

**“The Honour of the Crown,  
Dirt Roads, Boil Water Advisories and Self-Government:  
The Fiscal Relationship between the Crown and First Nations”**

NANCY KLEER\* and GILLIAN PAUL  
Olthuis, Kleer, Townshend LLP  
250 University Avenue, 8<sup>th</sup> floor  
Toronto, Ontario

Copyright © 2016, Nancy Kleer and Gillian Paul.

Prepared for:

Canadian Bar Association Aboriginal Law Conference  
May 2016

## INTRODUCTION

The title for this segment of the CBA’s Aboriginal Law Conference is “Street Level – Honour of the Crown Impact on the Community.” In many First Nation communities, those streets are dirt roads with extensive potholes, and the houses along those dirt roads are overcrowded and uninsured, and the challenges in those communities are great. So what does the legal principle of the *honour of the Crown* have to do with all that?

It is no secret that Canada is facing a crisis when it comes to the lives and well-being of many indigenous people in this country. For too long, First Nations<sup>1</sup> have fallen victim to significant funding disparities between on-reserve services and those available to the general Canadian public.<sup>2</sup> This gap in essential services has had devastating impacts on the quality of life on many Indian reserves that has led to conditions akin to Third World countries.<sup>3</sup> On-reserve residents

---

\* I would also like to thank my partner Senwung Luk for his comments on this paper.

<sup>1</sup> We have focussed in large part in this presentation for the 2016 CBA Aboriginal Law Conference on First Nation on-reserve issues and First Nations considering formalizing their self-government powers in negotiations with federal/provincial/territorial governments, given the focus of our practices. Fiscal relationship issues facing other indigenous peoples in Canada in relation to how the honour of the Crown applies in their particular contexts are of course very important and challenging as well.

<sup>2</sup> Human Rights Council, *Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya*, UN Doc A/HRC/27/52/Add.2 (4 July 2014) (“UN Report”)

<sup>3</sup> UN Report; Office of the Auditor General of Canada, *2011 June Status Report of the Auditor General of Canada*, (Ottawa: Office of the Auditor General of Canada), Chapter 4—Programs for First Nations on Reserves (“AG 2011 Status Report”)

are faced with inadequate healthcare programs and services, housing, water quality, education and child and family services.<sup>4</sup>

Despite numerous calls for change,<sup>5</sup> there has been very slow or no progress in improving the lives and well-being of Aboriginals living on-reserve and the crisis continues to worsen.<sup>6</sup> We have of course all read and followed with sadness and concern the news of the crises facing First Nation communities across Canada in relation to youth suicides, lack of clean water and inadequate and over-crowded and unsafe housing stock, and the list goes on.

Recently, the Canadian Human Rights Tribunal (“CHRT”) confirmed that Canada is discriminating against First Nations people by underfunding child welfare on-reserve. As a result, First Nations are receiving worse services in child protection and prevention and sometimes completely missing services that are available off-reserve.<sup>7</sup> While focusing specifically on child welfare, the decision could have far reaching implications so that it could be argued that the federal government cannot provide worse services on-reserve than those enjoyed by other Canadians. It remains to be seen what impact this decision may have on Canada’s approach to funding for services other than child protection and prevention.

The current state of the lives and well-being of Aboriginal people living on-reserve along with the CHRT’s recent call for the federal government to change its discriminatory practices with respect to child welfare services on-reserve begs this question: What is the obligation of the Crown to provide programs and services on-reserve that are equal to those enjoyed by other Canadians? Specifically, how does the *honour of the Crown* figure in assessing what this obligation is, and what, if anything, does the *honour of the Crown* necessitate in the context of the funding for programs and services, and for infrastructure, on-reserve?

A related dirt road-level issue that is not the subject of national news, but is a significant concern for some Aboriginal peoples in Canada, is the approach Canada is currently taking to the fiscal relationship with Aboriginal peoples who have entered or are negotiating self-government agreements<sup>8</sup> with Canada.

This paper reflects on the law regarding the *honour of the Crown*, and what that legal principle may require of the Crown in the context of these two specific areas that are everyday issues for many First Nations: (1) funding for programs and services and community infrastructure on-reserves, and (2) Canada’s fiscal approach to Aboriginal self-government.

