Introduction Aboriginal people have inhabited the territory that we now call Canada for several thousand years. Section 91(24) of the Constitution Act, 1867 provides the Parliament of Canada with exclusive legislative authority of “Indians, and Lands reserved for the Indians.” The information on this website about Aboriginal peoples is designed to provide more information about division of powers topics that effect Aboriginals. The information has been broken down into two sections, the first dealing with Aboriginal rights and the second dealing with Canada’s treaties with Aboriginal Peoples. **Aboriginal Rights** The law of Aboriginal rights can be synthesized from twelve decisions of the Supreme Court of Canada. [R. v. Sparrow, [1990] 1 S.C.R. 1075; R. v. Van der Peet, [1996] 2 S.C.R. 507; R. v. N.T.C. Smokehouse Ltd., [1996] 2 S.C.R. 672; R. v. Gladstone, [1996] 2 S.C.R. 723; R. v. Nikal, [1996] 1 S.C.R. 1013; R. v. Pamajewon, [1996] 2 S.C.R. 821; R. v. Adams, [1996] 3 S.C.R. 101; R. v. Côté, [1996] 3 S.C.R. 139; Mitchell v. M.N.R., [2001] 1 S.C.R. 911; R. v. Powley, [2003] 2 S.C.R. 207, R. v. Marshall; R. v. Bernard, [2005] 2 S.C.R. 220; R.v. Sappier, 2006 S.C.C.54.] Taken together, these decisions lay out a five step test for determining the existence and scope of any claimed Aboriginal right.

Aboriginal rights are those "practices, traditions and customs central to the aboriginal societies that existed in North America prior to contact with the Europeans." [R. v. Van der Peet, [1996] 2 S.C.R. 507 at para 44; Mitchell v. M.N.R., [2001] 1 S.C.R. 911 at par 15] Ancestral practices, traditions and customs are understood in light of their corresponding modern common law right. Courts asked to identify an aboriginal right will "examine the pre-sovereignty aboriginal practice and translate that practice into a modern legal right." [R. v. Marshall; R. v. Bernard, [2005] 2 S.C.R. 220 at para 51].

To analyze claims of Aboriginal rights, the Court must consider 5 elements: (1) characterization, (2) location, (3) time, (4) "integral to distinctive culture" and (5) continuity.

Characterization

The Court first must characterize the Aboriginal right being claimed.

Characterization of the right claimed is guided by 3 factors:

· the nature of the action which the applicant is claiming was done pursuant to an

aboriginal right;

- the nature of the governmental regulation, statute or action being impugned;

- the pre-contact practice, custom or tradition being relied upon to establish the right.

The characterization of the right must be specific. The Supreme Court has consistently rejected characterizing claims for aboriginal rights on a general basis.

The Supreme Court's twelve cases lay down that "the existence of an aboriginal right will depend entirely on the practices, customs and traditions of the particular aboriginal community claiming the right." [R. v. Van der Peet, [1996] 2 S.C.R. 507 at para 69]

The Plaintiffs carry an onus to prove their claim with specific, relevant evidence.

Evidence advanced in support of aboriginal claims, like the evidence offered in any case, can run the gamut of cogency from the highly compelling to the highly dubious. Claims must still be established on the basis of persuasive evidence demonstrating their validity on the balance of probabilities. [Mitchell v. M.N.R., [2001] 1 S.C.R. 911 at para 39]

Location

The Court must determine whether the claimed aboriginal right has a geographic character - whether it is site specific.

Plaintiffs must lead evidence not only of the traditional practices that give rise to their claimed aboriginal right, but also where and how these traditions were practiced

In Sawridge Band v. Canada the Federal Court refused to allow the Plaintiffs to lead general evidence which:

do[es] not assist the Court in deciding whether there are traditions, customs and practices internal to the Plaintiffs that support a right to decide membership in a way that has been unjustifiably abrogated by specific Amendments to the Indian Act.

General evidence is inconsistent with the direction that "the existence of an aboriginal right will depend entirely on the practices, customs and traditions of the particular aboriginal community claiming the right." [R. v. Van der Peet, [1996] 2 S.C.R. 507 at para 69].

