Legal Perspectives

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Andree Boiselle – Consultation and Implementation

I will start with some basic information, some background. The research I offer for reflection is broader than as the agenda shows. I'm interested in the question framework and doctrine of what's called justified infringement of Aboriginal rights in Canadian jurisprudence, the whole reasoning that surrounds justified infringement, that test.

That test of justified infringement arose out of the Supreme Court decision in Sparrow 1990; one of the first substantive cases that was interpreting the meaning of Aboriginal rights under Section 35, of the scope of the protection afforded by that constitutional provision. Section 35 recognizes and affirms Aboriginal rights, including treaty rights, but does not provide guidance as to the determination of the content of Aboriginal rights, nor with respect to the relationship with competing rights and with the jurisdiction of non-Aboriginal governments.

The argument has been made that the reason why Section 35 does not include a subsection delineating the criteria under which Aboriginal rights could be curtailed , was implicitly to prevent the kind of judicial activism that would lead to a curtailment of those rights. Yet the court in Sparrow does just that, brings to the interpretation of Section 35 this doctrine of curtailment or the conditions of infringement by simply saying that because the provision is so broadly worded, we need to put it into context, by saying that those rights cannot be absolute.

The court goes on to frame or articulate that doctrine in two parts: 1: Determine whether there is an infringement by asking whether a law or executive act of the Crown is imposing undue hardship on the Aboriginal right holder, is unreasonable, or creates meaningful obstacle to the preferred mode of exercise of the right by the Aboriginal party; 2: The justification part: If there is an infringement that's demonstrated by the Aboriginal party, the Crown bears the onus of demonstrating a justification, first by proving that it has a valid legislative objective in carrying forward this infringement measure, and second by showing by a set of proportionality requirements with respect to that infringement. There has to be a rational connection demonstrated between the legislated objective and the infringement that's contemplated.

Secondly, the infringement has to be shown to be crafted so as to impair the right as little as possible. Thirdly, the benefits flowing from the infringement measure can't outweigh the adverse impact on the

rights holder. The notion of consultation and accommodation is part of this demonstration. The duty of the Crown to consult and to demonstrably accommodate the group whose rights are being infringed, is meant to ensure that all is being done to minimize the infringement of the right.

In Sparrow, when that doctrine was first articulated, it seemed pretty clear that it had to be interpreted narrowly, that the justification condition that the Crown had to meet were quite high. Only questions of conservation were mentioned in Sparrow, and prevention of harmful conduct in the exercise of the right of Aboriginal party were mentioned or contemplated by the Supreme Court in 1990 as potentially meeting that justification threshold.

The reason for concern with respect to that doctrine rose gradually in the years since Sparrow because in follow up cases, or cases that were also determining Aboriginal rights, the Supreme Court went on to broaden the kinds of legislative objectives listed as potentially meeting the valid objective part of the test. While in Sparrow the court has said the public interest of non-Aboriginal Canadians at large it's too broad a statement to really allow us to assess and balance the rights of Aboriginal and non-Aboriginal people in accordance with the Constitutional protection afforded to Aboriginal rights.

Then Gladstone and Dalgamuk we really see the courts starting to list broad areas where the Crown can validly legislate to start infringing justifiably on Aboriginal rights. This justified infringement framework came further into focus over the course of last year in 2014 with two decisions were rendered by the Supreme Court: the Tsilhqot'in decision and Grassy Narrows, where we see the language of the public interest resurfacing in the court's judgement. Twenty-five years after Sparrow, actually kind of approving that language as one that can support a valid legislative objective.

But also in Tsilhqot'in the language of consent is used in a way that ends up being quite ambiguous. In the same breath as the court is supporting the title, and in favour of the Tsilhqot'in title to their lands, and saying there is going to have to be consent in order to infringe on the title holder's rights and jurisdiction over their lands, the court is really undermining the notion of consent itself by restating the justification infringement. It's possible if there is no consent, it's very clear in Tsilhqot'in that if there is no consent for legislation on the part of the province, that it's going to infringe on their jurisdiction. If there is justification understood in that broader sense than it was in Sparrow, then it's going to be fine. It's going to be fine to infringe. So what does consent mean in that context?