---

<sup>4</sup> AG 2011 Status Report, Chapter 4—Programs for First Nations on Reserves at page 7

<sup>5</sup> See for example UN Report; AG 2011 Status Report

<sup>6</sup> AG 2011 Status Report, Chapter 4—Programs for First Nations on Reserves at page 5

<sup>7</sup> *First Nations Child and Family Caring Society of Canada et al v Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)* 2016 CHRT 2 (“Caring Society”)

<sup>8</sup> The policy is intended to apply to comprehensive land claim agreements with a comprehensive self-government component; comprehensive self-government agreements; sectoral self-government agreements and legislated comprehensive self-government arrangements.

We begin with a brief recap of what the Courts have determined the *honour of the Crown* means and where it comes from. Second, we look at how the *honour of the Crown* is triggered. Third, we lay out what duties have already been found to be imposed by the *honour of the Crown*. Starting from that basic groundwork, we begin to explore what the legal principle of the *honour of the Crown* may require of the Crown in these two specific areas.

However, the legal principle of the *honour of the Crown* as it has so far been developed is just one lens to look through when considering the *honour of the Crown* in its relationship with Aboriginal peoples. The law can lead the way for change. But in other cases, it can follow behind what is or should actually happen on the dirt roads. In the case of the legal principle of the *honour of the Crown* and how it relates to funding obligations for indigenous peoples, the legal principle has quite a ways to catch up with the political and moral requirements for the Crown to act honourably. We conclude with some thoughts on our roles as lawyers in the unfolding law about the *honour of the Crown*.

## **PART 1: WHAT IS THE HONOUR OF THE CROWN?**

The *honour of the Crown* has become an oft-cited principle when discussing the relationship between Aboriginal people and the Crown. The *honour of the Crown* is the principle that when acting on behalf of the sovereign, the Crown must *always* conduct itself with honour.<sup>9</sup> With respect to its dealings with Aboriginal people, this principle means that in *all* its dealings with Aboriginal people, the Crown must act honourably.<sup>10</sup>

This principle stems from the “special relationship” between Crown and Aboriginal peoples.<sup>11</sup> As explained by Brian Slattery:

....when the Crown claimed sovereignty over Canadian territories and ultimately gained factual control over them, it did so in the face of pre-existing Aboriginal sovereignty and territorial rights. The tension between these conflicting claims gave rise to a special relationship between the Crown and Aboriginal peoples, which requires the Crown to deal honourably with Aboriginal peoples.<sup>12</sup>

Thus, the *honour of the Crown* is an obligation that arises from the Crown’s assertion of sovereignty over lands controlled by Aboriginal peoples, which lands and peoples were - and still are - governed by their own indigenous legal systems.<sup>13</sup> The purpose of the duty of honourable dealing is the reconciliation of these two facts.<sup>14</sup>

---

<sup>9</sup> *Manitoba Metis v Canada* [2013] 1 SCR (“MMF”) at para 65

<sup>10</sup> *Caring Society* at para 88; MMF at para 66

<sup>11</sup> MMF at para 66; *Caring Society* at para 89; *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53 at para 62

<sup>12</sup> Brian Slattery, *Aboriginal Rights and the Honour of the Crown*, (2005), 29 SCLR (2d) 443 at p 436

<sup>13</sup> See MMF at para. 67, where the Court states that “they [Aboriginal peoples] became subject to a legal system *that they did not share*.”

<sup>14</sup> MMF at para 66; *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 (“Haida”) at para 32

## **PART 2: WHAT REQUIRES HONOURABLE CONDUCT?**

Generally, the *honour of the Crown* is always engaged in the Crown's dealings with Aboriginal people where the issue is specific to Aboriginal people. However, the Courts have said it imposes a heavy duty and is not engaged by every interaction between the Crown and Aboriginal people.<sup>15</sup> For example, it will not be engaged where Aboriginal people can access a benefit that is also being provided to other Canadians.<sup>16</sup> The *honour of the Crown* has been found to be engaged:

