

Minister of Justice  
and Attorney General of Canada



Ministre de la Justice  
et procureur général du Canada

The Honourable / L'honorable Rob Nicholson, P.C., Q.C., M.P. / c.p., c.r., député  
Ottawa, Canada K1A 0H8

JUL 24 2008

The Honourable Joan Fraser, Senator  
Chair of the Standing Senate Committee on Legal and Constitutional Affairs  
The Senate of Canada  
Ottawa, Ontario K1A 0H4

Dear Senator Fraser:

On February 26, 2008, the Senate of Canada requested that the Government table a response to the fifth report of the Standing Senate Committee on Legal and Constitutional Affairs (the "Committee") adopted by the Senate on February 12, 2008, with the Minister of Justice and Attorney General of Canada identified as Minister responsible for responding to the report.

The Committee's report, entitled "Taking Section 35 Rights Seriously: Non-derogation Clauses relating to Aboriginal and treaty rights" (the "Report") was tabled in the Senate on December 13, 2007. It makes a number of recommendations aimed at improving the current approach to dealing with the issue of including, in federal legislation, non-derogation clauses referencing Aboriginal and treaty rights.

Pursuant to Rule 131 of the *Rules of the Senate of Canada*, I am pleased to respond to the Committee's Report in this letter, on behalf of the Government of Canada.

At the outset, I would like to thank the Committee for its diligent work on the issue of non-derogation clauses. The Report's detailed discussion of non-derogation clauses and its six recommendations are an important contribution to the ongoing debate on this issue.

In terms of the Committee's specific proposals for addressing the issue of non-derogation clauses, the Government of Canada agrees that the current *ad hoc* approach to the inclusion of such clauses in individual statutes is unsustainable and leads to a number of problems and risks.

We find the Committee's proposals for a legislative solution to this problem – i.e., the insertion of a new universal clause in the federal *Interpretation Act* (recommendation 1) and the repeal of existing non-derogation clauses in individual statutes (recommendation 2) – worthy of serious consideration. These proposals make a positive contribution in advancing the search for a solution to the difficult issues relating to non-derogation

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clauses. We do, however, have questions about the practical difficulties involved in repealing existing clauses. As a result, the Government of Canada will need to carefully consider the legal and practical implications of proceeding with recommendations 1-2. We will also want to canvass the views of Aboriginal groups with respect to these proposals, and the Report as a whole, before considering any endorsement or implementation of recommendations 1-2.

With respect to recommendations 3-4-5, the Government of Canada agrees with the Committee's view that meaningful consultation and up-front engagement with Aboriginal people in the legislative development context and elsewhere will also help ensure that Aboriginal rights, interests and perspectives are properly considered and respected. The federal government takes s. 35 Aboriginal and treaty rights very seriously, and is committed to their continued protection.

The Government's current approach to consultation and engagement is consistent with the Committee's recommendations in this area. The Government of Canada launched its action plan on consultation and accommodation on November 1, 2007, and recently made its Interim Guidelines on consultation publicly available on the website of Indian and Northern Affairs Canada (<http://www.inac.gc.ca/nr/iss/acp/index-eng.asp>). The action plan and the Interim Guidelines are aimed at addressing the legal duty of federal departments and agencies to properly consult with First Nation, Métis and Inuit groups whenever Crown actions may adversely impact upon established or potential Aboriginal and treaty rights.

With respect to the need for broad consultation or engagement with Aboriginal people as part of the legislative development process, it should be noted that the Government of Canada does in fact regularly consult with Aboriginal groups, communities, and organizations when proposing or developing legislation that could potentially affect their rights and interests. New draft laws are examined with a view to identifying potential impacts on Aboriginal people, and existing laws are reviewed for this purpose on an as-needed basis, in order to avoid having to resort to expensive and lengthy judicial interpretation and adjudication. These exercises in legislative drafting and review often involve broad and extensive consultations with various Aboriginal communities, groups, and governments that may be affected by the legislation in question. In addition, government lawyers involved in the drafting and reviewing of laws and regulations are well-versed in all aspects of constitutional law and are sensitive to the potential for federal legislation to affect s. 35 Aboriginal and treaty rights. Much work has been done to develop capacity-building resources and mechanisms in this regard, and improvements will continue to be made to ensure better training and support.

Finally, with regard to the Committee's proposal in recommendation 6, the notion of giving greater attention to Aboriginal customary and oral laws is an interesting proposal. To a certain extent, the federal government has been active in this regard in various contexts, including the addition of references to traditional knowledge in some statutes dealing with the management of natural resources and lands, and the development of programs like the Department of Justice's Aboriginal Justice Strategy that allow for

community-based alternative justice processes for Aboriginal offenders, where appropriate. It should be noted, however, that the diversity of Aboriginal legal traditions across Canada, and their largely oral forms of expression, pose significant challenges in terms of articulating any linkages or changes to Canada's existing legal framework. Giving greater attention to Aboriginal customary and oral laws is of a different magnitude than the goal of harmonizing common law and civil law systems in Canada as discussed in the Report.

Once again, on behalf of the Government of Canada, I would like to thank the Committee for its insightful Report, and for the opportunity to respond. We will ensure that the Committee's recommendations are given serious attention in developing options for moving forward.

Yours truly,

A handwritten signature in black ink, appearing to read "Rob Nicholson". The signature is fluid and cursive, with the first letters of the first and last names being capitalized and prominent.

The Honourable Rob Nicholson

c.c. The Honourable Chuck Strahl