Legislation / Precedence of Laws

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What is the legal significance of modern treaties?

Modern treaties/land claims agreements are the law of this country. They are not off to the side on some exotic sidebar. They inform everything that each and every one of you and your colleagues do every day, to the extent that that's within an area covered by these treaties, and in respect of the subject matter by one of these treaties.

There is no way I can emphasize that strongly enough, because what all LCAC members have found is that the culture of the federal civil service, not through any malignancy or malign intent, considers these things to be solely the business of AANDC.

What everybody needs to understand is modern treaties are not with AANDC, but AANDC is responsible to Parliament for following these agreements under the law. They have the responsibility to Parliament and no authority whatsoever to do anything about it. So we end up in a situation where a Deputy Minister testified to a Senate Committee that much of the life of he and his officials is spent "haggling" with other departments in respect of the implementation of these legally binding agreements. That simple fact underlies the frustrations of Coalition members, but also explains why we're so appreciative that all of you have taken the time to come to a session like this to learn about it. I give all of the credit to Alan and his colleagues for bringing this about.

Let's talk about the legal nature of modern treaties. We like to say that modern treaties have three separate personalities, three aspects. Those three aspects are as follows:

- They're **contracts** between the Aboriginal signatory and Her Majesty the Queen in right of Canada, and in many cases in right of a province;
- They're **statutes**. They're given the force of law, and have exactly the same force as any other statute enacted by the Parliament of Canada; and
- They're lists of **constitutionally protected rights and obligations**.

Each of those three facets gives rise to slightly different consequences. Under all three of those aspects, the basic legal context is a "fiduciary relationship" that exists between the Crown and Aboriginal peoples; and in some cases "fiduciary obligations;" and in all cases it invokes the "Honour of the Crown;" which has become, most recently in Supreme Court thinking, the lynch pin that defines responsibilities between the Crown and Aboriginal people. There is also the "Duty to Consult and Accommodate."

Land Claims Agreements as Contracts

Let's start with the land claim as a contract. A contract is an agreement, an exchange of promises in return for consideration being given. In many of the land claims agreements the consideration given is the surrender or extinguishment of Aboriginal rights, titles and interests in respect of lands and resources, etc. In the case of the Nisga'a there is consideration given in the exchange of promises as to the certainty that would be henceforth carried on in respect of the rights and interests. And the Crown gives consideration in the form of money, and the assumption of a number of other obligations.

The key elements of a contract are:

- Are there promises? Yes.
- Mutually exchanged? Yes.
- For valuable consideration? Yes.

As a contract, a land claims agreement can be sued upon as with any other contract. That is the basis for the action that's been brought by Nunavut Tunngavik Inc. against Her Majesty for a great number of alleged breaches of the contract – namely the Nunavut Land Claims Agreement. It's seeking contractual remedies of damages and

declarations. Last year the Nunavut Court of Justice awarded a summary judgment in respect of one of the violations.

There is an obligation in the Nunavut Land Claims Agreement for Her Majesty to establish a General Monitoring Plan that would monitor environmental and socio-economic data, and coordinate and keep track of important economic and environmental information that would assist in planning and decision making. From 1993 until after the lawsuit was commenced the General Monitoring Plan didn't happen. It is now underway. On that question, the court agreed that there had been a breach of the contract, and agreed that the damages that should be awarded to the Inuit would be based not upon ordinary contractual principles, but in terms of "disgorgement." The Crown must "disgorge" all the money it saved by failing to fulfill its promise. The Crown cannot reap a benefit by simply failing to do what it promised to do, and keep the cash. It ordered $14.8 million be paid to the Inuit. Her Majesty appealed, the Nunavut Court of Appeal heard the appeal, and we're awaiting a decision.

This illustrates the contractual nature of the agreement and the fact that parties find themselves in the contractual world when looking at their obligations.