- by section 35(1) of the *Constitution Act, 1982*;
- by explicit obligations to an Aboriginal group enshrined in the Constitution; and
- in situations involving the reconciliation of Aboriginal rights with Crown sovereignty – e.g. in interpretations of treaties and statutory provisions affecting treaty and Aboriginal rights.<sup>17</sup>

## **PART 3: WHAT DUTIES ARE IMPOSED BY THE HONOUR OF THE CROWN?**

The duties imposed by the *honour of the Crown* will vary in different circumstances. So far, the *honour of the Crown* has been applied in at least four situations:

- where the Crown assumes discretionary control over a specific Aboriginal interest, a fiduciary duty will arise from the *honour of the Crown*;
- the purposive interpretation of section 35, which therefore gives rise to a duty to consult and accommodate where the Crown contemplates action that may affect claimed but unproven rights;
- in treaty-making *and implementation* there will be a duty to engage in honourable negotiation and to avoid the appearance of sharp-dealing (emphasis added); and
- when the Crown makes a treaty or statutory grant, *the Crown is required to act in a way that accomplishes the intended benefit to be conferred on the Aboriginal group.*<sup>18</sup>

The Supreme Court found in *Manitoba Metis Federation* that in “the implementation of a constitutional obligation to an Aboriginal people, the *honour of the Crown* requires that the Crown: (1) takes a broad purposive approach to the interpretation of the promise; and (2) acts diligently to fulfill it.” In discussing the implications of this principle, the Court noted that the Crown must seek to perform the obligation “in a way that *pursues the purpose behind the promise*. The Aboriginal group must not be left “with an empty shell of a treaty promise”.

---

<sup>15</sup> MMF at para 68

<sup>16</sup> MMF at para 72

<sup>17</sup> MMF at paras 68-70; Haida at para 20

<sup>18</sup> MMF at para 73

## **PART 4: THE HONOUR OF THE CROWN AND FISCAL APPROACHES TO ON-RESERVE PROGRAMS AND SERVICES AND INFRASTRUCTURE AND ABORIGINAL SELF-GOVERNMENT FISCAL RELATIONSHIPS**

### **4.1 Funding for Reserves**

On-reserve programs and services are dramatically underfunded. On-reserve residents are not being provided with programs and services that are equal to those enjoyed by other Canadians. As a result, many residents on-reserve have a poor quality of life and are living in conditions that are akin to Third World countries. This is not anecdotal and has been shown time and time again. Canada as a government has acknowledged this.

In 2011, the Auditor General of Canada in the *Status Report* to the House of Commons dedicated an entire chapter to highlighting the significant disparity in funding of on-reserve programs and services. Based on audits over a span of ten years and visits to First Nation communities, the Auditor General concluded that the conditions on-reserve were significantly below average and not improving. The Auditor General noted that:

The education gap between First Nations living on reserves and the general Canadian population has widened, the shortage of adequate housing on reserves has increased, comparability of child and family services is not ensured, and the reporting requirements on First Nations remains burdensome.<sup>19</sup>

The Auditor General felt that while some efforts had been made to correct this situation, they were unsatisfactory and that not enough progress had been made. The Auditor General felt that a large part of the problem contributing to the pervasive crisis was:

....the lack of clarity about service levels on First Nations reserves, lack of legislative base to fund service delivery on reserves, a lack of an appropriate funding mechanism, and a lack of organization that could support local service delivery.<sup>20</sup>

If these issues were not corrected then the Auditor General felt there was a risk that living conditions on many First Nations reserves will remain significantly below national averages, with little prospect of a brighter future.<sup>21</sup>

This was not the first or last time that the Auditor General has highlighted issues with funding of services and programs on-reserve and criticized the lack of progress. The Auditor General pointed out funding issues on-reserve time and time again:

- In the 2000 April Report, with respect to Elementary and Secondary Education

---

<sup>19</sup> AG 2011 Status Report, Chapter 4—Programs for First Nations on Reserves at page 8

<sup>20</sup> *Ibid*

<sup>21</sup> *Ibid*

- In the 2000 October Report, with respect to First Nations Health
- In the 2003 April Report with respect to Housing Support on First Nations
- In the 2004 November Report, with respect to the Education Program and Post-Secondary Student Support
- In the 2006 May Report, with respect to the overall management of programs for First Nations
- In the 2008 May Report, with respect to First Nations Child and Family Services Program
- In the Spring 2015 Report, with respect to the Access to Health Services in Remote First Nation Communities

This dire situation in First Nation communities was also highlighted in 2013 by the Canadian Human Rights Commission (“CHRC”) in its *Report on Equality Rights of Aboriginal People*.<sup>22</sup> The Report confirmed that Aboriginal people in Canada are facing social injustice and systemic discrimination, both on and off-reserve.

