Constitutional Issues

R v Brennan et al

June 4 2020

This document is a supplement to the Notice of Constitutional Question (R v Brennan et al) dated August 8 2019, and Addendum to NCQ (R v Brennan et al) dated January 1 2020.

The constitutional issues are:

1. **Section 25 and 26 of the Charter**

   Members of the Amikwa Algonquin Nation, being all of those charged herein, fall under the definition of "other" in Sections 25 and 26 of the Charter. As they have not entered into a treaty or ceded the territory, they have the right to the recognition of their laws, practices, traditions and customs, through the prism of both domestic and international law. They have the right to the protection of the Rowan Proclamation of 1854, and the Indian Protection Act of 1850, designed to protect the "other" from settlers and their encroachment.

2. **S 35 and S 7 of the Charter**

A. <u>S 35</u>

The members of the Amikwa Algonquin Anishinabe Nation were traders and medicine men. The evidence to be offered in the constitutional challenge will speak to the trading activity of the medicines, which would include the tradition of cannabis and hemp as an active practice of the Amikwa Algonquin Anishinabe Nation.

B. <u>S 7</u>

The control of the trading in cannabis and hemp of the members of the Amikwa Algonquin Anishinabe Nation limits their economic well-being in an environment of

apartheid created by the Indian Act. All are confined to a small space of their territory with no economic prospects for survival. The act of apartheid is in contravention of Section 7 of the Charter.

C. Genocide and Apartheid

The members of the Amikwa Algonquin Anishinabe Nation will advance arguments showing the relationship between them and the British/Canadian colonial governments is informed by genocide and apartheid, and must be taken into account in the evaluation of their laws, practices, traditions and customs, which were destroyed by colonial policies designed to impoverish indigenous peoples, and led to their essential elimination.

3. Duty to Consult

The traditional Algonquin Grandmothers of the Amikwa Algonquin Nation have asserted a right to indigenous title in the territory within which these alleged offences took place. Upon assertion of title, the honour of the Crown arises, and the Crown has a duty to consult. This also relates to the laws, traditions, practices and customs of the indigenous peoples.

Mr Swinwood thank you for your summary of issues. I might be wrong but I thought Justice Ellies also asked that you provide an outline of the connecting factual matrix as it relates to each of the accused as well as the territorial jurisdiction that each case falls into.

- Below we have raised a few areas we thought you might assist us in clarifying.

Points of clarification:

1. You indicate that the Amikwa Angonguin Nation fall into the definition of ``***other***`` in section 25 &26. Just so we are all on the same page –both sections talk about *certain rights and freedom shall not be construed to abrogate or derogate from any Aboriginal treaty or other rights or freedoms….*

i. The ***other*** in these sections is in reference to rights of recognized Aboriginal peoples as defined by the various legislations and to my reading does not carve out another group of persons not already contemplated by the Charter.

ii. <u>Could you kindly clarify what you mean by *other* in reference to s. 25 & 26</u>.

2. Since s. 25 & 26 **does not create *new right*** but can more accurately be construed as shielding pre-existing aboriginal rights or aiding in the interpretation of such rights even beyond the scope of s. 35-it is unclear what – if not aboriginal sovereignty- is being claims in this regard.

i. Is this a sovereignty argument?

ii. Can you be more specific as to how this group acquired sovereignty to the exclusion of federal authority and when?

3. Can you please clarify how the Rowan Proclamation in conjunction with the Indian Protection Act – specific sections would be helpful to us- serve to ***carve out independent*** territory for the Amikwa Angonguin Nation?

4. On the s. 35 claim – can you provide any ***case law*** or policy / legislation / treaty/ or agreement that you might be aware of to support your position on the use and practices around cannibas in a commercial context?

5. The duty to consult seem fairy broadly outlined. Can you provide more direction and specifics as to what this ought to look like. Ie. Case law or policy to support your position here would assist.

6. Duty to consult – In the duty to consult context, Crown conduct only includes executive action or action taken on behalf of the executive. How/when is this engaged in the litigation process? Are you suggesting that the duty to consult was engaged when the legislation was enacted

Clarification on Issues

Points of Clarification

June 5 2020

1. My clients are not aboriginal persons, nor are they Indians – they are "other" as set out in the Papal Bull of 1537, Treaty of Utrecht 1712, and the Royal Proclamation of 1763. In the Royal Proclamation the words "…several Nations or Tribes of Indians with whom We are connected, and who live under our Protection…". "Indians with whom We are connected, and who live under our Protection" does not refer to the Amikwa Algonquin Nation, as they were neither connected nor under the protection of the British. This reference to Indian tribes "with whom We are connected, and who live under our Protection" refers mostly the Mohawk Nation, who are identified in the treaty of Utrecht in 1713, as being a suzerainty to the British. Members of the Amikwa Algonquin Nation were enemies, and they are identified as "other" in the above instruments. The only instrument where "other" is represented is in the Treaty of Friendship and Peace of 1701 (Montreal), wherein there was an agreement to share the land. We are still at 1701, as there has been no progress on that promise. As the Amikwa Algonquin Nation does not consider its members as "aboriginal" or "Indian," they fall under the rubric of "other" rights.

2. (i) This is not a sovereignty argument. The claim is that no jurisdiction has been acquired over the territory, as no surrender has ever been made to the British/Canadian colonial governments. The territory has not been ceded to any government pursuant to the Proclamation of 1763 or any other instrument. The rule of law must be applied in favour of the indigenous applicants as it has not been followed in this territory where the alleged offences took place.

   The applicants dispute the applicability of the Robinson Huron Treaty of 1850, and will bring forward evidence to demonstrate the majority of signatories to the Treaty were from the Potawatamie Nation in Wisconsin. One of the main signatories to that Treaty, Chief Shingwauk, signed a treaty in Chicago in 1830 and then signed the Robinson Huron Treaty in 1850.

   (ii) The members of the Amikwa Algonquin Nation have never ceded or surrendered the territory within which the offences took place. They are not "aboriginals' nor "Indians,"

and are not citizens of Canada. They are members of the Amikwa Algonquin Nation who have a right to the declaration of indigenous title to the territory, which would confirm they have a right to conduct the activity they are accused of engaging in today. Unlike the settlers, the members of the Amikwa Algonquin Nation are prepared to abide by the Treaty of Peace and Friendship of 1701 and share the land. They do not seek to exclude.

3. Please refer to paragraph 1 at page 2 of the NCQ dated August 8 2019, as to the wording of the Rowan Proclamation and Indian Protection Act. It does not "carve out" independent territory – it acknowledged its existence – "An act for the protection of the Indians in Upper Canada from imposition and the property occupied or enjoyed from Trespass and Injury.

4. S 35 will have to be dealt with by the filing of an expert report to answer this point of clarification.

5. The duty to consult is engaged when the traditional Algonquin Grandmothers asserted a right to a declaration of indigenous title. This file, the Bidal file and the Amended Statement of Claim are contiguous. By virtue of the laws, traditions, customs and practices of this indigenous nation, the Crown has a duty to consult (Haida – Supreme Court of Canada), which it has not undertaken yet. This consultation would go a long way to resolving long-standing conflicts.