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Treaties

When our peoples entered into treaties, there were nations of peoples. And, people always wonder why, what is a nation? Because only nations can enter into treaties. Our peoples, prior to the arrival of the non-indigenous peoples, were under a single political society. They had their own languages. They had their own spiritual beliefs. They had their own political institutions. They had the land base, and they possessed historic continuity on this land base.

Within these structures, they were able to enter into treaties amongst themselves as different tribes, as different nations on this land. In that capacity they entered into treaty with the British people. So, these treaties were entered into on a nation-to-nation basis. That treaty set out for us what our relationship will be with the British Crown and her successive governments.

Regena Crowchild
President, Indian Association of Alberta
Edmonton, Alberta, 11 June 1992*

THE COMMISSION'S TERMS OF REFERENCE required us to investigate and make concrete recommendations concerning

5. The legal status, implementation and future evolution of aboriginal treaties, including modern-day agreements.

An investigation of the historic practices of treaty-making may be undertaken by the Commission, as well as an analysis of treaty implementation and interpretation. The Commission may also want to consider mechanisms to ensure that all treaties are honoured in the future.

We were also directed to propose specific solutions, rooted in domestic and international experience.

This part of our mandate is in a sense the most simple to grasp. The treaties constitute promises, and the importance of keeping promises is deeply ingrained in all of us and indeed is common to all cultures and legal systems. Thus our task is, first, to identify the promises contained in the treaties. Then we must make recommendations for fulfilling any treaty promises that remain unfulfilled. This task, though simple to describe, takes us to the heart of our mandate and to the core elements of the relationship between Aboriginal and non-Aboriginal people in Canada.

We begin this volume, which concerns the restructuring of the relationship between Aboriginal and non-Aboriginal people, with an examination of the treaties because it has been through treaty making that relationships between Aboriginal and non-Aboriginal people have traditionally been formalized. In our view, treaties are the key to the future of these relationships as well. In this volume we address substantive issues such as governance, lands and resources, and economic development. Just as those issues were addressed traditionally in the nation-to-nation context of treaties, it is in the making of new treaties and implementation of the existing treaties that these issues can be addressed in a contemporary context.

In Volume 1, we discussed the history of treaty making; now we draw the lessons to be learned from that history. We will also see how the policies of the government of Canada, over time, ignored and marginalized the treaties, despite the continued insistence of treaty nations that the treaties are the key to all aspects of the relationship.* Finally, we will examine the central role of the treaties and treaty processes in fashioning a just and honourable future for Aboriginal peoples within Canada and an equitable reconciliation of the rights and interests of Aboriginal and non-Aboriginal people.

At the same time we must acknowledge that not all the substantive issues in our mandate can be addressed through the making, implementation or renewal of treaties. Treaties, as we will see, are by their nature agreements made by nations. Where there are groups of Aboriginal people who may not meet the criteria for nationhood, some other instrument must be used. The primary theme of this volume nonetheless remains the revitalization of Aboriginal nationhood, a theme discussed in greater detail in Chapter 3.

Earlier in our report, we identified four key principles of a renewed relationship: mutual recognition, mutual respect, sharing and mutual responsibility (see Volume 1, Chapter 16). These principles have been present in varying degrees throughout the treaty relationship. Some treaty relationships are very old: they go back to the earliest times of contact between the Aboriginal peoples of the Americas and the first Europeans to arrive here. Some relationships have yet to be formalized by treaty. The four principles provide a framework for understanding and fulfilling the treaties of the past and for making new treaties.

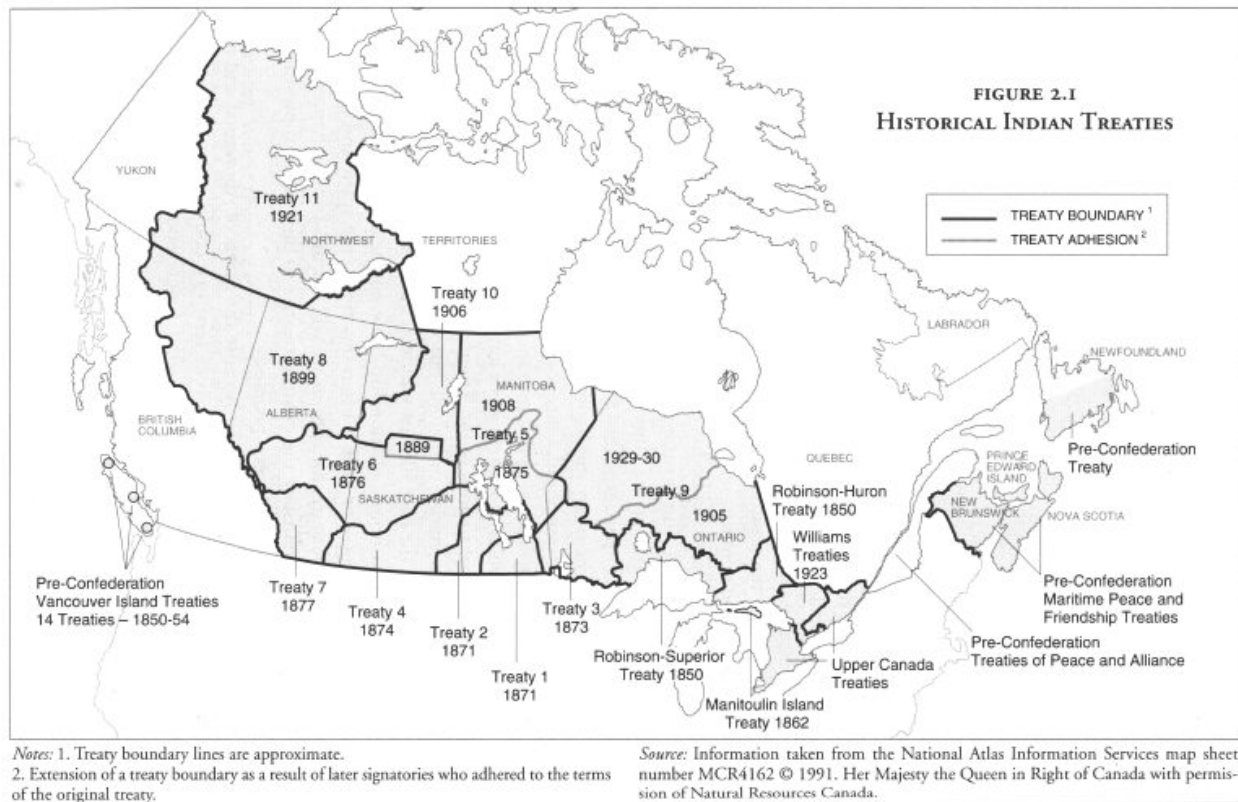
The story of the treaties is, sadly, replete with examples of failed communications, as peoples with vastly different views of the world attempted to make agreements. Those differences denied them a true consensus on many points, leading to frustration and animosity. In Volume 1, we saw that treaty making took place on a common ground of symbolism and ceremony, but contrasting world views led the treaty parties to divergent beliefs about the particulars of the treaties they made.

At the same time we must keep in mind that the very act of entering into treaties — even if the resulting agreements were flawed or incomplete — represented a profound commitment by both parties to the idea of peaceful relations between peoples. The act embodies the principles of respect and sharing that we identified in Volume 1. Just as these principles motivated the participation of the parties to some degree at the time of treaty, so they should now guide the actions of both treaty parties as they seek to establish consensus on the matters that divide them. The treaty mechanism itself provides a sound and appropriate framework for the task ahead. Once made, treaties need to be kept alive, honoured and adapted to changing circumstances.

As we saw in Volume 1, there was a long and rich history of treaty making among the Aboriginal nations of the Americas before the arrival of Europeans. This tradition was expanded to include European powers. The treaties made in the Americas during the past 500 years address matters of governance, lands and resources, and the economic relationship between the parties (see Figure 2.1). The original meaning — or as it is often described, the spirit and intent — of treaties has become obscure, for reasons we will discuss. In this chapter we will propose processes to reinstate the existing treaties to their rightful prominence in defining relationships between peoples.

Treaties were made in the past because the rights of Aboriginal and non-Aboriginal people occupying a common territory could come into conflict unless

some means of reconciliation was found. Contemporary Canadian law recognizes Aboriginal rights as being based on practices that are “an integral part of their distinctive culture”.¹ The unique nature of Aboriginal rights, as understood in Canadian law, makes it difficult to fit them into the context of rights and obligations our courts are accustomed to addressing. By entering into treaties, the parties can clarify how these rights should interact with one another.



Treaty making can enable the deepest differences to be set aside in favour of a consensual and peaceful relationship. The parties to a treaty need not surrender their fundamental cultural precepts in order to make an agreement to coexist. They need only communicate their joint desire to live together in peace, to embody in their own laws and institutions respect for each other, and to fulfil their mutual promises.

1. A Need For Public Education

We have an agreement as treaty Indians and we believe that these treaties cannot be broken or changed or negotiated because a sacred pipe was used when the treaties were signed and

sealed.

Nancy Louis
Samson Cree Nation
Hobbema, Alberta, 10 June 1992

Prejudice has prevented non-Aboriginal society from recognizing the depth, sophistication and beauty of our cultureBut this must change, or there will be immense suffering in the future in this beautiful land which the Creator has bestowed upon us.

Chief Eli Mandamin
Kenora, Ontario, 28 October 1992

In Volume 5, Chapter 4 we discuss in detail a program of public education on Aboriginal issues. Here we focus on the state of public knowledge about the treaties, which, unfortunately, are poorly understood by most Canadians. We begin by describing two images, both familiar, and both distortions of the meaning of the treaties. The first image is described in the accompanying box.

The Indians arrived in canoes, the chiefs noble and wise and the warriors strong of limb, and they came to the meeting place where officials in black felt hats and black suits and red-coated Mounties were already waiting. The chiefs passed a pipe around, and the officials took it awkwardly as the Mounties and the warriors watched, displaying no emotion. After much talk a paper was brought out, and the noble chiefs and the men in hats made their marks upon it with a formal flourish. The photograph was taken at this moment, and the treaty became an artifact of our history. The black-hatted men and the chiefs had just pledged their undying loyalty to one another under the watchful and sceptical eyes of the red-coated Mounties and the strong-limbed warriors.

As a caption for this image, we offer a quotation from a speech by Prime Minister Trudeau in 1969, commenting on his government's recently announced white paper on Indian policy:

We will recognize treaty rights. We will recognize forms of contract which have been made with the Indian people by the Crown and we will try to bring justice in that area and this will mean that perhaps the treaties shouldn't go on forever. It's inconceivable, I think, that in a given society one section of the society have a

treaty with the other section of society. We must all be equal under the laws and we must not sign treaties amongst ourselves.²

Prime Minister Trudeau's idea of the treaties, as expressed in the 1969 speech, was that they conferred rights to things such as "so much twine or so much gunpowder", making it easy for him to dismiss them as trivial relics.

The faded photograph of a treaty council is part of our common past as Canadians. It is one of a small number of images in our mental history books, along with the bearded man in a top hat driving in the last spike, the red-coated British soldiers scaling the cliffs before the battle of the Plains of Abraham, and the buckskinned *coureurs de bois* paddling laden canoes through a land of lakes and forests.

The photograph of the black-hatted officials, the noble chiefs and warriors, and the red-coated watchers has acquired a sepia tone, turning brown with age, and the corners are tattered. The men in the photograph are dead, their living words of mutual loyalty dispersed in the air like the smoke from their pipe, and the promises they made have been superseded by history.

The paper they signed has become their treaty, and the words on the paper speak of the circumstances of a dead past. The words on the paper survive, and it is easy to interpret them narrowly, legalistically, in a manner far removed from the spirit of coexistence prevailing when the treaties were made. In this way treaties can be made to appear trivial, indeed irrelevant, and to the extent that any honour is involved in fulfilling them, token payments of money, twine or gunpowder will suffice.

A second image comes to mind (see accompanying box). The caption for this second image could be the words of Justice Reed of the Supreme Court of the United States, in a decision rendered in 1955:

Every American schoolboy knows that the savage tribes of this continent were deprived of their ancestral ranges by force and that, even when the Indians ceded millions of acres by treaty in return for blankets, food and trinkets, it was not a sale but the conquerors' will that deprived them of their land.³

Were the treaties elaborate deceptions perpetrated by a sophisticated civilization upon unsophisticated and unwary Aboriginal peoples? Were the

treaties fraudulent, designed to provide a thin veneer of respectability for transactions that were actually acts of conquest? Were the men in black hats and red coats engaged in an elaborate show? Were their promises of enduring loyalty at best evasions and at worst outright lies?

This image is a caricature, and the Indians are drawn comically, in cartoon style. Their noses are exaggeratedly large and their skin is bright red. The chief's eyes bulge as he ogles the mound of beads and other trinkets that spill out of a chest the man in the black top hat has brought. The top-hatted man holds a deed to Manhattan. Clearly, both the chief and the top-hatted man think the other is crazy.

In this view of history, the chiefs and warriors did not know that they were already a conquered people whose consent to a treaty was a mere formality. They were duped into peace by words of loyalty and trust and refrained from exercising their considerable military power as a result. In this view, the treaty might as well have been an ambush; its effect was the same. In this view, therefore, to continue to respect the treaties is to perpetuate a cruel hoax. Surely it would be preferable to end the pretext that there were ever meaningful treaties and to get on with the job of integrating Indian people into society on the basis of equality and sameness.

The Commission undertook historical and legal research on the treaties on a scale unprecedented in our country's history.⁴ We heard at length from First Nations leaders and elders in all parts of the country about the treaties that were made. We heard from Inuit about their land claims agreements, which are modern-day treaties. We heard from the Métis Nation about their hope for a new accord or compact to formalize their relationship with Canada. We heard from leaders and elders of other nations, which were denied the opportunity to make a treaty with the Crown, that they want to do so now, if it can be done upon a proper foundation of mutual respect.

The Canada that takes a proud place among the family of nations was made possible by the treaties. Our defining national characteristics are tolerance, pluralism and democracy. Had it not been for the treaties, these defining myths might well not have taken hold here.⁵ Had it not been for the treaties, wars might well have replaced the treaty council. Or the territory might have been absorbed by the union to the south. Canada would have been a very different place if treaty making with the Indian nations had been replaced by the waging of war.

Each of the European nations that came to America to plant a flag and assert imperial pretensions had a particular approach to the people of the continent. The French settled in the St. Lawrence Valley and made such short-term military alliances as were necessary to secure peace and trade. The British brought the common law, reinvented the Indian treaty on the basis of that law, and used it as their primary tool for relating to the Indian nations. This led to what might be termed a friendlier form of expropriation. Certainly the British honed the process of treaty making for purposes of land cession to a fine art.

In the treaties, the British Crown and the Indian nations pledged undying loyalty to one another. The Crown's honour was pledged to fulfilling solemnly made treaty promises. When these promises were dishonoured, the results were shameful. As Alexis de Tocqueville wrote in 1840, "the conduct of the United States Americans towards the natives was inspired by the most chaste affection for legal formalities ... It is impossible to destroy men with more respect to the laws of humanity."⁶ Substitute 'British' or 'Canadians' for 'United States Americans' and the statement remains as valid and as provocative.

Indian treaties bear the strong imprint of the British legal system. Treaties are of course universal means of arranging alliances, enabling disparate peoples to keep the peace, and establishing mutually beneficial arrangements. What the British did uniquely was to establish unilaterally, in the *Royal Proclamation of 1763*, a set of rules to govern treaty making with the Aboriginal peoples of North America. These rules, as Canadian courts have since declared, gave rise to a unique trust-like relationship, which continues to have legal and political effect today.

The British legal system regarded the creation of these rules as an assertion of British sovereignty and dominion over the land occupied by the Aboriginal nations. Courts in Canada have accepted that it is not their role to question the legality of this assertion of authority. Within the boundaries of our mandate, however, the Commission can and does challenge the legitimacy of certain conclusions based on the Crown's assertions, particularly when they call into question the Crown's declared policies of honourable dealing and its legal duty so to deal (see our recommendations in Volume 1, Chapter 16). It is the Commission's duty to examine the Crown's role in making and fulfilling treaties with First Nations and to make recommendations to the Crown in relation to these historical actions.

The view described earlier — that treaties are no more than outdated scraps of

paper — has led many Canadians to consider that the specific obligations described in the treaty documents are trivial and can therefore be easily discharged. In this view, treaties are ancient and anachronistic documents with no relevance today. Like Prime Minister Trudeau in 1969, many Canadians still do not understand how, in a modern democratic society, treaties can continue to exist between different parts of society.

The other view — that treaties were weapons in a war fought not by combat but by deception and the systematic dishonouring of the sovereign's solemn pledges — leaves many Canadians puzzled, even appalled, by the prospect of giving renewed effect to treaties made in the distant (or even the recent) past. They react even more strongly to the prospect of making new treaties. There remains a view among Canadians that old treaty obligations might have to be fulfilled — grudgingly — but that the making of new ones is anathema to a vital and modern nation.

Canadian law and public policy have moved well ahead of these widely shared opinions about treaties. A mere twelve years after his 1969 speech, Prime Minister Trudeau agreed to a constitutional amendment that gave constitutional protection to “existing aboriginal and treaty rights”.⁷ By that time the courts had given strong indications that these rights had considerable legal significance. A year after the patriation of the constitution, Prime Minister Trudeau endorsed a further constitutional amendment that recognized the contemporary land claims process as the making of new treaties.⁸

Canadians' knowledge and understanding of treaties have not kept pace with these changes. Canadians are not taught that Canada was built on the formal treaty alliances that European explorers, military commanders and later civil authorities were able to forge with the nations they encountered on this continent. Today, with increasing awareness of Aboriginal issues, young Canadians may learn more about the treaties than their parents did, but there is still little in the way of teaching material and curriculum development to dispel this ignorance.⁹ It is especially unfortunate that the younger members of the treaty nations may be losing a sense of their own history. If, as Justice Reed said, “every schoolboy knows” that the treaties were a sham used to disguise the expropriation of land, then this is the direct result of schoolboys having been misled or at least deprived of the truth about the treaties and about the peoples that made them.

Our discussion of the historical treaties will of necessity be dominated by a discussion of First Nations. Treaties were not generally made with Métis people

or Inuit. As a result, this chapter may appear to focus on only one of the three Aboriginal peoples of Canada. Nevertheless the making of treaties in the future can and should be open to all Aboriginal nations that choose a treaty approach. Many of the future treaties may well be termed accords or compacts or simply land claims agreements. But the Commission believes that treaties, by any name, are a key to Canada's future. We will propose processes to implement and renew the historical treaties, which will involve an examination of the spirit and intent of those treaties. We will also make recommendations to revitalize treaty making for Aboriginal nations that have not yet entered into treaties with the Crown.

We will propose a rethinking of the treaties as a means to secure justice for Aboriginal nations and a reconciliation of their rights with the rights of all Canadians. The result could be a new, satisfying and enduring relationship between the Aboriginal and treaty nations and other Canadians. It is within the treaty processes we propose that our substantive recommendations on matters such as governance, lands and resources, and economic issues will ultimately be addressed.

Treaties need to become a central part of our national identity and mythology. Treaties have the following attributes:

- They were made between the Crown and nations of Aboriginal people, nations that continue to exist and are entitled to respect.
- They were entered into at sacred ceremonies and were intended to be enduring.
- They are fundamental components of the constitution of Canada, analogous to the terms of union under which provinces joined Confederation.
- The fulfilment of the spirit and intent of the treaties is a fundamental test of the honour of the Crown and of Canada.
- Their non-fulfilment casts a shadow over Canada's place of respect in the family of nations.

1.1 Treaties are Nation-to-Nation

The treaties created enduring relationships between nations. In Volume 1

(particularly chapters 3 and 5) we discussed the concept of nations of Aboriginal people. As discussed further in Chapter 3 of this volume, the original nations have evolved over time, and barriers to their exercise of nationhood have arisen, but this has not changed their relationship to the Crown.¹⁰ The parties to the treaties must be recognized as nations, not merely as “sections of society”.

In entering into treaties with Indian nations in the past, the Crown recognized the nationhood of its treaty partners. Treaty making (whether by means of a treaty, an accord or other kinds of agreements) represents an exercise of the governing and diplomatic powers of the nations involved to recognize and respect one another and to make commitments to a joint future. It does not imply that one nation is being made subject to the other.

As discussed in Volume 1, the nation-to-nation relationship became unbalanced when alliances with Aboriginal nations were no longer needed, the non-Aboriginal population became numerically dominant, and non-Aboriginal governments abandoned the cardinal principles of non-interference and respectful coexistence in favour of policies of confinement and assimilation — in short, when the relationship became a colonial one.

1.2 Treaties are Sacred and Enduring

Much was said at our public hearings about the sacred nature of the treaties and their embodiment of spiritual values. As Nancy Louis of the Samson Cree Nation said in the passage quoted earlier in this chapter, the treaty nations regard as sacred compacts the agreements that Prime Minister Trudeau described as “forms of contract”. The contrast between these perspectives could not be sharper.

Regardless of how the treaties are perceived, one thing is clear: the parties agreed that they were to be enduring. They were to last “so long as the sun rises and the river flows.”¹¹ These are solemn words. They are words with which the Crown pledged its honour. In this chapter we explore the prevalent amnesia about the treaties and why their spirit and intent need to be rediscovered and fulfilled.

Why are treaties with Indian nations different from ordinary contracts or international treaties? Some argue that they are not different. Some maintain that they are fully international in nature while others argue that they are simple

contracts. The courts of Canada have described them as neither international nor contractual but as constituting in Canadian law a unique category of agreement or, in the terminology used by the courts, *sui generis*.¹²

Regardless of the legal character of the treaties, the Commission has concluded that the treaties are unique in part because their central feature makes them irrevocable. The central feature of almost all the treaties is to provide for the orderly and peaceful sharing of a land and the establishment of relations of peace and even kinship. Once this has been acted upon, it cannot be reversed. Parties that have made such promises cannot go back to the beginning and annul the agreement, because the treaty has made them interdependent in a way that precludes starting over again as strangers.

Commercial contracts are easily made, then frequently changed or broken. Parties to contracts can resort to the courts, or they can simply change their minds about the contractual relationship. They can pay a penalty or damages, then go their separate ways.

In the realm of international law, treaties are less readily made, but they too are sometimes changed or broken. Nation-states that break off a treaty relationship may continue to have enduring links, but they do not usually find themselves in a state of continuing interdependence as a result of sharing a territory. Except in the rarest of cases, they do not make treaties that obliterate their separate identities and legal personalities or prejudice their exclusive dominion over their territories.

As discussed later in this chapter, the parties to the treaties now have a different perspective on their relationship. The treaty nations maintain that their national identities, their sovereignty and their title were recognized and affirmed by their making of treaties with the Crown. However, they did give up *exclusive* dominion over their territories by consenting to some form of sharing of their territory.

The Crown has traditionally contended that treaty nations, by the act of treaty making, implicitly or explicitly accepted the extinguishment of residual Aboriginal rights and acknowledged the sovereignty and ultimate authority of the Crown, in exchange for the specific rights and benefits recorded in the treaty documents.

Although it can be argued that some treaties, or key parts of them, are void for lack of consensus, they cannot be voided, because the parties to the treaties

are now intertwined and interdependent. For this reason, the treaties must be respected and implemented, however difficult this may prove. As a result, areas of consensus must be built upon, and areas where no consensus was reached at the time the treaty was signed must now become the subject of a process to achieve consensus.

1.3 Treaties are Part of the Canadian Constitution

The Commission is of the view that the treaties are constitutional documents, designed to embody the enduring features of the law of the country.

In extensive presentations to the Commission, treaty nation leaders said their nations were sovereign at the time of contact and continue to be so. Such positions are often perceived as a threat to Canada as we know it. The Commission has considered the various views of sovereignty expressed to us and has found no rational way to bridge the gap between those who assert and those who deny the continuing sovereignty of Aboriginal nations (see Chapter 3).

The Commission concludes that any detailed examination of sovereignty is ultimately a distraction from the issues our mandate requires us to address. Differences in deep political beliefs are best dealt with by fashioning a mutually satisfactory and peaceful coexistence rather than attempting to persuade the adherents of opposing positions that their beliefs are misguided.

Treaty making does not require the parties to surrender their deepest beliefs and rights as a precondition for practical arrangements for coexistence. In the international arena, treaties are made by nation-states reflecting the cultural and political diversity of all humanity. The treaties between the treaty nations and the Crown were based on their mutual consent and did not require either nation to surrender its identity and culture. The alternative to treaties was to take the treaty nations' territory by force, an option that was certainly used elsewhere in the Americas.¹³ The avoidance of war between Aboriginal nations and the French and British in what is now Canada was a direct consequence of the treaties and the relationships created by them.

The network of treaties between the Crown and treaty nations is described by some as confederal in nature.¹⁴ Treaty rights are now recognized and affirmed by section 35(1) of the *Constitution Act, 1982*. The Commission considers that the treaties do indeed form part of the constitution of Canada. When properly

understood, the treaties set out the terms under which the treaty nations agreed to align themselves with the Crown. Most treaty nation members who appeared before the Commission denied that their nations became mere subjects as a result of their treaties, but made it clear that a political and a spiritual relationship of enduring significance was created.