In 2014, the United Nations Special Rapporteur on the rights of indigenous peoples released the *Report on the Situation of indigenous peoples in Canada*. Overall, the Special Rapporteur found the socioeconomic conditions of Aboriginal people in Canada to be distressing and jarring.<sup>23</sup> Despite the Special Rapporteur’s call in 2005 for Canada to take more intensive measures to close the gap between Aboriginal and non-Aboriginal Canadians in healthcare, housing, education, welfare and social services, there was no reduction in the gap.<sup>24</sup> Among other things, the Special Rapporteur found that:

- At every level of education, Aboriginal people lag far behind the general population.<sup>25</sup>
- The housing situation has reached crisis level—overcrowded housing is endemic and homes are in need of major repairs.<sup>26</sup>
- The health of Aboriginals remains significantly worse than non-Aboriginal Canadians in terms of life expectancy, infant mortality, suicide and communicable and chronic diseases.<sup>27</sup>
- Aboriginal children continue to be taken into care of child services at a rate eight times higher than non-Aboriginal Canadians and there are disparities in the funding and service levels for child and family services.<sup>28</sup>

These are only a few of the many reports or studies that have confirmed the inadequacy of funding for programs and services. What is common throughout these various reports and studies is the conclusion that the conditions that exist on-reserve are worsening relative to non-Aboriginal people and the initiatives being taken by Canada to address the problems faced by Aboriginal people are unsatisfactory.

---

<sup>22</sup> Canadian Human Rights Commission, *Report on Equality Rights of Aboriginal People* (2013)

<sup>23</sup> UN Report at page 4

<sup>24</sup> UN Report at page 4

<sup>25</sup> UN Report at page 7

<sup>26</sup> UN Report at page 8

<sup>27</sup> UN Report at page 9-10

<sup>28</sup> UN Report at page 10

Canada was recently criticized again for its lack of responsiveness to correct services for on-reserve Aboriginal peoples.<sup>29</sup> In its follow-up order regarding remedial relief, the CHRT found Canada's response to the order that it change its discriminatory practices against First Nations children through its underfunding of child and welfare services to be inadequate. The CHRT determined that ultimately Canada was not moving swiftly enough to correct the problem.

Despite numerous calls for change, Canada continues to fail Aboriginal people. While dismal conditions on-reserve persist and there remains a significant disparity in funding of on-reserve programs and services, Canada is continuing the problem of inadequate efforts and response.

It is of course acknowledged and significant that the mandate letters provided by Prime Minister Trudeau to the Ministers have promised change, and speak of a nation to nation relationship. The Prime Minister, when recently questioned by an indigenous high school student from Oskayak High School in Nutana, Saskatchewan about what he intended to do to right the wrongs of past Prime Ministers and their governments, and why he and Canada were allowing the first peoples to live in Third World conditions, reiterated his government's commitment to renewing that nation to nation relationship in a spirit of "respect, openness and collaboration".<sup>30</sup> Those are good words. The 2016 federal budget promises \$8.4 billion dollars in funding over five years to begin to address these disparities. There are also good words, and Canada has acknowledged this is just the start. And of course, Canada is a very large government and making changes to fiscal relationships is not easy. But it will not be honourable conduct, and legally it may be dishonourable conduct, if the funding disparities are not addressed in a concerted and focussed way.

So why is it legally in keeping with the *honour of the Crown* to address these funding disparities swiftly? The core of the argument comes from exploring what the Court said in *Manitoba Metis Federation*, when it wrote that "**in treaty-making and implementation there will be a duty to engage in honourable negotiation**". The question that arises from this is whether the Crown has been engaging in honourable negotiation in the implementation of treaties?

