

Aboriginal Law - The Next Decade

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Six Key Issues Facing the Courts

- Who is Aboriginal?
- Collective vs. Individual Dichotomy
- Sovereignty Issues
- Aboriginal and Treaty Rights
- Jurisdictional Issues
- Infringement Justification

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Who is Aboriginal? - Still Unclear

- “Indians” - s. 91(24) *Constitution Act, 1867* (includes Metis?)
- Who determines who is/is not Aboriginal?
- Who is Aboriginal for “benefits” under Federal/Provincial policies?
- Who has s.35 Aboriginal & Treaty rights?

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Collective vs. Individual Dichotomy

- Aboriginal Rights are generally collective rights
- Which collective grouping: *Indian Act* bands; First Nations; Metis Communities; off reserve urban Aboriginal collectives
- Who has/ does not have standing to invoke Aboriginal & treaty rights? (treaty card holders practicing right within territory etc.)
- Who can determine membership, in what grouping?
- Do collective rights trump individual rights?

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Sovereignty Issues

- How was Crown sovereignty acquired over Aboriginal peoples (Doctrine of Discovery and *Terra Nullius* under question)
- How is Crown sovereignty established & what are the dates of sovereignty across Canada?
- After Crown sovereignty, what residual is left for Aboriginal peoples?

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Aboriginal & Treaty Rights

- Aboriginal title is a right to exclusive use and occupation of land
- Other Aboriginal land rights less than “Ab. title” are site-specific and limited in scope and use (e.g. land use - specific purpose [cattle grazing]; specific place; specific times - Subsurface rights?; riparian water rights? etc.)
- Can content of a treaty affect F.N. use of land held, or practice of a right, outside of treaty jurisdiction?

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Jurisdictional Issues for s.91(24) Indians/Lands

- What provincial laws apply?
- What provincial laws are referentially incorporated into federal s.88 *Indian Act*? (infringement of provincial laws of general application)
- What is the extent, nature and process of proper “infringement”?

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Infringement of Aboriginal & Treaty Rights

- *S.35 Constitution Act, 1982* - Ab. & treaty rights “recognized and affirmed”
- SCC held that these rights can be infringed by legislation with a valid legislative objective and a respect for Crown fiduciary duty
- Can provinces infringe?
- What is a “valid legislative objective”?
- What are “minimal impairment,” “consultation,” & “compensation”?

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Economic right of trade

- Aboriginal nations trading long before Europeans arrived
- Is this right of trade protected?
- Is “trade” an Aboriginal right?
- How is this “right of trade” protected/or not against International Trade Agreements?

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Conclusion - Issues to Watch

- Duty to consult - Fiduciary relationship
- Provincial infringement on land and resources affecting Ab. & treaty rights
- Economic quantification of infringement of Ab & treaty rights
- **Creative solutions to allow for win-win between prov. infringement and possible - non-monetary compensation for ab interest/right**

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Questions & Discussion

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