The Commission concludes that the treaties describe social contracts that have enduring significance and that as a result form part of the fundamental law of the land. In this sense they are like the terms of union whereby former British colonies entered Confederation as provinces.

1.4 Fulfilment of the Treaties is Fundamental to Canada's Honour

Canada holds a unique place among the nations of the world, considered a model of democratic ideals, pluralism, and respect for individual and group rights, which coexist in a rare and precious balance. The weak spot in Canada's international reputation, however, is that we have not honoured our obligations to Aboriginal peoples, a situation that has often been the subject of critical comment from international human rights bodies.¹⁵

Canadians also recognize that Aboriginal peoples have been treated unjustly; many have a sense of unease about this part of Canada's history. Unfortunately, many Canadians believe that it is too late to remedy these injustices. There is a genuine fear that the cost of justice might be too high.

The Commission believes, however, that a just and fair fulfilment of the treaties is fundamental to preserving Canada's honour in the eyes of the world and in the eyes of Canadians themselves.

We want to engage Canadians in a vision of treaty fulfilment that has three elements. First, we need to achieve *justice* within the separate treaty relationships by implementing those provisions of the treaties that are set out clearly in legal documents. Second, *reconciliation* must be achieved between the spirit and intent of the treaties and the rights of Canadians as a whole. Oral representations and assurances that preceded treaty signings cannot be ignored or divorced from the written text. They are part of the spirit and intent of the treaties. We believe that the purpose of the treaties was to achieve a *modus vivendi*, a working arrangement that would enable peoples who started out as strangers to live together as neighbours. The third element is to *extend*

the treaty relationship to all Aboriginal nations in Canada.

Before we can discuss justice in a meaningful way, however, we must overcome ignorance about the treaties. Attitudes arising from ignorance need to be altered through public education. We must engage in an open examination of the costs that drain the public purse and the public spirit alike, and against this we must begin to measure the gains offered by a new relationship.

A program of public education about the spirit and intent of the treaties should include the development of curriculum and teaching materials. It should also include films, plays, and novels to tell the stories of the treaties.

The three main audiences for a program of education are the Canadian public at large, the youth of the Aboriginal and treaty nations, and the public servants responsible for implementing the Crown's treaty obligations.

Recommendation

The Commission recommends that

2.2.1

Federal, provincial and territorial governments provide programs of public education about the treaties to promote public understanding of the following concepts:

- (a) Treaties were made, and continue to be made, by Aboriginal nations on a nation-to-nation basis, and those nations continue to exist and deserve respect as nations.
- (b) Historical treaties were meant by all parties to be sacred and enduring and to be spiritual as well as legal undertakings.
- (c) Treaties with Aboriginal nations are fundamental components of the constitution of Canada, analogous to the terms of union whereby provinces joined Confederation.
- (d) Fulfilment of the treaties, including the spirit and intent of the historical treaties, is a test of Canada's honour and of its place of respect in the family of

nations.

(e) Treaties embody the principles of the relationship between the Crown and the Aboriginal nations that made them or that will make them in the future.

2. Legal Context of the Treaty Relationship

The non-Indian governments began to say, “What treaties? You have no treaties.” They did not terminate the treaties. They did not restrict the treaties. They just forgot about the treaties and our claim to the land, our land. This is our land as promised by your law. Treaties are the law. They are even in Canada’s highest law, the constitution.

Chief Albert Levi
Migmag First Nation at Big Cove
Big Cove, New Brunswick, 20 May 1992

For many decades, Canadian courts struggled with the legal character of treaties with Aboriginal nations. Were they contracts? If so, they were certainly very different from ordinary commercial contracts in their subject matter, parties and open-endedness.¹⁶ Were they treaties as understood in international law? If so, how did they acquire any legal force in Canadian law in the absence of implementing legislation, as is required to give force to international treaties?¹⁷ These questions became the subject of numerous court cases, particularly in the 1980s, that helped to shape the legal context for treaties today.

In 1985, the Supreme Court of Canada concluded in *Simon v. The Queen* that treaties were neither contracts nor international instruments. In Canadian law, they were now to be regarded as agreements *sui generis*. Mr. Simon was a Mi’kmaq who defended himself against a charge of unlawful possession of a rifle and ammunition by referring to hunting rights secured by a 1752 treaty between the Crown and the Mi’kmaq. The Crown, in prosecuting the case, relied on international law on treaty termination to argue that hostilities subsequent to the treaty had terminated it. The Supreme Court of Canada, which eventually heard the case, reached this conclusion:

While it may be helpful in some instances to analogize the principles of international treaty law to Indian treaties, these principles are not determinative. An Indian treaty is unique; it is an agreement *sui generis* which is neither created nor terminated

according to the rules of international law.¹⁸

In adopting this as our starting point, we do not intend to diminish the views of those who see the nature of the treaties differently. We acknowledge the view of many members of treaty nations that the treaties are international in nature. The Supreme Court has stated that, under the laws of Canada, the principles of international law can be helpful, at least by way of analogy, in interpreting the treaties.

The international law of treaties was codified in the 1969 *Vienna Convention on the Law of Treaties*.¹⁹ As the decision in *Simon* suggests, the principles of this body of law can be used by analogy, although no court (other than the Supreme Court of Canada in *Horse*, discussed later in this chapter) appears to have resorted to international law to interpret a treaty since then. In *Simon* the international law relating to the termination of peace treaties was held not to apply. This result was to the benefit of the treaty nations, which sought to rely on the continued existence of the 1752 treaty with respect to hunting rights.

By the time of the *Simon* decision in 1985, section 35(1) of the *Constitution Act, 1982* had come into force and had given a new legal stature to existing treaty rights. Recent cases had affirmed that a generous and liberal approach to interpreting treaties is required. The classic statement is found in the following passage from the 1983 decision in *Nowegijick*:

It seems to me, however, that treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indians.²⁰

The 1990 *Sioui* decision provided the following succinct description of a treaty:

What characterizes a treaty is the intention to create obligations, the presence of mutually binding obligations and a certain measure of solemnity.²¹

The *Sioui* case involved a safe conduct document, issued in 1760, which the courts held to be a treaty between the Huron nation and the Crown. The Supreme Court made it clear that the relationship between the Huron and the Crown at that time was at least partly nation-to-nation:

At the time with which we are concerned relations with Indian

tribes fell somewhere between the kind of relations conducted between sovereign states and the relations that such states had with their own citizens.²²

In 1991, the Supreme Court observed in the *Bear Island Foundation* case that the fulfilment of treaty rights involved the fiduciary duty of the Crown.²³ The landmark decision in *Sparrow* elaborated further on the nature of the relationship between Aboriginal peoples and the Crown, although it did not involve treaties directly.²⁴ In *Sparrow*, the context was the effect of section 35(1) of the *Constitution Act, 1982* on an Aboriginal right to fish. A unanimous Supreme Court, interpreting the section for the first time, found that its words “incorporate the fiduciary relationship referred to earlier and so import some restraint on the exercise of sovereign power.”²⁵

The court quoted with approval the Ontario Court of Appeal decision in *R. v. Taylor and Williams*:

In approaching the terms of a treaty quite apart from the other considerations already noted, the honour of the Crown is always involved and no appearance of ‘sharp dealing’ should be sanctioned.²⁶

Based in part on this conclusion, the court described a general guiding principle for section 35(1) and generally for the future relationship between the Crown and Aboriginal peoples:

That is, the Government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples. The relationship between the Government and aboriginals is trust-like, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship.²⁷

In other words, the government cannot treat Aboriginal people as if they were adversaries. On the contrary, it must be mindful of the trust-like relationship with them and recognize and protect their Aboriginal rights as a trustee would protect them.

Canadian law thus provides a workable framework within which to begin to assess the status of the treaties and the special relationship they create. One

of the problems to which the treaties give rise, however, is interpretation. Canadian law contains complex evidentiary rules developed to address the interpretation of contracts between parties with equal bargaining power (and presumably sharing a common culture, language, laws and means of recording promises).

In considering the interpretation of treaties, Associate Chief Justice MacKinnon of the Ontario Court of Appeal had this to say in *Taylor and Williams*:

Cases on Indian or aboriginal rights can never be determined in a vacuum. It is of importance to consider the history and oral traditions of the tribes concerned, and the surrounding circumstances at the time of the treaty, relied on by both parties, in determining the treaty's effect. Although it is not possible to remedy all of what we now perceive as past wrongs in view of the passage of time, nevertheless it is essential and in keeping with established and accepted principles that the courts not create, by a remote, isolated current view of past events, new grievances.²⁸

The judge went on to set out a number of factors to guide the interpretation of treaties, which were subsequently approved by the Supreme Court of Canada in *Sioui*. Justice Lamer said in *Sioui*, without purporting to be definitive on the subject, that these factors were “just as useful in determining the existence of a treaty as in interpreting it”.

In particular, they assist in determining the intent of the parties to enter into a treaty. Among those factors are:

1. continuous exercise of a right in the past and at present;
2. the reasons why the Crown made a commitment;
3. the situation prevailing at the time the document was signed;
4. evidence of relations of mutual respect and esteem between the negotiators; and
5. the subsequent conduct of the parties.²⁹

Justice Lamer added that “once a valid treaty is found to exist, that treaty must

in turn be given a just, broad and liberal construction". He noted that U.S. law on treaties is just as relevant in considering treaty interpretation in Canada and that this principle "for which there is ample precedent was recently reaffirmed in *Simon*". He then adopted the 1899 U.S. Supreme Court decision in *Jones v. Meehan*:³⁰

It must always ... be borne in mind that the negotiations for the treaty are conducted, on the part of the United States, an enlightened and powerful nation, by representatives skilled in diplomacy, masters of a written language, understanding the modes and forms of creating the various technical estates known to their law, and assisted by an interpreter employed by themselves; that the treaty is drawn up by them and in their own language; that the Indians, on the other hand, are a weak and dependent people, who have no written language and are wholly unfamiliar with all forms of legal expression, and whose only knowledge of the terms in which the treaty is framed is that imparted to them by the interpreter employed by the United States; and that the treaty must therefore be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians.

Justice Lamer went on to say:

The Indian people are today much better versed in the art of negotiation with public authorities than they were when the United States Supreme Court handed down its decision in *Jones*. As the document in question was signed over a hundred years before that decision, these considerations argue all the more strongly for the courts to adopt a generous and liberal approach.³¹

The *Jones* case uses some of the pejorative language of another era, and most Aboriginal people would reject the description of their ancestors as "weak and dependent" when the treaties were negotiated.³²

Recent cases have turned the *Sioui* decision around, concluding that signatories of more recent treaties should not benefit from special rules of interpretation because of their growing sophistication in matters of negotiation. In *R. v. Howard*, involving a treaty that ceded Aboriginal title to parts of southern Ontario, the Supreme Court of Canada held as follows:

The 1923 Treaty does not raise the same concerns as treaties signed in the more distant past or in more remote territories where one can legitimately question the understanding of the Indian parties. The 1923 Treaty concerned lands in close proximity to the urbanized Ontario of the day. The Hiawatha signatories were businessmen, a civil servant and all were literate. In short, they were active participants in the economy and society of their province. The terms of the Treaty and specifically the basket clause are entirely clear and would have been understood by the seven signatories.³³

In *Eastmain Band v. Canada*, the Federal Court of Appeal took a similar approach to interpreting the 1975 James Bay and Northern Quebec Agreement. The court said that

while the interpretation of agreements entered into with the Aboriginals in circumstances such as those which prevailed in 1975 must be generous, it must also be realistic, reflect a reasonable analysis of the intention and interests of all the parties who signed it and take into account the historical and legal context out of which it developed.³⁴

The courts continue to grapple with the interpretive difficulties of the treaties. The facts of each case must govern their approach, but the evolving law on the special fiduciary relationship between the Crown and Aboriginal peoples will also continue to guide the courts. Each treaty is unique in time and circumstances. No single formula can be expected to settle the interpretation of such a diverse group of agreements.

To bring some clarity to our analysis of the jurisprudence, we refer to treaties that should benefit fully from the interpretive approach described in the *Sioui* case as historical treaties. Treaties to which these interpretive principles may not apply, such as the *Howard* and *Eastmain* cases, we refer to as modern treaties.

We do not suggest that there is a sharp dividing line between these classes of agreements. The historical context of the relationship between Aboriginal and non-Aboriginal people is relevant to all treaties, as is the general fiduciary relationship between Aboriginal peoples and the Crown described in *Sparrow*.

The treaties made before the twentieth century are clearly historical, as are the numbered treaties made in relatively remote parts of Canada early in this century (Treaties 8, 9, 10 and 11). Treaties made in 1975 and later can be characterized as modern. However, each treaty is unique, and as the courts have said, the factual context of each treaty must be considered when approaching issues of interpretation.

Indeed, if the logic of the court decisions is accepted, it might be said that the written text of an historical treaty is but one piece of evidence to be considered with others in determining its true meaning and effect. It seems illogical to recognize the two-sided nature of treaty negotiations but to conclude that the one-sided technical language recorded by the Crown is the whole treaty.

On the other hand, such an approach may be difficult to follow in light of the 1988 decision in *R. v. Horse*, in which the Supreme Court considered the admissibility of a transcript of the treaty negotiations to support an argument that the treaty was intended to guarantee the Indians a right of access to occupied private lands surrendered under the treaty. Justice Estey said:

I have some reservations about the use of this material as an aid to interpreting the terms of Treaty No. 6. In my view the terms are not ambiguous. The normal rule with respect to interpretation of contractual documents is that extrinsic evidence is not to be used in the absence of ambiguity; nor can it be invoked where the result would be to alter the terms of a document by adding to or subtracting from the written agreement.

The court went on to quote a classic statement of the parol (or oral) evidence rule:

Extrinsic evidence is generally inadmissible when it would, if accepted, have the effect of adding to, varying or contradicting the terms of a judicial record, a transaction required by law to be in writing, or a document constituting a valid and effective contract or other transaction. Most judicial statements of the rule are concerned with its application to contracts, and one of the best known is that of Lord Morris who regarded it to be indisputable that:

Parol testimony cannot be received to contradict, vary, add to or subtract from the terms of a written contract or the terms in which

the parties have deliberately agreed to record any part of their contract. [*Bank of Australasia v. Palmer*, [1897] A.C. 540, at 545]³⁵

Justice Estey noted that the parol evidence rule he relied on had its analogy in the approaches to the construction of Indian treaties. He quoted the *Nowegijick* case as well as *Jones v. Meehan*. Justice Estey nevertheless held that there was “no ambiguity which would bring in extraneous interpretive material.”³⁶

But what if the written version of the treaty was inaccurate or did not capture the understanding of the Indian parties? In *Sioui*, Justice Lamer referred to what Justice Bisson of the Quebec Court of Appeal had concluded, based on the opening words of the document in question (which was not signed by the Hurons): “the Hurons did not know how to write and the choice of words only makes it clear that the document of September 5, 1760 recorded an oral treaty.”³⁷ It is well known that the numbered treaties were ‘signed’ by chiefs who did not read or write and were asked to make their marks or to touch a pen. Without question, the chiefs saw this as a formality that was of great significance to the Crown. But can this formality make the Crown’s memorandum of the oral agreement the exclusive evidence of its content?

In an influential article (referred to in *Sparrow*), Brian Slattery encapsulated the basic problem:

The written texts of these treaties must be read with a critical eye. Usually, they were accompanied by extensive oral exchanges, which may have constituted the true agreement. The written version was translated orally to the Indian in a process that allowed ample opportunity for misunderstanding and distortion.³⁸

Looked at from a purely common-sense perspective, for the Indian parties who did not have the ability to read and write, the real treaty was very likely the oral agreement. The paper document may have been perceived as having the same importance to the Crown’s representatives as the ceremonial exchanges of wampum and the smoking of tobacco (to signify the solemnity and finality of the agreement) had to the Indian parties; but the legal document could not have been considered the agreement itself.

The *Horse* case might now be reassessed in light of the principles of *Sparrow*. In particular, courts faced with interpreting treaties in the post-*Sparrow* era

might consider what effect the *sui generis* nature of the relationship created by the treaties has on the evidentiary rules applicable to their interpretation. In *Sparrow* the court said that the relationship is trust-like and non-adversarial. Does this preclude the Crown from asserting that the written text is the whole treaty and that no oral evidence should be admitted to show otherwise?

The law of contracts does not appear to be bound as rigidly to the written word as the authorities discussed in *Horse* might suggest. In his leading text on the law of contracts, Waddams discusses the difficulty of applying the parol evidence rule to a world in which standard wording and pre-printed contracts are widely used:

If in all cases where documents were signed the signer had read and fully understood and intended to assent to the contents, the parol evidence rule would be widely applicable. In modern times, however, the growth in the use of standard form printed documents has greatly increased the number of cases where documents are signed without being understood or even read. Everyone knows this — even the judges now openly say it. *Clearly then the party seeking to rely on the document can often be held to know that it was unread. And if that party knows or has reason to know that it does not represent the intention of the signer the document should not be enforced.*

There is nothing very radical in this proposition. It springs naturally from the notion that the law of contracts exists to protect reasonable expectations.³⁹

It may appear somewhat farfetched to apply a comment about contemporary pre-printed business forms to the negotiation of treaties in the 1800s. The common issue in both situations, however, is whether the parties had reasonable expectations that a written document expressed their mutual intentions. In both cases, there can be considerable doubt, and in both cases, if it can be shown that the written document does not embody a true consensus on its terms, it should not be

treated as the exclusive record of the agreement. The hard work of ascertaining whether a true consensus was reached must then be undertaken. In some cases, as we will discuss, the parties may not in fact have reached consensus on some important points.

In the 1984 case *R. v. Bartleman*, Justice Lambert of the British Columbia Court of Appeal wrote:

There are many common law rules about the importance that is to be attached to the text of an agreement that has been reduced to writing. But where the text of the agreement was created by one party long after the agreement was made, and where the text is written in a language that only one party can understand, I do not think that any of those rules relating to textual interpretation can have any application.⁴⁰

In that case, the treaty text was produced well after the meeting and the 'signatures' of the chiefs were "crosses on the document [that] were not put there by the Indians."⁴¹

As the *Bartleman* decision suggests, it does not appear necessary to reject *all* common law rules applicable to written contracts to achieve a fair approach to interpretation, once it is recognized that most treaties, like many pre-printed contractual forms today, were contracts of adhesion. An adhesion contract is defined by *Black's Law Dictionary* as follows:

Standardized contract form offered to consumers of goods and services on essentially "take it or leave it" basis without affording consumer realistic opportunity to bargain and under such conditions that consumer cannot obtain desired product or services except by acquiescing in contract. Recognizing that these contracts are not the result of traditionally "bargained" contracts, the trend is to relieve parties from onerous conditions imposed by such contracts. However, not every such contract is unconscionable.⁴²

In other words, they are 'agreements' recorded by one party that do not necessarily reflect the real consent of the other. The law's traditional respect for the written word must give way to the reality of the situation and an honest assessment of the historical context. The cross-cultural process of treaty making makes these concerns much greater in the case of Indian treaties than in the world of contemporary commerce, where most participants are literate.

In the Commission's view, to ignore these factors is to deny the treaties their *sui generis* character in Canadian law and indeed to deny the very reasons that

they are *sui generis*. In *Horseman v. The Queen*, Justice Wilson wrote:

The interpretive principles developed in *Nowegijick* and *Simon* recognize that Indian treaties are *sui generis* These treaties were the product of negotiation between very different cultures and the language used in them probably does not reflect, and should not be expected to reflect, with total accuracy each party's understanding of their effect at the time they were entered into. This is why the courts must be especially sensitive to the broader historical context in which such treaties were negotiated. They must be prepared to look at that historical context in order to ensure that they reach a proper understanding of the meaning that particular treaties held for their signatories at the time.

Later in the judgement, this conclusion is reached:

In other words, to put it simply, Indian treaties must be given the effect the signatories obviously intended them to have at the time they were entered into even if they do not comply with today's formal requirements. Nor should they be undermined by the application of the interpretive rules we apply today to contracts entered into by parties of equal bargaining power.⁴³

The law of Canada, in summary, has strained to acknowledge the unique character of the treaties. It has recognized the uniqueness of the relationship between the parties to the treaties, and it has acknowledged the unique nature of Aboriginal title. But by nature the law is an inconsistent and politically inappropriate vehicle for resolving the deepest issues of treaty fulfilment.

Not surprisingly, the Canadian law applied to treaties is suffused with the values and assumptions of imperial treaty makers. The written text of the treaty document, for example, is given precedence over oral traditions (although there is somewhat grudging acknowledgement of the oral tradition). In *Horse*, the Supreme Court of Canada said that unless there is ambiguity in the text drafted by the Crown's draftsman, the courts cannot go outside the document for additional evidence about the true intentions of the parties. The courts have sometimes tried to avoid the rigours of this rule, but the rule remains in place, reflecting a highly literal approach to treaty interpretation.

Treaties are often up for interpretation in court cases, but usually in a narrow and ultimately frustrating context. Often the question at issue is whether an

Indian person whose First Nation is party to a treaty has a defence to a charge of hunting or fishing out of season. The variations on the facts are endless, but the pattern is common. Treaties often do provide for such a defence. However, the context does not invite a broad look at what the treaty was all about from the perspective of the First Nation party. The court is asked to decide the very narrow question of whether the accused has a treaty right to hunt or fish. The courts seldom have an opportunity to address more fundamental but controversial treaty questions such as whether the treaty nation's Aboriginal title to its traditional territories was effectively extinguished.

This is one of the central issues raised by treaties. What if the two parties had completely different concepts of the agreement each believed had been reached? What if there never was agreement at all? The normal law of contracts specifies that a valid contract requires two elements: the first is the required formality, in the form of a seal or consideration passing between the parties (consideration meaning simply the exchange of something of value). The second element is *consensus ad idem*. This means that the parties must actually have reached a meeting of the minds, that is, an agreement.

In commercial contracts, it can seldom be said that the parties did not have a meeting of minds about a sale of land, a car, shares or commodities. Usually, one party is purchasing something from the other for a price; both sides know what is being purchased and at what price.

Many of the treaties with which we are concerned were made with one of the parties (the Crown) believing that the central feature of the treaty was the purchase or extinguishment of the other party's Aboriginal title, while the very idea of selling or extinguishing their land rights was beyond the contemplation of the Aboriginal party, because of the nature of their relationship to the land. To date, *Paulette* has been the only case in which a direct discussion of this issue was even approached.

At least one court has expressed the view that if a treaty were approached from the perspective of contract law, it might be found invalid. In *R. v. Batisse*, the court said, in relation to the negotiation of Treaty 9 in 1905-1906:

As a result, approximately 90,000 square miles of resource-rich land was acquired by the Crown, free of any beneficial Indian interest, for an absurdly low consideration (even for that time). It is still not clear whether Indian treaties are to be considered basically as private contracts or as international agreements. If the former,

then the very validity of this treaty might very well be questioned on the basis of undue influence as well as other grounds.⁴⁴

Other courts have drawn a similar link between treaties and contracts. For example, in *R. v. Tennisco*, the Ontario Supreme Court observed about the formation of an Indian treaty:

In its simplest form the treaty must of necessity consist of an agreement or settlement arrived at between two or more parties with all of the elements of a valid contract. To be a treaty, the provisions of the agreement or settlement, at the very least, must be capable of enforcement during the life of the instrument at the instance of both parties.⁴⁵

If the Indian treaties were contracts, conventional legal analysis might indicate that many of them are void because of the absence of *consensus ad idem*. The law of contracts then suggests that the parties would return to their original positions, as if the contract had not been made. The problem is apparent. After 100 years of relying on a treaty that has been assumed to be about extinguishment, the parties cannot turn back the clock and begin again.

The legal characterization of the treaties as *sui generis* is a powerful conclusion with powerful implications in law. On one hand, terming the treaties *sui generis* is legally liberating. It means that special rules of law can be developed to address the unique nature of the treaties. On the other hand, though, it might be interpreted to mean that some of the basic protections of contract law do not apply if they would otherwise challenge the extinguishment of Aboriginal title.

Courts have been eager to find that Indian treaties are valid, although they are also willing to find that they have been breached. In *Simon*, the possible application of fundamental breach to the treaties was referred to by Chief Justice Dickson:

It may be that under certain circumstances a treaty could be terminated by the breach of one of its fundamental provisions. It is not necessary to decide this issue in the case at bar since the evidentiary requirements for proving such a termination have not been met.⁴⁶

Similarly, article 60 (1) of the Vienna Convention entitles a party to a treaty to

terminate it or suspend its operation in whole or part where the other party is in “material breach.”⁴⁷

When applied to the treaties, the doctrine of fundamental breach appears tailor-made for numerous situations. A recent example is the Supreme Court of Canada decision in *Bear Island*.⁴⁸ This case involved an assertion by the Teme-Augama Anishinabai (Deep Water People, in Ojibwa) that they had Aboriginal title to some 4,000 square miles of land in the Temagami area in northeastern Ontario, an area of exceptional beauty, dotted by clear-cut logging and tourist businesses in an uneasy balance. The litigation began in the early 1970s and ended with a judgement of the Supreme Court of Canada in the summer of 1991.