First Nations who signed the so-called historic treaties are frequently faced with Crown positions that limit the interpretations of those treaties. Many of us have heard First Nations peoples state that those treaties are not being honoured in the way the First Nations understood them. However, still today, the surrender clauses, which used the English language of "surrender" that was not part of the First Nations' legal systems, are often held up in positions taken by Crown officials to be the main purpose of these treaties. Aboriginal peoples have frequently tried to negotiate with the Crown the implementation of their treaties. But if the Crown takes very limiting interpretations of the treaties and refuses to engage in substantive negotiation with First Nations about what those historic treaties actually were intended to establish in the way of an ongoing relationship, and how the treaty obligations

---

<sup>29</sup> *First Nations Child and Family Caring Society of Canada et al v Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, 2016 CHRT 10 ("Caring Society No. 2")

<sup>30</sup> <e-notes> from fourarrows@outlook.com, 3 May 2016 Edition, Section IV, "Saskatchewan Indigenous Youth Press PM Trudeau About Third World Conditions As Canadian Attention Focuses on Indigenous Issues". ("Four Arrows")

under that treaty relationship should be implemented, that is arguably not in keeping with the *honour of the Crown*. It would, however, be in keeping with a duty arising from the *honour of the Crown* to engage in negotiations to implement the true spirit and intent of historic treaties.

Part of the treaty implementation negotiation process must address fixing the disparities in funding for programs and services and for funding for on-reserve infrastructure. If it is true, as we understand it to be, that historic treaties were intended to share the wealth of the land and its resources, not to give them up in exchange for being placed on reserves to live in poverty, then part of the implementation negotiations must address the sharing of the wealth generated from the Aboriginal title lands that Aboriginal peoples agreed to share when they entered those treaties. For example, revenue sharing, and tax-sharing from wealth generated from lands covered by treaties – rather than the very limited approach to tax-sharing that Canada now takes of engaging in negotiations about taxes that might be paid from income earned on reserves if the s. 87 *Indian Act* exemption from income situated on-reserve is given up - need to be open for negotiation in treaty implementation processes.

But treaty negotiations about fiscal relationships now take place within the confines of mandates derived from federal government policies about fiscal and tax arrangements with Aboriginal peoples. Turning the government ship around to a new direction needs to happen much more quickly so that these negotiations can take place in a way that is consistent with the *honour of the Crown*.

We emphasize here the concept of treaty implementation *negotiation* (rather than litigation) as being an obligation flowing from the *honour of the Crown*. The courts have said that the relationship between the government and Aboriginals is supposed to be “trust-like, rather than adversarial.”<sup>31</sup> Indigenous peoples should not have to exhaust their already limited resources to battle the Crown in court to gain equal access to and levels of programs and services on-reserve. This is not in the spirit of reconciliation and is contrary to the *honour of the Crown*. Time and time again, First Nations peoples talk about how incredibly frustrating it is to feel their only option left is to resort to litigation or to alternative dispute resolution mechanisms to hold the Crown to its obligations in treaties, when repeated political efforts to get the Crown to act in accordance with those obligations and to respect the true spirit and intent of the treaties have failed.

In those parts of the country where reserves exist but treaties have not (yet) been concluded, we are of the view that the *honour of the Crown* should also bring with it funding obligations for those reserves. Professor Brian Slattery, oft-cited by the Supreme Court, has written that the honour of the Crown arises from the Crown’s assertions of sovereignty. With the Crown’s assertions of sovereignty, the Crown took upon itself the powers to tax, to collect revenues from the land and resources, to pass laws to enable them to grant lands or issue mining and forestry licences and other permits to use the lands, and so to benefit from the wealth generated from these resources. Having done so, and not having shared those law-making authorities with the aboriginal peoples, having assumed control over the aboriginal peoples

---

<sup>31</sup> *R v Sparrow*, [1990] 1 SCR 1075 at page 1108



they put on the reserves, the *honour of the Crown* must also carry with it a Crown obligation to ensure that those peoples the Crown placed on reserves are not in a worse position in terms of the provision of programs and services than the settlers who have benefited so richly from the assertions of sovereignty.