Time

Aboriginal claimants must prove that the traditional practices relied on were in existence prior to contact with the Europeans.

"Integral to Distinctive Culture"

Aboriginal claimants must prove that the asserted practice relied on was "integral to the distinctive culture" of their pre-contact Aboriginal community.

In R. v. Van der Peet, [1996] 2 S.C.R. 507 at para 69, the Supreme Court explained that

To satisfy the integral to a distinctive culture test the Aboriginal claimant must do more than demonstrate that a practice, tradition or custom was an aspect of, or took place in, the Aboriginal society of which he or she is a part. The claimant must demonstrate that the practice, tradition or custom was a central and significant part of the society's distinctive culture.

He or she must demonstrate that the practice, tradition or custom was one of the things which made the culture of the society distinctive - that it was one of the things that truly made the society what it was.

Continuity

Aboriginal rights are communal rights. They are grounded in the existence of a historic aboriginal community and a present aboriginal community. Individuals may exercise aboriginal rights only by virtue of an ancestrally based membership in the present aboriginal community.

Claimants must demonstrate continuity between the Aboriginal practice exercised by the historically based community that existed prior to contact with Europeans and the practice as it is exercised by their modern community today. The whole point is that the doctrine of aboriginal rights expresses a "commitment to protecting practices that were historically important features of particular aboriginal communities."

In Bernard/Marshall, the Supreme Court added a new twist.

[T]he court must examine the pre-sovereignty aboriginal practice and translate that practice into a modern right. The process begins by examining the nature and extent of the pre-sovereignty aboriginal practice in question. It goes on to seek a corresponding common law right. In this way, the process determines the nature and extent of the modern right and reconciles the aboriginal and European perspectives. [R. v. Marshall; R. v. Bernard, [2005] 2 S.C.R. 220 at para 51]

This emphasis on the common law requires the Plaintiffs to show not only that the traditional practice existed, and was integral to the community, but also that the practice corresponds with a modern right being asserted, a right described or describable by common law concepts.

Plaintiffs are required to characterize the asserted aboriginal right in terms of a modern common law analogue. The correspondence between ancestral practice relied on and modern right asserted must have integrity. "A pre-sovereignty aboriginal practice cannot be transformed into a different modern right." Failure to make this link with care could prove fatal to the aboriginal rights claim.

Canada’s Treaties with Aboriginal People

In the period after Confederation, between 1871 and 1921, Canada entered into eleven numbered treaties with the aboriginal peoples. There are other Treaties besides, and many pre-confederation Treaties: http://www.ainc-inac.gc.ca/pr/trts/hti/site/trindex_e.html.

Status of the Treaties

What exactly are these treaties, and what use may courts make of them?

On their face, the treaties seem to contain an exchange of promises. This makes them like a contract. But, unlike a contract a treaty represents an exchange of solemn promises between the Crown and the various Indian nations. It is an agreement whose nature is sacred.

This lofty language refers to the juridical novelty by which the treaties establish a special relationship between the First Nations and the Crown. The relationship is special because the obligations created to cede land masses larger than many countries and to provide reserves and schooling are unusual, to say the least. The relationship is special also because the concepts underlying the treaties provide an important point of reference for how these communities are to relate to Canada in the future.

This special nature of Canada's treaties with the aboriginal people has been considered by the commentators and the courts. The Royal Commission on Aboriginal Peoples (RCAP) thought that the treaties allowed Canada to avoid the Indian wars that characterized settlement of the American frontiers, and thus the relationships created undergird the distinctive characteristics of the Canadian polity:

The Canada that takes a proud place among the family of nations was made possible by the treaties. Our defining national characteristics are tolerance, pluralism and democracy. Had it not been for the treaties, these defining myths might well not have taken hold here. Had it not been for the treaties, wars might have replaced the tribal council. Or the territory might have been absorbed by the union to the south. Canada would have been a very different place if treaty making with the Indian nations had been replaced by the waging of war. [Canada, Royal Commission on Aboriginal Peoples, Report of the Royal Commission on Aboriginal Peoples, vol. 2 (Ottawa: Canada Communication Group, 1996 at 15 [RCAP].]

