NATION TO NATION:

INDIAN NATION - CROWN RELATIONS IN CANADA

A Report Prepared for the Royal Commission on Aboriginal Peoples

by

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PREFACE

This report is the result of two research projects undertaken by Thalassa Research for the Royal Commission on Aboriginal Peoples.

For the first project, Thalassa was asked to provide an analytic framework for shaping, interpreting and synthesizing the results from the Commission's treaty case studies (draft reports) and to consider treaties as a foundation for First Nations' economic self-reliance and social development. We were also asked to review and draw from the work of the Commission's policy teams in this context.

For the second project, Thalassa was asked to describe the historical, legal and practical significance of the bilateral relationship between Treaty First Nations and the Crown, and to review previous and existing models for addressing treaty issues.

As there were interconnections and some overlaps between the two projects, a single document incorporating both was produced. In structuring the final report, we have articulated and applied the analytic framework at the outset, followed by our recommendations on renewal of treaty implementation and treaty-making in the modern context. An addendum provides background information on aspects of the bilateral treaty relationship.

Both projects were conceived as comprehensive in scope but limited by the Commission's time frames and budgets. As a result, the outcome of the projects was intended to provide a broad, results-oriented consideration of treaties and the bilateral relationship - primarily for the internal deliberations of the Commission. It was not intended to be an in-depth academic treatment of each of the many issues arising under the subject, but rather as a contribution to the ongoing and dynamic development of treaty policy.

With this caveat in mind, other readers may find the report of some use. In any event we trust that it provides some assistance to the parties as they contemplate the work that remains in obtaining an authentic renewal of the treaty process.

Thalassa Research,
Vancouver, British Columbia,
December 12, 1994.

A. THE INDIAN-CROWN TREATY RELATIONSHIP IN CANADA:

AN HISTORICAL OVERVIEW.

Over the course of North American history, First Nations entered, or were induced to enter, into Treaties whose written terms provide for the opening up of portions of their lands for settlement. No such treaties were signed for the Atlantic Provinces, Quebec, much of British Columbia, and large sectors of the north, however.

The practise of making Treaties with Indian Nations evolved through steps, each characterized by a shift in the balance of power between the signatory parties. For the purposes of analysis, we have divided these into stages, each reflecting significant changes in circumstance or practise. Admittedly these are somewhat arbitrary, and there is a degree of overlap, but they do provide some assistance in organizing the historical stream of events. In the following pages, we will return to these stages as various social and economic issues are discussed.

1. CONFLICT, PEACE AND FRIENDSHIP: 1541-1763.

During the early colonial period, Indian Nations were powerful and in control. European enclaves recognized Indian sovereignty, albeit grudgingly. Treaties were made to secure peace, trade, and alliance.

French contact with Indian Nations was generally limited to the pursuit of trade, missionary penetration, and military alliance. Land acquisition, although present, was not a significant issue.

British contact with Indian Nations produced British-Indian military and trade alliances. The sovereignty of Indian Nations was recognized, and their alliance or neutrality was essential in maintaining British strategic interests on the continent.

Treaties were intended to formalize relations with Indian nations to ensure peace, or to achieve a mutual benefit from trading and military alliance.

Treaties were based on the international practise of establishing legal and binding obligations between independent and sovereign nations.

2. ACCOMMODATION (1763-1815) AND DISLOCATION (1815-1867).

During this period, colonial powers were in ascendancy and the final chapters of intercolonial conflict and the wars of secession played themselves out. The "New World" was perceived as a place for profit and settlement. Treaties were made to achieve a non-threatening accommodation with Indian nations, to provide for an orderly process of land acquisition, and to ensure that the significant economic contribution of the fur trade was not disrupted. The Royal Proclamation prescribed the process.

The first part of this stage - accommodation - conformed closely to the principles enunciated

in the Royal Proclamation and later prerogative orders.

Pontiac's War persuaded the British Crown that Indian nations remained capable and determined to defend their interests. An accommodation was preferred by the British instead of further conflict.

The Royal Proclamation in 1763 was a unilateral declaration by the British Crown to regulate and harmonize relations between its colonial representatives and Indian Nations. Although the Proclamation itself is not a Treaty, it was by reference incorporated into a number of Treaty agreements in the period immediately following 1763 (more on this in later sections).

The Proclamation achieved several purposes, namely:

* by implication, it warned other European powers not to encroach on what the British defined as their North American sphere of influence;

* it imposed controls on British colonial governors to ensure that they did not intrude on Indian territories or interfere with the internal affairs of Indian Nations;

* it prescribed that treaty making occur in open public councils, so that all parties would be aware of the terms of agreement;

* it prescribed a process for land transactions, which were to be exclusively between the Crown and legitimate Indian authorities;

* Indian consent was required for all such transactions.

The Proclamation codified Imperial policy regarding the Treaty making process with Indian nations - it remains part of Canada's constitutional framework today.

The second part of this stage - dislocation - began generally after the War of 1812 (although in many instances it began earlier). Prospects of war faded and the Indian nations were no longer needed as allies, while increasing settlement put a high value on Indian land. By Confederation, the fur trade was already in decline and the economic partnership that had developed over the preceding 300 years was quickly shrinking as a proportion of the overall economy.

Colonists were agitating for more powers of self government (witness the Upper & Lower Canada rebellions of the late 1830's), while the Imperial government was going through a period of fiscal restraint and contraction.

With all of these dynamics at work, colonization was entering another phase. Indian nations

were increasingly seen as impediments to development, instead of allies and partners. Between 1830 and 1867, the Imperial Crown off-loaded many of it's political and financial responsibilities respecting Indians and Indian lands to local authorities, who, unbridled, began to pursue a policy of containment and economic dislocation.

The basis of post Confederation Indian policy - land cession treaties, assimilation, residential schools, fiscal transfers, etc. - was tested and adopted between 1815 and 1867. Significantly, although Imperial authorities were still technically responsible for Indian affairs, it was largely local governments which had *de facto* control over lands and treaties.

These were the very interests which Imperial authorities had previously tried so hard to prevent from holding any direct responsibility for Indian affairs, because of the *'frauds and abuses'* they had a propensity to commit. But for whatever reasons, in the years leading to Confederation they were the ones allowed to design and implement Indian policy which the Dominion government later inherited and adopted.

3. DISPLACEMENT AND ASSIMILATION (1867-1930).

The era of expansion and "nation building" arrived with Confederation in Canada. Rupert's Land was transferred to the new Dominion and the west was opened for settlement. Treaties were made on the prairies as a formality (from the Dominion's perspective) to legitimize expropriation, removal and settlement. Unbeknownst to many of the Indian nations, the Indian Act operated in tandem to contain, control and disperse Indian peoples. The ultimate aims were extinction or assimilation.

In the newly federated Canada, the displacement of Indian peoples accelerated in pace with events in the U.S.A. - though perhaps with less military conflict.

Treaty making became an instrument of displacement and frequently was effected by intimidation and by means of promises and assurances that were never kept. Thus, in Canada there is often little congruence between oral and written treaty terms.

In the Western prairies following Confederation, the furtrade economy - which had kept Indian nationhood and territories intact, and had given rise to the Metis - was superseded by an economy based on agriculture and white settlement. Accordingly, treaty making was extended to the West as a formality to legitimize dispossession - an outcome which was not understood or properly conveyed to Indian signatories.

By this time, what Indians understood to be the start of a mutually beneficial nation to nation treaty relationship (as portrayed graphically on the face of treaty medals) became instead a form of suzerainty sanctioned by settler laws (ie., the Indian Act) which operated to

detribalize, fragment, contain, and control Indian peoples and to program them for assimilation.

The Dominion government, far from fulfilling its duties as a trustee to the Indian nations *vis a vis* the interests of the provinces, usually gave the provinces wide latitude in violating treaty guarantees with respect to land, harvesting, etc.

4. DENIAL AND FRAGMENTATION: 1930-1969.

This period saw an acceleration of the policy and practise which evolved during the assimilation and displacement stage. The existence of an independent source of Indian rights was denied, as were the treaties and the treaty relationship. Treaty making, aside from several adhesions taken in the prairies, was abandoned as Dominion policy.

Between 1926 and 1951 Indian nations were effectively prohibited from preparing or advancing claims related to lands by provisions of the Indian Act.

Between the two world wars the enfranchisement provisions of the Indian Act were actively promoted to disconnect Indians from their identity and communities, and to disperse them into mainstream society.

Also, a concerted effort was made to *detribalize* Indian Nations, to reduce their land base further, and to accelerate assimilation via residential schools and by displacing traditional systems of government with Euro-Canadian municipal type administrations.

Following WWII, urbanization in Canada accelerated. Rural and frontier regions came to be seen largely as repositories of resource wealth (petroleum, minerals, forests and hydro power). Much of this land had never been ceded by Indian Nations, a fact that was not regarded as an impediment to development until the S.C.C.'s ruling in Calder in the early 1970's.

The 1950's and 1960's also saw the extension of mainstream settler 'social programs' to Indian peoples, which further served to destabilize traditional institutions and community security. These were followed in turn by settler-designed 'economic development' programs which similarly exacerbated the problems that they were supposed to address.

The treaties and the unique standing that the rights of Indian nations had under Canadian and international law were denied and deconstructed.

5. TERMINATION: 1969-1994.

A new era of 'social liberalism' led to the release of the 1969 federal White Paper. The White Paper announced that the time had come once and for all to terminate any remaining rights and special status held by the Indian nations, so that individual Indians could join Canada as "equal partners".

The 1969 White Paper was met with a concerted and vigorous response on the part of Indian nations across Canada, and as a result it was publicly dropped as a formal statement of policy in 1971-72. However, the philosophical basis of the White Paper and its policy objectives continued to play a central role in federal approaches to Indian affairs. Indeed, the White paper policy had simply gone underground.

Indian nations at the same time became more assertive at the political level and in the Canadian courts. The Calder decision of 1973 was a landmark in its recognition that aboriginal title did, after all, have some standing in Canadian law. At this point, "aboriginal title" became a problem for government and the captains of industry. Their response to the court's finding that aboriginal rights and title did exist was to actively seek their termination.

To deal with Aboriginal title, Canada introduced a *comprehensive claims* settlement policy - in the 1990's called "modern Treaties". This is a misnomer because, unlike earlier Treaties which provide a wide scope for interpretation, so-called "modern Treaties" are not predicated on a nation to nation relationship. "Modern Treaties" assume that the Indian nations concerned are neither nations nor sovereign, and that their land, in effect, can be expropriated, given financial compensation and certain other considerations. The so-called "Modern Treaties" purport to constitutionalize the assumptions and policies aimed at extinguishing both Aboriginal title and Indian identity.

These events have been paralleled by an increasing provincial role in Indian affairs, particularly in the areas of health, education, social services, child welfare, and 'off reserve' services. Much of this activity has been directly focused on dismembering the bilateral treaty relationship between Indian nations and the federal Crown, and submerging Indians within provincial or territorial jurisdiction.

In the face of this, Indian nations have won a number of important political and legal victories which served to 'legitimize' their standing in domestic law and Canadian society generally. However in each case the response of federal and provincial governments has generally been to meet them with continued denial, avoidance and delay, proceeding in the meantime with their own agenda.

6. CONCLUSIONS.

The five stages of Treaty making laid out in preceding pages suggest that:

* What started as a genuine 'nation to nation' Treaty making process became over time an artifice for the sole purpose of acquiring Indian lands and making Indian nations vanish as distinct peoples. Canada and its citizens have reaped substantial benefits from this turn of events, while Indian nations and their citizens have incurred significant loss.

* The result has been a wide and increasing divergence between the 'spirit and intent' of Treaties, as understood by Indian peoples, and federal statutes and policy initiatives designed to assimilate & dispossess Indian nations.

* In a sense therefore, the current bilateral connection between federal authorities and Indian nations is primarily for the purpose of achieving federal assimilation/termination goals.

* At the same time, many Indian nations insist on maintaining a bilateral relationship with the Crown as a necessary prerequisite to treaty implementation and treaty making.

* The result in 1994 is a bilateral treaty relationship in stalemate.

Most Indian nations are committed to their survival and flourishing as distinct societies. To survive and flourish, they require a viable land and resource base and full control over their political, legal and economic institutions. To survive as Indian nations is not to become assimilated and absorbed into an Anglo or French society. Indian nations believe that survival, on these terms, was guaranteed by the Treaties for *"as long as the grass grows...."*

Government authorities, on the other hand, subscribe to Durham's view (the Durham Report of 1838) that to tolerate different sets of values and institutions would only lead to conflict and disorder in the British possessions. He favoured a *"harmony of interests"* as a basis for good government (this was originally a rationale for assimilating French Canadians. By implication, it applied to Indians). Indian nations therefore were to be targeted for assimilation, regardless of the terms, spirit or intent of any treaty.

Clearly, there is no middle ground between the survival of Indian identity and nationhood, and being reduced to one of many assimilated 'ethnics' in a country defined as an 'ethnic mosaic'.

The problem with the treaty relationship therefore is to achieve mutual agreement on its meaning and to forge a renewed bilateral treaty process geared to treaty implementation and treaty making in accordance with a renewed consensus.

A renewed bilateral treaty process - if it is to succeed for all parties - must have as its objective the decolonization of the Indian nations and obtaining basic justice in their relationship with Canada. This will require a fundamental shift in the power relationship between the parties.

B: FOUNDATIONS:

AN ANALYTIC FRAMEWORK FOR THE TREATY RELATIONSHIP.

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1.0. SPIRITUAL.

1.1. SACRED COMPACTS: THE FIRST ORDER OF TREATY RELATIONS.

For most indigenous peoples, the lands and resources within their territories, and their social and governmental institutions, are gifts provided to them by the Creator. It is these original gifts, and the responsibilities that flow from them, which in turn provide the context for Treaty making with other peoples. This fundamental point of departure is critical to any analysis or understanding of the Treaty making process itself. It was described in a research paper prepared by Thalassa for the House of Commons' Special Committee on Indian Self Government in 1983:

> ... [T]he aboriginal economic foundations of Indian government were provided to each Indian Nation by the Creator. The terms aboriginal title and aboriginal rights today refer to those rights derived from a series of original social compacts between Indian peoples and the Creator. These compacts, in constituting Indian peoples as nations with distinct institutions of law and government, assigned Indian nations sacred, sovereign and particular responsibilities toward the occupation of territory and the use of the earth's resources. Lands and waters rich in natural resources - and natural laws to govern their use - were provided by the Creator so that Indian governments would have the means to nurture the physical and spiritual well-being of their citizens. Aboriginal economies thus represented the material foundations upon which Indian peoples raised the spiritual, political and cultural structures of their nationhood.
>
> .... Treaties, regardless of scope of purpose, constituted a second order of social compacts which drew directly on Indian nations' original social compacts for meaning and legitimacy.[1]

These points are illustrated by an exchange between Indian Agent T. Anderson and the leading Chiefs of Lakes Superior and Huron two years before the Robinson Huron and Superior Treaties were concluded. Anderson asked the Chiefs to document their complaints about white encroachment, and *"to prove on what authority you claim these lands"*. Chief Shingwakonce of Garden River replied:

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[1] Thalassa Research, "The Economic Foundations of Indian Self Government", report commissioned by the House of Commons Special Committee on Indian Self Government, 1983: p. 9; 11.

> You wish to know why we call this our Land. We think the answer is very plain... The Great Spirit placed us on this land long before the Whites crossed the Great Salt Lake. Our ancestors then lived in happiness - there being plenty of animals for food, at that time we had everything we could desire. The animals supplied us with food, the skins were take from their backs and placed on ours for covering.

Chief Peau de Chat of Fort William spoke next:

> You white people well know, and the Red Skins know how we came in possession of this land - it was the Great Spirit who gave it to us - from the time my ancestors came upon this earth it has been considered ours.[2]

1.2. INTERNATIONAL COMPACTS: THE SECOND ORDER OF TREATY RELATIONS.

We have noted that both indigenous peoples and Europeans had a long history of experience with Treaty making before they entered into relations with each other. For both peoples, the Treaty making process had divine origins or spiritual characteristics.

RCAP's Treaty policy team has noted that European Treaty making practises originated in Greek and Roman traditions, which assigned central importance to the sacred and spiritual dimension of the Treaty process. We further note that a divine mandate supported the policies of emperors and kings from ancient times to the mid-eighteenth century, with vestiges continuing to the present day.

It appears that in Euro-Canadian society, this aspect of the Treaty relationship was undermined by secular political and economic developments, most notably mercantilism, the scientific industrial revolution, and the emergence of a powerful bourgeois middle class.

Among indigenous nations, this part of the relationship - and the significance of the binding nature of the commitments made - is still alive and vibrant.

> .... we talk about treaty, when somebody uses a pipe, when somebody smokes a pipe, the very fact that they use a pipe invokes a higher power to come and to be part of that signing or whatever it is. For us, and I guess for you also, for Indians when people sign a treaty and they use a pipe, they burn sweetgrass and they use a pipe, this was a sacred kind of event. It was not something to

[2] Cited in James Morrison, "The Robinson Treaties of 1850: A Case Study", for RCAP, 31 March 1993: p. 52.

> be taken lightly.... When you see a treaty being done between the Indians and whomever and you see a sacred pipe, I am a pipe keeper and that pipe is sacred. No one really has a right to break those kinds of agreements and yet we know that several things have happened in the last while, that those treaties some people have said that they are sort of administrative kinds of things .... it seems to me that there should be a legal relationship based on those treaties and of the Government of Canada and of the Indian people of Canada.[3]
>
> Treaty 6 Indian Nations are founded upon principles that recognize the supremacy of the Creator, the sacredness of the pipestem and the oral traditions of our elders who have passed on our laws from generation to generation.... Canada makes something supreme by writing words. Our way of making something supreme and sacred is not with written words, it is with our sacred pipestem.[4]

It is significant to note that during Treaty Councils the Crown's agents as a rule partook in the ceremony and protocol that were the law and custom of the Tribes who were involved - usually with full knowledge of the implications.[5] In the following passage Alexander Morris described the significance of the pipe in the negotiations that led to the signing of Treaty #6 at Fort Carlton:

> On my arrival, the Union Jack was hoisted, and the Indian at once began to assemble, beating drums, discharging firearms, singing and dancing.... They then performed the dance of the 'pipe stem', the stem was elevated to the north, south west, and east, a ceremonial dance was then performed by the Chiefs and headmen, the Indian men and women shouting the while.
>
> They then slowly advanced, the horsemen again preceding them on their approach to my tent. I advanced to meet them, accompanied by Messrs. Christie and McKay, when the pipe was presented to us and stroked by our hands.
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> After the stroking had been completed, the Indians sat down in front of the council tent, satisfied in accordance with their custom we had accepted the

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[3] Wahpeton, SASK 92-05-26 286 Ken Goodwill: p. 223-225.

[4] RCAP Hearings: Hobbema, ALTA 92-06-10 Brian Lee: p. 64.

[5] See Paul William's case study on the Treaties with the Six Nations Confederacy; James Morrison's case study on the Robinson Treaties of 1850; S. Venne re: Treaty 6, etc. etc.

friendship of the Cree Nation.[6]

Sharon Venne explains that *"the acceptance of the pipe-stem as the binding instrument left no doubt amongst the Elders that the Treaty was entered into under Cree laws within Cree territory."*[7]

The spiritual importance attached to the Treaties reflects the fact that they are binding on future generations, and will have an effect on them - it is the collective and future interest that is the subject of the instrument. These responsibilities in turn are derived from the original compact with the Creator described in the preceding section.

That is why in many indigenous societies public gatherings and spiritual ceremonies are required for decisions that will have ramifications into the future. The future of the collective, the spiritual dimension, and the principle of consent are closely bound together in the Treaty process according to indigenous law and custom. All of this was acknowledged and recognized in British practise as James Morrison points out:

> The Royal Proclamation of 1763 had required purchases from any of the Nations or tribes in North America to be made *"at some publick Meeting or Assembly of the said Indians"*. This rule was elaborated in subsequent directions and instructions to colonial officials - the most important of which were the Dorchester Regulations of December, 1794, which would govern land acquisition policy in British North America during the first three decades of the nineteenth century. Article 3 of those regulations stipulated that *"all purchases are to be made in public council with great solemnity and ceremony according to the ancient usages and customs of the Indians, the principal Chiefs and Leading men of the Nation or Nations to whom the lands belong being first assembled"*.[8]

The spiritual basis of the Treaties also relates to the matter of dispute resolution and enforcement - they are subject to a higher law which is not swayed by the self interest of one of the parties. In the context of Treaty #6, this has been explained as follows:

> Indian people ensured the sacred and spiritual importance and intent of the

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[6] Alexander Morris quoted in Sharon Venne, "Treaty Six Report to the Royal Commission on Aboriginal peoples", November 1993: p. 37.

[7] Ibid., p. 41.

[8] NAC Reel B-61 CO42/101 fos.237-240; cited in James' Morrison's Robinson Treaty case study, March, 1994.

> Treaty by the smoking of the pipe. The pipe is our great seal, it is our signature. It ensures our commitment. When the Treaty promises were made in front of the pipe, the matter was laid at the feet of the Great Spirit. Our Grandfathers believed that [the] Queen had a God, too, who was also present, and was also a witness to the extreme sacredness of the promises made.[9]

The falling away from a spiritual understanding of the Treaties by Euro Canadians produced fundamentally different interpretations of the Treaties on their part - real estate transactions founded on extinguishment, as opposed to living covenants for equitable coexistence. These are some of the problems that have to be corrected in order to restore the Treaty relationship.

2.0. POLITICAL CHARACTERISTICS OF THE TREATY RELATIONSHIP.

2.1. MUTUAL RECOGNITION OF POLITICAL AUTHORITY.

Mutual recognition of authority and jurisdiction is an essential and inherent element of the Treaty making process. In their dealings with Indian Nations before and after the Royal Proclamation of 1763, the British understood that they were dealing with separate and distinct peoples on a nation to nation basis.

The Crown was fully aware that the cooperation of indigenous peoples was essential for the peace and security that further development depended on, and its policy had long recognized their authority and rights, and their ability to conduct an independent foreign policy. In 1749, a British Royal Commission considering the indigenous peoples of North America observed that:

> "[the] Indians, though living amongst the Kings subjects in these countries, are a separate and distinct people from them, they are treated as such, they have a policy of their own, [and] they make peace and war.....when they think fit, without control from the English".[10]

Today, descendants of the Anishinabek who were party to the Robinson Huron Treaty of

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[9] Board of Governors, Maskwachees Cultural College, Hobbema, Alberta, "Submission to the Royal Commission on Aboriginal Peoples", September 1993: pp. 2-3.

[10] Cited in UNSI submission to RCAP, Eskasoni NS, 05/06/92.

1850 explain it this way:

> The Crown recognized our authority and right of self government by the very act of entering into Treaty with us. There was no question of our ability or our right to govern ourselves - it was not something to be granted, but rather something that was so self evident it was assumed. Flowing from this recognition, the Crown admitted to our proprietary interest in the lands and resources within our territory, and negotiated an arrangement for the shared use of these lands and resources.[11]

It should be remembered that both parties had extensive prior experience in exercising their political authority - through Treaty making among their own neighbours. The Law of Nations represented Europe's custom with respect to Treaty protocol, while in North America the indigenous nations also had a long tradition of entering into and maintaining political relations through Treaty.

> 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.[12]

The Iroquois Confederacy itself is the result of a Treaty involving five (and later six) independent nations. In the 1850's, the Ojibway of what was to become Southern Manitoba entered into a Treaty with Dakotas of what was to become North Dakota and Minnesota.[13]

Also flowing from the mutual recognition of authority is the principle of consent. The Proclamation of 1763 recognized the importance of free and informed consent in Treaty relations between indigenous peoples and the Crown. It stated that the Crown could only obtain access to indigenous peoples' lands and resources *"if, at any time, any of the said Indians should* ***be inclined****."* (emphasis added)

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[11] United Chiefs and Councils of Manitoulin Fish & Wildlife Project, IPP submission, June 1993

[12] Lethbridge, ALTA 93-05-25 79 Les Healy PG 193.

[13] Manuscript from Walter Rudnicki, March 1994.

This provision conformed to the basic principles of English liberal-democratic political theory which had emerged from the writings of John Locke and others in the preceding century. Locke, in fact, directly tied the legitimate exercise of political authority to the consent of those governed.

> To this day, in liberal-democratic theory consent remains the original source of all legitimate political authority.
>
> What is important about Locke with respect to this consideration of Indian treaties are the economic motives which, he claimed, drove men to unite socially and politically. Consent was clearly tied to men's (and nations') perception of their economic self interest. As Locke explained, *"no rationale creature can be supposed to change his condition with an intention to be worse."*[14]

These fundamental principles are further articulated in the Final Act of the Helsinki Conference (1975), Article VIII of which states that:

> By virtue of the principle of equal rights and self-determination of peoples, all peoples always have the right, in full freedom, to determine, when and as they wish, their internal and external political status, without external interference, and to pursue as they wish their political, economic, and social development.[15]

2.2. INTERNATIONAL CHARACTER OF THE TREATY RELATIONSHIP.

In considering the historic status of the Indian nations, the Supreme Court of Canada has recognized that *"the Indian nations were regarded in their relations with the European nations which occupied North America as independent nations"*.[16] It went on to conclude that the conduct of Imperial officials in the eighteenth century *"demonstrate[s] the recognition by Great Britain that nation-to-nation relations had to be conducted with the*

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[14] Locke, IX: 131, cited in Thalassa Research, "The Economic Foundations of Indian Self Government", report commissioned by the house of Commons Special Committee on Indian Self Government, 1983: pp. 15-16.

[15] Quoted in Thalassa, 1983: pp. 2-3.

[16] R. v Sioui, Reasons for Judgement, SCC 24 May 1990: p. 29.

North American Indians."[17]

The international character of the treaty relations which were established between Indian nations and the Europeans have been an ever present reference point in First Nations' testimony before the Commission.

One of the implications of the Treaties' international character is that they established a relationship with the Imperial Crown, and not it's subordinate governments. After Confederation, the Dominion government assumed administrative responsibility for maintaining this relationship. So, the provinces may be beneficiaries of the Treaties, and may be required to perform certain duties to ensure their implementation, but they are not properly direct parties to the Treaty relationship.

2.3. BILATERAL NATURE OF THE TREATY RELATIONSHIP: NATION TO NATION.

With the Proclamation of 1763, the British Crown consolidated it's policy regarding Treaty making with indigenous nations. In order to prevent the many *frauds and abuses* which had been committed against the Tribes by self interested settlers and colonial governments, the Imperial Crown reserved unto itself the sole responsibility for entering into Treaty relations with the indigenous peoples of North America. This was a chapter in the beginning of the bilateral relationship between the Imperial Crown and the Indian Nations.

After the turmoil of their wars with the French, the British wanted to set the stage for secure and orderly development in North America. Imperial authorities were aware that colonial interests were often contrary to those of the indigenous peoples. But they also knew that the cooperation and participation of indigenous peoples was essential if the colonies themselves were to develop, and if the region as a whole was to prosper.

Peace and security for all parties was a major objective, and this was to be achieved by an adherence to the principles of justice and equity in the Imperial Crown's relations with indigenous peoples. In July of 1764, the British Lords of Trade explained the policy behind the Proclamation to Sir William Johnson, the Crown's Indian Superintendent for Northern BNA - the principles of justice and equity were coupled with an acknowledgement of indigenous peoples' civil authority:

> The most superficial view of the nature and disposition of the Indians and of the manner in which they regulate their civil concerns will suffice to show that a steady and uniform attachment to, and love of Justice and Equity is one of

[17] Ibid. at p. 30.

their first principles of Government.[18]

The Imperial Crown understood that local authorities - such as there were in North America at the time - were in a conflict of interest. Simply put, colonial governments could not be trusted to protect the land and other rights of indigenous peoples. As a select committee of the British House of Commons warned in June of 1837,

> The protection of the Aborigines should be considered as a duty peculiarly belonging and appropriate to the Executive Government, as administered either in this government or by the Governors of the respective Colonies. This is not a trust which could conveniently be confided to the local legislatures.... For a local Legislature, if properly constituted, should partake largely in the interests, and represent the feelings or settled opinions of the great mass of the people for whom they act. But the settlers in almost every Colony, having either disputes to adjust with the native Tribes, or claims to urge against them, the Representative body is virtually a party, and, therefore, ought not to be the judge in such controversies.[19]

This debate continued up to and after 1867 - could former colonial governments be trusted to maintain the principles of protection, justice and equity that the Crown had guaranteed? Subsequent events, which we will review, indicate not.

With Confederation and the passage of the BNA Act, 1867, Canada finally acquired delegated powers of self government. The Crown was now divided.

Although Great Britain retained Treaty making authority[20], Canada assumed responsibilities for "Indians and lands reserved for Indians" under s.91(24) of the BNA Act. The allocation of these responsibilities to the central government was an effort to provide the Dominion with the authority to protect the interests of Indian nations in the face of provincial competition for lands and resources. It can also be seen as an assumption of the responsibility for ensuring

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[18] British Lords of Trade to Sir William Johnson, 10 July 1764 in O'Callaghan's Documents Relative to the Colonial History of New York, 7: 636. Also Chapter One of Turpel, Joffe, Spalding "Treaty Extinguishment of Aboriginal Title", 18/10/93 pp. 2-5.

[19] Extract from the *"Report of the Select Committee of the House of Commons (UK) on the Aborigines of the British Settlements"*, 26 June 1837, quoted in Canada, Journals of the Legislative Assembly 11 Vic. (1847), Appendix "T": "General Recommendations". See further in *"Renouncing the Old Rules of the Game...."*, Hutchins, Soroka & Dionne draft final report, 15 November 1993: pp. 7-10.

[20] Until 1931, with the passage of the Statute of Westminster.

that the bilateral Treaty relationship was honoured and maintained.

2.4. TRUST OBLIGATIONS AND FIDUCIARY DUTIES.

The bilateral relationship is closely woven together with the Crown's trust responsibilities and fiduciary duties. The Proclamation and subsequent prerogative instruments contain a number of commitments and pledges on the Crown's part.

Acknowledging the many *'frauds and abuses'* committed against the Aboriginal peoples by colonials and their governments, the Imperial Crown would now stand between them - to ensure that the rights and interests of the Aboriginal peoples were protected, that the integrity of its own undertakings was maintained, and that the long term interests of its own citizens were secured. The Crown - first the Imperial, later the Dominion - was charged with the responsibility for ensuring that justice and equity prevailed in its relations with the indigenous peoples, and protecting their rights and interests.

Trust obligations concern the duty of the federal Crown to ensure effective protection and implementation of Treaty and Aboriginal rights. Often, as we shall demonstrate, the federal Crown has used provincial hostility as an excuse for inaction regarding implementation. But in fact, the Imperial Crown had the Crown in Right of Canada assume those obligations precisely **because** of the likelihood that provinces would be averse to the recognition and implementation of Treaty rights.

The federal Crown's trust obligations were to be used as a shield to ensure compliance with the terms of the Treaties, and as a means to secure peaceful and equitable coexistence between the Indian nations and the provincial and other subordinate levels of government.

Moreover, these duties and obligations take on added significance when one considers the almost absolute discretion that the Crown's governments assumed in the 'management' of Indian affairs.

> Once the government has assumed responsibilities in Indian affairs, those responsibilities can define the scope of its trust duties. Once having undertaken control in specific areas of Indian affairs, the government should be held to the high standard of care appropriate to its fiduciary relationship with Indians. Logic and fairness both suggest that the government should be responsible to the extent of fiduciary responsibility actually assumed.[21]

[21] K.T. Ellwanger, "Money Damages for Breach of the Federal-Indian Trust Relationship after Mitchell II", (1984) 59 Wash. L. Reve. 675, at 686; cited in Health & Healing Policy draft, 5 May 1994: p. 201.

2.5. RECIPROCITY AND MUTUALLY BINDING OBLIGATIONS.

Treaties are agreements between nations and peoples which contain mutually binding obligations and undertakings. Each party agrees to fulfil particular commitments, based on the substance of the Treaty itself and the issues at hand. In this sense, reciprocity is an essential component of the Treaty relationship.

It should not be forgotten that as a result of the Treaties, Euro-Canadians also obtained Treaty rights:

> We are not the only people that have treaty rights. The non-Aboriginal people also have treaty rights. They signed that treaty, and their people have treaty rights in the sense that we agreed to share in the land with them.[22]

Reciprocity also impacts on the interpretation of the Treaty instrument itself, it's meaning and it's result. As RCAP's Treaty policy team and many of the reports contracted by the Commission have demonstrated, one party to the treaties - the Crown - has imposed a unilateral and extremely narrow approach to treaty interpretation based on the treaty texts. This monopoly on defining the scope, intent and nature of existing treaty agreements has been exercised with prejudice against the rights, interests and circumstances of the Indian nations. As we shall demonstrate, a narrow reading of the written terms of the treaties does not reflect the understanding of the Indian nations, and neither does it reflect the commitments made in treaty councils by Crown representatives or the overall context in which treaty practise developed in North America.

[22] Lethbridge, ALTA 93-05-25 74 Chief Roy Whitney PG 186

3.0. ECONOMIC & SOCIAL CHARACTERISTICS OF THE TREATY RELATIONSHIP.

3.1. ECONOMIC AND SOCIAL TREATY RIGHTS: HOLISTIC, RECIPROCAL, DEVELOPMENTAL.

Economic and social relations are the basis of everyday life for the citizens of any nation. A secure economic and social environment is required so that productive and healthy development can take place. A prime objective of Treaty making has always been to establish understandings about how the political, economic and social interests of the parties would interact, or coexist. Each party inevitably seeks security and certainty with respect to the short and long term interests and rights of it's citizens.

This can be seen in Treaties between nation states and it is no different when one looks at the Treaties between the Crown and Indian Nations. To really understand these issues as they apply to the Treaties, they must be considered holistically, not sectorally, in terms of the overall health and productivity of a society. Compartmentalization does not assist in defining the issues, much less in identifying potential solutions. They must also be viewed in the dynamic sense, in that they were intended to provide a framework in which the parties would coexist through time, and develop together for mutual benefit.

One witness at the hearings distilled these things down to one crucial objective - the survival of the people:

> In addition to establishing a nation-to-nation relationship, our treaties provide protection and preservation of our rights in areas such as education, social and economic development, and health. **What each of these rights have in common is an over-riding concern for and connection to the survival of our people.** Chief Sweetgrass voiced this sentiment when negotiating Treaty Six in 1876. He said:
>
> *"When I hold your hands and touch your heart, as I do now, let us be one. Use your utmost to help me and help my children, so that they may prosper."*[23] [emphasis added]

We will show how these issues were central to the Treaty process in Canada, and that many of the Treaties provide guarantees of economic and social development.

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[23] Wahpeton, Sask. 92-05-26 228 Fourth Vice Chief Tom Iron, FSIN: pp. 124-27 .

3.2. ECONOMIC AND SOCIAL RIGHTS IN INTERNATIONAL COVENANTS.

It is also important to note that the peoples' economic and social development, and connected human and civil rights, are the subject of a number of international Covenants to which Canada is a party. The United Nations' International Covenant on Economic, Social and Cultural Rights states that

> 1. All peoples have the right of self determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
>
> 2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic cooperation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.[24]

Part II of this Covenant deals with can be broadly termed 'social issues'. Article 9 recognizes the *"right of everyone to social security"*; Article 11 recognizes the right of everyone *"to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions"*. Article 12 recognizes the right to *"enjoyment of the highest attainable standard of physical and mental health"*; Article 13 recognizes the right of everyone to education.

As has been mentioned, economic and social development are essentially dynamic processes, evolving over time and dependent upon the interaction that takes place between the Treaty parties. In this light, it cannot be seriously argued that rights to economic and social development are 'frozen in time', since that would contradict their fundamental definition.

3.3. COMMUNITY DEVELOPMENT AND ECONOMIC & SOCIAL RIGHTS.

In this context, community development is but one element in a larger constellation of initiatives that ultimately serve to correct historic imbalances. Thalassa described this connection in its work for the Penner Committee in 1983:

> As a foundation of Indian self-government, economic development must be understood as part of a larger developmental process aimed at improving both the material and qualitative conditions of a nation, people or community. Development requires meeting basic human needs such as food, housing,

[24] International Covenant on Economic, Social and Cultural Rights, Part I Article 1.

employment, education and medical services. But development also includes:

> meeting non-material needs like the desire for self-determination, self-reliance, participation in the making of decisions that affect workers and citizens, national and cultural identity, and a sense of purpose in life and work. [Kindervatter, 40]

.... Development involves more than improving a peoples' material circumstances or meeting economic needs. It cannot be reduced to the acquisition of wealth or narrowly-defined economic growth. Above all, development represents the ability of a people to master its own historical destiny.

> Economically, there is a world of difference between economic progress and the progressivity of the economy. On the broader development front, it is the difference between being the agent of one's own development as defined in one's own terms, and being a mere beneficiary of development as defined by someone else. [Goulet and Hudson, 19]

With this understanding of development in mind, it is clear that Indians cannot develop, economically or otherwise, as recipients of development programs defined by anyone other than themselves. Control of the development process is an essential precondition for achieving development goals; it is also a fundamentally important expression of a peoples' right to self determination.[25]

The next questions to be considered are "what kind of development and what kind of standards should be applied"? The specific answers to these questions will only come from the Indian nations themselves, and in the results of any equitable accommodation that may be reached in the future.

It is possible, however, to identify the components that are needed in general terms. First, there are the guarantees of security for traditional economic and social institutions and interests:

* the peoples' ways of life;

* the stability and security of the family;

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[25] Thalassa Research, "The Economic Foundation of Indian Self-Government", a report prepared for the house of Commons Special Committee on Indian Self-Government, 31 May 1983: pp. 6-8.

* the maintenance and development of culture;

* the security and development of traditional institutions, laws and practises;

* the stability and security of traditional economic activity and opportunity; etc. etc.

Second, there are the benefits to be shared from 'development' and 'civilization', at the direction of the indigenous peoples themselves:

* new economic opportunities, including a recognized interest in all transactions involving traditional resources and territory;

* infrastructure and shelter;

* shared improvement in services and health;

* shared improvement in opportunities for life-long education etc.

Certainly there are other matters that could be added to these lists, but we offer them here as a starting point for discussion and analysis. As we have already stated, any consideration of these issues needs to be done in light of the principles of reciprocity, mutual benefit & assistance, justice and equity which are at the heart of an authentic approach to the Treaty relationship. These principles, properly applied to specific circumstances, should facilitate the conclusion of understandings between Indian nations and the Crown.

3.4. ECONOMIC SECURITY.

Lands & resources, and the ability to manage them and benefit from them, are fundamental to the maintenance & development of a people. A peoples' culture, laws and institutions exist in interdependence with their economy, territory, and resources. Changes in one 'sector' affect each of the others, and in turn, the circumstances and prospects of the people themselves.

As we have already stated, in the context of development, economic rights and interests cannot be 'frozen in time', since this contradicts the very definition of 'development'. Prior to European arrival and during the fur trade era, this dynamic aspect was everpresent. Indian nations have demonstrated an agile and astute ability to adapt to new developments and opportunities, drawing upon the different elements of their resource base as appropriate - all to provide for their collective well being and security.

The fundamental point to be made here is that the survival - and prosperity - of the Indian nations has always flowed from their ability to freely choose how they would utilize their land and resources for collective benefit. If the peoples' economic activities and land use patterns - and their rights and interests - are seen in this context, then the conventional "hunter-gatherer/frozen rights" analysis begins to wear thin.

For one thing, this means that the arbitrary line between 'subsistence' and 'commercial' use of resources no longer exists. Resources within the territory were there to be used for the benefit of the people first and foremost. This could mean taking for personal use, for distribution within the community, or for commerce with other communities and peoples. In this sense the result was the primary objective, not the destination of the product.

The next critical point is that the economy of the Indian nations has always been a diversified one. Within their territories, many different resources are available in particular places at particular times. It was up to the community to determine how and when these resources would be used, and for what purpose. Of course, as time passes and relations with other peoples develop, new uses are found for familiar parts of the environment and new opportunities for benefit present themselves.

So, with the arrival of the British and the French fur traders, decisions were taken that led to an ongoing economic relationship based on increased utilization of the fur resource. This was really nothing 'new' - rather, it was just another of many decisions that had already been taken about how the peoples' lands and resources were to be used.

The Indian nations have always shown a willingness to be partners in the development of their territories. As long as the people were able to freely exercise their right to decide how and when they would use their resources for collective benefit - and share them for mutual benefit - the nations were prosperous. The partnership which had begun in the furtrade era later evolved to include other sectors such as transport, exploration & mining, and logging, etc.

But problems emerged when outsiders began to deny that the Indian nations had a legitimate role in making decisions about the use of their territory and resources. It got worse when outsiders no longer considered the rights and interests of the Indian nations in the calculation of benefits and losses resulting from management decisions.

Indian nations have consistently made attempts to engage themselves in the productive use of the resources within their territories, for long term benefit and security. Just as clearly, the record shows that they have been prevented from deriving substantive and long term returns from these resources. This pattern has continued up to today.

Contact between indigenous nations and the newcomers has from the beginning been

concerned with (i) the ways & means of sharing lands and resources, and (ii) reaching accommodation with respect to the cultural values, laws and institutions that govern the use and management of economic activity.

3.5. SOCIAL SECURITY.

In many cases, the Indian parties to the Treaties understood that things were changing, and they sought guarantees that they would be able to benefit from the changes that were taking place. This is on two levels: (i) security for existing culture and institutions, and (ii) access to new things - services, education, health care, etc. etc. Security for traditional institutions was sought, as well as the opportunity to benefit from developments in the non-traditional sector.

One of the critical prerequisites for social development is social security - the right of the individual, the family and the collective to exist in an environment that is stable, positive and productive. Existing international covenants which we have referenced recognize the importance of these rights. The treaties as we shall see represented a commitment between the parties to pursue 'steady state' relations where each party's citizens would be able to coexist for mutual benefit - in the context of 'orderly development'.

The 'peace order & good government' theme of the numbered treaties - which took place in the wake of the Riel rebellions of 1870 and 1885 - was an immediate response to the violence that had been brought about by the friction between indigenous peoples and settlers. But it was really just one more step in the long established practise of utilizing the treaty process as a means to resolve often violent conflict over the sharing of benefit and jurisdiction, and to provide a secure framework for social peace and coexistence between the parties.

In fact, violence is a recurring factor in the history of the treaty making process in Canada. The treaty process came to be relied on as a method of resolving points of friction and obtaining mutual commitment for the cessation of violence and the pursuit of peace - so that both parties could enjoy the security needed to foster development and prosperity.

3.6. JUSTICE AND EQUITY.

In the chapters that follow, we will document the ongoing relationship between violence, treaty making, and peaceful coexistence which has characterized the treaty process in Canada.

But did they serve their desired end? Has violence - among and between the parties - been halted? The answer to this question must be an emphatic NO. Despite this most basic undertaking contained in the treaties, violence has continued, but over time it has taken on a variety of forms and contexts which often allow it to be disregarded. This in itself is largely a function of the dismemberment of the treaty relationship which this paper will chronicle.

In many cases, acts of commission and omission on the part of non-Indian governments have created and perpetuated this significant violation of the Treaty relationship - and this is we suggest one of the root causes of the situation which now confronts the parties.

What do we mean when we speak of this tradition of violence? In historical terms, witness the wars between the Mi'kmaq and the English; the Mohawk and the French; Pontiac's war; the Mica Bay incident; the Riel rebellions; Oka. The list could go on. In each of these cases, the treaty process was the means through which the parties sought to obtain peace and security for their respective peoples.

Since the treaties, violence has not so much been characterized by armed conflict between warriors and colonial armies as it has been typified by institutional and indirect violence, imposed by one party with prejudice to the other. Some examples include:

* The criminalization of fish & wildlife harvesting and the role of Canada's enforcement, judicial and penal apparatus in its continued maintenance. This is not just an attack on the economic basis of the Indian nations, but on their societal fabric - the learning, reciprocal obligations, spirituality and other matters which are part and parcel of the act of harvesting.

* Residential schools represent a very calculated and sustained act of violence against the very fabric of indigenous society - the family and the community. They did this in the short term by separating parents and siblings, and in the long term by preventing three or four generations of indigenous peoples from maintaining their traditional family, educational spiritual and economic institutions or passing on their knowledge.

* The imposition of the Indian Act was another calculated act of violence, directed against indigenous institutions of governance, authority and accountability. It also forcibly dismembered communities and families by way of its membership provisions. Prohibitions against traditional spiritual practises

were an act of violence against sacred institutions and practises.

* Outside agencies' preoccupation with law enforcement (as opposed to prevention and protection) and the removal of community accountability has left the citizens of Indian nations open to systemic and personalized abuse and violence at the hands of the criminal justice system.

* The internal violence which is overwhelmingly present in many Indian communities (suicide, spousal & child abuse, violent crime) is a direct product of the colonialization process.

* There have also been many instances of violence, direct and indirect, resulting from continued and unresolved disputes over land and resources, for instance, Restigouche, Oka, Barriere Lake and many other locations within recent memory. These are accompanied by ongoing and more subtle forms of intolerance that essentially represent prejudicial intent - evidenced for instance radio shows in Quebec, Sports Anglers and Hunters groups, etc. The potential for violence latent in the 'white backlash' has often been used as an excuse by other governments for inaction in obtaining basic justice, whereas the Treaties in many cases represent a commitment by the Crown to ensure an environment of peaceful coexistence as between the parties and their citizens.

Because these acts of violence have been inflicted and perpetuated pursuant to federal and provincial 'laws', 'regulations', 'policies' and 'programs', they contain an element of deniability which has mitigated against the possibility of a holistic analysis and response. The fact that these matters have been largely removed from the purview of the treaty relationship by one of the parties adds to the problem.

So, have the treaty objectives of 'peace, order and good government' or 'mutual security' been met? No, on most counts. Certainly if the Indian nations were seeking a secure environment for their social and economic institutions and development through treaty, they obtained exactly the opposite.

The Crown was supposed to mediate between settlers and indigenous peoples - not just with respect to land, but also in terms of maintaining just and equitable relations, and security for all. This has not, for the most part, been the case.

Far from reducing or eliminating violence between and among the parties, the treaties appear merely to have changed the nature and scope of the violence and focused it in one direction - toward the Indian nations and their citizens. This in itself is not a result of the treaty relationship, but a result of the fact that one party has used its power of discretion to dissemble the treaty relationship and impose a regime of violence in its stead.

4.0. TREATY INTERPRETATION AND IMPLEMENTATION.

4.1. "SPIRIT AND INTENT" VS. STRICT CONSTRUCTION.

What happened after the Councils? The understandings and agreements reached were recorded by each party according to their custom - for Indian Nations, in the oral memory to be reported to communities and handed down to coming generations. For the Crown, in writing. Clearly the two 'versions' are most often very different in scope and content. Since then, Crown has asserted its discretion to interpret Treaties unilaterally, and to characterize the written text as authoritative.

The fact is, interpretation - and the need to ensure equity in terms of the weight attached to each parties' interpretation - are the basis of both the problems and the solutions.

RCAP's Treaty policy team has done substantial work in this area which raises fundamental questions about the accuracy of the written texts of the Treaties and the narrow approach to interpretation taken by the Crown. One result of this work is an approach that is more holistic and looks at the issues in terms of their broad meaning - in this sense, the "medicine chest" represents a bundle of concepts related to community health, not simply a box with bandages and injections.

In light of the overwhelming amount of evidence which has been assembled over the past twenty years, in virtually every treaty area, it is of some concern that the debate over the 'written text' vs. the 'oral understanding' is still a preoccupation for the parties.

As we have described, the Treaty relationship is a holistic one that can cover many, or a few issues of agreement between the parties, depending on their objectives and the circumstances.

This is reflected in the variety of Treaties that have been made between Indian nations and the Crown, and between Indian nations - their purpose and content. Each is unique and ultimately, can only be addressed and interpreted by the parties themselves. The review that follows is not intended to be comprehensive and makes no pretension to interpreting particular Treaties.

Rather, selected Treaties from each 'Treaty era' are considered in light of the circumstances of the time and the available record of subsequent events. Acknowledging the limitations inherent in this approach, clear patterns nonetheless make themselves clear.

For the Indian nations there can be no doubt that the Treaties were covenants which would provide a framework for mutual security, benefit and development. This assumes a holistic

approach to issues that presents problems when one tries to compartmentalize and categorize the Treaties themselves. As important, for most Indian nations the treaty relationship embodies a set of agreed upon principles which are to guide the parties and their relationship into the future. A denial of these principles in favour of a reliance on specifics and finality has been indicative of Canada's approach.

So, for instance, although only Treaty #6 contains a 'medicine chest' clause, 'health' and collective well being were clearly the object of many if not most of the other Treaties. At the same time, looking at the circumstances of Treaty #6 and other provisions in the written text, a narrow interpretation of the 'medicine chest' clause does not appear to reflect what was sought or agreed to by the Indian parties.

The point being that in taking a holistic approach, although provision for 'economic' or 'health' rights may not appear explicitly in a Treaty text, they are often present by implication or by virtue of other evidence.