The *honour of the Crown* is a relatively new legal concept that is still developing. While different, the *honour of the Crown* is not totally distinct from a breach of fiduciary duty. It is a broad principle that in some cases will lead to a fiduciary duty being imposed.<sup>32</sup> Like a fiduciary duty, the *honour of the Crown* should not be limited to land issues or issues arising out of section 35 of the *Constitution*.<sup>33</sup> It should have broader application. The *honour of the Crown* should be engaged in all situations where the Crown has assumed discretionary control over a specific Aboriginal interest, whether or not that Aboriginal interest is related to section 35 of the *Constitution* or specific Aboriginal or treaty obligations.<sup>34</sup>

This is particularly true when it comes to the funding and provision of programs and services on-reserve. Aboriginal people did not just have a foreign legal system thrust upon them. The Crown also assumed complete economic, social and proprietary discretion and control over them.<sup>35</sup> As was reiterated in *Attawapiskat First Nation v Canada*,<sup>36</sup> First Nations rely on funding from the Crown to provide essential services to their members. This degree of control and discretion in the funding of programs and services has left Aboriginal people “vulnerable to the risks of government misconduct and ineptitude.”<sup>37</sup> This power imbalance and high degree of discretion and control over Aboriginal people should trigger the *honour of the Crown* and require swift action with respect to the funding and provision of adequate programs and services on-reserve.

Another concept related to the obligations flowing from the *honour of the Crown* as it relates to the fiscal responsibilities for on-reserve funding of programs and services, is that the fiscal obligations should be shared by the Crown, both at the federal and provincial levels. The court in *Grassy Narrows First Nation v Ontario (Natural Resources)*<sup>38</sup>, commonly referred to as *Keewatin*, filled the legal gap that the only government with the obligation to fulfil treaty promises did not have the constitutional power to do so. In *Keewatin*, “the Court adopted a constitutional evolution doctrine that results in the benefits and burdens of treaties being inseparable.”<sup>39</sup>

---

<sup>32</sup> *MMF* at para 73

<sup>33</sup> See *Caring Society* at paras 87-113 for discussion on how the fiduciary duty can be broadened to include the funding and provision of on-reserve programs and services.

<sup>34</sup> *Wewaykum Indian Band v Canada*, 2002 SCC 79 (“*Wewaykum*”) at para 85

<sup>35</sup> *Wewaykum* at para 80; *Caring Society* at paras 87-113

<sup>36</sup> 2012 FC 948 at para 59

<sup>37</sup> *Wewaykum* at para 80

<sup>38</sup> 2014 SCC 48.

<sup>39</sup> Se H.W. Roger Townshend, “*Keewatin* Decision – Analysis and Likely Impact,” a paper prepared for The Commons Institute conference: [Aboriginal Law: Practice Primers and Contemporary Developments](#) 2015

Because the burdens/obligations under treaties are inseparable from the benefits, and the Crown is the unified Crown when it comes to those obligations, why do we assume that the federal Crown should be solely responsible for funding on-reserve programs and services and infrastructure? Section 91(24) of the *Constitution Act, 1867* will be the off-the-cuff answer to that question. But s. 91(24) is about legislative authority only. The Province and Canada's spending powers, on the other hand, are not determined by the division of powers in sections 91 and 92. We all by now understand and should accept, without question, that Canada and the Provinces must come together to meet unfulfilled treaty land entitlement obligations under treaties. But what of *other* treaty obligations?

The Provinces benefit from the revenues earned and taxes paid on income earned on First Nations' traditional territories outside their reserves. The concept that the Provinces too have obligations to fund programs and services for on-reserve peoples flowing from treaties and/or from the assertion by the Crown of sovereignty - which happened long before the Crown's legislative authority was constitutionally divided up by sections 91 and 92 - is one that does not appear, yet, to have been openly considered. So if the obligation to fund programs and services and infrastructure costs on reserves flows from the *honour of the Crown*, then the Crown at both levels should be required to work together to meet those fiscal obligations as well.

