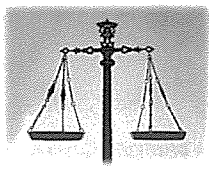
It's Role as "Referee" for Cultural Collision/Cohabitation in the Canadas



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In January 2000, the leadership of this country's highest court was placed into the hands of Chief Justice Beverly McLachlin. The Supreme Court of Canada ("S.C.C."), in shaping Canadian attitudes, government policy, and national consciousness regarding all Aboriginal issues, has never had as high a profile or as controversial a role as it does today.

Since the adoption of the *Constitution Act*, 1982, the S.C.C. has demonstrated an increased flexibility in its interpretation of Aboriginal Rights and Treaties. Canadians and young scholars will need to have a comprehensive understanding of Canadian Aboriginal history, including the role of the S.C.C. The Chief Justice has said that both she and her colleagues believe in a broad interpretation of Aboriginal Rights in which the 500 years of cohabitation must be taken into account on a case by case basis, as evidenced in *R. v. Marshall*:

> "The consideration of the historical background may suggest latent ambiguities or alternative interpretations not detected at first reading. Faced with the possible range of interpretations, Courts must rely on the historical context to determine which comes closest to reflecting the parties' intention. This determination requires choosing "from among the various possible interpretations of the common intention the one which best reconciles" the parties' interest." [*Regina v. Marshall* [1997] S.C.R. 287

The Royal Commission on Aboriginal Peoples and their now famous report (RCAP Report) was based on an exhaustive 178 days of public hearings in some 96 communities. After commissioning a multitude of research studies and consulting with research experts, it concluded that the main policy direction of Canadian Governments over the past 150 years is wrong.

Parliamentary debate on the recent Nisga'a Treaty in Parliament varies from the position of the Reform Party, who would oppose any notion of separate and distinct Aboriginal Nations to that of the Bloc Quebecois, for whom recognition of Aboriginal rights is a critical component of the democratic process. The establishment of rights for separate peoples would set a precedent for a unique, distinct and perhaps independent Quebec.

Why have Canadians forgotten our history with the Aboriginal peoples and Metis? The relationship between the first Europeans and the Aboriginal Communities that would have dominated the 1500's and 1600's were largely based upon the expansionist policies of the major European powers, England and France. Modern Canadian society forgets that the original European Colonists were small in number and were attempting to colonize vast stretches of territory. The maintenance of Aboriginal alliances was critical for both military strategy and our ability to ensure that the vast territories being occupied by the Europeans were held in a continuous fashion. With the defeat of Montcalm on the Plains of Abraham, the British continued to forge a "Special Relationship" with the Aboriginal Peoples.

The Royal Proclamation of 1763 was the defining moment in the relationship with the British Crown and it defines the first two centuries of contact. It would take several centuries before this fiduciary relationship would begin to be re-examined in a fresh light and expanded to the modern context of the S.C.C. interpretation of Aboriginal Rights.

The British imperative at the beginning of the 19th Century was to continue to continue to form alliances with the Aboriginal Peoples. Notwithstanding the remarkable contributions of leaders such as General Isaac Brock, historians now place the contributions of warriors such as Chief Tecumseh on par with or even above that of his British counterparts in ensuring that the self determination of Canada remained out of the control of American expansionism.

However, the introduction of *The British North America Act* in 1867 imposed colonial power by adopting a form of constitution for Canada without any major consultation or input from the Aboriginal Peoples. What followed were the *Indian Acts* of 1876, 1880 and 1884 which began the transformation of Aboriginal Nations to that of a "Conquered People". However, most Aboriginal Nations had no desire for this nor were they ever conquered as evidenced in the 18th and 19th Century Treaties which established the peaceful

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and orderly growth of Canada, particularly in the colonization of the West.