In any event, they remain available to both parties as items for present or future Treaty negotiations so that they can be covered explicitly, if circumstances require. It is this dynamism and flexibility which is a hallmark of the Treaty process, but which has suffered as a result of Canada's denial of the relationship.

So, in the review that follows, the data presented for each 'Treaty era' may not specifically address all social and economic issues, or every treaty. But the cumulative effect of the evidence demonstrates that at one time or another, Treaties have dealt with all and sundry matters. The point to be made is not that every sectoral issue was dealt with in every Treaty, but that the Treaty process provides an opportunity to address sectoral issues in a holistic and long term manner as they require attention, guided by fundamental principles which govern the treaty relationship itself. In this sense, if an acknowledged right to engage in commerce is present in one Treaty, it remains open to another Indian nation to also establish an understanding with the Crown on that issue through Treaty.

4.2. DENIAL AND DISMEMBERMENT OF THE TREATY RELATIONSHIP.

We have described some of the characteristics of the Treaty relationship which need to be understood before a clear analysis of the history and the situation can begin. They set the stage for a discussion of the what has happened in the Canadian experience with respect to the Treaty relationship.

The paper will reference the process by which the former colonies' self interest gained the upper hand in relations with the Indian nations, and how this affected the economic and social dimensions of the Treaty process. Of necessity this will also require some discussion of the legal and political developments which in many ways facilitated the economic and social

dislocation of the Indian nations.

The fact is that for well over one hundred years the Dominion and the provinces have pursued a policy which is predicated on the de-politicization and dismemberment of the Treaty process. This involved a preference on the part of other governments to interpret the scope and meaning of the Treaties unilaterally, without due consideration of the views and understandings of the other parties - the Indian nations. The matter of interpretation is of central importance to this discussion, as well as ultimate resolution of the Treaties generally.

Over time, through legislation such as the Indian Act and a host of other instruments and regulations, Canada and the provinces have deconstructed the Treaty relationship and subjected its component parts to the whims of policy and self interest. This has involved the dispossession of lands, resources, and people; interference in the internal affairs of Indian nations; an inequitable and unilateral interpretation of the Treaties themselves; and a variety of other measures intended to diminish and in effect terminate the Treaty relationship.

The key milestones in this process will be identified in connection with specific economic and social consequences that were borne by Indian nations as a result. This will lay the groundwork for a discussion of the solutions and remedies that may be available to enable the parties to renew the Treaty relationship.

4.3. CONFLICT AND CRIMINALIZATION OF TREATY RIGHTS.

Normally Treaties contain provisions concerning the resolution of disputes between the parties, or recourse available in the case of non-performance. Dispute resolution mechanisms are often binational or international. This, in part, is a recognition by the parties to the Treaty - as well as non-signatories - that it exists, has an effect, and carries with it certain commitments. Often there are sanctions for non-performance.

One major deficiency in most of the Treaties made with Indian nations is that they did not contain adequate provision for dispute resolution or enforcement mechanisms to ensure implementation. Even with the Treaties that do contain some reference to dispute resolution, those clauses have been implemented rarely if at all.[26]

Without effective enforcement mechanisms, the Indian parties to the Treaty are wholly reliant on the promises of the Queen - or the King, as the case may be. Hence the importance of the Crown's trust obligations and its fiduciary duty to comply with the terms of the Treaties and the requirement for Treaty making.

[26] For instance, see Hearings: Kingsclear NB 92-05-19 54 Linda Ross Pg. 125.

As will be evident below, in practise the Dominion/Federal government has long maintained a policy of denial and avoidance with respect to both equitable dispute resolution and effective implementation of the treaties with the Indian Nations.

The absence of an effective or equitable forum in which treaty related disputes can be heard has had a significant impact on the current state of the treaty relatioship, as well as public and government perceptions of it. The reality is that without a binational or multinational forum to provide a fair hearing, treaty disputes generally have had to be brought to Canada's domestic courts - courts which were not originally intended to adjudicate such disputes In fact, as we pointed out at the beginning, the Imperial Crown recognized the conflict of interest in settler-based institutions adjudicating disputes with the Indian nations.

The exercise of Treaty rights, especially economic and social rights, in many cases has been subject to 'criminalization' and prohibition. Many if not most of the treaty cases that have gone before the courts have involved the application settler laws and restrictions to treaty Indians. Most often these cases involve economic treaty rights: harvesting of fish & wildlife; trade and commerce. But traditional social institutions, such as the potlatch and sundance, have also been the subject of legal prohibitions and judicial sanction.

Even taking into account the many constraints that the courts face in considering Treaty disputes, for almost fifty years it was illegal for Indian nations to collect money for, or hire counsel, to pursue land claims or related disputes against Canada (without permission from the Deputy Superintendent of Indian Affairs).

Since the passage of the Constitution Act, 1982, aboriginal and Treaty rights have been "recognized and affirmed" in domestic law. Subsequently, the Supreme Court of Canada has acknowledged that the Treaties have an international character and that they do have standing in domestic law. These are positive developments, but they have not been matched by any substantive efforts to establish equitable dispute resolution mechanisms or sanctions for non-compliance.

Canada's courts were not developed to deal with Treaty related disputes and as such are carrying a heavy burden of precedent that is both prejudicial to the Indian nations, and contrary to the Crown's pledges and undertakings.

The criminalization of indigenous economies and cultural institutions will be addressed in the paper, as a source of dispute and in terms of the kinds of solutions and remedies that are required.

Interpretation, enforceability and implementation remain major problem areas with respect to the Treaty relationship. Policy and practise need adjustment so that they conform with Canada's own constitution and the terms of the Treaties. A return to reciprocity will require a holistic approach that connects dispute resolution and enforcement to the other elements of

the particular Treaty agreement.

4.4. IMPLEMENTATION AND THE CONDUCT OF THE PARTIES.

Generally there has been disagreement and conflict. Canada has unilaterally asserted a role for itself as sole interpreter and adjudicator. If anything, judging from the results obtained, the Indian Nations could see the treaties as the basis for the obliteration of their economic and social security, instead of what they were actually seeking. That is because they have not been able to play an equitable role in interpretation, adjudication, or enforcement - and because the Crown has not fulfilled it's treaty, fiduciary and trust responsibilities diligently or effectively.

5.0. PUBLIC FINANCE AND TREATY BENEFITS: RECTIFYING THE LEDGER.

5.1. CHANGING THE ACCOUNTS.

The rights, interests, losses and benefits of Indian nations have been removed from the account books - and severed from the mutual undertakings found in the treaties. So, the real costs of competing resource development and the appropriation of Indian lands & resources have been hidden from view, and the foregone benefits to Indian nations have not been considered adequately if at all. Land is the base for indigenous capital formation in Canada. But with the changing of the accounts, their 'competitive advantage' has been denied, and capital has accumulated in the hands of others.

This is largely as result of the assignment of rights over 'property' and 'transactions' that has taken place over the past 150 years, and the illegitimization of Indian rights and interests in their lands & resources. As we shall see, this was done to meet the imperatives of the colonial process - the appropriation of the means of production for settler's economic benefit was seen as requiring the economic dispossession and dislocation of the Indian nations. Colonialism does not provide for sharing - rather it is predicated on the assumptions of monopoly control and disenfranchisement of the 'native population'.

5.2. DISTRIBUTION AND DENIAL OF BENEFIT.

Who has benefitted? Canada, the provinces and their citizens. Who has taken a loss? The Indian nations. The vast disparity in benefit and loss is so dramatically clear from statistics that it is self evident. And yet in attempting to resolve these issues - or, in the case of

claims, even getting them recognized as issues worthy of negotiation - becomes an arcane science of quantifying loss, benefit and the impact of innumerable specific events.

Of course, this can be done, but why is it required when all of the parties know what is really at issue? Because although by now the parties do know the what the real issues are, certain of them continue to pretend otherwise and instead rely on compartmentalization, reduction and denial as a means of avoiding or delaying substantive discussion.

****

We will now turn to a more detailed discussion and analysis of the treaty process and its relationship to social and economic development. Recognizing that the treaty relationship itself is holistic and based on principles, we must still take an approach to analysis that involves a degree of compartmentalization and specificity. Each of the following chapters deals with particular 'sectors' of activity and policy, and specific events and circumstances. However, hopefully readers will see that this is only a means to an end, and that in each chapter basic principles and a holistic approach return to the discussion in a circular fashion.

C. ECONOMIC AND SOCIAL DEVELOPMENT:

TREATY FOUNDATIONS.

C. ECONOMIC AND SOCIAL DEVELOPMENT:

TREATY FOUNDATIONS.

1.0. LAND & ECONOMIC SECURITY.

1.1. CONTEXT.

1.1.1. Land, Laws and Property.

> Canadian law divides the world into things which can be owned (and therefore bought and sold) and things which cannot. The division is partly practical (ownership has to do with possession and control) and in many ways quite arbitrary....
>
> Industrial societies see the land as a commodity and a source of commodities. These societies can, intellectually and then physically, separate the land from what it is capable of producing, either in its natural state or in an altered, cleared, excavated or flooded state.
>
> Most indigenous legal systems keep the world whole; they either do not subdivide the natural world in the same way or do not subdivide the natural world at all. Peoples whose views of ownership are "collective" will draw different boundaries than those who see this territory as individually held.[1]

The land is the basis of a peoples' economy, society and culture. But as the above quotes point out, different peoples have different ways of characterizing and using the land for their social and economic development. These 'ways' are codified in laws (unwritten and written), and in societal consensus regarding norms of behaviour.

Traditional indigenous economic and social life were full of opportunities, transactions and responsibilities which flowed from the land and the produce of the land. But these transactions and the value system underlying them did not involve the medium of cash or the western notion of 'private property'. When Europeans arrived in North America, they brought with them a system of transactions and values linked together by these very two things: money and private property.

The land - as a basis for a peoples' social and economic development - and money - as the European basis for fixing the relative value of assets, resources and transactions - are intimately connected with the Treaty process, along with the clash between 'collective' and 'individual' property rights. In turn, the Treaty process, land and money are all subject to

[1] RCAP Treaty Paper, Treaty Policy team, May 10/94 draft: pp. 29-30.

laws - indigenous, Euro-Canadian or international, as the case may be.[2]

'Economics' is not just about available programs and affirmative action or right of first refusal. Economics are about how the stewardship of natural resources - and the transactions that result from the accrued benefit of development - are managed. How relative interest, loss and benefit are considered leads to certain assumptions. This is economics in the broad sense [as per health, education., etc.]

This section will review these issues in the context of Canada's economic and social evolution, paying particular attention to the Treaty relationship. We will look at the relative economic loss and benefit experienced by the parties over time, and changes in the way the land's benefits have been characterized and distributed. In doing this, key policy issues and some potential solutions will emerge.

1.1.2. The Current Situation.

RCAP's Economics policy team has observed that, in terms of individual circumstances,

> ...[I]n comparison to Canadians Aboriginal people have lower average incomes, lower rates of labour force participation, higher rates of unemployment, over representation in unskilled manual labour positions within the wage economy. It would be fair to say that Aboriginal people now occupy the margins of the Canadian economy.[3]

Data from Aboriginal Peoples Survey of 1991 state that 55.3% of Indians (on and off reserve) have annual incomes of less than $10,000; 22.5% between $10,000 and $19,999; and only 22.2% over $20,000.[4]

The disparities are wide and well documented, and the cost - in human and fiscal terms - is provocative. At the most basic level, the Commission's work is seeking to improve the circumstances and the prospects of these individuals.

But in trying to see how to reach that objective, some consideration of the economic situation now faced by indigenous peoples in the collective sense is required. In other words, as peoples who possess territories, governmental & social systems, laws, and economic interests

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[2] See also "Draft Policy Options paper", RCAP Economics policy team, 21 April 1994: pp. 60-63 re: 'Underlying conceptual differences'.

[3] Draft Policy Options Paper, RCAP Economics policy team, 21 April 1994: p. 17.

[4] Health & Healing, Ibid.: Table 2, p. 86.

which were firmly established millennia before the arrival of the newcomers.

The Economics policy team has recognized the importance of addressing indigenous economies from this perspective:

> While initiatives directed at individuals are important, this approach ignores the pervasiveness of the economic problems facing Aboriginal peoples and their historical origins in systemic or structural inequities. It also is not consistent with Aboriginal views of development, including the importance of building institutions and relationships that would permit Aboriginal stewardship over their economies.[5]

What is the economic stake of Indian nations today relative to the Canadian people and Canadian governments?

1.1.2.1. Canada's Accumulated Wealth.

Commercial interests have driven and directed Canada's evolution from the first arrival of the Europeans and in the ensuing centuries:

> Confederation .... reflected an evolution of political institutions within the British North American colonies as means to support economic development in the interests of commercial capitalism on the St.Lawrence. ... Federal government policies found their immediate motives in the interests of the dominant commercial, industrial, and financial groups, and their justification in the resources of the country.[6]

In western terms, Canada's economic and political development has generated significant wealth. Canada's success as an economic endeavour can be measured by virtue of its membership in the G-7, along with the other six nation states who enjoy 'most developed' status. The development of this country has produced tangible returns which have accrued over time and now exist as assets or benefits, all in the hands of various parties.

This is also evident from the fact that the United Nations, for the second time in five years, has ranked Canada first among nation states in terms of 'human development', based on three

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[5] Economics, Ibid.: p. 25.

[6] Kenneth Buckley, Capital Formation in Canada, 1896-1930 (McLelland & Stewart, Toronto, 1974): p. 80.

criteria: average income, life expectancy and educational attainment.[7]

Wealth and capital has collected in each of the regions of Canada, some more than others. For instance, in the Atlantic accumulated wealth is concentrated among a particular clique who wield economic and political power within that region (examples being the Irving or McCain families). In central Canada there are Montreal and Toronto, long time competitors in the generation and accumulation of wealth, and over control of national economic policy and the levers of government. Alberta's stake - as a government and as a pocket of accumulated capital - is largely a result of the petrochemical industry. British Columbia's political and economic presence is a consequence of the revenue generated by forestry, the fishery, etc. etc.

In each case, their current standing is a result of the degree to which they have benefited from, and retained, the wealth that has been generated by the innumerable transactions associated with Canada's development. The same applies to Indian nations. We have not had the opportunity to undertake substantial research in this area, but some selected examples should give an indication of the situation.

1.1.2.2. Indian Nations' Accumulated Wealth.

Since 1763, the Crown - first Imperial, for a time provincial, and since Confederation federal - has assumed authority for obtaining 'cessions', surrenders and leases of Indian lands & resources, as well managing the proceeds. Since 1867, for the most part these proceeds have been held and administered by the federal Crown 'in trust' for the 'use and benefit' of the beneficiaries. One way of trying to determine the extent of capital held by the Indian nations, then, is to refer to DIAND's trust fund accounts.

As of March 31st 1989, Canada held $744M in Indian capital monies, and another $102M in revenue accounts. However, the majority of this was heavily concentrated:

> A very limited number of bands, largely in Alberta, account for the vast majority of Indian monies on hand. Only 16 bands across Canada have capital monies on hand in excess of $1 million, of which 3 have over $25 million. Only six bands have over $1 million in revenue monies on deposit in the CRF. [consolidated revenue fund][8]

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[7] "We're No. 1 again",Ottawa Citizen, 28 May 1994: p. A1.

[8] Price Waterhouse, "Phase II Final Report: Band Monies", DIAND, Lands, Revenue and Trusts Review, 15 August, 1989: p. 3.

The proceeds from annuities, interest distribution etc. for some individuals (minors, adoptees, 'mental incompetents', missing persons) are also held in trust by DIAND. As of December 30 1988, there were over 20,000 individual accounts worth in total $157.6 million.[9] Together this represents $1.003 billion of accumulated 'Indian capital', but as stated above, most of it is held on behalf of a very small percentage of Canada's 500+ 'Indian Bands'. At the same time, it represents the sum total of capital accumulated after 200 years of land sales, leases, and timber & mineral surrenders.

Compare this to the formation of gross domestic capital in Canada between 1901 and 1930 alone, which amounted to $20.354 billion.[10]

At the same time, the majority of 'reserve' economies are for the most part unable to retain revenues that flow through them, preventing the accumulation of capital and wealth from day to day transactions.[11]

One can also look at the physical capital of the Indian nations - infrastructure, housing, public works. Quite the opposite from manifesting accumulated wealth and capital, the physical conditions of most reserves represent destitution and underdevelopment. Compare this to the huge capital investment represented by the many office towers, homes etc. in Canada's urban centres, or in this nation's communication & transport infrastructure.

What about equity in the land? Canada measures approximately 9.9 million square kilometres in size, parcelled out to various jurisdictions and private/corporate interests. Indian nations have recognized title to less than 0.5% of this total (excluding recent claims settlements north of 60).[12]

Turning to human capital, RCAP's Education and Health & Healing policy teams have noted that Indian peoples have been denied the benefit of Canada's social development, whether it be in terms of education, health, or social stability.

Each of these factors in turn is related to two things which, as a result of studies conducted in

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[9] Price Waterhouse, "Phase II Final Report: Individual Accounts", DIAND, Lands, Revenues & Trusts Review, 3 August 1989: p. 3.

[10] Series F179-182 "Gross Domestic Capital Formation by Quinquiennial Periods", in The Historical Atlas of Canada, 2nd Edition (Statistics Canada, Ottawa, 1983).

[11] Economics, Ibid.: pp. 40-41, re: the 'leakage' or 'bungie' effect.

[12] "Review of Developments - Canada - 1987-88"; presentation to the United Nations Working Group on Indigenous Populations, Geneva (Assembly of First Nations, August 1988): p. 2.

the United States, have been identified as critical to the success or failure of Indian nations' economic development. These are *"(1) de facto sovereignty and (2) effective institutions of governance"*.[13] In this respect, Canada's development and prosperity has been paralleled by a denial of Indian sovereignty and the destabilization of indigenous institutions of governance.

1.1.2.3. Conclusions.

Based on this cursory review, it is self evident that Indian nations have not benefitted equitably from Canada's development, particularly in light of the magnitude of their initial 'investment' - the Dominion's lands & resources. Beyond this it cannot be denied that Indian nations have also incurred a substantial loss in the process.

Today, all parties recognize that there are significant and long term problems to be addressed with respect to the economic situation of Indian peoples. But, as with the treaties themselves, there is disagreement as to their sources, and hence potential solutions. This disagreement is reflected in the parties' approaches to the issues.

Welfare payments - to individuals - and other income support programs remain central to other governments' response to the economic situation in Indian country.

The added focus on 'economic development' as an aspect of Indian Affairs policy over the last 35 years has largely focused on 'make work' projects which have temporary effect and whose revenues generally 'leak out' of the community without adding to the accumulation of a capital base. Generally designed and implemented without substantive Indian input or control, they have not improved the situation. RCAP's Economics policy team concludes that *"they have in fact stood in the way of the economic recovery of the communities."*[14]

In a capital-rich country, Indian nations are capital-poor. Despite years of expenditures and programs, today most Indian communities are more dependent than ever on transfers that come from sources over which they have no control. This is the continuing legacy of colonialism.

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[13] Economics, Ibid.: p.33.

[14] Economics, Ibid.: p. 17. See also Chapter 7.

1.2. TREATY ANALYSIS.

1.2.1. Conflict, Peace and Friendship.

Initially, the absence of shared expectations and agreed upon ways & means of sharing resulted in conflicts over land and resources. These conflicts threatened the social and economic integrity of both the indigenous nations and the Europeans, but particularly the latter. In Sioui, the Supreme Court of Canada took notice of the fact that *"in the minds of the local population the Indians represented a real and disturbing threat"* during this period.[15] The treaty process became the means through which the parties sought to reach agreement on these matters, but local colonial interests continually provoked the Indian nations by arbitrarily appropriating Indian lands & resources.

1.2.1.1. The Haudenosaunee.

An example can be found in the Haudenosaunee 'beaver hunting grounds' which - at the Confederacy's request - had been put under British 'protection' in the 1701 Nanfan Treaty.[16] The colonies, particularly New York and Massachusetts, coveted these lands and argued that they had been ceded through that Treaty. The Haudenosaunee, and Imperial officials, disagreed.

Almost seventy five years later, the matter was still unsettled and Sir William Johnson stated why the grounds had been reserved and why they had to remain so.

> That the memorable and important act by which the Indians put there Patrimonial and conquered lands under the Protection of the King of Great Britain their Father is not understood by them as a cession or surrender as it seems to have been ignorantly or wilfuly supposed by some, they intended and look upon it as reserving the Property and Possession of the soil to themselves and their heirs.....
>
> **These are their Hunting Grounds, by the profits of which they are to maintain themselves and their families, they are therefore against any settlements there because the consequence would be the driving away**

[15] R v. Sioui, Ibid.: p. 32.

[16] See Paul Williams 1993, Ibid.

Game & destroying their Livelyhood & Riches.[17] [emphasis added]

Clearly the purpose of the 1701 Nanfan treaty, at least in part, was to obtain guarantees of protection for the Haudenosaunee's economic base.

1.2.1.2. The Mi'kmaq.

During the eighteenth century, conflict over the use of lands & resources led to open warfare between the Mi'kmaq and the British. In the peace treaties that followed, economic considerations were key for both parties. The Halifax Treaty of 1752 provides an example. Article 4 states:

> It is agreed that the said Tribe of Indians shall not be hindered from, but have free liberty of hunting and fishing as usual and that if they shall think a Truck house needful at the River Chibenaccadie, or any other place of their resort they shall have the same built and proper Merchandize, lodged therein to be exchanged for what the Indians shall have to dispose of and that in the mean time the Indians shall have free liberty to bring for Sale to Halifax or any other Settlement within this Province, Skins, feathers, fowl, fish or any other thing they shall have to sell, where they shall have liberty to dispose thereof to the best advantage.[18]

This clause provides protection for the Mi'kmaq harvest, and by implication, the locations used for harvesting. It also makes it clear that trade and commerce involving fish, wildlife and manufactures would be permitted and protected.

Although land cession has not been dealt with in any of the Treaties applying to Nova Scotia, guarantees for the protection of Mi'kmaq lands were given by the Crown's agents. An example is the 1725 Treaty of Massachusetts Bay, where Lieutenant Governor William Dummer promised that *"...the Indians shall Peaceably Enjoy all their Lands & Properties.... & be no ways Molested or Disturbed in their planting or Improvement."*[19]

At the same time, the Mi'kmaq gave assurances that they would not molest British subjects or settlements that had been lawfully made. The Mi'kmaq regard their treaties as evidence of two states sharing one Crown. The terms of the Treaties include the preservation of the

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[17] NYCD, London Docs. XXXIII p. 18; quoted in Williams 1993, Ibid.: p. 151.

[18] Mi'kmaq Treaty handbook, Ibid.: p. 21.

[19] "Treaty of 1725, Promises by Lieutenant Governor of Massachusetts Bay", 15 December 1725: quoted in Mi'kmaq Treaty Handbook, Ibid.: p. 20.

economy of hunting and fishing and material benefits were provided. The influx of Loyalists into Nova Scotia brought an increase of abuses of the Mi'kmaq and disrespect for the *Proclamation*. The Colonial Period of 1800-1867 saw Mi'kmaq treaty rights largely ignored.[20] The Post Confederation period was a continuation of this pattern.

1.2.1.3. Fundamental Reform of Policy and Practise.

Despite the existence of these and other treaties, settlers and their local governments did not pay much heed, and continued to appropriate indigenous lands and resources. This led to renewed conflict which threatened not only the immediate security and safety of the parties, but also Britain's long term strategic interests in North America.

Imperial authorities recognized that the indigenous nations had proprietary rights to land and resources which could not be arbitrarily taken away without their consent and the payment of equitable compensation. They also recognized that the laws of indigenous people had standing *vis a vis* those of the English:

> The British Crown recognized that the Indians had certain ownership rights over their land, it sought to establish trade with them which would rise above the level of exploitation and give them a fair return. It also allowed them autonomy in their internal affairs, intervening in this area as little as possible.[21]

They recognized that the indigenous nations had proprietary rights which required protection and due process.

But at the same time, they were resigned to the fact that public opinion and economic interests among the settlers would vigorously oppose any restitution for lands already taken. In 1757, when Sir William Johnson was looking for ways of securing and maintaining alliances with the Indian nations against the French, he considered the possibility of 'rolling back' non-Indian settlement as a sign of good faith, but immediately talked himself out of it:

> This plan will be so mortifying to the great Patentees, and to the Pestilential Thirst of Land, so Epidemic tho' all the Provinces, that I imagine it wou'd

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[20] See also Daugherty, W.E., *Maritime Treaties in Historical Perspective,* Research Branch, DIAND, 1983. The Mi'kmaq signed Treaties with the English, French, and the Holy See.

[21] R v. Sioui, pp. 32-33.

> occasion too general an Opposition to be brought about.[22]

Notwithstanding this fact, the Imperial government understood very well that in it's competition with other European powers for access to North America, the alliance or neutrality of the indigenous nations was essential. The Supreme Court of Canada has observed that

> ...both the French and the English recognized the critical importance of alliances with the Indians, or at least their neutrality, in determining the outcome of the war between them and the security of the North American colonies.
>
> Following the crushing defeats of the English by the French in 1755, the English realized that control over North America **could not be acquired without the co-operation of the Indians.**[23] [emphasis added]

In fact, history shows that this alliance or neutrality was pivotal not only in the wars with the French; but also the wars with the Americans, the assertion of 'sovereign' claims in the Northwest after Confederation, and even the Arctic post - WWII. In other words, Canada as it is today is a result of that combination of alliance and non-interference.[24]

The result of the Seven Years War between 1753 and 1760 revolved around First Nation decisions to become allies or enemies of one side or the other. Both sides curried First Nation favour. In the end, the majority supported the British, principally because of assurances repeatedly held out by the British Crown to respect First Nations territories and rights. Britain had to stabilize the situation in British North America, in order to ensure a positive atmosphere for economic and social development.

> The reason for inclusion of rights in the Jay Treaty, the reason for treaty council promises made by Lord Simcoe, Dorchester and other representatives of the Crown, was not out of kindness or generosity, it was because there could not have been a peace or economic advancement for the European powers

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[22] Sir William Johnson Papers II, 737: Johnson to Thomas Pownall, 8 September 1757; quoted in Williams, 1993 Ibid.: p. 178.

[23] R v. Sioui, SCC, Ibid.: pp. 30-31.

[24] See Tony Hall, Ibid., for a more detailed discussion of this.

without the co-operation and support of the Aboriginal peoples.[25]

The end of the Seven Years' War in 1760 (following the capitulation of Montreal by the Mohawk-led "British" forces) had brought the Imperial Crown new problems of deciding how to proceed with settlement. If too broad a scope were to be given, resources to offer security and protection would be stretched too thin. The wealthy and powerful fur interests also favoured keeping settlement confined and leaving the First Nations in undisturbed possession of their lands. On the other hand, land speculators wanted to be free to acquire and dispose of lands. As well, a powerful, well-organized and aggressive group known as the Imperialists pressed to have British civilization spread as widely as possible over the face of the earth.[26]

And so, in the period before 1763, the Crown gave many guarantees to the Indian nations that their economic and political rights would be protected. The problem was that local colonies and settlers were breaching these agreements and fomenting violent conflict in the process. The Pontiac Rebellion of 1763 demonstrated that additional measures were necessary to secure peace and prosperity for all parties.

1.2.2. Accomodation (1763-1815) and Dislocation (1815-1867).

1.2.2.1. Justice vs. Self Interest.

Through the Royal Proclamation, the Imperial Crown committed and bound itself to fundamental reform, establishing basic principles of the relationship for the future. It seems to have been intended to set aside once and for all the notions of *terra nullius* and the presumption that indigenous rights to lands and resources had no standing in law. Two designations were mentioned regarding the Indian nations: "Indians under the protection of the English" and "Nations or Tribes of Indians With Whom We are Connected."

The *Proclamation* confirmed the pattern of recognizing First Nation rights and directed the Governors and Commanders in Chief of the Colonies to respect those rights. The renowned jurist Lord Denning ruled on this point in 1981 when the right of Britain to turn over its trust responsibility to Canada without maintaining control over administration of the Crown's relationship with First Nations was being challenged in British Courts.[27]

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[25] Akwesasne, Ont. 93-05-04: Micha Menczer P. 186-87.

[26] See Russell, Nelson Vance, *The British Régime in Michigan and the Old Northwest 1760-1796* (Philadelphia: Porcupine Press, 1978).

[27] *The Queen v. Secretary of State,* 1981, 4 C.N.L.R. p. 90. The Indian Association of Alberta, the Union of New Brunswick Indians, and the Union of Nova Scotia Indians applied

> ". . . it was the obligation of the Crown (through its representative on the spot) to take steps to ensure that the original inhabitants of the country were accorded their rights and privileges according to custom coming down the centuries except insofar as these conflicted with the peace and good order of the country or the proper settling of it. This obligation is evident most strikingly in the case of Canada by the *Royal Proclamation.*"

As a result of the *Proclamation,* grants by governors of unceded lands were prohibited. The Superintendent General of Indian Affairs for northern North America, Sir William Johnson, represented the Crown with respect to Indian matters, and reported only to the Crown. The British press approved of the arrangement, being of the opinion that Pontiac's War was *"occasioned by the Indians being cheated out of their lands by the English in America."*[28]

Although it began as a unilateral declaration, the proclamation was brought to many Indian nations, offered as a basis for future relations, and accepted as such through Treaty.[29]

Even so, the terms of the Proclamation were a compromise, reflecting the political reality of the colonists and their self interest. After reviewing a copy of the Royal Proclamation for the first time, William Johnson wrote to General Gage voicing his concern about the fact that although the Proclamation was clearly intended to prevent **future** abuses, it provided no remedy for **current** ones:

> I am hopefull that... there Lordships will be able still farther to contribute towards the salutary Points in view relative to the Indians. **This Proclamation does not relieve their present Grievances which are many, being calculated only to prevent the like hereafter, altho' there are numberless instances of Tracts which have indeed been purchased, but in the most illegal and**

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to the British Courts for a declaration that *". . . treaties or other obligations entered into by the Crown to the Indian peoples of Canada are still owed by Her Majesty in right of Her Government in the United Kingdom."* In essence, the courts ruled that these valid obligations would be met by the Government of Canada, i.e., the Crown in Right of Canada had assumed all treaty obligations.

[28] Quoted from New York Historical Collections for 1876, p.270.

[29] See Williams, 1993, Ibid. William Johnson held many Councils during the winter and summer of 1764 which resulted in Treaties that incorporated the terms of the Proclamation. ie., the Niagara Treaty of 1764.

fraudulent manner, all which demands redress.[30] [emphasis added]

If the past had been bad and could not be changed, at least the Crown would see to it that the future would be more 'just' and 'equitable'. But to land speculators such as George Washington, who would later become president of the United States, the *Proclamation* was regarded as a temporary inconvenience. He wrote his land agent, Colonel William Crawford in September, 1767:

> I can never look upon that Proclamation in any other light (but this I say between ourselves), than as a temporary expedient to quiet the minds of the Indians, and must fail, of course, in a few years, especially when those Indians are consenting to our occupying the lands.[31]

In 1769, the Commissioners for Trade reported that the boundary lines set out in the *Proclamation* separating settlement from Indian Territory were *"mere provisional arrangements adapted to the Exigence of the time."*[32] In an effort to obtain the accommodation that had been called for, Johnson proceeded to make treaties which he regarded as establishing a definite boundary line between Indian country and the European settlers.[33] When the line seemed unclear in New York, Johnson entered into the Treaty of Fort Stanwix in 1768 with the Iroquois.[34] While the boundary line could change - in fact the words of the Proclamation permit it to be changed if the proper treaty-making procedure is followed - the principles contained therein were not subject to change.

Johnson was aware that any further illegal encroachments upon First Nations lands would have plunged the western people into another "Indian War". He also knew that, along with land hungry colonists, there were also racist military commanders who were anxious to create havoc among the First Nations. General Amherst, for example, said the *"savages were the Vilest Race of Beings that ever Infested the Earth and whose Riddance from it must be*

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[30] Sir William Johnson Papers, Vol. 10 pp. 974-976: Johnson to Gage, 23 December 1763; quoted in Williams, Ibid.: p. 182.

[31] Quoted from Ford, W.C., *The Writings of George Washington* (New York, 1889), II, 220-21.

[32] Quoted from Pennsylvania Archives, IV, 315. See also Paul Williams, 1993, Ibid.

[33] New York Colonial Documents, VII, 717-41; 1004.

[34] New York Colonial Documents, VIII, 111 ff. See also Williams, Ibid.

Esteemed a Meritorious Act for the good of Mankind."[35]

On another occasion, in a letter to one of his colleagues Mr. Bouquet he wrote *"Could it not be contrived to send the Small Pox among those disaffected tribes of Indians? We must on this occasion use every strategem in our power to reduce them."*

To this Bouquet replied:

> I will try to inoculate the - with some blankets that may fall in their hands and take care not to get the disease myself. As it is a pity to expose good men against them I wish we could make use of the Spanish method to hunt them with English dogs, supported by rangers and some light horses, who would, I think, effectually extirpate or remove that vermin.[36]

Amherst responded:

> You will do well to try to inoculate the Indians by means of blankets, as well as to try every other method that can serve to extirpate this execrable race. I should be very glad your scheme for hunting them down by dogs would take effect, but England is at too great a distance to think of that at present.[37]

With the *Proclamation*, legislative assemblies governed areas which First Nations had ceded to the Crown for settlement. The Imperial Crown was to maintain a supervisory role, preventing First Nation lands from being settled prior to consent being obtained from the First Nations through an open and democratic process. The First Nations continued to govern themselves on the lands which they continued to reserve for their own use. In every pre-Confederation constitutional document, the operation of the *Royal Proclamation* is spelled out: the *Quebec Act* (1771) s. 3; the *Constitution Act* (1791) s. 33, and the *Union Act* (1840) s. 46.

Between The Treaty of Paris in 1763 and the American Declaration of Independence in 1775, Britain entered into approximately 77 treaties with non-European nations. Of this total, 40%

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[35] NAC, Haldimand Collection, Series B, LXIII, pt. i, p. 341.

[36] Source: Edward Channing, *A History of the U.S.*, N.Y. 1905, III 27-28.

[37] British Museum, Additional MSS, Bouquet and Haldimand Papers, 21,634. Also quoted in Francis Parkman's *Conspiracy of Pontiac*, II 44-5.

of all treaties were with the First Nations of North America.[38] These treaties form a part of the European treaty system and follow the same protocol as European treaties at the time. The First Nations were treated as sovereign nations throughout the Treaty process.

But in the Canadas, the internal conflict among the Crown's agents - those who did seek justice and equity and those who did not - continued. In the event, self interest and racism tended to prevail. Regardless of the intent and the status of the Royal Proclamation, the future was in fact an acceleration of what had come before - the policies embodied in the Proclamation were not implemented in substance, and only reluctantly in form. Events in Ontario in the period leading up to Confederation provide an example.

1.2.2.2. Devolution and Off Loading in Upper Canada.

The Upper Canada Rebellion of 1837 was driven in large part by the settlers' demand for *responsible government* - local control over lands, revenues and expenditures. In terms of the quote that opened this chapter, they wanted to redefine the way in which the natural world - and the political arena - was divided.

By the early 1840's, effective provincial control over land and resources was obtained.

> As far back as 1835, the British Colonial Secretary had pledged that the Canadian land system would be made subject to local legislation. In 1837, the Crown had assented to the first Public Land Act of Upper Canada. Under the Act of Union in 1841, the Crown surrendered control of land revenues to the provincial legislature in exchange for a *civil list* - that is to say, payment of the salaries and benefits of judges and other officials - though it required acts relating to the Crown lands to be reserved for royal assent. The latter stipulation would finally be dropped in 1854.[39]

Although the Imperial Crown retained authority to enter into Treaty and obtain Indian lands, it had now given up control over the revenues from Crown lands to the province. At the

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[38] *Pre-Confederation Treaties in the International Context,* Treaties and Treaty Rights Working Group, Sub-Committee of the Constitutional Working Group, Assembly of First Nations.

[39] Lillian Gates, *Land Policies of Upper Canada* (Toronto: University of Toronto Press, 1968): pp. 256-57. Cited in James Morrison, "The Robinson Treaties of 1850: A Case Study", RCAP, 31 March 1993: p. 14.

same time, it was reducing expenditures on Indians and settlement, and began off-loading the costs of the Indian administration and settlement onto the province. The Imperial government's position was that if the Province had the benefit of revenues from land and resources, it should also pick up the costs and responsibilities for obtaining them.

This process of devolution climaxed in 1860-66 when the Province's Commissioner of Crown Lands administered Crown responsibilities for land and settlement, **as well as** Treaty making and Indian Affairs. The Province's subsequent (mis)conduct put to proof why Imperial officials had kept local government separate from Indian Affairs.

In doing this, the Imperial Crown was off-loading its political **and** fiscal responsibilities for Indians. Adequate care was not taken to supervise the conduct of the new trustee. As a result, the advent of *responsible government* in the Province of Canada marked the arrival of the era of Displacement and Assimilation.

1.2.2.3. The Chippewa and Mississauga of Southern Ontario.

In the late 1700's and early 1800's Crown land acquisition in Upper Canada accelerated to accommodate Loyalist settlers and Indian allies who had been displaced - first as a result of the Revolutionary War, and then after the War of 1812.[40] Initially, these Treaties provided for the outright sale of portions of Tribal territories in return for one-time payments in cash or goods. The social and economic integrity of the Tribes was not yet under complete seige, since they retained other lands which they could rely on, and previous treaties of alliance provided for the annual 'presents'. So perpetual support or payments in the context of land sales were apparently neither offered nor sought.

Locations of economic or social importance - such as fishing spots on lakes and rivers, hunting & planting grounds, and community sites were reserved. At the same time, guarantees of protection from settlers' interference were obtained.[41]

But how was the 'value' of land to be translated into monetary terms? At least as early as the 1790's, disputes were arising as to the value of ceded lands to the parties, and therefore the purchase price. The Crown's agents had established a policy of obtaining Indian lands for

[40] For instance, the Six Nations reserve at Oshweken Ontario was purchased by the Crown from the Mississaugas to provide land for Mohawk Chief Joseph Brant and his followers, whose lands were in the new USA, but who had allied themselves with the British.

[41] Johnson (1986) Ibid.

the lowest price possible, based on its 'value to the Indians'. This price was significantly different than the 'market value' of the lands once they came into the public domain.[42]

For example, in 1798 the Crown approached some of the Mississauga resident on Lake Ontario, intending to obtain the shoreline from Burlington Bay (Hamilton) to York (Toronto). Counselled by Mohawk leader Joseph Brant, the Mississauga sought something close to the actual 'market value' of the land - more than the Crown was willing to pay. Crown agents were taken aback and commented on *"the unreasonable nature of this demand on the part of the Indians"*. This had little do with whether or not the Mississauga were seeking a fair deal - the explanation offered by some Colonial officials was that since previous land sales had not cost so much, future ones shouldn't either.[43]

This issue was discussed at length in a report by the Land Board to the Province's Executive Council that same year. The Board highlighted the contradictions inherent in government's approach:

> There is no secret to any Person at all acquainted with the state of Indian Affairs that the Aborigines of this Part of his Majesty's American Dominions are beginning to appreciate their lands not so much by the use in which they are in the habit, or are capable of making of them themselves, as by the value at which they see them estimated by those who purchase them and either cultivate them, or dispose of them in their natural state - It is equally notorious, that if the Indians want... there are a great many persons.... who will not fail to inform them that **the value of an Article depends as much upon its importance to the purchaser as on its usefulness to the present possessor.**[44] [emphasis added]

The report went on to consider what might happen when the Indians fully realized *"that the*

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[42] Joseph Brant, leader of the Haudenosaunee of the Grand River at that time, was well known for his successful efforts at obtaining market value or better for parcels of the Grand River tract. His actions led to an ongoing struggle with the Indian Department who insisted that by dealing directly with settlers, he was violating the terms of the Royal Proclamation. See Johnson, Ibid., and Williams, 1993, Ibid.

[43] Memoir of William Dummer Powell, 1 November 1797, in E.A. Cruickshank and A.F. Hunter, eds., The Correspondence of the Honourable Peter Russell (Toronto, Ontario Historical Society, 1932-1936), Vol. II pp. 19-22, and Russell to Brant, 29 July 1798, pp. 186-187; cited in Ian Johnson, "British -Tribal Relations in the Colonial Period" (unpublished manuscript, Union of Ontario Indians, 1986).

[44] Minutes of the Executive Council, 22 October 1798, Cruikshank, Peter Russell: pp. 290-291, Cited in Johnson, Ibid.

purchases made from them are to be converted into a source of wealth to ourselves", and concluded that it would not be in the province's interests to encourage that possibility. Instead, it was recommended that efforts be made to conclude a few large land purchases before knowledge ran its course - *"the purchase of 50 or even 100 Townships, if made now, will cost us less than the purchase of ten after..."*. In this way the province could *"dictate instead of soliciting the terms on which future acquisitions are to be made"*.[45] The goal of obtaining larger and larger tracts of land from the Indian nations at one time would remain central to government policy from that point onwards. At the same time, the annual presents would be used as a lever in pressuring the Mississaugas to be more 'realistic' in their demands.

Seven years later - in 1805 - there was a Treaty Council between the Mississauga and the Crown to deal with these same lands - altogether about 85,000 acres. The government's 'negotiating strategy' had worked - the combined effect of reduced 'presents' and increased friction with settlers & squatters had made the Mississauga 'more reasonable'.

Nonetheless, the Chiefs still used the occasion to obtain guarantees and protections with respect to the lands which were the basis of their communities and economy. In his speech, Chief Quinepenon not only makes clear the peoples' understanding of the Crown's trust obligations, but also mentions the role of women in the decision making process:

> Father, we have considered again the subject of the Land we spoke about yesterday; And altho' we and our Women think it hard to part with it, yet as our Father wants it, he will of course do better with it than we can ourselves.
>
> We therefore have altogether agreed to give all you ask, to do as our Father pleases with it except this River [the Credit] which we must persist in keeping.... All the rest of our Land we are willing to give to our Father depending on him for protection when we land along the Beach of the lake....
>
> We now rely on you Father to protect us when we want to encamp along the Lake and not suffer us to be driven off as we now are on the Lands we formerly sold our Father, altho' we were promised to camp and fish where we pleased. We also reserve all our fisheries both here, at the Sixteenth and Twelve Mile Creeks together with our Huts and Cornfields & the flats or bottoms along these creeks.[46]

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[45] Ibid.

[46] NAC RG10 Vol. 1, pp. 298-299: "Proceedings of a Meeting with the Mississaugas, River Credit", 1 August 1805, cited in Johnson, Ibid.

A provisional agreement was drawn up and confirmed, it included a payment of L1000 and protection of the shoreline, fishing grounds and farms. But later, in considering the terms on the Council, William Claus informed his superiors that in *"former purchases of Indian lands much larger sums have been paid for smaller tracts I therefore humbly submit... whether two thousand pounds in Provincial Cur'y would not be a fair price instead of one thousand."*

His request was denied, and the Mississauga received a payment of L1000 in goods. Beyond this, no actual protection was offered for their fishery or shoreline access, and efforts would continue to obtain further surrenders of their farms.[47]

The Crown proved lax in confirming with the Tribes the actual lands subject to each of these Treaties, and in preventing squatters and others from appropriating lands and resources that had been specifically reserved or had not been subject to Treaty. As a result, neither the Crown nor the Chippewa & Mississauga were certain as to which lands had been Treated for, and a quilt work of subsequent Treaties were patched together to cover for the errors over the next 125 years.

1.2.2.4. Annuities and Land Sales.

Until just after the War of 1812, land sale Treaties still generally involved one time payments in cash or goods. However, as we mentioned earlier, continued efforts to reduce expenditures from the Imperial Treasury led to one of the first clear examples of off-loading: the province was told that in future it would have to finance the purchase of Indian lands - and subsequent settlement - itself.

This brought about a change in the way Treaties were financed and cash transfers were made - instead of one time payments, annual instalments were to become the standard.

> Upper Canada could only afford to purchase Indian land by paying a small annuity to the tribes which could be offset by reselling the land to settlers at a profit and investing the return. In fact the annual payment to the tribes was often less than the interest earned by the government on the principal. This scheme saved the government a great deal of money and eventually earned a large enough profit to finance the administration of the province.[48]

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[47] NAC MG24 Series A-6, the Peter Hunter Papers: William Claus to Peter Junter, 21 August 1805 & 16 November 1805, cited in Johnson, Ibid.

[48] Lillian Gates Land Policies of Upper Canada (Toronto, University of Toronto Press, 1968): p. 230, cited in Johnson, Ibid.

Commentators have observed that the switch to annuities also represented an acknowledgement on the part of government that the economy of the tribes had been ravaged, and supplemental sources of income would be required, tied to the proceeds from the sale of traditional lands. From the perspective of the First Nations, yearly payments and meetings conformed more closely to traditional indigenous Treaty practise, which called for regular exchange of gifts and an annual renewal of agreements.[49]

The idea sounded good, but how was it applied in practise? Three points in particular need to be borne in mind for the discussion that follows: (i) how did the Crown's agents exercise their discretion over the management of land sales and revenues; (ii) what was the value of the lands compared to the return received by the Indian nations; and (iii) what was the result?

(a) Management & Exercise of Discretion.

> However upright may have been the intention of legislators, the fulfilment of their treaties has too often been left to the direction of men having a direct interest in violating or evading them.[50]

Evidence from Upper Canada and later the Province of Canada shows that in many, if not most cases, the handling of land sales and revenues were grossly mismanaged. Peter Schmalz, in his book The Ojibwa of Southern Ontario, documents many of the those that took place in what is now southern Ontario. Agents received a 5% commission on land sales, but being in the field were able to exercise personal (in)discretion largely at whim.

Captain Joseph Clench, an employee of the Indian department from 1813-1854, ended his term in charge of the London District and clearly used his office to prepare for his retirement.[51] On the 'management' side, he embezzled literally thousands of pounds from Indian land sale accounts for his personal benefit. On the revenue side, there were irregularities as well - in some cases, Clench declined to collect payment for Indian lands from settlers, on the basis that the whites had simply told him they unable to pay.

After a time, Clench was found out and removed from office on the specific charge of

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[49] Johnson, Ibid.; see also RCAP Treaty Paper, 10 May/94 draft, Treaty Policy team: p. 13.

[50] Report on the Indians of Upper Canada - Sub-Committee appointed to make a comprehensive inquiry into the state of the Aborigines of British North America (Aborigines Protection Society, London, Haddon, 1839): p. 23. Quoted in Johnson, Ibid.

[51] Schmalz, Ibid.: p. 164.

embezzling *"large sums of money"* from the Chippewa of Sarnia.[52] Proceedings against him commenced, but he died before they could be brought to a conclusion. Efforts continued to try and secure restitution from his estate, but there were many delays and it was not until 1905 that a small portion of the total amount was finally secured. A claim for the remainder of the monies owing to the Chippewas of the Thames was filed under Canada's Native Claims Policy in the 1970's, but it was rejected on the grounds that Canada would not be held liable for the conduct of agents of the Imperial Crown.[53]

Another example involved Samuel P. Jarvis, who was the Chief Superintendent of the Indian Department in Upper Canada from 1837-1845, at which time he was removed from office based on the findings of a committee of inquiry. He had stolen more than L4000 from Chippewa and Mississauga trust funds, and was accused, among other things, of issuing presents to non-Indian associates, and sexual assault against Anishnabe women. Schmalz reports that:

> Jarvis' family connections and wealth contributed substantially to protect him from legal prosecutions in these affairs. unfortunately, he was not an exception to the rule. The Indian Department was... *"notoreously the worst and most inefficient department in the province"*.[54]

Jarvis also served as a Director of the Bank of Canada.

In another part of this paper we will consider justice issues, but at this point it should be observed that generally agents of the Crown were not prosecuted for what were clearly criminal - let alone fiduciary - breaches, and the Tribes were not compensated fully or at all for their losses (if in fact the Crown took the time to determine exactly what those losses were). In this sense, the 'justice' system did not act to protect even the baldest civil rights of the Indian nations, let alone uphold the Treaties or the Imperial Crown's prerogative orders. This selectivity in the application of due process and the most fundamental of civil rights is an example of how the government's discretion over the management of Indian afffairs was often exercised.

Records - such as they exist - for land sales on the Bruce Peninsula and Manitoulin Island resulting from Pre-Confederation Treaties show clearly that in many cases little if any effort was made to actually collect the full purchase price and interest for lots once the initial

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[52] Schmalz, Ibid.: pp. 169-171.

[53] Personal communication, Kelly Riley, Chippewas of the Thames, to Peter DiGangi, 4 June 1994.