To conclude this part, there have been recent positive developments with respect to on-reserve programs and services funding, one being Canada's decision to not seek judicial review of the CHRT's decision on funding of child and welfare services. The funding directed toward Aboriginal programming, including funding for primary and secondary education, social infrastructure, child and family services, and quality of water in the 2016 Federal budget was also a welcome development. However, it is not enough to just throw money at the problems. Sending in mental health workers to address suicide crises is necessary, but not sufficient. First Nations need more than a blanket, quick fix solution, and Canada and the Provinces have acknowledged this. To echo the words of the CHRT, "Words need to be supported by action....This is the season for change. The time is now."<sup>40</sup>

#### **4.2 Self-government Agreements and the Fiscal Relationship**

In July 2015, Canada released, after years of internal policy work and some limited engagement with indigenous peoples in Canada, *Canada's Fiscal Approach for Self-Government Arrangements*. The approach sets out a fiscal funding formula that, among other things, provides that where a First Nation wishes to "draw down" a law-making authority under a self-government agreement, the base amount for the funding is the program funding authorities currently in place which INAC currently provides under funding arrangements with First Nations still under the *Indian Act*. First Nations who have entered or are considering these self-government arrangements have raised concerns with Canada already about this aspect of the new fiscal approach. The approach locks in the existing inequalities in funding for on-reserve programs and services like education, child welfare, health, etc. Carrying forward an

---

<sup>40</sup> Caring Society No. 2 at para 41

inadequate funding base into self-government fiscal agreements raises the question of whether this approach is consistent with the *honour of the Crown*.

To answer this question, we begin with some basic facts about the current context for negotiating self-government. Canada's policy on inherent rights recognizes the inherent right of self-government as a s. 35 right. Self-government agreements being negotiated are being negotiated under that policy. Canada's negotiators say, and mean, that Canada wants self-government to succeed, and of course it is plain that the First Nations want the same. And the Courts have said that the *honour of the Crown* is engaged by section 35. There are many issues to be negotiated in fiscal relationship agreements. One of those issues that must be open for honourable negotiation, rather than shut down by Canada's fiscal policy framework under which Crown negotiators operate, is the base funding that will be available for the development and implementation of First Nation-developed laws.

### **CONCLUSION**

We have explored above, in a preliminary way, the legal implications of the *honour of the Crown* for fiscal relationships between the Crown and Aboriginal peoples. We conclude with a challenge for Crown and other lawyers to remember that the law's finely tuned legal principles are of course not the only way to view the *honour of the Crown*.

The federal and provincial governments have the job of addressing the needs of Aboriginal peoples in Canada and working to help create opportunities for improvements. Aboriginal governments need to be partners in that job. While carrying out this work, these three levels of government need to always keep in view the history of how this country came to be Canada. We have heard how former Chiefs speak of the dilemma they feel they are in locked within the funding arrangements they have with INAC. Some have described themselves, of course with deep frustration, as "administrators of poverty". How can it be in keeping with the *honour of the Crown* that the descendants of the peoples who signed treaties to share the land with settlers, who had or have Aboriginal title to vast lands in this country, find themselves living in communities where so many people live in poverty? As lawyers for our various clients, whether they be indigenous peoples or the Crown or the private sector, we should be considering how to *expand* the legal principle of the *honour of the Crown* to get to a relationship – including the fiscal and tax aspects of that relationship - that achieves justice.

After the Prime Minister recently visited Shoal Lake 40 First Nation, Chief Erwin Redsky urged the Prime Minister to act on his promises. The Chief wrote in a statement following the visit that "Your words are welcome, but unfortunately, we have a whole museum full of fine Canadian promises that are unfilled.... Achieving a respectful, equitable nation to nation relationship is going to take real stamina."<sup>41</sup> To that we would add that it will take lawyers working hard and being creative to implement the principle of the *honour of the Crown*, whether that be in their legal arguments, in the negotiation of self-government agreements

---

<sup>41</sup> Four Arrows May 3, 2016 edition, Section IV, "PM Trudeau visits Shoal Lake #40 on a "Private Visit" – with VICE News.

and the fiscal agreements that accompany them, in the drafting of new legislation, in the revision of and implementation of policies regarding funding for indigenous peoples, or in the many other legal matters that come up in the ongoing relationship between the Crown and indigenous peoples.