In Grassy Narrows, the court is reiterating that there is going to be an infringement of Treaty 3 rights if no meaningful hunting and fishing rights are provided in the treaty area by the treaty right holder. It's contemplated in Canadian jurisprudence that there can be an extinguishment of treaty rights if the proper justification is provided and the thresholds for justification are met.

So what does this have to do with modern treaties? There is no distinction in the constitutional framework flowing from Section 35 between historic treaties, general Aboriginal rights that can be recognized and affirmed, and modern treaties and land claim agreements we're talking about at this conference. There is no difference inherently in the kinds of legal doctrines that are supposed to apply to the older treaties and to the modern treaties. Just a cursory look at the two types of instruments shows how different historic and modern treaties are in terms of the level of specificity, the actual

consensual nature of the treaty. So the kind of rationale that underlies the whole justified infringement framework becomes really questionable. Is it because if that rationale was grounded in the fact that Section 35 was really broad, we don't really know what we're dealing with, so we can judicially import that kind of legitimating doctrine for infringing those broad rights in the same breath as we delineate them, there's no supporting corresponding rationale for doing so in terms of modern treaties that do include very carefully crafted wording when it comes to settling disagreements, cooperation, detailed jurisdiction and rights of the various parties to the modern treaty.

The Campbell case, from 2000, confirmed the constitutional validity of the Nisga'a land claim agreement. There is a mention in that case at the Supreme Court level of B.C, a case that was not brought to appeal, that the justified infringement framework should apply to the modern treaties as well. So that land claim had to be understood in the context of ongoing infringement.

There is a real question with regard to the certainty that is the stated objective of those modern land claim agreements, reiterated most recently in the 2014 comprehensive land claim agreement policy of the Harper government. We'll see how it's understood and appreciated by the new authorities in place in the federal government. There's this stated notion that we're looking for certainty. Not only the Crown but also the Aboriginal parties are entitled to certainty.

This is to explain the grounding and premises of my research. I'm looking at recent decisions in the last two or three years with respect to implementation and infringement cases brought with respect to modern land claim agreement. I'm finding a tendency on the part of the courts to want to stay within the boundaries of those modern land claim agreements, which can be encouraging in some respects. Doesn't necessarily always yield the results hoped for by Aboriginal parties, but it still potentially generating a trend towards not applying justified infringement to those types of agreements. This being said there are cases, most recently the 2015 Makivik case in Quebec, where the court is resorting to that framework; ultimately to the benefit of Makivik claimants, but even if it's to the benefit of the Aboriginal party in one case, my worry remains with regards to reaching for that framework as a way to think through an infringement of rights encompassed by the treaty.

My research is far from exhaustive and includes no cases that explicitly wrestle with the validity of the application of the doctrine of justified infringement; to override the carefully crafted delineation of Aboriginal rights in modern treaties.

I believe that to make treaties work for future generations we need to come to terms with the meaning of their constitutional protection.

Larry Chartrand – The Costs of Foregoing the Arbitration Option for Resolving Disputes

I'll focus on issues dealing with land claim arbitration panels, and some of the developing principles related to the interpretation of modern land claims agreements.

I am a beneficiary of a modern land claims agreement; the Metis settlement. Most people don't recognize the Metis agreement as a modern land claim agreement, although it is an agreement between the Alberta Metis Nation and the Alberta Government, including land claims and self government aspects.

For a number of years I was an arbitrator for the Sahtu Dene land claims agreement. I stayed on there for four terms. I'd like to talk about the value land claims arbitration panels and the concern that they are underutilized. There is some scholarship that has pointed that out. The Crown has sometimes refused to use these panels to resolve disputes. I'll also look at a couple of points with respect to recent case law related to how the courts interpret modern land claims. There are a couple of principles that seem to be emerging: deterrence, and relational reconciliation.

