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The Campaign to Erode Aboriginal and Treaty Rights

For almost 15 years, the federal Department of Justice has conducted a campaign to erode the constitutional and legal status of Aboriginal and Treaty rights in Canada.

In doing so, it has also campaigned to reduce the role of Parliament in its oversight of such rights.

How has this happened?

Aboriginal peoples have a central place in Canadian history and in contemporary Canadian life. The relations between Aboriginal peoples and the Crown have figured prominently in Canada's constitutional and political evolution.

Those relations have not always been constructive or just. Treaties have often been one-sided and continue to be violated. Laws, such as the *Indian Act*, have often been oppressive. We all live with that legacy.

The patriation package of constitutional reforms in 1982 offered some new thinking. Section 35 of the *Constitution Act, 1982* recognized and affirmed the existing Aboriginal and Treaty rights of Aboriginal peoples, and guaranteed these rights elevated constitutional status.

Many Aboriginal peoples hoped that section 35 would guarantee Aboriginal and Treaty rights as strongly as federal and provincial powers are guaranteed under the Constitution. As treaties with Aboriginal peoples are themselves the products of many compromises, it seemed counterintuitive that the courts would permit one party to those treaties --- the Crown --- to be able to unilaterally re-work those compromises in its favour. This was reflected in the inclusion of section 35 in a separate part of the *Act* than the *Canadian Charter of Rights and Freedoms,* which placed it outside the reach of the limitations contemplated by section 1.

Subsequent court decisions, notably the 1990 Supreme Court of Canada in *R. v. Sparrow*, determined that constitutional protection for Aboriginal and Treaty rights is not absolute. In limited circumstances, existing Aboriginal and Treaty rights could be 'infringed' by new laws. But the Court did try to set the bar high. Only laws that have a valid legislative objective, and that could be justified against a series of tests involving such things as consultation and accommodation, consistent with the honour and good faith of the Crown, could validly infringe. The Court later added that the Crown's duty to consult would require the full consent of the Aboriginal nation "on very serious issues."

Up until 1995, new federal laws that might have the potential to conflict with Aboriginal and Treaty rights routinely included a 'non-derogation' provision; a provision confirming that Parliament did not intend the new law to be interpreted in a way that would conflict with Aboriginal and Treaty rights. Such non-derogation provisions provided comfort to Aboriginal

peoples that new legislative projects were not designed to have unintended side-effects that would be hostile to Aboriginal and Treaty rights.

Starting in 1995, the federal Department of Justice has worked, first, to chip away at, and, then more recently, to undermine directly this constitutional balancing act. It has done so without bringing the matter clearly to the attention of Parliament, or Aboriginal peoples, or the Canadian public.

In laws drafted since 1995, the Department of Justice has experimented with replacing the clear non-derogation language with many weaker variations. All those variations have trended towards a blurring, weakening, and, eventually, overturning, of Parliament's previously clear presumptive intention not to diminish Aboriginal and Treaty rights in new legislative projects.

For quite some time, this campaign went undetected. When spotted by Aboriginal representatives, and brought to the attention of Parliamentarians, the Senate Standing Committee on Legislative and Constitutional Affairs carried out a careful and thorough investigation of the matter. The investigation resulted in a thoughtful report in December 2007, supported across party lines, entitled *Taking Section 35 Rights Seriously: Non-derogation Clauses relating to Aboriginal and Treaty rights*.

Among the sensible recommendations of that report, the Senate Committee urged that the federal *Interpretation Act* be amended to include a general presumptive rule that new laws be interpreted to uphold rather than erode Aboriginal and Treaty rights. This presumption could be rebutted; Parliament would, consistent with the Constitution and court rulings, maintain the power to infringe Aboriginal and Treaty rights, but would reserve the discretion carefully to itself as to whether or not to do so in relation to any new proposed law. This *Interpretation Act* approach has already been employed in Manitoba and Saskatchewan at the provincial level. Those provinces have experienced no practical problems.

The Department of Justice ignored the Senate recommendations.

With the wording of a proposed new law, the *Safe Drinking Water for First Nations Act,* the campaign to erode the constitutional and legal status of Aboriginal and Treaty rights has come full circle.

For the first time, a new law would include an active 'derogation' provision; that is, the proposed law explicitly states that Aboriginal and Treaty rights deemed to be in conflict with the law's stated objective will not be respected.

And for the first time, a new law would contradict promises made to Aboriginal peoples in treaties as to the interpretive primacy of those treaties.

Many Aboriginal peoples are desperate for improved water supply after decades of federal underfunding. In a cruel feature of the new law, eligibility for future federal funding support for

improved water services would be tied to willingness to live under the new derogation regime created by the proposed law.

The new law has been developed without the required consultation with those affected. There has been no respect for the "free, prior and informed consent" test that has been embedded in the 2007 *United Nations Declaration on the Rights of Indigenous Peoples,* a universally accepted human rights declaration that the federal government now claims to endorse.

All of this, of course, is bad news for Aboriginal peoples. But perhaps equally disturbing for all Canadians is the technique adopted in the new law that allows future erosion of Aboriginal and Treaty rights to be carried out through the executive branch of government by way of regulations.

Regulation writing is, of course, the special province of Department of Justice officials. Unlike the case with new statutory proposals, which must go through three readings and committee review at House of Commons and Senate stages, Parliament has virtually no say with respect to new regulations.

Canada's highest court has affirmed that the respect and protection of existing Aboriginal and Treaty rights is an underlying constitutional principle and value. Given Canada's colonial history towards Aboriginal peoples, the responsibility of Parliament is particularly important in safeguarding the rights and interests and dignity of Aboriginal peoples, and the reliability and durability of their fundamental rights.

It would be a sad day for Canadian democracy if Parliament compromises its duty to respect underlying constitutional principles and values, and safeguard collective and individual rights. Parliament must not surrender its responsibility to Department of Justice officials, who would prefer that any debate as to how much respect be given to Aboriginal and Treaty rights be conducted behind bureaucratic closed doors.

Home and abroad, Aboriginal peoples and Canada deserve much better.

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