[54] cited in Schmalz, Ibid.: pp. 165-166. For more detail & other examples, see pp. 164-174.

downpayment had been made. Accounts of the land sales transactions were so poorly kept that proper audits were impossible to complete (in the case of Saugeen and Nawash lands on the Bruce, an audit was not even attempted until fifty years after the lands sales had begun).[55]

Even today, DIAND denies liability for the management of land sales and will not provide audited statements of land sales account books - it places the burden on First Nations to collect the accounts, have audits done, and demonstrate if there is any basis for a "claim".[56]

Many other examples from this period could be cited if time and space permitted, but the point has been made.

(b) Value of Lands.

Land sales on the Bruce Peninsula during this period provide an example of how purchase price and market value were dealt with. Large tracts had already been sold by the Chippewa of Saugeen and Nawash in the 1830's and following to allow for settlement, but they retained substantial reserves. Large scale immigration from Ireland and Britain unleashed a wave of land hungry settlers who cared little about Indians or reserves. Confrontations over land were on the rise, and squatters were taking over reserve land with impunity to the point where Indian Superintendent Oliphant came to the seemingly odd conclusion that the only way some lands could be saved for the Saugeen Chippewa was to obtain a surrender for the majority of their reserve.[57]

Notwithstanding open conflict with lawless settlers, the Chippewa were not agreeable to another surrender. Indian Agent Anderson noted that much of his difficulty resulted from the fact that the Chippewa were *"governed by the voice of the people"* and not the Chiefs alone. So, not able to obtain free consent, he resorted to threats:

> You complain that the whites not only cut and take your timber from your lands, but that they are commencing to settle upon it, and you cannot prevent them, and I certainly do not think the Government will take the trouble to help you... **The Government, as your guardian, have the power to act as it**

[55] Schmalz, Ibid.: pp. 169-170; see also Paul Williams, "The Manitowaning Treaty of 1862" (Union of Ontario Indians, August 1986).

[56] Personal communication, Helen Lynn, Specific Claims East, DIAND: 19 May 1994.

[57] Schmalz, Ibid.: pp. 140-142.

pleases with your reserve.[58] [emphasis added]

By 1854 the surrender had been obtained, according to Schmalz, not with the consent of the people, but by getting *"the signatures of those in debt, those who had a weak claim to the land, those who feared white encroachment, and especially those interested in farming".*[59]

A total of 500,000 acres was put up for auction, the proceeds of which was to be for the use and benefit of the Chippewas of that area. Buyers usually paid 20% down, with the remainder to come in annual instalments, along with interest. Timber dues were also to be paid and credited to the Chippewa accounts. *"These provisions, if adhered to, would have resulted in millions of dollars flowing into Saugeen Band funds."* However poor book keeping and lax collection of payments diminished revenues - *"thousands of acres of land had been sold but not paid for in full".*[60]

As important was the pressure that the settlers brought to bear on government to reduce the purchase price of lands **after** they had been sold. Arguing that they had paid too much in auction for the land, settlers and their politicians began agitating for refunds, reductions in amounts owing, and a re-evaluation of the value of the lands themselves. In 1868 the Bruce County Council even lodged a claim for monies derived from the land sales, asserting that it needed the money more than the Chippewa.

In 1872-73 Canada gave in and appointed a person to valuate the lands in question - William Bull, who also happened to be clerk of the Township of Amabel, where the majority of the 'aggrieved' settlers lived. Reductions in land prices and timber dues resulted, only to be followed by more petitions, another re-evaluation in 1897-98, and once again *"large reductions were made in favour of the settlers".* In 1901 another Order-in-Council was passed further reducing the price on sold and unsold lots.

Schmalz reports that this was not ncessarily done at the insistence of poor settlers, but in the interests of land speculators who were connected with the political elite. Land agencies were established with the specific intention of taking advantage of the situation. They bought *"thousands of acres in Abermarle, Amabel, and Keppel townships at low prices in 1882 and*

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[58] PAO, "Copies or Extracts of Recent Correspondence Respecting Alterations in the Organization of the Indian Department in Canada", Colonial Office, May 1856: p. 12; cited in Schmalz, Ibid.: p. 142.

[59] Schmalz, Ibid.: p. 143.

[60] Schmalz Ibid.: pp. 169-173.

later sold them at inflated prices."[61]

(c) Land Sales to Subsidize Settlement.

Although ostensibly, government was to manage the sale of 'surrendered' lands for the long term benefit of the Indian nations, evidence demonstrates that much if not most of the benefit was distributed and accumulated elsewhere. A case in point is the Canada Company, which was given a charter in 1825 by Britain to act as a settlement corporation, selling unsold surrendered Indian lands to settlers. By 1828 the Company had been granted almost 2.5 million acres of Indian lands. Since annuities were fixed at a rate substantially below market value, significant profits were generated - enough not only to subsidize the operation of government, but also to pay dividends to shareholders.[62]

Even the monies that eventually ended up in Indian trust fund accounts were often freely used as a ready source of capital for the settler elite. In the 1840's, *"the failure of the Grand River Navigation Company led its government appointed white 'trustees' to remove their personal money and replace it with Six Nations trust funds. The money was lost."*[63]

This practise continued and accelerated with time.

> When the Pennefather Commission in 1858 was handed London's decision to discontinue outright in 1860 the yearly parliamentary grant for Indian Affairs, it suggested that the Indian peoples would have to be encouraged to cede all their unused lands to the Province of Canada in order to finance their government services. Once again the colonial administration intended to make the Indian Department financially self-sufficient through the sale of Indian lands. While Indians paid for their own benefits, they had no control over the expenditures.[64]

Relying on the precedents which had already been set, the Province turned this Imperial off-loading to its advantage by using Indian land sales not just to pay for the 'Indian

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[61] Schmalz, Ibid.: pp. 172-174.

[62] Thelma Coleman and James Anderson The Canada Company (Toronto: Cumming, 1979) and others, cited in Johnson, Ibid..

[63] Williams, 1993, Ibid.: p. 113.

[64] Leslie, pp. 145, 146. Province of Canada. Journals of the Legislative Assembly. Sessional Papers, Appendix 21, "Report of the Special Commissioners to investigate Indian Affairs in Canada", Toronto, 1858, Part III. Cited in Aronson & Maguire, Ibid.: p. 17.

administration', but also the costs of settlement.

In their IPP submission to RCAP, the United Chiefs and Councils of Manitoulin give an account of how the proceeds from land sales arising from the 1862 Manitoulin Treaty were in large part used to subsidize the cost of settlement.

> That Treaty brought about the sale and settlement of the majority of the eastern sector of the Island. We were to receive the proceeds of the land sales to provide capital for our communities into the future, so that we could grow and prosper in the long term. However, it turned out that the Crown used the proceeds of the land sales to pay for survey costs, the administration of the sales themselves, and even the construction of roads on the island. These things therefore did not appear on the public accounts as a cost associated with opening up the island for settlement - they were a savings for government, and a cost borne by us.[65]

The Province, forced to bear the costs of Treaty making and settlement because of Imperial off-loading, used its position to in turn off-load these costs to the Indians themselves. This, in addition to sloppy accounting and non-collection of payment for lands, meant that the Anishinabek only received a small proportion of the actual value of the lands which had been sold. On balance, then, it appears that in this case the proceeds of the land sales were largely dedicated for the *'use and benefit'* of the province and the settlers, with the costs of settlement and infrastructure charged against Indian trust fund accounts.

(d) What was the Result?

Lands & resources, as a form of 'property', were the Indian nations' capital. It was understood that land sales proceeds were to provide for future well being of the Indian parties, to supplement the livelihood they derived from lands & resources that had been reserved. The management of these matters was left to the discretion of their trustee, the Crown.

But government policy was not to pay 'market value' for lands, and there was a lack of diligence in collecting payment. In addition, reserved lands and resources were not protected. Once the monies were spent off, reserved resources had been appropriated and Indians were left without capital or an economic base, they were characterized as 'wards' and regarded as a 'burden'.

[65] United Chiefs & Councils of Manitoulin "UCCM Fish & Wildlife Project", submission to the Intervenor Participation Program, 30 June 1993: p. 35.

So, in may ways the land sales were a direct subsidy to the province, the Crown's Agents themselves, and settlers. Indian nations received little lasting benefit - certainly nowhere near an equitable proportion of their contemporary or future value. The capital that had been generated came to rest in the pockets of others.

The situation of the Chippewas of Saugeen and Nawash provides an example:

> As a result the funds available to the Southern Ojibwa during this transition from hunters to farmers were inadequate. Although they had sold millions of acres to the government, many of them still had to go begging. The *Wesleyan Methodist Report* of 1857 clearly stated the problem: *"Though they have many thousand pounds in the hands of others, yet very little is at their own command. The amount of annuities paid to each, is about six to ten dollars a year, which does not supply their real wants one month, the rest of the time they fish, hunt or beg."*[66]

The Chippewa and Mississauga who lived to the south and east of the people at Saugeen and Nawash provide another example:

> To a significant degree the Mississauga and Chippewa [and the Ojibway generally] financed the foundation of Upper Canada's prosperity at the expense of their self-sufficiency and economic independence. Government profits in the nineteenth century from the sale of Indian land amounted to the difference between the purchase price and the fair market value.... If the Mississauga and Chippewa had received market value for their lands, the British treasury would have been obligated to finance the development of Upper Canada while the aboriginal population would have become the financial elite of the New World.[67]

Their experience was the rule and not the exception. Considerable capital was generated through the sale of Indian lands in Upper Canada prior to Confederation, but it was soon dissipated to serve other interests.

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[66] Wesleyan Methodist Report, 1857, xxiii, cited in Schmalz, Ibid.: p. 166.

[67] Johnson, Ibid.

1.2.2.5. The Robinson Treaties.

The Robinson Superior and Huron Treaties of 1850 are largely the result of Anishinabek resistance to mining and timber developments which were taking place on lands that were not covered by Treaty agreements. The events leading up to and following the Treaty were directly related to discussions on the kind of sharing of resources and authority that needed to take place to provide for the future economic benefit and security of the parties.

In the exchanges that took place before and during the Treaty Councils, the intentions of the Chiefs - and their understanding of what would be required to provide for the prosperity of future generations - are clear.

During the 1840's mining and settlement was encroaching on the hunting grounds - and even the settlements - of the Anishinabek who lived on the north shores of Lakes Huron and Superior. There had already been a number of petitions and minor incidents, but the Crown had not taken action. Some of the leading Chiefs then went to Montreal to meet directly with the Governor General in order to secure a commitment for treaty.

They explained that no Treaty covered the sharing of those parts of their territories, and clearly stated the economic imperatives and opportunities that were at stake. The following excerpt from James Morrison's RCAP case study on the Robinson Treaties speaks of the Chiefs' address to the Governor General:

> After reminding the English of their help in time of war, the Chiefs referred to recent pressure for resource development:
>
> *"you have hunted us from every place as with a wand, you have swept away all our pleasant land, and like some giant foe you tell us "willing or unwilling" you now must go from amid these rocks and wastes, I want them now! I want them to make rich my white children, whilst you may shrink away to holes and caves like starving dogs to die. Yes Father! your white children have opened our very graves to tell the dead, even they shall have no resting place."*
>
> ..... *Father - Can you lay claim to this land? If so, by what right? Have you conquered it from us? You have not; for when you first came among us your children were few and weak, and the war cry of the Chippewa struck terror to the heart of the pale face. But you came not as an enemy, you visited us in the character of a friend. Have you purchased it from us, or have we surrendered it to you? If so, when? and how? and where are the treaties?"* The Great Spirit, said the Chiefs, had originally stocked their lands with animals for clothing and food, but now these were gone. However, the Great Spirit had foreseen that this would happen *"and placed these mines in our lands, so that*

> *the coming generations of his red children might find thereby the means of sustenance".* Their address closed by entreating the Governor to *"call a council of our nation as speedily as possible, to enter into some treaty with us for our lands, so that no bad feelings shall exist between your red children and your white children".*[68]

Although at the time the Governor promised prompt action, delay was the result while the government sent up a second commission of inquiry into the "claims" of the Anishinabek. The Commission in the end found that they did hold title and that their claims of the damage being inflicted by development were true. But by that time, the people had become impatient and shut down the mining operation at Mica Bay by force. Arrests were made and charges laid, but ultimately the incident served to trigger the establishment of a formal Treaty commission.

(a) Annuities and Resource Revenues.

At the Treaty Council, the sharing of resources, and the continued ability of the Anishinabek to make use of 'ceded' lands was discussed. Commissioner Robinson, James Morrison reports, assured the Chiefs

> that they would have continued use of all of the lands to be covered by treaty - with the possible exception of small tracts needed for mining. The new white arrivals, then, would be expected to co-exist with aboriginal people, rather than try to displace them.[69]

The texts of the Robinson Huron and Robinson Superior Treaties are identical with respect to some of the key provisions that have to do with economics and resources. Annuities to be paid to beneficiaries were explicitly tied to future Crown revenues from 'ceded' lands. The relevant provision states that

> should the territory hereby ceded by the parties of the second part at any future period produce such an amount as will enable the Government of this Province, without incurring loss, to increase the annuity hereby secured to them, then and in that case the same shall be augmented from time to time, provided that the amount paid to each individual shall not exceed the sum of one pound Provincial currency in any one year, or such further sum as Her Majesty may

[68] Montreal Gazette, 7 July 1849, p.2.

[69] James Morrison, Robinson Treaty Case study, March 1994: p. 124.

be graciously pleased to order.[70]

Morrison goes on to describe the Commissioner's stated intentions in drafting this provision:

> In his official report, W.B. Robinson explained both to the Governor-General and the administration that the resource revenue clause had been intended to silence the "evil advisers" of the Indians - Allan Macdonell and his associates - who were trying to create dissatisfaction over the extensive territory covered by the agreement. Desiring to leave the Indians no just cause of complaint, said Robinson, *"I inserted a clause securing to them certain prospective advantages should the lands in question prove sufficiently productive at any future period to enable the Government without loss to increase the annuity. This was so reasonable and just that I had no difficulty in making them comprehend it".*[71] The Commissioner had probably lifted this idea from Alexander Vidal and T.G. Anderson, who in their report the year before, had suggested that *"provision might be made if necessary for an increase of payment upon the further discovery and development of new sources of wealth".*[72]

Regardless of Robinson's intentions, the written text contained a crucial 'escape hatch' for the government - rising annuities were to be at the Crown's discretion. Given established practise, what followed should not come as a surprize.

The Anishinabek perspective on this particular provision of the Treaty is explained by Morrison in connection with the

> ... Ojibway tradition that the Robinson treaty was an open contract - or *Chi-Debahk-(In)-Nee-Gay-Win* in the *anishnabe* language. According to the late Fred Pine (1897-1992), a great-grandson of Shingwakonce, *"an open contract means we will add something on it".*
>
> Interviewed in 1990, Mr. Pine echoed the words of John Mashekyash a century earlier. *"Well the government did not add on it like they were supposed to. Take all the timber dues from wood cut in this country. The money was*

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[70] Treaties #60,61, cited in Morrison, March 1994: p. 171.

[71] Morris, pp.18-19, cited in Morrison, March 1994: pp. 171-172.

[72] Vidal-Anderson Report (typescript), p.10; cited in Morrison, p. 172.

supposed to go to Indian Affairs for us. We signed that. But it never came out".[73]

The escalating annuities provision was a way of tying fiscal transfers directly to the benefit accrued from lands & resources, and in that manner keep the Anishinabek rights and interests on the public accounts. The record indicates that this was clearly on the minds of both parties prior to and during the treaty negotiations.

However, the annual payments remained fixed at $1.00 until 1870 when the Chiefs petitioned the Governor General for full implementation of the treaty in this respect. They were seeking an equitable return on their capital - the land and its resources - consistent with what they had negotiated at treaty. By that time, Confederation had come and gone, leaving Canada with responsibility for 'Indians and lands reserved for Indians', and Ontario with control over lands and resources. This division of constitutional powers was used by each to argue that the other should pay, in what was to become a familiar pattern of quite literally passing the buck.

Ontario admitted that it had made a profit from the lands covered by the treaty, but *"denied that the annuities constituted some sort of trust, or lien on the lands".*[74] Anyways, the province argued, Indians were now a federal responsibility. In 1874 Canada raised the annual payments to $4.00 unilaterally. In 1890-91 the matter went to arbitration - Canada seeking arrears and future payments, the province denying any responsibility. The Anishinabek themselves were not party to these proceedings.

After arbitration, the matter was appealed to the Supreme Court, and finally to the Judicial Committee of the Privy Council in England in 1897. In what would seem to be a denial of nearly two centuries of Imperial policy, the Committee found that the treaty provisions were *"nothing more than a personal obligation"* on the part of the old province, and that the new province of Ontario was under *"no duty.... whether in the nature of a trust obligation or otherwise, to apply the revenue derived from the surrendered lands in payment of the annuities.".*[75]

This decision was taken by the province as licence to remove Anishinabek interests in 'ceded' lands from the public accounts, along with any consideration of the benefit or loss that would accrue to them as a result of management decisions. Today, the cities of Thunder Bay, Sault Ste. Marie and Sudbury lie within the territory covered by the Robinson Treaties,

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[73] Fred Pine, interviewed by Thor Conway, 17-18 Oct.1990; cited in Morrison, 1994: p. 173.

[74] James Morrison, Ibid.: p. 175. See his Robinson Treaty case study for a more detailed treatment of this incident.

[75] Quoted in Morrison, Ibid.: p. 178.

beneficiaries of the wealth that the area has produced. The annuities remain the same as they were in 1874 - $4.00 per annum.

(b) Harvesting Rights.

Another provision in the Robinson Treaties dealt specifically with harvesting rights on 'ceded' lands. It states:

> And the said William Benjamin Robinson of the first part, on behalf of Her Majesty and the Government of this Province, hereby promises and agrees [...] to allow the said Chiefs and their tribes the full and free privilege to hunt over the territory now ceded by them, and to fish in the waters thereof as they have heretofore been in the habit of doing, saving and excepting only such portions of the said territory as may from time to time be sold or leased to individuals, or companies of individuals, and occupied by them with the consent of the Provincial Government.[76]

The evidence demonstrates that this clause was in direct support of the continued self sufficiency of the Anishinabek:

> At least in 1850, there can be little doubt that W.B. Robinson saw the terms of the treaty as a guarantee that the traditional Native economy would continue to be viable. This wasn't altruism on his part - he was trying to save the government money. By allowing the Ojibways to retain reservations for their own use, he explained in his report, and by securing to them *"the right of hunting and fishing over the ceded territory, they cannot say that the Government takes from their usual means of subsistence and therefore have no claims for support, which they no doubt would have preferred, had this not been done".*[77]

Robinson's understanding of this provision did not restrict Anishinabek use of natural resources to mere 'subsistence' - he was well aware that large parts of the existing Indian economy were dependent on trade and commerce, and in fact suggested to the Anishinabek during the Treaty Councils that the arrival of miners would provide them with a steady *"market for any thing they may have to sell".* A continued right to commercial use of fish &

[76] Robinson Treaties, cited in Morrison, 1994: p. 206.

[77] Morris, p.19, cited in Morrison, 1994: p. 208.

wildlife resources was confirmed.[78]

At the same time, the text of the treaty guarantees the *"full and free privilege"* to harvest without any reference to regulation by other governments.[79] In other words, Anishinabek laws related to harvesting and management would continue to apply to Anishinabek use of these resources.

The reason that guarantees regarding harvesting were sought was because of the importance that fish & wildlife played in the peoples' economy, and the potential for commercial return. Until the late 1830's, the Anishinabek had controlled the commercial fishery on Lake Huron, and the 1850 Treaty was intended to protect their remaining stake in the resource.[80] But when commercial licensing was introduced in the late 1850's, it was based on a conscious policy of exclusion. The interests of the Anishinabek were purposely removed from the books so that the resource could be allocated to citizens of the province and the United States.

In the ensuing decades, Ontario used licences, regulations and prosecution to restrict or eliminate Anishinabek involvement in the 'commercial' and the 'domestic' harvest. This was a direct attack on primary elements of the Anishinabek's economic base which led to violence in the short term and sustained resistance in the longer term.[81]

The Province

> took the position that neither the Robinson Treaties of 1850 nor any other agreement gave Indian people the right to hunt or fish on public lands without authority of Ontario law. As a result, many *anishnabeg* were fined or went to jail for activities which they believed were protected under their treaties. The federal government was unwilling or unable to defend them[82]. In March of 1911, a council of Chiefs met at Parry Sound, and forwarded a resolution to the Department of Indian Affairs asking for redress. They stated that *"all the*

[78] Morrison, 1994: pp. 208-209.

[79] Morrison, Ibid.: pp. 206-207.

[80] UCCM 1993, Ibid.: p. 12.

[81] See Morrison, Ibid.: pp. 206-224 for detail; also United Chiefs & Councils of Manitoulin, "UCCM Fish & Wildlife Project", submission to RCAP's Intervenor Participation Program, 30 June 1993.

[82] NAC RG10 Vol.6743 File 420-8 Vol.1. Frank Pedley to F.R. Powell, 24 Dec.1908; cited in Morrison, Ibid.: p. 218.

> *Chiefs residing under the Robinson-Huron Treaty and the Chiefs on the Manitoulin Island, together with their respective people do claim one voice as being deprived of their privileges of fishing, hunting and trapping rights according to understanding under the Robinson-Huron Treaty and other treaties of earlier dates, thus taking away the means of their livelihood".* The Chiefs also noted that, because of the enforcement of game and fish laws, *"many of our people have suffered the penalty thereof not only in fines but also in imprisonment"*[83].

The beneficiaries of this policy were non-Indian commercial fishermen and sports harvesters. Ontario's regime for fish & wildlife management placed *value* on the interests of those sectors, while removing any consideration of the *value* that they held for the Anishinabek.

The United Chiefs & Councils of Manitoulin has attributed this process of dispossession to *"prejudicial bookkeeping"*. The distortions that have resulted are explained in terms of their benefit and loss:

> One must be extremely cautious in looking at the relative costs and benefits of the fish and wildlife sector, for a number of fundamental reasons... [W]e have outlined the Crown's attempts to appropriate our authority over, and use of, natural resources. Behind these events though, one can see the imposition of a new set of values, an alien method of determining the relative worth of these resources, and the removal of any consideration of the actual costs and benefits involved. We have described how, beginning in the late 1800's, the Crown began its attempts to control and regulate supply and demand related to fish and wildlife resources. What we now see are the results of this effort - the Crown has squandered much of the resource and allocated use based on privilege, not need or constitutional requirements. Remedial measures are required.
>
> The sports harvest is favoured through government regulation because selective use and analysis of statistics inflate its true contribution to the economy. The "value" of the sports harvest seems to be determined only by looking at the consumption patterns of those who participate. On the balance sheet, no consideration is given to significant costs related to our economic and social dislocation: welfare dependency; poor health due to a reduction in the consumption of fish and game; or overwhelming but ineffective enforcement and prosecution measures. At the same time, no consideration is given to the value which these resources hold for our communities: the savings from not

[83] RG10 Vol.6743 File 420-8 1. Petition, 22 March 1911; cited in Morrison, Ibid.: p. 218..

> having to purchase store bought food; the health benefits of country food; or the importance of harvesting activities to our social, cultural and spiritual life....
>
> Government and commercial operators have created a market full of distortions that has determined a relative "price" for these resources. A very low value is put on "subsistence" harvesting, in terms of economic weight and social status, and a very high value has been put on "sports" harvesting. As a result, we have been effectively priced out of the market.
>
> It seems strange that outsiders (who can afford to) come hundreds, sometimes thousands of miles to harvest game and fish in our territory, while at the same time we who actually live here have serious problems with access. Restrictions on the availability of these resources and the prospect of prosecution and persecution are costs that we are forced to pay so that outsiders can continue to enjoy their privilege. So it is now often more convenient, safer, and cheaper for our people to buy groceries at the local store than it is to go into the nearby bush to take fish or game. This demonstrates how the dominant system as a whole is biased against a balanced evaluation of our real situation in relation to Ontario's economy and society.
>
> At the same time, other costs and benefits - for instance, the value of clean habitat, and the costs of habitat destruction and pollution - are not factored into the Crown's balance books to be weighed against the relative costs and benefits of non-renewable resource extraction over the long term. This makes it even more difficult to see the true picture. Even Crown revenues from resident angling licences go directly into the Consolidated Revenue Fund, and are not directly tied to expenditures related to the operations of the fisheries program.[84]

As early as the 1910's, federal and provincial officials were aware of the fact that the province's fish & wildlife regulations were in breach of the Robinson Treaties, and moreover that in court the Treaty would prevail. Instead of working to obtain implementation of the treaty, they agreed between themselves not to have the matter addressed through the courts, so that Ontario's policies would be allowed to stand.[85] As a result, Canada adopted a policy of not informing Robinson Treaty Indians of their rights under treaty in order to appease the province. For instance, in the 1950's Indian Affairs officials wrote that *"It is not the desire of the Branch to inform Indians fully concerning their Treaty rights because*

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[84] "UCCM Fish & Wildlife Project", RCAP IPP, 30 June 1993: pp. 30-31.

[85] NAC RG10 Vol. 6474 File 420-8X: re: R. v. Padgena.

conservation and management could be defeated by so doing".[86]

Often, other governments deny treaty rights on the basis that they are not in fact rights, or that the treaty text is ambiguous. In this instance, however federal-provincial cooperation in the denial of rights was done with the full knowledge that the treaty terms were unequivocal and the regulations they were protecting were *ultra vires.*

But it was not just provincial fish & wildlife regulation that acted to undermine this aspect of the Anishinabek economy. Resource development - particularly mining and logging - also had a significant and negative impact. A report from the Nipigon detachment of the RCMP filed in March 1936 described the situation as grim:

> During the past five or six months I have made a general survey of conditions among the Indians of this district, and find that considerable hardship and suffering was prevalent among them..... A large portion of this area is being prospected, with the result that wild game and fur bearing animals are very scarce. The Indians of this district are getting very discouraged and discontented, as it is practically impossible for them to buy sufficient food or clothing, with the result that they are continually going from one mining camp to another begging, or else applying for relief.[87]

The dark irony here is that it was concern about the negative impacts of mining on the Anishinabek economy which had precipitated the Robinson treaties in the first place, and moreover, two key treaty guarantees which had been obtained - rising annuities tied to resource extraction and protection for harvesting rights - had been emptied of their meaning.

[86] RG10 Vol. 8863 File 1/18-11-8 Vol. 1: Ostrander to Matters, 17 September 1954; quoted in Morrison, Ibid.: p. 223.

[87] Corporal R.K. Alcock, Nipigon Detachment, RCMP to Agent Burk, 7 March 1936: DIAND File 492/20-7-7-50 Vol. 1. Courtesy of the Ojibways of the Pic River First Nation.

1.2.3. Displacement and Assimilation: 1867-1930.

1.2.3.1. Management of Monies & Lands.

Problems continued in land & monies management even after responsibility for Indian Affairs was returned to the central government. This is evidenced by the 500+ 'specific' claims filed with Canada so far. We will provide one example. In 1897, the conduct of Indian Agent J.P. Donnelly of the Port Arthur District was investigated by the Inspector of Indian Agencies J.A. McRea, and found to have

> mismanaged the business entrusted to him and that there have been irregularities in the payment of annuity monies to the Indians of his Agency and in the payment of his travelling expenses for which he must be held responsible.

This was not only for personal gain - it was also found that Donnelly had entered into arrangements with the Hudsons Bay Company to ensure that the payment of annuities would bring direct benefit to them. The matter was brought before the federal cabinet, which accepted the Superintendent General's recommendation to dismiss him. However, as far as Indian Affairs records indicate, the matter stopped there - Donnelly was not prosecuted, and the Robinson Superior Anishnabe were never compensated.[88]

1.2.3.2. The Numbered Treaties and the Sale of Rupert's Land.

On May 2nd, 1670, the Hudsons Bay Company (HBC) was incorporated by Royal Charter, and given monopoly trading rights under British law in what became known as Rupert's Land and the North-Western Territory - altogether about 2.9 million square miles.[89] Through the Charter, the HBC was also granted a proprietary right to the lands and waters in the territory and judicial authority - Frank Tough concludes that together the terms of the Charter gave the

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[88] NAC RG10 Vol. 2173 File 36,072 Part 1, esp. "Extract from a Report of the Committee of the Honourable Privy Council, Approved by His Excellency on the 15th of December, 1897". Courtesy of the Ojibways of the Pic River First Nation.

[89] Charter of the HBC, 2 May 1670; Frank Tough, "Aboriginal Rights Versus the Deed of Surrender: The Legal Rights of Native Peoples and Canada's Acquisition of the Hudsons Bay Company Territory", in Prairie Forum, Vol. 17 No. 2 (Fall 1992): p. 225.

HBC *"the status of a proprietary government"*, but at the pleasure of the Crown.[90]

Two hundred years later almost to the day - June 23rd, 1870 - the Territory was transferred to Canada by the HBC. This same geographic area was also the subject to Aboriginal rights and title, which were dealt with in another way - through the Treaty making process that led to the conclusion of the numbered Treaties. In this sense the whole HBC territory was brought into Canada by virtue of two parallel agreements - one set made with the Indian nations, and the other made with a large and powerful corporate entity.

We will now take a look at the considerations and terms involved in each of these transfers in an attempt to compare the relative benefit that came to each of the parties as a result of these parallel transactions, and the value that was attached to their respective interest.[91]

(a) Background to the Transfer.

Although according to the letter of it's Charter the HBC had proprietary rights to the territory and some degree of governmental power, in practise it did not challenge Aboriginal people's rights to their traditional lands, or interfere with their internal governance.[92] Indeed, given the number of HBC traders relative to the Aboriginal population, clearly the Company would have had to depend on the consent of the Indian nations to locate or operate within their territories. The focus of interaction between the Company and the Indian nations was economic and social.

But over time events challenged the Company's monopoly position in the North-West. By the 1840's Metis people and Canadian business interests were actively seeking a rolling back of the territory over which the Company could exercise monopoly rights. The Charter was seen as a *"barrier"* to Canada's expansion that had to be removed.

This was accomplished in the first instance through a corporate buy out, engineered by a coalition of leading financial and political interests who wanted to extend the Dominion's

[90] Tough, Ibid.: p. 229.

[91] See also Tony Hall, "The Fur Trade and Aboriginal Rights: History, Education, and Constitutional Meaning", Prepared for Leroy Littlebear and RCAP, 1994: esp. pp. 15-17.

[92] Tough, Ibid.: pp. 229-230. See also Tony hall, Ibid.: pp. 16-17 re: the case Connolly v. Woolrich: "Mr. Justice Monck found in Quebec Superior Court that even as the fur trade developed, *"the territorial rights, political organization such as it was or the laws and usages of the Indian tribes... were left in full force, and were not even modified in the slightest degree."*

transportation and communications corridor across the prairies to B.C.[93] Frank Tough describes the motivations of the new owners who took control of the Company after 1863:

> The new stockholders that bought into the reconstructed HBC were investing in land; the prospectus stressed that the Company lands would be opened up for European colonization and mining grants would be available... [T]he HBC was now under control of men whose priority was *"to realize the values of the southern parts Rupert's Land rather than to manage the trade to the North."*[94]

It is noteworthy that these overtures were being made by the Company prior to the conclusion of any of the prairie treaties.

(b) Negotiations.

Like the Treaties, the transfer of Rupert's Land was the result of negotiations between the parties - in this case the government of Canada, Britain's Colonial Office, and the HBC. Discussions began in 1863, and continued until the transfer was completed in 1870.

The HBC quickly established three principles upon which it wanted the negotiations to proceed - *"a large cash payment, ongoing revenues from future development, and protection of its fur-trade operations"*.[95] To facilitate the transfer, Britain passed the Rupert's Land Act in 1868, which allowed the HBC to surrender its charter to the Queen, who in turn would admit Rupert's Land into the Dominion.[96]

Canada's principle negotiators were George E. Cartier and one William MacDougall.[97] The Colonial Secretary and his staff initially acted as intermediaries between Canada and the Company. The Company held out for significant benefits, and Canada challenged its right to demand payment for lands that were already the Crown's anyways. Part of the debate

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[93] Tough, Ibid.: pp. 231-233.

[94] Ibid.: p. 233.

[95] Tough, Ibid.: p. 234.

[96] Rupert's Land Act, 1868, 31-32 Victoria, Chap. 105; cited in Tough, Ibid.: p. 235.

[97] It is noteworthy that McDougall was the Crown's principal negotiator in the Manitoulin Treaty of 1862 - allegations that he acted illegally in those negotiations to force a surrender from the Odawa and Ojibwa continue to this day and the Treaty itself has been the subject of claims and litigation. See also Morrison, Ibid.: p. 224.

involved whether there should be a one time payment to the Company, or whether it would obtain rights to continued long term revenues.

The British government took the view that the transfer would *"prove a source of increasing prosperity both to the inhabitants of that Dominion and to the proprietors of the Hudson's Bay Company"*[98] - in other words, the parties would mutually benefit and develop as a result. It removed itself from the final negotiations, but Canada was told to 'take due care' in considering the situation of the Indian nations, and informed of the Imperial government's expectation that the Indians would not *"be confined within wantonly narrow limits"*.[99] Tough comments on the Imperial government's decision not to take a more active role in the protection of Indian interests and rights:

> By reducing Indian title to a sense of duty, the negotiations did not have to reconcile the two differing claims to Rupert's Land. During the negotiations, serious consideration of Indian title would have led to a comparison of the HBC claim to Rupert's Land and Indian entitlement. Clearly, the question of Indian title was not a mere oversight; **there was a deliberate effort by the imperial government to confine Indian entitlement to a policy status.**[100] [emphasis added]

So, although the rights and title of Indian nations were considered during these negotiations, they were characterized as incidental rather than substantive. The Imperial government would not pick up any of the costs of the transfer. In the result, Canada took on the responsibility for Indian 'claims', and the HBC relieved of any obligation in this respect. This is reflected in Term 14 of the HBC's Deed of Surrender:

> 14. Any claims of Indians to compensation for lands required for purposes of settlement shall be disposed of by the Canadian Government in communication with the Imperial Government; and the Company shall be relieved of all responsibility in respect of them.[101]

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[98] HBCA, A.13/16/4: Rogers to Northcote, 17 April 1869, fo. 292; quoted in Tough, Ibid.: p. 238.

[99] Delegates' Report, Granville to Sir John Young, Governor General of Canada, 10 April 1869: p. 38; quoted in Tough, Ibid.: p. 239.

[100] Tough, Ibid.: p. 240.

[101] Memorandum, "Details of Agreement between the Delegates of the Government of the Dominion, and the Directors of the Hudsons Bay Company", 22 March 1869, in E.H. Oliver, The Canadian North West: It's Early Development and Legislative Records (Ottawa, 1914-15): p. 959; cited in Tough, Ibid.: p. 227.

The terms of 'compensation' to the Indian nations were supposed to be developed according to the application of *"equitable principles"*.[102] How then does the agreement with the HBC over transfer compare to the Treaty agreements which cover the same land? Tough concludes that although the Deed of Surrender acknowledged Indian title, the two overlapping claims to Rupert's Land *"were not given equal consideration"*.[103]

(c) Agreement and Implementation.

According to the terms of transfer, the HBC was granted[104]:

> -over a fifty year period, the option of selecting and selling one-twentieth of the surveyed lands in the 'fertile belt'
>
> -L300,000 in cash
>
> -50,000 acres around it's existing trading posts

As well, it was relieved of any responsibility with respect to the settlement of Indian 'claims'. Taken together, the terms of the transfer provided the Company with immediate cash; guaranteed new sources of revenue through a long term stake in the profits to be made from settlement; and protection of its existing revenues (ie., the trading posts).

Surveys in the prairies took the form of square townships, subdivided into 36 sections, all of them numbered. In each township, the HBC was granted title to section 8 and 3/4 of section 26; in every fifth township, all of section 26 went to the Company.[105] With a guarantee of being able to exercise it's option of sale over a fifty year period, the Company was able to wait until the market offered maximum return. Compare this to the sale of Indian lands in pre-Confederation Ontario, where they were bought at a fixed price by Crown agents and government pocketed any appreciation in value that came with time.

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[102] Kent McNeil, "Native Claims in Rupert's Land and the North-West Territory: Canada's Constitutional Obligations", Studies in Aboriginal Rights No. 5 (Saskatoon: Native Law Centre, 1982); cited in Tough, Ibid.: p. 228.

[103] Ibid.: p. 243.

[104] Tough, Ibid.: p. 238.

[105] Chester Martin, Dominion Lands Policy (Toronto, 1938), chapters 9 & 10; cited in Kenneth Buckley, Capital Formation in Canada, 1896-1930 (McLelland & Stewart, Toronto, 1974): p. 233.

The land sales in particular were to be a steady source of revenue and capital. Tough summarizes:

> Between 1905 and 1922, the Company's dividend rate ranged from 20 to 50 percent. These large dividends were supported by land sales. Although Native peoples were kept at a subsistence level, the HBC accumulated capital. Between 1891 and 1930 the HBC's land earnings netted profits of $96,366,021, a far cry from the L2 million invested in 1863. Ultimately, HBC land sales were greater than the L1 million that the Colonial Office had agreed to in 1869 as the value of the HBC's claim to Rupert's Land. The actual amount of land granted is another measure of the compensation due to these two claims to Rupert's Land. In the case of Manitoba, the Department of the Interior calculated that by 1930, some 559,301 acres had been set aside for Indians (2.6% of the land that had passed from the Crown), but 1,279,965 acres had been granted to the HBC (6.1% of the lands that had passed from the Crown). The outcome of these very different claims was not equitable.[106]

Across the prairies, the HBC ultimately received and sold 7 million acres as a result of the terms of the Rupert's Land transfer.[107]

Clearly the *value* assigned to the HBC's interests in Rupert's Land were substantial, and as a result the Company was able to realize significant long term benefit from the advance of settlement and the transition to a new economic regime. The Company does not appear to have encountered any serious problems with implementation of the agreement it had struck with Canada, or in realizing the benefits that it had been promised.

This is significantly different than the experience of those Indian nations who became parties to the numbered treaties - in terms of the *value* attached to their interest, or in terms of the way in which implementation was managed.

1.2.3.3. The Canadian Pacific Railway.

Another example of value and exchange on the prairies during the treaty period can be found in the first transcontinental railway. In this instance the terms finally agreed on with government were not based on any prior claims, but on the future benefits that would come from a coast-to-coast transport system. In 1881 Parliament ratified a contract with the CPR that provided to the company a cash grant of $25M; a network of government constructed

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[106] Tough, Ibid.: p. 245.

[107] Buckley, 1974, Ibid.: p. 19.

roads valued at $37.8M; and 25M acres of land for re-sale (all odd-numbered sections in surveyed townships, except sections 11 & 29).

Lands required strictly for rail purposes were provided at no cost; domestic goods purchased for construction would be tax exempt *"forever"*; rail lands themselves would be exempt for the first 20 years; and the CPR would enjoy a monopoly on traffic in the west for 20 years. In addition, Canada loaned the company a total of $34.5M during the railway's construction.[108] As a result of the generous terms of this agreement, the Company was able to complete construction without a significant reliance on mortgage bonds - *"Land grant bonds, stock sales, and government aid were the chief expedients until the road was completed"*. By 1934, the CPR had sold over 16M acres of the lands it had been granted through this arrangement. Total proceeds to the company from the sale of agricultural lands and townsites to 1934 were $176M.[109]

1.2.3.4. The Numbered Treaties.

The numbered Treaties represent an attempt on the part of post-Confederation Dominion governments to 'standardize' the Treaty formula as a means of opening up large tracts of land for settlement. In this respect, there are certain similarities in each - but this needs to be balanced by a recognition that the circumstances under which each was negotiated, and the objectives of the particular Tribes, were unique and distinct.

With this caution in mind, there are some generalizations that can be drawn. In most cases, the Crown's representatives emphasized that traditional economies would be protected and that assistance would be provided to participate in and benefit from 'new' economic regimes - in short, that the Treaties would provide the security required for self sufficiency and development.

The expectation that Indian nations' self sufficiency and productivity would be maintained, however, coexisted with the contradictory objective of extinguishment. Lieutenant Governor Alexander Morris, the Crown's principal negotiator in four of the numbered Treaties, predicted a positive and equitable result:

> Let... us have a wise and paternal Government faithfully carrying out the provisions of our treaties, and doing its utmost to help and elevate the Indian population, who have been cast upon our care, and... we will see our Indian population, loyal subjects of the Crown, happy, prosperous and self-sustaining, and Canada will be enabled to feel, that

[108] Buckley, 1974, Ibid.: pp. 107-108.

[109] Buckley, 1974, Ibid.: pp. 107-108.

> in a truly patriotic spirit, our country has done its duty by the red men of the North-West, and thereby to herself. So may it be.[110]

Indian Commissioner J.A. Provencher described it in terms of two policy directions that faced government:

> There are two modes wherein the Government may treat the Indian nations who inhabit this territory. Treaties may be made with them simply with a view to the extinction of their rights, by agreeing to pay them a sum, and afterwards abandon them to themselves. On the other side, they may be instructed, civilized and led to a mode of life more in conformity with the new position of this country, and accordingly make them good, industrious and useful citizens.
>
> Under the first system the Indians will remain in their condition of ignorance and inferiority, and as soon as the facilities for hunting and fishing disappear, they will become mendicants, or be obliged to seek refuge in localities inaccessible to immigration or cultivation.
>
> Under the second system, on the contrary, they will learn sufficient for themselves, and to enable them to pass from a state of tutelage, and to do without assistance from the Government.[111]

The policy advanced by these agents of the Crown - benefit and well-being - was articulated in many if not all of the Treaty Councils that led to the numbered Treaties. We will review some examples below.

Another point that bears mention here relates to what was actually being negotiated. Oral history from across the prairies indicates that in many cases all that was being sought - and all that was agreed to - was a sharing of lands for settlement and agricultural purposes. This has been characterized as the topsoil *"to the depth of a plough"* or *"six inches from the top"*, but not the subsurface.[112] Today the position of many of the Indian nations in the prairies is that they neither discussed nor consented to any sharing of the subsurface in treaty councils, and that as a result this remains an outstanding issue.

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[110] Alexander Morris, The Treaties of Canada with the Indians of Manitoba and the North West Territories, Willing and Williamson, Toronto, 1880: pp. 296, 297.

[111] R.S.C. 1985, Appendix 2, No. 3: p. 34; Indian Commissioner J.A.N. Provencher. Cited in Federal Treaty Policy Draft #2, Stephen Aronson and Ron Maguire for RCAP, 6 October 1993: p. 13.

[112] See Venne, Ibid. re: Treaty #6; Touchwood File Hills Qu'Appelle Tribal Council submission to RCAP, 31 August 1993: pp. 6-8; FSIN submission to RCAP, Ibid.

1.2.3.5. Treaty Six.

The Commissioner's report on the negotiation of Treaty #6 illustrates the acknowledgement by both parties that the Treaty was intended to facilitate the development of a mixed economy which would include traditional practise as well as new pursuits, and that this economy would be self sufficient.

> A spokesman, Poundmaker, then addressed me, and asked assistance when they settled on the land, and further help as they advanced in civilization. I replied that they had their own means of living, and that we could not feed the Indians, but only assist them to settle down....I explained that we could not assume charge of their every-day life, but in a time of great national calamity they could trust the generosity of the Queen. The Honourable James McKay also addressed them, saying that their demands would be understood by a white man as asking for daily food, and could not be granted...
>
> At length the Indians informed me that they did not wish to be fed every day, but to be helped when they commenced to settle, because of their ignorance how to commence, and also in case of great famine.... They saw the buffalo, the only means of support, passing away. They were anxious to learn to support themselves by agriculture, but felt too ignorant to do so, and they dreaded that during the transition period they would be swept off by disease or famine - already they have suffered terribly from the ravages of measles, scarlet fever and small-pox.[113]

Transport, agriculture and settlement were indeed what the treaties on the prairies were intended by Canada to facilitate. The production of prairie wheat *"provided the basic economic opportunity in the economic development of Canada from 1896 to 1930"*. By 1900, the prairie provinces had become the major export region of Canada.[114]

The overall federal policy which prevailed at that time - to turn Indians into farmers - seemed to fit nicely with the suitability of the land in the prairies, and was reinforced by the provisions in many of the numbered treaties which called for implements, livestock, seed etc.

Although many of Canada's early 'agricultural experiments' failed in Upper Canada during the pre-Confederation era, it appears that in some parts of the prairies at least, there was success:

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[113] quoted by 4th Vice Chief Tom Iron, FSIN, op. cit.: pp. 136-137.

[114] Buckley, 1974 Ibid.: pp. 2; 22.

> Carter reports that during the late 19th and early 20th centuries Indian people in the Treaty Six and Seven areas of Saskatchewan were becoming farmers. They steadily increased the number of acres under their cultivation, and were able to grow enough food both for their own subsistence and for sale in local markets. Between 1899 and 1929, income from agriculture was the most important source of incomes for Indian families.[115]

Why was this development and adaptation arrested? RCAP's Economics policy team cites a number of reasons, including labour and market changes resulting from the Great Depression and WWII. They have also mentioned that the trend towards *"centralization and concentration of capital"* - in the hands of others, we must assume - also had a significant effect. So did the policy and practise of government, which, in response to pressure from non-Indian farmers, began to *"sell off productive Indian lands, place restrictions on the sale of produce, and limit the use of new technologies to increase productivity."*[116]

(a) The Case of Mistawassis.

In Saskatchewan, actual Indian reserve acreage totalled around 1,650,000 acres following the signing of the treaties. By 1930, around 400,000 acres had been alienated, frequently as a result of pressure applied to Canada by non-Indian farmers and developers. A typical example were land surrenders that the people of the Mistawassis reserve were compelled to make.

In 1891, the Mistawassis Band in northern Saskatchewan was regarded as one of the most 'advanced' bands in the west because of the lands they had under cultivation and the quality of the crops grown there. In 1911, the Department of Indian Affairs responded to their request for assistance in expanding their agricultural capacity by proposing the surrender of 1,607 acres of reserve land.[117] Funds from the sale of this land would buy the plough, tractor, fencing and fuel that the Mistawassis people needed.

Following the surrender, the Mistawassis reserve was compelled to surrender a further 5,028 acres in 1917[118], and another 11,530 acres in 1919.[119] Like many other Indian

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[115] Sarah Carter, Lost Harvest (1990) cited in Economics, Ibid.: pp. 19-20.

[116] Economics, Ibid.: pp. 19-20; see also pp. 14-15.

[117] NAC RG10 Vol. 1619.

[118] NAC RG10 Vol. 6655, File 107A-5-5 Part 1, and File 107A-5-10 Part 2.

[119] NAC RG10 Vol. 7533 File 26107-3.

communities, Mistawassis became caught in a vicious circle: compelled to use reserve land - the supposed basis of their future self sufficiency - as a medium of exchange to procure basic necessities, which in turn led to increased dependence.

1.2.3.6. Treaty Eight.

Treaty #8, concluded in 1899, covers parts of Alberta, Saskatchewan, British Columbia and the NWT. It took place against a backdrop of change and conflict brought about in part by the Klondike gold rush and the northward movement of settlement and exploration.[120] The available evidence demonstrates clearly that *"livelihood concerns were the single most important issue to the Indians at the signing of the Treaty in 1899. ... The Indian people were assured, and it was understood, that Treaty 8 would* ***protect*** *rather than threaten their way of life."*[121]

(a) Harvesting.

The Commissioners' report unequivocally supports this view:

> There was expressed at every point the fear that the making of the treaty would be followed by the curtailment of the hunting and fishing privileges, and many were impressed with the notion that the treaty would lead to taxation and enforced military service.
>
> We pointed out the Government could not undertake to maintain Indians in idleness; that the same means of earning a livelihood would continue after the treaty as existed before it; and that the Indians would be expected to make use of them.....
>
> [W]e had to solemnly assure them that only such laws as to hunting and fishing as were in the interest of the Indians and were found necessary in order to protect the fish and fur-bearing animals would be made, and that they would be as free to hunt and fish after the treaty as they would be if they never entered into it.

[120] "A Report Prepared by the Treaty 8 Tribal Association for the Royal Commission on Aboriginal Peoples", August 1993.

[121] Ibid.: p. 32.

> We assured them that the treaty would not lead to any forced interference with their mode of life, that it did not open the way to the imposition of any tax, and that there was no fear of enforced military service.[122]

The actual wording of the treaty text is as follows:

> And Her Majesty the Queen HEREBY AGREES with the said Indians that they shall have right to pursue their usual vocation of hunting, trapping and fishing through the tract surrendered as heretofore described, subject to such regulations as may from time to time be made by the Government of the country, acting under the authority of Her Majesty, and saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes.
>
> ... and for such Bands as prefer to continue hunting and fishing, as much ammunition and twine for making nets annually as will amount in value to one dollar per head of the families so engaged in hunting and fishing.[123]

But instead of resolving conflicts between Indians and non-Indians and protecting the economic base of the First Nations as was intended, conflict and the appropriation of their resources actually accelerated after treaty.[124] The Treaty 8 Tribal Association of BC has provided RCAP with substantial documentation which demonstrates that the application of harvesting regulations after Treaty had a significant and prejudicial impact on Indian economies, and that preference was afforded to non-Indian commercial and sports users.[125] They have also summarized the result:

> Indian peoples can no longer make a living by fishing, hunting and trapping as they did at the time of Treaty. **This is not their choice.** By allowing the environment to be exploited ... so that Treaty 8 peoples can no longer live by their traditional means, the Government has violated the Treaty.[126] [emphasis added]

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[122] Treaty Commissioner's Report for Treaty #8, quoted in Ibid. pp. 30-31

[123] Treaty 8, quoted in Ibid.: p. 31.

