Arriving At A Common Understanding Of Crown And Aboriginal Duties

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« Todo ver a otro est verse vivir en otro.
Voir l'autre, c'est se voir vivre dans l'autre. »
Maria Zambrano

I would like to thank the conference organizers for inviting me to speak to you today. The theme of Day One is "Defining Crown and Aboriginal[1] Duties" – a task the Supreme Court of Canada has undertaken on a case-by-case basis in the absence of political consensus on these issues since 1982.

1- Recent history: A paradigm shift

A brief look back in time will provide useful context for the theme we are discussing today. In 1969, the federal government published its White Paper on Indian Policy followed by statements by the then-Prime Minister denying the existence of "aboriginal rights" in Canada and dismissing historical treaties with Aboriginal peoples as destined to become obsolete and lose their legal effect.

The Supreme Court of Canada's ruling in *Calder*,[2] which concerned the aboriginal title of the Nisga'a people of British Columbia, reversed Canadian jurisprudence on aboriginal title. Another lower court decision[3] handed down the same year which also had major ramifications in Canada involved the aboriginal title of the Cree Nations of Quebec.

In response to the *Calder* ruling, the federal government altered its position on aboriginal rights, declaring its willingness to begin negotiating claims involving aboriginal title in a statement issued in 1973.[4] The government clarified its intentions in two subsequent policies, one on comprehensive claims published in 1981 and another on specific claims published in 1982.[5]

We are all familiar with the debate that surrounded the repatriation of the Canadian Constitution in the 1980s, and the political lobbying and legal interventions by Canada's First Nations, both in Canada and Britain, to secure constitutional protection of their rights.

The *Constitution Act, 1982* [6] was adopted with provisions for:

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[1] In this paper, the term "First Nations" is used except when reference is made to the terms used in legislation, administrative documents and court rulings.
[2] *Calder* v. *British Columbia (Attorney General)*, [1973] S.C.R. 313.
[3] *Le Chef Max "One-Onti" Gros-Louis et autres* c. *La Société de développement de la Baie James*, [1974] R.P. 38.
[4] *Statement by the Honourable Jean Chrétien, Minister of Indian and Northern Affairs, regarding Indian and Inuit claims, August 8, 1973.*
[5] *In All Fairness: A Native Claims Policy – Comprehensive Claims*, Ottawa, 1981 and *Outstanding Business: A Native Claims Policy – Specific Claims*, Ottawa, 1982.
[6] Section 35 of the *Constitution Act, 1982*.

- Constitutional recognition of the existence of Aboriginal peoples in Canada (Indian, Inuit and Métis).
- Recognition and affirmation of their specific collective rights: existing aboriginal and treaty rights.
- Participation (with no right to vote) of Aboriginal representatives in constitutional conferences dealing with aboriginal matters.

These three elements set precedents that completely transformed our political and legal landscapes. New strategies and political actions had to be devised, not only by governments but also by Aboriginal peoples.

The round of constitutional conferences aimed at defining the content and scope of the new rights under the *Constitution Act, 1982*, failed to produce a consensus. The *Charlottetown Accord*, which included certain provisions on the inherent right to self-government, was eventually defeated by referendum in 1992. Since then, there have been no further constitutional negotiations or comprehensive political negotiations, either bilateral (Aboriginal – federal) or multilateral (Aboriginal – federal – provincial).

In the meantime, federal and provincial legislative authorities continued to regulate Aboriginal peoples as though these rights had not been recognized, which meant that many cases ended up in the courts. This left the Supreme Court with the task of defining rights, and the corollary Crown duties, on a case-by-case basis.

A paradigm shift became evident in the latter part of the 20th century as regards Canada's aboriginal policy. This policy was largely founded on postulates carried forward from imperial policies of previous centuries: non-recognition of aboriginal rights, extinguishment of aboriginal title, gradual extinguishment of the legal effects of treaties, the trusteeship system under the *Indian Act*, to name but a few. This shift dictated a complete overhaul of the policy with respect to Aboriginal peoples, a responsibility that lies principally, but not exclusively (as we shall see), with governments.