Most modern land claims have arbitration dispute resolution mechanisms in them. They generally include arbitration panels, as alternatives to the courts. For example in the Sahtu Dene agreement in Chapter 6 the arbitration panel is described as an alternative to the courts for resolving disputes. Although the courts are not necessarily excluded. It's a choice whether to pursue arbitration or go to the courts.

It's been noted there has been a lack of utilization of arbitration processes, as an alternative to the courts, in spite of the fact that they are less costly, and sometimes more effective than the courts.

In 2004 it was said that parties have not made extensive use of arbitration procedures.

In 2008: the Senate released a scathing report on the failure of the Crown to rely on these alternative processes to resolve land claim disagreements. There has been almost universal refusal by the federal government to submit to these processes, despite the fact that they were negotiated and included in the agreements.

It should be noted though that in some cases, such as in the Sahtu, arbitration is not chosen, in favour of court action, by modern treaty holders.

Given this criticism by the Senate about the underutilization of arbitration panels, AANDC Minister Chuck Strahl said in a letter to the Senate, "I am working with my fellow colleagues to develop guidelines whereby Canada would agree to use binding arbitration including financial matters." I haven't heard or seen any results from that promise.

In 2014 there was a discussion document circulated about renewing the comprehensive land claims policy. In that document is a statement that says "Use of arbitration should require consent of all parties

to the dispute on matters beyond determination of fact or technical issues, unless otherwise specified in the treaty." I have a concern with that language because of the limitations it imposes.

The courts are an institution that is very British, does not include Aboriginal resolution mechanisms. Judges are generally socialized to value Canadian interests, not Indigenous interests. I am a proponent of indigenizing the law.

"Such disregard also threatens the integrity of the arbitration panels themselves, that are set up in the land claims agreements. Such processes are at serious risk of being viewed as ineffective, and if such views persist, will simply become eventually irrelevant. They are no longer seen as a serious institution, these arbitration panels, are regarded as an afterthought. For example the Sahtu arbitration panel, which has been in existence since 1993, has not seen a claim yet. I agreed to sit on that panel in 1993, and after four terms I said "What's the point?" It's embarrassing to you when someone comes up to you and says "How many claims have you arbitrated." And I have to say "Zero."

There are significant values to arbitration processes. They are efficient and cost effective. They are inherently flexible. The advantages to them of course are that an arbitration panel has a lot of flexibility to adopt morals incorporated into Indigenous laws and practices, and to be culturally sensitive and inclusive. So they can incorporate a cross-cultural approach to decision making that is inclusive of Indigenous laws and processes.

With respect to the Sahtu arbitration panel, we decided to make it a priority to learn Dene and Metis legal processes. We studied Dene law, held workshop on legal pluralism and cross cultural legal integration. Met with Elders in the communities several times. All of this research took place so that if the panel ever was to hear a case would be able to consider it in light of both Canadian law and Dene law.

Re modern treaty interpretation: A decision made in arbitration for example, or in the courts, under the Sahtu or Gwich'in agreements, we may be asked to determine what principles of treaty implementation will apply. In such a modern treaty the parties will have expressly turned their minds to the issue of how the treaties should be interpreted to express the intent of the agreements.

The courts have said that given that reality, there will be significant deference given to the terms of the agreement when it comes to interpretation. Courts distinguish between historical treaties where this deference doesn't exist and modern treaties. There is a presumption that the principle of ambiguity that the courts have said apply to the interpretation of historical treaties don't apply necessarily to modern treaties.

There is a principle of deference, but there is also a counter principle of relational reconciliation. Like historical treaties, they are not meant to be understood as commercial contracts, but rather as instruments designed to foster positive long term relationships. So in this context, it is inappropriate to maintain a strict letter of the agreement interpretation, which may be acceptable in a commercial contract context, but not in a modern treaty context, which is part of a process of reconciliation between Canada and the Indigenous nation.