[124] Ibid.: p. 34.

[125] Ibid.: pp. 40-51.

[126] Ibid.: p. 99.

This point was also emphasized by representatives of Treaty #8 at the RCAP hearings:

> I have elaborated on the devastating impacts of various resource space developments on the land base and ecology of the traditional use areas of the bands in our portion of British Columbia. **It should be obvious by now that there is a demonstrable and directly causal relationship between these developments and the erosion of the local indigenous traditional economy and mode of life.** I would like to point out that the maintenance of the First Nations mode of life, their way of life, the traditional economy and so forth is entrenched in Treaty 8.[127] [emphasis added]

This result is the rule rather than the exception. Across Canada,

> The viability of traditional economies has been threatened by policies or activities which reduced the quantity of land and resources available to Aboriginal groups, affected the quality of the land and resources (ecological integrity), limited the rights of Aboriginal groups to access them or increased the costs involved.[128]

(b) Agriculture.

Although the Commissioners understood that the northern climate was not as suited to farming as the prairies were, support for a transition to agriculture was nonetheless discussed and promised. The text of the treaty states that, when families expressed an intention to take up farming or stock raising, a range of implements, livestock, seed and provisions would be supplied.[129]

One of the problems encountered in implementing these provisions was that although in some cases implements and livestock were provided, Indian Affairs often refused to supply the training and supervision necessary to ensure success. A number of attempts at agriculture and stock raising failed as a result.[130]

The Treaty 8 Tribal Association points out that between 1899 and 1940, Indian Affairs actually *"placed very little significance on the treaty"*. In terms of the implementation of

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[127] Fort St. John, BC 92-11-20 63 Peter Havlik p. 314.

[128] Economics, Ibid.: p. 63.

[129] Treaty 8 Tribal Association, Ibid.: pp. 51-52.

[130] Ibid.: pp. 53-54.

those part of the treaty that guaranteed assistance in agriculture and stock rasing,

> ... the Department did not measure its efforts against the terms and the spirit of the treaty. This attitude not only deprived Indian farmers of promised assistance, but **placed the whole question of Indian agriculture outside the realm of an agreement between two parties and into the realm of the decision making powers of a distinct government.**[131] [emphasis added]

This provides a specific example of an overall trend on the part of Canada - to unilaterally remove issues and actions from the scope of the treaties themselves, and instead place them in the realm of *policy*, beyond the reach of remedy and due process. The Treaty 8 Tribal Association observes that in doing this, Canada has been able to ignore not only the spirit and intent of the treaty, but also it's *"plain language"*.[132]

1.2.3.7. Land Entitlement.

Nowhere is this denial of the 'plain language' contained in the numbered treaties more evident than with respect to treaty land entitlement. Each contains a formula for the setting aside of reserve lands based on population. Treaties 1, 2, and 5 provide for 160 acres (a 1/4 section) per family of five, while the others call for 640 acres (a full section).[133] Some reserves were surveyed and set aside relatively quickly, others were not. In addition, many of the initial calculations of reserve size did not take into account 'absentee' Band members.

With the passage of the Natural Resources Transfer Agreement (NRTA) in 1930, matters became more complicated since the prairie provinces now had 'control' of lands within their borders. The federal response was a mixture of delay and inaction. It was not until the mid-1970's that the situation began to be addressed through negotiations, but progress was by no means smooth, and in Saskatchewan at least, litigation ensued. Over the past fifteen years, a number of individual settlements have been reached in Alberta, and a framework agreement is now in place in Saskatchewan which is intended to resolve the matter there. Discussions are taking place in Manitoba but agreement has not yet been reached.

Notwithstanding this progress, land entitlement remains in large measure unfulfilled. In Manitoba around 1 million acres (based on current population) are owing to the beneficiaries

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[131] McCardle and Daniel 1976: 95; quoted in Ibid.: pp. 55-56.

[132] Ibid.: p. 111.

[133] Personal communication, TARR Centre of Manitoba, 27 May 1994. Note: Manitoba First Nations party to Treaties 1, 2 and 5 are now in the process of trying to determine how this discrepancy in acreage came about.

of treaties #1, 2, and 5.[134] Next door in Saskatchewan outstanding treaty land entitlement amounts to approximately 1.6 million acres.[135]

Needless to say, the First Nations with outstanding TLE have been denied the economic benefit that these lands could have provided over the past 100+ years. The reluctance demonstrated by Canada in fulfilling these agreements stands in sharp contrast to the ease with which the HBC was able to obtain implementation of its own agreement flowing from the Rupert's Land transfer and makes for an interesting point of comparison.

On the one hand, the HBC was able to identify its lands at the time of survey, and then wait up to fifty years to take advantage of the appreciation in value that a booming real estate market would bring. On the other hand, many Indian nations on the prairies have had to wait over 100 years for their TLE and as a result missed the boom completely, and, instead of being able to benefit from their original Aboriginal title, they are compelled to purchase lands from third parties at prices that have increased significantly over the course of the past century.

1.2.3.8. Value of the Exchange & Foregone Benefits.

The materials reviewed in the preparation of this paper indicate clearly that the treaty relationship was intended to guarantee economic benefit and security to the parties as part of an exchange that was to be based on the principles of reciprocity. This is the case whether one looks at treaties made in 1701 or those made more recently. Although significant emphasis has been placed on historical research as a tool to assess the losses and benefits to the parties in qualitative terms, surprizingly little has been done to try and quantify the result.

The Federation of Saskatchewan Indian Nations (FSIN) recently commissioned a comparison of the benefits that accrued to the Province and to the Indian nations as a result of the treaties made in that province.[136] The study considered the province's GDP in land-based sectors of the economy (farming, forestry, fishing, trapping, mining, electricity and gas), on the

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[134] Personal communication, Treaty & Aboriginal Rights Research Centre of Manitoba, 26 May 1994.

[135] "McKnight Commercial Centre - An Urban Reserve Case Study", for RCAP, August 1993: p. 8.

[136] First Nations Consultants, Inc. & the Coopers & Lybrand Consulting Group, "An Assessment of the Benefits Received and Forgone by the Indian Nations as a Result of the Treaties Signed Between the Crown and the Indian Nations of Saskatchewan" (no date); contained in Appendix 1 of "A Comprehensive Presentation to the Royal Commission on Aboriginal Peoples by the FSIN" (no date).

assumption that if the Indian nations had retained full control over their traditional lands & resources, they would have been in a position to obtain direct benefit from their development.[137] On the other side of the ledger, government transfers on behalf of Indians or directly to Indians were calculated.[138] This was done on a year by year basis covering the years 1926 through 1988.

The results of the study demonstrate a substantial inequity in the balance between benefits foregone and benefits received.

> ...[I]f the Indian Nations retained control over the lands, their economic interests would be far larger than what has been obtained by the Indian nations from the Federal government.
>
> Benefits received by Indian society under the Treaties have not kept up with the growth in benefits obtained by non-Indian society under the Treaties. This substantial net imbalance persists in spite of economic downturns in the province, a declining non-Indian population base in Saskatchewan, and large percentage ... increases in transfer payments to Indian Nations.
>
> The negative balance in these net benefits continues to grow.
>
> The basic message ... is that the benefits derived by the Crown on behalf of non-Indian society have been multiples of the payments made by the Crown throughout the entire period studied.... While payments to Indian Nations appear to have grown in recent years, the economy has grown far more quickly...[139]

The study undertaken by the FSIN represents an area of research and analysis which has been largely neglected, but should which should get more attention, inasmuch as it attempts to quantify the results of the 'exchange' in terms of benefit and equity. One fundamental part of the equation not dealt with in the FSIN study however, which we have only been able to touch on from time to time in this paper, are the losses also experienced by Indian nations as a consequence of 'the exchange'. We suggest that if these were factored into the equation, the resulting inequity would be significantly more pronounced.

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[137] Ibid.: p. 1.

[138] Ibid.: p. 2.

[139] Ibid.: p. ii.

1.3. CONCLUSIONS.

At the beginning of this chapter we spoke about how the world can be viewed, and how in the case of North America, the earth has been divided up and parcelled out as 'property'. This may be contrary to indigenous law and world view, but nonetheless, it is the newcomers' definitions which have prevailed over the past century. The historical record clearly shows that the treaty relationship was seen by the parties as a way of securing their future - in the economic, political, social and spiritual spheres. Just as clearly, it tells of how one party changed course and used the relationship as a means of literally extinguishing the interests and the existence of the other party.

We have only reviewed selected cases in this paper, but the landscape is littered with versions of the same events that we have described. There is a consistency in the historical record which indicates that this dispossession did not happen by accident or due to the unwillingness of Indian nations to adapt within the frameworks that they had negotiated. Rather it was the result of a conscious program of colonization, dispossession, and extinguishment.

One party has knowingly monopolized on the power of definition to empty the treaties and appropriate the capital and the property of the Indian nations. Without 'property' and without recognized jurisdiction, Indian nations came to be characterized as a 'burden', with anything received by them only 'at the pleasure of the Crown'.

> This is a far cry from the spirit and intent as promised in the Treaties. We were to share in the growth and the riches of this country, but very knowingly and very precisely, the governments carved out our destinies and pushed us to places to exist with no economic opportunity and to be forgotten.[140]

This is the result of the colonization process, consistent with what Frantz Fanon described as he saw it a half a world away:

> For it is the settler who had brought the native into existence and who perpetuates his existence. The settler owes the fact of his very existence, that is to say, his property, to the colonial system.[141]

Indians were expected to pay their way, but left without the means to do so. Treaties which were clearly intended to protect tribal economic interests were instead used to legitimize their

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[140] Thompson Manitoba 93-06-01: Peter Sinclair, Mathias Colomb Cree Nation: pp. 502-503

[141] Frantz Fanon, The Wretched of the Earth (Grove Press, Inc., New York, 1968): p. 36.

dispossession. This is not even to consider that the same process was taking place in the Atlantic, Quebec, British Columbia and the north without even the pretense of treaty making.

In turn, Canada and the provinces have leveraged the Indian lands and resources they obtained to fuel their own economic and social development. The equation goes something like this:

> [Resources]... attracted labour and capital to the direct exploitation of virgin land resources and induced investment throughout the economy in major secondary and tertiary industries, and through these, in housing and other community facilities greater by many times than the investment on the.... frontier itself. This leverage effect, the most significant aspect of the frontier, was a determining factor in the development of Canada's economic structure and, to a large extent, of its political structure as well.[142]

Tony Hall in his work for RCAP has also cited this process whereby other governments have transformed *"Aboriginal territorial domain into legal currency that can be used as a lever of credit to expand the money system".*[143]

One result of the extinguishment doctrine has been that the interests, rights and needs of the Indian nations have been disconnected from revenues derived from the land. The magnitude of their foregone benefit, and their loss, is immense. On the other hand, who have been the principal beneficiaries?

The Imperial government was able to cut the apron strings and let its colonies make their way without further expense. Its citizens and corporations continued to accumulate wealth and capital from Canada long after Confederation.

The federal government and in some cases the provinces have been able to use the proceeds from the sale of Indian lands to help subsidize settlement and infrastructure costs. Indian lands & resources have been, and continue to be used as collateral in government borrowing. They are the basis upon which Canada has been built.

But it is the provinces and their citizens who have been the principal beneficiaries of the treaties. The proceeds from Canada's lands and resources have largely come to them, either through direct management and exploitation or indirectly by way of federal transfers. At the same time, they have generally been able to deny any responsibility to consider the rights and interests of the Indian nations (or pay for them) because of section 91(24) of the BNA Act

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[142] Buckley, 1974 Ibid.: p. 2.

[143] Hall, Part 2, Ibid.: p. 29.

and the outcome of the last century's Privy Council cases.

Canada has 'responsibility' for 'Indians and lands reserved for Indians', but the province has the land and its resources. This division of powers has been used consistently to avoid substantive efforts to obtain remedy or obtain a balance in the sharing of 'property' (ie., the land, its resources, the capital derived from them, and the transactions related to them). In the words of one commentator, *"The ping-pong game of this brand of federalism is all too familiar."*[144]

However, in the post 1982 era, the treaties and the Crown's fiduciary duties have finally assumed some of the legal standing they were denied for so long. Over the past twenty years domestic 'Indian' case law has been evolving slowly in fits and starts, and many issues remain unclear in that context, but enough substance has emerged to provide alternative approaches to loss and remedy.

One such avenue concerns domestic law as it relates to unjust enrichment. In a paper prepared for the Joint Working Group on Specific Claims, Alan Pratt outlined how this could be applied to provincial obligations, in tandem with or separate from issues arising from the Crown's fiduciary duties.

> In the leading Supreme Court of Canada case *Pettkus v. Becker*[145] Mr. Justice Dickson, as he then was, established the elements of unjust enrichment as an independent cause of action:
>
> 1. an enrichment of the defendant;
> 2. a corresponding deprivation on the part of the plaintiff; and
> 3. an absence of juristic reason for the enrichment
>
> It has been recently written that "unjust enrichment" does not mean "unfair enrichment" merely "reversible enrichment".[146] The Dickson formulation of unjust enrichment removes any moral stigma from liability under this doctrine.
>
> If the Crown in right of the provinces are subject at least in some fashion to the Crown's fiduciary duty... this fact will affect the determination whether any "juristic reason" exists to permit the enrichment of the province to remain

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[144] Alan Pratt, "Discussion Paper on a Possible Role for Provinces in Specific Claims", draft for the Joint Working Group on Specific Claims, 31 May 1993: p. 39.

[145] [1980] 2 S.C.R. 834.

[146] Lionel D. Smith, "The Province of the Law of Restitution" (1992), 71 Can. Bar Rev. 672 at 676.

untouched.

Alan Pratt goes on to explain that whether or not the province instigated the loss, if it was enriched as a result, elements of unjustified enrichment are present. Without going into detail, he described the remedy as *"essentially restitution of the benefit".*[147]

This approach, along with others described in preceding pages[148], are examples of the efforts that are now underway to obtain a more balanced definition of history, law and economics as they relate to the treaties. They are opening doors that had been shut to find a more authentic basis for discussion - one that is based on an accurate recollection of the facts, and which takes into account the relationship as a whole.

Agreeing on the facts and the actual nature of the situation under negotiation are essential if negotiations are to hold any hope of success. This is a crucial first step, and should be a key object of the parties' efforts.

However, many barriers remain, since no matter the facts, ways of seeing things do not change quickly. In the next chapter, we will take a look at fiscal flows and revenue generation as they relate to the treaty relationship, keeping in mind the themes that have emerged so far.

[147] Pratt, 1993, Ibid.: pp. 39-40.

[148] ie., FSIN's 'treaty audit', UCCM's analysis of the accounts related to fish & wildlife, or Frank Tough's comparison of the Rupert's Land transfer vs. the numbered treaties.

2.0. FISCAL TRANSFERS AND PUBLIC FINANCE.

2.1. CONTEXT.

As we have discussed in previous chapters, traditionally Indian nations were self sufficient. Interdependence between communities and nations - in terms of trade, mutual support, and technological transfer - did not mean dependence. We have described how this situation changed over time as a result of the colonial process - the appropriation of lands and resources, the destabilization of social & governmental institutions, and the 'changing of the accounts'. Today Indian people and Indian nations, generally speaking, are dependent on transfers from other governments.

> **The individual level:** Results from the 1991 Aboriginal Peoples' Survey state that 'employment' is the source of income for only 58% of Indians (on and off), while social assistance is for 31%; training, education and workmen's compensation is 11%. [149]

> **The collective level:** As one example, over 90% of the revenue base of the United Indian Councils - whose membership is made up of nine Mississauga and Chippewa First Nations resident in southern Ontario - is transfer income from other levels of government. *"Contrast this to the consolidated revenue basis of Ontario local governments [which] ... represent only 40.5 percent of total revenue."* Reports suggest that this is the norm rather than the exception.[150]

In this respect, the situation off reserve is the same. RCAP's Economics policy team has described the urban Aboriginal community as one which

> ... has limited control over the institutions that serve them and... limited control over the development of their community. It is a community which is heavily subsidized from outside whether this subsidization is through social assistance

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[149] Health & Healing, Ibid.: Table 3, p. 87.

[150] Torben Drewes & Harry Kitchen, Department of Economics, Trent University "Current Practises in Financing Aboriginal Government", for RCAP, March 1994: pp. 62-63.

for individuals or grants in support of organizations.[151]

Needless to say, this dependency was not intended to be a result of the treaty relationship. We shall now turn to look at some of the events that brought this about.

2.2. TREATY ANALYSIS.

2.2.1. Conflict, Peace & Friendship (1541-1763).

During their wars with the French and later the Americans, the British employed 'presents' as a means of securing alliances with indigenous nations and providing for their needs. This was one of the first forms of direct transfer payments from the Crown to indigenous nations. These presents - most often in the form of weapons, food and trade goods - were regarded by both parties as payment for services rendered and faithful alliance, and were integral to the renewal of prior mutual support Treaties, or the confirmation of new treaties.[152]

It cannot be stressed too much that in the wars with France and later the United States, Britain's future in North America hinged on the active support - or the neutrality - of Indian nations. These alliances had a *value* to each of the parties which involved not just with war against an agreed upon enemy, but also trade and commerce - furs, fish, game, and manufactures.

The presents themselves included guns, powder, shot, tobacco, cloth and provisions. They were intended to support combatants and their communities in times of war, and assist with the conduct of the fur trade in times of peace.

2.2.1.1. The Haudenosaunee.

The 'presents' were a consistent fixture in treaties and councils between the British and the Confederacy. The 1701 treaty made with Lieutenant Governor John Nanfan of New York involved the provision of guns, powder & shot, tobacco, hatchets, bread, clothes, pipes, etc.

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[151] Economics, Ibid.: p. 95.

[152] For instance, the 1777 treaty between the British and the Iroquois made at Oswego; the 1752 Halifax Treaty with the Mi'kmaq; the 1764 Niagara Treaty with the western and eastern nations.

etc. This practise would continue until the 1850's and after Confederation.[153]

2.2.1.2. The Mi'kmaq.

The 1752 Halifax Treaty between the British Crown and the Mi'kmaq was concluded at a time when Britain and France were still warring over their interests in North America. It linked peace and alliance between the parties directly to the provision of 'presents'. Article 2 states

> That all Transactions during the Late War shall on both sides be buried in Oblivion with the Hatchet, and that the said Indians shall have all favour, Friendship and Protection shewn them from this His Majesty's Government.[154]

Article 6 adds

> That to Cherish a good harmony and mutual Correspondence between the said Indians and this Government His Excellency .... hereby promises on the part of His Majesty that the said Indians shall upon the first day of October Yearly, so long as they shall Continue in Friendship, Receive Presents of Blankets, Tobacco, some Powder & Shott, and the said Indians promise once every year, upon the said first of October, to come by themselves or their Delegates and Receive the said Presents and Renew their Friendship and Submissions.[155]

This was not an isolated instance, and was a basic element of the Treaty agreements that were made during this period.[156]

2.2.1.3. The Seven Nations of Canada and the French.

The French maintained similar practises with their allies, including the provision of

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[153] Williams, 1993, Ibid.: pp. 130-140 re: the Nanfan Treaty.

[154] "Treaty or Articles of Peace and Friendship Renewed", Halifax, 22 November 1752, cited in The Mi'kmaq Treaty Handbook (Native Communications Society of Nova Scotia, Sydney, 1987): pp. 20-21.

[155] Ibid.

[156] See Paul Williams, "The Tree and the Great Law of Peace", draft report for RCAP, December 1993; also Wicken & Reid for RCAP re: the Mi'kmaq.

blacksmiths paid for by the government. At the 1760 Council held in Kahnawake with the Seven Nations, the Haudenosaunee and the British, the former French allies sought and obtained assurances from the Crown's representatives that this practise would continue.[157]

We will trace the evolution and demise of this aspect of the Treaty relationship in the following section, using Ontario as an example.

2.2.2. Accommodation (1763-1815) and Dislocation (1815-1867).

Sir William Johnson, Superintendent General of Indian Affairs for the North of British North America, met with the leadership of 24 Indian nations at Niagara in 1764. At that time he announced the terms of the Royal Proclamation of 1763 and assured the tribes of the Crown's partnership and good faith. A Treaty of alliance was concluded generally, incorporating the promises contained in the Proclamation, and in some cases earlier treaties of alliance with individual nations were renewed.[158]

The distribution of presents, and continued payments, were an integral part of Johnson's offer of peace and alliance, and built on a practise that was already long established:

> The promise was that the King would always send presents each year to his Indian allies, *"as long as the sun shines and the rivers flow and the British wear red coats"*.... A wampum belt recording and confirming the promises was kept by the Ojibways and read faithfully every year thereafter at the annual distribution of presents.[159]

The distribution of presents was a key aspect of the treaty relationship between the Indian nations and the British, and remained so for 75 years after the Proclamation and the advent of the 'land cession treaties' that followed. Gatherings would take place each summer in strategic locations - for instance Drummond Island (before the American Revolution) and Manitoulin Island (beginning in the 1830's).

In wartime and in peacetime, the "presents" was a time of reaffirmation of

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[157] Williams, 1993 Ibid.: p. 173.

[158] The western Huron (Wyandotte) also entered into a separate bilateral treaty of alliance at Niagara - see Aronson and Maguire, Ibid.: pp. 8-9. For a more detailed discussion of the Niagara Treaty, see Williams, 1993, Ibid.: pp. 185-190.

[159] Paul Williams, "The 1850 Treaty and the Annual Presents from the King", unpublished manuscript, 12 February 1993: p. 1.

loyalties, political counselling, national planning and social gathering.[160]

The treaties of alliance and the consequent distribution of 'presents' were a cornerstone of the economic and political accommodation that was being negotiated by the parties at that time. As we shall see, however, the relative *value* attached by each of the parties to this relationship would change with events.

At least by 1798 Crown agents in Upper Canada had begun to take a dim view of the 'presents'. From their perspective, (i) presents were a burden on the Indian Department, and (ii) the physical security they provided not only encouraged Indians' inherent 'laziness', but also made them less inclined to agree to the sale of their lands at prices government was willing to pay. In the long term, presents would be curtailed and ended to meet the wishes of the Imperial treasury. In the short term, they would be used as a lever by the local authorities. [see preceding chapter re: lands]

At this point there was a marked change in the way Crown agents characterized the presents themselves, and by implication, the treaty relationship between the parties. The Mississauga provide an example here.

> Lord Portland... urged that the presents distributed to the tribes for military service should be considered rewards for good behaviour rather than accruing from any right. If the tribes co-operated they would receive presents, if they refused the presents would stop....
>
> *"...the Messassague Indians...must be brought to consider themselves in no way entitled to those presents; that they are indebted for them to His Majesty's spontaneous bounty, and owe them solely to his Paternal regard for their Welfare and Comfort..."*[161]

Here are early signs of dispute between the parties as to the nature of their relationship and the role of treaty commitments in that relationship. This was the beginning of what was to later become a keystone of Canada's Indian policy: the removal of matters from the treaty relationship and their placement in the field of unilateral discretion & 'policy'. In the preceding chapter we reviewed how the presents - which were the result of a separate alliance treaty - were manipulated by Crown agents to obtain land cessions from the Mississauga.

This change of policy may have been contrary to what had been agreed at Niagara in 1764

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[160] Williams, Ibid.: pp. 2-3.

[161] Portland to Russell, 6 December 1798, Cruikshank, Vol. III pp. 22-23; cited in Johnson Ibid.

and in other instances, but it gained acceptance at the political and bureaucratic level - at least until circumstances once again attached a *value* - in government's eyes - to the alliance-as-transaction. When the prospect of another war with America loomed in the years immediately preceding 1812, Crown agents did an about-face. Sir James Craig wrote to Francis Gore in 1808:

> The Indian Nations owing to the long continuance of Peace have been neglected by us, and from the considerable curtailments made in the Presents to those People it appears that retaining their attachment to the King's interest has not of late been thought an object worthy of serious consideration.[162]

Councils were held, amends made, the presents flowed freely, and in the event the Crown was able to depend on the assistance of thousands of Indian warriors in the ensuing hostilities. However, after the War of 1812 was over, it did not take long for the government to resume its previous approach.

> A ceiling of L20,000 per year was placed on Indian Department expenditures... in the year of 1829. A considerable demand was placed on this fund. Presents ... consumed half to two-thirds of the budget. The fixed costs of salaries and pensions to the Superintendents and other personnel (L4150) left almost no money in the treasury for implementing the departmental projects.[163]

The Imperial government, anxious to trim the cost of its bloated empire, began looking for ways to cut the fat. Steven Aronson and Ron Maguire make mention of how the treaties - and the annuities which followed with land sales - were *"inextricably linked"* with the 'presents'. But they also report that

> the traditional system of Indian presents... came to be seen by British officials in London, during a time of Imperial retrenchment, as an unnecessary draw on the Treasury. Time and again, Imperial pressures on the colonial offices to reduce or even eliminate the annual presents were met with resistance from both the local administrators and the First Nations themselves.... The report of the Macauley Inquiry in 1839 noted that the annual gift-giving in 1836 alone, was 15,850 pounds currency out of the entire parliamentary grant of 20,000

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[162] NAC Colonial Office Papers, File 42 Vol. 136: Craig to Gore, 10 March 1808, cited in Johnson, Ibid.

[163] Schmalz, Ibid.: pp. 166-167.

pounds currency for Indian Affairs. [164]

Between 1828 and 1858 there were six different formal inquiries into the economic and social conditions of the Indians, and the future of the Indian Department.[165] They considered not only the cost of Indian Affairs, but responsibility for administering the relationship between the Crown and the Indian nations.

> However much colonial and provincial governments wanted to take control of Indian Affairs, they did not want to assume the cost of the annual presents. By the 1830's, schemes were being devised to make the Indian Department self-supporting, though a fund based on sales of Indian lands used to run the Department, by reducing staff, and by reducing and eventually abolishing the presents.[166]

The Bagot Commission of 1842-43 recommended that presents should be paid in the form of agricultural implements and supplies instead of guns, ammunition, nets and hooks - in order to encourage a change in Indian behaviour towards farming and support the overall strategic goal of assimilation.[167] In a later chapter on education we will show how a portion of the annual presents were also dedicated instead to Indian schools in Upper Canada.

In 1852 presents in Upper Canada were commuted to a cash payment *"beginning with three fourths of the value of the equipment and diminishing one fourth until final extinction in 1857".*[168] This was a breach not only of existing treaty agreements, but also a denial of the Indian political, military and economic support which had been essential to securing and maintaining England's foothold in British North America.

But the presents did not disappear - they were just charged to another account. As the Imperial presents were being curtailed, goods, cash, and later annuities were given out in the

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[164] John Leslie, Commissions of Inquiry into Indian Affairs in the Canadas, 1828 - 1858, Indian and Northern Affairs Canada, Research Branch (Treaties and Historical Research Centre), Ottawa, 1985: pp. 44, 45, 52; also John Milloy, "The Era of Civilization - British Policy for the Indians of Canada, 1830-1860", unpublished doctoral thesis, Oxford University, 1978. Cited in Steve Aronson & Ron Maguire, "Federal Treaty Policy Study" Draft #2, 6 October 1993: pp. 16-17.

[165] Aronson & Maguire, Ibid.: p. 16.

[166] Williams, 12 February 1993, Ibid.: p. 1.

[167] See Schmaltz (1991); Williams (12/2/93), Ibid.

[168] Schmalz, Ibid.: pp. 167-168.

land 'cession' treaties that were being concluded to obtain territory for settlement - and paid for by local authorities with part of the proceeds from land sales. The presents retained their significance (symbolic and material) with respect to the relationship - except now it was one based on land, not alliance. In this way, then, cash and material transfers remained a central part of the treaty relationship between Indian nations and the Crown. At the same time, they were explicitly linked to the continued self sufficiency and well-being of the Tribes, and began to include provision for health and education. (see the previous chapter for additional detail on this transition)

2.2.3. Displacement & Assimilation (1867-1930).

The giving of 'presents' remained an important aspect of treaty protocol among Indian nations generally - in terms of concluding agreements and renewing them.[169]

In this respect, treaty councils continued after Confederation as they had before - involving money payments, food and supplies as part of the proceedings and part of the agreements to be reached. These goods and supplies had a tangible economic & social benefit.

Each of the councils leading to the numbered treaties involved discussion about economic matters and self sufficiency. And each contains provision for supplies and capital equipment to assist in the maintenance and development of a stable economy.

These included clothing, cloth, seed, livestock, harrows, ploughs, traps, twine for nets, ammunition, 'a chest of ordinary carpenter's tools', saws, grindstones, 'medicine chest', in various combinations in each of the numbered treaties. In some, annual salaries for Chiefs and councillors were also specified.

Commitments regarding education and health also fall into this category of fiscal or material transfers that were to play a role in accommodation and development.

2.3. CONCLUSIONS.

The 'presents' have always been an aspect of the treaty relationship between Indian nations and other nations - most lately Canada on behalf of the Imperial Crown. However there has been a dispute between the parties to the treaties as what these presents imply. The dispute

[169] See Aronson & Maguire, Ibid., and RCAP Treaty Policy Team paper.

has a bearing on economic and social matters.

Canada has taken a literal view of the written terms - some items were one-time only, other items to be issued annually, but 'frozen in time' - for instance annuities remain as they were originally fixed, at $3 or $5 per year, although inflation has rendered those amounts meaningless. Certain things, like ammunition and twine, were unilaterally commuted and have been the subject of claims.

This is despite the fact that in most if not all cases, the Commissioners stated that the annuities, tools, livestock etc. were to provide for the economic well being and development of the Indian nations, and were part of the consideration for the exchange that was taking place. As we have noted in other parts of this paper, the promises and assistance were cast in perpetual and meaningful terms - 'as long as the sun shines' and 'for your children yet to come'.

Many Indian nations viewed - and continue to view - the presents as tangible evidence of the sharing aspect of the treaty relationship, and a physical contribution to the peoples' security and development. This consideration was intended to continue, to be renewed annually, and to evolve with time and circumstances. So that a yoke of oxen might today be a backhoe; etc. etc.

Even before Confederation, Crown agents were attempting to 'change the accounts' by characterizing the 'presents' as a *privilege* and not a *payment.* As time went by, the same thing happened to the fiscal and material transfers which formed a part of the land 'cession' treaties.

2.3.1. Relief.

Fiscal transfers - and material support - were taken outside of the treaty relationship and confined to policy, and in this way subject to the whim of the Crown's agents. One result of this change was that instead of focusing on self sufficiency and development (as the material and financial transfers contained in the treaties were clearly intended to do), transfers came to focus merely on survival - in the form of relief. The 'requirement' for relief was itself a logical result of the economic dislocation which we have already documented.

> The beginnings of an Indian relief policy were set out in the 1880 Indian Act. The policy was simple: Indians shall pay the full costs of their own relief if they can afford it, **and all other relief is discretionary.**[170] [emphasis added]

[170] Health & Healing, Ibid.: p. 195.

Relief took the form of payments to individuals as opposed to communities. *"This had the effect of overturning collective cooperation and challenging the importance of the extended family in well-being."*[171] Instead of transfers providing assistance for social development, they were used as a means of social control:

> With its total control of Indian monies, the Indian Department was in a position to use rations and medical attention as a tool to further its goals of civilization and advancement... The economical nature of the Indian relief system, and its coercive value, caused it to persist without change until well into the 1950's..... Indian Agents mismanaged trust monies at every turn, and used relief as a reward or punishment. This was most galling when destitution resulted from the failure of their economic tutelage.[172]

Despite these efforts to exert control and discretion over transfers, the problems only got worse:

> As time went on and the assimilation programs of the federal government consistently failed, the social needs of Canada's First Nations only became greater and government costs burgeoned.[173]

2.3.2. Programs of Economic and Social "Assistance".

The advent of various 'social assistance' programs involving direct transfers to Indian communities and their impact has been well documented by RCAP's Economics and Health & Healing policy teams, and readers are referred to those papers for additional detail.

The speed with which this transition took place varied across the country. North of 60, it happened very quickly: *"By 1955 destitute relief, Family Allowance and pensions to Northern Aboriginal peoples exceeded combined territorial fur production. Two years later it was double."*[174]

The introduction of these 'support mechanisms' changed the accounts and subtracted from the

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[171] Ibid.: p. 194.

[172] Health & Healing: pp. 195-197.

[173] Aronson & Maguire, Ibid.: p. 13.

[174] Health & Healing, Ibid.: p. 219. The Cree nation at Lubicon Lake is another well documented and very recent example of an economy which went from being 95% self sufficient to 95% dependent on social assistance in a matter of years.

value attached to traditional community institutions, economies and accountability loops:

> In some cases, but not all, relocation [onto reserves] was accompanied by the introduction of income security programs. The influx of monies meant greater dependency upon a cash economy, and social stratification along monetary lines. This undermined extended family units, and transformed women, and the young and old, from producers and contributors in traditional economies to dependent consumers in a cash economy. This decreased their inherent value to the community, and made them prime targets for abuse.
>
> The involvement of government programs which guaranteed "services" also weakened the accountability of individuals to their communities. Members of communities increasingly became dependent for their well-being on government programs and government administrators. As a result, communities came to have less and less power to set and enforce community standards. This is a critical problem which they face today.[175]

The exercise of federal control and discretion over the resourcing, design and delivery of 'social development' and 'economic development' programs has, far from improving the situation, actually worsened it. Eleven years ago, Thalassa Research reviewed federal transfers to Indian nations as part of its work for the Penner Report on Self Government. At that time even Canada admitted that its approaches to social and economic development were ineffectual:

> In the Department's own words, the effect of the federal government's policies towards Indian people have been *"to foster dependent and alienated Indian societies which demonstrate many of the characteristics of underdeveloped nations in Africa, Asia, and Latin America"*..... More importantly, there is evidence to suggest that Indian socio-economic conditions are deteriorating:
>
> *... current trends suggest that socio-economic conditions in Indian communities are actually worsening. At the same time, if federal expenditure patterns continue to be shaped by the present policy framework, costs are likely to increase during this decade without producing any appreciable impact on Indian poverty.*[176]

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[175] Ibid.: p. 220.

[176] [IEEDM, DP, 3] quoted in Thalassa Research "The Economic Foundations of Indian Self Government", 1983 for the House of Commons Special Committee on Indian Self Government: pp. 46-47.

We also observed that economic development was accorded a low priority in overall DIAND expenditures, particularly when compared to 'social development' expenditures (ie., welfare and social assistance):

> In 1978-79 Inuit and Indian Affairs program expenditures (grants, contributions, transfer payments) for social assistance and support accounted for 22.3% of its budget. In comparison, 6.6% of IIAP expenditures were allocated for Indian economic development. In 1981-82, the figures were 27% and 7.5% respectively, showing the consistency of DIA spending priorities.[177]

Perhaps not so surprisingly, in the past decade little appears to have changed. Combined expenditures by Canada on Indian economic development in 1992-93 amounted to around $377.4M.[178] On the other hand, DIAND's 'social development' budget came in at $816M, more than double the amount allocated for economic renewal. 'Social development' transfers accounted for almost 43% of the Indian & Inuit Affairs total expenditures in 1992-93.[179]

Although federal expenditures on Indians have been steadily increasing, most of the increase is a direct result of escalating welfare dependency.[180] As we have already discussed, because these expenditures are not tied in any way to the benefits obtained by Canada and the provinces through treaty they have come to be seen as a 'burden' and therefore a prime target for off loading. We have traced the development of this trend (off loading) over the past century and a half, and all indications are that today it is accelerating.

> On-reserve social assistance expenditures have increased at 12% p.a. for about 30 years... This is despite the fact that reserve populations have increased at about 3% p.a..... This growth is extremely perplexing to Treasury Board, which in mid-1993 ordered a halt to off-reserve social assistance expenditures. In one stroke Canada refused to honour off-reserve chargeback agreements with the provinces [with some exceptions]... The result to Canada is a 20% drop in

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[177] DIA "Indian Conditions": 111; 1981-82 Public Accounts: DIA, cited in Thalassa 1983: p. 47.

[178] Drewes & Kitchen, 1994, Ibid.: pp. 21; 32; 33; 40. This figure represents the combined total for DIAND ($98M); Pathways ($200M); Northern Careers ($3.4M); and ISTC's Aboriginal Economic Program ($76M).

[179] Ibid.: p. 15.

[180] Andrew Webster, "The Impact of Spring 1994 Federal Budget Changes in INAC on First Nations" (Assembly of First Nations, 26 February 1994): p. 6.

> Indian welfare expenditures and a corresponding provincial burden.[181]

The costs of this move to most of the provinces are enormous. In Manitoba alone it is in the neighbourhood of $20M annually.[182] If the major struggle between Canada and the provinces in the last century was over control of Indian lands and resources, in this century it has turned to a debate over which level of government underwrites the human cost. In both instances, Indian nations - those most affected - have not been directly involved.

Shedding direct welfare costs may ease Canada's expenditures in the short term, but it has not had any effect on the causes of the situation. If anything, burgeoning welfare costs demonstrate the fundamental inadequacy of current 'economic development' strategies being pursued by the federal government. Notwithstanding the savings realized by the most recent round of offloading,

> ... social welfare expenditures continue to grow and Treasury Board is alarmed that CAEDS and Pathways have failed in their main purpose: to flatten the welfare curve.[183]

These same trends can be seen in just about any sector of activity: increasing costs, unilaterally designed policies and programs, and off loading, in the face of increased dependency. Take housing for example:

> A national Aboriginal comprehensive long range housing policy is required which focuses on Aboriginal cultural integrity and economic self-sufficiency. Current federal and provincial trends in areas of housing dictate against the development of such a policy.... These policies are not conducive to self-sufficiency directions.[184]

The situation is clear as are the causes. The question we now turn to is how to find a way out of it. This begins with a summary of some of the problems associated with fiscal transfers to the Indian nations.

2.3.3. Problems.

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[181] Webster 1994: p. 7.

[182] Lithman 1994: p. 80.

[183] Webster 1994: p. 7.

[184] Economics, Ibid.: p. 99.

No matter how the accounts have been changed, the fact is that Crown expenditures on aboriginal peoples continue to be derived from economic activity which takes place on the traditional lands of the Indian nations. The disconnection of indigenous peoples' social & economic development from the proceeds of the land has led to the creation of the 'burden of the Indian administration', its perpetuation and its growth. Resolving this problem will require a fundamental restructuring of how Crown revenues are characterized, allocated and disbursed. Of necessity this exercise must involve not only Canada and the Indian nations, but also the provinces.

In the nearer term, control over existing resources and accountability for their expenditure must be put in more responsible hands. As matters now stand, program-accountability amounts to the assurance that the funds in question were spent entirely for the purposes intended. Program managers are not required in any meaningful way to demonstrate that the transfer or investment in question **actually improved the well-being of the recipients**, or that the transfer or purchase was economically efficient.

The economic, social or cultural rationality of program objectives does not enter the equation at all and so does not form part of the assessment or accountability mechanisms. Neither are existing programs connected together in any holistic or comprehensive manner - except inasmuch as they have been the target of cost cutting and off loading.

Accountability and control must reside with the Indian nations and their citizens so that a cohesive approach can be developed and implemented. As well, all federally administered programs which relate to 'Indian affairs' should be subjected to rigorous cost/benefit analyses with full Indian participation. It may something to consider the role of the Treasury Board in this context. Perhaps the Treasury Board could - in authentic partnership with the Indian nations - put in place a set of normative criteria (broadly expressed in terms of efficient additions to Indian well-being) to guide the assessment of the effectiveness of Indian- and DIAND-directed program spending and the re-design of ineffective programs, with a focus on restoring holism and undoing the damage that compartmentalized approaches have inflicted.

This might involve in addition something like "The Office of the Ombudsman for Indian Affairs" (see also discussion re: a 'Parliamentary Commissioner for Indian Affairs' in Part II of this paper). Beyond the usual duties of an ombudsman - the re-dress of administrative injustice - he could publish an annual report along the lines of the Auditor General but with particular reference to DIAND and other federal departments concerned with Indian expenditures. The office of the ombudsman could constitute the administrative mechanism governing the application of the system of normative guidelines described above. The office of the ombudsman could also embody the system of "feed-back loops" linking recipients and program managers.

The function of this office would be to ensure that the Crown's internal operations are consistent with the standard of conduct required of a fiduciary as well as any other principles

or objectives agreed to between the parties. It would operate separately from any bilateral treaty-related fora or dispute resolution mechanisms.

One step in this process also involves obtaining more clarity with respect to what expenditures on 'Indian affairs' actually are. Drewes and Kitchen, in their work for RCAP, have highlighted the factors which now prevent this from being done.[185]

Accurate data on the real costs of the current situation cannot be drawn only from designated program expenditures related to 'Indians'. They must also consider, for instance, costs related to the 'administration of justice' as it affects citizens of the Indian nations - investigation, court time, incarceration, etc. etc. A holistic approach to renewal and decolonization requires a holistic consideration of the real costs, benefits, and losses that result from the prevailing situation.

The role of the provinces in this context cannot be overlooked. They spend significant amounts of their own revenues on First Nations citizens and also administer numerous federal transfers. However, most have made no significant effort to *"isolate that part of their expenditures that can be considered to be directed to aboriginal peoples."*[186]

Their role as a source of transfers to First Nations citizens will only increase if the current trends of off loading and urban migration continue. However, their accountability to the Indian nations, and their ability to design and deliver appropriate 'programs', are matters which deserve close scrutiny. If the federal Crown, as a fiduciary, has failed so glaringly in fulfilling its duties and appears committed to shedding them, can the provinces - who have historically been stridently opposed to First Nations' rights and interests - be expected to do a better or a more conscientious job? We suggest that the answer to this question is NO.

This in turn leads to the overarching matter of jurisdictional responsibility for programs, services, revenues and expenditures. In connection with health, education, off-reserve issues and economics, the prevailing uncertainty with respect to jurisdiction has been highlighted as a source of many existing problems and a barrier to solutions.

The situation now facing the Indian nations is unequivocal proof that jurisdictional ambiguity leads to denial, and ultimately neglect. On top of that, it actually contributes to increased costs, in social and financial terms. The area of child welfare provides an example which also speaks to the past performance of federal and provincial governments:

> The federal policy of limiting the development of Indian Child Welfare

[185] Drewes & Kitchen 1994: pp. 2-7.

[186] Drewes & Kitchen, 1994: p. 5.

> services was accompanied by dramatic increases in child welfare costs.... Federal-provincial arrangements were an important factor. Provinces had a very limited financial stake in Indian child & family services, since they billed the federal government for their costs. There was no incentive for them to curb expenses...
>
> Despite a tenfold increase in Indian child welfare costs between 1975 and 1993, however, it is clear ... that Status Indians did not and do not receive the same level of child & family services as other Canadians. Moreover, despite the increased expenditures, a recent estimate shows that Status Indian children are in state care at a rate that is ten times the national average.[187]

In every sector, experience demonstrates that federal and provincial control and 'discretion' have only exacerbated situations that were grave to begin with. This in itself suggests that the exercise of control and discretion are in the wrong hands. How does this behaviour measure in light of the fiduciary and trust responsibilities of the Crown? What remedial action is required?

2.3.4. The Role of The Treaty Relationship.

All of these considerations lead back to the treaty relationship and the consequences of Canada's attempts to deconstruct that relationship. The dislocation of self sufficient economies and vibrant social institutions has led to massive dependency, and all of these events are largely a consequence of the fact that one party has imposed its own definitions and taken the consideration of fiscal and economic matters outside of the context - and the obligations - of the Treaty relationship.

Seen in these terms, an obvious starting point for resolving these problems and reducing dependency is to return them to the purview of the treaty relationship. Put another way, the treaty process is an available and a viable mechanism for decolonization and renewal.

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[187] Health & Healing: p. 227.

3.0. HEALTH AND HEALING.

3.1. CONTEXT.

3.1.1. Traditional Practise, Contemporary Definition.

The importance of healthy communities and individuals to the development of a society cannot be underestimated.

> ... no other right so fundamentally relates to the survival of our people as that of health. Our strength and our future turns upon the well-being of our people. Without healthy, socially developed youth, we have no leaders for the future. Without available, high-quality care for the elderly, we have no guidance or wisdom from the past. Without strong, committed people acting today to champion our rights and to further our nations' interests, we have no guarantees for anyone beyond today. ....[1]

We note that RCAP's Health & Healing policy team has defined 'health' *"in the broad sense, encompassing well-being and social justice"*. They explain that

> ... Aboriginal people envision health as the natural by-product of strong social organization, institutionally guarded cultural integrity, economic opportunity and security, as well as an equitable relationship with Canadians generally. As a result, they cannot accept a health care and social service system that treat "health" as the narrow by-product of a limited domain of services....
>
> In the Aboriginal model of well-being, the goal is balance in a broader socio-environmental sense, and "health" is the outcome.[2]

They add that instead of a *"managed outcome of a series of services"*, health should be seen as *"the natural outcome of community life based on social justice and the equitable distribution of Canadian wealth and resources"*.[3]

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[1] Wahpeton, Sask. 92-05-26 228 Fourth Vice Chief Tom Iron, FSIN: pp. 124-27

[2] RCAP "Health & Healing Policy Paper", draft, 5 May 1994: p. 12.

[3] Ibid.: p. 15.

This holistic approach is at odds with the standard western medical and institutional values that have been applied to health in recent times, but judging from current trends, 'western' practitioners are moving closer to the Aboriginal peoples' understanding and practise:

> This convergence can be seen... in the definition of "health" put forward by the World Health Organization: *"a state of complete physical, mental and social well being, not merely the absence of disease or injury".*[4]

This analysis assumes that health is a collective matter - the health of the individual has a direct impact on the overall health of the family, the community and the nation.[5] It also assumes a spiritual foundation for 'health':

> ... health is a responsibility given to us by the Creator... It is up to us to ensure that we take care of what He has given us.[6]

Although specific practises varied from nation to nation, some generalities about traditional aboriginal health care can be drawn. Healing systems involved different members of the community and the family depending on the expertise, but all members of the community shared overall responsibility for maintaining community well being. *"In this way, healing systems were... fundamental to the social structure and the self governing systems of each society".*[7]

Our analysis of the relationship between the Treaties and 'health' will be taking place in the context of the 'broad' definition provided by the Health & Healing policy team.

3.1.2. Current Conditions.

Available statistics show without any ambiguity that Aboriginal peoples' 'health' is not of the same quality as the 'health' of others.

> ... [S]evere inequity exists between the health and social well-being of Aboriginal people and the wider Canadian society. These inequities extend across almost all indicators including life expectancy, infant mortality, social violence, and children in care. While the evidence indicates that in some areas,

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[4] Ibid.: p. 59.

[5] Ibid.: p. 13.

[6] Rheena Diabo, RCAP hearings at Kahnawake, 13 May 1993, cited in Ibid.: p. 27.

[7] Ibid.: pp. 25; 205-206.

> Aboriginal conditions have improved over the past decade, the evidence also indicates that this general improvement has plateaued in recent years, and indeed in some areas such as social violence, problems have been on the increase.[8]

This reality is not for a lack of expenditures, studies, or efforts at 'reform'.

> Despite the fact that the illness burden of Aboriginal communities has been well documented for many years, and many task forces and commissions have made recommendations designed to alleviate these conditions, progress has been remarkably slow. In fact, in a number of instances, available evidence suggests that conditions are getting worse.[9]

Why, one might ask, has this been the case?

> The simple answer is that ... policy initiatives and community innovations were occurring in a narrowly defined sectoral focus on illness care services without a broader consideration of the social context. Without an appropriate commitment to Aboriginal self government and attendant mechanisms to facilitate the integration of health and healing approaches at the community level, the sectoral approach to planning by its very nature undermines community based approaches to health development. **This fundamental structural problem has constrained the various "transfer" exercises which characterized the 1980's.**[10] [emphasis added]

3.1.3. Wellness, Oppression and Colonialism.

In the following pages we will analyze the contemporary crisis in 'Aboriginal health' - and potential solutions - in terms of the Treaty relationship, its history and its future. We will review the complex bundle of factors that lie behind the 'simple answer' quoted above.

Essential to this analysis is a discussion of colonialism - not merely in theoretical terms, but as it applies to the history and the current circumstances of Aboriginal peoples in Canada. In the 1960's, the Afro-Caribbean psychologist Frantz Fanon wrote extensively on the relationship between 'health', colonialism and decolonization. Although his studies focused on the 'third world' and particularly the liberation struggle in Algeria, many of his

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[8] Health & Healing, Ibid.: pp. 174-175.

[9] Ibid.: p. 15.

[10] Ibid.: p. 211.

observations are of direct relevance to our discussion.