2- New duties for the Crown: A corollary of the recognition of new rights

The Crown's duties have been transformed since 1982. Constitutional recognition of the existence of Aboriginal peoples in Canada and of their specific collective rights changed the nature of the protection afforded their rights. New rights have been recognized and they are better protected than in the past. It follows that the Crown's obligations have been substantially altered.

A) A restriction on the powers of legislatures and governments

By agreeing to constitutionally protect the rights of Aboriginal peoples, legislatures and

governments undertook to restrict their respective powers. This applies to both their past and future measures. As regards past measures, a review of existing statutes and regulations is required to determine whether they adversely affect existing aboriginal and treaty rights and, if so, to ascertain the extent of the necessary amendments. This review would also assist legislatures and governments in guarding against infringements of these constitutional rights in all future measures, or to justify any such infringement.

An analogy can be drawn with section 15 of the *Canadian Charter of Rights and Freedoms*, adopted as part of the *Constitution Act, 1982*, but not enacted until three years later. The purpose of this delay was precisely to allow a review of the existing legislation so as to reduce the number of court remedies sought that would test the existing legislation against the new constitutional protection of rights guaranteed by the Charter.

In deciding *Sparrow*, the Supreme Court affirmed that "The Constitution of a country is a statement of the will of the people to be governed in accordance with certain principles held as fundamental and certain prescriptions restrictive of the powers of the legislature and government."[7]

B) Obligations imposed by the courts in the absence of political discussions

It is by default that the courts have been compelled to define the entire constitutional framework created in 1982, due to the lack of any political process for political discussion and negotiation. The Supreme Court of Canada has felt obliged to articulate that:

these rights constitute "a solemn commitment that must be given meaningful content."[8]

These are not only abstract principles, but concrete rights for which a contemporary application must be found

B-1) A fiduciary relationship giving rise to a fiduciary duty

Crown duties have been altered by court rulings as well, notably *Guerin*[9] and *Sparrow*. In *Guerin*, the Supreme Court qualified, for the first time, the relationship between the Crown and Indians as a fiduciary one, thereby greatly amplifying the Crown's responsibility.

In *Guerin*, Justice Dickson based this fiduciary relationship on the fact that Indian lands are inalienable except to the Crown, as dictated by the *Royal Proclamation of 1763*, the cornerstone of British imperial policy with respect to lands occupied by Aboriginal peoples in North America. On the facts in this case, the Court held that this relationship created a fiduciary obligation, enforceable in a court of law, which made Parliament and governments

[7] *R.* v. *Sparrow*, [1990] 1 S.C.R. 1075, page 1106, citing *Reference re Manitoba Language Rights.*
[8] *Sparrow*, Ibid, p. 1108.
[9] *Guerin* v. *The Queen*, [1984] 2 S.C.R. 335.

(federal and provincial) accountable for their responsibility towards First Nations.

Following *Guerin*, the Supreme Court expanded the scope of this concept in *Sparrow*, making the Crown's duty to act in a fiduciary capacity with respect to all Aboriginal peoples (not only to Indians in the limited context of surrenders under the *Indian Act*) the general guiding principle for section 35(1) of the *Constitution Act, 1982*.

But not all aspects of the Crown's fiduciary responsibility automatically create a fiduciary duty. For example, in a case relating to the Crown's duty to ensure participation of Aboriginal representatives in constitutional conferences, the Supreme Court rejected a claim by the Native Women's Association of Canada on the basis that the right of Aboriginal peoples to participate in constitutional discussions "does not derive from any existing Aboriginal or treaty right protected under s. 35." The Court went on to conclude that the federal government was not obligated "to extend an invitation and funding directly to the respondents."[10]

In a subsequent decision, *Reference re Secession of Quebec*, the Supreme Court concluded that the concerns of Aboriginal peoples regarding the effects on their constitutional rights of a possible secession by Quebec would be addressed by the federal and Quebec governments in negotiations "in which aboriginal interests would be taken into account."[11]

B-2) The honour of the Crown

In its deliberations on the Crown's fiduciary duty to Aboriginal peoples and its analyses of aboriginal and treaty rights, the Supreme Court has held that the Crown is bound by its honour and that no "sharp dealing" can be tolerated, owing to the responsibility deriving from the Crown's fiduciary relationship.