Modern treaty interpretation the honour of the Crown and the duty to consult are particularly well suited to addressing the relational aspect of treaty implementation.

Most people think Honour of the Crown is about the duty to consult, but actually Honour of the Crown is about a whole host of obligations. Arbitration panels in some respects are good for both the Crown and Indigenous parties.

Sophie Theriault – Land Claim Objectives – Climate Change as a Test Case

(see presentation)

My paper is the results of a very preliminary research project on land claims agreements negotiation and implementation in the context of climate change. My contribution aims to analyse the conditions for land claims agreements to enhance the capacity of indigenous peoples, especially those living in the northernmost regions of Canada, to adapt to the fast changing environment.

Flexible legal arrangements and institutions are necessary in land claims, that can evolve and adapt over time to accommodate incremental changes to the environment.

In order to foster climate adaptation for current and future generations of indigenous communications, land claims must be adapted. There is an argument to be made that land claims agreements must be living constitutional agreements that are able to evolve with changing circumstances.

Although I focus on the North, what I'm saying is also relevant to other regions of Canada.

Climate change is already exerting pressure on the environment, human health, and indigenous cultures. This pressure will likely intensify in the future, it's hard to be optimistic.

It has become imperative to think seriously about building or reinforcing the adaptive capacities of human societies to their changing environment. In Canada, due to geographic and economic realities, indigenous peoples are particularly vulnerable to climate change.

Some of the impacts of climate change do threaten to interfere significantly with land claim agreements, including harvesting, management of resources, protected areas, water rights, natural resource development, etc.

In northern regions climate change is likely to affect the distribution and range of wildlife species as habitat changes, as well as migratory patterns. Indeed, some of these changes are already well documented. Other effects include changes in sea ice, snow cover, and landscape that will affect traditional hunting areas and impede access.

Marine coastal communities are facing increasing exposure to storms and rising sea levels. Some communities are beginning relocations. Permafrost melting will impact on existing and future buildings. Pipelines and airstrips will also be negatively affected by melting permafrost.

Some areas will experience increased economic activity and related pressures due to climate change, as they become more accessible due to factors such as longer ice-free periods, making commercial shipping, resource extraction and tourism more economically viable.

The timing of climate change effects is not certain. Indigenous communities have proved very resilient, however. In a study of 15 Inuit communities, regulations have been identified by Inuit as a constraint on the flexibility required for adapting to climate change. A flexible and adaptive legal and governance framework is required to facilitate the adaptations required.

Research questions:

1. How should we define objectives of land claims agreements in the context of a largely uncertain environmental future?
2. How could land claim agreements foster the capacity of Indigenous communities to adapt to complex, interconnected and non-linear effects of climate change?
3. What would be the main features of adaptive land claims agreements?

These questions will be answered in the next few years.

I will use the remaining time to use climate change as a test case for reflecting on the old debates on the objectives of land claims agreements as the final and definitive settlement of all outstanding aboriginal claims, or as living constitutional agreements that are amended according to changing needs and circumstances.

Land claims agreements are meant to define rights and obligations basically forever. From the perspective of climate adaptation, it is imperative that these agreements be flexible enough to adjust to shifting environmental conditions.

It's important to note that some climate change will be efficiently addressed by existing institutions. However, the accumulation, intersection and intensity of environmental changes likely to occur before the end of the century could impose a moral duty to renegotiate provisions or adapt new ones to safeguard the continuing relevance and effectiveness of land claims agreements.

While all modern treaties provide for amendments, those provisions are a panacea from a climate adaptation perspective, especially without mechanisms to address the power relationships between the parties. Especially where the interests of Indigenous people are in competition with powerful interests such as extractive industries.