Fanon studied the social and psychological dysfunctions that emerge when one people is 'successfully' colonized by another - particularly the process of internalizing violence so that it is unleashed against the individual, the family, or the community, instead of against the actual source of oppression.

> There is thus during this calm period of successful colonization a regular and important mental pathology which is the direct product of oppression.[11]
>
> ... colonialism in its essence ... [is] a fertile purveyor for psychiatric hospitals.[12]

The prevalence of violence within the Aboriginal community has been highlighted:

> ... the primary cause of mortality in Aboriginal communities is now related to injuries sustained as a result of accidents and violence. Indeed, the term 'accidents" is no longer considered appropriate as it obscures the existence of preventable social and environmental causes.[13]

The Commission itself has heard testimony that links colonialism with social violence and unwellness. *"[W]e begin to adopt our oppressor's values and in a way we become oppressors ourselves."*[14] The Health & Healing policy team has accepted that the colonial relationship - as it has evolved and as it still exists - is behind today's statistics:

> ... [W]hatever the *direct* cause of the problem, the *underlying* cause is the same. The oppressive relationship between Aboriginal and non-Aboriginal societies is the "virus" that leads, by one route or another, to disproportionate rates of social problems, illnesses and premature death.
>
> It may be ... difficult to accept that racism is a health problem. The accumulation of racist incidents - some of them perpetrated deliberately over a long period of time by social agencies which meant to be doing good - has

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[11] Frantz Fanon, The Wretched of the Earth (Grove Press, Inc., New York, 1968): pp. 250-251.

[12] Ibid.: p. 249.

[13] 'Health & Healing", Ibid.: p. 140.

[14] Roy Fabian, Executive Director, Hay River Treatment Centre, RCAP Hearings, Hay River NWT, 17 June 1993.

> been translated into Aboriginal people's feelings about themselves, their attitudes to living and dying and their treatment of one another. This is internalized racism, a cause of self destructive and high risk health behaviours, and a cause of neglectful and violent behaviour toward others.[15]

In this context, healing is *"about personal and collective recovery from oppression"*.[16]

3.1.4. Health, Economy and Society.

Before proceeding, it is important to understand the relationship between 'health' and other 'sectors' of policy and activity. Available evidence makes a clear connection between individual and collective health on the one hand, and socio-economic conditions on the other.[17] The Health & Healing policy team has concluded not only that *"the current health and social conditions in Aboriginal communities are a product not of poor health care services but of poor socio-economic conditions"*, but also that *"economic dependency is the greatest determinant in the social and health situation today"*.[18] So, although this chapter ostensibly deals with 'health', the facts and the conclusions must be considered along with the other portions of this study - particularly those that deal with the economic dislocation of the Indian nations.

3.2. TREATY ANALYSIS.

As stated above, we have adopted the definition of 'health' provided by RCAP's Health & Healing policy team in our analysis of the history.

3.2.1. Conflict, Peace & Friendship.

3.2.1.1. The Haudenosaunee.

The Great Law and the Treaty protocol used by the Haudenosaunee provide a clear example of how the preservation of 'health' - in its broad sense - was an everpresent objective, not

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[15] Health & Healing, Ibid.: pp. 36; 38-39.

[16] Ibid.: p. 10.

[17] Ibid.: pp. 50-53.

[18] Ibid.: pp. 83; 198. See also Economics, Ibid.: pp. 37-39.

only in internal governance, but also in relations with other peoples.

The **procedures** employed in councils and negotiations contain explicit acknowledgement of the importance of 'health' and 'healing'. The thanksgiving address used to open councils is known as *Ohenton karihwateh'kewn* ('the words that come before all others'), which has been explained by Paul Williams.[19]

> [It]... reminds those gathered in council that they have duties not only to the law and the people, but also to the entire natural world; that as each part of that world continues to fulfil its responsibilities, so we as humans have our own duties to fulfil to maintain the world as it should be....
>
> [It]... also brings the minds together in a sacred way. A gathering of the people begins with their agreement on their place in the world and their duties to the world. The momentum of agreement carries over to the council that follows. Where two people may have arrived at the meeting as adversaries, giving thanks together reminds the participants of their place as humans together, and also of their transitory nature.

After the thanksgiving comes the Ceremony of Condolence. The story of the Peacemaker and the origins of the Ceremony of Condolence are in many ways directly linked to the individual and collective process of 'healing', and the maintenance of 'health'. It is said that when the Peacemaker resolved to bring unity to the people, he chose as his helpers two people who were 'sick' - *Ayonhwathah* (who in grief had *"become a cannibal"*), and *Jikonseseh* (who *"thrived on gossip and war"*). If his message could heal these people, all would see its healing power.[20]

> ... the Peacemaker first explained that he had to clear their minds of the things that were troubling them.... First he cleared Ayonhwathat's sense, removing the tears from his eyes so that he could see once again clearly; removing the obstructions caused by grief from his throat; clearing the impurities from his insides. The words made him physically comfortable and removed the memories and thoughts which caused anguish.[21]

The role of this ceremony in Treaty Councils underscores one of the essential purposes of the Treaty relationship - to encourage healing, and maintain the health of the parties:

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[19] Paul Williams, "Part I - The Tree and the Great Law of Peace"; for RCAP, December 1994: pp. 6-7.

[20] Williams 1993, Ibid.: p. 11.

[21] Ibid.: p. 12.

> Each of the "words" of the condolence describes a particular hurt that has come from the grief and loss. Then the speaker explains how that hurt has affected the people who are gathered together. Then, through his words, he removes or heals the hurt and grief. The condolence is above all a healing for troubled minds.[22]

Crown representatives adopted Haudenosaunee protocol in their relations with the Five Nations. One of the reasons for this was that *"the procedures worked: they worked effectively to bring about peace and consensus, to create the Good Mind and the One Mind **necessary for the joint welfare of all the peoples involved**."*[23] Williams records many examples which demonstrate that the British understood the purpose of the Condolence Ceremony and that they participated in it as one of the essential elements of Treaty Councils.[24]

From the perspective of the government of Canada, the "Treaty right to health" is considered in the narrowest sense - essentially a debate on whether or not the written text contains reference to 'medicine' or 'doctors'. However, Haudenosaunee practise demonstrates that 'health' and 'healing' were integral parts of the Treaty process itself, and were in fact one of the ultimate objectives of the Treaty relationship. In this sense, 'health' and 'healing' are principles and objectives which are embedded in the treaty relationship to the point where there is no necessity for explicit provisions that specify particular services.

3.2.1.2. The Council at Kahnawake, 1760.

Soon after the defeat of the French, and Council was held at Kahnawake involving the British, the Haudenosaunee, and the Seven Nations of Canada (who had been previously allied with the French). The purpose of this Council was to discuss how the new peace would affect all of the parties. At that time, the Seven Nations requested both the British and the Haudenosaunee to restrict the trade in liquor, citing its negative effects on individual and community health:

> As we have now made a firm Peace with the English & ye 6 Nat's. we shall endeavour all in our Power to keep it inviolably. There is one thing Br. which we understand you have great Plenty of, which is Liquor, as that is the only thing which can turn our heads and prove fatal to us, we who now represent 8

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[22] Ibid.: p. 14.

[23] Ibid.: p. 57.

[24] Ibid.: pp. 66-70.

> nat's. here present entreat you in the most Earnest Manner not to suffer any of your People to sell or give any to us...[25]

This request was clearly intended to protect the health and well being of the citizens of the Seven Nations.

3.2.2. Accommodation & Dislocation.

3.2.2.1. Chippewa and Mississauga Treaties.

Anglo settlement in what is now southern Ontario did not begin in earnest until the Loyalist migrations which followed the American Revolution and the War of 1812. The Chippewas and Mississaugas (members of the Ojibway - the Anishinabek nation) who lived there already had long standing relations with the British Crown, largely through economic and military, which had developed during the wars with the French and later the Americans.[26]

Lands needed for Loyalist - and later, general - settlement led to the conclusion of a number of Treaties between the Crown and the Chippewas & Mississaugas, beginning the late 1700's and through on up to 1923. These Treaties were some of the first post-Proclamation agreements that were explicitly about the acquisition of lands - taking the form of 'sales' of land in return for a one time payment in cash or goods, often with specific provision for the protection of fishing, farming and hunting grounds. These transactions took place at a time when the economies and social institutions of the Tribes were still intact, and a living could still be made from the remainder of the Tribes' territory.

However, by the early 1800's increased settlement and competition for resources had begun to have a serious negative effect on the society and economy of both the Chippewas and Mississaugas, and other considerations were now introduced into subsequent Treaty negotiations. The destabilization of traditional economies and social institutions, and the increased use of alcohol in this context, all contributed toward to need to seek assurances with respect to the overall health and well being of the people.

The Crown's requests for lands were dealt with in the overall context of the relationship between the Tribes and the Crown, and the long term economic and social security of the

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[25] Sir William Johnson Papers, XIII, p. 163: quoted in Williams, 1993 Ibid.: p. 173.

[26] Ian V.B. Johnson, "British - Tribal Political Relations in the Colonial Period - The Early Mississauga Treaty Process" (Union of Ontario Indians, unpublished manuscript, 1986).

Tribes in the face of increased settlement.

In October 1818 a Treaty Council between the Crown and the Chippewa took place at the Holland River. The Crown sought title to about 1.5 million acres of prime agricultural lands and in return was prepared to provide an annual payment in goods. Chief Yellowhead added that he also wanted the Crown to supply a medical doctor for his people in consideration of the land surrender. The Crown's representative, William Claus, promised that the request would be *"faithfully communicated"* and that he had *"no doubt [the Governor] will attend your wishes."*[27]

However, in the text of the Treaty that was prepared by the Crown, no mention of this commitment was made. Claus explained his actions in his report:

> Not conceiving myself at liberty to accede to the request made, respecting a medical person, I merely replied *"that I would communicate their wish to their Great Father"* - doing so, I beg leave, in the event of His Grace according to their request, to mention the name of Barton Lee.... who is ..... qualified to fill this appointment.[28]

This exchange provides another example of the Crown's power of discretion with respect to treaty provisions and arrangements.

At a Council that took place with the Mississaugas in November of the same year, respecting a Treaty for lands around Rice Lake, William Claus explained that one-time cash payments were to be substituted by ongoing assistance and support as a compliment to the annual presents.

> [The King]... does not mean to do as formerly, to pay you at once, but as long as any of you remain on the Earth to give you clothing in payment every year, besides the presents he now gives you.

This was the beginning of *annuities*. Buckquaquet, leading spokesman for the Mississauga in that territory, agreed that more equitable arrangements needed to be put into place:

> From our land we receive hardly anything & if your words are true, we will

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[27] Canada, Indian Treaties and Surrenders (Toronto, Coles, 1971) Vol. 1: p. 47; "Minutes of an Indian Council, October 17, 1818": p. 103. Cited in Johnson, Ibid., Chapter re: "The Tribal Diaspora - The Emergence of Canada" (no pagination).

[28] NAC RG10 Vol. 489 pp. 281-283: Claus to Major Bowles, 10 November 1818; cited in Johnson, Ibid.

> get more by parting with them than by keeping them. Our hunting is destroyed.... We hope that we shall not be prevented from the right of Fishing, the use of the waters & hunting where we can find some game. We hope that the Whites who are to come among us will not treat us ill.[29]

A research report prepared by Cynthia Wesley-Esquimaux in 1990 continues the story:

> Several years later, when the Chippewa were moved onto the Coldwater Reservation, the Chiefs requested that a surgeon be stationed in their village as a term of their residency on the reservation. The government agreed to assign a medical doctor to the reservation but this arrangement only lasted for six years before the Coldwater Reservation was sold by the Crown to settlers because of its agricultural value. The Chippewa Chiefs have continued to lobby for medical services from the closing of the Coldwater Reservation up to the present day.[30]

Although during the Pre-Confederation period no consistent measures relating to Indian health care were put into place, Crown representatives were aware of existing needs, and discussion related to the provision of these services occurred. Sir John Colborne suggested that health care and other 'social services' could be provided by the Crown from the profits acquired from the resale of surrendered Indian lands.[31] First a portion of the budget for the annual 'presents', and later portions of annuities payments were used to offset 'health and social' costs as Britain off-loaded financial responsibilities during this period. [see chapter on land/finance for more detail...]

Considering the economic and social upheaval that the Upper Canada Tribes were experiencing at that time, the specific requests for medical assistance need to be seen as only one aspect of what was really being sought - security for the overall health and social integrity of the people.

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[29] NAC RG10 Vol. 790, pp. 67-70: "Minutes of a Council with the Chippewa Nation", November 5, 1818. Cited in Ian Johnson, Ibid.

[30] Cynthia Wesley Esquimaux & Wilma Jacknife, "Health Rights & Treaties" (Centre for Treaty Advocacy, Assembly of First Nations, Ottawa, April 1990): pp. 24-25.

[31] NAC Colonial Office Papers File 42, Vol. 388: Sir John Colborne to Secretary R.W. Hay, 3 May 1829: cited in Wesley-Esquimaux & Jacknife, Ibid: p. 26.

3.2.3. Displacement and Assimilation.

3.2.3.1. Treaty Six.

(a) Background.

The events leading up to the conclusion of Treaty #6 in 1876 were rapid and dramatic. Beginning at least as early as 1735, the Cree people of the Saskatchewan River valley were exposed to successive waves of disease for which they had no natural immunity and as a result many people had died. Six years before the Treaty a wave of small pox came though the valley and killed almost one third of the indigenous population.[32] RCAP's health & Healing policy team has noted that these kinds of 'virgin soil' epidemics *"characteristically kill off or debilitate a high proportion of adults in their prime years, people responsible for food procurement, defense, and procreation, thereby compounding the infectious disease mortality with famine and starvation."*[33]

At the same time, the buffalo, which had been a primary means of livelihood on the plains, was quickly falling prey to over harvesting and loss of habitat. The market for buffalo robes and for select cuts of meat from these animals led to a systematic and organized slaughter carried out by those in the employ of American traders and the Hudsons Bay Company:

> ... an estimated 160,000 buffalo a year were being slaughtered on the Canadian plains, mostly by American hide hunters from Montana and the half-breeds from various settlements on the prairies... The indigenous people saw the Treaty as a method to prevent the loss of the buffalo herd and a way to protect the way of life for future generations.[34]

A significant increase in the availability and quantity of hard liquor throughout the area began around 1871 - largely at the hands of American traders - which had wide spread negative consequences. Prior to the Treaty numerous complaints about this had been lodged with the

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[32] Sharon Venne, "Treaty Six Report to the Royal Commission on Aboriginal Peoples", November 1993: p. 20.

[33] "Health and Healing Policy Paper" RCAP Draft, 5 May 1994: p. 74.

[34] Venne, 1993, Ibid., pp. 25-26.

Hudsons Bay Company and the Crown by the Indian leadership.[35]

Against this backdrop, the new Dominion of Canada was in the process of 'opening up the west' to settlement and development, directing thousands of new immigrants to the prairies.

Thus, when the Treaty Councils were held at Fort Pitt, Fort Carlton and other locations, health, social and economic security were foremost in the minds of the Indian leadership.

> The Crown made a number of important oral promises that form the complete definition of the health and social development guarantees. What emerges from both the written records which document the treaty process and the oral tradition of our people is that the treaties were not to disrupt our way of life. The written record of Lieutenant Governor Morris reflects this fact.....
>
> *"At length the Indians informed me that they did not wish to be fed every day, but to be helped when they commenced to settle, because of their ignorance how to commence, and also in case of great famine.... They saw the buffalo, the only means of support, passing away. They were anxious to learn to support themselves by agriculture, but felt too ignorant to do so, and they dreaded that during the transition period they would be swept off by disease or famine - already they have suffered terribly from the ravages of measles, scarlet fever and small-pox."*
>
> It seems clear that the context in which our forefathers saw the right to health and social development was one of anxiety about the effects of deadly epidemics on their people, and concern that the settlement process would able to help the people to adapt to new social and economic realities. Our negotiators realized that our nations would require help to achieve a successful transition...
>
> The Governor made a very significant statement in response to our negotiator's fears that they would be wiped out by some unforeseen epidemic. He said that the case of *"great sickness or famine"* would be a case of *"special consideration"* and so would attract additional attention and assistance from the Crown. Morris subsequently described the circumstances that would attract special attention from the Crown.
>
> *"The only occasion when [special] help would be given, would be if Providence should send a great famine or pestilence upon the whole Indian people*

[35] Venne, 1993, Ibid., pp. 27-28.

included in treaty...something unforseen." [36]

(b) The Treaty Text.

The concerns expressed by the Chiefs during the negotiations and the commitments made by the Crown's agents found some reflection in the written text of the Treaty, although, as we shall see, there remain disputes as to the meaning and application of the particular clauses.

Morris had made a distinction in his discussions with the Chiefs between ongoing 'regular' health care and 'special measures' in the case of large scale calamity, and this distinction was reflected in two separate clauses:

> That in the event hereafter of the Indians comprised within this treaty being overtaken by any pestilence, or by a general famine, the Queen, on being satisfied and certified thereof by Her Indian Agent or Agents, will grant to the Indians assistance of such character and to such extent as Her Chief Superintendent of Indian Affairs shall deem necessary and sufficient to relieve the Indians from the calamity that shall have befallen them.....
>
> That a medicine chest shall be kept at the house of each Indian Agent for the use and benefit of the Indians at the direction of such agent.[37]

A third clause found near the beginning of the Treaty relates to something else that has a direct relationship with individual and collective health - alcohol:

> ... within the boundaries of Indian reserves, until otherwise determined by Her Government of the Dominion of Canada, no intoxicating liquor shall be allowed to be introduced or sold, and all laws now in force, or hereafter to be enacted, to preserve Her Indian subjects inhabiting the reserves or living elsewhere within Her North-west Territories, from the evil influence of the use of intoxicating liquors, shall be strictly enforced.

When taken together, these three clauses give some idea of the priority that the Indian leadership put on the health and physical well being of their people, and the Crown's acknowledgement of the legitimacy of these objectives. It is important to note, however, that in each case the written text provides the Crown's agents with discretion over the application

[36] RCAP Hearings, Tom Iron, Ibid., pp. 131-36.

[37] Treaty #6, 1876.

and implementation of each provision.

(c) The Outcome.

In looking at the result within Treaty #6, it is critical to consider the impact that the Crown's discretion had on the implementation and interpretation of these clauses.

> As early as 1880 the annual reports of the Department of Indian Affairs began to make frequent mention of tuberculosis as the major cause of death among Aboriginal people in the prairies. Despite growing evidence of the devastating potential of the epidemic, the Department buried the evidence in reports to Cabinet..... [I]n 1882 the death rate from tuberculosis for Plains Cree was approximately 40/1,000 of population annually (the current national tuberculosis death rate is less than 2/100,000)....
>
> Most tragically, the role played in this epidemic by the residential schools was major. Dr. Peter Bryce, the second medical superintendent sent to western Canada by Indian Affairs.... found in an examination of five residential schools in Alberta in 1909, that the TB infection rate among school children was 100% in three of the schools and nearly that in the other schools. The annual death rate among school children was 80/1,000..... What was particularly appalling about the situation was that in many of the medical investigations, most students arrived at the school free of infection (and in whose homes no evidence of infection could be found), yet took the infection back to their homes and communities from the schools.[38]

RCAP's Health & Healing policy team has also noted how legislative intrusion following the Treaties assisted in undermining traditional healing institutions:

> ... revisions to the Indian Act prohibiting healing ceremonies (e.g., the potlatch and sun dance) further extended the external society's regulatory control over community-based systems of healing in Aboriginal communities, and contributed to the suppression of traditional healing practises. In a specific effort to convert Aboriginal hunters and trappers into agricultural labourers... ceremonial activity (which often occurred during important agricultural seasons) was banned and elders and healers were prosecuted.[39]

The Canadian courts have had some opportunity to consider the 'medicine chest' - in 1935,

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[38] Health & Healing Policy Draft, 5 May 1994: pp. 75-76.

[39] Ibid.: p. 207.

the matter was considered by the Exchequer Court of Canada in Dreaver v. the King[40]. The Government contended the Treaty meant just what it said: a box of medicines would be available from Indian Agents. The treaty #6 nations contended that the clause should be interpreted to include medicines, drugs, and medical supplies. The Court agreed with the First Nations that the clause should be interpreted generously.

On the other hand, the Saskatchewan Court of Appeal[41], in deciding whether a Treaty Indian had to pay for provincial health and hospital insurance, took the narrow approach in concluding that the "medicine chest" provision could refer to nothing more than *"the plain meaning of the words."*

> .... the obligation was to have physically on the reservations for the use and benefit of the Indians a supply of medicine under the supervision of the agent. I can find nothing ... that would justify the conclusion that the Indians, in seeking and accepting the Crown's obligation to provide a medicine chest, had in contemplation provision of all medical services including hospital care.

This literal and minimalist approach to interpreting the scope of the treaty right is indicative of the problems which the courts face in dealing with matters that are often beyond the scope of precedents and normal judicial consideration.

3.2.3.2. Other Numbered Treaties.

Although Treaty #6 is the only one which explicitly speaks of the 'medicine chest', RCAP's Health and Healing policy teams reports that

> ... similar verbal representations were made by treaty commissioners when Treaties 7, 8, 10 and 11 were being negotiated. Fumoleau (1979:113), for example, has shown that the Treaty Commissioners negotiating Treaty 8 promised medicines and medical care. A 1919 report by the Assistant Deputy and Secretary of Indian Affairs, states that Indians were to be *"assured... that the government would always be ready to avail itself of any opportunity of affording medical service."*[42]

Keeping in mind the comments made by the Chiefs and Morris during the Treaty negotiations, and even within the narrow construct of the Treaty's written text, one would

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[40] April 10, 1935, unreported.

[41] R. v. Johnston (1966) 56 D.L.R. (2d) 749.

[42] Health & Healing Policy Draft 5 May 1994: p. 203.

think that the circumstances of today would have all of the attributes of a pestilence or calamity. At least, it would certainly be regarded as such if these statistics prevailed in non-Indian society. The fact is, however, that the backdrop of suffering has become 'routine' in the eyes of provincial and federal policy makers, and therefore an excuse for inaction.

3.3. CONCLUSIONS.

Judging from the available documentation that has been reviewed, the right to individual and collective health & well being was a major consideration for the Indian nations in a significant number of treaties. It was also the subject of discussion and commitments on the part of the Crown's representatives, and is reflected clearly in a number of surviving Council minutes.

Whether or not there were specific references to a 'medicine chest', or a 'doctor', there were almost always commitments sought (by the Indians) and assurances given (by the Crowns' representatives) that the nation and future generations of both sides would do well and obtain security.

Certainly, the result has been very different than any of the parties anticipated, and contrary to what the Crown's agents - in many cases - committed to during treaty councils. The point here is not health-as-a-sectoral-right. Rather, it is to admit that mutual undertakings regarding the health and well-being of the parties was essential to the relationship and the understanding that was confirmed by Treaty. This vantage point is critical in considering the treaties as holistic instruments instead of one dimensional 'surrenders'. Health - and education - and economic interests, etc. etc. - are perhaps best seen as a bundle of results that the parties agreed to preserve and develop through the treaty relationship - a relationship that was to be guided by the fundamental principles which we have already described.

The holistic nature of the agreements reached is confirmed by the ways in which breaches in one 'sectoral area' impact on other areas - for instance, the relationship between economic marginalization and poor health. Or the relationship between assimilation programs and residential schools on the one hand, and community health and wellness on the other.

The taking of 'health' and well-being outside of the treaty relationship and relegating it to policy is tangible evidence of the federal government's ongoing efforts to deconstruct the treaty relationship. It also provides another example of the 'changing of the accounts' that has taken place.

The Health & Healing policy team write that traditionally,

> the ethical and practical basis of the traditional , community based mode of supporting the less fortunate. Simply, once asked as was given, and one did

> not ask unless there was real necessity... [But] needs assessment is now principally on dollar deficiency basis. This.... has corrupted but not obliterated traditional perceptions of need and modes of distribution.[43]

This perspective provides an alternative - and we would suggest a more accurate - approach to 'cause', 'effect', and 'solutions'. Isolated sectoral programs cannot address the situation precisely because they are sectoral and do not take into account the holistic nature of the relationship between Indian nations and Canadians - what each party does in one sector has an effect in other sectors. In this context the treaty relationship is one which was intended to address the relations between the parties in a holistic and global sense.

Looking at the situation with these principles in mind casts it in a different light:

> ... as the negotiators were concerned for the well-being of future generations, they wanted to ensure that all practical steps were being taken to protect the health of all their people. This kind of interpretation clearly makes health a treaty right, and not a privilege granted by the federal government. As we can all appreciate, making it a right changes everything about health, from delivery of services to funding questions to coverage comprehensiveness.[44]
>
> The health right is then, truly guaranteed only when it is recognized as a treaty obligation, part of the sacred trust between the Crown and Saskatchewan First Nations. **It must be recognized in the spirit in which our forefathers intended it; that is, it must act to guarantee the survival of a strong, distinct culture and people.**[45] [emphasis added]

This approach to the treaty relationship has immediate implications for existing policies, guidelines and norms of 'program delivery' - since these in themselves reflect the literal, compartmentalized approach that has been applied to the treaties generally. The Health & Healing policy team writes that:

> ...[The] long and sad history of colonialism lives on today in the complex web of institutional arrangements that structure the relations between the Aboriginal peoples and the Canadian state. And ... this existing institutional framework daily fails to address many of the most basic needs of Aboriginal individuals, families and communities....

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[43] Health & Healing, Ibid.: p. 214.

[44] 4th Vice Chief Tom Iron, FSIN, ibid.: p. 137

[45] 4th Vice Chief Tom Iron, Ibid., pp. 146-147.

> Our analysis leads us to conclude that a major departure from past and current approaches will be required if health and social well-being are to be effectively promoted in Aboriginal communities. In our view, it is not simply a matter of tinkering with existing policies or programs. Rather, wholesale changes in approach are required. Health and social service systems based on entirely new principles must, we believe, be constructed.[46]

We would suggest that the principles by which these changes should be guided are those inherent in the treaty relationship - holism, reciprocity, development and mutual benefit. Taken together, they serve to focus on the objectives of achieving collective health and well-being.

[46] Health & Healing, Ibid.: p. 333.

4.0. EDUCATION.

4.1. CONTEXT.

Education, as the primary means of transmitting knowledge, identity and life skills, has a direct relationship not only to a peoples' social cohesion, but also their development. In the context of the Treaty relationship this dual role - preserving culture while at the same time providing for the learning of new skills - was and remains and important factor. In this light, education cannot be considered separately from the economy of a people and their social well being - it is intimately connected with these things, and that fact is reflected in the records of many of the Treaty Councils.

4.1.1. Traditional Practise, Contemporary Definition.

RCAP's Education policy team has adopted a holistic and comprehensive definition of 'education'. Characterized as 'lifelong learning', the educational process fully involves the individual, the community and the nation - as well as interaction with other nations and societies.[47]

Recognizing that there were and are distinct approaches to education among the Indian nations, some generalizations can still be drawn. The following description comes from the Cree nation:

> In the Cree language, the word for "education" connotes a lifelong process which incorporates, holistically, the spiritual, emotional, intellectual and physical development of the participants in the process. Teachers as well as students are included in the development process, for in the process of teaching, one also learns. The word implies that knowledge is shared between the teacher and student, and, in the act of sharing, the student becomes obligated to pass on the knowledge so acquired for the betterment of the community. In the Cree culture, education is not broken up into stages such as elementary, secondary, and post-secondary. It is a continuum which begins at

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[47] "Education Policy Options Paper" draft #2, RCAP Education policy team, April 1994: pp. 23-24.

> birth and does not end until death.[48]

This is radically different than the conventional definitions and approaches to education which have been adopted by Euro-Canadian society over the years. But - just as the health & healing policy team has noted in their sector of study - there is a growing acknowledgement among non-Indians that the conventional approaches to education simply do not work:

> There is a basic convergence between Aboriginal and humanistic criticism of contemporary education systems to the effect that current approaches are severely out of balance.[49]

The de-industrialization of the North American economy, contraction of the salaried workforce and an increase in freelancing, changing technology and the need for ongoing re-training, as well as the reality of single parents & working parents, have all highlighted the fact that traditional approaches to education - for non-Indians - do not work.

4.1.2. Current Conditions.

Available statistics demonstrate that Aboriginal peoples experience higher drop out rates and lower performance rates in the mainstream school system. In 1991, 51% of the out of school Aboriginal population in the 15-24 year old age group had less than a grade twelve education.[50] The drop out rate for Aboriginal students ranges anywhere from 75% - 95%, depending on the region and locality.[51]

If the goals of education are to prepare youth for gainful employment and assumption of family and community responsibilities, then prevailing rates of unemployment and social atrophy within Aboriginal communities demonstrate clearly that these goals remain unmet.

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[48] Ibid.: p. 316.

[49] Ibid.: p. 31.

[50] Education Draft #2: p. 3.

[51] Ibid.: p. 280.

4.2. TREATY ANALYSIS.

4.2.1. Conflict, Peace and Friendship.

During this stage of the Treaty process, negotiations were primarily related to economic and political rights. Generally speaking, these were the days before colonial administrators actively sought the assimilation of Indian nations, and before non-Indian incursions had dealt serious blows to the cultural and social integrity of the Tribes. At that time, then, it was primarily through securing agreements on political and economic matters that the protection of 'social' rights was obtained.

This is not to say that 'Indian' education - with the objective of assimilation - was absent during this period. In fact, the Education policy team has noted that from the early 1600's, *"missionaries attempted to "civilize" Aboriginal people, using education as their tool".*[52] However, this did not take place in the context of the overwhelming imposition of Euro-Canadian domination that was to occur in later centuries, and it was often with the consent of the Indian nations involved.

For instance, three Haudenosaunee Chiefs and a Mahican Chief travelled to England and met with Queen Anne on April 19th, 1710. A number of issues were raised at that time, one of which was education. They mentioned that

> Their alliance had brought them some knowledge of Christianity and if the Queen would *"send over some Persons to instruct us, they shall find a most hearty welcome".*[53]

This request led the Anglican Church to send missionaries into Iroquois territory to teach: *"... the Society for the Propagation of the Gospel operated schools within Haudenosaunee territory for nearly two centuries afterwards."*[54]

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[52] Education policy draft #2, Ibid.: p. 12.

[53] Malvina Bolus, "Four Kings Came to Dinner with Their Honours" (The Beaver, Winnipeg, Autumn 1980): pp. 46-48; Quoted in Williams, 1993 Ibid.: p. 166.

[54] Williams, 1993 Ibid.: p. 167.

4.2.2. Accommodation and Dislocation.

4.2.2.1. The Chippewa and Mississauga.

In the 1820's, political and social realities in Upper Canada brought about a change in colonial policy with respect to the Chippewas and Mississaugas living in what is now southern Ontario - changes which would later be applied to Indians generally. Instead of allies, they now were seen as obstacles to settlement, and continued friction with non-Indians related to trespass and resource use suggested that new approaches were required.

Initially, Indian education in Upper Canada was funded and directed by various missionary societies, particularly the Methodists, who began to establish schools and churches among the Chippewas and Mississaugas in 1824.[55] The churches would continue to play an important role in "Indian education" over the next century and a half, but soon the state was also to intervene directly.

In 1829, the new Lieutenant Governor of Upper Canada, Sir John Colborne, laid out a plan based on the relocation of communities to centralized, isolated reserves where they would be taught the ways of the whiteman and be kept out of the way of settlers. The costs for this effort were to be paid from the proceeds of Treaty land sales and leases.

> ... [T]he tribes would be settled on reserves, trained in western agricultural techniques, and immersed in Christian teachings. The plan was to be financed through a fund created for their future support by granting leases of their lands and selling part of them. The implications of this policy were far reaching. It laid the foundation for a government commitment to fund development, education and medical and social services to the tribes from the income produced from their aboriginal lands. Colborne argued that this plan was to be preferred over the existing policy *"which has occasioned an enormous expense without conferring any benefit on the Indians, or ensuring their friendship."*[56]

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[55] Peter Schmalz, The Ojibwa of Southern Ontario (University of Toronto Press, 1991): p. 151.

[56] NAC Colonial Office Papers, File 42 Vol. 388: Sir John Colborne to Secretary R.W. Hay, 3 May 1829; cited in Ian V.B. Johnson "British-Tribal Political Relations in the Colonial Period - the Early Mississauga Treaty Process" (Union of Ontario Indians, 1986) [last chapter - no pagination]

Assimilation was the basis of this policy, as expressed by Sir John Murray, Secretary of State for War and the Colonies, in his approval of Colborne's plan. Instead of 'allies', Indians were to be 'wards':

> The course which has hitherto been taken with these people, has had reference to the advantages which might be derived from their friendship in times of war, rather than to any settled purpose of gradually reclaiming them from a state of barbarism and of introducing amongst them the industrious and peaceful habits of civilized life.[57]

Events spurred on the implementation of this policy - the settler population of Upper Canada increased by nearly 50% between 1830 and 1833 and 'voluntary' removal was one way to keep Indians from interfering with settlement. A number of reserves were set aside for the Chippewa and Mississauga in the 1830's to achieve this objective.

> Initially the reserves were intended as places where Indians would learn the rudiments of white culture as a precursor to assimilation. The Coldwater-Narrows agricultural experiment was established for the Chippewa of Lakes Simcoe and Huron in 1830.[58]

The Chippewa themselves petitioned for relocation to a safe haven, and cited the circumstances which led them to this decision:

> ..white men seize on our furs, and take them from us by force, they abuse our women and violently beat our people. We are poor in lands and have few places for hunting.[59]

But the British also invited other Anishnabe to Coldwater, including those from Drummond Island, which was conceded to the United States in the wake of the War of 1812. Oral history collected at Wikwemikong in 1963 tells of the offer that Indian Agent Anderson made to those people:

> Anderson got up and said, *"I got a letter from our Great Father and your place, your village here belongs to our friend the United States. It is no more a British place.....He wants me to take all you Indians in this Potaganising*

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[57] NAC RG10 Vol. 116: Sir George Murray to James Kempt, 25 January 1830, cited in Ibid.

[58] Ian Johnson, "The Coldwater Experiment" (Ontario Indian, Toronto, Vol. 5 No. 3, March 1982).

[59] Quoted in Schmalz, Ibid.: p. 161.

> *[Drummond Island] and come with me to move over to Coldwater at the foot of Georgian Bay".....* And Anderson said, *"We'll all go to Shena'sibing [Coldwater] and if you all go then the British government is going to take care of you in the hold of his hand, as long as you live, you and your grandchildren. And those who will not come along with me the British government will drop them right here."*.....
>
> Before they left in Potaganising, a man by the name of Gabo..... he said to Anderson, *"Well how you going to be over there after you get to Coldwater? We have nothing over there but we have houses here."* And Anderson said, *"Never mind your houses. Leave your houses here. Our British Government is very rich. He'll build you a house. He'll build you all you need over there."* Okay then....
>
> So the houses were all built up. The first house was for Anderson, the Indian Agent. They kept on building all the other houses for the Indians. After they built up all the houses there was some lumber left, so they built a school for the Indians. And that's the first Indian school for Indians.[60]

Education and training in agricultural pursuits was provided at the Coldwater-Narrows, funded by proceeds from land sales.

> In 1830 Colborne constructed dwellings, a meeting house, some barns, and even grist and saw mills. Some land was cleared... and cattle provided. Missionaries looked after their spiritual needs and a white teacher was engaged to instruct them in farming. The cost to settle approximately 500 Ojibwa amounted to L3000, which came out of their annuities from almost 2 million acres they had sold.[61]

It is useful to note that this approach to educational and economic adjustment was community based - elders, adults and their children were fully involved in the process of training and development in a community atmosphere. This is reflected in the oral record from Wikwemikong: *"There was still some lumber left so they built a small little barn. It was all use together. It wasn't built for one."* [62]

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[60] Mike Trudeau, Wikwemikong, interviewed by Frank Myers, 9/9/1963. Courtesy of James Morrison and Gore Bay Museum.

[61] Schmalz, Ibid.: p. 161.

[62] Mike Trudeau, Ibid.

Indian Agent Thomas Anderson reported in 1835-36 that the peoples' condition had improved considerably:

> Prior to 1830 these Tribes had become much demoralized from their long Residence near White Settlements. They were in the constant habit of drinking spiritous Liquors to excess, not one of them could read or write; and they scarcely knew any thing of Religion. Their Hunting Grounds were exhausted... and [they] were constantly in a State bordering on Starvation....
>
> [Now]... each Indian with a family has a little Farm under Cultivation; .... his wigwam is exchanged for the Log House; hunting has in many Cases been altogether abandoned, and in none appears, as formerly, to be resorted to as the only Means of Subsistence.[63]

Despite the 'progress' made at Coldwater-Narrows, the experiment was soon aborted. Anderson reported that the Reserve was no sanctuary from incursions by non-Indians, and that the people were *"obliged frequently to submit to irritating and extremely unjust Treatment on the Part of neighbouring White Settlers".*[64] Oral history describes these events in a different way:

> They lived there until their government, their Great Father wrote again to Anderson. He said the Anderson, *"How are the Indians that you took to Coldwater? Are they farming? Are they tilling the land?".* Anderson wrote back to our Great Father, and he said, *"No there are just small, little patches, little gardens. They don't make any farms.".* Our Great Father said, *"Well, I'm afraid we'll have to move them out again because they are in the way. There are lot of people who are making farms from over that way from Toronto. They were coming over to Coldwater where the Indians were and they were in the way because they weren't tilling the land."* So they were moved away again.[65]

By 1836-37, Coldwater was dissolved to provide additional lands for the neighbours. The Anishnabe were dispersed to their remaining territories. Some went to Islands in Georgian

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[63] Cited in Peter Schmalz, Ibid.: pp. 144-145.

[64] Schmalz, Ibid.: p. 144.

[65] Mike Trudeau 1963: Ibid.

Bay and Lake Simcoe.[66] Others went further north to Manitoulin where another 'agricultural experiment' (which met the same fate) was begun at Manitowaning.[67] In this instance, *"Progress for the whites took precedence over progress for the Ojibwa".*[68]

Colonial policy regarding education remained inconsistent and sporadic until the advent of Confederation, and education itself only began to appear regularly as a provision in the numbered Treaties. But clearly in the period before Confederation, 'Indian education' had become intimately tied to removal, assimilation and adjustment, as well as the expenditures of the Indian Department and the Treaty process itself.

4.2.2.2. Education Funding, Annuities, and the Presents.

In 1845 Lord Metcalfe had made an arrangement with many of the Tribes that the issue of gunpowder included in the annual 'presents' would be *"withheld on the understanding that the sum thus saved would be applied in promoting education among them."*[69] The following year George Vardon, Chief Clerk of the Indian Department, was asked by the Select Committee if the Tribes had agreed to have some of the funds designated for the annual 'presents' put towards education. He replied:

> From the information which I have derived from the Superintendents in Upper Canada, the Indians are fully satisfied with the proposed arrangement; as regards Upper Canada some funds in lieu are to be applied to education..... [T]here is no settled communication in lieu of these allowances, but it has been held out to the Indians that something in the way of education would be done for them in return for a stoppage of the said supplies, with which they seemed

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[66] Johnson, Ibid.

[67] In 1836 a Treaty was concluded with the Odawa and Ojibway which set aside the 'Manitoulin Islands' as a reserve for all of those Indians from Upper Canada who, because of dislocation or otherwise, chose to remove there. Education and training in agriculture etc. was to be a central part of the initiative. But by the 1860's, many of the Anishnabe had remained in their traditional lands and not removed to Manitoulin. The agricultural experiment had not produced 'sufficient results' and settlers were agitating for land. In 1862, a treaty was concluded which had the effect of opening up most of Manitoulin for sale and settlement. See chapter on lands for additional detail.

[68] Schmalz, Ibid.: p. 145.

[69] Personal communication from Paul Williams, 18 May 1994. See also Schmalz, Ibid.: p. 181.

satisfied.[70]

In a previous chapter we have already discussed the matter of the annual 'presents' in some detail - at this time, the Crown was trying not only to reduce and eliminate the presents, but also change the nature of the transfer so that it would 'encourage' the 'civilization' of the Indian nations. But by the late 1850's, the annual presents had been abolished by the Imperial government. Local authorities then turned to the annuities from land sale Treaties to cover the costs of the policy.

Schmalz reports that although the Churches maintained a major role in financing and operating Indian schools in Upper Canada, *"the government unilaterally deducted up to one-fourth of the land sale annuity money from the more prosperous bands to support residential schools".*[71] Crown officials themselves acknowledged that draining the annuity funds in this way was not only discriminatory, but prejudicial to the very purpose that the annuities were to serve. The preliminary report of the Pennefeather Commission of Inquiry into Indian Affairs, released in November 1856, contained this admission:

> It must not be forgotten that to educate their children the Indians already burden themselves with a heavier charge than is paid by the most civilized nation in the world to obtain a similar result. 25 p.c. [%] of their annuities is allotted to the support of the model schools, besides the salaries of their local school masters; if, in addition to this, that are to be.... of heavy percentage, their slender incomes will be almost entirely absorbed.[72]

These facts were not lost on the Indian people themselves. Thomas Anderson, Indian Agent at Cobourg, reported on a speech delivered to him in August 1857 (probably by the Mississauga):

> But lately our presents have been stopped and our lands we have been induced to sell for small value... The government established schools all over the country for the white children whilst we are left to take the money from our annuities for that purpose, we were in hopes that instead of our presents, the money would have been applied in teaching us to live like our white brethren

[70] Appendix to the 5th volume of the Journals of the Legislative Assembly of the Province of Canada, 1846: pp. 1-2. Courtesy of Paul Williams.

[71] Schmalz, Ibid.: p. 181.

[72] NAC RG10 Vol. 230, pp. 136,615-136,626: "Preliminary Report of the Pennefeather Commission", 19 November 1856; courtesy of Paul Williams.

but such is not the case.[73]

4.2.3. Displacement and Assimilation.

Beginning with Treaty #1, concluded in 1871 in southern Manitoba, the provision of education became a standard consideration in each of the subsequent Treaties, up to Treaty #11.

RCAP's Education policy team has explained it this way:

> The various peoples of the First Nations understood that their way of life was undergoing tremendous change. They secured from the Queen's representative, in exchange for their promise to share the land, assurances that they would not be left out of the mainstream of the new economy. They sought assurances, and were promised, that they would be given tools to acquire "the cunning of the white man". The most significant of these tools was, of course, education, and the Treaty right to educational assistance became a standard clause in all the numbered Treaties....[74]

Here is what the Crown's representatives actually said during the negotiation of Treaty #4 in the Ft. Qu'Appelle Valley with representatives of the Cree and Saulteaux:

> The Queen always keeps her promises, always protects her red men... The Queen thinks of the children yet unborn. (know there are some red men and some white men who think only of today and never think of tomorrow.) The Queen has to think of what will come long after today. Therefore, the promises we have to make to you are not for to-day only but for tomorrow, not only for you but for your children born and unborn, and the promises we make will be carried out for, as long as the sun shines and the water flows in the ocean.....
>
> The Queen wishes her red children to learn the cunning of the white man, and when they are ready for it, she will send school masters on every reserve and

[73] Anderson to the Indian Department, 19 August 1857; no citation, courtesy of Paul Williams.

[74] Education Draft #2, Ibid.: p. 312.

pay for them.[75]

It is important to note the fact that the Commissioner highlighted the perpetual nature of the relationship that was being proposed and portrayed the benefits that were to come in this light.

4.2.3.1. Treaty Six.

The following excerpts of testimony from RCAP hearings describe some of the background to the negotiation of Treaty #6:

> Implicit in the negotiations was an assurance by the Crown that the children of future generations would be cared for and assisted as they grew up in a new society. Our forefathers were concerned that our children would have all the advantages that the white society afforded to other Canadians.
>
> The Treaty Commissioners heard these concerns and responded to them in the recognition of a right to education, but also in representations made to our leaders that:
>
> *"...your children will be taught, and then they will be as well able to take care of themselves as the whites around them."*
>
> Only by ensuring that our children and our people have equal opportunity to develop their physical and social potential will this promise reach fruition. The right to social development is implicit in all of the language of our treaty negotiators; they signed treaty for the sole purpose of ensuring our future survival in every sense of the word....
>
> Chief Sweetgrass voiced this sentiment when negotiating Treaty Six in 1876. He said:
>
> *"When I hold your hands and touch your heart, as I do now, let us be one. Use your utmost to help me and help my children, so that they may prosper."*.....
>
> Poundmaker, speaking during the Treaty Six negotiations put forward a clear

[75] Morris, pp. 95-96, quoted in Tony Hall, "Part 2 - Aboriginal Crown Treaties in the History and Constitution of Canada: Basic Principles, Basic Interpretations", Prepared for Leroy Littlebear and RCAP, 1994: pp. 9-10.

vision of his expectations and understandings of treaty:

> *"When I commence to settle on the lands to make a living for myself and my children, I beg of you to assist me in every way possible - when I am at a loss how to proceed I want the advice and assistance of the Government; the children yet unborn, I wish you to treat them in like manner as they advance in civilization like the white man...this is the voice of the people."*[76]

The negotiations themselves demonstrate how a variety of issues were woven together in a seamless web - economic security & adaptation, social security & development, health & education - all were connected in the minds of the Indian leadership. Alexander Morris, in his report on the conclusion of Treaty #6, reflected this fact:

> A spokesman, Poundmaker, then addressed me, and asked assistance when they settled on the land, and further help as they advanced in civilization. I replied that they had their own means of living, and that we could not feed the Indians, but only assist them to settle down....I explained that we could not assume charge of their every-day life, but in a time of great national calamity they could trust the generosity of the Queen. The Honourable James McKay also addressed them, saying that their demands would be understood by a white man as asking for daily food, and could not be granted...
>
> At length the Indians informed me that they did not wish to be fed every day, but to be helped when they commenced to settle, because of their ignorance how to commence, and also in case of great famine.... They saw the buffalo, the only means of support, passing away. They were anxious to learn to support themselves by agriculture, but felt too ignorant to do so...[77]

The clause in the written text of Treaty #6 which was supposed to reflect these understandings reads:

> Her Majesty agrees to maintain schools for instruction in such reserves hereby made as to Her Government of the Dominion of Canada may seem advisable,

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[76] Wahpeton, Sask. 92/5/26, Fourth Vice Chief Tom Iron, FSIN, pp. 141-42; 124-27; 135-36.

[77] Alexander Morris cited at RCAP hearings by 4th Vice Chief Tom Iron, FSIN, ibid., pp. 131-36.

whenever the Indians of the reserve shall desire it.[78]

The result, however, was not what the Indian nations had anticipated, or, we would argue, what the Crown's agents had promised. In August 1884 - eight years after the conclusion of the Treaty - a number of the Treaty #6 Chiefs presented a petition to the Crown outlining the terms of the agreement which had not been implemented. One of their complaints was that schools had not been built on each reserve as provided for in the Treaty.[79]

To put this Treaty commitment into perspective,

> It must be borne in mind that in the 1870's and 1880's, a school house on every reserve represented the state of the art in education systems in western Canada. There were, at the time, but a handful of schools in western Canada, and no universities at all.[80]

As time went by, the promise of decentralized education within each community was replaced with the nightmare of centralized residential schools.

4.2.3.2. Other Numbered Treaties.

It was stipulated in Treaty Nº1 and Nº2 that *"Her Majesty agrees to maintain a school on each reserve hereby made whenever the Indians of the reserve should desire it."*

Treaty Nº3, Nº5 and Nº6 added the words *"... as to Her Government of Her Dominion of Canada may seem desirable,"* and Nº6 added the twist, *"schools for instruction"*.

Treaty Nº4 stipulated *"Her Majesty agrees to maintain a school in the reserve allocated to each band as soon as they settle on said reserve and are prepared for a teacher."*

Treaty Nº7 agreed to provide *"salary of such teachers to instruct the children of said Indians"* instead of *"schools"*. Treaty Nº8 struck the provision that the teachers would be provided when the Indians were settled on their reserves and desire teachers.

Treaty Nº9 agreed that Her Majesty would *"pay such salaries of teachers to instruct the*

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[78] Treaty #6 between Her Majesty the Queen and the Plain and Wood Cree Indians and Other Tribes of Indians at Ft. Carlton, Fort Pitt and Battle River, 1876.

[79] Venne, 1993: p. 88.

[80] Education draft, Ibid.: p. 313.

children of said Indians, and also to provide such school buildings and educational equipment as may seem advisable to Her Majesty's Government of Canada."

Treaty N°10 said simply that His Majesty *"agrees to make such provision as may from time to time be deemed advisable for the education of the Indian children."*

Treaty N°11 said that His Majesty *"agrees to pay the salaries of teachers to instruct the children of said Indians in such manner as His Majesty's Government may deem advisable."*

The differences in wording make, of course, a field-day for lawyers. Who in Treaty N°10 is to deem what is advisable? Are teachers in many of the treaty areas expected to teach without schools, or are there to be schools without teachers? Are schools to be located on reserve (as some specify) or off-reserve which others imply is possible? What happens in Treaties N°1, 2, and 4 which do not subject the benefits to what the government deems advisable? Does only Treaty N°9 get educational equipment?