Land Claims Agreements as Statutes

One of the frustrating things that people with land claims agreements have encountered in dealing with departments other than AANDC, is the argument, "Yes, I know that the agreement requires this and we respect your agreement, but we have to make our decisions and carry out our duties in accordance with the statutory framework of our department;" i.e. Fisheries Act, Environmental Assessment Act, etc. Here again, there is a failure to recognize that the settlement legislation passed by Parliament ratifying these treaties gives them the force of law. They are in every way, every bit as much a statute as the Fisheries Act, or the Canadian Environmental Assessment Act, or any other regulation.

When federal departments are confronted with the treaty issue, it's important to understand that your statutory and regulatory world is defined intrinsically by the land claim agreement just as much as the governing statute of your department.

A contract is strictly between the parties to the contract. I can't sue on a contract made between two other people. They can sue each other, but I can't, because I'm not a party to the contract. However, when you give something statutory effect, it's binding on the world, whether you're party to it or not, and that's the difference between a statutory obligation and a contractual obligation. Statutes bind everyone. Statutes are sometimes inconsistent with each other, and there is a whole legal world concerned with how to sort out such differences.

Virtually all land claims agreements say that if there is a conflict or inconsistency between the provisions of the land claims agreement and any other federal law or regulation, the land claims agreement prevails. It's a trump rule. The settlement legislation, which is legislation Parliament enacts in order to give effect and statutory effect to these agreements, will itself say "In the event of a conflict or inconsistency between this act and any other act, the settlement legislation prevails." So it was a failure to understand that led to the Crown proceeding with a bill called S8. It originated in the Senate, was called The Clean Drinking Water Act. A laudable intention; to govern safe drinking water on reserves under the Indian Act. But in a moment of dramatic overreaching, a clause was included saying that the provisions of that Act would also apply to people with land claims agreements, and if people with land claims agreements opted in, then the act in the regulations would prevail over the land claims agreement, the settlement legislation, and any laws passed by a self governing nation.

So what we then had was warring prevailing legislation. It was a real problem, but to the considerable credit of the Department and the Minister, that clause was withdrawn prior to the enactment of the Act.

Land Claims Agreements as Constitutionally Protected Agreements

There are different kinds of constitutional protection. There are some things, most notably the division of powers between federal and provincial governments, that simply cannot be altered. If the federal government enacts a law, and the courts find that it's in respect of a matter assigned exclusively to the province, the federal law is simply invalid, it is of no force and effect. We call it *ultravires*. You cannot justify a federal law that is enacted in respect to a matter of provincial jurisdiction, and vice versa. If a provincial law invades federal jurisdiction, it's *ultravires*, and has no force and effect.

There is a different kind of constitutional protection that applies to sections of the Charter of Rights and Freedoms. It is governed by Section 1 of the Charter of Rights and Freedoms. "The rights in this Charter are subject to reasonable limitation prescribed by law as may be demonstrably justified in a free and just society." In other words,

Parliament and the provincial legislatures are able to pass laws inconsistent with Charter rights if those laws can be shown to be demonstrably justified in a free and democratic society.

The Supreme Court of Canada has articulated a number of tests to determine which laws will get through Section 1 and which won't. However, Section 35 is not part of the Charter of Rights, which is in Part 1 of the Constitution Act; it's in Part 2. Thus, Section 1 does not reach it. The Supreme Court of Canada, in the Regina vs. Sparrow decision, ruled that Section 35 rights are not absolute. In this decision the Supreme invented a test for "The justified infringement of Aboriginal rights." What they said was "Section 1 does not apply, but Aboriginal rights are not absolute, they can be infringed provided that:

- It's in pursuit of a valid legislative objective
- The justification has to be in accordance with the Honour of the Crown

It's here that the phrase "Honour of the Crown" is inserted into the debate. In order to show that it's justified in accordance with the honour of the Crown, the court provided a list of factors to be considered that were described as "a justificatory standard." They named a number of things that would be looked at to decide whether the justificatory standard had been met:

- Was compensation offered?
- Was it a minimum amount of infringement to achieve the desired end?
- Did you consult with the Aboriginal people before infringing their rights?

