation of settlement legislation, when the terms of the agreement are carried out by all parties.

### **3.2 Self-Government Agreements**

Self-Government negotiations may take place in parallel with comprehensive claims negotiations. The Government of Canada recognizes the inherent right of self-government as an existing Aboriginal right under section 35 of the *Constitution Act, 1982*. It recognizes, as well, that the inherent right may find expression in treaties, and in the context of the Crown's relationship with treaty First Nations. Recognition of the inherent right is based on the view that the Aboriginal peoples of Canada have the right to govern themselves in relation to matters that are internal to their communities, integral to their unique cultures, identities, traditions, languages and institutions, and with respect to their special relationship to their land and their resources.

Broadly stated, the Government views the scope of Aboriginal jurisdiction or authority as likely extending to matters that are internal to the group, integral to its distinct Aboriginal culture, and essential to its operation as a government or institution. Under this approach, the range of matters that the federal government would see as subjects for negotiation could include all, some, or parts of the following:

- 1) establishment of governing structures, internal constitutions, elections, leadership selection processes ;
- 2) membership;
- 3) marriage;

- 4) adoption and child welfare;
- 5) Aboriginal language, culture and religion;
- 6) Education;
- 7) Health;
- 8) social services;
- 9) administration/enforcement of Aboriginal laws, including the establishment of Aboriginal courts or tribunals and the creation of offences of the type normally created by local or regional governments for contravention of their laws;
- 10) policing;
- 11) property rights, including succession and estates;
- 12) land management, including: zoning; service fees; land tenure and access; and expropriation of Aboriginal land by Aboriginal governments for their own public purposes;
- 13) natural resources management;
- 14) agriculture;
- 15) hunting, fishing and trapping on Aboriginal lands;
- 16) taxation in respect of direct taxes and property taxes of members;
- 17) transfer and management of monies and group assets;
- 18) management of public works and infrastructure;
- 19) housing;
- 20) local transportation;
- 21) licensing, regulation and operation of businesses located on Aboriginal lands;

### **3.3 Mechanisms for Implementation**

The Government anticipates that agreements on self-government will be given effect through a variety of mechanisms including treaties, legislation, contracts and non-binding memoranda of understanding.

### **3.4 Specific Claims**

Most specific claims are related to land and generally involve either the loss of reserve lands without lawful surrender by the band concerned, or the government's failure to pay compensation where lands were taken with legal authority. Other specific claims arise with respect to the administration of Indian monies and other assets such as timber and mineral rights.

The government's policy on specific claims is that it will recognize claims by Indian bands which disclose an outstanding "lawful obligation", i.e., an obligation derived from the law on the part of the federal government. A lawful obligation may arise in any of the following circumstances:

- 1) The non-fulfillment of a treaty or agreement between Indians and the Crown.

- 2) A breach of an obligation arising out of the Indian Act or other statutes pertaining to Indians and the regulations thereunder.
- 3) A breach of an obligation arising out of government administration of Indian funds or other assets.
- 4) An illegal disposition of Indian land. Canada.

### **3.5 How Specific Claims Are Dealt With**

The following steps are usually followed:

1. Presentation of the claim.
2. Review of claims by the Office of Native Claims.
3. Determination of the acceptability of the claim.
4. Resolution
5. Further review of the claim by the Indian Claims Commission.

### **3.6 Treaty Land Entitlement**

Treaty Land Entitlement is a group of claims which relate to a group of treaties that were signed with First Nation. Many First Nations did not receive the full amount of land that was promised to them. These outstanding land entitlements are referred to as Treaty Land Entitlement claims and they are handled separately from other specific claims.

## **4. Summaries of Some Important Case Law**

Noteworthy are: \_

### **4.1 Treaty issues**

**R. v. Marshall**, [1999] 3 S.C.R. 456

The Supreme Court of Canada ruled that there is an implied term in the Treaties of 1760-61 granting to the Mi'kmaq signatories a right to engage in traditional resource harvesting activities, including for the purposes of sale, to the extent required to provide them a moderate livelihood. In the course of the judgment, the Court clarified some important principles of evidence relating to the interpretation of Indian historical treaties. In particular, the Court expressly rejected its earlier pronouncement in the *Horse* case that treaties are to be interpreted without resort to intrinsic evidence where the treaty terms are unambiguous.

**R. v. Marshall**, [1999] 3. S.C.R. 533

One month after the above *Marshall* Supreme Court of Canada decision, the Court, in the course of dismissing an application for a rehearing of the case, clarified several important aspects relating to its prior decision. The Court stressed that the treaty right does not belong to the individual but is exercised by the local community. The Court also emphasized that, in its earlier judgment, the only treaty right which had been established was in relation to fishing, hunting and traditional gathering activities such as wild berries and fruit. With respect to what resources are covered by the treaty, the Court stated that any extended interpretation of the term "gathering" so as to include logging and minerals, would have to be established by the aboriginal claimant in another case. The exercise of the treaty harvesting right is limited to the area traditionally used by the local community. With respect to the justified infringement of the treaty harvesting right, the Court stressed that the Crown can accommodate the historical involvement by non-aboriginal persons in the resource industry in regulating the treaty right.

