



TEN PRINCIPLES CONCERNING COURT CASES AFFECTING TREATY AND ABORIGINAL RIGHTS

Litigation by Canada's First Nations have produced substantial victories but also some setbacks in the courts, such as the recent *Mitchell* decision. Victories include: "affirmation and recognition" of aboriginal and treaty rights in Section 35 of the Canadian Constitution, recognition of the Crown's "fiduciary obligation" to manage reserve land and other assets, and recognition of the concept of aboriginal title. The following comments are intended to provide some practical guidelines for Treaty #3 First Nations to use in formulating court strategies to protect treaty and aboriginal rights.

— **The specific histories of individual First Nations are important for court decisions, but trial judges have considerable discretion in accepting both oral and written historical evidence.**

Trial judges must consider the historical evidence, including oral tradition, but the judge has considerable discretion in the weight assigned different kinds of evidence. Claimants must make every effort to put the best historical evidence possible before the courts. The Supreme Court will interfere if it believes a trial judge has made a mistake, as in *Mitchell*, where it found that the trial judge made a "clear and palpable error." In *Mitchell*, the

Supreme Court has reined in the *Delgamuuk* ruling of 1997 by once again limiting the application of oral evidence and the weight given to it.

— **Trial judges tend to consider practical realities in defining aboriginal and treaty rights.**

Competing resource uses of non-Indians will be considered by the trial judge as one factor in deciding the possible regulating or limiting of a treaty or aboriginal right.

— **The Supreme Court of Canada prefers to identify broad principles for the negotiation of agreements between First Nations and the Crown.**

The courts, in dealing with politically sensitive issues, prefer to issue decisions which set parameters for negotiations between First Nations and federal or provincial governments. As a practical matter, such negotiations may set precedent for subsequent dealings.

— **The "liberal" approach of the courts in interpreting historic treaties usually produces modest practical results.**

Courts may utilize historical evidence to enhance treaty rights, to create new treaty rights, or even to limit existing treaty rights. In general, the courts have a tendency to narrowly interpret newly recognized rights to minimize the impact on non-Indian interests.

— **In interpreting historical treaties, the courts tend to rely on the version of the treaty as published by Canada for their conclusions.**

The courts are usually reluctant to accept rights where such rights are not mentioned in the actual words of the written treaty. If supported by adequate historical data, such "outside promises" may be accepted as part of the treaty, but there are no cases where the Supreme Court of Canada has accepted any claimed rights which specifically contradict the written treaty. This has obvious implications for cases where the written treaty subjects treaty rights to federal regulations, even if it can be argued that this clause was not part of the oral agreement.

— **The "liberal" interpretation of the courts does not apply to modern agreements where First Nations had access to legal advice.**

Future agreements with the Crown must be negotiated with care as the First Nations will probably be held to full letter of their agreements.

— **Aboriginal rights are recognized by the courts as existing today if the tests established in the *Van Der Peet* case can be met.**

These are:

The activity must be part of a custom, practice or tradition that was an

integral part of an aboriginal community's distinctive culture prior to European contact; and The activity is a modern form of a pre-contact activity, but it can not be substantially different from pre-contact activities.

The courts have rigidly adhered to the *Van Der Peet* tests. In practical terms, the rigid application of these tests may raise the bar of required historical evidence to such a level that it is difficult for many First Nations to meet. There can be no pre-contact written historical documents by Europeans, so the evidentiary weight falls on oral history and social science.



— **The Supreme Court of Canada has defined "aboriginal title" as the broad right to use land for a wide variety of purposes not constrained by historical practice but it is subject to regulation under tests established by the *Sparrow* case.**

Aboriginal title, following the *Delgamuukw* case, has a number of attractive advantages. However, with the second *Marshall* decision it is possible that the Crown can justify limitation of aboriginal title by a broad variety of public interests. Invalidating treaty rights in favor of aboriginal title may entail substantial risk.

— **According to the Supreme Court of Canada, self-government rights must be justified in the same way as any other aboriginal right.**

In the *Pamajewon* case, the Supreme Court of Canada rejected a broad claim that a First Nation has the right to manage its own affairs. The Court rejected the claim as being too general, stating that a particular historic right to regulate gambling operations had to be clearly established.



— **Under certain conditions, aboriginal and treaty rights are subject to regulation by federal and provincial authorities.**

Under conditions established by the *Sparrow* case, the Crown may justify its limitation of treaty or aboriginal rights. These conditions include “consultation” with First Nations. First Nations *must* be cautious of meetings with government officials which may only be attempts to lay a paper trail of consultation used to justify infringement.

In summary, it is apparent that the Supreme Court of Canada will continue to give weight to conflicting political and economic interests while projecting an aura of sensitivity to First Nations. The *Mitchell* case indicates that despite previous positive judgements, the Supreme Court is still a colonial court of the occupying power. *Mitchell* and other recent cases signal a retreat of the Supreme Court that indicates it does not intend to actually protect aboriginal or treaty rights and land.

The existing avenue for negotiated settlement, the federal Specific Claims Process, involves the Crown in a conflict of interest position as defendant, judge and jury. Current proposals by Canada to change the claims process fail to correct this problem by creating a truly independent tribunal. The alternative, seeking resolution to claims issues through litigation, will continue to hold risks. Litigation strategies are beyond the financial resources of many First Nations. The Department of Justice and the

provincial Attorneys-General still spend enormous sums in preparing for litigation on Native issues, including legal, historical and anthropological research. Government funding will generally only be available for cases which the Crown thinks it can win. The Supreme Court will continue to advocate negotiated, rather than litigated, solutions.

For more information call Grand Council Treaty #3 at (807)548-4214.



Grand Council Treaty #3's Administrative Office supports the various councils of the Nation including the National Assembly and the Chiefs Assembly by contributing to the following activities:

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| Policy Analysis | Strategic Planning |
| Policy Design | Governance Revitalization |
| Law Making | Historical Research |
| Issue Identification | Program Development |
| Coordination of Technical and Political Working Groups | |

As the National Government of the Anishinaabe Nation in Treaty #3, the National Assembly is working to reinvigorate traditional governance in the following areas:

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| Health | Infrastructure |
| Social Services | Education |
| Policing and Justice | Childcare |
| Lands and Resources | Economic Development |
| - including Trapping | |



Leon Jourdain, Grand Chief, Grand Council Treaty #3



PRACTICAL GUIDELINES FOR TREATY #3 FIRST NATIONS CONSIDERING LITIGATION OF TREATY OR ABORIGINAL RIGHTS