The *Bear Island* case is worthy of special study on many levels. It is a saga of nearly 20 years of argument before the courts. It is an object lesson to many Aboriginal leaders who want to place their people’s most important rights before a court. The judgement of the trial court, released in late 1984, found that there were no Aboriginal rights at all. It discussed the evidence of individual families and their trapping areas in great detail. There was a treaty, but the case was not framed so as to require the court to address any entitlement under the treaty.

By the time the Supreme Court released its decision, it was 1991, nearly seven years later. The court concluded that the trial judge was wrong and added that, on the basis of the facts as the trial judge found them, there had been “an aboriginal right” but that some “arrangements” made sometime after the treaty amounted to an adherence to the treaty. This extinguished the Aboriginal rights of the Teme-Augama Anishinabai. The Supreme Court remarked that there was agreement that some of the treaty rights had not been fulfilled. The fulfilment of these rights, the court indicated, involved the fiduciary obligations of the Crown.

The Ontario Court of Appeal had even gone so far as to conclude that the Robinson-Huron Treaty had the effect of unilaterally extinguishing the Aboriginal title of the Teme-Augama Anishinabai because the Crown had formed the intention to extinguish that title, and the ratification of what was in form an agreement was equally capable of being a unilateral act of extinguishment by the sovereign.⁴⁹

If the facts of the treaty adherence found to have occurred were looked at from the perspective of ordinary contract law, another legal doctrine would certainly

have raised its head — that of fundamental breach. The Teme-Augama Anishinabai were said to have exchanged their Aboriginal rights for two main rights: the right to annuities and the right to a reserve of reasonable size. A major component of the treaty — and probably the most fundamental one — remained unfulfilled. A small reserve was created in the late 1940s, 60 years after the adhesion. The balance of the land entitlement remains unfulfilled, however, more than 100 years after the adhesion.

Bear Island suggests that the validity of a treaty purporting to extinguish Aboriginal rights will seldom be questioned. It may be that the treaty rights of the First Nation have not been recognized or implemented, but this cannot call into question the cession of land. In the eyes of the law, the Crown can be compelled to live up to commitments under the treaties, but the extinguishment has validity no matter how poorly the Crown subsequently fulfilled its obligations.

The Commission believes that cases such as *Bear Island* place an inappropriate burden on the courts. It is beyond the normal duty of the courts to rule on the validity of instruments that have been relied upon for generations, even centuries. It is natural for a court to leave such instruments intact, rather than set them aside, and simply provide for compensation if the Crown has breached its duty. The Supreme Court has never been asked to rule on the validity of a treaty when there is compelling evidence that the written text deviated from the treaty nation's understanding.

Indian treaties now have the following attributes in Canadian law:

- They are agreements sui generis, neither mere contracts nor treaties in international law.
- They were entered into by one party — the Crown — that owed a fiduciary duty to the other party — the treaty nation.
- The honour of the Crown is always involved in treaties' formation and fulfilment.
- Historical treaties are to be given a large and liberal interpretation in light of the understanding of the Aboriginal party at the time of entering into the treaty.
- While modern treaties may not benefit from the same rules of interpretation as

apply to the historical treaties, the courts have not yet explored the impact of the Sparrow decision on their interpretation, particularly their sui generis nature and the Crown's fiduciary duty.

The Commission believes that the unique nature of the historical treaties requires special rules to give effect to the treaty nations' understanding of the treaties. Such an approach to the content of the treaties would require, as a first step, the rejection of the idea that the written text is the exclusive record of the treaty.

The basic question we posed earlier still lingers: what if there was no agreement at all? One party thought it was purchasing land; the other thought it was agreeing to share its territory. This goes beyond the limits of legal analysis and into the grey area of contact between two alien societies entering treaty, signifying something very important to both of them, but perhaps something very different to each of them. Questions of Aboriginal and treaty rights are different in many ways from the issues courts normally decide, and one might wonder whether they are inherently unsuitable for disposition by the courts ('non-justiciable').

The Supreme Court of Canada has consistently reaffirmed, however, in every important decision on Aboriginal or treaty rights since at least 1973, that these are in fact justiciable issues. In *Calder*, *Guerin*, *Simon*, *Sioui* and other cases, arguments have been made that the issues before the court could not or should not be addressed by judges. Until the 1984 *Guerin* case, the Crown's fiduciary responsibilities were described as a non-justiciable "political trust". Aboriginal and treaty rights were described as having been "superseded by law". Until *Sparrow*, the regulation of Aboriginal rights to fish was said to have extinguished those rights.

The Supreme Court of Canada, for the most part consistently, has made it clear that Aboriginal and treaty rights are part of the legal regime that defines the rule of law in Canada. These court decisions have come slowly, erratically, and at great cost to Aboriginal people. They are also built on a jurisprudential foundation that did not have the benefit of the Aboriginal perspective on key issues.⁵⁰ Whatever the shortcomings of the legal system that considered these rights, they are clearly not historical anomalies; nor are they mere constructs of policy. They are part of the bedrock of our law, and they paved the way for our pluralistic society.

They have also contributed, however, to an increase in tensions between the

treaty parties. Court proceedings simply do not foster reconciliation. They create winners and losers. Those who lose an argument in court do not always accept it, particularly if they regard the process or the result as illegitimate. This applies equally to treaty nations people and to segments of the non-Aboriginal population. For this reason, we see a need for treaty nations, the institutions of the Crown and the Canadian public to engage in a process of mutual understanding and respect that is not driven by successes or failures in court.

When the courts arrive at the limits of legal analysis and the law as legitimate tools for determining rights, they will be compelled to recommend a negotiated political settlement based on such rights as they have found to exist. Courts can describe rights. They cannot make a relationship based on those rights work. At some point we may have to stop looking to the courts for assistance. An eloquent plea to this effect is found in the judgement of Justice Lambert of the British Columbia Court of Appeal in the *Delgamuukw* case:

So, in the end, the legal rights of the Indian people will have to be accommodated within our total society by political compromises and accommodations based in the first instance on negotiation and agreement and ultimately in accordance with the sovereign will of the community as a whole. The legal rights of the Gitksan and Wet'suwet'en peoples, to which this lawsuit is confined, and which allow no room for any approach other than the application of the law itself, and the legal rights of all Aboriginal peoples throughout British Columbia, form only one factor in the ultimate determination of what kind of community we are going to have in British Columbia and throughout Canada in the years ahead. In my view, the failure to recognize the true legal scope of Aboriginal rights at common law, and under the Constitution, will only perpetuate the problems connected with finding the honourable place for the Indian peoples within the British Columbian and Canadian communities to which their legal rights and their ancient cultures entitle them.⁵¹

3. Historical Treaties: The Need for Justice and Reconciliation

Our people have always understood that we must be able to continue to live our lives in accordance with our culture and spirituality. Our elders have taught us that this spirit and intent of

our treaty relationship must last as long as the rivers flow and the sun shines. We must wait however long it takes for non-Aboriginal people to understand and respect our way of life. This will be the respect that the treaty relationship between us calls for.

Josephine Sandy
Ojibwa Tribal Family Services
Kenora, Ontario, 28 October 1992

By virtue of section 35 of the *Constitution Act, 1982*, existing treaty rights are protected by the constitution. Thus, the treaties are now in a sense part of the constitution, including the unique relationships they create among nations or peoples. Despite section 35, however, the institutions of government have been slow to reflect the treaties in their laws, policies and practices. All too often, treaty rights are disputed in the courts.

As we have seen, the law of Canada has developed certain rules that pay respect to the unique nature of the treaties. But treaties are also circumscribed by the nature of the law the courts are called upon to apply. The courts have brought to bear a legalistic focus on the written text of treaties. The Commission has concluded that further court decisions may well deepen the gulf between the treaty parties, regardless of who wins and who loses future court battles.

Even when a treaty right prevails in court, there is reluctance to implement that right. Frequently, treaty rights come to courts in connection with criminal prosecutions. There is no readily available mechanism to implement in positive terms a right that has been given judicial recognition as a defence to a charge of unlawful hunting or fishing. Similarly, disputes about reserve land or other important treaty rights are often delayed and frustrated by inappropriate processes for fulfilment, thus perpetuating injustice (see Chapter 4 in Part Two of this volume).

3.1 The Need for Justice

The Commission sees the first objective in fulfilling the treaties as the achievement of justice. Treaty rights already identified by the courts should be given force and effect. Our recommendations to achieve justice in this narrow but important sense are set out at the end of this chapter and in other chapters in this volume (see in particular Chapter 4).

Treaty promises were part of the foundation of Canada, and keeping those promises is a challenge to the honour and legitimacy of Canada. The fulfilment of treaty rights already recognized by the courts will bring important benefits to treaty nations people. In particular, the full implementation of hunting, fishing and trapping rights can assist in the revitalization of traditional economies. The fulfilment of treaty land entitlements and the resolution of land claims will provide important resources for creating new economic opportunities.

The implementation of legally recognized rights under the treaties will also demonstrate that the Crown's honour is reflected in the Crown's actions. Until the rights already recognized in Canadian law as being in the treaties are respected, treaty nations cannot be expected to embark on further discussions aimed at deeper reconciliation with other Canadians. It is not enough for governments to say, "Trust us."

The first stage of treaty implementation therefore is to find ways to give effect to treaty rights already acknowledged by the Canadian legal system. Our specific recommendations for short-term implementation are set out later in this chapter and in Chapter 4.

3.2 The Need for Reconciliation

By reconciliation we mean more than just giving effect to a treaty hunting right or securing the restoration of reserve land taken unfairly or illegally in the past. We mean embracing the spirit and intent of the treaty relationship itself, a relationship of mutual trust and loyalty, as the framework for a vibrant and respectful new relationship between peoples.

New attitudes must be fostered to bring about this new relationship. A consensus will have to evolve that the treaty relationship continues to be of mutual benefit. New institutions must be created to bring this relationship into being. At present, the relationship between the treaty parties is mired in ignorance, mistrust and prejudice. Indeed, this has been the case for generations.

We embark on this discussion with a full appreciation that Canada is in a fiscal crisis. In our view, however, the cost of the present unreconciled relationship far outweighs the cost of achieving the proper balance in the relationship, particularly when human costs are included. We examined the cost of the present regime and its consequences in terms of poverty, despair and

premature death (see Volume 5, Chapter 2). A new relationship built on honouring the treaties will lead to self-reliance, empowerment and the restoration of resources to the treaty nations. It will lead away from the crippling dependence on government that has been engendered in treaty nations communities.

The Commission has identified major issues requiring analysis, reconciliation and redress. They stem from profound differences in the beliefs of the Crown and the treaty nations with respect to the nature and content of the treaties. Before exploring these differences, it is important to lay a foundation for reconciliation by setting out the areas where consensus has been achieved by the treaties.

3.3 Common Ground in the Treaties

The courts have sometimes mistakenly regarded the written text as an accurate and complete record of the treaty agreement. There are dangers in going to the other extreme and concluding that the treaties are so completely devoid of consensus that the written records should be discarded. This view would result in a complete rejection of the treaties as representing any kind of agreement whatsoever.

In fact, there is considerable common ground between the Crown and treaty nations concerning the treaties. Both parties perceived the treaties as providing for a shared future. The treaties were to define relationships between governments. They guaranteed a sharing of the economic bounty of the land. They guaranteed peace and prevented war. They involved a mutual respect that was to be enduring. There is common ground in the understanding that once the treaty was made, it would define and shape the future relationship between the parties in a definitive way.

There is common ground in the fact that each party brought to the treaty ceremony its most sacred and enduring symbols. The Crown formalized the treaties using its most formal instrument: a written document under seal. Clergy were often asked to attend treaty councils to provide advice and spiritual guidance to the parties. Representatives of the Crown pledged the word of the sovereign. In the Anglo-Canadian legal tradition, making the treaty agreement under seal gave it force in law, as expressed by Lord Denning of the English Court of Appeal in 1982:

They [the Indian peoples] will be able to say that their rights and freedoms have been guaranteed to them by the Crown, originally by the Crown in respect of the United Kingdom, now by the Crown in respect of Canada, but, in any case, by the Crown. No parliament should do anything to lessen the worth of these guarantees. They should be honoured by the Crown in respect of Canada 'so long as the sun rises and river flows'. That promise must never be broken.⁵²

Similarly, the treaty nations drew upon solemn practices from their own laws and traditions: the pipestem, wampum, tobacco and oratory. For the Indian nations of the plains, the sacred pipe sealed the agreements:

The concept of treaty, *inaistisinni*, is not new to the Blood Tribe. Inaistisinni is an ancient principle of law invoked many times by the Bloods to settle conflict, make peace, establish alliances or trade relations with other nations such as the Crow, the Gros Ventre, the Sioux and, more recently, the Americans in 1855 and the British in 1877. Inaistisinni is a key aspect of immemorial law, which served to forge relationships with other nations. Inaistisinni is a sacred covenant, a solemn agreement, that is truly the highest form of agreement, binding for the lifetime of the parties. So solemn is a treaty that it centres around one of our most sacred ceremonies and symbols, the Pipe.

Les Healy
Lethbridge, Alberta
25 May 1993

In each case, treaty making was solemnized with the formality appropriate to commitments intended to endure as long as the sun rises and the rivers flow.

3.4 Lack of Common Ground

In Volume 1, we showed that the Indian nations and the Crown had divergent views about the fundamental assumptions on which the treaties were based. The Crown's objective was to achieve the extinguishment of Aboriginal title and the subjection of treaty nations to the Crown's authority. The British Crown, like all European powers that came to the Americas, adhered to the doctrine of discovery. Chief Justice Marshall of the U.S. Supreme Court described this doctrine in a 1823 decision, *Johnson v. M'Intosh*:

This principle was that discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession.

The exclusion of all other Europeans necessarily gave to the nation making the discovery the sole right of acquiring the soil from the natives, and establishing settlements upon it. It was a right with which no Europeans could interfere. It was a right which all asserted for themselves, and to the assertion of which, by others, all assentedWhile the different nations of Europe respected the right of the natives, as occupants, they asserted the ultimate dominion to be in themselves; and claimed and exercised, as a consequence of this ultimate dominion, a power to grant the soil, while yet in possession of the natives. These grants have been understood by all to convey a title to the grantees, subject only to the Indian right of occupancy.⁵³

This principle explains the British Crown's purposes in treaty negotiations, at least after the *Royal Proclamation of 1763*. The Crown thought it had dominion over Indian lands, even in the absence of a treaty. Indian title was seen as a possessory right, a cloud upon the Crown's title that could be purchased to perfect that title. Acquisition of that title was a one-time purchase.

The treaty nations regarded the treaties, in terms of their spirit and intent, as a set of solemn, oral and mutual promises to coexist in peace and for mutual benefit. The treaty was to be renewed regularly, to be kept fresh and living. In this view, the piece of paper produced by the Crown was no more the treaty than was the pipestem, the wampum or the tobacco that symbolized the solemnity of the promises.

Each treaty is a unique compact, but there is remarkable consistency in the principles of the treaties as expressed by the treaty nations themselves. They maintain with virtual unanimity that they did not give up either their relationship to the land (or as Europeans called it, their title) or their sovereignty as nations by entering into treaties with the Crown. Indeed, they regard the act of treaty making as an affirmation of those fundamental rights.

Indian treaty nations naturally approached the treaties they made with Europeans on the same basis as the treaties they made with each other. As we

saw in Volume 1, indigenous treaty practice was to reinforce the autonomy of nations and to establish relations of kinship among them. To the treaty nations, the making of a treaty affirmed their nationhood and their rights to territory. They created sacred relations of kinship and trust.

3.5 The Vulnerability of Treaties

The treaties have been affirmed by both parties, and nullification is not an option for either party.⁵⁴ The treaty nations affirm, virtually without exception, that they have valid treaties with the Crown and do not seek to void them. This is key to understanding the position they asserted to this Commission and elsewhere. They take issue not with the existence or essential validity of the treaties but with the Crown's interpretation of the content of the treaties.

In Canadian law, as we have seen, the conduct of the parties after the treaty is relevant to the continuing validity of a treaty.⁵⁵ International law, by analogy, provides for limited circumstances under which a party may suspend specific treaty terms when a dispute arises, as opposed to withdrawing from or nullifying the treaty as a whole.⁵⁶

The Commission believes that if the treaty nations were to choose to use all legal means at their disposal to challenge the orthodox legal interpretation of the written text of their treaties, some key provisions of the treaties might well be vulnerable in light of legal doctrines such as duress, *non est factum*, fundamental breach, and breach of the Crown's fiduciary duty.⁵⁷ Such proceedings might result in grave legal and financial uncertainty across Canada as long-held rights were called into question.

It is also quite possible that this would not occur. If faced with the argument that the treaties did not, for example, extinguish Aboriginal title, at least some courts might narrow and confine the results of some of the cases of the past 30 years, which have generally been favourable to Aboriginal peoples' interpretation. In this situation, Aboriginal people might become frustrated by the lack of respect for their aspirations, and renewed violence could occur, both within and outside treaty nation communities.

We must emphasize that challenging the legal texts of the historical treaties does not reflect the position of the treaty nations. They have waited steadfastly for implementation of their treaty rights as they understand them. It is the Crown that has marginalized the treaties to the point where questioning their

validity — clearly as a last resort — might become an option.

The present tension between the competing visions of what the treaties were intended to accomplish compels the parties to make a choice between two starkly opposed options:

- renegotiating the historical treaties from scratch, or
- identifying and implementing the spirit and intent of these treaties.

3.6 Implementing the Spirit and Intent of Treaties

The Commission uses the term ‘spirit and intent’ to mean the intentions the treaty parties voiced during treaty negotiations as the underlying rationale for entering into a treaty and its expected outcome: sharing, coexistence and mutual benefit. The term transcends the purely legal nature of treaties and includes their constitutional and spiritual components. It requires the treaties be approached in a liberal and flexible way.

The Commission believes that the spirit and intent of the historical treaties need to be re-discovered and restored as the basis for treaty implementation. We have concluded that the cross-cultural context of treaty making probably resulted in a lack of consent on many vital points in the historical treaties. As the courts have indicated, modern treaties do not give rise to the same difficulties of understanding, but they do pose interpretive problems of their own, as well as, in many cases, stopping short of the comprehensive measures needed to restructure the relationship. We believe that honouring the spirit and intent of the historical treaties requires two distinct approaches:

- a broad and liberal interpretation of the treaty promises and agreements as understood by *both* treaty parties, using all available information regarding the treaty negotiations, including secondary and oral evidence, without giving undue weight to the treaty text; and
- a negotiated compromise on issues on which a thorough examination of the evidence leads to the conclusion that the treaty parties themselves failed to reach consensus.

The key to implementing the spirit and intent of the treaties is the open acknowledgement that the treaty parties may have failed to reach agreement

on issues such as Aboriginal title because of the difficulty of translating the central concepts. In this light, it would be unconscionable for the Crown to insist on extinguishment of rights through the treaties because of factors that vitiated the free and informed consent of treaty nations.⁵⁸

It is the Commission's view that Canada should indicate its willingness to assume and implement the obligations of the Crown as these become apparent in light of the spirit and intent of the treaties. This will, of necessity, involve a commitment to decolonize treaty nations.

3.7 The Fiduciary Relationship: Restoring the Treaty Partnership

Elsewhere in our report we address the nature of the fiduciary relationship between the Crown and Aboriginal peoples (see Volume 1, chapters 5 and 7; Volume 2, chapters 3 and 4). The nation-to-nation relationship embodied in the practice of treaty making implies a set of *mutual* fiduciary obligations between the nations that were parties to treaties. This relationship arises from the mutual agreement of the treaty parties to share a territory and its benefits and thereby to establish a continuing and irrevocable relationship of coexistence. This can best be understood as a partnership, an idea we had in mind in choosing a title for our special report, *Partners in Confederation*.

Fiduciary principles provide guidance in cases where a relationship has become unbalanced and one party, for one reason or another, becomes vulnerable to the power of the other. Regardless of the partnership relationship that the treaties created or should have created, treaty nations have been deprived of many basic civil and economic rights and as a result have been placed in a state of vulnerability to federal and provincial government power.

The relationship between Aboriginal peoples and the Crown reflects the classic fiduciary paradigm of one party's vulnerability to another's power and discretion. The law imposes clear duties on the 'dominant' party within such a relationship.

In the Commission's view, the Crown is under a fiduciary obligation to implement such measures as are required to reverse this colonial imbalance and help restore its relationship with treaty nations to a true partnership. This will require the Crown to take positive steps toward this end as well as to refrain from taking actions that will frustrate it.

The New Zealand courts have discussed this notion of partnership in connection with the Treaty of Waitangi of 1840. In the 1987 case, *New Zealand Maori Council v. A.-G.*, President Cooke of New Zealand's highest court wrote:

The Treaty [of Waitangi] signified a partnership between races, and it is in this concept that the answer to the present case has to be foundIn this context the issue becomes what steps should be taken by the Crown, as a partner acting towards the Maori partner *with the utmost good faith which is the characteristic obligation of partnership*, to ensure that the powers in the State-Owned Enterprises Act are not used inconsistently with the principles of the Treaty.

It should be added ... that the duty to act reasonably and in the utmost good faith is not one-sided. For their part the Maori people have undertaken a duty of loyalty to the Queen, full acceptance of her Government through her responsible Ministers, and reasonable co-operation.⁵⁹

Justice Richardson put it this way:

In the domestic constitutional field which is where the Treaty resides under the Treaty of Waitangi Act and the State-Owned Enterprises Act, there is every reason for attributing to both partners that obligation to deal with each other and with their treaty obligations in good faith. That must follow both from the nature of the compact and its continuing application in the life of New Zealand and from its provisions.⁶⁰

Justice Casey wrote that there was a concept of 'ongoing partnership' in the treaty:

Implicit in that relationship is the expectation of good faith by each side in their dealings with the other, and in the way that the Crown exercises the rights of government ceded to it. To say this is to do no more than assert the maintenance of the "honour of the Crown" underlying all its treaty relationships.⁶¹

The key principles in such a treaty partnership are those we identified in Volume 1 as the keys to a renewed relationship: mutual recognition, mutual

respect, sharing and mutual responsibility.

The treaty partnership must be a goal for the future, since the past has been characterized by a lack of good faith on the part of the Crown, the sometimes arbitrary exercise of power contrary to the interests of Aboriginal peoples, and the imposition of policies of marginalization.

As the relationship between Canada and Aboriginal and treaty nations is gradually restored to one of partnership rather than domination, through the revitalization of existing treaties and the making of new ones, the duty of care may well become more equal and reciprocal in practical terms. As Aboriginal and treaty nations regain their dignity and rights, they will enjoy greater opportunities to interact with Canadian society as a whole and will be honour-bound, by treaty, to act with the same degree of good faith that they quite properly demand of Canada today.

The renewed treaty partnership also disposes of any notion that treaty nations can enjoy rights without corresponding obligations. Indeed, the numbered treaties expressly required treaty nations to keep the peace and enforce the laws. This is one of the bases of a right to establish treaty nation justice systems.⁶² Treaties were clearly intended to include mutuality of rights and obligations.

The condition of dependence and underdevelopment among treaty nations is the legacy of disregard for the real nature of the treaty relationship. A fiduciary obligation exists on the part of all Crown institutions to reverse this condition and to foster self-reliance and self-sufficiency among the treaty nations.

3.8 Aboriginal Rights and Title: Sharing, Not Extinguishment

As we wrote in *Treaty Making in the Spirit of Co-existence*, nothing is more important to treaty nations than their connection with their traditional lands and territories; nothing is more fundamental to their cultures, their identities and their economies.⁶³ We were told by many witnesses at our hearings that extinguishment is literally inconceivable in treaty nations cultures. For example, Chief François Paulette testified:

In my language, there is no word for 'surrender'. There is no word for 'surrender'. I cannot describe 'surrender' to you in my

language. So how do you expect my people to put their X on 'surrender'?

Chief François Paulette
Yellowknife, Northwest Territories
9 December 1992

The treaty nations maintain with virtual unanimity that they did not agree to extinguish their rights to their traditional lands and territories but agreed instead to share them in some equitable fashion with the newcomers. The presentation of Chief George Fern of Fond du Lac First Nation community is representative:

We believe the principle of sharing of our homeland and its natural resources is the basis of the treaty arrangements, not surrender or extinguishment. Accordingly, the concepts of resource co-management and revenue sharing from the Crown lands and resources are the proper forms of treaty implementation. Such arrangements would provide a significant economic basis for self-government, and would provide First Nations with the ability to protect and benefit from Mother Earth.