### **4.2 Aboriginal Rights and Fiduciary Obligation Issues**

**R. v. Van der Peet**, [1996] 2 S.C.R. 507; **R. v. Gladstone**, [1996] 2 S.C.R. 723; **R. v. NTC Smokehouse Ltd.**, [1996] 2 S.C.R. 672

These cases involve the question of whether section 35 of the *Constitution Act, 1982* includes, as an aboriginal right, a right to fish commercially. In the *Van der Peet* case, the Court outlined the test for identifying aboriginal rights protected under section 35. Essentially, an aboriginal group must establish that, at time of contact with Europeans, the particular activity

claimed as an aboriginal right was a practice, tradition or custom that was integral to the society's distinctive culture.

Applying the above test to the facts of the cases, the Court ruled that the accused in *Gladstone* had established an aboriginal commercial fishing right. However, the Court also indicated that, in the context of aboriginal commercial fishing rights, there are no internal limitations to the right. As such, the *Sparrow* justification test had to be refined for aboriginal commercial fishing rights. Other considerations, apart from conservation goals, are to be taken into account in determining whether governmental restrictions were justified. Objectives such as the pursuit of economic and regional fairness, as well as, the historic non-native participation in the fishery are relevant objectives in the context of the justification analysis. Aboriginal rights have to be given priority but they also have to be reconciled with other rights and interests.

#### **4.3 Reserve Related Issues - Taxation**

**Westbank First Nation v. British Columbia Hydro and Power Authority**, [1999] S.C.R. 134

The Supreme Court of Canada dismissed the appeal of the Westbank First Nation from the decision of the B.C. Court of Appeal that the Band's assessment taxation by-laws do not apply to B.C. Hydro. The Court set out the test outlining how charges levied by public bodies qualify as a "tax". In applying the criteria, the Court held that the Band's by-law imposed a tax. In view of the fact that provinces and their agents, such as B.C. Hydro, are exempt from taxation under section 125 of the *Constitution Act, 1867*, the Court held that B.C. Hydro is exempt from the Band's taxes.

The decision makes it clear that, although a by-law may have received ministerial approval, the application of the by-law will have to nevertheless withstand constitutional scrutiny. The Court also acknowledged that Parliament's intention in enacting section 83 of the *Indian Act* may have been to advance self-government and that, so long as validly levied charges do not bear the hallmarks of "taxation", a Band is constitutionally capable of imposing regulatory charges or user fees on third parties, including an agent of the provincial Crown.

**Osoyoos Indian Band v. Oliver (Town)**, Supreme Court of Canada (2002)

As a general matter the Court should be cautious in taking away interests in land in the absence of a complete evidentiary record.

Section 83(1)(a) of the *Indian Act* provides Indian bands with the jurisdiction to impose tax on a very broad range of interests in land, and should be given a broad reading. Band councils have the power to tax any interest or use of reserve lands in order to defray their costs as the government of that land. It follows that, unless the entire interest of a band is removed, land remains in the reserve for the purposes of s. 83(1)(a) and both easements and rights to use or occupy land held by non-band members are subject to the taxation jurisdiction.

The fiduciary duty of the Crown is not restricted to instances of surrender. Section 35 clearly permits the Governor in Council to allow the use of reserve land for public purposes. Once it has been determined that an expropriation of Indian lands is in the public interest, however, a fiduciary duty arises on the part of the Crown to expropriate or grant only the minimum interest required in order to fulfill that public purpose, thus ensuring a minimal impairment of the use and enjoyment of Indian lands by the band. This is consistent with the provisions of s. 35 which give the Governor in Council the absolute discretion to prescribe the terms to which the expropriation or transfer is to be subject. This two-step process minimizes any inconsistency between the Crown's public duty to expropriate lands and its fiduciary duty to Indians whose lands are affected by the expropriation. As the Crown's fiduciary duty is to protect the use and enjoyment of the Indian interest in expropriated lands to the greatest extent practicable, the duty includes the general obligation, wherever appropriate, to protect a sufficient Indian interest in expropriated land in order to preserve the taxation jurisdiction of the Band over the land, thus ensuring a continued ability to earn income from the land.

While in general s. 35 of the *Indian Act* authorizes the removal of land from the reserve, it did not authorize the removal of lands from the reserve for the purposes of s. 83(1)(a) in the circumstances of this case. Because the source of the power to expropriate here was the *Water Act*, the discretion to grant "land" pursuant to s. 35(3) was limited to the land or interest in land "reasonably required" for the canal. Since the canal was already built when the transfer was made, the interest in question is that which is reasonably required to operate and maintain the canal only.

A canal is similar in nature to a railway in that both are permanent structures on the land involving operation and maintenance activities, and a grant of a statutory easement can be sufficient for the purposes of building and maintaining a railway.

The Order in Council does not evince a clear and plain intent to extinguish the Band's interest in the reserve land. It is

ambiguous as to the nature of the interest conveyed. In light of such ambiguity, resort must be had to the interpretive principles applicable to questions dealing with Indian interests, and the interpretation which impairs the Indian interests as little as possible is to be preferred. In light of these principles, the Order in Council should be read as granting a statutory easement to the province, and therefore the canal land is still "in the reserve" for the purposes of s. 83(1)(a) of the *Indian Act*.

### **5. Residential Schools and Aboriginals**

Numerous individuals are seeking damages for the abuse they suffered at residential schools and have filed lawsuits that name the Federal Government, among others.