[10] *Native Women's Association of Canada v. Canada*, [1994] 3 S.C.R. 627, at p. 664.
[11] *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, at para. 139.

3- Duties for both parties to disputes (governments and Aboriginal peoples)

In more recent judgments, it is becoming evident that the Supreme Court is no longer satisfied with settling disputes solely by construing aboriginal rights and Crown obligations. Instead of simply defining aboriginal rights, the Court is shifting to a pattern of creating duties for Aboriginal peoples. In fact, the Court has come to impose duties on both parties: the Crown and Aboriginal peoples. It is important to bear in mind that such duties are set out by the courts within the context of litigations. For this reason, they do not cover the full scope of the parties' respective duties; rather they constitute a set of minimal rules that will serve as a reference for the future. They do not limit the capacity of the government and Aboriginal peoples to agree on a much broader range of reciprocal duties. The duties created by recent case law serve as a frame of reference for the conduct of subsequent negotiations between the Crown and Aboriginal peoples. This is also the minimal frame of reference that will guide the courts in judging the respective conduct of the parties in future litigations.

Certain duties are imposed equally on both parties, such as the duty to act in good faith and to accommodate.[12] Others are specific to one party or the other, such as the Crown's duty to consult meaningfully, which does not necessarily give Aboriginal peoples a right of veto.[13] Aboriginal peoples on the other hand, have a duty to not compromise the Crown's efforts nor to adopt unreasonable positions.[14]

4- The judicial approach: The clash of conflicting interests

The clash of conflicting interests in litigations arises from the parties' respective views of their rights. This may occur before or after the parties have tried unsuccessfully to accommodate their respective positions, or when their positions are irreconcilable on an issue involving a new right that one or both parties want decided. In litigation, both parties anticipate that an outside third party will rule in favour of their interpretation of the right.

The judicial process is not designed to facilitate a reconciliation of the parties' interests. The fairly recent initiatives to resolve disputes through mediation do nothing to alleviate the adversarial nature of the judicial process. On the contrary, as litigation progresses, the seeming imbalance between the parties is exacerbated, not to mention the inevitable result that one party wins and the other loses. This does nothing to enhance future relations between governments and Aboriginal peoples. Regardless of the outcome of the litigation, governments and Aboriginal peoples must continue to interact, unlike parties to private

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[12] *Delgamuukw* c. *British Columbia* [1997] 3 S.C.R. 1010, at para. 186; *Haida Nation* v. *British Columbia*, 2004, SCC 73, at para. 50.

[13] See, in particular, the following decisions: *Delgamuukw*, *Haida Nation* and *Taku RiverTlingit First Nation* v. *British Columbia (Project Assessment Director), 2004 SCC 74*.

[14] Haida Nation, ibid, at para. 42.

disputes who may never meet again after their case concludes.

Moreover, the ambit of any ruling is necessarily limited, despite the precedential weight of higher court decisions. This is why the judicial process is not exclusive; in other words, it does not prevent and certainly should not substitute for the advancement of political discussions and negotiations between the political actors.

The Supreme Court has repeatedly emphasized that negotiation is a far more fruitful recourse than litigation reconciling the pre-existence of aboriginal societies and the sovereignty of the Crown. But at the same time, the Court has made it clear that it will readily intervene to "reinforce" the negotiation process.[15]

Moreover, the Supreme Court recently stated that nothing prevents governments from setting up regulatory schemes to address procedural requirements for consultations and other discussions with Aboriginal peoples, thereby strengthening the reconciliation process and reducing recourse to the courts.[16] In fact, the Court noted in *Delgamuukw* that, following *Gladstone*, it had significantly expanded the legislative objectives that can justify an infringement of aboriginal rights, which objectives may relate to the reconciliation of the prior occupation of North America by Aboriginal peoples with the sovereignty of the Crown.