Chief George Fern
Prince Albert Tribal Council
La Ronge, Saskatchewan, 28 May 1992

The written text of many treaties provides for the extinguishment of traditional Aboriginal land rights, in exchange for specified contractual rights, pursuant to the Crown's policy of using the treaty process to extinguish Aboriginal title. The Treaty 7 First Nations recently conducted a treaty review process with respect to their treaty and came to this conclusion:

In 1877, the Blackfoot Confederacy, Tsuu T'ina, and the Stoneys entered into an agreement to share the land with the European settlers, resources were never surrendered, the land was never surrendered. These nations were to be taken care of and provided for in perpetuity by the government.

It is now more apparent than ever that there were two understandings at the conclusion of the Treaty at Blackfoot Crossing in 1877. One is the obvious belief by the government that the essence of the Treaty was a land surrender. It must be

stressed that according to the Indian Agent Reports, that by the time Treaty 7 was made, treaty making was only a formal exercise to extinguish Indian title to land.

What we believed to be the agreement reached by the Treaty 7 First Nations was an agreement to share the land to the depth of a plow in return for certain concessions.⁶⁴

Insistence by Crown agencies that Aboriginal title was largely extinguished by the treaties has the potential to be highly destructive to the process of reconciliation. The text of the post-1850 treaties clearly provides for the extinguishment of Aboriginal title. But the people of the treaty nations reject that outcome. It is unlikely that any court decision could ever change their minds on this central issue. For this reason, the Commission proposes that the question of lands and resources be addressed on the basis that the continuing relationship between the parties requires both to accept a reasonable sharing of lands and resources as implicit in the treaty (see Chapter 4). For a range of reasons developed more fully in the next two chapters, we believe that any interpretation of the spirit and intent of the historical treaties that is to endure as the basis of a new relationship must be, and must be seen to be, fair to the First Nations parties in terms of their ownership of, use of and access to their traditional lands and resources.

The implications of a lack of consensus on the issue of title to land are enormous. There is a deep dispute between the treaty parties with respect to the extent of historical treaty agreements, particularly in regard to treaties whose written texts contain extinguishment provisions.

In *Treaty Making in the Spirit of Co-existence*, we wrote of the extinguishment clauses of past treaties:

In light of divergent understandings of extinguishment clauses and the jurisprudence on treaty interpretation ... it cannot always be said with certainty that the written terms of an extinguishment clause will determine the clause's legal effect.⁶⁵

We went on to say:

Extinguishment policy during the era of the numbered treaties was designed to clear Aboriginal title for the sake of non-Aboriginal

settlement and Aboriginal assimilation. In combination, these purposes do not merely ignore the interests served by Aboriginal title, they negate them. They amount to a justification of extinguishment for extinguishment's sake. These objectives, in our view, do not merit serious consideration in a constitutional regime committed to fundamental principles of equality and respect for Aboriginal difference.⁶⁶

Thus, notwithstanding clear words calling for extinguishment in many historical treaties, it is highly probable that no consent was ever given by Aboriginal parties to that result. Aboriginal people, who believe that the Creator set them on their traditional territories and gave them the responsibility of stewardship of the land and of everything on it, are not likely to have surrendered that land knowingly and willingly to strangers. By the same token it would be entirely consistent with their world view and ethical norms for them to share the land with newcomers.

The legal character of Aboriginal title (see Chapter 4), the source and nature of the Crown's fiduciary duties to Aboriginal peoples (see Volume 1, Chapters 5 and 7 and Chapters 3 and 4 in this volume), and the fundamental contractual nature of the treaties raise a serious question about whether the treaties that purport to extinguish Aboriginal title over large tracts of land actually achieved this end.⁶⁷ The treaties did, however, include an agreement to share territory between treaty nations and the newcomers as represented by the Crown.

Thus, it is possible that Aboriginal title continues to coexist with the Crown's rights throughout the areas covered by treaties, despite the Crown's intention to include a cession of Aboriginal title. It is also possible, however, that the courts could continue to give effect to the written text of a treaty, however illegitimate this may be from the treaty nation's perspective.

The treaty relationship requires that the parties meet in a spirit of partnership to complete their incomplete agreement. Since neither party has expressed a wish to nullify the treaties, we must consider how the parties should deal with the issues arising from lack of consensus.

During the negotiations required to complete the treaties, it stands to reason that the Crown should not assert that the Aboriginal title of the treaty nations has been extinguished unless there was clear consent. On the other hand, the treaty nations, having undertaken an obligation of sharing in good faith, must not take any steps that contradict the spirit and intent of a partnership

predicated on those principles. Both parties are therefore under constraints, stemming from their treaty obligations, in negotiating the completion of the treaties.

It should be implicit in these negotiations that the principle of sharing, which was central to the treaty nations' purposes in making their treaties, entitles them to an adequate land base to satisfy their contemporary cultural and economic requirements and to support their governments.

3.9 Sovereignty and Governance

Sovereignty, like extinguishment, is a concept that does not have a ready analogue in Aboriginal languages and world views (see Chapter 3). Treaty nations uniformly consider that in formalizing treaty relations with the Crown, they were acting as nations. When the treaties accorded mutual recognition and described specific and mutual rights and obligations, the treaty nations were not intending to cede their sovereignty, but to exercise it.

In the 1832 case *Worcester v. State of Georgia*, Chief Justice John Marshall of the United States Supreme Court wrote:

The words “treaty” and “nation” are words of our own language, selected in our diplomatic and legislative proceedings, by ourselves, having each a definite and well understood meaning. We have applied them to Indians, as we have applied them to the other nations of the earth. They are applied to all in the same sense.

... These articles [of treaties between Indian nations and both Great Britain and the United States] are associated with others, recognizing their title to self-government. The very fact of repeated treaties with them recognizes it; and the settled doctrine of the law of nations is that a weaker power does not surrender its independence — its right to self-government, by associating with a stronger and taking its protection.⁶⁸

In his concurring opinion in the same case, Justice McLean asked:

What is a treaty? The answer is, it is a compact formed between two nations or communities, having the right of self-government.

Is it essential that each party shall possess the same attributes of sovereignty to give force to the treaty? This will not be pretended; for, on this ground, very few valid treaties could be formed. The only requisite is, that each of the contracting parties shall possess the right of self-government, and the power to perform the stipulations of the treaty.⁶⁹

We do not quote these words in support of any theory that the Crown and the treaty nations had or have the same or different attributes of sovereignty but to confirm the essential link between the right and power of a people to govern themselves and the act of treaty making.

The Commission believes that the spirit and intent of the treaties requires the Crown to respect the inherent right of the treaty nations to govern their own affairs and territories. Implicit in this principle, of course, is the right of treaty nations to enter into intergovernmental relations with the Crown, to acquire the benefits of such agreements, and to incur their burdens voluntarily.

In this connection, there will have to be an examination of how these rights are to be exercised. The Aboriginal people who can assert and exercise such a right are members of the nations that entered into treaties with the Crown. In entering into nation-to-nation treaties with them, the Crown has already acknowledged their self-governing nation status. Other Aboriginal nations have not yet entered into treaties with the Crown. As we discuss in Chapter 3, they have a right to negotiate and enter into treaties that will set out their powers of governance.

3.10 Observations Regarding Fulfilment of the Historical Treaties

The historical treaties (including the written and oral versions) cover a wide range of topics. The Commission does not intend to catalogue the particular rights and obligations in these treaties, but we want to caution against ignoring the unwritten assumptions about the treaties that have contributed to so much misunderstanding.

We make the following observations regarding the historical treaties:

- Specific rights of the treaty nations under the treaties have not been

recognized or implemented in many, and possibly most, cases.

- The implicit treaty right of governance has not been recognized.
- In many, if not most cases, implementation of treaties has resulted in an imbalance in the benefits and the burdens of the treaty relationship in favour of the Crown and against the interests of the treaty nations.
- Canadian law has tended to give force to the treaty texts that purport to extinguish the rights and title of treaty nations, while not giving effect to aspects of the treaties that require the Crown to fulfil its fiduciary duties to implement the treaties fully and fairly.

If the validity of the historical treaties — or certain key components of them, including the extinguishment clauses — were placed before the courts, key aspects of many portions of the written texts might be set aside on the following bases:

- In some cases, treaty nations may not have given informed consent to the extinguishment of their rights and title.⁷⁰
- In some cases, important components of the treaties may not have been included in the written text drafted by the Crown.⁷¹
- In some cases the letter of the treaty text may have been fulfilled, but the spirit and intent, which require a broader interpretation of the text, may have been breached.⁷²
- In some cases, the failure of the Crown to provide some treaty entitlements may constitute fundamental breach.⁷³
- In some cases, treaties might be found unconscionable, or agreement might be found to have been induced by fraud, undue influence or duress.⁷⁴
- In some cases, implementation of the treaties might be found to fall short of the standards required of a fiduciary.

Finally, the written texts of the historical treaties do not set out treaty nations' inherent right of self-government in explicit terms. This has led to doubt on the part of non-Aboriginal governments and courts about whether governance is a

treaty right.

These observations lead us to conclude that, if no alternative to the courts can be found, historical treaties in many, if not most, parts of Canada may well be the subject of renewed court challenges.

A better process must be found.

Recommendation

The Commission recommends that

2.2.2

The parties implement the historical treaties from the perspective of both justice and reconciliation:

(a) Justice requires the fulfilment of the agreed terms of the treaties, as recorded in the treaty text and supplemented by oral evidence.

(b) Reconciliation requires the establishment of proper principles to govern the continuing treaty relationship and to complete treaties that are incomplete because of the absence of consensus.

4. Treaty Implementation and Renewal Processes

The approach we prefer at the present time is to proceed on the basis of the treaty relationship. We hope that with the new government we can enter into some kind of a national process, a bilateral process, so that we can begin to look at how we are in fact going to implement not only the treaties but the inherent right to self-government as well.

National Chief Ovide Mercredi
Assembly of First Nations
Ottawa, Ontario, 5 November 1993

The sources of the under-development, poverty, disease and dependence within our First Nations can be found in the disregard and violation of our treaties and of Canada's own constitution. Likewise, the seeds of the solutions to the fundamental problems and contradictions can be found in the honouring

and faithful implementation of these sacred treaty rights and obligations.

Vice-Chief John McDonald
Prince Albert Tribal Council and Denesuliné First Nations
La Ronge, Saskatchewan, 28 May 1992

If the Royal Commission is truly interested in furthering resolution of the injustices committed against our nations in the name of the Crown, then you must join us in calling upon the Crown in right of Canada to return to the relationship between our peoples as intended by the treaty and enter into a comprehensive bilateral process of treaty review with each First Nation on a nation-to-nation basis. Only this type of bilateral nation-to-nation dialogue will be capable of resolving our differences and restoring the honour of the Crown.

Chief Johnson Sewepegaham
Little Red River Cree Nation/The Tall Cree First Nation
High Level, Alberta, 29 October 1992

During our hearings, leaders and members of treaty nations without exception called for the establishment of a treaty implementation and renewal process. The Commission agrees. This is not the creation of a new process but the renewal of a very old one.

In the opinion of Commissioners, a treaty implementation and renewal process is the appropriate way to address issues of relevance to the treaty relationship. If the process is renewed in a fashion that properly respects the treaties and the beliefs and diversity of the treaty nations, it will usher in a new era in the life of Aboriginal peoples and Canadians.

This section focuses on the historical treaties. These agreements were made before the general availability of legal representation to Aboriginal people. The modern treaties are lengthy, detailed and the product of extensive negotiation. They may not, however, address all the dimensions of an agreement that meets the standards of fairness and completeness we are seeking to establish through this report. We address the special challenges of the modern treaties later in this chapter.

Presenters testified variously to the need for a “bilateral treaty process”, a “treaty implementation process”, “treaty renovation”, “treaty review” or simply a “treaty process.” Their terminology varied, but all agreed that the existing treaties need to be revisited and revitalized.

Many emphasized the bilateral nature of the proposed treaty process.⁷⁵ We refer to 'treaty implementation and renewal processes' without always prefacing the term with 'bilateral'. The treaties are correctly perceived by treaty nations as being bilateral in nature: the treaty nations are one party, and the Crown is the other.⁷⁶ Treaty nations, in many cases, regard their relationship under treaty as one made between sovereigns. Certainly, they all regard their relationship as being between nations or peoples. Each of the treaties represents the coming together of two separate cultures, political systems, legal systems and systems of land tenure. The treaties are therefore, in this sense, fundamentally bilateral.

Each side of the treaty implementation relationship, however, can be politically complex. Treaty nations, for example, can be made up of different clans, tribes or villages, recognized by their own laws and customs. In addition, in some places, traditional treaty nation political structures have been superseded by the establishment of band councils elected under the *Indian Act*, as well as by other entities, such as tribal councils and provincial, regional and national political associations, to represent some treaty nations for some purposes.

Similarly, while 'the Crown' is in a very real sense a single party to a bilateral treaty relationship, Her Majesty the Queen is advised by many ministers of many governments and has no real authority independent of them. In Canada, Parliament has the primary legislative authority and the federal government executive responsibility for fulfilling the treaties, but many treaty issues involve matters within provincial jurisdiction and ownership, particularly lands and natural resources.

The Crown in Canada today is a concept that both constrains governments from wrongful actions and acts more positively as an affirmative and honourable force that is required to uphold treaty relationships and treaty promises made on behalf of society as a whole.

Some treaty nations continue to regard the Crown in right of the United Kingdom as having continuing relevance to their treaty relationships. Their views on this matter are strongly held and worthy of respect.

While the treaty relationship is bilateral in nature, issues of representation of the two treaty parties will be important to the success of a bilateral treaty process. Many treaty implementation discussions may involve more than one government on both sides. On one side will be the federal and provincial governments. In time, treaty nations will have governments that are in effect

‘federal’, with individual band governments or their successors retaining certain local autonomy within a broader treaty nation government structure. The result of a successful treaty process will determine how the governments of treaty nations will function as one of three orders of government within the Canadian federation. The essential bilateral nature of the relationship will be preserved, but the discussions may involve more than a single government entity on each side of the table.

We refer to a process of implementation and renewal of the historical treaties. The treaty nations do not want to start afresh and create a new relationship between the parties. They want the treaties to be implemented in the context of the traditional relationship but in a way that the parties can agree effects a just and reasonable resolution of areas in dispute. They see the treaties as sacred compacts between peoples, not as relics of the past, and they want them renewed in that spirit. We use the term ‘implementation’ because treaties already deal at least implicitly with the issues raised by treaty nations. We use the term renewal to emphasize the need to revitalize, in contemporary form, the treaty relationships established so long ago.

The treaty process will involve the negotiation of gaps in the record of the original treaty as recorded by the Crown. As we have concluded, the treaty nations see the written text of the historical treaties as incomplete and misleading. Negotiation of these gaps does not imply renegotiation of the entire treaty. The proposed treaty process is *not* a renegotiation of the existing historical treaties. The treaty nations did not ask the Commission to recommend renegotiation of their treaties, or nullification, amendment or reopening of them. In light of the history of many of the treaties, particularly the consistent implementation of only one view of the treaty relationship, at the expense of the other, this is perhaps surprising.

According to the approach of Canadian law to date, many of the treaties resulted in the extinguishment of the most fundamental rights any people can possess. Against this backdrop, it is remarkable that a repudiation of the treaties has not been asserted with greater vigour. On the contrary, the treaty nations that testified before the Commission asserted that all the terms of the treaties — including matters that were not recorded by the Crown — continue to exist and require only identification and implementation. They do not regard the written texts of treaties as authoritative; but neither do they repudiate or seek to nullify their treaties. The point the treaty nations make, however, is that the original treaty, however ambiguous, one-sided or deficient, created a relationship between the parties that continues today; what is required is a

process undertaken in the context of that relationship and consistent with the spirit that generated it.

The consistent message emerging from the testimony of treaty nations is that the treaties are sacred and spiritual covenants that cannot be repudiated, any more than the cultures and identities of treaty nations can be repudiated. In entering into treaties, treaty nations maintain that they made an irreversible and spiritual alliance with the Crown that cannot be broken.

The treaty nations believe that their fundamental relationship with the Crown has been made and solemnified: what is required is a continuing process occurring in the context of that relationship.

The federal government has regarded outstanding treaty issues as claims or grievances, so it has established a claims procedure that seeks finality and certainty in one-time settlements, arrived at through negotiation. While the treaty process will involve negotiations to give effect to the spirit and intent of treaties, it will be shaped by the pre-existing relationship of partnership.

With remarkable uniformity, the treaty nations consider that their treaties with the Crown already contain commitments to maintain that partnership and to review it periodically. Many early treaties contain explicit commitments to renew and continue to renew the treaty relationship. The distribution of annuities on annual treaty days under many treaties is regarded as much more than the payment of rent. It is regarded as a formal opportunity to discuss and renew the relationship each year.

We quote the words of Lord Sankey, of the Judicial Committee of the Privy Council, who described the *British North America Act* as “a living tree capable of growth and expansion within its natural limits.”⁷⁷ Just as a country’s constitution is organic, being shaped and reshaped continually by the evolving circumstances of human society, the principles of treaties made between nations must also be interpreted as the relationship evolves. In this light, the treaties must also be flexible enough to include new matters that might not have been raised at the time of the original treaty discussion. Treaty relationships, once established or re-established, must be flexible enough to address new items of concern.

The treaty process will thus emphasize the treaty as a set of mutual rights and mutual fiduciary obligations appropriate to the continuing relationship between treaty partners, rather than as a set of claims and grievances. In this process,

there will be a mutual endeavour to achieve clarity, precision and certainty with respect to the content of treaty rights and obligations on both sides.

Canada is fortunate to have a living tradition of treaty making that can now be revitalized. In some countries, notably Australia, no treaty process with Indigenous peoples was ever commenced, and the struggle to begin reconciliation between Indigenous and non-Indigenous peoples is now under way after 200 years of denial of Aboriginal rights.⁷⁸

In other countries, such as the United States, the government terminated the treaty process unilaterally in the last century,⁷⁹ creating severe anomalies among the Native American peoples and withdrawing from them the principal and constitutionally recognized means of establishing and maintaining their relationship with the United States.⁸⁰ It is significant that in New Zealand, where a form of treaty process exists, important advances in Maori rights have been achieved.

In Canada, the constitutional recognition of rights under land claims agreements as treaty rights is symbolic of the continued vitality of the treaty process, regardless of the difficulties inherent in contemporary claims policies. As a result, Canada could set a precedent among the nations of the world in using or reviving the treaty as the primary means of legitimizing relations with indigenous nations.

Making a treaty does not require the parties to put aside all their political and legal differences, much less adopt each other's world view. A treaty is a mutual recognition of a common set of interests by nations that regard themselves as separate in some fundamental way. Treaty relationships will evolve organically, but there must be no expectation that one world view will disappear in the process. On the contrary, treaty making legitimizes and celebrates the distinctiveness of the parties while establishing their bonds of honour and trust.

In Canada, the establishment of formal processes to address treaty issues has been suggested in the past. Perhaps most notably, in 1985 and 1986 discussions took place between some of the First Nations that are party to Treaty 8 and David Crombie, then minister of Indian affairs, with the objective of renovating that treaty. Crombie described the proposed initiative in a letter to Treaty 8 head negotiator Harold Cardinal on 11 March 1985. His words eloquently express our own view of the treaty implementation process:

As you know, I have appointed Mr. Frank Oberle, M.P. to explore ways in which problems or grievances in regard to the current treaty can be remedied, unfulfilled portions of the treaty can be fulfilled, and the spirit and intent of the treaty can be utilized as the basis for an agreement upon which we can move into the future. Where my current mandate is not sufficient to accommodate the needs of this process, I am willing to proceed to Cabinet with a request that Cabinet issue appropriate authority. I agree that where appropriate, the federal government could introduce legislation to implement or reaffirm the agreement. I reiterate your own statement that such discussions and agreement would not be a repudiation nor a renegotiation of the treaty but would be an affirmation and clarification of its true terms. In addition to matters dealt with under the treaty, additional agreements might be contemplated by both parties.

While I am willing to consider the articles of the treaty, the report of the treaty commissioners and other written contemporary report, and the Indian understanding of the treaty including written and oral history, I do not believe that we need to be limited in this fashion and that it is much more important that we recognize that the treaty is the expression of a special relationship, which itself needs to be renewed and restored. It is in the spirit and intent of this, rather than a legalistic requirement that you produce evidence, that we should proceedThe exercise, in my view, offers an opportunity to redesign and reconceptualize your relationship with the federal government in a way which reinforces your historical and constitutional rights as Indian First Nations, while at the same time, restoring to you the means to manage your own affairs.

The process was endorsed by Prime Minister Mulroney during the first ministers conference of April 1985.⁸¹

The ministerial appointee, Frank Oberle, prepared a discussion paper on the scope and issues of the renovation initiative, which was sent to Mr. Crombie on 31 January 1986 and set out a detailed program for a step-by-step renovation of the issues arising from Treaty 8.⁸² But the proposed process faltered because of a lack of formal cabinet authorization.⁸³ This experiment illustrates the need for formal government commitment. The presentations of Treaty 8 leaders showed that they continue to strive for a treaty review process, despite

the setbacks of the past.⁸⁴

Proposals for a treaty process led to the inclusion of several provisions in the 1992 Charlottetown Accord:

(2) The government of Canada is committed to establishing treaty processes to clarify or implement treaty rights and, where the parties agree, to rectify the terms of the treaties, and is committed, where requested by the Aboriginal peoples of Canada concerned, to participating in good faith in the process that relates to them.

(3) The governments of the provinces and territories are committed, to the extent that they have jurisdiction, to participating in good faith in the processes referred to in subsection (2), where jointly invited by the government of Canada and the Aboriginal peoples of Canada concerned or where it is specified that they will do so under the terms of the treaty concerned.

(4) The participants in the processes referred to in subsection (2) shall have regard to, among other things and where appropriate, the spirit and intent of the treaties, as understood by the Aboriginal peoples concerned.

(5) For greater certainty, all those Aboriginal peoples of Canada who have treaty rights shall have equitable access to the processes referred to in this section.

(6) Nothing in this section abrogates or derogates from any rights of the Aboriginal peoples of Canada who are not parties to a particular treaty.⁸⁵

These provisions died with the accord, but they demonstrate that, quite recently, this idea had broad acceptability among federal, provincial and territorial governments, as well as the leadership of the national Aboriginal organizations.

In 1993, the electoral platform of the Liberal Party of Canada, which now forms the government, expressed support for the idea of a treaty process.⁸⁶ Since taking office, the government has indeed begun to address the need for treaty processes. The Manitoba Framework Agreement, dated 7 December 1994, between the minister of Indian affairs and 60 First Nations communities in Manitoba, provides as one of its principles:

5.3 In this process, the Treaty rights of First Nations will be given an interpretation, to be agreed upon by Canada and First Nations, in contemporary terms while giving full recognition to their original spirit and intent.⁸⁷

The Mohawk/Canada Roundtable is another process whereby the government of Canada and the Mohawk communities of Akwesasne, Kahnawake and Kanesatake have begun discussions “to promote harmony and peaceful coexistence among the Mohawks and Canada through cooperation and non-confrontational negotiations.”⁸⁸ These Mohawk communities have tabled a joint statement on the inherent right of self-determination that asks Parliament to pass legislation to “empower the process of negotiating treaties and other arrangement[s] between Mohawk governments and Canada.”⁸⁹

In addition, Ron Irwin, minister of Indian affairs, and the Confederacy of Treaty 6 First Nations signed a declaration of intent on 16 March 1995 containing an agreement to “develop a protocol for bilateral Treaty discussions respecting Treaty Six”.⁹⁰

On 10 August 1995, the government of Canada announced new policy proposals for the negotiation of self-government in which it envisaged self-government agreements being constitutionally protected as treaty rights.

The government of Canada is prepared, where the other parties agree, constitutionally to protect rights set out in negotiated self-government agreements as treaty rights within the meaning of section 35 of the *Constitution Act, 1982*. Implementation of the inherent right in this fashion would be a continuation of the historical relationship between Aboriginal peoples and the Crown. Self-government rights could be protected under section 35

- in new treaties;
- as part of comprehensive land claims agreements; or
- as additions to existing treaties.

Treaties create mutually binding obligations and commitments that are constitutionally protected. Recognizing the solemn and enduring nature of treaty rights, the government believes that the primary criterion for determining whether a matter should receive constitutional protection is whether it is a

fundamental element of self-government that should bind future generations. Under this approach, suitable matters for constitutional protection would include

- a listing of jurisdictions or authorities by subject matter and related arrangements;
- the relationship of Aboriginal laws to federal and provincial laws;
- the geographic area within which the Aboriginal government or institution will exercise its jurisdiction or authority, and the people to be affected by it; and
- matters relating to the accountability of the Aboriginal government to its members, in order to establish its legitimacy and the legitimacy of its laws within the constitution of Canada.⁹¹

These initiatives, particularly the last one, are generally consistent with the Commission's recommendations for new treaty implementation and renewal and treaty-making processes. However, as we explain later in this chapter and in the next chapter, the Commission is of the view that these treaty processes should be centred around Aboriginal nations and treaty nations rather than individual communities.