4.2.3.3. "School Lands" in the Prairies.

As a footnote to this discussion, and in the interests of comparison, the 'school lands' deserve at least cursory mention. In the chapter on land & economics we looked at how townships in the prairies were subdivided and allotted to various interests as a way of covering off selected start up expenses related to the 'opening up' of the prairies. Some went to the HBC (acquisition costs); some to the CPR (infrastructure development), and some directly for homesteaders (settlement & production).

Two sections from every township were also set aside as school lands. *"These were to be sold as the progress of settlement valorized the land and the proceeds applied to the cost of providing educational facilities for the children of settlers."*[81] We have not had an opportunity to assess specifically how these sales were managed or what the proceeds were, but in all 9.3M acres of school lands were sold to settlers.[82] At the very least, the fact that they were held back and sold at auction after their *value* had had a chance to appreciate demonstrates an intention to take advantage of the 'market' in order to support the social continuity and development through education.

We do not know if there was a schoolhouse-in-every-township, but certainly homesteaders would not have been able to work their lands or build their communities if their children were centralized in distant residential schools. Also we do not know how long the proceeds of the

[81] Buckley 1974 Ibid.: p. 18.

[82] Martin, 1938 cited in Buckley, 1974 Ibid.: p. 19.

land sales were able to cover the costs of education, or what the quality and frequency of education was, for that matter.

Regardless, there are still some observations that can be made in terms of what the 'school lands' represent.

* In policy development and in the public accounts, education for the homesteaders was explicitly tied to the land, and revenues from the land.

* The policy (if it was implemented effectively) of holding school lands back and selling them later by auction to take advantage of market value reflected an intention to obtain maximum return for the beneficiaries.

* It represented a commitment to community building and development.

Investigating the specifics of the school lands - particularly in terms of its implementation and the revenues generated - remains for another time, but it would be interesting to undertake a more detailed comparison with the way in which treaty education was managed on the prairies.

4.2.4. The Residential Schools.

In the preceding pages we have provided selected examples to show how education was considered in each of the periods under discussion. Now we will turn to the general result. From the perspective of the Indian nations, *"Aboriginal leaders insisted on education to learn the skills necessary to survive in harmony with European-based economies, as well as their own".*[83] This could be described as a 'bicultural' approach to education. What the Crown's agents had in mind, however, was something altogether different.

In 1842, the first 'industrial residential' school for Indians was set up at Alnwick, in southern Ontario. Funded by missionaries, it was to become the model for what would follow.[84] The system of residential schools which was later established by Canada - with continuing support from the religious orders - not only decimated traditional knowledge and the transmission of culture, but also failed at providing Indian people with the tools necessary to prosper in coexistence with non-Indian society. Finally, it provided a most unhealthy environment for living, let alone learning.

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[83] "Education Policy Options Paper" Draft #2, April 1994: p. 13.

[84] Schmalz, Ibid.: p. 158.

4.2.4.1. Culture and Continuity.

On the one hand, the residential school system was based on the principle of assimilation, which required the erasure of traditional values, language and knowledge. There was no intention of respecting or protecting traditional institutions or systems of belief & knowledge.

Duncan Campbell Scott, Deputy Superintendent General of Indian Affairs during the early 20th century, was quite frank in his reading of the issue:

> The happiest future of the Indian race is absorption into the general population, and this is the object of the policy of our government. The great forces of... education will finally overcome the lingering traces of native custom and tradition.[85]

That the ultimate objective was termination can be seen by the fate that often befell those who were 'successfully' educated: enfranchisement. Indian people frequently had *"their status stripped from the if they in any way became successful. Achieving higher education and "professional" qualifications were prime reasons for involuntary enfranchisement".*[86]

Today, the residential schools policy has been described as one which *"attempted... to destroy cultural retention and transmission"* through *"the dismantling of a previously existing social order"*. Removal from the home environment often meant that children had little or no exposure to family role models or the responsibilities that flow from participation in a living community (also consider language, values, etc. etc.).[87] RCAP's Health & Healing policy team has observed that generally,

> ...the strength of social and community bonds is strongly related to death rates..... [and] social experiences in the early years of life have a determining

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[85] D.C. Scott, *"Indian Affairs, 1867-1912"* in Shortt and Doughty, eds., Canada and Its Provinces, Vol. 7: pp. 622-23, quoted in Schmalz, Ibid.: p. 182.

[86] "Health Policy Paper" Draft #2, RCAP Health & Healing policy team, 5 May 1994: p. 199. See also RCAP Education Policy Options Paper Draft #2, April 1994 at p. 12: *"The Lower Canada Indian Protection Act of 1850 linked education to enfranchisement."*

[87] Maskwachees Cultural College, "Submission to the Royal Commission on Aboriginal Peoples", September 1993: pp. 6-8.

effect on health and wellness in later life.[88]

Testimony at the hearings described specific examples:

> The most important thing that we lost through that whole residential school era was parenting, positive parenting. That was replaced with physical violence and a lot of all the other abuses: physical, sexual, emotional, mental, spiritual, all of that. And it went on for four generations. What I see happening within our community is the pain is still there.[89]

One point which bears mention in connection with the prairies is the contrast between this approach to education and social development - removing children from the land and their communities - and the 'school lands' approach, which was fiscally and physically tied to the land and consciously directed toward the building of non-Indian communities.

4.2.4.2. Academic Learning.

At the same time, the teaching of non-Indian knowledge was not particularly effective or successful. Research carried out for RCAP on the residential school era seems to indicate that curriculum did not provide students with the tools that they would really need to compete successfully with non-Indians upon their return to their home communities.[90]

One reason for the failure of the academic side of residential school policy was the inherent contradiction posed by the other side of the policy:

> When schools were implemented in Aboriginal communities across North America they had two competing, incompatible goals. Schooling for Aboriginal people has always suffered from the competition between these two incompatible goals. One goal is the assimilation of Aboriginal people into the general society, the destruction of Aboriginal identity, culture and language and institutions.... Competing against that destructive goal of assimilation has been another goal of self-determination or self-government; a goal of

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[88] Health & Healing, Ibid.: p. 52.

[89] Cindy Sparvier, Social Worker, Joe Duquette High School, RCAP hearings, Saskatoon, 27 October 1992.

[90] Personal communication with John Milloy, February 1994.

self-sufficiency....[91]

4.2.4.3. A Healthy Learning Environment.

One effect of the residential school system which had dramatic consequences on the students themselves and their descendants involved the health of individuals and communities (see section on health for more detail). Deaths from tuberculosis were staggering:

> [In residential schools]... tuberculosis killed 24% of all children who attended over a fifteen year period. None other than Deputy Superintendent General Duncan Campbell Scott conceded of the residential schools:
>
> *It is quite within the mark to say that fifty percent of the children who passed through these schools did not live to benefit from the education which they had received therein.*[92]

But the impact of the schools had a longer term negative effect on the survivors, their families, communities and nations:

> The aftermath of the residential school policy has been devastating. Community leaders believe some, perhaps many of the individual and family problems experienced by Aboriginal peoples today can be directly linked to this policy. Our own studies suggest that elevated levels of suicide, family violence and breakdown, substance abuse, educational failure, and many other problems cannot be completely separated from the devastating and long-term impact of this policy.[93]

4.2.4.4. Conclusions on the Residential Schools.

By these measures, the residential school system breached commitments that had been made specifically in a many Treaty Councils - first, by not respecting and protecting traditional institutions and values; second, by failing to provide effective and relevant Euro-Canadian curriculum; and third, by thrusting children into what was literally a diseased environment. It was also a violation of the principles of mutual support and benefit which are at the foundation of the treaty relationship. The result is described in a submission made to RCAP

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[91] Regina, Sask. 93/5/10; Dr. Eber Hampton: pp. 16-17; 18.

[92] Health & Healing draft #2 Ibid.: p. 207.

[93] Health & Healing, Ibid.: pp. 222-223.

by the Board of Governors of the Maskwachees Cultural College:

> The results... [for] those who attended the schools were dramatic. They became people caught between two lifestyles. They learned, but did not understand one way, and they instinctively had a yearning for, but could not know the other way. It is this ambiguity., now being passed on to a third generation, which is the root cause of the social problems being experienced today.
>
> Drug and alcohol abuse, poor parenting skills and crimes against self and society are the direct result of a population struggling with the ambiguity of being stuck between two lifestyles in which they can see no common thread. They are afflicted with an anger and despair born out of a loss which cannot be buried and cannot be resurrected.[94]

4.3. CONCLUSIONS.

Just as there exists today a dispute between the parties with respect to the meaning of the Treaties generally, *"there is a fundamental contradiction between what is sought by Aboriginal people and what is offered in educational systems".*[95]

RCAP's Education policy team has concluded fundamental structural and policy change is required to address the many problems currently present in 'Indian education':

> The continuing failure of formal education systems to show significant progress clearly indicates that Aboriginal education is faced with an impasse that cannot be resolved by more futile efforts at reforming the system.[96]

This will of necessity involve a *"fundamental re-thinking of the nature of education, the goals appropriate to an Aboriginal population and the means necessary to achieve these goals."*[97]

Since the early 1800's, Canadian governments have tried to assert the power of unilateral

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[94] Maskwachees Cultural College, op. cit., pp. 8-9.

[95] Education Policy Draft #2, Ibid.: p. 2.

[96] Education Draft #2, Ibid.: p. 27.

[97] Ibid.: p. 4.

definition over 'Indian education' - what is constitutes; what it shall be; how, when and where it shall be delivered. For *"fundamental re-thinking"* to be able to occur, other governments must, as in other areas, relinquish some of their power over definition.

> Is there a Treaty right to education? The Treaties themselves, provide an answer to this question, since they specifically mention the provision of schools. There is, therefore, no question that there is a Treaty right to education. The analysis must shift, accordingly, to the content and scope of the right.[98]

4.3.1. Treaty Interpretation.

Any analysis of the scope and content of the right to education must consider the matter of treaty interpretation.

4.3.1.1. Literalism and Denial.

Consistent with what we have observed in other chapters, Canada's approach to education in the treaty context is to take a reductionist approach which revolves around the written text. Government lawyers conclude it is not unreasonable to interpret the provision that the Crown maintain schools on reserve as an undertaking that up-to-date educational services and facilities are to be provided, but with the ultimate discretion as to the timing and nature of educational services remaining with the government. The same lawyers conclude that the use of the word "schools" contemplated "small institutions of a local nature, probably at the primary level" rather than colleges and universities.

This opinion is bolstered by pointing to the words "teachers", "instruct", and "children" as indicating primary school education only. Could not, the government lawyers say, the Treaty be interpreted according to the "plain meaning of the words"?

The government's legal opinion is that the liberal interpretation ordered by the courts should be applied only to the words "teachers" and "schools", since the treaties do not use the word "education." "Teachers" and "schools", they claim, do not have ambiguity in their meaning, and in another ruling of the Supreme Court of Canada, R. v. Horse[99] it was said where there is no ambiguity in the text of a Treaty, there is no need to look beyond those words.

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[98] Education: p. 316.

[99] [1988] 2 W.W.R. 289.

These opinions find partial expression in Canada's stated position:

> ..... the federal government has admitted to the Treaty Commissioner that there exists a Treaty right to elementary and secondary education on reserve. However, the federal government is contesting any right to post-secondary education, or to elementary and secondary education off reserve.[100]

From Canada's view, the 'best alternative to a negotiated solution' might simply be to turn the matter over to its courts, and then assert a minimalist doctrine in the proceedings: that even a fair, large and liberal interpretation could not conclude that a "school on reserve in 1889" means a "university in 1989"; or that since Treaties should be construed "in the sense that they would naturally be understood by the Indians", it could not have been the understanding of the Indians that university or other education was a prospect. All else failing, Canada could argue that government still has discretion as to how best its obligations to provide education should be fulfilled.

These rationalizations may focus on treaty text, but what they are in the final analysis is a denial of the treaty relationship itself.

4.3.1.2. Holism and Responsibility.

Although the government policy discourse which we have just described does deal with the **treaties**, we would argue that it has little to do with the treaty **relationship** - other than signalling an intention to terminate it. Preoccupation with the written text has excluded any opportunity to apply the principles of holism, reciprocity or development to the matter at hand.

The record shows that the treaty commissioners explained the treaty offer - and its educational component - in terms of these very principles. Alexander Morris wrote that *"The new generation can be trained in the habits and ways of civilized life - prepared to encounter the difficulties with which they shall be surrounded, by the influx of settlers"*. In this sense the specifics (which are only recorded in one party's written text) were far less important in negotiations than the principles which would apply in the future and the result that would be obtained.

So, if this approach to the treaty relationship and interpretation is taken, where will it lead? The application of principles and standards changes the nature of the discussion from a zero-sum game to a positive-sum one which focuses on positive cooperation and results instead of

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[100] Education: p. 314.

denial and failure.

This perspective was described in more detail to the Commission during its hearings in Regina:

> .... not all education is created equal. In this area when the treaties were signed education was one of the things that Indian people wanted in exchange for sharing the land; and that was a very clear expectation, a clear understanding of the treaties. So that... Alexander Morris, the Queen's Treaty Commissioner, reports that in the negotiation for the treaties he told the Chiefs and Elders "Your children will be taught and then they will be as well able to take care of themselves as the whites around them."
>
> **In that phase of the treaty negotiation the treaty commissioner set a very high standard for Aboriginal education. He set an outcome standard.** Many times when we think about education we think about equality of access, that Aboriginal people should have the same access to higher education and other educational institutions as non-Aboriginal people, and that is an important factor. But the Crown, in signing the treaty, set itself an even higher standard than equality of access and no one could seriously argue that even the equality of access standard...
>
> **The higher standard is the standard of equality of outcome. The Queen's representative committed the Crown to equal educational outcomes for Aboriginal children as for non-Aboriginal children.** Any educator can tell you that's a very high standard indeed and a tough one to meet and a standard that the Crown cannot meet without the partnership of Aboriginal institutions and Aboriginal people.[101] [emphasis added]

Without a doubt this road leads us to a very different destination - because it is assessed in terms of the result, and the *value* attached to each party's interests. What remains to be discussed is where the discretion and responsibility for obtaining these results should reside.

4.3.2. Changing the Accounts.

We have introduced this theme in other chapters, and it also surfaces here. For one thing, the cost of education has been divorced from any consideration of the benefits accruing to the Crown from development on shared or ceded lands, and thus become a 'burden' to be avoided or off-loaded. But in the context of education, the changing of accounting methods

[101] Regina, Sask. 93/5/10; Dr. Eber Hampton: pp. 16-17; 18.

has a cultural and community dimension as well - one which has a bearing on the result.

RCAP's Education policy team has highlighted the impact of western education on the use of, and value attached to, indigenous knowledge, culture and language. Today this surfaces on the most basic of levels - the role of elders in the education process, and in the transmission of culture and ways of knowing.

> Elders' knowledge and contributions, even today, are not validated, or supported adequately through existing funding mechanisms - continued denial of traditional knowledge and perspective, or the role of traditional knowledge in providing a cohesive collective environment...[102]

This is said to have a causal relationship to the performance of Indian students in school:

> Evidence showing the high drop-out rate of Aboriginal students, anywhere from 75% - 95% across the country, supports the conclusion tact, for most Aboriginal students, the "incomplete" education is not producing "educated" Aboriginal people. Something is missing. The answer is clear for many Aboriginal people. The students must be provided with a way to be educated in their Aboriginality. Elders are seen as the key to completing the students' education.[103]

The Education policy team appears to conclude, as we do, that an overall readjustment of the methods of accounting, and determining loss and benefit, is required:

> New arrangements under which Aboriginal peoples will once again benefit from the wealth of their homelands have yet to be worked out in most regions of Canada. Those arrangements are basic to the implementation of new models of education under Aboriginal authority, because breaking free from the constraints of external decision-making means breaking free from dependency on resources under the control of external agencies.[104]

'Breaking free' involves returning 'education' to the treaty relationship. This will require all parties to take responsibility for the process and the outcome, applying the principles of holism, reciprocity and development to the task. As well, the important role that education must play in the renewal of Indian nationhood and the decolonization process itself needs to be recognized and acted on.

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[102] Education Draft #2, Ibid.: pp. 277-278.

[103] Ibid.: p. 280.

[104] Ibid.: p. 9.

Taking the foregoing into account, there can be no doubt that significant emphasis must also be placed on the education process as it applies to and involves the non-aboriginal public - the citizens of the Crown. The clear and pressing need for sustained and effective public education efforts on the part of provincial and federal governments, as well as Indian governments, cannot be understated.

5.0. JUSTICE AND EQUITY.

5.1. CONTEXT.

5.1.1. Traditional Practise, Contemporary Definition.

> The purpose of justice in an Aboriginal society is to restore peace and equilibrium to the parties and to the community. The people understood when one member of the community was not functioning well, the whole was diminished, and the community worked together to restore its strength and its unity. The aim of the Aboriginal dispute resolution system is real resolution, restoration of cooperative coexistence. Aboriginal people expect the criminal justice system to do the same.[1]

In all societies, the administration of justice is where the collective will and accumulated precedent are brought to bear on particular circumstances and disputes. Any 'justice system' will need to provide resolutions to conflicts which often go beyond personal interest to the wider collective interest of the people or peoples involved. It will also need to bring 'just' and 'equitable' principles to bear on the issues under consideration if it is to enjoy legitimacy and effectively resolve disturbances in the social order. In short, 'the law' is to provide a shield against arbitrary and prejudicial treatment.

Over time communities and peoples develop their own methods and institutions to address the maintenance of social order, harmony and security. This involves measures for settling disputes, as well as the adoption and the application of rules and laws that set agreed upon parameters for acceptable conduct, effective remedies and appropriate sanctions.

When we use the term 'justice' in this paper it is in the broadest sense - the ways and means of maintaining peace and good order among and between peoples, as well as the definition of what is 'just' and 'equitable'. The 'justice' system ultimately defines the rules by which social and economic interaction occur, and the ways in which disputes over social and economic conflict are dealt with. In this light the administration of 'justice' defines the boundaries of acceptable behaviour and sanction, and the scope of freedoms and rights that are available to individuals and communities.

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[1] "First Nation People and the Criminal Justice System: Review and Compilation of Inquiries, Task Forces and Commissions" (Assembly of First Nations, 1992): p. 3.2-4.

In Canada, the executive and legislative arms of government develop and enact the laws which are in turn applied by governments' enforcement agencies and finally considered by the judiciary.

Indigenous peoples have developed different institutions and ways of organizing around the administration of 'justice', described in general terms in the opening quote of this chapter, and in many instances throughout this paper.

5.1.2. Reciprocity and Coexistence.

The Euro Canadian system of justice is very different than the systems that were established by indigenous peoples and in operation at the time of Treaty. These differences were the cause of conflict when the two systems came into contact, as we have shown. The Treaties were in large part intended - by both the parties - to establish an agreed upon framework which would enable the two 'justice' systems to coexist for mutual security and benefit - the establishment and maintenance of peaceful and orderly relations between the parties. This of necessity involved arrangements with respect to how, where and when their respective jurisdictions and interests would apply.

In the discussion of justice that follows, we will review the Treaties and justice from two angles: (i) the internal affairs of the parties, and (ii) relations between the parties. How were the Treaties intended to address these matters? What has been the result? The Assembly of Manitoba Chiefs has answered these questions in this way:

> ... what we propose is the restoration of two concepts: that the traditional system of aboriginal justice served the needs of its society based on the object of healing, reconciliation and reestablishment of the community in situations where the peace and harmony of the community is disrupted; and that the same object of peace and harmony was intended to serve the needs of two societies when conflict arose.... The denial or perversion of historical arrangements has brought about great injustice to one of those societies.[2]

The justice system and its operation is a critical point of conflict between Indian nations and the Crown, one which is at the very heart of the Treaty relationship, and one which must be resolved if any improvement is to be seen - not only in the overall economic and social situation of Indian nations, but in the relationship between Indian nations and the Crown.

It appears clear that through the Treaty making process Indian nations intended to reserve unto themselves jurisdiction over the administration of justice among their own people, with

[2] Assembly of Manitoba Chiefs submission to the Manitoba Justice Inquiry: p. 3.

other tribes, and to varying degrees, within their territories. In many Treaties there was also agreement on how each party's jurisdiction would apply in the resolution of disputes between themselves or their citizens.

However, despite the mutual undertakings contained in the Treaties, one party has maintained a sustained effort at illegitimizing indigenous institutions of justice, while imposing its own system. The result has been devastating and continues to exact an enormous price from individuals, families and communities, a price that is paid in pain and suffering.

We will show that in a significant number of Treaties at least, the Indian nations were led to understand that they were obtaining guarantees which would provide for stability and orderly relations between the Crown's citizens and their own - while retaining jurisdiction over their own internal affairs and relations with other Tribes. Fundamental to this arrangement was agreement on the ways in which the parties - and their citizens - would conduct themselves in relation to one another, and what rules would apply. Instead of obtaining security, the result - at least for the Indian nations - has been one of violence and a world turned upside down.

5.2. TREATY ANALYSIS.

5.2.1. Conflict, Peace and Friendship.

5.2.1.1. The Mi'kmaq.

Many, if not most of the Treaties made prior to 1763 were clearly about war & peace, and relations between the parties' governments, institutions, and individuals. 'Justice' issues were a major consideration, and here the Mi'kmaq provide an example. Sometimes allied with the French but also acting on their own prerogative, the Mi'kmaq waged successful and periodic war against the British during the period when they were trying to move their sphere of influence northward into Nova Scotia from New England. The British sued for peace, and this led to a series of Treaties, now known as the Covenant Chain.

For over forty years, unpredictability, betrayal and violence had prevailed in the relationship between the governments and the citizens of the two parties. In each of the Treaties that make up the Covenant Chain, reconciliation, security and the stabilization of institutional arrangements for coexistence was key.

The stated objective of the Boston Treaty of 1725 was to *"erase and for bear all Acts of hostility, Infuries and discords"*, and to *"henceforward hold and maintain a firm and Constant Amity and Friendship"*. It provided for the return of hostages and captives held by each party, and dealt with the resolution of disputes related to lands, trade, and harvesting.

> If any Controversy or difference at any time hereafter happen to arise between any of the English and Indians for any reall or supposed wrong or injury done on either side no private Revenge shall be taken for the same but proper application shall be made to His Majesty's Government upon the place for Remedy or induse there of in a due course of Justice. We submitting ourselves to be ruled and governed by His Majesty's Laws and desiring to have the benefit of the same.[3]

This Treaty, drafted by the British, was presented to the Atlantic Tribes afterwards for ratification. Although it is clear that both of the parties were seeking reconciliation and a way of resolving disputes, available evidence shows that the Atlantic Tribes did not consent to be brought fully under the King's laws or authority, or agree with the portions of the written text which implied this.[4] **???? cited in Bill Wicken, ???? : p. 111.[5] ??? cited in Wicken ????: p. 111f.[6]**

In fact, the written text of the 1725 Annapolis Royal Treaty makes specific reference to the role and authority of the Mi'kmaq's internal justice system, and acknowledges the collective and distinct interests of the Mi'kmaq polity:

> **That if there happens any robbery or outrage committed by any of the Indians, the tribe or tribes they belong to shall cause**

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[3] "Treaty of 1725, for Ratification at Casco Bay", 15 December 1725, Boston; cited in The Mi'kmaq Treaty Handbook (Native Communications Society of Nova Scotia, Sydney & Truro, September 1987): pp. 17-18.

[4] Loron, speaker for the Penobscot people who attended the ratification of this treaty at Casco Bay in July 1726 in that capacity stated in a letter addressed to the Lieutenant-Governor: *"Having hear'd the Acts read which you have given me I have found the Articles entirely differing from what we have said in the presence of one another, 'tis therefore to disown them that I write this letter unto you.*

" Loron was especially concerned with terminology which implied that he and his people had acknowledged King George to be their King and had *"declar'd themselves subjects to the Crown of England."* Rather, Loron wrote that: *"when you have ask'd me if I acknowledg'd Him for King I answer'd yes butt att the same time have made you take notice that I did not understand to acknowledge Him for my king butt only that I own'd that He was king in His kingdom as the King of France is king in His.*

" See further in Wicken & Reid, RCAP, p. 111.

satisfaction and restitution to be made to the parties injured.[7]

The 1752 Halifax Treaty reaffirmed earlier compacts and elaborated on how disputes between the party's respective citizens would be dealt with:

> 8. That all disputes whatsoever that may happen to arise between the Indians now at Peace and other His Majesty's Subjects in this Province shall be tryed in His Majesty's Courts of Civil Judicature, where the Indians shall have the same benefits, advantages & Priviledges as any others of his Majesty's Subjects.[8]

The Mi'kmaq, as represented by the Union of Nova Scotia Indians, presented their interpretation of this article of the 1752 Treaty during RCAP's hearings in Eskasoni:

> The final section of the Treaty, Article 8, relates to the **justice system** and the mechanism to be used in resolving disputes between Mi'kmaq and non-Mi'kmaq. We knew that something had to be in place to regulate relations between our citizens and the settlers, but we also knew that the traditional Mi'kmaq justice system had to play a continued role in our internal affairs. This called for a "two legged" justice system based on the concept of **co-habitation**. For incidents involving Mi'kmaq citizens on Mi'kmaq territory, our traditional justice system would apply. For disputes between settlers, the English justice system would be used.
>
> Finally, for matters that involved the two peoples, the English Civil justice system, with input from the Mi'kmaq, would come into play. We refused to be administered under the political authority of the local settlers or under criminal law in connection with justice matters. Instead, the Civil law of England - the fundamental principles of contract, property, and torts - was understood to be the appropriate basis on which to measure the conduct of affairs

[7] "Treaty of 1725, for Ratification at Annapolis Royal", Boston, 15 December 1725; in Mi'kmaq Treaty Handbook: p. 19.

[8] "Treaty or Articles of Peace and Friendship Renewed", Halifax, 22 November 1752, cited in The Mi'kmaq Treaty Handbook: pp. 20-21.

between the two peoples.[9]

This contemporary interpretation echoes the commitments made by Nova Scotia Governor Jonathan Belcher to the Mi'kmaq in 1761, at a ceremony renewing the 1752 Halifax Treaty. Belcher explained that the operation of British law would act to protect the rights and interests of the Mi'kmaq:

> **I meet you now as His Majesty's graciously honoured servant in government and in his royal name.... to build a covenant of peace with you, as upon the immovable rock of sincerity and truth, to free you from the chains of bondage, and to place you in the wide and fruitful field of English liberty.**
>
> **The laws will be like a great hedge about your rights and properties. If any break this hedge to hurt or injure you, the heavy weight of the laws will fall upon them and punish their disobedience.**[10] **[emphasis added]**

(a) The Result.

Was the desired result obtained? Documentary evidence suggests not. At least as early as 1849, even Crown authorities conceded that the Mi'kmaq could not expect due process or fair hearing from the local justice system in disputes between themselves and colonists.

> **At that time, the Indian commissioner reported to the Nova Scotia Legislative Assembly that the justice system and the political process in the province could not be counted on to "protect" Indian interests and rights: *"Under present circumstances, no adequate protection can be obtained for Indian property. It would be vain to seek a verdict from any jury in this island against the tresspassers on the reserve; nor perhaps would a member of the Bar be found willingly and effectually to advocate the cause of the Indians, inasmuch as he would thereby injure his own prospect, by***

[9] "Treaty Federalism and the Covenant Chain", Union of Nova Scotia Indians' submission to RCAP, Eskasoni, 5/6/92: p. 7.

[10] Belcher's Address, Halifax, 1761, cited in Grand Chief Donald Marshall, Sr., Grand Captain Alexander Denny, and Putus Simon Marshall, "The Covenant Chain", in Boyce Richardson, ed., Drum Beat (Summerhill Press, Toronto, 1989): p. 73.

damaging his popularity."[11]

Certainly this does not indicate that Mi'kmaq at that point in time enjoyed the *"same benefits, advantages & Priviledges as any others of his Majesty's Subjects"* that the most literal and narrow reading of the 1752 Treaty text guaranteed. Things did not get better - instead, the system appears to have devoted significant effort to legitimizing and regularizing the breaches which had gained a foothold.

(b) Donald Marshall Jr.

Clear evidence of the continuation of this imbalance and its effect on the life of individuals at the community level can be seen in the case of Donald Marshall Jr. Charged for the death of another youth in 1971 and later convicted of manslaughter, he was sentenced to life imprisonment. It was only eleven years later that the real facts and circumstances of his case were allowed to be considered, leading to his release.[12]

But political and institutional resistance continued for another seven years. The Royal Commission on the Donald Marshall Jr. Prosecution - which was only established by a reluctant government after a public outcry at its avoidance of the issues - did not report until 1989.

When it did report, even systemic self interest could not prevent the disclosure of disturbing facts. The Commission concluded that every level of the justice system played a role in the wrongful conviction of Donald Marshall Jr. - including not only the police (who played *"a central role throughout"*), Crown Attorneys and the judiciary, but even his initial defense lawyers. Moreover, the Commission found that one of the major reasons why the system acted as it did was that Donald Marshall Jr. was Mi'kmaq. It acknowledged that racism - systemic and otherwise - was an overriding factor in the politics of Nova Scotia justice, and that it was a key factor, not only in Junior's treatment, but in the historic and current treatment of Mi'kmaq people generally.[13]

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[11] Grand Chief Donald Marshall, Sr., Grand Captain Alexander Denny, and Putus Simon Marshall, Ibid.: p. 98.

[12] See "The Covenant Chain", Ibid.: pp. 95-100.

[13] Royal Commission on the Donald Marshall Jr., Prosecution, Findings and Recommendations (Halifax: The Commission, 1989) cited in "First Nations People and the Criminal Justice System: Review and Compilation of Inquiries, Task Forces and Commissions

(c) Harvesting.

The experience of the Mi'kmaq also illustrates how the judicial and enforcement agencies of other governments assisted in the breach of Treaty guarantees to freely take fish & wildlife, and the subsequent criminalization of harvesting.

Article #4 of the 1752 Halifax Treaty addresses Mi'kmaq rights to fish and wildlife in the context of trade, commerce and livelihood:

> **4. It is agreed that the said Tribe of Indians shall not be hindered from, but have free liberty of hunting and fishing as usual and ..... the Indians shall have free liberty to bring for Sale to Halifax or any other Settlement within this Province, Skins, feathers, Fowl, fish or any other thing they shall have to sell, where they shall have liberty to dispose thereof to the best advantage.[14]**

This issue has been addressed in a preceding section of this report, but the point to be made here is to look at the role of the 'justice' system in the application and consideration of these Treaty rights. The Article in its written form does not appear to be ambiguous or unduly qualified. It builds upon the Treaties and Crown commitments that had preceded it.[15]

However the history since then, at least for the Mi'kmaq, has been exclusion and prosecution. The seminal SCC decision in Simon was the culmination of generations of conflict over the harvesting of fish & wildlife resources, much of it played out within the justice system.[16] Among other things, the Court found that

> **The Treaty was entered into for the benefit of both the British**

(Assembly of First Nations, 1992): #2.6.

[14] "Treaty or Articles of Peace & Friendship Renewed", Halifax, 22 November 1752, cited in Mi'kmaq Treaty Handbook: pp. 20-21.

[15] The 1752 treaty was only one link in the Convenant Chain of treaties between the Mi'kmaq and the Crown. Lieutenant Governor Belcher's Proclamation of 1725 stated that *"the Indians shall not be molested in their persons, Hunting, Fishing and planting grounds nor in any other their lawfull Occasions by His Majesty's subjects or their Dependents".* Mi'kmaq Treaty Handbook: pp. 19-20.

[16] Simon v The Queen [1985] 2 S.C.R.

> **Crown and the Micmac people, to maintain peace and order as well as to recognize and confirm the existing hunting and fishing rights of the Micmac... the Treaty of 1752 was validly created by competent parties.[17]**

From this it was clear that the rights of the Mi'kmaq to harvest with *"free liberty"* had been breached. But the court's decision, positive as it was, failed just the same inasmuch as it did not bring about substantive change in the operation of the system. It took additional prosecutions and Crown losses in the courts to bring them to the point of seriously reassessing their policies or reaching even a minimal accommodation with respect to the harvesting of wildlife.[18]

Despite all of this, both the federal and provincial Crowns have remained for the most part unwilling to discuss substantive ways and means of implementing the provisions of the Treaties and reaching an overall resolution of the issue through negotiations. Instead, today the Crown continues to prosecute cases in Nova Scotia which fall within the harvesting provisions the Treaties.

One reason for this is that there is still a general reluctance on the part of other governments to accept or accommodate Mi'kmaq law and principles of fish and wildlife management and their application to Mi'kmaq citizens, or to embrace them in light of the principles of the treaty relationship.

In what could be regarded as a perverse turn of events, the leading case of this kind currently before the courts in Nova Scotia involves charges of trafficking in eel which were laid against none other than Donald Marshall Jr. in the fall of 1993. Indications are that the Crown intends to use this prosecution as a test case to resume its attack on the validity of the 1752 Halifax Treaty. Although through article 8 of the 1752 Treaty it appears that the Mi'kmaq agreed that disputes between the parties would be referred to the civil judicature, certainly they never contemplated that the courts would be used in an adversarial manner to challenge other rights guaranteed in the same Treaty.

(d) Conclusions.

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[17] Ibid.: p. 401.

[18] For a more detailed discussion of these events, see "Renouncing the Old Rules of the Game: Crown Conduct within the Context of Litigation Involving Aboriginal Peoples", prepared by Hutchins, Soroka & Dionne for RCAP, 15 November 1993: pp. 52-64.

Judging from these facts, Articles 4 and 8 of the 1752 Halifax Treaty have been breached over a long period of time in a most fundamental way. Traditional systems were submerged under the weight of other governments' laws and self interest. The result has been prejudicial to the rights and interests of the Mi'kmaq. The justice system has not been able to resolve these matters or mediate them effectively, as provided for in the Treaties. Other governments have not responded adequately to the direction provided by their own courts, or even the letter of the Treaty, in responding to the situation as it has developed. In fact, they are continuing with prosecutions, advancing the position that the Treaties themselves are of no force and effect.

5.2.1.2. Haudenosaunee.

Many of the Treaties between the Iroquois Confederacy and other nations made during this period also deal specifically with justice matters. A Treaty made between the Haudenosaunee and the British at Fort Albany New York on September 24th 1664 - the earliest on record between these two parties - is an example. The text reads in part:

> **That if any English, Dutch or Indian (under the protection of the English) do any wrong, injury or violence to any of ye said Princes, or their Subjects, in any sort whatsoever, if they complained to the Governor at New York or the Officer in Chief at Albany, if the person so offending can be discovered, then that person shall suffer punishment and all due satisfaction shall be given, and the like shall be done for all other English Plantations.**
>
> **That if any Indians belonging to any of the Sachims aforesaid, do any wrong, injury or damage to the English, Dutch, or Indians under the protection of the English, if complaint be made to ye Sachims, and the person be discovered who did the injury, then the person so offending shall be punished and all just satisfaction shall be given to any of his Majesties subjects in any Colony or other English plantation in America.[19]**

Paul Williams provides commentary on the text:

> **The treaty provided for separate personal criminal jurisdiction: each**

[19] NYCD, London Docs. I, pp. 67-68: Treaty of September 24, 1665, quoted in Williams, 1993: p. 126.

> party was responsible for the conduct of its own subjects. Conflicts and "satisfaction" were to be resolved at a government-to-government level, with complaints being made to the "sachims" on one side and the Governor of New York of the Officer in charge at Albany on the other....
>
> The essential elements of the Two Row Wampum - the separation of laws and government - are reflected in the written version of the September, 1664 Treaty. The idea that conflicts must be dealt with at a governmental level, without claims of jurisdiction by either party over subjects of the other, is a precursor of the Covenant Chain.[20]

A number of later Treaties with the Confederacy reiterated the parties' commitment to these procedures. However, with time, things changed. One hundred years later, in April 1764, a treaty made with the Seneca provided that robbery and murder would be dealt with according to British law:

> That should any Indian commit Murder, or rob any of His Maj'ty's subjects, he shall be immediately delivered up to be tried, and punished according to the equitable laws of England, and should any White man be guilty of the like crime towards the Indians, he shall be immediately tried and punished if guilty.[21]

Paul Williams explains what happened incrementally over the next 200 years:

> Both Canada and the United States extended their jurisdictions, in violation of their earlier treaty promises. Criminal jurisdiction came first, moving swiftly from a claim of jurisdiction over murder to more general jurisdiction outside "Indian territory" and finally to all matters inside and outside the territory.[22]

5.2.2. Accommodation and Dislocation.

We have already discussed the background which led to the Royal Proclamation

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[20] Williams, 1993 Ibid.: pp. 91-92.

[21] Documents Related to the Colonial History of New York: Seneca Treaty of April 1764; quoted in Williams, 1993, Ibid.: p. 194.

[22] Williams, 1993, Ibid.: p. 113; see also pp. 187, 194.

of 1763. For the purposes of this section, however, it is important to note that it was in many ways a specific response to the Pontiac uprising. Angered by continued encroachments on Indian lands after the fall of Montreal in 1760, and the failure of the British to remove their forts from Indian territories, the Odawa Chief forged an inter-Tribal alliance whose objective was to protect Indian lands around the Upper Great Lakes and the Ohio Valley. In the spring of 1763 they laid seige to Detroit and over the course of the next few months destroyed many British Forts from Lake Erie to Wisconsin. Thousands of settlers and English soldiers were killed. The garrison at Fort Pitt (Pittsburgh) resorted to sending blankets and clothes infected with smallpox to the Indians in an attempt to break the seige at that location.[23]

But by October Detroit had not yet fallen, and the French (who, from the Louisiana territory, had initially encouraged Pontiac) now counselled him to take the course of peace. He ended the seige on October 21st.[24] He could not know that two weeks earlier - on October 7th - King George had formally announced the terms of the Royal Proclamation of 1763 in England (Thomas Gage, Commander of British Forces in North America, received copies of the Proclamation on November 30th).[25]

This is the immediate situation that the Proclamation was intended to address: the prevention of violence and discord, and the maintenance of peaceful coexistence, were overriding factors in the Crown's adoption of a *"just and equitable"* policy with respect to the Indian nations.

One often-ignored section of the *Proclamation* dealt with the apprehension of criminals who sought refuge in First Nation Territory. The implication was clear: the First Nations were recognized as operating under their own laws and not British law. Settlers who wilfully or inadvertently had seated themselves on First Nation lands were to remove themselves forthwith.

But although the policy may have existed on paper, things were different on the ground. By the early 1800's, violence, discord and inequity were again the hallmark of Crown-Indian relations throughout the colonies generally.

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[23] See Williams, 1993 Ibid.: pp. 175-177.

[24] Carl Waldman, Atlas of the North American Indian (Facts on File Publications, New York, 1985): pp. 106-108.

[25] Sir William Johnson Papers Vol. 10, pp. 974-976: Gage to William Johnson, 1 December 1763; cited in Paul Williams 1993 Ibid.: p. 182.

5.2.2.1. Upper Canada.

The Aborigines Protection Society of England filed a report with Imperial authorities in 1839 condemning the violation of aboriginal rights that had been taking place through *"fraudulent treaty"* and dispossession.

> **Unquestionably the .... frauds and abuses mentioned in the Proclamation of 1763, have been repeated down to a very late period by the Government itself, instead of being repressed...**

Part of the reason cited for the precarious state of the Indian nations generally was *"By the neglect of obvious means of securing justice to Indians in courts of law, in their participation of civil rights, and in just regulations of trading with them."*

Theft of resources, combined with the denial of due process and equitable treatment within the justice system was described further:

> **In every transaction, pacific or warlike, the poor Indian has ever been the sufferer and his remonstrance is as vain as his resistance is hopeless.... and we gain the advantage while he has no redress for direct outrage or fraudulent dealing. His evidence is not received in our courts, and justice is thus denied for wrongs inflicted with impunity.**

As a part of their proposed solutions to the problems which they highlighted, the Aborigines Protection Society recommended that the Indian nations' *"laws and usages should be carefully collected; and observed in our courts."*[26] The setup of a legislative committee to investigate Indian Affairs in 1844-45 was largely a response to the accusations made by the APS. However, as the Committee was formed by the government of the Province, its report was quite

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[26] Report on the Indians of Upper Canada - Sub-Committee appointed to make a comprehensive inquiry into the state of the Aborigines of British North America (Aborigines Protection Society, London, Haddon, 1839): pp. 4-5; 23; 51. Cited in Ian V.B. Johnson, British-Tribal Political Relations in the Colonial Period - the Early Mississauga Treaty Process (unpublished manuscript, Union of Ontario Indians, 1986) [unpaginated - final chapter]

literally a whitewash, founded on denial and avoidance.[27] This is not surprising, since by then the Province had already obtained control over lands, resources and the machinery of local government. The Imperial Crown still set Indian policy, but now the Province controlled implementation.

5.2.2.2. Discretion and Abuse.

Tony Hall has noted that *"... in England and in the colonies she beget, the primary purpose of civil society was to provide the laws and institutions for the protection of private property."*[28] If this was the case, it does not appear that these laws were applied to the property and assets of Indian nations.

In the final two decades before Confederation Britain accelerated the devolution of fiscal and administrative responsibilities to the Province of Canada. We have already described the perennial worry of Imperial officials that, left to its own devices, the local government would act with prejudice to the rights of Indian nations. But this principle seems to have been set aside by an Imperial government whose new priorities were off-loading and devolution. Ample justification for this worry was provided by events in Ontario during this period. As of 1860 and up until 1866, the Crown Lands Department (responsible for acquiring and distributing lands & resources) was merged with the Indian Department. Indian land sales were no longer just a means of acquiring land for settlement, they were a way of financing the province's settlement and development.

The result was devastating in economic and social terms, but it also represents a complete abandonment by Crown agents of the application and the 'rule' of law. The law, and the justice system were used in a capricious manner and applied - or not applied - as self interest dictated.

In another chapter we have reviewed the appropriation of Chippewa lands that took place on the Bruce Peninsula, and government's decision to concede to the wishes of settlers rather than apply the law to the protection of reserve lands. At the time Lord Elgin justified the Crown's abandonment of its duties by describing the mass of squatters who occupied the reserve as an

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[27] "Commission of the Canadian Assembly to Investigate Indian Affairs, 1844-45: cited in Johnson, Ibid.

[28] Tony Hall, Ibid.: p. 22.

"*uncontrollable force of .... natural law*".[29] There was no attempt to seek remedy by applying the Crown's 'rule of law'. Having set aside that route, Crown agents reasoned that the only way to protect *some* Chippewa reserve lands, would be to seek - through whatever means - a surrender of *most* of the reserve.[30] It was predicted that the squatters would be appeased, but as we described earlier, they were not.

The management of land sales themselves throughout the Province during this period was rife with irregularities and embezzlement, as already discussed. However, we also noted that the application of law - investigation, prosecution, restitution - was the exception rather than the rule. Individuals such as S.P. Jarvis were quietly dismissed and allowed to enjoy the proceeds of their illegal efforts and maintain their position within the elite, while the Indian nations were left without remedy.

In his case study of the 1850 Robinson Huron & Superior Treaties, James Morrison provides other examples of the selective and self interested application of the law on the part of the Province of Canada. By allowing mineral development to take place on unceded lands, the Province was not conforming to the law governing the occupation and assignment of Indian lands. The Anishinabek knew this, and so did the Crown's agents. Avoidance by the Crown led to confrontation and conflict, which led to Treaty. The Robinson Treaties in this sense were intended - by both parties we would argue - to bring their relationship into law, and provide a framework to which each party could rely on for continued security and protection.

But as we discussed earlier, instead there was an arbitrary and unilateral application of 'law' to the harvesting and other rights of the Anishinabek - rights which had been confirmed by the Treaties. The result was and continues to be prejudicial.

The justice system generally and the Treaty relationship in particular are intended to be a protection against arbitrary or prejudicial action. In the cases we have reviewed, it seems that the application of the law and the Treaty process were used instead to justify that same behaviour.

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[29] A. Doughty ed., The Elgin Grey Papers 2: Elgin to Grey, 21 November 1849; quoted in Schmalz, Ibid.: p. 141.

[30] PAO, "Copies or Extracts of Recent Correspondence Respecting Alterations in the Organization of the Indian Department in Canada, Colonial Office, May 1856: p. 3, 4; cited in Schmalz, Ibid: p. 141.

5.2.3. Displacement and Assimilation.

The settlement of the west, the numbered Treaties and the Riel rebellions of 1870 and 1885 are inextricably tied together. Against a backdrop of communal violence, insecurity, and social & economic change, the numbered Treaties were seen by both parties as providing a basis for peaceful relations so that each could live in security and stability. In these respects their genesis was similar to many of the Treaties which were concluded earlier - as a response to violence and conflict, and a means of obtaining the peace & security required for coexistence, prosperity & development.

Treaties #2, 3, 4, 5 and 6 all contain the same clause relating to 'peace, order and good government':

> And the undersigned Chiefs on their own behalf and on behalf of all other Indians inhabiting the tract within ceded, do hereby solemnly promise and engage to strictly observe this treaty, and also to conduct and behave themselves as good and loyal subjects of Her Majesty the Queen.
>
> They promise and engage that they will in all respects obey and abide by the law, **and they will maintain peace and good order between each other, and also between themselves and other tribes of Indians, and between themselves and others of Her Majesty's subjects**, whether Indians or whites, now inhabiting or hereafter to inhabit any part of the said ceded tracts, or the property of Her Majesty the Queen, or interfere with or trouble any person passing or travelling through the said tracts, or any part thereof, and that they will aid and assist the officers of her Majesty in bringing to justice and punishment any Indian offending against the stipulations of this treaty, or infringing the laws in force in the country so ceded.[31] [emphasis added]

The significance of this provision was detailed by the Assembly of Manitoba Chiefs in their submission to the Manitoba Justice Inquiry in 1988.

> Under the treaty provision referred to above, the First Nations in Manitoba assert that their jurisdiction to "maintain peace and good order", exclusive of all other competing jurisdictions, has been

[31] Treaty #6, 1876.

recognized and guaranteed under treaty. In interpreting the meaning of "peace and good order", the First Nations rely on the basic understanding of the Indian people that the Treaty did not diminish but confirmed their right to govern themselves as separate and distinct peoples. In that context, this provision when given practical meaning and application entails full jurisdiction to establish and maintain peace and good order:

a) Between the Indians of the Tribe;
b) Between Indian Tribes of the same Indian Nation;
c) Between Indian Tribes of different Indian Nations;
d) Between Indian Tribes and Her Majesty subjects, whites or Indians that reside on ceded land.

The provision recognizes the jurisdiction of the Indian tribe to bring to justice and punishment "any Indian offending against the stipulations of this treaty, or infringing the laws in force in the country so ceded." In asserting such jurisdictions the Indian Tribe who signed the Treaties containing this provision are to further "aid and assist" the officers of Her Majesty in "bringing to justice and punishment" such Indian offenders. Such "aid and assistance" provided by the Indian Tribes goes beyond the "policing" of their people but involves a role for the Indian tribe in the administration of justice and punishment even on lands that have been ceded under Treaty.

This part of the treaty provision is interpreted by the First Nations as recognition that their Tribal sovereignty extends to exercising jurisdiction over Indian persons who violate the Treaty or the laws that apply on ceded lands.

Under this provision of the Treaties in respect to the breaches of laws that are in force in the lands ceded, the Indian Tribes retained authority to enforce such laws and to bring to justice and punishment such Indians who offended Treaty or non-Indian laws outside of reserved Indian lands.

In these provisions the Chiefs on their own behalf and on behalf of all the Indians inhabiting ceded land promise and engage to "obey and abide by the law". This provision does not indicate if the laws referred to are the laws of the Indian tribe or the laws of Her Majesty the Queen. The only specific reference for the application of the law of the Dominion of Canada is with respect to the

prohibition of alcohol on reserved lands or lands unceded.

Did the Indian Tribes agree under Treaty to obey and abide by the law on both ceded and unceded lands? The Indian interpretation and understanding of the Treaties is that their governmental powers were not adversely affected by the Treaties.