5- The need for a broader perspective

Jurisprudence established by the courts cannot provide an answer to the broader set of issues facing our society. While the legal and judicial debates are most interesting, court decisions elucidate in their orders the latitude in any given case for each of the conflicting interests involved. They cannot replace our social policies.

Nor can the judicial arena provide an answer to more fundamental issues facing our society as a result of the paradigm shift that followed the constitutional recognition of the specific collective rights of Aboriginal peoples. What do we want to achieve in this regard? What place do Aboriginal peoples occupy in Canadian society? What place do they wish to occupy? How and when do we intend to accomplish our goals? These major socio-political objectives have not been redefined since the radical change brought about in 1982.

Aboriginal issues cannot remain confined to the judicial forum where they have been debated since 1992. A broader social dialogue that transcends political boundaries is called for. This dialogue will allow governments and Aboriginal peoples to express their respective views. It will also promote an appreciation of the diversity of Aboriginal peoples by providing a forum in which their distinctive voices can all be heard.

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[15] *Delgamuukw*, 1997 at para. 186.
[16] *Haida Nation*, op. cit. at para. 51.

The failure to reach consensus in the constitutional and political discussions from the early 1980s to 1992, should not prevent the resumption of talks on these two levels. The establishment of a permanent forum would provide a venue and structure for discussions and negotiations on major principles applicable at the national level. This permanent forum would first have symbolic value, as concrete proof of the recognition of the need for such a venue integrated into the political and constitutional life of this country. In addition, it would allow the parties present to express their different perspectives. It would also avoid the impression left by the previous series of conferences, that a consensus had to be reached quickly when in fact a completely new process was just beginning.

All discussions and negotiations on issues relating to nationally applicable, major principles should be conducted on a smaller scale, so as to allow greater flexibility, and should accommodate the various First Nations and their particular circumstances. Negotiation mechanisms could be established at the provincial, regional, tribal or local levels, to allow closer ties to be established between the various communities and their representatives, who may be on different paths. Existing mechanisms for cooperation between First Nations and other Aboriginal or non-Aboriginal governments could be adapted for this purpose. Bridges created between Aboriginal and neighbouring communities, through the forging of relationships founded on mutual respect between all parties, would have the added advantage of reducing the present duplication of resources and efforts. Also, many initiatives now resting on the shoulders of individuals would gain institutional support.

One of the side benefits of these initiatives would be to keep the general public better informed of the content and progress of discussions. As the situation now stands, the public remains largely in the dark on these matters, which fuels prejudice on all sides rather than fostering a better understanding of the stakes involved.

6- Diverging and converging interests

The identification of major socio-political objectives should give all the parties an opportunity to clarify the interests at issue. It should also lead them to reflect on their common interests while identifying their respective diverging interests. In other words, the adoption of major objectives should be an opportunity to exceed the bounds of discussions focussed on the parties' respective positions regarding their rights.

The constitutional negotiations held over the past 30 years allowed us to gain an appreciation of the complexities of the interests at issue. It often appeared that the federal government's interests competed with provincial interests (or at least with some of them). Likewise, Aboriginal peoples often adopted opposing positions, even within First Nations themselves. Comprehensive claims negotiations revealed positions common to a province and a group of First Nations but contrary to the federal government's positions. Seldom did anyone stop long enough to try to determine what objectives or interests might be common to the parties

involved.

For example, the desire to reduce the gulf between the living conditions of Aboriginal peoples and those of the general public that form the basis of the United Nations human development index, could be a common objective in several current negotiations. If such objectives were discussed beforehand, it would help the parties develop an integrated vision rather than fixating on parallel conflicting visions, as is too often the case at present.