Our observations about the nature of the treaties and the relationships established by them apply to the modern as well as the historical treaties. The circumstances under which the modern treaties were negotiated dictate a different focus for implementation and renewal, but in principle the goal of renewing and revitalizing the relationship is the same.

Recommendations

The Commission recommends that

2.2.3

The federal government establish a continuing bilateral process to implement and renew the Crown's relationship with and obligations to the treaty nations under the historical treaties, in accordance with the treaties' spirit and intent.

2.2.4

The spirit and intent of the historical treaties be implemented in accordance with the following fundamental principles:

(a) The specific content of the rights and obligations of the parties to the treaties is determined for all purposes in a just and liberal way, by reference to oral as well as written sources.

(b) The Crown is in a trust-like and non-adversarial fiduciary relationship with the treaty nations.

(c) The Crown's conflicting duties to the treaty nations and to Canadians generally is reconciled in the spirit of the treaty partnership.

(d) There is a presumption in respect of the historical treaties that

- treaty nations did not intend to consent to the blanket extinguishment of their Aboriginal rights and title by entering into the treaty relationship;
- treaty nations intended to share the territory and jurisdiction and management over it, as opposed to ceding the territory, even where the text of an historical treaty makes reference to a blanket extinguishment of land rights; and
- treaty nations did not intend to give up their inherent right of governance by entering into a treaty relationship, and the act of treaty making is regarded as an affirmation rather than a denial of that right.

2.2.5

Once the spirit and intent of specific treaties have been recognized and incorporated into the agreed understanding of the treaty, all laws, policies and practices that have a bearing on the terms of the treaty be made to reflect this understanding.

5. Treaty-Making Processes

It is self-defeating to pursue a policy that supposes that the terms of a land claims agreement can be fixed for all time. There can be no acceptable final definition of the compromises that must be made between societies over succeeding generations. The conclusion of a modern land claims agreement must be seen as a

beginning, not as an end.

The emphasis on finality in the current federal land claims policy is at odds with the federal government's expressed support for Aboriginal self-government. In the event that comprehensive land claims agreements are to serve as a central reference point in the balancing of the distinctiveness of Aboriginal societies and the demands of a common Canadian citizenship, then the agreements must be open to periodic review, renegotiation and amendment. It is ambitious enough for the representatives of the Crown and an Aboriginal people to achieve a mutually beneficial agreement for the foreseeable future; it is ludicrous to try to anticipate with precision the circumstances and needs of all future generations.

Bernadette Makpah
Nunavut Tunngavik Inc.
Montreal, Quebec, 29 November 1993

Much of what we have written about implementing and renewing existing treaties can be applied, with modifications, to making new treaties. At present, the comprehensive claims policy is the only vehicle for negotiations between Aboriginal nations and the Crown on questions of fundamental rights and relationships. As discussed in our report, *Treaty Making in the Spirit of Co-existence An Alternative to Extinguishment*, the comprehensive claims policy continues to contemplate blanket extinguishment as a possible option in settlement agreements. We discussed alternatives to this approach in that report and direct the reader to it. Later in this volume, we address in greater detail the shortcomings of the comprehensive claims policy as a basis for making treaties (see Chapter 4 in Part Two of this volume).

Under section 35(3) of the *Constitution Act, 1982*, rights under land claims agreements, including comprehensive claims agreements, are deemed to be existing treaty rights for constitutional purposes. In our view, however, this does not make the process of achieving these agreements a complete treaty process; because of the limitations of the existing process, it does not necessarily result in a satisfactory treaty relationship either. Present federal policy does not permit the negotiation of governance rights as an integral component of a comprehensive claims agreement. Delegated self-government arrangements can be negotiated and are being negotiated in tandem with comprehensive claims, but federal policy denies the possibility of those arrangements acquiring the status of treaty rights under section 35 of the

*Constitution Act, 1982.*⁹²

The comprehensive claims process aims to achieve an exchange of Aboriginal rights to land for rights derived exclusively from a claims agreement. In this process, all residual Aboriginal rights to land, other than lands in “specified or reserved areas”, are to be extinguished.⁹³ In our view, the making of new treaties should occur on the basis of mutual recognition as a means to just and fair coexistence of Aboriginal and non-Aboriginal people. Blanket extinguishment of Aboriginal rights and title does not foster this result. Similarly, as discussed in the next chapter, we regard every Aboriginal and treaty nation as having an inherent right of self-government, which includes the right to enter into a treaty with the Crown that explicitly addresses self-government.

The present comprehensive claims policy has three main deficiencies:

- First, it does not acknowledge the inherent right of self-government as giving rise to treaty rights of governance under section 35 of the Constitution Act, 1982.
- Second, it continues to contemplate blanket extinguishment of Aboriginal rights and title as an option.
- Third, it excludes Métis people and certain First Nations claimant groups.

5.1 Implementation of Modern Treaties

Our essential conclusions about the historical treaties are equally applicable to treaties that will be made in the future. We regard the treaty-making process as a continuing and vital part of Canadian life. We do not regard modern treaties as any less binding or enduring than earlier ones. We agree that treaties made in the future, like those made in the recent past, will be made largely on the basis of a common language and greater sensitivity on both sides to the matters that can produce difficulties of interpretation. Having said this, modern treaties and future treaties alike will benefit from the perspective that they are, above all, embodiments of a nation-to-nation partnership.

Our assessment of the comprehensive claims policy leads us to conclude that implementation of modern treaties made under that policy should involve two main themes. First, they should be reopened to permit the addition of constitutionally entrenched rights of self-government. The full implications of

this conclusion will be fleshed out in the next chapter. Second, where a modern treaty contains a provision for the blanket extinguishment of the Aboriginal party's land rights, that party might elect to have the treaty reopened for renegotiation.

Renegotiation would require *both* parties to begin again at the starting point of those treaties. Logically, this would require the revival of Aboriginal rights to land that were extinguished in blanket fashion. However, it would also require the Aboriginal party to account for all benefits received in exchange for extinguishment. It is quite possible that the federal, provincial or territorial governments involved in the renegotiation would be unwilling to pay as much as was provided in the original agreements, given their view that renegotiation could diminish the degree of certainty and finality involved.

We must also emphasize that renegotiating modern treaties would require untangling the complex arrangements that have grown up around them. Unlike historical treaties, modern treaties call explicitly for frequent renegotiation of particular issues and contain dispute-resolution mechanisms negotiated by the parties and tailor-made for the circumstances of the original agreement. In this sense, they are 'living' agreements to a greater extent than the historical treaties. We would therefore urge the parties to modern treaties to exercise caution in discussing implementation and renewal of these treaties. Nevertheless, to the extent that these treaties do not meet the requirements of a modern relationship as outlined in this chapter, they warrant modification.

It may well be that the treaty principles we have identified can be implemented without wholesale renegotiation. It may also be possible for the negotiations we envisage to take place within the framework of the modern treaties. We encourage the parties to explore all their options and the implications of their treaty partnership before concluding that wholesale renegotiation must occur.

5.2 The Peace and Friendship Treaties

At the other historical extreme from the modern treaties are the historical treaties known as the peace and friendship treaties. Many treaties were made with Indian nations before 1763, when the Crown began to use the treaty process to acquire territory and extinguish Aboriginal title. The rights in these peace and friendship treaties continue to have force and constitutional protection.⁹⁴ They do not, however, purport to codify the entire relationship between the parties. In particular, they do not address title to the ancestral

lands of the treaty nations. It is clear that these treaties were the beginning of a process that remains unfinished.

The *Mi'kmaq Treaty Handbook*, published in 1987 by the Grand Council of Micmacs, the Union of Nova Scotia Indians and the Native Council of Nova Scotia, states:

The surviving documents are often incomplete summaries of meetings that typically required many days and were repeated every few years as necessary. By themselves, the documents are fragments; considered together, they constitute a great chain of agreement. In other words, the treaty documents ... should be seen not as distinct treaties but as stages and renewals of a larger agreement or pact that developed during the 1700s between the Mi'kmaq and the British.

By entering into treaty, Britain joined our circle of brother nations, the Wabanaki Confederacy, and we joined its circle of nations known as the British Commonwealth

We have fulfilled our only agreement to date: to remain friends and allies of the British Crown and to live in peace with all of his or her subjects

Now, if our conditions are to be improved and our differences reconciled it must be by an arrangement that takes the past into account. What is required is policy and action that acknowledge the treaty relationship we developed with the British Crown.⁹⁵

Whether the land issue is the proper subject for a new treaty or the continuation of an existing treaty or series of treaties is a matter for the treaty parties to decide. The same is true for the negotiation of treaties that address the jurisdiction of treaty nation governments for the first time.

For many years, the nations that are parties to early peace and friendship treaties were denied access to the comprehensive claims process because it was assumed that their land rights had been superseded by law (see Chapter 4). The Commission does not regard this conclusion, whether legally sound or not, as a legitimate reason to deny access to the treaty-making process. Denial of access to the treaty-making process cannot be justified by any non-

consensual appropriation of Aboriginal rights to land.

5.3 Making New Treaties and Equivalent Agreements

The Commission does caution that not all groups of Aboriginal people will be eligible for treaty nation standing. The basic unit of Aboriginal self-determination and self-governance is the nation (see Chapter 3), and in our view only nations can have treaty relations with the Crown. There must be some objective criteria that define a nation, and we discuss what these might be in the next chapter.

First Nations, Inuit and Métis presenters at our hearings pointed out that their peoples are distinct from each other, with different political and cultural traditions, including their traditions of forming relationships with the Crown and with other peoples. Treaty making has been the traditional method whereby First Nations and the Crown have made compacts for coexistence. To avoid misunderstanding, we emphasize that we are not advocating the adoption of First Nations traditions by Inuit and Métis groups.

Our focus is the formalization of new relationships. Internationally, the treaty is used to achieve this between nation-states. In Canada, although treaties have been used to fashion *sui generis* relationships with Aboriginal peoples, the term has been used primarily in connection with First Nations. The agreements made in the future between the Crown and Aboriginal nations might well be called accords, compacts, land claims agreements, settlement agreements or other appropriate terms. They would reflect different world views and priorities. Indeed, if they are true treaties, they would necessarily give expression to the unique rights and cultures of the Aboriginal nations signing them. Our point is that treaty relationships and access to treaty institutions should be extended to all nations of Aboriginal people that want to have them.

We must also caution that we regard treaty making as the exclusive preserve of nations. In the case of the treaty implementation and renewal process described earlier in this chapter, the nation status of the treaty nations was determined by the original act of treaty making. In the case of Aboriginal nations seeking to enter the treaty process today, their status as nations will have to be established.

To open the treaty-making process to Aboriginal groups that do not meet the criteria of a nation would detract from the fundamental nature of treaties and

the integrity and status of the nations that make them. This does not preclude a variety of other initiatives to give effect to the rights and aspirations of groups that do not qualify as nations. It simply preserves the essential nation-to-nation nature of the treaties.

Inuit land claims agreements

The Inuit experience with treaties has been restricted to the modern comprehensive land claims process,⁹⁶ beginning in 1975 with the James Bay and Northern Quebec Agreement and continuing with the Inuvialuit Final Agreement in 1984 and the signing of the Nunavut Land Claims Agreement on 25 May 1993.⁹⁷ These agreements are often termed modern treaties. Negotiations on the Labrador Inuit claims continue. The Inuit leadership, like that of First Nations that have signed comprehensive claims agreements, has questioned the legitimacy of the extinguishment clauses in those agreements.⁹⁸

The Inuit leadership has sought constitutional recognition of Inuit Aboriginal rights, including the right of self-government, and has generally striven for forms of public government. Inuit refer to themselves as a people rather than as a nation or nations. This terminology does not alter the fact that many Inuit groups would likely meet the criteria of nationhood and would be eligible to establish a treaty process if they wanted to do so.

Again, we emphasize that there is no reason why treaties with Inuit have to resemble those with other Aboriginal peoples. As Inuit land claims agreements show, the negotiation of a modern treaty can result in public government and include many other elements tailored to the circumstances of Inuit.

Métis treaties

Some persons regarded as Métis were included as 'Indians' in some of the historical treaties, but Métis people generally have been excluded from treaty making. More recently the Métis Association of the Northwest Territories signed the 1990 final agreement on the Dene/Métis claim in the Northwest Territories. That agreement has not been ratified, however, because of objections to its reference to blanket extinguishment of Aboriginal rights to land. The Sahtu Métis (along with the Sahtu Dene) have since signed a comprehensive claims agreement.⁹⁹

The Commission regards Métis people as eligible to negotiate a treaty relationship with Canada subject to the criteria defining 'nation' or 'people'.

The western Métis Nation has pursued negotiations for a Métis Nation accord, but the latest attempt was thwarted by the failure of the Charlottetown Accord in 1992. In our view, such an accord, being based on nation-to-nation dealings, would be a treaty. The Métis Nation must have full access to all processes and institutions to assist in the negotiation of a satisfactory treaty or accord. The unique situation of Métis people may of course give rise to agreements that have little resemblance to treaties made by First Nations.

Recommendation

The Commission recommends that

2.2.6

The federal government establish a process for making new treaties to replace the existing comprehensive claims policy, based on the following principles:

- (a) The blanket extinguishment of Aboriginal land rights is not an option.
- (b) Recognition of rights of governance is an integral component of new treaty relationships.
- (c) The treaty-making process is available to all Aboriginal nations, including Indian, Inuit and Métis nations.
- (d) Treaty nations that are parties to peace and friendship treaties that did not purport to address land and resource issues have access to the treaty-making process to complete their treaty relationships with the Crown.

6. Establishment of Treaty Processes

Regarding those parts of Canada which have not yet been covered by land claims settlements, we believe the government should now, belatedly, endorse the principle underlying the *Royal Proclamation of 1763*. Following the consolidation of British North America, this proclamation enunciated the principle of leaving Aboriginal people in possession of all the lands outside the settled colonies of the time and forbidding European settlement of these

Aboriginal-held lands until agreements had been reached between the Aboriginal peoples of each region and the Crown. While the terms of the Royal Proclamation were never carried out, this policy still makes admirable sense.

Modern Aboriginal policy, particularly with regard to those groups in the undeveloped or partially developed frontier regions not yet ceded to Canada by Aboriginal people, including much of the interior and some of the coast of Newfoundland and Labrador, needs a 1990s version of the Royal Proclamation, that is, a renewed commitment by Canada to bring about, with utmost urgency, freely-negotiated agreements which will create a new set of partnerships within Confederation with Aboriginal nations and, to a large extent, retroactively legitimate the process of development and non-Aboriginal settlement.

Dr. Adrian Tanner
Native Peoples' Support Group of Newfoundland and Labrador
St. John's, Newfoundland, 22 May 1992

The Commission believes that treaty processes should be established pursuant to a formal declaration of the Crown and have an explicit statutory foundation. We also propose the creation of new institutions to facilitate these processes.

6.1 A Royal Proclamation

A treaty is an exercise of the prerogative powers of the Crown. A declaration of the Crown's commitment to the treaties is, in our view, properly made by a royal proclamation.

The *Royal Proclamation of 1763* was the most significant landmark in the Crown's history of treaty making with Aboriginal peoples. While not a treaty, the Proclamation did establish fundamental principles to guide the Crown in making treaties, particularly with regard to the lands of Indian nations.

The Proclamation also stands as an important recognition of the rights of Aboriginal peoples and their status as nations. It has been called the Indian Bill of Rights, and it continues to have the force of law in Canada. It is at least quasi-constitutional in nature, if not a fundamental component of the constitutional law of Canada.¹⁰⁰

In keeping with its high symbolic importance, and to lend substantive legitimacy

to the new approach to treaty relations that we recommend, it would be appropriate for the Crown, in the person of the reigning monarch, to announce the establishment of a new era of respect for the treaties. We therefore conclude that formal renewal of treaty processes should be initiated by a royal proclamation to supplement the *Royal Proclamation of 1763*.

The new proclamation should have the same standing in Canadian law and policy as the *Royal Proclamation of 1763*. It should affirm the nature of existing treaty relationships as well as the continuity of the treaty process. It should embody the living commitment of the Crown to fulfilling its relationship with treaty nations.

We see a new royal proclamation as the symbolic turning point in the relationship between Aboriginal peoples and other Canadians. The proclamation would

- reaffirm and endorse the basic principles of the *Royal Proclamation of 1763*;
- acknowledge the injuries of the past, when Aboriginal rights were ignored, treaties were undermined and the *Indian Act* was imposed, and express Canadians' regret for policies that deprived Aboriginal peoples of their lands and often interfered with their family relationships, spiritual practices, structures of authority and relationship with the land;
- express the will of the government of Canada to achieve reconciliation so that Aboriginal people can embrace their Aboriginal and Canadian citizenship without reservation;
- commit the Crown to implementing and renewing existing treaties and making new treaties;
- recognize that Métis people, as one of the Aboriginal peoples recognized in section 35 of the *Constitution Act, 1982*, are included in the federal responsibilities set out in section 91(24) of the *Constitution Act, 1867*;
- commit the Crown to recognizing the inherent right of governance of Aboriginal nations and the jurisdiction of Aboriginal governments as one of three orders of government in Canada and to implementing a process for this recognition;

- commit governments and institutions that act in the name of the Crown to honour Aboriginal and treaty rights;
- recognize fundamental principles defining the nature of Aboriginal title (see Chapter 4); and
- commit the Crown to honourable redress for breaches of its honour in its past dealings with Aboriginal peoples in Canada.

We emphasize the importance of the intervention of the reigning monarch to give weight to these undertakings. For many treaty nations, the relationship with the monarch is real, personal and enduring. The Crown symbolizes this relationship in the same way as the Pipe and the Two Row Wampum.

The royal proclamation must represent the commitment of Canada as a whole. The proclamation must transcend partisan politics and regional differences, so there must be a serious attempt to secure the support of provincial and territorial governments. The success of treaty implementation and renewal and of treaty making will require the involvement of the provinces. There must also be wide consultation with the treaty nations and other Aboriginal peoples to ensure that the proclamation is not seen in any way as a pre-emptive measure or a measure that might derogate from any Aboriginal or treaty right.

6.2 Companion Legislation

We are aware of the potential for empty symbolism. Without companion legislation, a royal proclamation would change nothing. We also recognize that such a proclamation alone would have no legal effect, regardless of its moral authority. The proposed royal proclamation must therefore be accompanied by appropriate legislation. We propose that the government of Canada recommend that the House of Commons and the Senate, by joint resolution, request Her Majesty to issue the royal proclamation. The companion legislation would then be introduced in Parliament as draft legislation to give substantive symbolic force to the commitments contained in the Proclamation, as well as giving it legal force. It is obvious that the proclamation should be issued as early as possible to demonstrate the government's clear intentions and that it be accompanied by draft legislation. Here we outline the elements that should be contained in the treaty legislation; other elements of the companion legislation are set out later in this volume and in Volume 5, Chapter 1.

The treaty legislation would set out the guiding principles of the treaty processes and provide for the establishment of the institutions required to implement them. It should also introduce certain reforms of the law in relation to the judicial interpretation of treaties.

The proposed treaty legislation should achieve the following objectives:

- It should provide for the implementation of existing treaty rights, including the rights to hunt, fish and trap.
- It should affirm liberal rules of interpretation of treaties, having regard to the context of treaty negotiations, the spirit and intent of each treaty, and the special relationship between the treaty parties, and acknowledge the admissibility of oral and secondary evidence in the courts to make determinations with respect to treaty rights.
- It should declare the commitment of Parliament and government of Canada to the implementation and renewal of each treaty on the basis of the spirit and intent of the treaty and the relationship embodied in it.
- It should commit the government of Canada to treaty processes to clarify, implement and, where the parties agree, amend the terms of treaties so as to give effect to the spirit and intent of each treaty and the relationship embodied in it.
- It should commit the government of Canada to a process of treaty making with Aboriginal nations that do not yet have a treaty with the Crown and with treaty nations whose treaty does not purport to address land and resource issues.
- It should clarify that defining the scope of governance for Aboriginal and treaty nations is a vital part of the treaties.
- It should authorize establishment of the institutions necessary to fulfil the treaty processes in consultation with treaty nations, as discussed in greater detail later in this chapter and in Chapter 4.

It is vital that these unilateral acts of the Crown not be perceived by Aboriginal peoples as a breach of the treaty relationship. It is therefore essential that the proposed proclamation and its companion legislation be the subject of thorough discussion and consultation with Aboriginal peoples and provincial and

territorial governments before they are introduced.

The royal proclamation would supplement the written text of the constitution and would form part of the constitution as the *Royal Proclamation of 1763* does now.

Thus far, we have addressed only federal legislation. However, without complementary provincial legislation and territorial ordinances authorizing those governments to participate in treaty processes, it will be impossible to achieve their objectives, particularly with respect to lands and resources. There is a particular obligation on the part of provinces to participate, as they have benefited directly from past breaches of the treaties. In addition, the *Constitution Act, 1867* and the transfer of lands and resources to the western provinces by the government of Canada in the 1930s may have made land available to the provinces that ought to have remained with Aboriginal peoples. Treaties are instruments of reconciliation; it is therefore in the interests of all parties for provincial and territorial governments to participate in these historic processes.

The Commission also respects the views of many treaty nations that continue to look to the international arena for fulfilment of their treaties. In proposing Canadian treaty processes, in no way is the Commission attempting to exclude continuing dialogue and activity in international bodies concerning Indigenous peoples' rights.

Recommendations

The Commission recommends that

2.2.7

The federal government prepare a royal proclamation for the consideration of Her Majesty the Queen that would

(a) supplement the *Royal Proclamation of 1763*; and

(b) set out, for the consideration of all Aboriginal and treaty nations in Canada, the fundamental principles of

(i) the bilateral nation-to-nation relationship;

(ii) the treaty implementation and renewal processes; and

(iii) the treaty-making processes.

2.2.8

The federal government introduce companion treaty legislation in Parliament that

(a) provides for the implementation of existing treaty rights, including the treaty rights to hunt, fish and trap;

(b) affirms liberal rules of interpretation for historical treaties, having regard to

(i) the context of treaty negotiations;

(ii) the spirit and intent of each treaty; and

(iii) the special relationship between the treaty parties;

(c) makes oral and secondary evidence admissible in the courts when they are making determinations with respect to historical treaty rights;

(d) recognizes and affirms the land rights and jurisdiction of Aboriginal nations as essential components of treaty processes;

(e) declares the commitment of the Parliament and government of Canada to the implementation and renewal of each treaty in accordance with the spirit and intent of the treaty and the relationship embodied in it;

(f) commits the government of Canada to treaty processes that clarify, implement and, where the parties agree, amend the terms of treaties to give effect to the spirit and intent of each treaty and the relationship embodied in it;

(g) commits the government of Canada to a process of treaty making with

(i) Aboriginal nations that do not yet have a treaty with the Crown; and

(ii) treaty nations whose treaty does not purport to address issues of lands and

resources;

(h) commits the government of Canada to treaty processes based on and guided by the nation-to-nation structure of the new relationship, implying:

(i) all parties demonstrating a spirit of openness, a clear political will and a commitment to fair, balanced and equitable negotiations; and

(ii) no party controlling the access to, the scope of, or the funding for the negotiating processes; and

(i) authorizes the establishment, in consultation with treaty nations, of the institutions this Commission recommends as necessary to fulfil the treaty processes.

2.2.9

The governments of the provinces and territories introduce legislation, parallel to the federal companion legislation, that

(a) enables them to meet their treaty obligations;

(b) enables them to participate in treaty implementation and renewal processes and treaty-making processes; and

(c) establishes the institutions required to participate in those treaty processes, to the extent of their jurisdiction.

7. Content of Treaty Processes

We agreed to maintain peace and friendship among ourselves and with the Crown. Peace and friendship can only be nurtured through processes which allow treaty partners to talk and resolve any differences through negotiations and goodwill.

The unique and special relationship which is evidenced by the existence of our treaty places upon both partners a duty to take whatever steps are necessary toward creating mechanisms or processes for resolving difficulties and differences which from time to time will arise in the course of such a relationship

We seek urgent action aimed at commencing the task of addressing and resolving the many outstanding issues which have arisen in our treaty relationship. We want to make clear our position that treaty framework is a framework we wish to utilize for redressing the many inequities which presently exist. We want the results of that process recognized, affirmed and protected by the Canadian constitution.

Chief Bernie Meneen
High Level Tribal Council
High Level, Alberta, 29 October 1992

Treaty parties will devise the appropriate process for reviewing, implementing and renewing the treaty relationship or for making new treaties. In this section, we provide some guidance on the possible content of treaty processes and the results they may be designed to achieve.

The treaty-making process we envisage represents an evolution from the present comprehensive claims process toward a process that is less exclusionary with respect to the parties and the subject matter of agreements and predicated on the affirmation rather than the extinguishment of Aboriginal title (see Chapter 4).¹⁰¹

The Crown saw the historical treaties, as the federal government has seen modern treaties, as one-time final transactions. This perspective must be overcome. The treaties must be acknowledged as living instruments, capable of evolution over time and meaningful and relevant to the continuum of past, present and future. They should not be frozen as of the day they are signed.