From 1867 up to the introduction of the *Constitution Act*, 1982, the interpretation of Aboriginal rights and rights under treaties went through the "Dark Ages" via a series of technical judgments. As explained by Justice Binnie of the S.C.C., in the recent R. v. Marshall case:

> "Until enactment of *Constitution Act*, 1982, the Treaty Rights of Aboriginal Peoples could be overwritten by competent legislation as easily could the rights and liberties of other inhabitants. The hedge offered no special protection, as the Aboriginal People learned in earlier hunting cases such as *Sikyea v. The Queen* [1964] S.C.R. 642, and *R. v. George* [1966] S.C.R. 267. On April 17th, 1982, however, this particular type of "Hedge" was converted by section 35(1) into sterner stuff that could only be broken down when justified according the test laid down in *R. vs. Sparrow*, [1990] 1 S.C.R. 1075, at P.1111 @ et seq., has adapted to apply to Treaties in Badger, Supra, per Cory J.E., @ page 812 @ seq."

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So what followed in the latter half of the 19th Century and the first three quarters of the 20th Century, was a broad policy, supported by our S.C.C., to eventually assimilate the Aboriginal population into that of the greater Canadian society. The disastrous effects of this policy are still being felt to this day and will continue to reverberate throughout the Aboriginal community.

The "Dark Ages" ended with the introduction of the *Constitution Act*, 1982. The Charter of Rights and Freedom protects individuals by preventing the government from imposing laws that are too restrictive of their rights. Section 25 was introduced to protect special Aboriginal laws and status from being destroyed by some other application of the Charter:

> "s.25 - The guarantee in this Charter of certain rights and freedom shall not be construed so as to abrogate from any aboriginal, treaty or other rights and 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 may be acquired by the Aboriginal Peoples of Canada by way of land claims settlement."

Even prior to the *Sparrow* case, came the important decision of the S.C.C. in *Guerin v. R.* [1984], D.L.R. (4th) 321. The interpretation of Aboriginal Rights was associated with the term "Sui Generis". The interpretation of Sui Generis is that Aboriginal Rights are unique, different, and distinct. The Guerin case is also considered definitive of the S.C.C.'s attempt to define and confirm the special fiduciary relationship of the Crown to the Aboriginal Peoples.

Later in the *Sparrow* cases, the test for infringement under Section 35(1) of the *Constitution Act*, 1982 was set out:

> "To determine whether the fishing rights have been interfered with such as to constitute a *prima facie* infringement of Section 35(1), certain questions must be asked. First, is the limitation unreasonable? Second, does the regulation impose undue hardship? Third, does the regulation deny to the holders of the right their preferred means of exercising that right? The onus of proving a prima facie infringement lies on the individual or group challenging the legislation".

The pronouncement in Sparrow soon became known as the "justificatory test," as this relates to Aboriginal Rights. The overlay of legislative powers over Aboriginal Peoples must contain within it an inherent limitation of the Crown's exercise of its legislative powers to take into account Aboriginal Rights.

Where are we now and where do we go to from here? As the RCAP Report indicated, there are in excess of some 450 Aboriginal claims that are in various states of negotiation and litigation. Looking forward to the 21st Century, the current Chief Justice, Beverly McLachlin has set out the summary of principles governing interpretation of Treaty and Aboriginal Rights. Although speaking in dissent in *Regina v. Marshall*:

1. "Aboriginal treaties constitute a unique type of agreement and attract special principles of interpretation: *R. v. Sundown*, [1999] 1 S.C.R. 393, @ para. 24; *R. v. Badger*, [1996], 1 S.C.R. 7701, @ para. 78; *R. v. Sioui*, [1990] 1 S.C.R. 1025, @ pg. 1043; *Simon v. The Queen*, [1985] 2 S.C.R. 387, @ pg. 404., see also [J. Sake] Youngblood Henderson "Interpreting Sui Generis Treaties" [1997], 36 Alta. L. Rev. 46; L.I. Rotman, "Defining Parameters: Aboriginal Rights, Treaty Rights and the Sparrow Justificatory Test" [1997], 36 Alta. L. Rev. 149.