The elders as the teachers on treaty promises and understandings have continuously and consistently maintained that in the lands reserved by Indians or unceded lands, the Indian people would continue to live as they had done in the past free of external interference. In other words, their freedom and political rights as distinct people remained unfettered. The Indians retained their freedom as before the treaty to determine their own future and destiny. If this understanding of the treaty were to be recognized, this would mean that federal and provincial laws would not apply to Indians living on reserved lands, unless, of course the Indian Tribes were to decide such laws were to apply to them. This power to incorporate the laws of other jurisdictions is not a new phenomenon and flows from the inherent powers of all people to make decisions deemed by them to be in this best interest.[32]

5.2.3.1. Treaty Three and Enforcement.

Implementation and enforcement of Treaty #3 was characterized as one aspect of the interaction between the two party's laws during the negotiations of that Treaty. Tony Hall refers to comments made by one of the Ojibway negotiators as recorded by Alexander Morris:

> ***"All the promises that you have made me, the little promises and the money you have promised, when it comes to me year after year -- should I see, that, there is anything wanting, through the negligence of the people that have to see after these things, I trust it will be in my power to put them in prison."***
>
> **It is interesting to contemplate if this leader had an Aboriginal jail or a Canadian jail in mind as the destination for those charged and**

[32] Assembly of Manitoba Chiefs submission to the Manitoba Justice Inquiry [draft - n.d.; c. 1988]: pp. 42-43.

convicted with violating the treaty.[33]

5.2.3.2. Treaty Six: Justice, Harvesting and Health.

An example from Treaty #6 territory in Saskatchewan follows to demonstrate the interrelationship between the administration of justice, harvesting, community health & well being, and the Treaty provisions. In this sense it is a clear example of the different result that holistic principles would bring the these matters. It also shows specifically how the conduct of the Crown's enforcement agencies and the operation of the justice system - conscious or not - replaces the treaty relationship with violence.

In the chapter on health & healing, we discussed the background to Treaty #6, and the emphasis that was placed not only on the right to continue harvesting, but also the prohibition of alcohol. Treaty #6 also contains the "peace and order" clause cited above. The case of R. v. Wolfe[34], recently before the courts in Saskatchewan, ties all of these issues together.

Saskatchewan's Department of Parks and Renewable Resources had sent an undercover agent to the Onion Lake Reserve to investigate suspicions of trafficking in wild meat.

> At the initial meeting with one of the defendants, on each trip to the reserve, as well as on the hunting expedition, the undercover investigator took considerable amounts of beer and alcohol along with him or purchased drinks for the defendant. On two occasions he provided the defendants with money with which they purchased Listerine to drink. The officer had discussed taking beer with him to the reserve with his supervisor and had received approval for this action... The facts in evidence demonstrate that it was obvious that the defendants had alcohol related problems.[35]

We have already discussed the provision in Treaty #6 which prohibited alcohol, and the reasons why this clause was included in the agreement.

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[33] Morris, p. 72, quoted in Tony Hall, Part 2, Ibid.: p. 14.

[34] R. v. Wolfe, [1993] 2 C.N.L.R. 180 (Sask. Prov. Court), cited in "Renouncing the Old Rules....": pp. 43-46.

[35] "Renouncing...": pp. 43-44.

> **Treaty 6 clearly establishes an obligation on the part of the Crown and its agents to prevent intoxicating liquors from entering the reserve as well as an obligation to enforce existing laws which prohibit the entry of alcohol.[36]**

In addition, the Chief and Council of the Onion Lake Band had passed a bylaw in 1988 making it a dry reserve (copy of which had been provided to the RCMP for enforcement purposes). Regardless, the Crown's agents willfully took advantage of the ill health of some community members (ie., alcohol abuse) in order to obtain the evidence that they needed to secure a conviction.

Keeping in mind that this investigation and the subsequent prosecution took place well after the SCC had provided guidance on these matters (through such decisions as Sparrow, Simon, etc.), the conduct of the Crown's agents in this instance has been described as *"unconscionable"*. At the same time, the multiplicity of issues raised suggest strongly that the judicial process, concerned as it is with the application of only one party's laws, and within narrow confines, cannot hope to seriously address the substantive causal issues. In this light, the real victims in this instance were the defendants, and the Indian parties to Treaty #6.

This does not appear to be anything close to obtaining basic justice, let alone treaty implementation. On the other hand, the circumstances and the result take on a very different light if the principles of holism, reciprocity and development are applied.

5.3. CONCLUSIONS.

5.3.1. Criminality.

What has been the result? This is one area where the facts are difficult to dismiss. These were summarized by the federal Department of Justice in September of 1991:

> **Report after report has documented that aboriginal people have high contact rates with police and disproportionately high rates of arrest, conviction and imprisonment. Although less than 3% of Canada's population, in 1991, aboriginal people comprise 11% of the population of federal institutions and nearly 15% of the**

[36] Ibid., p. 46.

provincial prison population. Aboriginal offenders are also less likely to be paroled early in their sentences. Incarceration rates are even higher for aboriginal women. Aboriginal youth are also disproportionately represented in juvenile detention facilities.

General aboriginal over-representation is particularly acute in some jurisdictions and regions. For example, among western provinces, aboriginal admission rates ranged from a low of 19% in British Columbia to a high of 66% in Saskatchewan, where aboriginal people comprise approximately 10% of the population. There is every indication that the problem is worsening, given that the federal aboriginal inmate population is increasing at more than twice the national rate. Saskatchewan government data show in addition that while the sentences given aboriginal offenders have become shorter on average, they have become more frequent and increasingly involve offenses against the justice system itself in the form of failure to appear for court and defaulting in paying fines.

While there may be persistent debates among social scientists about the precise link between social and economic conditions and crime, few would dispute that the poor economic and social conditions suffered by many aboriginal peoples go a long way to explaining the high rates of crime, and specific problems of substance abuse and family violence.....

Any approach to aboriginal justice will therefore have to cut across the jurisdictional barriers that divide government departments and levels of government and will have to address the complex interplay between crime prevention and social, cultural and economic development.[37]

Who is being incarcerated and for what? A 1988 study by Brad Morse and Linda Lock found that over 60% of aboriginal 'offenders' were between the ages

[37] Department of Justice Canada, Aboriginal people and Justice Administration - A Discussion Paper, September 1991: pp. 7-8. It is significant that the Department of Justice discourse makes no mention of the treaty relationship or the treaties in connection with the determination and administration of *justice*. This is indicative of the avoidance and denial which we have documented in other chapters.

of 16 and 30.[38] The same report found that 39% were incarcerated for committing major violent crimes, and 25% were incarcerated for major property crimes, for a total of 64%.[39]

Although 'report after report' has documented the stark reality presented by these facts, very little has actually been done to address the fundamental causes of the situation - the dislocation and disruption brought about by Treaty breaches and interference in the internal affairs of the nations.

In the chapter on health we have already discussed the relationship between colonialism and illness. At this point it is worth bearing in mind that there is also a connection between colonialism and antisocial and/or violent behaviour. Frantz Fanon discussed this in the context of the Algerian revolution and then drew a wider application:

> **The Algerian's criminality, his impulsivity, and the violence of his murders are therefore not the consequence of the organization of his nervous system or of characterial originality, but the direct product of the colonial situation....**
>
> **For a colonized man, in the context of oppression.... living does not mean embodying moral values or taking his place in the coherent and fruitful development of the world. To live means to keep on existing. Every day is a victory.....**
>
> **It would therefore seem that the colonial context is sufficiently original to give grounds for a reinterpretation of the causes of criminality.[40]**

5.3.2. Cultural, Economic and Political Crimes.

Aside from dealing with the behaviour of individuals in the strict 'criminal law'

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[38] Brad Morse & Linda Lock, Native Offenders' Perception of the Criminal Justice System (Ottawa: Department of Justice, 1988): p. 16; cited in "First Nations People and the Criminal Justice System: Review and Compilation of Inquiries, Task Forces and Commissions (Assembly of First Nations, Ottawa, 1992): p. 2.5-2.

[39] Morse & Lock: p. 18, cited in Ibid., p. 2.5-3.

[40] Frantz Fanon, The Wretched of the Earth (Grove Press, Inc., New York, 1968): pp. 309; 308; 306.

context, there have been a number of efforts to 'criminalize' the exercise of basic Treaty and Aboriginal rights, and illegitimize traditional institutions through the use of legislation, enforcement agencies and the judiciary.

In 1906, the Indian Act was amended to prohibit a number of traditional religious practises. Section 149 stated that:

> Every Indian or other person who engages in, or assists in celebrating or encourages either directly or indirectly another to celebrate any Indian festival, dance or other ceremony of which the giving away or paying or giving back of money, goods or articles of any sort forms a part, or is a feature... or who engages in any celebration or dance of which the wounding of mutilation of the dead or living body of any human being or animal forms a part or is a feature, is guilty of an indictable offence and is liable to imprisonment for a term not exceeding six months and not less than two months...[41]

From 1926 until 1951, provisions in the Indian Act made it an offense to collect or receive monies for the advancement of "Indian claims" without the permission of the Superintendent General of Indian Affairs. In effect this outlawed efforts by Indian leadership and communities to fulfil their political responsibilities in protecting lands, resources, and the treaties.

In another chapter we have shown how federal and provincial laws have been used to prohibit and restrict the harvesting of fish and wildlife pursuant to Treaty - a practise that continues today, notwithstanding clear direction provided by Canada's own courts. There is also the matter of trade, commerce, and the power of taxation.

At the same time, laws of property have ignored the rights and interests of the Indian nations to lands and resources within their territories, and allowed other interests to appropriate these. The effect has often been prejudicial to the Indian nations.

Taking all of this into account, it does not appear that the desired result of peaceful and secure coexistence was obtained by the Treaties, even though in many cases that was their main purpose. Instead one party has allowed it's legislative, enforcement and judicial apparatus to create and maintain an atmosphere of violence and insecurity within aboriginal communities. In this

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[41] Quoted in Williams, Ibid. [n.p.]

sense, 'settler law' has become a launchpad for attacking the rights and the laws of Indian nations, instead of being a protective 'hedge' around them.

The illegitimization of traditional institutions of governance, authority and dispute resolution by Crown agents led to the breakdown of community based mechanisms for social control, harmony and order. Without these, many First Nations have been rendered unable to fulfil their responsibilities under the Treaties to maintain peace and order within and between the Tribes, or with the Crown's citizens.

In 1992 the Assembly of First Nations made the following observations:

> As the Manitoba Inquiry pointed out, Aboriginal people are the poorest of the poor and that fact contributes to the over-representation of Aboriginal peoples in the courts. It is not enough however, to only acknowledge the role that poverty and its social condition plays in this over-representation. **It becomes fundamental to ask where that poverty and condition came. The denial of Aboriginal collective rights and the reality of self determination have seriously contributed to the problems.**[42] [emphasis added]

However, the AFN also noted that despite the large number of reports commissioned on these matters, and the numerous recommendations, most of them *"have not adequately dealt with why there is such conflict but only as to how better process and administer programs"*. Solutions are more likely to be found by acknowledging that *"Aboriginal governments will need to establish systems to deal appropriately with those people causing problems in their community and provide a means for other community members...[to]... resolve their disputes."*[43]

The evidence demonstrates that in most cases at least part of the problem lies in the fact that enforcement agencies and the judiciary are not dealing with these issues in the context of the Treaty relationship, and without due regard to the provisions of the Treaties, their constitutional status, or the trust obligations and fiduciary duties of the Crown. In fact, the executive and legislative arms of Canadian governments have encouraged this by their avoidance and denial that these aspects of the relationship are even relevant.

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[42] AFN 1992, Ibid.: p. 3.2-1.

[43] Ibid., p. 3.2-1.

5.3.4. Next Steps.

To us this seems very different than the policy of *"justice and equity"* which was advanced in the Royal Proclamation.

* The Treaties were to provide for peaceful coexistence and equitable relations between the parties. The justice systems and laws of each party were to play a role in the ongoing relationship between the them.

* Instead, the judicial and legislative apparatus of one party has been used to displace the other party's, and to impose a regime that has fomented and maintained an atmosphere of violence and insecurity within the Indian nations.

* Jurisdiction over community order and well being reside within the community or the nation and subject to their laws, sanctions and remedies. The evidence that the Canadian justice system has not yet been adequate to assure fundamental justice for Indian nations is unequivocal.

* The record indicates that disputes which take place between the Treaty parties with respect to jurisdictional overlap or Treaty provisions have not been properly or effectively addressed through the Canadian judicial system.

* In sum, fundamental justice has been denied and continues to be denied - Canada's justice system.

What must be done to once again obtain basic justice for Indian nations in the context of the 'justice' system? A return to the principles of the treaty relationship would be a starting point. Assessing the operation of the justice system in light of the principles of reciprocity and equity would call into question its role as a legitimizing factor in the colonial domination of the past, and instead point to the role which it could play in the process of decolonization and healing.

Applying the principles of mutual recognition of authority, mutual responsibility and non-interference would also provide an opportunity to look positively on the fact that the laws and institutions of Indian nations have an important role to play in this process:

> In establishing a system of justice for Aboriginal people, the laws

> **enacted by Aboriginal people themselves, or deliberately accepted by them for their purposes, must form the foundation for the system's existence. This calls for systemic change.[44]**

As we have asserted throughout this paper, an appropriate vehicle for the systemic change that is required is the treaty relationship itself, and the guiding principles which it embodies.

[44] AFN 1992, Ibid.: p. 3.2-4.

6.0. TREATY RIGHTS AND "OFF RESERVE" TREATY INDIANS.

6.1. CONTEXT.

Although the 'off reserve' issue has come to the fore recently due to a combination of sheer numbers and in some cases unilateral federal off loading, it has been around for a very long time. In broad terms, it relates to rights of mobility, territory and the application of rights.

6.1.1. Traditional Practise, Contemporary Definition.

Among most indigenous nations, one's 'rights' flowed from one's relationship to the family, clan, community, nation, and ultimately, the land. The exercise of these rights was determined by a whole constellation of reciprocal obligations and institutions which defined how and where 'rights' could be exercised. For instance, in some communities, trapping grounds were regarded as 'family' property, but anyone from the community could hunt for food in that territory without sanction. On a wider level, certain specific locations - for instance fishing camps - were used collectively by a number of communities. At the level of the nation, mobility rights were subject to agreement with other nations in adjacent territories - rights of free passage, harvesting and trade were matters for negotiation and agreement, often through treaty.

The advent of the 'land cession' treaties and the reserve system was to have a substantial impact on these arrangements, and this is where the on/off reserve issue has its origins.

Our analysis looks at the on/off issue with three factors in mind. The first has to do with access to lands & resources 'off reserve', and restrictions on the freedom of mobility. The second relates to design and operation of the reserve system. And the third has to do with the result - migration off reserve to urban centres. These three factors are closely interwoven and are best considered together to provide a fuller understanding of causes and potential solutions.

Within each of these a number of dynamics are present - the appropriation of 'off reserve' lands & resources which led to economic dislocation; the destabilization of traditional social and governance institutions; and the policy of extinguishment. The result in turn has been exacerbated by structural changes in the overall economy and population growth.

6.1.2. Current Conditions.

There has been a growing trend toward off-reserve migration over the past thirty years. In 1967, about 21% of 'registered Indians' lived in urban or rural centres; by 1987 the proportion had increased to 35%; today, the number is said to be in the neighbourhood of 41%.[45] These are estimates only, it being generally acknowledged that accurate data on the numbers and conditions of Indian people in urban centres are in most cases unavailable.[46] Other sources put the number of off-reserve status Indians at over 50% of the total population.[47]

All indications are that this trend will continue into the foreseeable future. In Saskatchewan, it is estimated that by the year 2030 the population of registered Indians will be 355,460, and that 266,595 - or 75% of the total - will be residing off-reserve.[48]

There are a number of reasons why the numbers are growing. One has to do with the legacy of external interference in membership and the creation of a class of 'non-status' Indians who could not reside on reserve. Bill C-31 was intended to correct this, and today "C-31's" make up around 17.5% of the Indian Registry.[49] These people often reside off reserve either because they have lost close connection with their home communities over the years, or simply because there is no room for them back home (ie., not enough land or houses).[50]

In other cases, the move off reserve has been a decision based on opportunity -

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[45] 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", for RCAP, 1994: pp. 37-39.

[46] Lithman, Ibid.: pp. 44-45.

[47] Winnipeg First Nations Tribal Council submission to RCAP's Intervenor Participation Program, 20 July 1993: p. 3.

[48] "Future Trends & Directions" (Federation of Saskatchewan Indian Nations, July 1991): p. 2; cited in Touchwood File Hills Qu'Appelle Tribal Council (Treaty #4), "Royal Commission on Aboriginal Peoples Report", 31 August 1993: p. 16.

[49] Lithman, Ibid.: p. 37.

[50] Lithman 1994 Ibid.: p. 52.

to take advantage of educational or employment opportunities. In still other situations, migration off-reserve is an effort to escape from intolerable conditions, social breakdown or abuse.

A common thread here is that reserves in many cases do not provide a viable environment for social & economic security or development. This is why 'urban' Indians are sometimes referred to as 'refugees' - the decision to relocate is not a result of freedom of choice, but rather the only option to escape abuse or seek opportunity.

Over the past 20 years, the population of Indian nations has been increasing at a proportionately greater rate than non-aboriginal society. At the same time, reserve communities continue to experience increasing restrictions in their access to lands and resources and also their ability to develop the institutions and infrastructure needed to encourage economic and social growth. The result has been a continued deterioration of day to day life at the reserve level, and a dramatic increase in the exodus of peoples off reserve.

> When addressing off-Reserve First Nations People, it is important to reiterate the reasons for the massive influx of First Nations People to urban centres from Reserves. It is not difficult to visualize the third world living conditions which is the reality of many reserves...

> Inadequate employment is a result of lack of economic development, adequate social services, health care and housing. Living conditions are deplorable and beyond description. There are limited to no recreation facilities in most communities. There are no plumbing services such as running water or washroom facilities. All these factors contribute to widespread hopelessness and despair in our communities.[51]

6.1.3. Treaty Breach: Cause & Effect.

A large percentage of the urban aboriginal population is made up of Treaty beneficiaries, and in many cases they place their current circumstances in the context of the treaty relationship - its purpose and its denial:

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[51] Winnipeg, Man. 93/6/3 Jennifer Wood: pp. 304-306.

> **Why is this happening? Why, when there are Legal and Sacred Treaties which supposedly guaranteed the best interests of both parties? It has been said that the Department of Indian Affairs has directly and indirectly promoted the migration of Native People to urban centres. They have rejected economic development and view reserves as non-viable economic bases. In turn, migration is seen as an option and as an end to the "Indian Problem". Theory being, that if the Indians depopulate the Reserves, they have then become assimilated into main stream Society as part of the urban fabric. Therefore, according to the theory and the assimilation plan, there will be no more need for Reserves of Treaty Rights. According to Indian Affairs, as soon as the Indians leave the Reserves, they become ordinary people with no special rights.**
>
> **However, the startling reality is painfully contrary to this theory. As the Native population migrates to the cities, the problems of the Reserve Communities are sure to follow. The third world conditions as the living reality of the reserves has now moved into the cities and into the front yard of the "White Man".[52]**

And many of those who have had to migrate are the most vulnerable:

> **Aboriginal women and their children represent the largest category of refugees from violence and instability and .... form the largest part of the urban Aboriginal population.[53]**

Generally speaking, Canada's 'Indian policy' was made up of three elements which were each dependent on the other's success: the appropriation of lands and resources; assimilation; and ultimately extinguishment and dispersal. The first element of the plan succeeded, resulting in the economic dislocation of Indian nations. The second element was an unmitigated failure - Indian nations

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[52] Winnipeg, Man. 93/6/3 Jennifer Wood: pp. 304-306. See also Lithman, Ibid.: p. 45. And, from the Economics Policy team: *"... [M]any of the economic and related problems encountered in rural and isolated communities have simply been replicated in towns and cities. In particular, the rapid growth in the urban Aboriginal labour force has not been accommodated and unemployment and welfare dependence have reached levels which would be utterly unacceptable to the rest of society."* "Draft Policy Options Paper", RCAP Economics policy team, 21 April 1994: p. 95.

[53] Mamawichitata, 1993: p. 13; cited in Health & Healing, Ibid.: p. 303. See also Economics, Ibid.: p. 92.

were not assimilated, although their social and governmental institutions were destabilized. The policy of extinguishment has also failed: Indian nations continue to exist and moreover have grown considerably in size. They remain as a dynamic socio-political and physical reality on the landscape.

The Indian nations cannot simply be wished away. However, federal and provincial governments have not been willing to accept the fact that the plan failed, and instead have pretended otherwise. As a result, those Indian people who are a part of the urban exodus have been caught in a jurisdictional tangle of denial and neglect, and those on reserve remain without significant opportunities to resume use and benefit of their traditional lands & resources. Mobility within and between tribal territories have been unduly restricted with the imposition of international, provincial and other administrative boundaries which have no relationship with traditional territories.

This denial is manifested in the response of other governments. Discussion between Canada, the provinces and the municipalities have not focused on addressing the causes of the situation, but revolve instead around who shall pay for band-aids to treat the symptoms, each wanting to spend as little as possible on 'services', and each denying fiscal responsibility. It is significant that the decades-long debate about off-loading and (non)responsibility for 'off reserve' Indians has largely taken place without the participation of those most directly affected - Indian governments and their citizens.

This situation typifies the other-worldly nature of government policies which have been founded on extinguishment and a denial of the treaty relationship - no matter how hard they wish that these objectives have been achieved, and act as if they had, reality continues contradict them.

In this light, continued denial, efforts to terminate treaty rights, and tacit support for the dispersal of Indian people can be seen as a desperate attempt to make the facts conform to what other governments wish would happen. The problem is, as we have said, that the reality stubbornly refuses to go away.

6.2.0. TREATY ANALYSIS.

6.2.1. Conflict, Peace and Friendship.

During the period before 1763, in many ways it was the colonists themselves who were restricted to *reserves* - the toeholds that they had gained for settlement along the eastern seaboard of the USA and in New France. When

settlers went outside of these bounds and tried to appropriate lands or resources, there was conflict. It was this kind of unregulated activity that ultimately led to the Royal Proclamation.

At the same time, there were efforts to establish agreed upon rules for interaction in each party's territories. For instance the Halifax Treaty of 1752 specifically provided for the right of the Mi'kmaq to enter 'urban areas' and engage in trade and commerce.

> **... the Indians shall have free liberty to bring for Sale to Halifax or any other Settlement within this Province, Skins, feathers, fowl, fish or any other thing they shall have to sell....[54]**

In other words, it was understood that the Mi'kmaq would carry their rights with them when they left their territories and entered British settlements.

The 1760 Murray Treaty made with the Huron guaranteed them safe passage and the right to practise their 'religion' and 'customs' *"over the entire territory frequented by the Hurons in 1760, so long as the carrying on of the customs and rites was not incompatible with the particular use made by the Crown of this territory..."*.[55]

Rights of free passage and mobility were an essential consideration during this period and a major aspect of the treaty relationship. On the one hand, trade and commerce between the parties was dependent on the parties being able to get together to engage in transactions. On the other hand, unmolested passage was critical for the British and the French in their colonial competition, and this depended on the Indian nations.[56]

6.2.2. Accommodation and Dislocation.

The Royal Proclamation itself set up what could be seen as the first and largest *Indian reserve* in British-Canadian history: the *hunting grounds* of North

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[54] "Treaty or Articles of Peace and Friendship Renewed", Halifax, 22 November 1752: Mi'kmaq Treaty handbook, Ibid.: p. 21.

[55] R v. Sioui, 1990, cited in Lithman, Ibid.: p. 27.

[56] See Williams 1993 with respect to the Haudenosaunee; Johnson 1986 re: the Chippewa & Mississauga.

America. The purpose of this *reserve*, judging from the text and background of the Proclamation, was to protect Indian nations from encroachment by settlers, and thus preserve the economic & social foundations of indigenous societies. This was not purely an acknowledgement that Indian nations had rights and interests in their lands which could not be unilaterally appropriated. It also reflected the fact that Indian nations needed to maintain control over the means of production to fulfil the economic imperatives of the fur trade.[57]

But as we have seen in other chapters, increasing settlement and the declining importance of the fur trade in southern British North America contributed to a situation where local governments increasingly sought to restrict or eliminate the ability of Indian nations to use and manage lands & resources. The emergence of the *reserve* system as we know it today is a product of this policy.

6.2.2.1. The Foundation of Modern Reserve Policy.

Throughout, the evolution of the reserve system has been underpinned by two parallel - and often contradictory - objectives on the Crown's part. First, to **protect** Indian interests and secure to them a land base for future self sufficiency; and second, to **remove** Indians from lands which settlers coveted, so that they would not impede development.

This has an intimate connection with the policy of extinguishment, and the *changing of the accounts* which has been a theme throughout this paper. On one level, the creation of reserves was a part of the overall process of gradual extinction of rights - and identity - that Canada assumed would happen. The policy of extinguishment meant that for government, the treaties and the reserves themselves were not an affirmation of rights so much as they were but one stage in a process that was based on the incremental restriction and elimination of rights. Tony Hall has noted that as this approach to treaties and reserves developed, reserves themselves

> ... became integral to the object of building Canada by narrowing and extinguishing the Indian domain. This process pointed only in one direction. Indian nations were seen as terminal and so their lands, their languages and their cultures would eventually

[57] See Tony Hall, 1994, Part 1.

> disappear. Anticipation of this one-way march to oblivion is deeply rooted in the Canadian legal system which sees the Aboriginal interest in Canada as a finite domain that is always being cut back here, extinguished there.[58]

In this sense, reserves were holding cells - a temporary measure until such time as extinction or assimilation took their course. But the plan backfired miserably.

6.2.2.2. Mobility and the Treaty Relationship.

During the period between the Proclamation and Confederation, however, there are examples where the connection between mobility and the continued application of treaty rights and benefits was acknowledged by the Crown and remained as an explicit aspect of the treaty relationship.

One example can be found - perhaps oddly - in connection with the Imperial Crown's efforts to reduce and eliminate the annual 'presents', a process which has been discussed in other chapters. A problem that had concerned American and Imperial authorities was the continued relationship between Britain and the 'American Indians' - members of those nations whose territory straddled the Canada-USA border and who continued to exercise their rights of mobility and free association.

The British were concerned about the cost of provisioning Indians who weren't resident in Canada, while the Americans had expressed concern about the fact that long after the War of 1812, the Crown was still distributing powder and shot to them.

At the annual gathering for the distribution of presents that took place in Manitowaning in 1837, Crown officials announced that after three years, presents would no longer be given to Indians resident in the USA. It should be remembered that at this time the United States was aggressively pursuing its policy of Indian removal to lands west of the Mississippi River, and thousands of Potowatomi, Chippewa and other Indians were moving north across the border instead.

The Crown's stated policy was to grant refuge to those Indian nations who

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[58] Tony hall Part 2, Ibid.: pp. 28-29.

wanted it, and this offer was made at Manitowaning.[59] But what is striking about the address delivered to the assembled tribes has more to do with the guarantee of continued rights and mobility within Canada.

> **Your Great Father the King has determined that Presents shall be continued to be given to all Indians resident in the Canadas.**
>
> **But presents will be given to Indians residing in the United States for three years only, including the present delivery....**
>
> **But Children:**
>
> **Let it be understood that the British Government has not come to a determination to cease to give presents to the Indians of the United States. On the contrary the Government of your Great Father will be most happy to do so provided they live within the British Empire. Therefore at the same time that your Great Father is willing that his Red Children should all become permanent settlers on this Island - it matters not to him in what part of the British Empire they reside - They may go across the great Salt Lake to the country of their Great father and there reside and there receive their presents - or they may remove to any part of the Province of Upper or Lower Canada, New Brunswick, Nova Scotia or any other British colony and yet receive them. But they cannot and must not expect to receive them after the end of three years if they continue to reside within the limits of the United States.....**
>
> **Children: You must therefore come and live under the protection of your Great Father or lose the advantage of which you have so long enjoyed of annually receiving valuable presents from him.[60] [emphasis added]**

Remember that at this time, as we have shown in other chapters, the 'annual presents' were an integral part of the treaty relationship that had been established between the tribes and the Crown. The discussion at Manitowaning, therefore was squarely placed in the context of this treaty relationship. What the Crown was proposing was an exchange - foregoing residence in the United

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[59] This is part of the story we began telling in the Education chapter about Coldwater and the subsequent removal to Manitoulin.

[60] Address at Manitowaning, 4 August 1837: no citation; courtesy of Paul Williams.

States, in return for full mobility and the retention of treaty rights within the whole of the British Empire.[61]

The issues raised by the imposition of borders and boundaries are beyond the scope of this paper, but they do require some mention in this context. The division of territory between Britain and the United States which took place in the years following the Revolutionary War was only the beginning of a process whereby tribal territories were truncated by provincial, territorial, treaty and municipal boundaries. Most often these boundaries are not connected to traditional territories and do not take into account pre-existing arrangements regarding mobility between Indian nations. The result is that aboriginal and treaty rights of mobility, harvesting commerce etc. are unduly prejudiced and restricted. Any discussion of "off reserve" issues needs to be considered in this context.

6.2.3. Displacement and Assimilation.

Consistent with the assimilation/relocation policy which was adopted by Canada in the decades before Confederation, the numbered treaties - from the government's perspective - revolved to a large degree around the creation and maintenance of reserves to achieve this objective. This involved a number of things.

First, the removal of people from the lands within their territories, and separation from the means of production (resources). This is detailed in another chapter.

Second, services and certain treaty benefits were to be available only on reserve, in an attempt to centralize the Indian population, attracting them to one location and in so doing draw them off the land. It would also streamline administrative costs. If encouragement did not work, compulsion was employed - hence the pass laws which prohibited travel off reserve without the approval of the Indian Agent.[62]

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[61] Paul Williams, in his case study of the Haudenosaunee treaties, provides many specific examples of the importance which the Iroquois Confederacy attached to freedom of mobility - for trade, and to maintain relations not only with other members of the Confederacy, but other tribes and settlers as well. Williams, 1993, Ibid.

[62] "the Indian Act does not deal with Indians but with the reserve system": Sanders (1988:152) quoted in Lithman (1994) Ibid.: p. 34.

As we have mentioned, in Canada's view reserves were only to be a temporary step in the ultimate elimination of Indian nations as distinct peoples. This is evident from Canada's interpretation of the provisions in the treaties which call for the setting aside of reserves. Many are based on a population formula, with no 'sunset clause'. One would think that this would allow for the expansion of reserves as population and circumstances warranted, particularly in light of the assurances given by treaty commissioners that they were to provide a basis for self sufficiency into the future.

But this has not been the case. Witness the ease with which reserves have been reduced to allow for the expansion of non-Indian municipalities and settlement, in contrast to the many obstacles which have been placed in the way of enabling new reserves from being established or old ones expanded.

Returning to the use of lands and resources off reserve, experience in many treaty areas demonstrates that assurances were given regarding continued use of traditional lands, and that settlement on reserve would only be at the pleasure of the Indian nations themselves.

> During the negotiations for treaty 1, the Lieutenant-Governor Archibald declared (after a long statement about reserves being for agricultural purposes) that:
>
> *"There will be plenty of land that is neither tilled or occupied where you can go and roam and hunt as you have always done, and, if you wish to farm, you will go to your own reserve where you will find a place ready for you to live and cultivate."*[63]

Lithman summarizes the tenor of the discussions that took place in the numbered treaty councils regarding the 'off reserve':

> ... the reserves were to be primarily for agricultural activities for those who wanted to settle there in order to pursue these. No-one was to be deprived of non-agricultural pursuits, and no losses in relationship to treaty rights were to derive out of this choise. [sic] **'Indianness' was explicitly..... not tied to residency.**[64] [emphasis added]

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[63] Morris 1991/1880: 29, quoted in Lithman, 1994 Ibid.: p. 29.

[64] Lithman, Ibid.: p. 30.

Moreover, evidence suggests that treaties may not have even been concluded if mobility rights on traditional lands had not been guaranteed. The Commissioners' report for Treaty #8 is clear on this point:

> **Indeed, the Indians were generally averse to being placed on reserves. It would have been impossible to have made a treaty if we had not assured them that there was no intention of confining them to reserves.[65] [emphasis added]**

Many Indian nations saw reserves as a 'home base' from which continued use of traditional lands and resources would be staged. One example comes from the Begetigon Anishnabe of Lake Superior:

> **It was more like the central place for them their families, trapping in each direction more like a depot for them I guess.[66]**

Another comes from Treaty #5:

> **The treaty party told us what was supposed to be in the document and this was interpreted to us. Our people signed the agreement based on the understanding that we were agreeing to share the land and that we would live together in peace....**
>
> **Some government people would like us to have governments like towns or cities, with a mayor and a town council. This would be appropriate if all they were to govern was the village, but our people cannot create a living from the small pieces of land granted to us under the government's interpretation of the treaty. We need a government that can manage the resources of the region of land that was ours when the settlers came. Each community requires enough land to support it's people.[67]**

Subsequent conduct by the Indian parties demonstrates a consistent pattern of continued use of off reserve resources and lands, but this use has been severely restricted and suppressed by the alienation of lands to third parties

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[65] Commissioners' report for Treaty #8, quoted in Treaty 8 Tribal Association of B.C., Ibid.: p. 65.

[66] Personal communication, Annie Desmoulin to Elizabeth Starr, 18 September 1992: courtesy of the Ojibways of the Pic River First Nation.

[67] Sioux Lookout, Ont. 92-12-01; Abe Kakepitum: pp. 171; 173

and the imposition of federal/provincial regulations.[68] These imposed measures reflected the view of other governments that confinement on reserves was to facilitate and compliment the appropriation of lands & resources for their own citizens. There were a variety or reasons why off reserve economic activity was discouraged or prevented, but *"Not the least of these was fear of reduced economic opportunities for immigrants."*[69]

6.2.4. Denial and Termination.

Without access to their traditional territories for economic activity, reserve communities were left with a marginal economic base at best. This, combined with the destabilization of indigenous institutions of society, culture and governance that resulted from the imposition of the Indian Act, meant that in many cases reserves became rural ghettos of despair and atrophy instead of 'protected' zones of development.

Meanwhile, Canada realized that not all services could be delivered on reserve effectively, due to locational factors and economies of scale. At the same time, it became clear that reserve communities were managing to maintain their cultural continuity and traditional institutions. Assimilation therefore required the removal of Indian children from their communities to forcibly disconnect them from 'bad influences'. This was articulated in a letter from the Reverend Alexander Sutherland, general secretary of the Methodist Church of Canada, Missionary Department, to Laurence Vankoughnet, Deputy Superintendent General of Indian Affairs:

> ***'Experience convinces us that the only way in which the Indian of the country can be permanently elevated and thoroughly civilized is by removing the children from the surroundings of Indian home life, and keeping them separated long enough to form those habits of order, industry, and systematic effort, which they will never learn at home.'*** **He suggested that the department *'fix the term of residency at five years for girls and six for boys, and make attendance for this term compulsory. The return of children to their houses, even***

[68] See RCAP Land & Resources policy draft re: problems with access to land & resources 'off reserve' for economic activity. Testimony from RCAP's hearings also provides considerable detail of the difficulties encountered in accessing lands & resources within traditional territories.

[69] Health & Healing, Ibid.: p. 198.

> ***temporarily, has a bad effect, while their permanent removal after one of two years residence results in the loss of all that they have gained."***[70]

The residential schools, and subsequent approaches to education which involve a significant off reserve component, were responses to these considerations. The role of off reserve institutions in the provision of medical care is another example.

But, as it turned out, Indian nations did not become extinct, and for the most part their citizens could/would not be assimilated. In fact, the Indian population began, in the 1960's, to grow faster than the non-Indian population. Canada's willingness to provide off reserve services in the context of the residential school system stands in stark contrast to the policies which it would later adopt once assimilation had been abandoned in favour of termination.

6.3. CONCLUSIONS.

The result has been migration - either to seek opportunities which are absent on reserve, or else to escape the oppressive atmosphere. The response from other governments has generally involved denial, off loading and avoidance of the root causes. The federal position on this issue was inferred in a letter sent by DIAND's Regional Director General for Manitoba to Eric Robinson of the Winnipeg First Nations Tribal Council in 1992:

> **As you are aware, Canada's current policy and its interpretation of existing treaties is that federal responsibility, with a few exceptions (e.g. Economic Development programming, Post-Secondary Education, etc.), and jurisdiction extends only to Indian people resident on-reserve. It is the general responsibility of the provinces to look after the needs of its aboriginal citizens who do not receive federal programs and services and this responsibility extends to Indians living off-reserve.**[71]

Remarks made by former Minister of Indian Affairs Tom Siddon state the federal

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[70] Quoted from Linda Tschanz, *Native Language and Government Policy: An Historical Examination* (London, 1980): p. 7, in Schamlz, Ibid.: p. 181.

[71] Linda Jolson, RDG, DIAND, Manitoba, to Eric Robinson, WFNTC, 16 January 1992: appended to WFNTC IPP submission to RCAP, 20 July 1993.

government's position with more clarity:

> It's a clear interpretation of our legal and fiduciary responsibility that off-reserve Indian people status or non-status, Metis, **are to be treated as all other Canadians by the delivery of services and programs which the provinces have a responsibility to deliver to all Canadians equally.**[72] [emphasis added]

The treaty relationship was predicated on mutual benefit and the continued health and well-being of both parties. In many cases it was to include the ability to choose between the security of the traditional way of life and the land, or the opportunities presented by settler society, or a combination of both. Events, largely the result of the exercise of government discretion, seem to have foreclosed all of these options.

In that respect, the restriction and denial of rights off reserve in urban areas is just the flip side of the denial of rights off reserve on 'Crown lands'. They both represent ongoing efforts to narrow and ultimately terminate those rights and interests recognized through treaty or which exist independent of treaty.

By refusing to address the off reserve issue substantively, governments have avoided the fact that their own actions brought about the situation. Having garnered the benefit, they now refuse to accept responsibility for the cost. In fact their very definition of the situation itself represents a continued denial of the reality that confronts them.

Acknowledging the reality and the responsibility that comes with it also involves recognizing that 'mobility' rights, inasmuch as they are a essential to social and economic security & development, are part and parcel of the treaty relationship. This is not so much dependent on the particular wording of a particular treaty, as it is on the principles and commitments upon which they were concluded. Certainly the historical record demonstrates that mobility was a key factor in each of the treaty 'eras' that have been reviewed.

6.3.1. Services in the Urban Context.

Contractors' studies, IPP submissions and testimony at RCAP's hearings all

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[72] Tom Siddon, remarks to the House of Commons Standing Committee on Aboriginal Affairs, 26 May 1993; quoted in Torben Drewes & Harry Kitchen, "Current Practises in Financing Aboriginal Government", for RCAP, March 1994: p. 9.

point to the current jurisdictional and program quagmire. Canada, the provinces and municipalities have not approached the issues in a holistic manner, but rather seem to see them only as added burdens to be avoided or to seek compensation for.

There is a proliferation of agencies, departments and officials that bewilder even those familiar with them, and which do not reflect a cohesive assessment or response to the situation. In many ways this is a direct result of other governments' efforts to deconstruct the treaty relationship and 'change the accounts'.

The result is vacuum - no one is present to undertake the institution building in urban areas that must take place if circumstances are to improve.[73]

The roles and responsibilities of the Indian nations with respect to their own citizens have simply been treated as if they do not exist. At the same time, other governments do not want to accept responsibility themselves, or when they do, their interventions are at best insufficient, or at worst prejudicial. Jurisdictional ambiguity inevitably leads to denial and neglect.

If one views the treaties as recognizing the jurisdiction of Indian nations over their internal affairs and their ability to enter into relations with other governments, then the authority of Indian nations to take responsibility for the needs of their citizens, wherever they may be, needs to be accepted as an aspect of the Treaty relationship.

This may include the direct provision of services by Indian nations to their citizens, or cooperative arrangements between Indian nations to deliver services together, or contracting with non-Indian governments for services, depending on the circumstances. Each of these can fit comfortably within the conduct and evolution of the treaty relationship.

Policy, legislation and practise need to accommodate these possibilities that flow from the treaty relationship, as opposed to rejecting or ignoring them.

6.3.2. Governance, Representation & Membership.

Although sometimes lumped together in the discussion on 'programs & services' off reserve, political representation is a separate matter. Many 'urban'

[73] Economics, pp. 101-102.

First Nation citizens who participated in RCAP's hearings identified the lack of political accountability and representation with respect to their interests as a major problem.[74] This is another legacy of the Indian Act and government policies which have fragmented community identity and membership.

This is an internal matter to the Indian nations, but it requires at the very least a willingness on the part of other governments to *"get out of the way, and let the First Nations find their own mechanisms of implementing responsible political structures."*[75]

Individual Indian governments, Tribal Councils and other political organizations need to address matters of representation, accountability and activity directly and frankly with their own citizens. This is beginning to happen, one example being the Winnipeg First Nations Tribal Council, which represents the interests of treaty Indians in that city, and which from it's inception has been linked closely to existing Indian political institutions in that province.[76]
But, given current circumstances, this cannot happen without other governments first stepping aside, and then actively supporting this process.

6.3.3. Recognizing and Renewing Linkages.

The prevailing situation as we have said, is largely the result of the policies of fragmentation and dispersal that have been engineered by other governments - dividing communities through membership rules; undermining political and social institutions by using residence as a pretext for preventing free association and representation; and treating reserves in isolation from the traditional waters, lands & resources upon which they must depend.

What this suggests is that part of the solution lies in putting the pieces back together, and reconnecting the parts of the circle - a holistic approach. This includes recognizing the importance of developing and maintaining linkages between the citizens of Indian nations who reside 'off reserve' and their home nations, communities and territories.

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[74] Economics, Ibid.: p. 102; Saskatoon Treaty and First Nations Assembly "Report on Urban Self Governance", IPP RCAP, 30 September 1993; Winnipeg First Nations Tribal Council, Ibid.

[75] Lithman, Ibid.: p. 51.

[76] Winnipeg First Nations Tribal Council submission to RCAP's Intervenor Participation Program, 20 July 1993.

This must take place on a number of levels simultaneously - governance, membership, the delivery of services, eligibility, etc. As well, RCAP's Economics policy team has highlighted *"the importance of business/economic development linkages between urban and rural reserve communities"*.[77]

6.3.4. Urban Reserves.

In the context of this discussion, the existence of urban reserves represents another bundle of anomalies and contradictions which deserve some attention. We have described how on one level, reserves were intended to provide a 'safe haven' of sorts for economic and social development. However in many (most) cases subsequent practise and policy on the part of other governments undermined the ability of reserves to fulfil this function. Beyond this, there are certain limiting characteristics which, for instance, prevent reserve lands from being used as collateral. But still, reserves hold one significant characteristic which is a major competitive advantage in terms of economic activity - Indian taxation powers and immunity. The whole area of taxation is a major one, rife with dispute, and time prevents us from addressing all of its aspects.[78]

For the purposes of this analysis, we will briefly consider the power to tax, its connection to the treaty relationship, and its application to 'urban' reserves. In doing this we will set aside the prescriptions relating to taxation which are contained in the Indian Act, and instead turn to the fundamental principles which underlay the treaty relationship. If the treaties represent a mutual recognition of governmental authority, then implicit in that recognition is the power to tax, and to use taxation as an instrument to achieve social & economic policy objectives.

In the context of trade and commerce, reserves - particularly in urban areas - present an opportunity to play an important role in the economic renewal of the Indian nations. In the absence of taxes levied by other governments on transactions, Indian governments have a range of tax room which they could

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[77] Economics, p. 91.

[78] Immunity from tax by other governments (on or off reserve) has long been held out as a treaty right by the Indian nations, although as far as we know treaty #8 is the only numbered treaty in which the official commissioner's report gave it explicit mention (even then it is absent from the 'official' treaty text). A number of Pre Confederation treaties imply immunity from tax (ie., 1752 Halifax Treaty), but the written texts have been the subjectof dispute and litigation.

occupy and devote toward socio-economic development, or which they could leave open as an incentive to attract commerce, development and investment.

However there has always been, on the part of other governments, a stiff resistance to any notion that Indian governments or their citizens might actually make use of these competitive advantages. Part of it has to do with an unwillingness to share coveted tax revenue and the authority that comes with it. But perhaps more important, this resistance has to do with long held assumptions that underlay the practise of colonialism. Key among these is the belief that wealth, commerce and benefit are the preserve of the colonizers. From this perspective, the colonized exist only as a source of revenue and profit, and any attempts on their part to change the exploitative basis of the relationship is seen as a vital threat.

> Local businesses saw the reserve community only as a market, with the flow of goods into the reserve and money out into their hands.[79]
>
> For a variety of reasons, governments were disinclined towards promoting mainstream economic activity within off-reserve, Crown land, Aboriginal communities. Not least of these was fear of reduced economic opportunities for immigrants.[80]

These attitudes, at root a product of unabashed self interest, continue to prevail. The leakage of income from reserves to neighbouring non-Indian communities is notorious and well documented. So is the state of their economies. And yet, in a perverse twist of logic, the federal Department of Finance has suggested that allowing Indian governments to exercise their powers of taxation, and enabling them to make productive use of the competitive advantages inherent in reserve status *"could lead to social inequity and economic distortions"*.[81] We would ask, 'for who?'. Certainly a more equitable characterization of these issues and a wider range of approaches is required before a just accommodation can be reached.

6.3.5. The Role of the Treaty Process.

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[79] Economics, Ibid.: p. 21.

[80] Health & Healing, Ibid.: p. 198.

[81] Department of Finance, "A Working Paper on Indian Government Taxation" (Ottawa, Preliminary draft, 12/11/92): p. 5.

We suggest that the treaty relationship offers an appropriate and viable mechanism through which to address the issues outlined in this chapter, because at bottom they are the same issues that are present in each of the other areas we have reviewed. Applying the principles of the treaty relationship to the 'off reserve problem' would introduce a number of considerations that have been largely absent from the discourse so far: mutual recognition of authority and responsibility; reciprocity; equity; and holism. Entitlements, rights and interests would be discussed in light of the reality of traditional tribal territories and relations.

In this sense, returning the 'off reserve' into the realm of the treaty relationship does not assume that the resulting dialogue will degenerate into reductionist debate over the precise nature and scope of specific 'treaty rights.' This would be a continuation of the approach that created the problems in the first place.

Quite the opposite, returning the 'off reserve' into treaty should provide a holistic set of principles and standards - and an overall framework - in which to address the issues cooperatively, and in that way obtain basic justice. Clearly the 'off reserve problem' is a reality that won't go away, however much some parties wish it would. A key step in resolving it is to begin to recognize its potential for being a positive aspect of the interaction between societies, and as an essential contribution to the renewal of Indian nations and their citizenry.

D. BACK TO THE FUTURE:

IN SEARCH OF BILATERAL TREATY RENEWAL AND TREATY-MAKING

D. BACK TO THE FUTURE:

IN SEARCH OF BILATERAL TREATY RENEWAL & TREATY MAKING

1.0. INDEPENDENT DISPUTE SETTLEMENT AND NEGOTIATIONS.

1.1. NEGOTIATING BACK TO THE FUTURE.

The absence of an effective bilateral process for treaty renewal and treaty-making has resulted in "a staggering inventory and backlog of accumulated issues and claims." In seeking a way out of the morass, Robert Jamieson has argued, "it is in the best interests of all people of Canada that a new relationship be developed so that Indian people can escape an enforced unwelcome debilitating dependency [and] so they can participate as full partners in building a better country and world."[1]

In seeking a "new relationship," however, Indian Nations and the Crown must decide whether they wish to renew their historic bilateral relationship or innovate new tripartite or multilateral relationships for negotiating the future. The approaches are fundamentally different and likely to produce fundamentally different results.

A third option, renewing the bilateral nation-to-nation relationship with Canada while establishing parallel bilateral government-to-government relationships with the provinces (the "bilateral-bilateral" process), is a possible way to accommodate both renewal and innovation in negotiations and deserves further consideration. Everything should be on the table in these discussions - a truly comprehensive approach is the best way to reverse the effects of compartmentalization and disempowerment which have held sway for the last century.

For the time being, treaties remain the object of ongoing debate between the Indian Nations and federal authorities. In practice, treaties have been relegated to political limbo by the federal government, which gives them lip-service and the formalities of recognition while seeking to extinguish their significance for the future.[2]

There is general agreement that the relationship between Indian Nations and Canada needs basic adjustment and reshaping to take into account contemporary social, economic, legal and political developments. There also is general agreement that the Indian Nation-Crown relationship needs to incorporate Indian "self-government," though great differences exist as to what this may entail.

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[1] Jamieson, Roberta, speech to American Bar Association, August, 1988.

[2] The agreements reached in the federal government's comprehensive claims process demonstrate that the price of modern "treaty-making" and "treaty implementation" is the extinguishment of historic treaty rights and aboriginal title (*e.g.*, the Dene/Metis Final Agreement and the Yukon Umbrella Final Agreement).

If the means through which accommodation is to take place are to be congruent with the ends, the relationship for the future must be mutually determined, not unilaterally dictated. This means a negotiated future. Paradoxically, however, unless such negotiations are structured at the outset to reflect the basic character of the future relationship (*i.e.*, bilateral, tripartite, multilateral or bilateral-bilateral, along with a delineation of the respective roles, responsibilities and jurisdictions of the parties), they will likely not produce substantive results. While there is both need and opportunity for the final result to be a negotiated solution dealing squarely with the complex issues, the complexities will be virtually impossible to deal with if prior agreement on the basic character of the future relationship is absent.

Given that the federal and provincial governments have divided all existing jurisdiction between themselves, if Indian self-government is going to become a reality "someone has to move aside or share space if all parties are to take their place within the jurisdictional parameters."