In recognition of the fundamental arrangements the treaties established, RCAP considered that the treaties were properly understood as constitutional in nature:

The network of treaties between the Crown and treaty nations is described by some as confederal in nature. Treaty rights are now recognized and affirmed by s. 35(1) of the Constitution Act, 1982. The Commission considers that the treaties do indeed form part of the constitution of Canada. When properly understood, the treaties set out the terms under which the treaty nations agreed to align themselves with the Crown …The Commission concludes that the treaties describe social contracts that have enduring significance and that as a result form part of the fundamental law of the land. In this sense they are like the terms of union whereby former British colonies entered Confederation as provinces. [Ibid. at 20.]

Varieties of these views have been incubating in the courts. The British Columbia Supreme Court affirmed RCAP's opinion that treaties have always been constitutional in nature because "long before the 1982 enactment of s. 35, aboriginal rights formed part of the unwritten principles underlying our Constitution." [Campbell v. British Colombia (A.G.) (2000), 189 D.L.R. (4th) 333 (B.C.S.C.) at 351.] This way of putting it that the treaties inhere in the unwritten architecture of the constitution and can give rise to constitutional obligations is the view taken in the landmark opinion of the Supreme Court in the Secession Reference:

Consistent with this long tradition of respect for minorities, which is at least as old as Canada itself, the framers of the Constitution Act, 1982 included in s. 35 explicit protection for existing aboriginal and treaty rights, and in s. 25, a non-derogation clause in favour of the rights of aboriginal peoples. The "promise" of s. 35, as it was termed in R. v. Sparrow, [1990] 1 S.C.R. 1075, at p. 1083, recognized not only the ancient occupation of land by aboriginal peoples, but their contribution to the building of Canada, and the special commitments made to them by successive governments. The protection of these rights, so recently and arduously achieved, whether looked at in their own right or as part of the larger concern with minorities, reflects an important underlying constitutional value. [Reference re: Seccession of Quebec, [1998] 2 S.C.R. 217 at 262-63.]

Interpretation of Treaty Texts

Treaty interpretation requires the rules of evidence to be relaxed, and for context to inform the intention of the parties.

[E]ven in the context of a treaty document that purports to contain all of the terms, this Court

has made clear in recent cases that extrinsic evidence of the historical and cultural context of a treaty may be received even absent any ambiguity on the face of the treaty. [R. v. Marshall, [1999] 3 S.C.R. 456 at para. 11]

A principal reason why historical and cultural context is critical to treaty interpretation is that the treaty texts were written by the Crown's representatives. In many cases the Aboriginal people who negotiated the treaties and signed them with a mark were unable to read. Some contemporaneous reports of treaty making show that the written treaty texts differ markedly from the oral promises made by Crown representatives. Treaty 3 is a good example. Treaty 3 was negotiated during an intense three days during which Canada's representatives made many promises in response to Ojibway demands. Some of these were not included in the written treaty text, including promises that the Indians would be exempt from military conscription, that minerals found on reserve would only be sold with the consent of the Indians, that any Indian children who had emigrated to the United States would be admitted to the treaty if they returned within two years, that the Indians would forever have use of their fisheries. The reason why these promises were left out was that the Commissioners had brought with them a text compiled from failed treaty negotiations of the year before. This text did not reflect the many concessions made during the intense three days of negotiations. "In their haste to conclude the agreement, [Canada's treaty commissioners] used as a finalized version the draft treaty from the previous year which would not reflect the new items of agreement in the negotiations just concluded." [Wayne Daugherty, Treaty Research Report: Treaty One and Treaty Two (Ottawa: Treaties and Historical; Research Centre, INAC, 1983), Chapter 3.] All of the Chiefs who signed Treaty 3 were unable to read, and signed' with a mark. In a Report that discussed conflicting Federal and provincial claims in the context of Treaty 3 lands, a Canadian official stated:

there were other conditions relating to the reserves not embodied in the treaty, but which should have been so embodied, inasmuch as they were imposed by the Indians during the negotiations for the treaty, and which are in view of the illiterate condition of the Indians as much conditions of their enjoyment as those actually inserted in the treaty; [Re the Titles of the Dominion and the Province of Ontario Respectively in Indian Lands, Indian Reserves and in the Royal Metals and Other Metals Therein and Timber Thereon [n.d.], Ottawa, National Archives of Canada (RG 10, vol. 2545, file 111834, pt. 1).]