2. Treaties should be liberally construed and ambiguities or doubtful expression should be resolved in favour of the Aboriginal signatories: *Simon*, supra, @ p. 402; *Sui*, supra @ p. 1035; *Badger*, supra @ p. 52.

3. The goal of treaty interpretation is to choose from among the various possible interpretations of common intention the one which best reconciles the interests of both parties at the time the treaty was signed: *Sui*, supra, @ pp. 1068 and 1069;

4. In searching for the common intention of the parties, the integrity and honour of Crown is presumed: *Badger*, supra @ p. 41;

5. In determining the signatories' respective understanding and intentions, the Court must be sensitive to any cultural and linguistic differences between the parties: *Badger*, supra @ paras. 52 - 54; *R. v. Horseman*, [1990] 1 S.C.R. 901, @ p. 907.

6. The words of the Treaty must be given the sense which they would naturally have held for the parties at the time: *Badger*, supra, @ p. 53 e.t. seq.; *Nowegijick v. The Queen*, [ ] 1 S.C.R. 29 @ p. 36.

7. A technical or contractual interpretation of treaty wording should be avoided: *Badger*, supra; *Horseman*, supra; *Nowegijick*, supra.

8. While construing the language generously, Courts cannot alter the terms of the Treaty by exceeding what "is possible on the language" or realistic: Badger, supra, @ p. 76; Sui, supra, @ p. 1069; Horseman, supra, @ p. 908.

9. Treaty rights of aboriginal peoples must not interpreted in a static or rigid way. They are not frozen at the date of signature. The interpreting Court must update Treaty rights to provide for their modern exercise. This involves determining what modern practices are reasonably incidental to the core Treaty right in its modern context: *Sundown*, supra, @ p. 32; *Simon*, supra, @ p. 402. [paragraph 78 - *R. v. Marshall*]

Justice McLachlin goes on to suggest what a twofold test approach in the interpretation of a Treaty involves. First, the words of a Treaty should be viewed as to their "facial meaning" which brings you to conclude a preliminary one or more possible interpretations. The second step then goes on to the interpretation of the Treaty's historical and cultural background which requires the Court to delve into the historical past. On behalf of the S.C.C., Justice Binnie also takes a well placed shot across the bow of historians, when he states:

> "The Courts attracted a certain amount of criticism from professional historians. These historians see an occasional tendency on the part of judges to assemble a "cut and paste" version of history. ... While the tone of some of this criticism strikes the non-professional historian as intemperate, the basic objection, as I understand it, is that the judicial selection of facts and quotations is not always up to the standard demanded of the professional historian, which is said to be nuanced....the law sees a finality of interpretation of historical events where finality, according to the professional story, is not possible. In reality, of course, the Courts are handed disputes that require for their resolution the finding of certain historical facts. The litigating parties cannot await the possibility of a stable academic consensus. The judicial process must do as best it can...(paras. 36 and 37).

The challenge for future Canadian scholars is to live up to the Court's expectations of accurate, historical analysis of the facts. As we move into the 21st Century, one position is clear, the status quo is broken. First Nations peoples are requesting an agenda for change that is ambitious and far reaching in both their legal and economic implications. As the RCAP Report suggests, changes will have to be negotiated and implemented by Aboriginal Peoples in the way that they choose. The challenge to governments is to develop social policy that will provide a 21st Century framework for solutions with the Aboriginal Community. Since the implementation of the *Constitution Act*, 1982, the S.C.C. has raised the bar on interpreting the relationship of the Aboriginal Peoples to other Canadians. Aboriginal society has waited 500 years for our S.C.C. to reach this point and they are not going to go away. With our new Chief Justice and the illuminated role of the S.C.C., we are only beginning to formulate the reorganization of our relationship with Aboriginals, Metis and Inuit. It remains to be seen whether Canadian Society and it's policy-makers are up to the challenge. ■

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