This justificatory standard tied the Honour of the Crown to the Duty to Consult, but duty to consult is then defined in the context of how you would justify an infringement, instead of simply complying with the law. The next thing that comes up is in the Haida case. The Haida asserted Aboriginal title and rights to Haida Gwaii, their traditional homeland, and they hadn't proven them in court, and they hadn't reached a treaty, but they asserted their rights. The question was: was there nonetheless a duty to consult with them in the face of these asserted rights? The Supreme Court of Canada said yes, there is. But of course the depth of consultation required will depend upon the "strength of the claim." This has since given rise to a new wave of effort to measure the strength of claims.

A distinction must be made between the common law duty to consult and the duty to consult in modern land claims agreements. They are very different in that the claims actually set out what consultation will take place and how it will occur. Consultation in modern land claims agreements should not be informed, much less governed by, the policy you may have heard of about the Crown's consultative requirements, which has been generated in the context of the common law duty to consult.

So then what are your obligations? Interestingly, the best and most recent analysis of the Crown's duties (that means all federal departments, the whole of government). The Supreme Court of Canada has pronounced in the Manitoba Metis Federation case that the facts and legal issues involved in that case gave rise to pronouncements by the Supreme Court of Canada about all treaty and constitutional obligations to Aboriginal people. But they're of particular relevance to modern land claims agreements. I've summarized those into a number of bullets:

- Treaty obligations must be broadly interpreted in accordance with their purpose (no legalistic parsing, over-lawyering the words).
- An honourable interpretation of a treaty obligation cannot be a legalistic one that divorces the words from their purpose.
- The Honour of the Crown requires it to act diligently in pursuit of its solemn obligations and the honourable reconciliation of Crown and Aboriginal interests (The Crown can't say "We'll get around to that, it's not in this year's budget, not in my work plan, my approved mandate doesn't include it, etc.).
- The law assumes that the Crown always intends to fulfill its solemn promises, including constitutional obligations. At a minimum, sharp dealing is not permitted (leading an Aboriginal group to think that one approach will be taken when another is intended is sharp dealing).
- If the Honour of the Crown is pledged to the fulfillment of its obligations, it follows that the Honour of the Crown requires the Crown to endeavour to ensure its obligations are fulfilled
- Crown servants must seek to perform the obligation in a way that pursues the purpose behind the promise. The Aboriginal group must not be left with an empty shell of a treaty promise. (Unfortunately, over the past years many people with modern treaties have felt they have been left with an empty shell).

So we don't need to wait for departmental briefing papers to be approved up the food chain in order to tell Crown servants what their obligations are. The Supreme Court of Canada has done that heavy lifting for you. You look at

the purpose behind the obligation, you do not take the legalistic approach, you endeavour to make sure that's done, and you do so diligently. And that all flows from the Honour of the Crown.

Fiduciary duty is not a term in ordinary parlance. Fiduciary duty has grown up where one party has the power over the interests, especially the property, of another. Examples are trustees, lawyers handling trust accounts, financial advisors, etc. The concept of fiduciary duty started applying in the world of Aboriginal law in the 1980s around a case involving the issue of the surrender of reserve land for the creation of a golf course. The courts ruled that the Crown owed the band a fiduciary duty in respect to its handling of that property.

Then the concept of fiduciary duty was widened to describe the entire relationship between the Crown and Aboriginal people. That confused things for about 10 years, until the Supreme Court clarified the situation with a statement that it is a fiduciary relationship, but not every element of a fiduciary relationship carries with it fiduciary duties. In order for the Crown to have fiduciary duty enforceable by strict damages in the courts, it's necessary that the Crown have discretionary control over what called a "cognizable legal interest" of an Aboriginal group, such that the Aboriginal group is vulnerable to the exercise by the Crown of its discretion. In other words, if the Crown has control over something that's a cognizable interest, like money or land, and the Aboriginal group is vulnerable, then there is a fiduciary duty.

A relatively narrow set of transactions fits within those perameters. We're going to have situations where the Crown, in carrying out its responsibilities, has to conduct itself in a certain way to Aboriginal people. It's that way that has been described by the court as in accordance with the Honour of the Crown. The Crown has to act honourably.