The circumstances surrounding Treaty 3 are not unique.

It is circumstances like these that explain why the courts require that history and surrounding circumstance play important roles in treaty interpretation: it is the only way to really know to what the parties to the treaty agreed. The agreement' is to be found in the understandings that the parties to the treaty had, which may be imperfectly reflected by the written text. Courts have been repeatedly warned on this score by the Supreme Court of Canada. Courts have been instructed that history and surrounding circumstance are one of the ways to get at the aboriginal

perspective as to what was the content of the agreements: "… if there is evidence by conduct or otherwise as to how the parties understood the terms of the treaty, then such understanding and practice is of assistance in giving content to the term or terms." [R. v. Taylor and Williams (1982), 34 O.R. (2d) 360 at 367.] Courts charged with interpreting the treaties must consider the Aboriginal perspective, for that is the only way to understand what was agreed. The Supreme Court of Canada requires that:

... when considering a treaty, a court must take into account the context in which the treaties were negotiated, concluded and committed to writing. The treaties, as written documents, recorded an agreement that had already been reached orally and they did not always record the full extent of the oral agreement. The treaties were drafted in English by representatives of the Canadian government who, it should be assumed, were familiar with common law doctrines. Yet, the treaties were not translated in written form into the languages (here Cree and Dene) of the various Indian nations who were signatories. Even if they had been, it is unlikely that the Indians, who had a history of communicating only orally, would have understood them any differently. As a result, it is well settled that the words in the treaty must not be interpreted in their strict technical sense nor subjected to rigid modern rules of construction. [R. v. Badger, [1996] 1 S.C.R. 771 at para.52.]

Historical and cultural context are but one of a set of special rules which apply to the interpretation of Canada's treaties with the aboriginal people. Because the treaties establish a special relationship between peoples, the Courts also require that the treaties be interpreted in a manner that maintains the honour of the Crown. [R. v. Badger, [1996] 1 S.C.R. 771 at para.97.]Courts will not countenance any sharp practice or unfair dealing. Courts assume that the Crown intends to comply fully with each promise, obligation or right set out in a treaty, or garnered from reconstruction of the understandings of the parties.

Treaty terms must be assessed with a large, liberal and generous interpretation in favour of the First Nation signatory. [R. v. Simon, [1985] 2 S.C.R. 387 at 402; R. v. Sioui, [1990] 1 S.C.R. 1025 at 1035.] Ambiguities, uncertainties or doubtful expressions are to be settled in favour of the First Nation signatories. Not only should "treaties and statutes relating to Indians ... be liberally construed," and doubts "resolved in favour of the Indians" but any limitation which restricts First Nation rights must be narrowly construed.

Remedies for Breach

As we have seen, the exchange of promises that characterizes the treaties makes them seem analogous to contracts, albeit contracts of a very solemn and special public nature. It seems to

be this aspect, the exchange of promises meant to bind, that prompts the courts to say that the treaties "create enforceable obligations based on the mutual consent of the parties;" [Badger, supra at para 76], that treaty promises are "binding obligations which would be solemnly respected," [R. v. Simon, [1985] 2 S.C.R. 387 at 24.] and are "binding obligations" of the Crown. [R. v. Sioui, [1990] 1 S.C.R. 1025 at 43.] All of this makes it appear that the treaties self-execute in the sense that they are justiciable, and that courts may give remedies for breach of the obligations the treaties create.