7.1 Entry to be Voluntary

No treaty nation can or should be compelled to enter a new process. If a treaty nation wishes to leave its treaty relationship as it is, the nation's right to remain apart from a process that in its view might derogate from its treaty should be respected.

Commissioners heard many treaty nation leaders, elders and members tell us not to tamper with their sacred treaties. Commissioners respect that view. No aspect of any treaty should be discussed, let alone redefined or amended,

without the consent of the treaty parties.

It is the Commission's view, however, that what is sacred about the treaties is not the specific provisions, which we believe the parties can agree to change, but rather the continuing relationship to which both the Crown and the treaty nations brought their most binding formalities. The relationship is sacred, but the details of the relationship are subject to definition. Indeed, representatives of treaty nations have been consistent in asserting that the treaties were to be renewed regularly and revisited in the light of changing circumstances.

In recommending a process to reconcile the differing understandings of treaties and to engage in a constructive dialogue on issues where agreement was reached, Commissioners do not regard this as tampering with the treaty but rather as giving it life and meaning for today and for the future.

The Commission does not propose renegotiation of the treaties but rather implementation of the spirit and intent of the treaties, including completing them where appropriate or amending the treaty text where the parties acknowledge that it does not embody their true agreement. This respects the rights of the treaty nations to enter into protocols to give greater definition to their rights and obligations under the treaty and to resolve different views the treaty parties may have with respect to those specific rights and obligations.

7.2 Timing to be Realistic

Many treaty relationships have fallen into serious disrepair over a period of generations and even centuries. Reversing this trend through renewal of treaty relationships will take considerable time. A generation may well have passed before both treaty parties feel that the true principles of their treaty have been restored. The parties should be realistic about the size of the task ahead and the time needed to complete it.

It is important that the proposed royal proclamation contain a clear acknowledgement of the continuing nature of the process and the magnitude of the task. For this reason, the royal proclamation should also commit the agencies of government to short- and medium- term initiatives to give effect to the treaties and to recognize the desirability of providing interim relief in appropriate circumstances.

We also recognize that negotiations may have to take place in stages to

accommodate the capacity of governments to address the issues raised. This should be done by agreement, with certain negotiations being identified, with the concurrence of all parties, as 'lead' negotiations.

7.3 Long-Term Resources to be Available

Adequate resources for treaty-making and treaty implementation and renewal processes should be made available to treaty nations, with sufficient long-term predictability to permit their relationship with the Crown to be repaired and restored gradually. The treaty legislation should address the question of resources, to provide a legislative foundation for funding. Treaty nations must, of course, be accountable for their expenditure of these public funds.

Recommendation

The Commission recommends that

2.2.10

The royal proclamation and companion legislation in relation to treaties accomplish the following:

- (a) declare that entry into treaty-making and treaty implementation and renewal processes by Aboriginal and treaty nations is voluntary;
- (b) use clear, non-derogation language to ensure that the royal proclamation and legislation do not derogate from existing Aboriginal and treaty rights;
- (c) provide for short- and medium-term initiatives to support treaty implementation and renewal and treaty making, since those processes will take time to complete; and
- (d) provide adequate long-term resources so that treaty-making and treaty implementation and renewal processes can achieve their objectives.

7.4 Nature and Scope of Items for Discussion

It would be entirely inappropriate for the Commission to specify the substantive content of treaty processes, but we would like to provide guidance on some of

the issues they should attempt to address.

Some treaty nations have declared that every point of contact between them and the non-Aboriginal people and institutions of Canada is affected in one way or another by the relationships established by their treaties.¹⁰² Certain apparently unimposing items referred to in treaty texts may be emblematic of larger issues that define important components of the treaty relationship. Other issues may be implicit and not mentioned at all in treaty texts. Still other matters, particularly governance and Aboriginal title, are generally regarded by Aboriginal and treaty nations as fundamental rights not ceded in treaties.

The issues under discussion in treaty-making and treaty implementation and renewal processes could include

- the fundamental purposes, character and scope of the treaty relationship;
- the parties, successors and beneficiaries of the treaties;
- the effect of a treaty, if any, on the Aboriginal right and title to land;
- the adequacy of the land and resource base secured by the treaty;
- economic rights, including treaty annuities and hunting, fishing and trapping rights;
- the rights and obligations of the parties arising from a treaty relationship in a modern context;
- education, health and taxation issues;
- governance and justice issues;
- a determination of the extent to which federal and provincial legislation has extinguished, diminished or infringed upon Aboriginal and treaty rights; and
- disputes based on breaches of legal or fiduciary obligations arising in relation to the Crown's past, present and future administration of Indian lands and assets.

In this volume, we address the basic elements of the new relationships to be

forged with all Aboriginal nations in the context of governance (Chapter 3), lands and resources (Chapter 4), and economic issues (Chapter 5). Here we provide a brief explanation of the relevance of these elements to treaty processes. In each case, more complete discussion and substantive recommendations are set out in the relevant chapters.

Governance

Whether or not the written text of the treaties refers expressly to rights of governance, we can say with certainty that all treaty nations regard themselves as self-governing. Without exception, the treaty nations that testified before the Commission expressed the view — which we accept — that the Crown entered into treaties with treaty nations on the basis that they were self-governing nations with the ability to discharge the treaty obligations they undertook. Thus, treaties acknowledged their jurisdiction over treaty subject matters and by necessary implication over other matters not addressed specifically in a treaty.

In this regard, we will not repeat our earlier comments about governance.¹⁰³ We agree with the treaty nations that governance issues are implicit in any treaty relationship. We find that the right of treaty nations to govern themselves was acknowledged implicitly by the Crown. The medals and uniforms provided to chiefs and headmen under many treaties affirm their legitimacy as the government of the treaty nations. The treaty nations undertook to maintain peaceful relations with settlers. How could they do this without the power to govern themselves?

As discussed fully in the next chapter, the new relationships we foresee are based on the inherent right of Aboriginal nations to act as one of three orders of government in Canada. It is vital that the link between governance and treaties be re-established, including the right to institute Aboriginal justice systems.¹⁰⁴ Thus, it is crucial that existing treaties that are to be implemented and renewed, as well as new treaties yet to be made, address governance powers in explicit terms.

Lands and resources

In most cases, the treaty nations dispute the written provisions in their treaties that provide for the extinguishment or cession of their Aboriginal rights and title to lands. In the treaties predating 1763, often described as treaties of peace and friendship, land rights are not mentioned, and the treaty nations maintain that their land rights have survived the making of these treaties. For example,

Alex Christmas, president of the Union of Nova Scotia Indians, said this during our hearings:

Although we have many treaties, none of them dealt with the surrender of lands and title ...

The matter of our traditional lands and resources must be addressed in a manner consistent with the principles underlined in the 1752 treaty and the standards of the treaty-making process laid out in the Royal Proclamation. Canada's current comprehensive claims policy calls for the extinguishment of Aboriginal and treaty rights in return for specific rights granted by the federal settlement legislation. In our view, if future agreements are to provide for coming generations and reflect our unique constitutional relationship with the Crown, they must be based on the recognition of our Aboriginal and treaty rights, not on their extinguishment. We require an adequate land base and equitable access to natural resources if we are to truly join the circle of Confederation.

Alex Christmas
Union of Nova Scotia Indians
Eskasoni, Nova Scotia, 6 May 1992

In the case of treaties that the Crown regards as having extinguished Aboriginal land rights and title, there is a treaty nation tradition that the treaty was intended to ensure an equitable sharing of lands and resources. How otherwise could Aboriginal people and settlers live peacefully side by side? The words of Chief George Fern are representative:

We believe the principle of sharing of our homeland [and] its natural resources is the basis of the treaty arrangements, not surrender or extinguishment. Accordingly, the concepts of resource co-management and revenue sharing from the Crown lands and resources are the proper forms of treaty implementation. Such arrangements would provide a significant economic basis for self-government, and would provide First Nations with the ability to protect and benefit from Mother Earth.

Chief George Fern
Prince Albert Tribal Council

La Ronge, Saskatchewan, 28 May 1992

As we have seen, the cross-cultural nature of treaty negotiations almost certainly gave rise to a lack of consensus on this vital issue in many instances.¹⁰⁵ It appears that many of the historical treaties did not secure the voluntary cession of Aboriginal title, even though the Crown intended this result and even though the legal language of the written treaty texts recorded a cession.

We reached some key conclusions with respect to the historical treaties that contain blanket extinguishment provisions. We do not suggest that these conclusions apply in precise fashion to every treaty. Rather, we set them out as emerging from the overall pattern of treaty making in Canada.

First, the historical treaties are agreements and as such are subject to the basic principles of contract law, with additional guidance being derived from the international law principles governing treaties. Even a cursory survey of the treaties reveals numerous ways that contract law could be invoked to call into question the extinguishment of Aboriginal land rights. The common law of contracts already recognizes certain categories of contracts — unconscionable contracts, contracts made in writing but that do not embody one party's consent, contracts made under duress, and contracts that have been fundamentally breached — all of which attract specific, well-established doctrines of invalidation. In our view, these doctrines are applicable to many of the treaties. They are also flexible enough to be adapted to the *sui generis* aspects of the treaties that make them different from other agreements.

Second, the historical treaties were made in the context of what is now seen as a fiduciary relationship between the parties, and where they involve a cession of Aboriginal title they must bear particular scrutiny. As a fiduciary, the Crown must account for any unfair or improper benefit derived from appropriating Aboriginal title without clear consent or without making sure that the treaty nations were fully informed. The Crown owed conflicting duties to the treaty nations and to Canadians generally and must bear an onus of clear and plain proof that the extinguishment of Aboriginal land rights occurred properly, that is, that there was not only free but also informed consent to the extinguishment on the part of the Aboriginal parties.

Third, throughout the period when historical treaties that purport to extinguish Aboriginal title were being made, the Crown had the power to extinguish Aboriginal title without the consent of Aboriginal people, but this would have

required a clear and plain legislative intention to do so. There was no such legislative authority for what was done.

Fourth, the historical treaties were meant to be enduring. Both parties have formally affirmed that they rely upon them. As we have discussed, the unique nature of the treaties implies a relationship of partnership, including mutual obligations to deal with each other in good faith. These obligations do not permit either party to draw back from the treaty relationship or from the duties that flow from it. The clarification of these rights and duties must therefore be the subject of good faith negotiations so that consensus can be reached on the respective rights and obligations of the parties.

If it flows from these four conclusions that in many instances the historical treaties did *not* result in the voluntary cession of Aboriginal title, that title may well continue to exist over the large portion of the Canadian land mass dealt with in the numbered treaties. This result, already contemplated by the trial decision in *Paulette*, would place the land regime in the parts of Canada covered by the treaties of cession in the same position as most of British Columbia, the Atlantic provinces, certain parts of the Northwest Territories and Quebec, as well as other areas where the Crown never attempted to obtain a cession of Aboriginal title.¹⁰⁶

The parties to the historical treaties already have a treaty relationship that prohibits them from engaging in certain conduct and requires them to deal with one another honourably and in good faith. The treaty relationship establishes affirmative obligations on the parties to complete the treaties and at the same time restrains them from conduct that is inconsistent with treaty principles. Treaties provide a framework for the peaceful resolution of disputes.

In Chapter 4, we set out our detailed recommendations for a more equitable sharing of lands and resources through treaty processes. An adequate land base is essential to the economic and cultural health of Aboriginal peoples and to the viability of Aboriginal governments. It is the Commission's view that the treaty nations intended to enter into treaties that would provide for this result, and only such an outcome would meet the standards of fairness imposed by the relationship we envisage.

Economic rights

In addition to providing for sharing lands and natural resources, the treaty nations regard the historical treaties as creating an economic relationship

between themselves and the Crown. As with the political components of the treaty relationship, the economic aspects will evolve with time and with changing circumstances. These are also matters for treaty implementation and renewal processes (see Chapter 5).

Similarly, new treaties will be deeply concerned with economic issues. Not only will lands and natural resources be an issue, but other provisions to enable Aboriginal nations to benefit from economic opportunities will have to be addressed as well.

Treaty annuities

One example of economic rights in the historical treaties is the practice of paying annuities. The Robinson treaties of 1850 and the numbered treaties made after 1870 provide for annual annuities to be paid to each member of a treaty nation. Today, many treaty nation members travel great distances to collect their treaty annuity on treaty day because of the symbolic value of meeting with the Crown's representatives to renew the treaty and affirm the continuing nature of the treaty relationship.

With the passage of time, the value of these annuities, typically \$4 or \$5 per year, has been severely eroded. The dollar amount specified in the original treaty is still distributed annually. The annuities established by the Robinson treaties, for example, represented between one-half and one-third of the annual wage of an unskilled labourer.¹⁰⁷ Annuities could also increase if revenues derived from the territory affected by the treaty rose. Treaty 1 provided for the annuity to be "made in such articles as the Indians shall require of blankets, clothing, prints (assorted colours), twine, or traps, at the current cost price in Montreal, or otherwise, if Her Majesty shall deem the same desirable in the interests of Her Indian people, in cash".¹⁰⁸

The growth of the modern social safety net eventually brought larger infusions of resources. The treaty nations insist that all transfers of resources to them are in fact being made pursuant to treaty. We agree that the treaty promises of wealth transfer should be reconsidered in treaty implementation and renewal processes.

Hunting, fishing and trapping

Similarly, the Robinson treaties and the numbered treaties contain assurances

that the traditional economic activities of hunting, fishing and trapping would be preserved. The words used to record these rights in the treaties varied, however, and extensive litigation has subsequently produced many anomalies in interpretation.

In addition, in some cases these rights have been abrogated unilaterally by the Crown or affected by regulations that breach the letter and spirit of the treaty promises. In the prairie provinces, for example, the Natural Resources Transfer Agreements of the 1930s altered treaty rights to hunt, fish and trap, and recent cases indicate that these treaty rights may indeed have been extinguished without the consent of treaty nations and replaced with a more limited set of rights.¹⁰⁹ Provincial game and fish laws and regulations have been applied to treaty nations people without regard for their treaty rights, and for decades federal laws such as the *Fisheries Act* and *Migratory Birds Convention Act* have criminalized essential harvesting activities guaranteed by treaty (see Chapter 4).¹¹⁰ These issues are overdue for consideration in treaty implementation and renewal processes, particularly given their central importance to the economic well-being and cultural integrity of treaty nations.

Other economic issues

The Crown's other promises of economic assistance were often expressed in the treaties by reference to the provision of fish hooks and nets, ammunition, or agricultural equipment and seeds. These items, humble as they may seem, represent the undertaking of an economic relationship. They represent the Crown offering economic development aid in exchange for peaceful coexistence and the sharing of territory.

In Chapter 5, we address the economic issues facing treaty nations and other Aboriginal peoples today and suggest some ways for the Crown to provide assistance in a modern context.

Other treaty issues

Individual treaties raise other issues that might be the subject of treaty processes. Just as ordinary items such as fish hooks and twine represent continuing commitments of economic aid, other references to apparently simple matters may signify important commitments in the treaty relationship.

Each of the numbered treaties, for example, provides specifically for rights to

education. These are sometimes expressed in the form of a simple requirement to provide a school or a teacher, but when taken together with the oral record and understanding of the treaty nation, they entitle treaty nations people to be educated so that they can earn a living in today's world (see Volume 3, Chapter 5).

Education was regarded as vital to give children the means to maintain and develop their culture and identity while at the same time acquiring the skills necessary to survive and flourish in the context of the new settler society. The treaty right cannot, therefore, be seen as limited to the salary of a teacher, the construction of a school building, or the purchase of a few books. We regard education as a proper subject for treaty processes.

The text of Treaty 6 provides for a "medicine chest".¹¹¹ Treaty nations of Treaty 6 have maintained consistently that the medicine chest provision means that full medical care was to be provided under their treaty. Other treaty peoples regard full medical care as implicit in their treaty relationship, having been discussed at the time of treaty.

The people of Treaty 8 were concerned that the treaty would lead to an enforced change in their way of life because of the imposition of taxes. They were assured by the treaty commission that this would not occur, but this assurance was not properly recorded in the written version of the treaty.¹¹²

Many treaty nations regard their immunity from taxation by the governments of Canada and the provinces as an implicit treaty right. They refer to section 90 (1) (b) of the *Indian Act*, which deems personal property "given to Indians or to a band under a treaty or agreement between a band and Her Majesty" to be "situated on reserve", thus exempting it from taxation by virtue of section 87 of the act. A revised assessment of the scope of treaty rights and obligations will conceivably have an impact on the extent of the exemption of treaty nations from taxation.

First Nations that do not have reserve land, as well as Métis people and Inuit, do not benefit from this limited exemption from tax. The present legislative exemption applies only to status Indians who can demonstrate close links between personal property (including income) and a reserve.¹¹³ Despite section 87, virtually all Aboriginal adults in Canada pay some taxes to all levels of government, and the overwhelming majority cannot take advantage of the tax exemption described in the *Indian Act*.

The legislation also draws a sharp distinction between economic activity on- and off- reserve. The Commission believes that taxation issues, like governance, must be clarified and formalized to permit a clear and predictable regime for intergovernmental relations in the future. We believe that Aboriginal governments should benefit from the immunity from taxation now enjoyed by federal and provincial government property, as guaranteed by section 125 of the *Constitution Act, 1867*.

We believe that explicit treaty-based taxation regimes should combine intergovernmental exemptions from taxation with new and enhanced powers of Aboriginal governments to tax people living on their territory, including their own members, and economic activity taking place on their territories (see Chapters 3 and 5). For these reasons, we regard taxation as an appropriate subject for treaty processes.

We believe that all discretionary payments, transfer payments and program funding should be examined in the context of the treaty discussions. Whether these payments are made now pursuant to an explicit treaty right, legislation or discretionary policy, they should come under close scrutiny in light of the treaty relationship. Many government programs now administered on the basis of need may in fact be a matter of treaty entitlement. There is a difference between collecting welfare and receiving dividends from investments. New treaties and renewed treaties should make these distinctions explicit.

Through treaty processes, and over time, treaty nations can begin to realize a real transfer of power and resources in their favour in fulfilment of the treaty relationship.

Our report contains many recommendations that could be implemented through treaty implementation and renewal processes. In making new treaties, the parties are free to fashion any arrangements they wish. No issue should be left off the negotiating table arbitrarily.

Recommendation

The Commission recommends that

2.2.11

The following matters be open for discussion in treaty implementation and

renewal and treaty-making processes:

- governance, including justice systems, long-term financial arrangements, including fiscal transfers, and other intergovernmental arrangements;
- lands and resources;
- economic rights, including treaty annuities and hunting, fishing and trapping rights;
- issues included in specific treaties (for example, education, health and taxation); and
- other issues relevant to treaty relationships identified by either treaty party.

7.5 Outcomes of Treaty Processes

Section 35(1) of the *Constitution Act, 1982* states that the “existing ... treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed”. In other words, it gives constitutional protection to treaty rights, although it is not their source. Their source is the treaties themselves. Section 35 (3) was added by a constitutional amendment in 1983. It extends the definition as follows:

For greater certainty, in subsection (1) “treaty rights” includes rights that now exist by way of land claims agreements or may be so acquired.

This amendment makes it clear that the existing treaty rights referred to in section 35(1) include rights contained in past treaties as well as rights contained in treaties yet to be made. It also makes it clear that land claims agreements past and future are a form of treaty.

Parties to a treaty should be free to modify or supplement it. In theory they can even renegotiate the treaty if they come to the conclusion that the current treaty inadequately describes their relationship.¹¹⁴ In virtually every case, however, we believe that treaty nations will not wish to renegotiate their historical treaties but will want to achieve an understanding of the real terms of those treaties and then to implement that understanding. The treaty nations that have entered into modern treaties may be more likely to ask for renegotiation, but as we

discussed earlier, they may also risk more than the other parties if that occurs.

Commissioners strongly recommend to treaty parties that they put their agreements in writing and that they include in them dispute resolution mechanisms that can be invoked by either or both treaty parties.

It is important to set out clearly the relationship between the original treaty and any treaty implementation and renewal agreement to define or supplement the rights contained in the original treaty. It might be argued that the existing treaty rights are constitutionally entrenched and thus immutable. But such an approach would distort the essential nature of treaties, which is that they create continuing relationships capable of growth, amendment and clarification as the parties desire.

Protocol agreement

The most common outcome of treaty implementation and renewal will be a formal protocol agreement that defines specific treaty rights and obligations, perhaps for specified periods of time, with clearly defined mechanisms for review and renegotiation of the elements covered by the agreement.

Such a protocol could state specifically that it is not a treaty but simply an intergovernmental agreement of a lesser nature that governs and, for certain purposes, defines rights and obligations derived from a treaty. It could also describe rights that are nonetheless treaty rights within the meaning of section 35(1). This is consistent with section 35(3) of the *Constitution Act, 1982*, which enables a land claims agreement to result in constitutionally protected treaty rights.

Such protocol agreements should be ratified legislatively to remove any doubt with regard to their legal status. This was done, for example, with the James Bay and Northern Quebec Agreement, although now the treaty nation government, as well as Parliament and, if necessary, the relevant provincial legislature, would be expected to pass legislation.¹¹⁵

Supplementary treaty

Alternatively, treaty implementation agreements could be given the status of supplementary treaties that leave the original treaties intact and add to them. From what we have heard, this approach would not likely be the preferred one

for many of the treaty nations.

It is possible that implementation and renewal of existing treaties could be achieved in part through a modern interpretation of the original historical agreement. Items not originally dealt with, or dealt with unsatisfactorily, could be handled in a supplementary treaty.

On the other hand, treaty nations such as the Mi'kmaq and the Haudenosaunee have made a series of separate treaties with the Crown and have expressed a wish to continue the treaty-making process. Any supplementary treaty would coexist with earlier treaties.

Replacement treaty

A treaty implementation and renewal agreement could consist of a new treaty that terminates and replaces the original treaty. Renegotiation or replacement should be an option for treaty nations that regard their original treaties as fundamentally flawed. This alternative is extremely unlikely to be the choice of many of the treaty nations, however, which have strongly advocated implementation of existing treaties.

We caution that there should be no requirement or expectation that the treaty implementation and renewal process will produce yet another treaty within the meaning of section 35. Since treaty nations believe strongly that their treaties already exist and are complete, it is to be expected that many — and even most — treaty nations will choose to establish implementation protocols.

Regardless of the type of agreement reached, legislation and regulations will likely have to be enacted by the treaty parties to formalize the renewed treaty and to provide for implementation, review and dispute resolution.

Recommendation

The Commission recommends that

2.2.12

The royal proclamation and companion legislation in relation to treaties provide for one or more of the following outcomes:

(a) protocol agreements between treaty nations and the Crown that provide for the implementation and renewal of existing treaties, but do not themselves have the status of a treaty;

(b) supplementary treaties that coexist with existing treaties;

(c) replacement treaties;

(d) new treaties; and

(e) other instruments to implement treaties, including legislation and regulations of the treaty parties.

7.6 Reorganization in Preparation for Treaty Processes

Later in this volume we make a series of major recommendations for restructuring federal government institutions related to Aboriginal affairs (see Chapter 3). Here we deal only with the establishment of government agencies to address treaty processes.

The government of Canada has begun to dismantle the department of Indian affairs, the first step being the signing on 7 December 1994 of a framework agreement between the minister of Indian affairs and northern development and 60 First Nations communities represented by the Assembly of Manitoba Chiefs.¹¹⁶

The agreement makes it clear that the dismantling process should restore to First Nations jurisdiction now exercised by other federal departments. Dismantling of the department has been a constant demand from treaty nations for many years. The question that arises is which agencies of the federal Crown will negotiate or maintain liaison with treaty nations in the future. In preparation for treaty renewal, thought must be given to how Crown commitments can be met in the context of a Canada that is not only a constitutional monarchy but a federation.

The Commission uses the term 'the Crown' to mean the repository of the constitutional values of our society that transcend ordinary political arrangements. The Crown is no longer a simple monolithic entity, if indeed it ever was. The Crown represents the Canadian people as well as their governments. It epitomizes the rights and obligations of the Canadian people

as a collective whole.

In the present context, the Crown is party to all treaties with treaty nations. These obligations have been assumed by the Crown, and they are now implicit in section 35(1) of the *Constitution Act, 1982*. This is true whether the treaty in question was made by the French Crown, the British Crown, the Crown in right of Canada, or the Crown in right of a province. It is even true, in our view, of treaties made by the Hudson's Bay Company under the Crown's authority, as with the Douglas treaties on Vancouver Island.

The contemporary relationship between the Crown in this sense and the treaty nations is the theme of this chapter. Our use of the term 'the Crown' embodies values, rights and obligations that would survive even the end of the monarchy in Canada, although they are symbolized by the monarchy at present.

The gradual dispersal of Crown obligations

The Crown has not implemented the spirit and intent of the treaties for many reasons. In part, it was because of different understandings on the part of the Crown's representatives and the treaty nations with respect to the treaties. The dramatic extent of cross-cultural misunderstandings was analyzed earlier.