7- The Indian Claims Commission: A bridge between two different perspectives

The Indian Claims Commission is a commission of inquiry created in 1991, as part of a five-point plan adopted by the federal government in the wake of the Kanesatake-Oka crisis. The Commission's inquiry and mediation mandate covers specific claims that have been rejected by the federal government. Specific claims relate to infringements of treaty rights or breaches of statutes with respect to the assets of a First Nation. In fulfilling its mandate, the Commission has adopted methods that enable it to bridge the gap between two different, and often opposing, perspectives (always opposing in inquiries, but not necessarily so in mediation).

Typically, the Commission's inquiries involve two parties: the federal government and a First Nation. However, an inquiry will occasionally involve several Aboriginal parties with conflicting interests, in addition to the federal government. In most inquiries, the parties are meeting for the first time to discuss in person the issues in dispute and their respective positions on each issue. From the outset, the parties are asked to agree on the issues to be addressed, failing which the inquiry panel will define the issues.

A community session is held in all inquiries. This not only allows the First Nation to present its "case", it also gives elders and other community members an opportunity to be heard as witnesses.

This unique and ground-breaking feature of the Commission's process has many benefits:

1. it serves to gather oral history from community members on an important aspect of their community's life – oral history which has been recognized as evidence by the Supreme Court since 1997;
2. it recognizes the value of testimony from elders and other community witnesses;
3. the transcripts of this oral evidence become part of the community's written history, thus making it more accessible to community members and facilitating its dissemination outside the community;
4. it allows the community to express its position orally to federal government representatives;
5. it gives federal government representatives exposure to the socio-political and

geographic realities of the community, as well as an opportunity to hear the community's witnesses;

6. it allows the community, for the first time, to make itself heard and defend its position before an independent and impartial authority.

In many cases, during the presentation of oral arguments which follows the community session, the parties are making their legal positions public for the first time, since the initial claim assessment process is conducted internally by the Department of Indian Affairs and based solely on a review of the record. The educational value of this stage of the inquiry process must not be underestimated: it is often the first opportunity for the First Nation's representatives to hear a lawyer for the federal government expound the reasons for the government's finding that it had no outstanding legal obligation in their claim. By the same token, it may be the first opportunity for the federal government's lawyer to hear legal arguments by the First Nation that persuade him or her to recommend that the government reconsider its rejection of the claim.

At all stages of its inquiry process, the Commission takes care to identify and propose opportunities for mediation, not only in the interests of expediency but also to facilitate reconciliation, if not agreement, between the parties.

Through its experience in mediation with the parties' consent, the Commission has learned many valuable lessons. Even when the parties agree to turn to mediation, there is no guarantee that their positions on their respective rights will converge. Some mediation cases are extremely complex, either because of the many parties involved (federal and provincial governments and several First Nations) or because of the number of specific claims outstanding with the same First Nation.

As an independent and impartial authority, the Commission plays a pivotal mediating role by finding room for productive negotiation while maintaining due regard for any potential imbalance between the parties. At all times, the Commission stresses the importance of openness in all dealings between the parties.

Mediation also allows the First Nation's representatives, often for the first time, to assume control of the manner in which their case is pursued throughout the claim settlement process, rather than leaving it in the hands of their lawyer as in a judicial proceeding.

The Indian Claims Commission leaves it to the parties to decide what form the mediation will take. Throughout the mediation process, the emphasis is on identifying and clarifying respective interests in an effort to reach a consensus on points of procedure and substance. The parties are encouraged to collaborate on much of the background work: determining subjects for research and analysis, recruiting experts and defining their mandates, etc. By cooperating in this manner, the parties get to know each other better and gain mutual respect. In addition, time and costs are saved.

On the strength of the experience it has gained over the years, the Commission is able to

advise the parties on their choice of experts, coordinate studies or technical evaluations, and so on, thus making the negotiations more expeditious for all concerned. The issues are addressed openly, which facilitates the resolution of impasses and ultimately the settlement of claims. This type of negotiation leads to a better understanding of the people and the stakes involved.

The Indian Claims Commission is an example of the type of institution that can serve as a bridge between the federal government and First Nations. There are few such institutions in Canada. The lessons learned over the Commission's first 14 years of operation can serve as a guide for a broader debate on this subject, a debate in which the Commission will be pleased to take part.