It is true that fiduciary obligations and treaty obligations at times overlap in the sense that a breach of treaty can and often does constitute a breach of the Crown's fiduciary obligations to First Nations. [Ontario (Attorney General) v. Bear Island Foundation, [1991] 2 S.C.R. 570 at 575.] It would be wrong to conclude from this overlap that treaty rights depend for enforcement upon the application of fiduciary law. Treaty rights precede fiduciary obligations as independent, sui generis entitlements of quasi-constitutional significance. Canada's obligations under the treaties do not arise from the fiduciary relationship between itself and Indian peoples. Canada's obligations have their source in the fact that the people of Canada, as represented by their government, entered into a solemn treaty relationship in which binding promises were made to the aboriginal people in exchange for very substantial consideration given by the Indians in return.

There is not a large amount of litigation which seeks to enforce Canada's treaty promises. What litigation there is uses the treaties as shields against prosecutions or restrictions, not as swords to obtain performance of treaty promises or damages for breach. The explanation for the paucity of litigation probably lies in the fact that in1927, Parliament enacted s.141 of the Indian Act, which made it an offence for any legal counsel to receive payment on behalf of any Indian Band for "the prosecution of any claim … for the benefit of the said tribe or band …" This provision remained on the books until 1951. [Indian Act, S.C. 1926-7, c.32 and R.S.C. 1927, c. 98, s.141; repealed by S.C. 1950-1, C.29 s.123.] More recently, claims that Canada has violated its treaty promises are funnelled into special dispute resolution fora under Canada's specific claims and treaty land entitlement policies. These policies provide negotiation tables, and funding for negotiations to resolve claims that Canada has breached its lawful obligations under the treaties.

Notwithstanding the absence of treaty litigation, it seems that treaty rights are justiciable and can constitute the basis of a claim for compensatory and equitable remedies, including damages. This is the opinion of the Indian Claims Commission, which holds that treaty rights, "being equitable in nature, can be enforced by the courts, either through an award of specific performance or, in circumstances in which specific performance may not be available, an award of, first, compensatory damages in lieu of the shortfall land, and, second, compensatory damages for late performance." [See:

http://www.indianclaims.ca/pdf/LongplainEng.pdf] This opinion is also consistent with the court descriptions of the treaties as creating binding and enforceable obligations, previously considered.

Given the independent exchange of promises between the Crown and First Nations recorded by the treaties, the expectations created, the specificity of the promises, and the large consideration provided by the Indians in exchange, it seems that treaty promises are meant to be justiciable. If this proves to be correct, treaty promises are independent sources of legal obligations owed by the Crown. The Indian Claims Commission explained :

…it is without question that such treaty covenants are of sufficient importance in modern Canadian society that they stand on their own as sui generis obligations independent of the concept of fiduciary obligation for their legitimacy or enforceability. To suggest that the treaties are reliant on the vehicle of fiduciary duty to make them enforceable would fail to accord them the historical and constitutional importance that they have acquired in Canada. [See: http://www.indianclaims.ca/pdf/LongplainEng.pdf]

Extinguishment of Treaty Obligations

Prior to 1982, treaty promises could be extinguished by competent legislative action. Legislation alleged to extinguish a treaty promise must be specific and precise; "if legislation bears on treaty promises, the courts will always strain against adopting an interpretation that has the effect of negating commitments undertaken by the Crown." [Mitchell v. Peguis, [1990] 2 S.C.R. 85 at 119].

Regulatory legislation does not extinguish treaty promises, unless it possesses this specificity. The fact that a right is "controlled in great detail by [a] regulation does not mean that the right is thereby extinguished." [R. v. Gladstone, [1996] 2 S.C.R. 723 at para. 31]. Even regulatory legislation that is inconsistent with the continued existence of treaty rights will not extinguish a treaty promise unless it exhibits a "clear and plain intent to extinguish treaty rights," [R. v. Sparrow, [1990] 1 S.C.R. 1075 at 1099.] or the regulation is "wholly incompatible" with the continued exercise of a treaty right. [R. v. Sundown, [1999] 1 S.C.R. 393 at 414-15.]The Crown has the onus to prove extinguishment. To prove a treaty right has been extinguished the Crown must make: "strict proof of the fact of extinguishment' and evidence of a clear and plain intention on the part of the government to extinguish treaty rights." [R. v. Badger, [1996] 1 S.C.R. 771 at para. 41.]