Increasingly, however, continual reorganizations in government have resulted in trivialization of the treaties because of deliberate policies inimical to the treaties or sheer ignorance and neglect of the treaties as the source of rights and obligations.

The division of jurisdiction between the federal and provincial orders of government has also resulted in a division of the Crown's duty under the treaties. Indeed, court decisions conclude that these responsibilities belong to different entities entirely. In 1910, Lord Loreburn of the judicial committee of the privy council described the contemporary judicial view of the two separate roles of the federal and provincial Crowns in *Canada v. Ontario*:

The Crown acts on the advice of ministers in making treaties, and in owning public lands holds them for the good of the community. When differences arise between the two Governments in regard to what is due to the Crown as maker of treaties from the Crown as owner of public lands they must be adjusted as though the two Governments were separately invested by the Crown with its rights and responsibilities as treaty maker and as owner

respectively.¹¹⁷

The Commission is of the view that both federal and provincial governments are required by the honour of the Crown to participate in treaty processes and to give effect to treaty rights and promises. The fulfilment of the Crown's duty is their joint responsibility.

Remarkably, there has never been a department or agency of the government of Canada devoted to the fulfilment of treaties. The mandate of the Department of Indian Affairs and Northern Development (DIAND) is to implement the *Indian Act*. Over time, the federal government's point of contact with treaty nations has been dispersed to a host of departments and agencies, all of which apply federal legislation and policies but none of which has a mandate to address the whole array of issues arising from treaties. The rights that flow from the *Indian Act* have been accorded greater prominence than Aboriginal or treaty rights.

The result is that the original nation-to-nation treaty relationship has dissolved into a complex relationship between the governments of treaty nations (more accurately, individual band councils) and a host of federal and provincial government entities. In the process, the treaty relationship has been lost sight of.

A Crown treaty office

The organization required to enable the government of Canada to fulfil its obligations under the treaties is an important matter. In our view, DIAND cannot legitimately serve this role. The legacy remaining from the flawed relationship of the past makes the department largely incapable of implementing a new relationship. The creation of a Crown Treaty Office within a new Department of Aboriginal Relations will ensure that a department of the government of Canada has, for the first time, an unambiguous mandate to identify and implement treaty rights and obligations and to make new treaties. This will reverse the trend that has diminished the relevance of the treaties. In Chapter 3, we discuss in detail the structure and mandate of the proposed Department of Aboriginal Relations and the place of the Crown Treaty Office within it.

A Crown Treaty Office would assume the responsibilities of the Crown in right of Canada in implementing and renewing and making treaties and would coordinate the Crown's participation in treaty implementation and renewal. The role of the Crown Treaty Office should be mentioned in the royal proclamation

and its functions set out in the companion legislation. It must have a clear and prominent place in the federal government.

For the reasons discussed later in this volume, the Crown Treaty Office should be insulated from the program delivery responsibilities now exercised by DIAND. The implementation of treaty terms, which often involve multiple federal entities, should be overseen, directed and managed by the Crown Treaty Office. Its senior official, the chief Crown negotiator, will take direction from specific negotiation mandates given by cabinet to the minister of Aboriginal relations and from the work of other branches of the new Department of Aboriginal Relations.

Recommendation

The Commission recommends that

2.2.13

The royal proclamation and companion legislation in relation to treaties:

(a) establish a Crown Treaty Office within a new Department of Aboriginal Relations; and

(b) direct that Office to be the lead Crown agency participating in nation-to-nation treaty processes.

The role of provincial governments

The terms of Confederation complicated the task of identifying the Crown as a party to treaties. Under the constitution, and subject to the *Canadian Charter of Rights and Freedoms* and the constitutionally protected rights of Aboriginal peoples, the provinces are sovereign within their spheres of jurisdiction.

The rights and obligations described in the treaties have implications for the provinces, and it is clear that treaty implementation and treaty making will engage many areas of provincial legislative competence and proprietary rights. Treaty processes will require provincial Crown lands and resources to be made available to provide for a reasonable sharing of the natural resource wealth of the country. Provincial laws that now apply to Aboriginal and treaty nations people and lands will have to be modified to make room for Aboriginal

governance. As a result, successful treaty processes will require the active co-operation and participation of provincial governments as an integral component of the Crown. This is why we recommended that the provinces introduce legislation to enable them to meet their treaty obligations and participate in treaty processes (see Recommendation 2.2.9 earlier in this chapter).

Some treaties that were made between treaty nations and the undivided Crown must now be implemented by a Crown that acts through two constitutional orders of government. In addition, under the constitution, Parliament has legislative authority and the government of Canada has executive responsibility for the treaty relationship. As many treaty nations people describe it, the relationship between treaty nations and the provinces is government-to-government, while the relationship between treaty nations and the Crown in right of Canada is nation-to-nation.

Federal and provincial responsibility to meet treaty obligations must be clarified and implemented to eliminate federal/provincial disputes over cost sharing. To achieve this, some overall federal/provincial cost-sharing arrangements will have to be made (see Volume 4, Chapter 7). Recent experience suggests that these arrangements can in fact be achieved. Two examples are the 1992 Saskatchewan Treaty Land Entitlement Framework Agreement and the financial components of the British Columbia treaty process.¹¹⁸

The Commission proposes that provincial governments organize themselves, possibly through legislation parallel to the federal treaty legislation, in a way similar to the proposed Crown Treaty Office, with provincial offices being established as negotiating agencies responsible to provincial governments and legislatures.

In many provinces, agencies dedicated to Aboriginal relations already exist.¹¹⁹ In no case has a provincial government established an agency with a mandate to implement the provincial government's responsibilities with regard to the treaties or enter into new treaties. Existing provincial agencies tend to be small policy development and co-ordination offices or branches of larger ministries. Substantive responsibility (and consequent authority) for lands, resources and myriad other matters continues to be vested in line ministries.

There is good reason to think that provincial governments are subject in law to the Crown's fiduciary duties to Aboriginal and treaty nations.¹²⁰ They are obliged to respect Aboriginal rights and are subject to the burdens of treaty rights. In addition, in many cases provincial governments have been enriched

by the federal government's breaches of treaty obligations, particularly in relation to land or the failure of the Crown to enter into a treaty relationship with Aboriginal nations. As a matter of equity and honour, provincial governments should feel a particular responsibility to ensure that Aboriginal people secure a fully adequate land base.

Recommendation

The Commission recommends that

2.2.14

Each province establish a Crown Treaty Office to enable it to participate in treaty processes.

7.7 Reorganization of Aboriginal and Treaty Nations

In Chapter 3 of this volume we discuss the major issues of governance for Aboriginal peoples. We describe the harm that has been done to traditional Aboriginal governing structures, and we recognize the need for new governing bodies. These themes are of particular importance in the context of treaty processes.

This Commission cannot determine which entities can legitimately represent treaty nations in treaty processes. In many cases, treaty nation representation may not be an issue. In other cases, there may be competing entities that claim standing to represent Aboriginal and treaty nations. In Chapter 3, we discuss the need for a federal policy on recognition of Aboriginal nations.

This crucial issue has the potential to paralyze treaty processes at the outset. Many of these issues stem from Canada's legislative creation, through the *Indian Act*, of band council governments exercising delegated power, as opposed to Aboriginal and treaty nation governments. The government of Canada thus created much of the problem and should assume some role in its solution.

What is an Aboriginal or treaty nation?

Authentic renewal of treaty relationships will require realignment not only on the part of the Crown but also on the part of Aboriginal and treaty nations. Each

Aboriginal and treaty nation must ultimately determine for itself the route that it will take to a reconstituted nation government, but we feel obliged to make some observations and identify potential pathways to renewal. Later in this volume, we address the rebuilding of Aboriginal nations in more detailed terms (see Chapter 3). Here we address in a preliminary fashion the link between nationhood and treaties.

The *Royal Proclamation of 1763* refers, significantly, to “Nations or Tribes of Indians”. Consistent with this designation, the vast majority of historical treaties — in their written versions — refer to particular nations or tribes. These terms are a reflection of historical fact and British imperial practice. As we saw in our review of history, both the British and the French conducted Indian policy on the assumption that their Aboriginal counterparts possessed the political, territorial and economic characteristics of nationhood.

An Aboriginal or treaty nation is an indigenous society, possessing its own political organization, economy, culture, language and territory. The Supreme Court of the United States identified some of these characteristics of nationhood in *Cherokee Nation v. State of Georgia*:

The numerous treaties made with them by the United States recognize them as a people capable of maintaining the relations of peace and war; of being responsible in their political character for any violation of their engagements, or for any aggression committed on the citizens of the United States by any individual of their community.¹²¹

More than 140 years after this judgement, the International Court of Justice attacked the concept of *terra nullius* in its advisory opinion on the Western Sahara, noting that “at the time of colonization Western Sahara was inhabited by peoples which, if nomadic, were socially and politically organized in tribes and under chiefs competent to represent them.”¹²²

We have already referred to recognition by Chief Justice Marshall and Justice McLean of the U.S. Supreme Court that the terms ‘treaty’ and ‘nation’ were European in origin and that the only prerequisite to a valid treaty is that both parties be self-governing and capable of carrying out the treaty’s stipulations.

Displacement and deconstruction of the Indian nations as policy

Britain acknowledged the nationhood of the Indian nations at an early stage and made undertakings of non-interference with internal matters. At the same time, this recognition was often undermined by the imperatives of political and economic expediency. Intertribal and intratribal rifts were often encouraged or exacerbated by Crown agents to advance imperial or local policy objectives. As a result, the treaty-making process, which began on an explicitly nation-to-nation basis, became more ambiguous in time as the government of Canada undermined the integrity of the Aboriginal nations with which it had treaty relations.

Interference with Aboriginal political structures entered a new and more formalized stage with the federal government's adoption of the consolidated *Indian Act* in 1876. Despite the fact that the Crown was still engaged in treaty making on the basis of nationhood or at least tribal organization, the act identified bands as the legal embodiment of Indian political structure.¹²³ Moreover, bands and their membership were defined by the act, which gave the responsible minister authority to recognize and even to create bands and to divide their membership and assets. The act not only provided a legislative basis for the denial of Indian nationhood, but also recast the relationship between Indian people and the Crown in administrative instead of political terms.

As discussed in Volume 1, the *Indian Act* was intended to hasten the assimilation, civilization and eventual annihilation of Indian nations as distinct political, social and economic entities. It was not intended as a mechanism for embracing the Indian nations as partners in Confederation or for fulfilling the responsibilities of the treaty relationship. Rather, it focused on containment and disempowerment — not by accident or by ignorance, but as a matter of conscious and explicit policy. The breaking up of Aboriginal and treaty nations into smaller and smaller units was a deliberate step toward assimilation of Aboriginal individuals into the larger society.

After almost 120 years, the *Indian Act* has taken its toll — not only in the quality and the basis of the relationship between Indian nations and the Crown, but also with respect to the internal organization of the Indian and treaty nations. In the next chapter, we examine in detail the approaches Aboriginal nations may choose to pursue to reclaim and reconstruct their nationhood.

8. Institutions for Treaty Processes

There should be an independent body to oversee violations of the treaties. This body could be formed by Indigenous peoples and the Crown, and have the authority to approve fines and penalties against the treaty violator. The violators could be individuals, corporations or governments. All would be subject to the jurisdiction of this body.

There has never been any independent body in Canada to oversee the implementation of the treaties. In other Commonwealth countries that have treaties with the indigenous peoples, the state governments have tried to unilaterally implement their own form of treaty resolution. One which immediately comes to mind is the New Zealand model known as the Waitangi Tribunal. We have our own version in Canada known as the Office of the Treaty Commissioner. Each of these bodies was modelled after the American Indian Claims Commission. In the United States and in New Zealand these bodies have serviced their political masters and not the Indigenous peoples. We must strive for something which serves us.

Regena Crowchild
President, Indian Association of Alberta
Edmonton, Alberta, 11 June 1992

What may be required is an institution that would ensure the Crown's full compliance with its responsibilities and obligations. This could take a number of forms, but a key would be to place treaty implementation and treaty making outside the realm of partisan politics, with an institution whose mandate would be to uphold the honour of the Crown, not to cater to the whims of political expediency.

Alex Christmas
President, Union of Nova Scotia Indians
Eskasoni, Nova Scotia, 6 May 1992

The restoration of the treaty relationship through the making of new treaties and the implementation and renewal of existing ones will require the establishment of at least two types of independent and neutral institutions: treaty commissions and a specialized Aboriginal Lands and Treaties Tribunal. Their functions would be quite distinct, but both will be vital to the success of the proposed treaty processes.

To be legitimate in the eyes of treaty nations, these institutions must be established through consultation and negotiation with the Aboriginal and treaty nations. They must also be genuinely independent of federal and provincial governments. Finally, they can have no authority to affect any rights of Aboriginal and treaty nations that have not given their clear consent to the creation of these institutions or accepted their roles.

As a result, although this chapter has concerned steps the Crown should take to meet its unfulfilled obligations, the present discussion must be more general, in that the treaty parties must consult and agree on the institutions required to move the relationship forward.

8.1 Treaty Commissions

Throughout the history of Canada, commissions have been established to negotiate treaties with Aboriginal nations. The term commission has been used from time to time to refer to the negotiating teams appointed by the Crown and, more recently, to bodies established to facilitate treaty discussions and negotiations. It is the latter meaning we use here.

Treaty commissions should be established by the government of Canada, the appropriate provinces and territories, and Aboriginal and treaty nations. These commissions would be permanent, independent and neutral forums where negotiations as part of treaty processes can take place. They should be established on a regional basis as required, the most obvious and useful structure being along provincial or territorial lines, although the possibility of using treaty boundaries should also be explored.¹²⁴

A number of such entities now exist, including the B.C. Treaty Commission and the Saskatchewan Office of the Treaty Commission. The commissions would assist the treaty parties to resolve political and other disputes arising in treaty processes. Their mandate would be to eliminate both substantive and procedural obstacles within treaty processes.

Treaty commissions must not be simply administrative structures. What is required is the creation of an *environment* that will promote and permit treaty processes to succeed. Treaty commissions would provide the entire range of services necessary to foster and facilitate the success of talks.

Eighteenth-Century Treaty Commissions: The Council Houses

In the summer of 1764, Sir William Johnson held a great congress with 24 Indian nations at Niagara. When a peace was made, Sir William extended the Covenant Chain to the nations of the Western Confederacy. His home at Fort Johnson on the Mohawk River, in what is now New York state, became the first permanent imperial council house, permanently stocked with provisions. Its outbuildings were sleeping quarters and meeting places. The shady area in front of the house was ideal for open-air councils. The home of Johnson the individual became inseparable from the council house of Johnson the representative of the Crown.

After the Revolutionary War, Lieutenant Governor John Graves Simcoe of Upper Canada envisioned a permanent council house in his capital city of London, on the Thames River. On September 1, 1794, he wrote to Lord Dorchester:

That as soon as conveniently it can be executed, a Council House should be erected for this purpose at the proposed seat of Government, London, particularly adapted as central to the Indian Nations; that there the Indian [peoples] should be assembled to receive their regular presents, with all due form and solemnity under His Majesty's Picture or Statue; that they may be taught to repose in security on their Great Father, consider him and not his Officers or Agents as their benevolent benefactor — That to this fire-place, a deputation of all their Chiefs should be annually invited to resort, to reconcile their respective differences, to receive advice, and to renew their friendship with the King's People, which they are sufficiently acquainted is indispensable for their common protection.

Simcoe's council house would have served as a place of safety and neutrality and, more important, as a concrete symbol of the relationship between the Treaty nations and the Crown. Unfortunately, it did not come into being.

Source: Paul Williams and Curtis Nelson, "Kaswentha", research study prepared for RCAP (1994), quoting from *The Correspondence of Lieut. Governor John Graves Simcoe*, ed. E.A. Cruikshank (Toronto: Ontario Historical Society, 1925).

Recommendations

The Commission recommends that

2.2.15

The governments of Canada, relevant provinces and territories, and Aboriginal and treaty nations establish treaty commissions as permanent, independent and neutral bodies to facilitate and oversee negotiations in treaty processes.

2.2.16

The following be the essential features of treaty commissions:

- Commissioners to be appointed in equal numbers from lists prepared by the parties, with an independent chair being selected by those appointees.
- Commissions to have permanent administrative and research staff, with full independence from government and from Aboriginal and treaty nations.
- Staff of the commissions to act as a secretariat for treaty processes.
- Services of the commissions to go beyond simple facilitation. Where the parties require specialized fact finding of a technical nature, commissions to have the power to hire the necessary experts.
- Commissions to monitor and guide the conduct of the parties in the treaty process to ensure that fair and proper standards of conduct and negotiation are maintained.
- Commissions to conduct inquiries and provide research, analysis and recommendations on issues in dispute in relation to historical and future treaties, as requested jointly by the parties.
- Commissions to supervise and facilitate cost sharing by the parties.
- Commissions to provide mediation services to the parties as jointly requested.
- Commissions to provide remedies for abuses of process.
- Commissions to provide binding or non-binding arbitration of particular

matters and other dispute resolution services, at the request of the parties, consistent with the political nature of the treaty process.

Above all, treaty commissions must respect the political and even diplomatic nature of treaty processes. They must be and be seen to be independent of the parties. They cannot legitimately have any authority to resolve disputes unless such authority is conferred on them by both parties.

Treaty commissions will serve as the guardians or keepers of treaty processes. To give them the best chance of achieving this status, there must be full and open consultations with Aboriginal and treaty nations before the Crown brings them into being. Corresponding laws or resolutions of Aboriginal and treaty nations would then be required before treaty commissions could be considered a legitimate part of individual treaty negotiations.

8.2 An Aboriginal Lands and Treaties Tribunal

There will be a need to resolve disputes within treaty processes. As we have shown, a treaty process is political by nature. In Chapter 4 we recommend establishment of an Aboriginal Lands and Treaties Tribunal. We have considered carefully the relationship between the tribunal, which would be a court-like and adjudicative body, and the institutions necessary to ensure success in a political process. Our concern is the relationship between the tribunal, which would have a broad mandate to hear and decide disputes, and the profoundly political nature of a treaty process.

Many treaty nations' representatives have expressed concern about the present role of the courts in adjudicating treaty issues. The courts are seen as a product of the Crown's legal and political system and as such are perceived as lacking legitimacy to address questions arising from a nation-to-nation political relationship. Others, however, have asked us to respond to the shortcomings of the court system by recommending establishment of a judicial body with binding authority but one that would be more detached from the Crown's legal and political traditions.

We recommend that the tribunal play a supporting role in treaty processes, with three main elements in its mandate. First, the tribunal should have jurisdiction over process-related matters such as ensuring that the parties negotiate in good faith. Second, the tribunal should have the power to make orders for interim relief. Third, the tribunal should have jurisdiction to hear appeals on

funding issues.¹²⁵

The tribunal would be a forum of last resort in treaty processes, and every attempt should be made to provide for the negotiated, mediated or arbitrated resolution of treaty disputes with the assistance of treaty commissions, which would have primary responsibility for ensuring that treaty processes are kept moving and on track.

The existence of the tribunal should not shape treaty processes. Its jurisdiction over treaty processes should be limited to deciding particular matters that might otherwise have been litigated in court and to acting as an appellate body in relation to certain functions of the treaty commissions. Most important, in the treaty processes the tribunal must be only one of an array of dispute-resolution mechanisms available to the treaty parties.

Recommendation

The Commission recommends that

2.2.17

The Aboriginal Lands and Treaties Tribunal recommended by this Commission (see Volume 2, Chapter 4) play a supporting role in treaty processes, particularly in relation to

- (a) issues of process (for example, ensuring good-faith negotiations);
- (b) the ordering of interim relief; and
- (c) appeals from the treaty commissions regarding funding of treaty processes.

Notes:

* Tables of contents in the volumes themselves may be slightly different, as a result of final editing.

* Because of its length, Volume 2 is published in two parts, the first containing

chapters 1 to 3 and the second chapters 4 to 6.

* Transcripts of the Commission hearings are cited with the speaker's name and affiliation, if any, and the location and date of the hearing. See *A Note About Sources* at the beginning of this volume for information about transcripts and other Commission publications.

* In this chapter we use the term 'treaty nations' to refer to the Aboriginal parties to treaties with the Crown. We use the term 'Aboriginal nations' to refer to nations of Aboriginal people that have not yet made a treaty with the Crown that addresses their Aboriginal rights and title. We refer to these nations collectively as 'Aboriginal and treaty nations'.

1 *R. v. Sparrow*, [1990] 1 S.C.R. 1075 at 1099.

2 Peter Cumming and Neil Mickenberg, *Native Rights in Canada* (Toronto: General Publishing, 1972), p. 331.

3 *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272 at 289-90 (1954), Reed J.

4 The following studies were conducted as part of the research program of the Royal Commission on Aboriginal Peoples [RCAP]: Stephen Aronson and Ronald C. Maguire, "Federal Treaty Policy Study" (1994); Russel Lawrence Barsh and James Youngblood Henderson, "International Context of Crown-Aboriginal Treaties in Canada" (1995); Harold Cardinal, "Treaty 8 æ A Case Study" (1994); Denys Delâge et al., "Les autochtones de la Nouvelle France et du Québec : XVIe XXe siècles" (1995), which includes the following studies: Denys Delâge, "Les échanges culturels dans l'alliance franco-amérindienne, 1600-1760" (1995), Marc Jetten, "La reconnaissance et l'acquisition de la propriété autochtone en Amérique du Nord (du XVIIe et XIXe siècles) : Le cas des nations domiciliées du Canada" (1993), Jean-Pierre Sawaya, "Les sept nations du Canada : traditions d'alliance dans le nord-est, XVIIIe et XIXe siècles" (1994), and Régent Sioui, "Les enjeux contemporains au Québec" (1994); Peter W. Hutchins and Anjali Choksi, "Renouncing the Old Rules of the Game: Crown Conduct in the Context of Litigation Involving Aboriginal Peoples" (1994); Peter Russell and Roger Jones, "Aboriginal Peoples and Constitutional Reform" (1995); Andrée Lajoie et al., *Le statut juridique des autochtones au Québec et le pluralisme* (Cowansville, Quebec: Éditions Yvon Blais, 1996), which includes the following studies: Andrée Lajoie, "Synthèse introductive", Jean-Maurice Brisson, "L'appropriation du Canada par la France de 1534 à 1760 ou les rivages inconnus du droit", Sylvio Normand, "Les droits des

Amérindiens sur le territoire sous le Régime français”, Andrée Lajoie and Pierre Verville, “Les traités d’alliance entre les Français et les Premières Nations sous le Régime français”, and Alain Bissonnette, “L’influence du Régime français sur le statut et les droits des peuples autochtones du Canada : relecture critique de la jurisprudence”; Rene M.J. Lamothe, “‘It Was Only a Treaty’: A Historical View of Treaty 11 According to the Dene of the Mackenzie Valley” (1993); Yngve Georg Lithman, “The Feathers of a Bird and the Frosts of Winter: Portability of Treaty Rights in an Era of Restraint and Off-Loading” (1994); Joseph Eliot Magnet, “Métis Land Rights in Canada” (1993); Louise Mandell and E. Ann Gilmour, “Land Rights of the Métis” (1994); James Morrison, “The Robinson Treaties of 1850: A Case Study” (1994); John Olthuis and H. W. Roger Townshend, “Is Canada’s Thumb on the Scales?: An Analysis of Canada’s Comprehensive and Specific Claims Policies and Suggested Alternatives” (1995); Delia Opekokew, “The Inherent Right of Self-Government as an Aboriginal and Treaty Right” (1994); Louise Mandell, “B.C. Issues” (1993); Alan Pratt, “Discussion Paper Regarding the Natural Resources Transfer Agreements of the Prairie Provinces” (1994); Alan Pratt, “The Numbered Treaties and Extinguishment: A Legal Analysis” (1995); D.N. Sprague, “Administrative History of Métis Claims” (1994); Thalassa Research, “Nation to Nation: Indian Nation-Crown Relations in Canada” (1994); Frank Tough and Leah Dorion, “‘The claims of the half-breeds---have been finally closed’: A Study of Treaty Ten and Treaty Five Adhesion Scrip” (1993); Sharon H. Venne, “Final Report on Treaty 6 Case Study” (1994); Bill Wicken, “An Overview of the 18th Century Treaties Signed Between the Mi’kmaq and Wuastukwiuk Peoples and the English Crown, 1725-1928” (1993); Paul Williams and Curtis Nelson, “Kaswentha” (1995); and James Youngblood Henderson, “Land in British Legal Thought” (1994). For information about research studies prepared for RCAP, see *A Note About Sources* at the beginning of this volume.

5 We use the term ‘myth’ here in the sense used by Douglas Sanders in *Aboriginal Self-Government in the United States* (Kingston: Institute of Intergovernmental Relations, Queen’s University, 1985), p. 2. A major myth in United States Indian law is the concept that elements of inherent tribal sovereignty have continued from the point of first contact with Europeans. I call it a myth, for it is difficult to see how the concept was respected in the periods of removal, allotment and termination. It is a myth in the most positive sense of being a concept designed to instruct and give meaning to people and institutions. The myth has allowed the transformation of institutions.