While some of the recent agreements provide for periodic review processes, the scope of the review is often limited to very specific areas of the agreement, and would not necessarily lead to the negotiation of new provisions. Some agreements, such as the Tlicho, do go a bit further.

From a 2004 agreement in principle in Quebec: This provides a good basis to start thinking about how to structure agreements to accommodate climate change adaptation. "Treaty is to be of an indefinite duration and length, but is reviewed at regular intervals, and may be amended in accordance with the terms in Chapter 17. Chapter 17 includes this provision: "The treaty shall however be reviewed on a

periodic basis, upon this review the parties shall determine whether the treaty should be amended, due to circumstances which have significant effects on this provision. However the review procedure is not intended to question the very foundation of the treaty.

Other provisions that provide flexibility ensure that First Nations are not excluded from benefitting from any constitutional amendments or international conventions in relation to indigenous people.

It is possible to imagine treaties that can evolve, and adapt to circumstances without thwarting the objective of certainty. From a climate adaptation perspective such processes recognize major environmental disruption as a circumstance warranting potential amendments to land claim agreements.

Major environmental disruptions that would justify reopening the treaty would have to be strictly defined as disruptions that have the effect of precluding permanently or for a significant amount of time, the exercise of a right provided by the agreement.

We can think as well about a joint monitoring committee that would be created to assess climate change impacts on the exercise of rights provided for in the land claims agreements, taking into account both traditional ecological knowledge and scientific knowledge.

Dispute resolution mechanisms are tailored to reduce power imbalances between the parties.

I will conclude by saying that my project based on the early hypothesis that land claims agreements do have an important role to play in enhancing the ability of indigenous people to adapt to a changing environment.

Climate could be accounted for when negotiating agreements. Predictable impacts of climate change on past and current uses of the land and resources can be taken into account from the outset. Since the impacts of climate change are largely uncertain, adaptation should be seen as an iterative process sustained by legal arrangements that can evolve through time.

Such processes would foster the reconciliation of land claims agreements with Indigenous visions of treaty making as an ongoing dialogue creating permanent living relationships between coexisting nations.

Questions

Bruce, Nunavut Tunngavik:

Re Larry's presentation, arbitration: We struggle with arbitration; the GOC will not go to arbitration re financial matters. Last time binding arbitration was in a land claim was in the time of Inuvialuit agreement. They had four arbitrations; the first they lost, the other three they won, and there has been no binding arbitration in modern agreements since then. It was only recently forced and included in the Nunavut Land Claim Agreement as a result of our lawsuit. The only way this is going to change is through litigation.

Larry Chartrand:

Even in the Sahtu and Gwich'in there are narrow areas where the parties agree to compulsory arbitration, but it is not broad like in the Inuvialuit agreement. Quite different between them, and notoriously complicated. The broad jurisdiction in the Inuvialuit agreement is good, not seen in subsequent agreements.

Derek Rasmussen:

Dougald, in his remarks when the lawsuit settlement was signed, the most important thing was not the $255 million Inuit won, but the arbitration provision; getting unilateral arbitration on financial matters. The language is not finished yet, but this is an important precedent, was a very contentious issue. Either party can go to binding arbitration on financial matters without consent.

Ghislain Otis

Question for Sophie: Is there existing empirical evidence that treaties as they now stand do not allow adaptation to climate change? Or are we speculating as to what might happen in the future? And Andre, I would point out that despite the fact that it is frustrating from the point of view of Indigenous parties that modern treaty rights can be displaced, it's still hard for the federal and provincial governments to override Indigenous rights and prerogatives, as it is for them to override provincial rights and prerogatives. The federal government can override provincial rights and prerogatives upon simple proof of conflict. No justification, consultation, no consensus is required.

Sophie:

There is no empirical data, but it is starting to build, as adaptation research is in its infancy. There will be cases where climate change agreement will not conflict with land claims, but what do we do when there are conflicts? Such as the need to move a community, etc. Taking a preventative approach would require that we build such ideas into land claims agreements.