6 Alexis de Tocqueville, *Democracy in America*, trans. George Lawrence, ed. J.P. Mayer, Volume 1 (New York: Harper & Row, Publishers, 1988), p. 339.

7 *Constitution Act, 1982*, s. 35(1).

8 *Constitution Amendment Proclamation, 1983*, s. 35(3).

9 A notable and valuable exception is the high school text by Richard Price, *Legacy: Indian Treaty Relationships* (Edmonton: Plains Publishing Inc., 1991).

10 See also RCAP, *Partners in Confederation: Aboriginal Peoples, Self-Government, and the Constitution* (Ottawa: Supply and Services, 1993).

11 *R. v. Secretary of State for Foreign and Commonwealth Affairs, ex parte Indian Association of Alberta*, [1982] 2 All E.R. 118 at 124, Lord Denning MR. Lord Denning quotes from a 1794 New Brunswick treaty with the Mi'kmaq.

12 *Simon v. The Queen*, [1985] 2 S.C.R. 387 at 404.

13 For a harrowing account of genocide in the Americas see David E. Stannard, *American Holocaust: Columbus and the Conquest of the New World* (New York: Oxford University Press, 1992).

14 See Russel Lawrence Barsh and James Youngblood Henderson, "Aboriginal Rights, Treaty Rights, and Human Rights: Indian Tribes and 'Constitutional Renewal'", *Journal of Canadian Studies* 17/2 (1982), pp. 55-81.

15 A notable example is the case of *Sandra Lovelace v. Canada*, a 1981 decision of the United Nations Human Rights Committee under Article 5(4) of the *Optional Protocol to the International Covenant on Civil and Political Rights*. The decision is reproduced at [1982] 1 C.N.L.R. and concluded that section 12(1)(b) of the *Indian Act* was in violation of several articles of the covenant. Bill C-31 repealed that provision in 1985.

16 See *Pawis v. The Queen*, [1980] 2 F.C. 18 (1979) 102 D.L.R. (3d) 602 (F. C. T. D.).

17 See *Francis v. The Queen*, [1956] S.C.R. 618.

18 *Simon* (cited in note 12) at 404.

19 *Vienna Convention on the Law of Treaties*, UN Doc. A/CONF.39/27 (1969).

20 *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29 at 36, Dickson J.

21 *R. v. Sioui*, [1990] 1 S.C.R. at 1044.

22 *Sioui* at 1038.

23 *Ontario (A.G.) v. Bear Island Foundation*, [1991] 2 S.C.R. 570 at 575.

24 *Sparrow* (cited in note 1) at 1075.

25 *Sparrow* at 1109.

26 *R. v. Taylor and Williams* (1982), 34 O.R. (2d) 360 at 367, MacKinnon A.C.J.O.

27 *Sparrow* (cited in note 1) at 1108.

28 *Taylor* (cited in note 26) at 364.

29 *Sioui* (cited in note 21) at 1045.

30 *Jones v. Meehan*, 175 U.S. 49 (1899).

31 *Sioui* (cited in note 21) at 1036.

32 The Supreme Court of Canada has indicated that this language can no longer be accepted. See *Simon* (cited in note 12) at 400.

33 *R. v. Howard*, [1994] 2 S.C.R. 299 at 306-307 [references omitted]. *Howard* involved the question of whether a treaty made in 1923 had extinguished a pre-existing treaty right to fish. The circumstances surrounding the 1923 treaty negotiations are troubling, in part because the treaty commissioners rejected a request by legal counsel for the Aboriginal parties to be heard during the public hearings. Furthermore, there is no evidence that the legal implications of the treaty were explained to the Aboriginal signatories, by the treaty commissioners or anyone else, when the treaty was signed.

34 *Eastmain Band v. Canada*, [1993] 1 F.C. 501 at 518 (F. C. A.). Leave to

appeal to Supreme Court of Canada denied, [1993] 3 S.C.R. vi. Sébastien Grammond, in “Aboriginal Treaties and Canadian Law” (1994) 20 Queen’s L.J. 57 at 74-75, has criticized the decision because it ignores the fact that the Crees were essentially compelled to negotiate because the Quebec Court of Appeal had, in *Société de développement de la Baie James v. Kanatewat*, [1975] C.A. 166, dissolved the injunction granted by Justice Malouf of the Superior Court ([1974] Que. P.R.) and because the decision does not refer to the fiduciary duty of the Crown that may have been created by the extinguishment of Aboriginal rights by the Agreement. See also Sébastien Grammond, *Les traités entre l’État canadien et les peuples autochtones* (Cowansville, Que.: Les Éditions Yvon Blais Inc., 1995), p. 129.

35 *R. v. Horse*, [1988] 1 S.C.R. 187 at 201-202.

36 *Horse* at 203.

37 *Sioui* (cited in note 21) at 1046. The judgment of Bisson J.A. is reported at [1987] R.J.Q. 1722 at 1729.

38 Brian Slattery, “Understanding Aboriginal Rights” (1987) 66 Can. Bar Rev. 727 at 734-735.

39 S.M. Waddams, *The Law of Contracts*, 3rd ed. (Toronto: Canada Law Book Inc., 1993), pp. 217-18 [emphasis added].

40 *R. v. Bartleman* (1984), 55 B.C.L.R. 78 at 92 (C.A.).

41 *Bartleman* at 88.

42 *Black’s Law Dictionary*, 6th ed. (St. Paul, Minn.: West Publishing Co., 1990), p. 40.

43 *Horseman v. The Queen*, [1990] 1 S.C.R. 901 at 907.

44 *R. v. Batisse* (1978), 19 O.R. (2d) 145 at 151 (Dist. Ct.).

45 *R. v. Tennisco* (1981), 131 D.L.R. (3d) 96 at 105 (Ont. S.C.).

46 *Simon* (cited in note 12) at 404.

47 See D.J. Harris, *Cases and Materials on International Law*, 3rd ed. (London: Sweet & Maxwell, 1983), p. 608. Material breach is defined in Article 60 (3) as

(a) a repudiation of the treaty not sanctioned by the present Convention; or

(b) the violation of a provision essential to the accomplishment of the object or purpose of the treaty.

48 *Bear Island Foundation* (cited in note 23) at 570.

49 *Ontario (A.G.) v. Bear Island Foundation* (1989), 68 O.R. (2d) 394 at 419 (Ont. C.A.).

50 Leading cases such as *St. Catherine's Milling and Lumber Co. v. The Queen* (1888), 14 Appeal Cases 46 (Judicial Committee of the Privy Council) were decided without any participation by the Aboriginal peoples whose rights were under discussion. In addition, from 1927 to 1951, the *Indian Act* made it an offence for band funds to be used for litigation. See the *Indian Act*, R.S.C. 1927, chapter 98, section 141, and Volume 1, Chapter 9 of this report.

51 *Delgamuukw v. British Columbia (A.G.)*, [1993] 5 C.N.L.R. 1 at 254-55, Lambert J.A.

52 *Secretary of State for Foreign and Commonwealth Affairs* (cited in note 11) at 129-30.

53 *Johnson v. M'Intosh*, 5 U.S. (8 Wheaton) 543 at 573-74, Marshall C.J. (1823). For further discussion of these issues see Robert A. Williams, *The American Indian in Western Legal Thought: The Discourses of Conquest* (New York: Oxford University Press, 1990).

54 In the case of the Crown, we regard the recognition and affirmation of existing treaty rights in section 35(1) of the *Constitution Act, 1982* as conclusive of the Crown's affirmation.

55 *Sioui* (cited in note 21) at 1045.

56 Article 44(3) of the Vienna Convention (cited in note 19) provides that a party may as a general rule only invalidate, terminate, withdraw from or suspend the operation of a treaty as a whole, and may only do so in relation to

particular clauses if

(a) the said clauses are separable from the remainder of the treaty with regard to their application;

(b) it appears from the treaty or is otherwise established that acceptance of those clauses was not an essential basis of the consent of the other party or parties to be bound by the treaty as a whole; and

(c) continued performance of the remainder of the treaty would not be unjust.

Article 45 of the Vienna Convention provides that a state may not invalidate, terminate or withdraw from a treaty if, after becoming aware of the certain facts that might justify those actions:

(a) it shall have expressly agreed that the treaty is valid or remains in force or continues in operation, as the case may be; or

(b) it must by reason of its conduct be considered as having acquiesced in the validity of the treaty or in its maintenance in force or in operation, as the case may be.

57 See Alan Pratt, “The Numbered Treaties and Extinguishment: A Legal Analysis”, research study prepared for RCAP (1995).

58 See Pratt, “The Numbered Treaties”.

59 *New Zealand Maori Council v. Attorney-General* (1987), 1 N.Z.L.R. 641 at 664 (C.A.) [emphasis added].

60 *New Zealand Maori Council* at 682.

61 *New Zealand Maori Council* at 703.

62 See RCAP, *Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada* (Ottawa: Supply and Services, 1996).

63 RCAP, *Treaty Making in the Spirit of Co-existence: An Alternative to Extinguishment* (Ottawa: Supply and Services, 1995).

64 Elders of Treaty 7: Walter Hildebrandt, Dorothy First Rider, and Sarah Carter, *The Spirit and Intent of Treaty 7* (Treaty 7 Tribal Council, Tsuu T'ina, Alberta, 1993), p. 6.

65 RCAP, *Treaty Making in the Spirit of Co-existence* (cited in note 63), p. 17.

66 RCAP, *Treaty Making in the Spirit of Co-existence*, p. 57.

67 See Pratt, "The Numbered Treaties" (cited in note 57).

68 *Worcester v. State of Georgia*, 8 U.S. (6 Peters) 515 at 559-561 (1832).

69 *Worcester v. State of Georgia* at 581.

70 See *Re Paulette and Registrar of Land Titles No. 2* (1973), 42 D.L.R. (3d) 8 at 40: "That notwithstanding the language of the two treaties there is sufficient doubt on the facts that aboriginal title was extinguished that such claim for title should be permitted to be put forward by the Caveators." This decision was subsequently overturned on technical grounds (related to the availability of the caveat) that do not affect the point here.

71 Many examples can be given here. In *Treaty No. 8 made June 21, 1899 and Adhesions, Reports, etc.* (Ottawa: Queen's Printer, 1966), the treaty commissioners for Treaty 8 recorded a promise that no taxation would be permitted, but this was not included in the treaty text. The report on the negotiations leading to Treaty 3, *Treaty No. 3 between Her Majesty the Queen and the Saulteaux Tribe of the Ojibbeway Indians at the Northwest Angle on the Lake of the Woods with Adhesions* (Ottawa: Queen's Printer, 1966), included mention that the wild rice harvest was to be protected, but again this was not included in the treaty text.

72 Few if any treaties made in Canada explicitly address the rights of the treaty nations to govern themselves. Implicitly, however, the power to fulfil the treaty promises requires that the treaty nations be self-governing.

73 *Bear Island Foundation* (cited in note 23) might be such a case.

74 See *R. v. Batisse* (quoted earlier in the chapter and cited in note 44) in relation to *The James Bay Treaty: Treaty No. 9 (made in 1905 and 1906), and Adhesions made in 1929 and 1930* (Ottawa: Queen's Printer, 1964).

75 For example, see transcripts of the hearings of the Royal Commission on Aboriginal Peoples [hereafter RCAP transcripts] for the following: Brian Lee, Hobbema, Alberta, 10 June 1992; Chief Lindsay Cyr and Felix Musqua, Saskatoon, Saskatchewan, 28 October 1992; Johnson Sewepegaham, Chief Bernie Meneen and Harold Cardinal, High Level, Alberta, 29 October 1992; François Paulette, Yellowknife, Northwest Territories, 9 December 1992; and Gregg Smith and Dorothy First Rider, Lethbridge, Alberta, 25 May 1993, among others.

76 In our view this remains true even in cases where the government of a province has signed a treaty. See in this context *R. v. Batisse* (cited in note 44) at 148-49 in relation to Treaty 9 and *R. v. Howard* (cited in note 33) in relation to the 1923 Williams treaties.

77 *Edwards v. Canada (A.G.)* (1929), [1930] A.C. 124 at 136.

78 This is the direct result of the landmark decision of the High Court of Australia in *Mabo v. Queensland* (1992), 107 A.L.R. 1.

79 As provided in *The Appropriations Act*, 25 U.S.C. § 71 (1871): “No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty; *Provided, further*, That nothing herein contained shall be construed to invalidate or impair the obligation of any treaty heretofore lawfully made and ratified with any such Indian nation or tribe.” See Felix S. Cohen, *Handbook of Federal Indian Law* (Charlottesville, Virginia: Michie, Bobbs-Merrill, 1982), p. 107.

80 The U.S. Constitution, Article II, section 2(2) provides that the president “shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur.” This has always been held to include treaties with Indian tribes; see, for example, *Fellows v. Blacksmith*, 60 U.S. (19 Howard) 366 at 372 (1856).

81 First Ministers Conference: The Rights of Aboriginal Peoples, Ottawa, April 2-3, 1985, “Notes for an Opening Statement by the Right Honourable Brian Mulroney, Prime Minister of Canada”, at 7-8.

82 Frank Oberle, P.C., M.P., “Treaty 8 Renovation æ Discussion Paper,” January 31, 1986. This paper has never been formally published, yet with the consent of the minister was widely circulated for discussion purposes in March 1986.

83 See Harold Cardinal, RCAP transcripts, High Level, Alberta, 29 October 1992.

84 See the RCAP transcripts for the following: Tribal Council of High Level, Alberta, 29 October 1992; Treaty 7 Tribal Council, Lethbridge, Alberta, 25 May 1993; and Federation of Saskatchewan Indian Nations, Saskatoon, Saskatchewan, 28 October 1992.

85 Meeting of the First Ministers and Aboriginal and Territorial Leaders, “Charlottetown Accord æ Draft Legal Text, October 9, 1992”, s. 35.6(2)-(6). This text did not receive formal approval from governments before the referendum vote in October 1992.

86 See *Creating Opportunity: The Liberal Plan for Canada* (Ottawa: Liberal Party of Canada, 1993), p. 98: A Liberal government will seek the advice of treaty First Nations on how to achieve a mutually acceptable process to interpret the treaties in contemporary terms, while giving full recognition to their original spirit and intent.

In a news release on 8 October 1993, the Liberal Party of Canada called for the creation of a land claims commission with the following functions: To report regularly to Parliament; to facilitate claims negotiations; to establish time frames; to develop criteria for validating claims; *to inquire into the need to clarify or renovate treaties to make their express terms consistent with their spirit and intent*; and to have an ongoing role in the implementation of claims agreements. [emphasis added]

87 *The Dismantling of the Department of Indian Affairs and Northern Development, the Restoration of Jurisdictions to First Nations Peoples in Manitoba and Recognition of First Nations Governments in Manitoba æ Framework Agreement*, 7 December 1994, s. 5(5.3).

88 Mohawk Councils of Akwesasne, Kahnawake and Kanesatake, letter to RCAP, 27 January 1995.

89 Mohawk Councils of Akwesasne, Kahnawake and Kanesatake, “A Joint Statement on the Inherent Right of Self-Determination and the Exercise of that Right by Akwesasne, Kahnawake and Kanesatake”, (1995).

90 *Declaration of Intent*, 16 March 1995.

91 *Aboriginal Self-Government: The Government of Canada’s Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government* (Ottawa: Public Works and Government Services, 1995), p. 8.

92 See *Yukon First Nations Self-Government Act*, S.C. 1994, c. 35; see also Department of Indian Affairs and Northern Development, *Comprehensive Land Claims Policy* (Ottawa: Supply and Services, 1986), p. 18: “As a matter of policy, most aspects of [negotiated self-government] arrangements will not receive constitutional protection unless a constitutional amendment to this effect is in force”.

93 DIAND, *Comprehensive Land Claims Policy*, p. 12.

94 The *Simon* (cited in note 12) and *Sioui* (cited in note 21) decisions involved such treaties, in the context of section 88 of the *Indian Act*. While the Supreme Court of Canada has yet to hold specifically that a treaty of peace and friendship gives rise to constitutionally protected rights, there is no reason to think that the court will depart from its earlier findings.

95 The Grand Council of Micmacs, the Union of Nova Scotia Indians and the Native Council of Nova Scotia, *The Mi’kmaq Treaty Handbook* (Sydney, N.S.: Native Communications Society of Nova Scotia, 1987), p. i.

96 See Wendy Moss, “Inuit Perspectives on Treaty Rights and Governance Issues”, in RCAP, *Aboriginal Self-Government: Legal and Constitutional Issues* (Ottawa: Supply and Services, 1995), p. 95.

97 *Nunavut Land Claims Agreement Act*, S.C. 1993, c. 29, brought into force 10 June 1993. This agreement not only settled the comprehensive land claim to the eastern Arctic but enabled the establishment of the new territory of Nunavut as well. See *Nunavut Act*, S.C. 1993, c. 28.

98 Inuit Tapirisat of Canada, RCAP transcripts, Ottawa, 3 November 1993.

99 *Sahtu Dene and Metis Comprehensive Land Claim Agreement* (Ottawa: Public Works and Government Services, 1993).

100 Among the many references to the Royal Proclamation in the leading court cases, see *The King v. Lady McMaster*, [1926] Ex. C. R. 68 at 72-74; *Easterbrook v. The King*, [1931] S.C.R. 210 at 214-15 and 217-18; *Calder v. British Columbia (A.G.)*, [1973] S.C.R. 313 at 394-401, Hall J.; *Guerin v. The Queen*, [1984] 2 S.C.R. 335 at 383, Dickson J.; *Sioui* (cited in note 21) at 1063-64; and *R. v. Secretary of State for Foreign and Commonwealth Affairs* (cited in note 11).

101 See also RCAP, *Treaty Making* (cited in note 63).

102 This is generally true of the treaty nations that are party to the numbered treaties. Having said this, it must be recognized that the treaty nations that are parties to early peace and friendship treaties do not regard their treaties as having attempted to define a comprehensive relationship with the Crown.

103 See Chapter 3 of this volume and RCAP, *Partners in Confederation* (cited in note 10), pp. 11-14, 16-19.

104 See RCAP, *Bridging the Cultural Divide* (cited in note 62).

105 See Pratt, "The Numbered Treaties" (cited in note 57) and Volume 1, Chapters 4 and 5.

106 In British Columbia, until recently (the Nisg_a'a agreement being the most noteworthy example), there has been no attempt to obtain a cession of Aboriginal title, and a treaty-making process has been established. In the Atlantic provinces, there are numerous treaties of peace and friendship that do not purport to affect Aboriginal title. In the Northwest Territories some comprehensive claims have been settled and others have been in negotiation for many years. In Quebec some comprehensive claims have been settled and others are in negotiation.

107 See James Morrison, "Robinson Treaties of 1850: A Case Study", research study prepared for RCAP (1993).

108 *Treaties 1 and 2 between Her Majesty the Queen and the Chippewa and Cree Indians of Manitoba and Country Adjacent with Adhesions* (Ottawa:

Queen's Printer, 1957).

109 See Alan Pratt, "Discussion Paper Regarding the Natural Resources Transfer Agreements of the Prairie Provinces", research study prepared for RCAP (1994).

110 The *Migratory Birds Convention Act* was repealed and replaced in 1994 by the *Migratory Birds Convention Act, 1994*, S.C. 1994, chapter 22 to address this difficulty. It now includes a 'non-derogation' clause to protect Aboriginal and treaty rights from its provisions. Amendments to the international agreement in question, the Migratory Birds Convention, are currently under negotiation by the states party to the convention to address this concern.

111 *Copy of Treaty No. 6 between Her Majesty the Queen and the Plain and Wood Cree Indians and Other Tribes of Indians at Fort Carlton, Fort Pitt and Battle River with Adhesions* (Ottawa: Queen's Printer, 1964).

112 See "Report of Commissioners for Treaty No. 8" [22 September 1899], in *Treaty No. 8* (cited in note 71), p. 6.

113 See *Williams v. Canada*, [1992] 1 S.C.R. 877.

114 See Bill Nothing, RCAP transcripts, Sioux Lookout, Ontario, 1 December 1992, regarding the position of the Nishnawbe-Aski Nation with respect to the issue of renegotiating Treaty 9: In the past they have talked about renegotiating or renovating the treaty. However, when the draft Memorandum of Understanding was presented to the chiefs in 1985, all reference to the treaty was removed at the request of the chiefs. The MOU [memorandum of understanding] process is not a treaty-based initiative.

Despite the written text of the treaty, First Nations did not agree to surrender land. One judge, who is involved in the RCNE [Royal Commission on the Northern Environment] litigation case stated that we had a claim which may not yet have been legally recognized to the ownership of a vast area of land.

The treaty will remain intact and all options for dealing with the treaty are still open to NAN [Nishnawbe-Aski Nation]. Work on legal challenges for the treaty, treaty implementation or treaty interpretation, can and should continue.

115 For a discussion of the status of the James Bay and Northern Quebec

Agreement in light of the federal and provincial legislation that ratified and incorporated the agreement, see the article and book by Sébastien Grammond (cited in note

34). See also *Nunavut Land Claims Agreement Act* (cited in note 97), s. 4.

116 See *The Dismantling of the Department of Indian Affairs* (cited in note 87).

117 *Dominion of Canada v. Province of Ontario*, [1910] A.C. 637 at 645.

118 See *Saskatchewan Treaty Land Entitlement Framework Agreement between the Government of Canada, the Entitlement Bands and the Province of Saskatchewan*, 22 September 1992, E98 C6 C2 (Sask.); and *Memorandum of Understanding between Canada and British Columbia Respecting the Sharing of Pre-Treaty Costs, Settlement Costs, Implementation Costs and the Costs of Self-Government* (Vancouver: Ministry of Aboriginal Affairs, 21 June 1993).

119 See the following domestic governance case studies commissioned by the RCAP research program: Peter Aucoin and Violet Paul, “Canadian Governments and Aboriginal Peoples Project: Province of Nova Scotia” (1995); Kathy Brock, “Relations with Canadian Domestic Governments: Manitoba” (1995); David Cameron and Jill Wherrett, “New Relationship, New Challenges: Aboriginal Peoples and the Province of Ontario” (1995); Ken Coates, “First Nations and the Yukon Territorial Government: Toward a New Relationship” (1993); John Crossley, “Relations Between the Province and Aboriginal Peoples in Prince Edward Island” (1995); Gurston Dacks, “Canadian Governments and Aboriginal Peoples: The Northwest Territories” (1995); G. Bruce Doern, “The Politics of Slow Progress: Federal Aboriginal Policy Processes” (1994); Paul J. Dudgeon and Thomas Dore, “Domestic Governance Project: Regina Government Study” (1993); Renée Dupuis, “The Government of Quebec and Aboriginal Self-Government” (1995) [translation]; Roger Gibbons, Sonia Arrison and Jennifer Stewart, “Domestic Governments and Aboriginal Peoples: The Alberta Case” (1995); Robert Gravel, “Relations entre les gouvernements municipaux de la région de Québec et le village des Hurons-Wendat” (1995); David Milne, “The Case of New Brunswick-Aboriginal Relations” (1995); Darcy A. Mitchell and Paul Tennant, “Government to Government: Aboriginal Peoples and British Columbia” (1994); Ken Rasmussen, “Canadian Governments and Aboriginal Peoples: The Case of Saskatchewan/Aboriginal Relations” (1995); and Adrian Tanner et al., “Aboriginal Peoples and Governance in Newfoundland and Labrador” (1994).

120 See the following research studies prepared for RCAP: S. James Anaya, Richard Falk and Donat Pharand, *Canada's Fiduciary Obligation to Aboriginal Peoples in the Context of Accession to Sovereignty by Quebec*, Volume 1, *International Dimensions*, and Renée Dupuis and Kent McNeil, Volume 2, *Domestic Dimensions* (Ottawa: Supply and Services, 1995); and Patrick Macklem, "Normative Dimensions of the Right of Aboriginal Self-Government", in *Aboriginal Self-Government* (cited in note 96).

121 *Cherokee Nation v. State of Georgia*, 5 Peters (1831) at 1-2.

122 *Western Sahara Advisory Opinion*, [1975] I.C.J. Reports at 39.

123 For example, Treaty No. 6 (cited in note 111) of 1876 was made with the 'Plain and Wood Cree Indians'.

124 This is the suggestion made by the Assembly of First Nations in "Reclaiming Our Nationhood, Strengthening Our Heritage", a brief submitted to RCAP in 1993. For information about briefs submitted to RCAP, see *A Note About Sources* at the beginning of this volume.

125 A major part of the tribunal's role would be resolving disputes of a specific claims nature that, for whatever reason, the Aboriginal parties choose to have settled outside the broader treaty implementation and renewal or treaty-making processes. A detailed description of this aspect of the tribunal's proposed responsibilities is set out in Chapter 4.