> Like it or not, Canada has arrived at an unexpected crossroads in its political evolution, and a new roadmap has to be drawn. Whether that map will be drawn to reflect the status quo, or whether it will reflect enlightened standards regarding colonialism, human rights, collective rights, and indigenous peoples is yet to be determined. It is that very question which offers Canada an opportunity which has not presented itself in the U.S. since 1775.
>
> Generally, Indian Nations look to their original relationship with the Crown - the relationship reflected in the *Royal Proclamation* of 1763 or in Treaties - as their landmarks for the new map. Governments, on the other hand, have as their landmarks centuries of unilateral changes which they have made in the original relationship....[3]

Negotiating a resolution of fundamental differences seems to be the only way to draw a map for the future relationship which all parties will use. We suggest that the principles of the traety process provide the framework for these negotiations. As Roberta Jamieson pointed out in her address to the American Bar Association, that is the only way to escape the current morass, rooted as it is in colonialistic and racist attitudes.

> We lawyers tend to focus on the legal perspective, as we have been trained to do. We must be careful, though, that our training does not make us incapable of remembering that the legal situation of aboriginal peoples is the fruit of colonialism and racism. We must remember that colonialism and racism arise from ingrained attitudes, unstated assumptions, assumptions hidden so deep in the social psyche that they are difficult to

[3] Jamieson, Roberta, speech to American Bar Association, Panel on Native Justice, August, 1988.

> examine in a rational or objective manner. These attitudes seem to have infected all political parties, all age groups, all regions.... Until these attitudes change, we will continue to have a relationship which is not in good health, regardless of any niceties which justify its legality.[4]

For many years, the courts were not used by Indian Nations because it was illegal for them to do so. From 1927 to 1951, the Indian Act made it an offense for anyone to receive or solicit funds for the prosecution of any Indian claim. While those sanctions no longer exist and it has too often been necessary for Indian Nations to seek legal redress, in many cases the courts have not been able to respond adequately to the challenges posed by Indian litigants. As Roberta Jamieson points out:

> The Canadian system of justice did not evolve with aboriginal issues or perspectives in mind.
>
> The legal system is not equipped to resolve issues which are essentially political in nature.
>
> Many precedents upon which judgments are based were set without aboriginal people being represented.
>
> The *Indian Act* provides legal justification for limitations on Indian Nation actions which are not found elsewhere in Canada.
>
> The historic roots and evolution of Canada's social and legal systems have advanced the exercise and guarantee of rights for individuals vis-à-vis the State, but have not adequately advanced the question of collective rights...
>
> The legal process often tends to worsen the relationship between the parties outside the courtroom and further lessens trust between them.
>
> Considering the huge number of complex issues to be resolved, courts are expensive and time-consuming.
>
> Once an issue goes to court, the parties lose control of the process.
>
> The adversarial courtroom process does not allow issues to be resolved in a mutually-beneficial manner.
>
> In the end, the court's decision often relies upon a narrow legal or technical

[4] *Ibid.*

interpretation which usually is unsatisfactory to both sides.[5]

Properly configured, empowered and facilitated negotiations offer an alternative road to the future. In facilitated negotiations, the parties can address issues and claims through an independently-managed process which breaks with historic patterns, and in which all parties take on specific responsibilities. Facilitated negotiation attempts to reconcile competing interests. The parties engage in a joint search based on principled action.[6] Where agreement cannot be reached, an empowered facilitator can order the utilization of mediation, fact-finding, non-binding arbitration, binding arbitration, or reference to a court to break deadlocks. Among the advantages of facilitated negotiation are the following:

* All parties can contribute equally to a jointly-conducted search for mutually-acceptable solutions.

* Negotiations provide enough flexibility to overcome the obstacles and rigidity which courtroom procedures requires, but with enough ground-rules to promote fair treatment and to advance resolution.

* This flexibility also means that arrangements need not be carved in stone, and mutually-acceptable alterations can be made in the future to accommodate new realities.

* There is the potential for creative solutions which reconcile competing interests in a way which accommodates the special place of aboriginal peoples.

* There can be informal as well as formal meetings, and meetings can be held at the local level to involve entire Indian Nation communities.

* Intergovernmental arrangements, fiscal and otherwise, can be incorporated in the resolutions.

* Since consensus is required, a party of small size, lacking in power and resources .... has equal power to make or break a settlement agreement.

* Since many issues involving Indian Nations involve strongly-held principles on which compromise often is not possible, the "all-or-nothing approach" so characteristic of litigation is replaced by a process which permits motivated parties to shape an issue so that partial resolution may be achieved while matters which cannot be resolved at the moment are temporarily set aside. In

[5] *Ibid*.

[6] *Report of the Indian Commission of Ontario*, October 31, 1988, p. 3.

negotiations, an Indian Nation need not put its rights on the table, nor is it necessary for a government to abandon fundamental principles of its political system.

* When long-term solutions prove elusive, sometimes innovative interim arrangements can be agreed upon which will produce some incremental change and concrete results until such a time as a more permanent accommodation can be reached.

* Facilitated negotiations offer the parties to show a willingness to compromise, to accept input from others, to accept responsibility for reaching a successful conclusion. They must abandon power in favor of cooperation. No one imposes, no one ignores others, no one manipulates.

1.2. DIFFICULTIES IN NEGOTIATING THE FUTURE.

As Professor Douglas Sanders notes, the acceptability of negotiations also requires making a number of assumptions which seem to be unjustified.[7] It presupposes there will be agreement as to what issues will be settled. It assumes there will be a continuing commitment of governments and Ministers over time to settle those issues. It assumes that governments can organize themselves adequately to negotiate. It assumes that Indian Nations can organize and function as equals in a negotiating process.

The historical track record is that Indian Nations and governments on their own rarely reach mutually-acceptable resolution of issues. There is a need for independent assistance and a mutually-acceptable, jointly-defined approach to treaty interpretation and treaty-making.[8] In both the Joint Cabinet Committee and the bilateral process, we have seen that the Indian Nations insisted on "independent chairpersons," "neutral secretariats," and "commissioners" to manage those processes.[9]

Indian Nations have learned from experience that if negotiations are to be

[7] Sanders, Professor Douglas, "The Australian Aboriginal Land Commissioner," UBC, June 3, 1989.

[8] See: FSIN/DIAND, "Draft Terms of Reference of Office of Treaty Commissioner in Saskatchewan." See also Oberle, Frank, *Report on Treaty #8 Renovation*, Ottawa.

[9] For a more detailed discussion of these initiatives, refer to the addendum to this report.

productive, settler governments must agree to an independent, neutral third-party to facilitate negotiations, mediate and resolve deadlocks with powers binding upon the parties. At times, they have advocated a third-party with an international character, befitting the nation-to-nation relationship.

Experience has also shown that where settler governments are allowed unilaterally to interpret treaties and impose policies for treaty-making, conflicts of interest, imbalances and deadlocks ensue. In particular, the federal government cannot negotiate honourably when its trust obligations to Indian Nations are in conflict with its other political and administrative interests. Federal policies inevitably place the latter ahead of the former, political interests are not balanced with fiduciary responsibilities, and the government is cast in the role of implacable adversary to the rights, aspirations and interests of the Indian Nations.

Unlimited financial resources and a judicial system within which settler governments can pursue a lengthy series of maneuvers, also leaves Indian Nations unevenly matched in negotiations and in court.

1.3. NEED FOR AN INDEPENDENT COMMISSION OR SECRETARIAT.

From the time of the Joint Cabinet/NIB Committee to the present, the Indian Nations have sought independent chairing of negotiations and an obligatory neutral dispute-resolution mechanism for negotiations with the federal government. In 1982, the AFN proposed in a draft memorandum that negotiations be "internationally supervised if the aboriginal peoples parties to those negotiations so request." The federal government found this proposal "unacceptable to the Government of Canada, since it calls for an abrogation of Canadian sovereignty."

The Report of the Penner Committee on Indian Self-Government also called for an independent secretariat. "Past difficulties experienced by Indian communities in negotiating with the federal government have generated mistrust and suspicion which could complicate the many rounds of negotiations." It recommended "that the federal government and designated representatives of Indian First Nations jointly appoint and fund an independent secretariat to provide a neutral forum for conducting negotiations between them."[10]

[10] *Report of the Parliamentary Special Committee on Indian Self-Government*, 1983.

> In addition to making it more likely that discussions would achieve some success after decades of frustration, independent supervision and facilitation of negotiations would also add stability and continuity to the process.
>
> Roberta Jamieson has noted that Canada's traditional methods of dispute-resolution, largely drawn from labour relations models, are not appropriate or likely to succeed in Indian Nation-Crown negotiations.

> The methods which Canadian society has traditionally relied upon to advance a cause, to deal with disputes, and to arrive at solutions are often not suitable to deal in an effective manner with First Nations issues because they usually involve such profoundly entrenched and intricate positions....
>
> A mere statement of political commitment is not enough to fuel negotiations if momentum is to be maintained. Political commitment must be constantly evidenced by concrete results if the process is to offer promise. ... More than good intentions are needed. In fact, if it is true that the road to Hell is paved with good intentions, I think that road ends on an Indian reserve.[11]

Both sides need the patient objectivity and permanence of an independent secretariat or commission using alternative, culturally-appropriate dispute-resolution techniques to keep the negotiating process honest and moving forward.

In facilitated negotiations, all parties are held accountable for their commitments to meet timeframes. This is necessary if negotiations on Indian Nations issues are to be kept moving. In other areas, an impending strike in labour negotiations, for example, there is some urgency to fuel negotiations. Generally, governments feel no such urgency if there is not an independent facilitator with real authority to enforce accountability.

In order to facilitate efforts of the parties to arrive at mutually agreed upon solutions, a fact-finding commission might be established with the power to make initial determinations regarding facts in dispute and issues appropriate for negotiation. These determinations would then shape the formal negotiation agenda. Fact-finding could take place at the request of any party. As well, fact-finding could continue after negotiations to monitor implementation of agreements. The Penner Committee identified this need with respect to implementation of the "James Bay Agreement."

> Even after reaching their landmark agreement with the federal and Quebec governments, the James Bay Cree were faced with serious problems getting

[11] Roberta Jamieson, Address to the American Bar Association Convention Panel on Native Self-Government, August, 1988.

> governments to act and to provide funds. Moreover, there was no forum in which they could seek to have the agreement enforced. ... Disputes are bound to arise, so there must be a workable and expeditious mechanism acceptable to both sides to enforce the agreements.[12]

An independent commission might also be used to allocate negotiation funding so that Indian Nations' financial resources were at least equal to those available to federal and provincial governments at any point in the negotiation process.[13]

These common circumstances provide a further explanation as to why such independent commissions and secretariats are frequently proposed.

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[12] *Report of the Parliamentary Task Force on Indian Self-Government*, 1983, p. 67. Although Parliament and Quebec enacted concurrent legislation to give further effect to the agreement, the Grand Council of the Crees continues to point to violations of the statutes by governments.

[13] This role presumes that funding is provided in the form of grants or contributions, not as loans against fuure settlements, as is the current federal policy. Thus, while the *B.C. Treaty Commission* has been mandated to allocate negotiation funding to Indian Nations (see below), it is constrained by the federal government's loans policy and cannot do much to "level the playing field" in this regard. Sooner or later, the Indian Nations are required to pay their costs of negotiation.

PART II: CONCLUSIONS & OPTIONS FOR RENEWAL.

A. DYSFUNCTION AND THE BILATERAL TREATY RELATIONSHIP.

B. OBSTACLES TO A WORKABLE BILATERAL TREATY PROCESS.

C. RENEWAL OF THE BILATERAL TREATY RELATIONSHIP:

CONCLUSIONS & PROPOSALS.

The ethos of the Treaty is the real raw material that makes up the vision of a society all New Zealanders can adhere to:

partnership,
cooperation,
respect,
mutual benefit,
negotiation,
compromise,
good faith.

These are the principles we must adopt.

Prime Minister David Lange, Auckland, New Zealand,
October 21, 1988.

A. DYSFUNCTION AND THE BILATERAL TREATY RELATIONSHIP.

1. CONTEXT.

One usually understands a bilateral relationship to mean two parties, working together cooperatively to address and resolve issues in a way that serves their respective interests. Effective bilateralism usually depends on each party's willingness to give and take, to demonstrate commitment, and to treat each other with fairness and respect.

In light of today's situation, at the most primary level, an effective and authentic bilateral treaty process should have as its objectives:

* decolonization and empowerment of the Indian Nations;

* restoration of a land and resource base sufficient for Indian Nations to be self-sufficient and self-governing;

* jurisdictional realignment by federal and provincial governments to accommodate Indian Nations' inherent powers and authority;

* entrenching basic standards of justice, equity and "fair dealing" in the treaty relationship;

* an implementation plan and program to achieve these objectives

A bilateral relationship could be voluntary and can self-destruct, especially if one of the parties proves to be manipulative, unreliable or coercive. On the other hand, a bilateral relationship forged by a legally enforceable contractual agreement cannot be dissolved unilaterally - at least not without cost to someone. This is doubly true in the case of Indian treaties which entrench a bilateral relationship "for as long as the sun shines, the grass is green and the river flows".

How can an effective bilateral treaty process be sustained where one of the parties has always tended to be manipulative, unreliable and coercive? With great difficulty, to say the least. In such circumstances, bilateralism is defined more by the unequal powers of the participants than by legally enforceable treaty obligations. In effect, the bilateral treaty relationship becomes dysfunctional.

Under international law, if one of the parties to a treaty does not live up to its spirit or intent, the agreement becomes null and void. The offending party forfeits whatever rights or concessions that the treaty provided. If this principle applied

to Indian treaty signatories, withdrawal from a failed bilateral treaty relationship with the Crown would amount to re-assertion of sovereignty over their traditional territories. This may be a defensible legal principle.

In reality, however, dysfunctional treaty bilateralism means consignment to a state of limbo where Indian Nations are exposed to an endless series of federal prescriptions in a future that has little or no relevance to what was intended when Indians entered into treaty. This state of affairs reflects not only the
legacy, but also the perpetuation of colonialism with all of its attendant costs.

Insofar as treaty Indians are concerned, one can therefore posit two kinds of bilateralism, namely:

1. A bilateral Indian/Crown relationship maintained for the purpose of meeting treaty obligations in accordance with mutually acceptable rules of interpretation.

OR

2. A bilateral Indian/Crown relationship maintained for the purpose of legitimizing a host of different federally sponsored policy and program initiatives whose effect may be to amend, degrade or terminate the provisions of the original treaty.

The former could advance the basic objectives outlined above. The latter constitutes a rejection of those objectives. Aside from a short-lived treaty renovation initiative in 1985, there is no known instance where a bilateral process was established and aimed at agreement on the full meaning and implications of a treaty relationship and to put this into effect. Even when a bilateral process was originally established for such a purpose, it always ended up as a vehicle for federal objectives that had little to do with the spirit and intent - or the terms - of the treaties as understood by the Indian parties.

So, there are today no significant opportunities for substantive negotiations with respect to the treaty relationship - at the level of individual treaties, regionally or nationally.

Disputes between the parties on these fundamental issues continue to hamstring progress. These disputes include:

* the nature of the treaty relationship itself;

* the scope and intent of individual treaties;

* ways & means of implementing the treaties and resolving disputes.

1.1. Policy and Process: A Fragmented Landscape.

In the absence of any opportunity for squarely addressing these matters, Indian Nations are left to choose between a number of sectoral and compartmentalized forums that now occupy the field, none of which offer the prospect of substantive or comprehensive advance on these fronts.

1.1.1. Claims.

The federal government's 'claims' processes and policies have been firmly discredited as a basis for obtaining anything other than minimal gains with doubts remaining about long term benefits. Claims policy remains founded on extinguishment of aboriginal and treaty rights and non-recognition of the jurisdiction of Indian Nations. These policies have been determined unilaterally by Canada (and in some cases, provincial governments).[1]

In 'specific claims', the policy and process focus on the written treaty texts but even then they are selective: e.g., treaty land entitlement is accepted for negotiation (reluctantly) while treaty harvesting rights are routinely rejected. There is no opportunity to address wider issues, since it does not recognize the existence of the treaty relationship in anything more than the most literal and minimalist sense.

In 'comprehensive claims' (so-called "modern treaties"), extinguishment is still the foundation of policy, and the authority of Indian governments remains unrecognized - except inasmuch as it is required to obtain 'consent' to extinguishment of their title and rights. Since 1985, the federal government has disingenuously described its extinguishment policies as an "exchange" of undefined rights for specific "rights" defined in negotiations. Extinguishment remains the bottom line.

1.1.2. Litigation.

Litigation is a gamble with the odds (bad precedent, financial costs, settler courts, etc.) stacked against the Indian Nations. The results of litigation are at best piecemeal. Because the provisions of treaties differ, and in the light of the vicissitudes of litigation, the pattern of rights (and powers) established by litigation will differ from Indian jurisdiction to jurisdiction.

More important, the resulting pattern of rights respecting any given Indian jurisdiction does not necessarily establish a set of rights that can underpin the sort of relationship that Indian Nations want with Canada or the kind of communities that serve the aspirations of Indian Nations.

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[1] See RCAP paper on claims by John Olthuis and Roger Townshend for a more detailed critique of existing policy & process.

Litigation is basically adversarial in nature and hence makes it (virtually) impossible for the Crown to respect its fiduciary responsibility to Indians not only with respect to the matter under litigation but also more generally.[2]

Finally, since the time of Andrew Jackson's presidency, the enforcement of positive court decisions by settler governments has been a notorious problem. All of these are probable reasons why Canada and the provinces prefer litigation to authentic negotiations, regardless of what their stated positions may be.

1.1.3. Constitutional Reform.

Aside from the inclusion of s. 35 in the Constitution Act, 1982, numerous recent efforts at Constitutional reform - including or excluding "Indian agenda items" - have been unproductive at best, and at worst, disastrous. In any event, the fact that they are 'multilateral' has mitigated against the formulation of a unified response on the part of Indian Nations and has undermined the bilateral nation-to-nation relationship.

1.1.4. Special Purpose Negotiations & Initiatives.

Initiatives such as the Community Based Self Government process (CBSG), the Lands, Reserves & Trusts Review, the Alternatives to the Indian Act effort, and the Department of Finances' Review of Indian Taxation have been characterized as alternatives to the status quo. In reality, however, they have been closely circumscribed by existing federal policy objectives and sectoral in nature. In this sense they cannot offer holistic solutions or address fundamental underlying issues.

1.1.5. Unilateral Action.

Unilateral action - by either party to the treaties, or by third parties such as the provinces - creates 'facts' on the ground but, can lead to increased animosity and backlash.

[2] See "Renouncing the Old Rules of the Game", by Hutchins, Soroka & Dionne, for RCAP for a more detailed discussion.

B. OBSTACLES TO A WORKABLE BILATERAL TREATY PROCESS.

None of the courses outlined above provides the kind of framework in which decolonization, self-sufficiency, self-government, jurisdictional realignment, or the achieving standards of basic justice and equity, can proceed in a rational or coherent manner. Outcomes in fact can be, and sometimes are, inimical to these fundamental objectives.

The process of addressing the nature and scope of aboriginal & treaty rights as it exists is flawed, particularly with respect to ensuring just and rational outcomes.

A genuine and workable bilateral process between the federal Crown and Indian peoples is essential if treaties are to be more than historical artifacts. Some of the major problems that have to be addressed in laying the groundwork for a form of bilateralism that responds to the treaty concerns of most Indian peoples, can be summarized as follows:

1.0. LEGITIMATE AUTHORITIES.

Insofar as the federal government is concerned, there is usually not much confusion about the mandate of Ministers and officials. In important matters, one or the other operates under a prior authority of the Cabinet or a statute passed by Parliament. In the case of the 'historic' treaties, federal negotiators offered their solemn pledges as personal representatives of the Queen or King. Section 91(24) of the Constitution Act, 1867 can be read as a constitutional undertaking by Canada to fulfil the treaty obligations of the British Crown. The problems here are in obtaining a mandate that would allow for substantive discussions that go beyond the limits of existing policy, and resolving the jurisdictional 'ping pong' game that is often played by Canada and the provinces.

In the case of Indian people, succeeding generations of federal interventions in their political institutions often have obscured the legitimacy of authorities who purport to speak for them. The treaties were made with Indian Nations, but the political institutions of Indian people today are more a reflection of the federal legislation and policies that were intended to undermine and frustrate the free exercise of Indian nationhood. Today, what Indian leaders, governments or organizations have the authority and mandate to enter into a treaty process, particularly if the end result extinguishes the rights of future generations?

The first consolidated Indian Act came into effect in 1876. This statute, and its various subsequent amendments through the years, operated to redefine Indian identity, detribalize and fragment Indian society, displace traditional systems of Indian governance, and foster a state of anarchy and dependency on reserves. As matters now stand, Canada does not acknowledge the

existence of Indian Nations[3], nor, for the most part, is there any consistent system of accountable governance in place that speaks for such Nations. What there is instead are:

* Regional and national organizations funded originally by the federal government for the primary purpose of advising governments on policy and program issues. Leaders of such organizations are usually elected by chiefs rather than by a general vote.

* Tribal councils and agencies that are federally funded primarily for the purpose of delivering various federal or provincial programs to member communities. These organizations in many cases fill the role of the former District Offices of the Department of Indian Affairs, which they displaced.

* Community chiefs and councils, for the most part, have to function under the provisions of the Indian Act and derive their political and legal status - in Canada's view - from this legislation, not from Indian nationhood. Again, in Canada's view, their powers are not "inherent" but derivative and devolved.

* Special purpose native leadership groups or initiatives sometimes are created, funded and occasionally staffed by the government to achieve various policy objectives. (For instance, the Chiefs Governance Working Group and the Indian Lands Management Board, associated with the First Nations Chartered Lands Act proposals).

Although there are exceptions, organizations and entities whose existence and activities are determined by federal legislation and policy cannot necessarily be expected to speak authoritatively on behalf of Indian Nations (in the sense that these nations have existed and exercised their authority in the past).

There are many factors at play which mitigate against the restitution and development of institutions of Indian nationhood and inherent governance. On balance, the extent to which Indian peoples have been able to adapt to these imposed measures and maintain some degree of political continuity is a testimony to their resilience.

At the same time, existing organizations are in most cases extremely vulnerable to federal pressure, particularly with respect to resourcing. Perceived 'intransigence' or 'unreasonableness'

[3] Indian nations in this context refers to the United Nations definition contained in the Universal Declaration of Human Rights, ie., a people who share the same language, culture, traditions and customs, and who occupy the same geographical region. Canada has resisted the application of this definition to Indian nations. The term has been corrupted in Canada so that individual communities are now referred to as 'nations'.

in the face of stated federal policy or expected patterns of behaviour are often met with sanctions. In some cases, federal authorities have been known to seek out or establish alternative groups whom they expect will be more amenable to their objectives. (Divide and rule.)[4] In others, funding and negotiations are simply suspended or terminated.[5]
Accountability, representivity and legitimacy are today major issues in Indian country which have yet to be fully addressed by most nations. Until these matters are resolved internally by the citizens of the Indian Nations themselves, bilateralism will remain discounted and reduced to a process whereby the federal government is dealing with organizational extensions of itself.

2.0. THE NEGOTIATING GAME.

The federal government tends to define its obligations to Indian peoples in the narrowest legal terms. All other kinds of involvement with Indian Nations and their citizens are relegated to a discretionary category. We have seen in other chapters how this characterization of the relationship has been a licence for neglect, denial and ultimately off-loading of its trust obligations and fiduciary duties.

In most cases, it is the domestic courts who identify particular species of 'lawful obligations'. The Supreme Court of Canada's 1973 decision in Calder for example, legitimized - for the purposes of Canada's law - the concept of aboriginal title.
Other court decisions (ie., Sparrow, Simon, Geurin, Sioui) have accepted that the Crown's fiduciary duties are of legal consequence, that the treaties are binding, and that they require a liberal approach with respect to interpretation. Much of this recent judicial guidance speaks in global terms about the nature of the relationship between Indian Nations and the Crown, laying out principles with respect to how the relationship is to be conducted.

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[4] The creation of the 'Woodland Cree' Band as an alternative to negotiating with the Lubicon Cree is a notorious and current example. But this strategy has a long pedigree: *"The government.. employed a variety of tactics to pressure native negotiators into accepting the government's terms, such as threats to withdraw the offer to treat, warnings of the consequences of white settlement without a treaty, and attempts to undermine the role of chiefs and exploit differences among the bands."* - see Peter Usher, Frank Tough and Robert Galois, "Reclaiming the Land: aboriginal title, treaty rights and land claims in Canada", Applied Geography (1992), 12, p. 117.

[5] This represents a continuation of past practise. Control over fiscal and material transfers has often been used by federal authorities to reward 'appropriate' behaviour or punish 'inappropriate' behaviour. See RCAP's Health & Healing Policy Paper (draft, 5 May 1994): pp. 192 ff. & pp. 204 ff. for a historical review of this practise as it applies to relief and medical assistance.

Instead of responding in these terms however, most federal and provincial governments have acted to contain and limit the impact of these decisions in order to preserve their power, policies and revenues. Any possibility for a holistic approach to the treaty relationship has been fragmented into policies or programs which preclude any opportunity for joint definition of treaty principles, standards, agenda or objectives.

The 1973 Native Claims Policy and its successors - 'specific' claims, 'comprehensive' claims, and claims-of-another-kind, were direct responses to the repercussions of Calder and subsequent cases that built on it. Canada was faced with the fact that Indian Nations' interests in the land had standing in domestic law, and further that the Crown owed a legal duty with respect to the treaties and the conduct of the overall relationship.

Its response was to see these things as liabilities rather than positive, honourable responsibilities and the result were claims policies whose objective has been to extinguish aboriginal and treaty rights and terminate 'liabilities' (with some leeway for regional variation). Put another way, Canada's response to the legal reality of aboriginal title has been to seek its extinguishment rather than to seek its positive accommodation.

DIAND's Lands, Revenues, and Trusts Review, its successor the 'Chiefs Governance Working Group', and associated initiatives were largely a reaction to Guerin. Canada's response in this instance was to assess, limit and shed the perceived 'contingent liabilities' associated with the relationship between Indian Nations and the Crown - reducing it to the smallest possible number of component parts that are admitted to be 'lawful obligations'. The objective then becomes one of successfully administering the problem until a way can be found for it to be discarded, instead of accepting these responsibilities and responding in a way that would support an equitable relationship.

Indians, in conventional political terms are relatively weak, having been dispossessed of their economic base, their recognized spheres of jurisdiction, and cohesive political & social institutions. The inherent difficulty in negotiations with the federal government is that, whether they are bilateral or not, the playing field always favours the federal interest - so much so that often Canada's 'best alternative to a negotiated agreement' (BATNA) is simply to leave the table and terminate negotiations.

For the federal and provincial governments, the motivation to seek comprehensive solutions to the challenges the treaties pose is very low if one adopts the conventional wisdom on these points:

* such solutions promise, in the conventional way these things are calculated, to be expensive;

* jurisdictional matters, that could have an serious impact on the constitutional share-out of powers and responsibilities between the federal and provincial levels,

could be at stake;

* the claims of Indian Nations respecting the treaty relationship touch on the sovereignty of the Canadian state; and

* success would not necessarily provide for electoral gain; the contrary is at least as likely.

These remain the principal reasons why other governments have traditionally acted on the three fundamental (but unstated) responses to these matters: avoidance, denial and delay. This is their BATNA.[6]

Reference has been made to the fact that externally induced political and structural dysfunctions in the Indian body-politic often compromise the capacity of Indian Nations to protect their interests. Federal negotiators come to the table constrained by guidelines that have been pre-cooked and blessed previously by the Cabinet or senior management. Disempowered Indian representatives dealing with mission-driven federal officials reduces bilateralism to little more than a ritual which legitimizes a foregone conclusion.

Discounting shifts in policy rhetoric, federal Indian Affairs policy has always maintained a consistent overall direction. Even before the first "Commission to Enquire into Indian Affairs" submitted its report in 1847, Indian Nations and their citizens were targeted for assimilation into Canadian society through the incremental invalidation and termination of their rights. A 'bilateral concensus' in practise has come to mean that federal assimilation objectives have prevailed - or at least have not been compromised.

A sustained bilateral process to address the ways and means of restoring Indian nationhood, providing an economically viable land and resource base, recognizing inherent powers of Indian government, and defining a relationship between Indian Nations and Canada's federal system, has never taken place. In order for these matters to be substantively addressed, a fundamental change in the power-relationship between the parties is required.

Adversarial negotiation, face to face or refereed by the courts, means legal and political gridlock that ratchets forward or backward according to the contents of the latest court decision or claim settlement. In this context, the enunciation of broad principles toward comprehensive solutions is seen as not possible or impolitic. The current situation resembles, in its major characteristics a zero sum game, something which is hardly productive of justice.

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[6] For a more detailed discussion of the problems inherent in current approaches to 'negotiation', see Morris/Rose/Ledgett "Analysis of Canada's Comprehensive and Specific Claims Policies and Suggested Alternatives", draft for RCAP April 1994; also Andrea McCallum, "Dispute Resolution Mechanisms in the Resolution of Comprehensive Aboriginal Claims" for RCAP, May 1993.

3.0. CONSENT.

The principle of consent is embodied in the Royal Proclamation of 1763 and has been affirmed in a number of court decisions since then. For example, in 1984, in Guerin, it was noted that

> ... it is the acknowledgement of an historical reality, namely that Indian bands have a beneficial interest in their reserves... and interest which cannot be derogated or interfered with by the Crown's utilization of the land for purposes incompatible with the Indian title unless, of course, the Indians agree.[7]

Although treaty-making is predicated on consent, and all subsequent land surrenders required the signature of Chiefs and headmen to be effected, the concept of consent has no precise meaning for the federal government, even today. One can reasonably assume for example, that a successful outcome to a bilateral process would be an agreement on a course of action.

Conversely, if there is no agreement, one would expect that there would be no grounds for action. This is not how consent is perceived or applied however by federal authorities. After all is said and done and regardless of the doctrine of consent, the federal government reserves for itself the prerogative to do whatever it wills. The unfettered exercise of this power of discretion has, as we have outlined in previous chapters, been the cause of enormous loss and damage.

The federal rationale for Indian consent may arise out of the difficulty of identifying Indian authorities whose agreement on behalf of a larger group will stand up in court if challenged. Also, a negotiations process could still reach an impasse even through the odds are heavily stacked in favour of the federal government. In such circumstances, federal authorities do not want to be left with their hands tied, especially if some form of intervention is considered necessary in the national interest, or for any other reason.

From the point of view of the federal government, therefore, the main considerations in engaging in any form of bilateralism for the purpose of obtaining agreement or consent from Indian Nations can be summarized as follows:[8]

> 1. As a general principle, whatever is done in seeking consent should be overseen by lawyers in the Department of Justice to ensure that there is no breach of fiduciary duties and trust obligations - as defined by Canada.

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[7] Guerin v. The Queen [1984] 2 S.C.R.

[8] See "Fiduciary Relationship of the Crown with Aboriginal Peoples: A Guide for Managers" Report of an Interdepartmental Committee of Deputy Ministers on Justice and Legal Affairs: July 1993.

2. Groups who are owed fiduciary duties would be prime candidates for bilateral interaction because such duties establish a legal relationship (not the same as 'lawful obligation'). The federal government identifies such groups as Indians registered under the Indian Act, beneficiaries of treaty agreements, and any group that is recognized by federal authorities for the purposes of dealing with Indian title, rights or related issues.

3. The federal government defines *negotiations* with aboriginal groups as a process aimed at arriving at legally binding agreements based on mutual consent. (We have already addressed some of the problems associated with whether or not full and informed consent can be assumed under existing practises related to negotiation.)

4. Federal authorities define *consultations* as a process that requires neither agreement nor consent on the part of Indian Nations. This suggests that if agreement is not possible, a negotiation exercise would be downgraded and redefined as "consultation." The implication is that the federal government, having consulted with interested parties, can then take unilateral action at its pleasure.

5. In instances where bilateral negotiations produce a concensus between the two parties, the result may not be final. To make sure that the Indian participants in negotiations are actually speaking for a particular group or community, a ratification process is required. This procedure is used most often whenever the agreement amends a treaty, alienates Indian territory, extinguishes aboriginal rights, or releases the Crown from a 'lawful obligation' or liability.

6. A ratification procedure that is immune to future legal challenge has proved elusive. There have been some concerns raised that those who are expected to vote are not always given a complete sense of the content or the consequences of voting 'yes' or 'no,' i.e., are not "fully informed." This is compounded by the fact that most modern agreements are very dense, technical and legalistic. In some instances, off-reserve members have objected to being excluded from voting on issues affecting their community. There have been cases where ratification votes have been repeated until the proponents of an agreement obtained the needed endorsement.[9]

[9] Some recent court judgements have adopted the principle that 'modern' treaties or land claims agreements are not subject to 'liberal rules of interpretation' because the leadership and negotiators understood fully what was on the table (ie., George Henry Howard v the Queen, SCC, 12 May 1994). However, this does not address whether or not the people themselves had full

4.0. INTERPRETATION: PRINCIPLES VS. SPECIFICITY.

What are the Treaties and what is the Treaty relationship? For both parties they were a means of seeking the security that would provide for future development and prosperity in the context of coexistence. This appears self evident.

But a major problem exists with respect to the interpretation of the instruments themselves. The Crown relies on written text - which it drafted and which it interprets unilaterally. This preference for unilateralism is contrary to the nature of the treaty relationship to begin with, but the focus on written text belies a deeper problem which results from a preoccupation with compartmentalization and specificity.

No one really knew what would come in the future - witness the Crown's agents expressing their (seemingly) honest belief at treaty councils that the changes to come would not be drastic or prejudicial. Regardless, the parties agreed to meet the future together on certain **terms**.

These terms from the Indian perspective are the principles which would guide the parties in meeting the challenges and changes that the future would bring. In contrast, the terms which Canada has chosen to rely on are those that found their way into the written treaty document: extinguishment above all, but also specific and finite promises, narrow in scope and incidental in terms of government's overall objectives.

Whether you look only at the written text or consider "spirit and intent", the pattern of treaty relationships and the treaty rights they express vary widely in terms of their specifics. But there is a point of convergence at the level of principle and the fundamental nature of the treaty relationship itself which cannot be denied and which is of crucial significance in this discussion.

Paul Williams speaks of the Treaties and the use of wampum in recording the context and basis of agreements reached. The wampum assists in recalling the obligations and commitments of the parties in the holistic and comprehensive sense - as a way of helping to adapt to changing circumstances with consistency:

> Another consequence of using wampum is that it is the *principles* rather than the legalistic details that are recalled. It is the principles that are later recalled and re-ratified, not the particulars and details which might lead to arguments and to

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knowledge. One way to obtain a clearer picture might be to take a sampling to determine how grassroots people, who participated in ratification votes for claims settlements, actually understood the key provisions of those settlements. This understanding could then be compared to the actual provisions.

a need for lawyers.[10]

> The principles of respect, friendship, unity of mind, and peace are embodied in the Two Row Wampum and the Silver Covenant Chain. The idea that nations can be of one mind without becoming subsumed one by the other is constant in those relations and is drawn from the Great Law of Peace.....
>
> ... [These].. concepts represent a continuum in relations, dynamic and flexible in dealing with often turbulent changes in politics, war and peace and evolving technologies, while constant and consistent in fundamental principles.[11]
>
> The laws of Canada seek "treaties". They seek specific events and councils at which specific promises were made. The laws of the Haudenosaunee seek the relationship, and find repeated councils at which the relationship was refined and reaffirmed.[12]

The same point has been made in considering the numbered treaties and their scope:

> ... treaty rights are not defined by the specificities in the treaties, but what these specificities were meant to express: the recognition of autonomy for the First Nations and their citizens, as well as material compensations for what they gave up in the treaties.[13]

The notion of establishing principles which in turn would inform a determination of the specifics as between the parties has been recognized by Canada's courts as a fundamental characteristic of the relationship between Indian Nations and the Crown:

> In the Calder case, Laskin J. wrote in 1973 that *"the Proclamation must be regarded as a fundamental document upon which any just determination of original rights rests."* And he added, that *"it contains general statements, wanting*

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[10] Williams 1993: p. 50.

[11] Ibid.: p. 108.

[12] Ibid.: p. 117.

[13] 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" (for RCAP, 20 April 1994): p. 2.

in particularity. In this respect it is like other Bill of Rights."[14]

Of course, given the contents of preceding pages, this difference in approach is not hard to explain. Principles and standards are hard to dismiss or dispense with once agreed to. On the other hand, specifics often lend themselves to isolation, reduction, and rationalization, after which elimination and termination are but small steps.

5.0. HOLISM VS. FRAGEMENTATION.

Closely connected to this conflict between principles and specifics is the priority which the parties attach to keeping things whole ('comprehensive' in the authentic sense) as opposed to breaking things down. In Part I above dealing with lands, health, education, social services, etc., the cause- and-effect relationship between compartmentalization and indigenous dislocation was something that surfaced repeatedly - in our review of the history, the literature, and the work of RCAP's policy teams.[15]

We have described how the treaty relationship has been deconstructed over time, each fragment being removed by Canada and placed in a variety of disconnected cubby-holes - policies, programs, non-negotiables, etc. Whole communities have been divided and splintered by the Indian Act. The social, economic and political aspects of the treaties which were central to their conclusion have been subdivided into a bewildering variety of initiatives and processes which, despite Canada's stated intentions, have only served to move things from bad to worse. Off loading and the actions of provincial governments in their turn have subdivided the circle even further.

This is not news. In response to the 1969 White Paper, the Manitoba Indian Brotherhood tabled a document called Wahbung: Our Tomorrows, which highlighted the same problem. The Economics policy team quotes:

> In developing new methods of response and community involvement, it is imperative that we, both Indian and Government, recognize that economic, social and educational development are synonymous, and thus must be dealt with as a "total" approach rather than in parts. The practise of program development in segments, in isolation between its parts, inhibits if not precludes, effective utilization of all resources in the concentrated effort required to support economic,

[14] Calder, 1973, quoted in Lithman 1994: p. 26.

[15] Time has not provided us with an opportunity to review all of the Commission's policy work. We make this point based on consideration of the draft policy papers re: Health & Healing, Education; Economics; Treaties; and Land & Resources. See relevant chapters for specifics.

social and educational advancement.[16]

Over twenty years later, the Commission has received the same message from those who attended the hearings:

> All of these along with constitutional reform discussions, protection and implementation of treaty rights through the treaty making process and the legislative change discussions should not be done in isolation of each other since they are all part of a holistic approach to First Nation self-government.[17]

> I also think that in the discussion of self-government and land claims we can include all of these other issues. Any aspect which affects our life, I think, should be dealt with. It is ridiculous to separate items. We have our little Indian Act over here; we have our land claims policies here; we have our self-government over here. That's not the way the Dene people are. The Dene people have always maintained a strong relationship with the land and the way they do things. Again, I feel that that is another concentrated effort by a government to break up the way that we live our lives.[18]

There can be no doubt that this difference in approach is occurring at the most basic conceptual level. However, the facts indicate clearly that compartmentalization has played an overwhelming role in the dislocation and colonization of the Indian Nations, and that it continues to do so.

In light of the empirical evidence[19], this issue cannot be dismissed as simply a 'difference in world view' or 'dispute over interpretation'. Rather, it is a fact that must be recognized and addressed if the parties are in any way serious about resolving the problems that confront them. Taking critical matters outside of the treaty relationship has led to a history of loss and abuse. Putting them back in is essential to future security and development.

Something worthy of note in this connection is the fact that holism is not a principle that emanates only from the Indian Nations in the context of the treaty relationship and life overall. There are significant and growing movements in the non- Indian disciplines of health, education, 'social services' and economics which recognize that a holistic approach to human dynamics and

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[16] Wahbung: Our Tommorrows (Manitoba Indian Brotherhood, 1971); quoted in Economics, Ibid.: p. 119.

[17] The Pas, Man. 92/5/20: Chief Harold Turner: pp. 251-52.

[18] Fort Simpson, NWT 92/5/26, Greg Nyuli: pp. 294-295.

[19] Again, see relevant chapters in this paper on Economics, Health, Education, and also the work of these policy teams.

development is the recommended prescription for western society as a whole.

If it is accepted that the legacy of fragmentation must be healed by a return to holism, then the treaty relationship is the logical and appropriate vehicle for doing so.

C. RENEWAL OF THE BILATERAL TREATY RELATIONSHIP:

CONCLUSIONS AND PROPOSALS.

1.0. DESTINATIONS, CHALLENGES, REQUIREMENTS.

As it is practised currently, bilateralism has little if anything to do with the maintenance of a treaty relationship. It functions rather as a vehicle to be employed by Canada when it serves in furthering its policy objectives. In the final analysis, the Indian party to a bilateral exercise could be any entity, large or small, that is prepared to play in Ottawa's ball court on its terms.

The development of an authentic bilateral treaty process will require fundamental reorientation of policy and practise on the Crowns' part, and a similar realignment among the Indian Nations. There are two alternative destinations for Indian Nations in Canada:

> **Termination:** Ultimate disconnection from home community, lands and nation through the incremental reduction & elimination of treaty and aboriginal rights, accompanied by dispersal into Canadian society. This requires only maintenance or minor adjustment of the status quo, and letting time take its course. Termination would likely occur under the aegis of neo-colonial "community self-government" arrangements that would devolve administrative control over programs and services to Indian "elites" without fundamentally changing the power relationship between federal and provincial governments and Indian Nations. (Instead of colonial administration under the Indian Act, Indian communities would assume self-administration of their own poverty and disempowerment.) Regardless of the scenarios and strategems employed, the result, we believe, would be increased loss, suffering and cost for all parties.
>
> **OR**
>
> **Self-determination & Renewal:** Renewal of Indian nationhood, restoration of a viable land & resource base, and recognition of the inherent powers required by Indian governments to fulfill their treaty and other responsibilities. This would require fundamental jurisdictional realignment and significant change in the power relationship between Indian Nations and the federal and provincial governments. This would also require basic transformations and renewals of the internal governing structures of many Indian Nations. The result, we believe, would be increased health, productivity and prosperity - for all parties.

The federal government in the past has been committed to the former goal. Most Indian peoples subscribe to the latter. There is no middle course or third option that makes itself apparent.

Given the complexity and magnitude of the situation, an authentic renewal of the treaty relationship would seem to require a phased process which provides an alternative way of addressing issues of importance to the Indian Nations and meeting the basic objectives we cited earlier. For Indian Nations who are parties to 'historic' treaties, the bilateral process along the lines outlined amounts to treaty implementation. For Indian Nations who do not have a treaty relationship, the bilateral process would be based on the same principles, and lead to treaty making in the orthodox sense.

The challenge is to set in train a self-motivating, self- generating political process that, over time, achieves comprehensive solutions. Of necessity, this will need to take place on a number of levels and in a number of ways. Some things will need to occur simultaneously, others can only happen sequentially. Some aspects will have to be dealt with at the aggregate level (ie., nationally, regionally, by treaty territory), others strictly at the local level.

2.0. SETTING PRINCIPLES AND STANDARDS.

This introduces one major question which we have considered but for which we can offer no cut and dried answers. How to balance (a) the prerogative of each Indian nation to engage the federal Crown in discussions related to the particular treaty to which they are a party, with (b) the need for some assurance that a basic set of agreed upon principles and standards will apply to all?

Based on our reading of past and recent history and our assessment of circumstances, there is a clear need for mutual agreement between the Indian Nations and Canada on basic principles and standards for the bilateral treaty process.

First, a consideration of indigenous law and convention. There being more than 40 Indian Nations in Canada, each with their own laws, culture and territory, it must be recognized that there is a lot of diversity. At the same time, though, we have observed and reported on a convergence of understanding generally among Indian Nations with respect to basic principles that apply to the conduct of the treaty relationship and the responsibilities of the parties. These can provide some guidance in anticipating what global principles and standards might be applied from indigenous law.

Turning next to the other party - the Crown and its personalities - again there is a diversity in understanding and intent - the Imperial Crown, the colonies, the Dominion, provinces, etc. Each developed their own policy, practise, laws and so on. But at the same time there is here also a degree of convergence and continuity at the level of basic principle.

The Royal Proclamation of 1763 set standards which we have discussed previously and which in a number of cases were subsequently incorporated into treaties. Other Indian Nations who entered into treaty long after have also cited it as a factor in their understanding of the treaty

process, most recently before the Commission.[20] As well, the Supreme Court of Canada and the British courts have had occasion to consider and speak to its application in Euro-Canadian law.

Canadian courts have also been considering principles related to treaty interpretation, the fiduciary duty, the degree of 'justified' legislative intrusion, etc. and incorporating them into an emerging body of precedent.[21] These, like the Proclamation often speak broadly in terms of principle and conduct. And they have been acknowledged to some degree by Indian Nations as stating basic principles and standards which might be applied to consideration of the treaty process.

There is, therefore, some basis for belief that there can be a tangible degree of convergence of basic principles, not only among Indian Nations, but also between Indian Nations and the Crown's own legal tradition. (This, of course, notwithstanding past and continuing conduct of the Crown's agents.)

From another vantage point, development of an agreed upon framework & principles at the global level ('out in the open') would serve to allay concerns about the possibility of divide-and-conquer or the manipulation of particular circumstances to create precedents.

With respect to the practicalities of time, fiscal resources and the organization of negotiations, there is also great benefit in first establishing basic principles and standards at a global level, followed by treaty or tribal-level negotiations within the framework standards that have been established. There would be no need to reinvent the wheel in each treaty area.

However, even if this approach proved acceptable to the parties, the matter of representation - which we have already discussed - still remains. Among Indian Nations and representative organizations, there are wide variations in the basis and character of governance and leadership. The question "Who speaks for the Nation (or Nations)?" will have to be answered before embarking on a process aimed at comprehensive treaty-based solutions.

At the same time, some Indian Nations may be ready and anxious to proceed with substantive negotiations, while others may not be, preferring instead to prepare carefully and move cautiously. The former may not be willing to wait until the stage had been set, while the latter might be glad for breathing space and a clear view of the terrain ahead.

Certainly, there are numerous other factors which come into play whenever movement toward fundamental change is seriously considered. Not all of them can be predicted or accounted for.

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[20] In reviewing transcripts of the hearings, Intervenor submissions and contractors' reports, it is hard to find many that do **not** mention the Proclamation.

[21] For instance, Calder, Guerin, Simon, Sparrow, Sioui, etc.

At the same time it would be presumptuous to lay out a ready made theoretical 'bilateral model' before going through the necessary steps of consultation, feedback, adjustment, and acceptance.

Only the parties themselves can determine the location and characteristics of their destination. We can, however, try to provide a rough roadmap in the hope of assisting the parties in their journey.

What follows is by no means exhaustive or definitive. Rather, these suggestions are offered in the hope that they may contribute to RCAP's overall development of approaches and recommendations in this area.

3.0. FOUR STAGES OF TREATY RENEWAL.

The four stages of treaty renewal set out below are proposed as a starting point for conceptual and policy development on bilateral treaty renewal. They represent potential components of what inevitably will be a comprehensive and long-term process of fundamental realignment and paradigm shift in Canada.

Stage I: Recognition and Reconciliation.

The federal Crown must embrace and acknowledge the bilateral treaty process as the basis for its relationship with Indian Nations, and commit to an authentic renewal of this relationship, with all that it implies. This could be done by proclamation or parliamentary resolution or by other means, but its significance would be to formally open the door, set the context, and trigger substantive movement toward justice and equity. It would be not unlike the Royal Proclamation of 1763 (in terms of stated purpose and direction), and in this sense would provide a clear sense of historical and legal continuity.

An aspect of this stage could be establishment of a National Treaty Commissioner's Office mandated to oversee implementation of the treaty renewal process.

Stage II: Empowerment and Preparation.

Each party has homework to do before substantive or treaty specific negotiations can take place. Some of this homework is internal to the parties, some will require collaboration and cooperation. In each case it will entail substantial effort.

This stage could include:

* The development of agreed upon objectives and principles with respect to the nature and scope of the treaty relationship in global terms.

* The development of agreed upon principles and standards to be applied to treaty interpretation - again, in global terms.

* The renewal of Indian nationhood by Indian peoples themselves- moving beyond the definitions of the Indian Act and the fragmentation imposed by 'on/off reserve' policy directives - and implementing Indian government institutions that are consistent with Indian nationhood and which are mandated by the free and informed consent of Indian peoples to exercise the inherent powers and jurisdictions of their respective Nations. Build (or re-build) where necessary Indian political organizations to represent the diversity of Indian interests effectively at every relevant level of jurisdiction (ie., every level of governance that, as a matter of practical significance, has an impact on Indian well-being and the expression of treaty rights).

* Consideration of interim measures which could be put into place to 'hold the line' until substantive negotiations commenced. For instance, what happens to claims negotiations or litigation already underway? What about off-loading? What about continued alienation of tribal lands and resources to third parties?

* Identifying the extent of the land base and resource equity that is necessary to support viable and healthy communities and nations.

* The funding of 'Indian programs' and services should be transformed, beginning with a determination of the real costs of the status quo and an accurate accounting of the level of current expenditures. This would be followed by a rigorous cost-benefit analysis and ultimately a comprehensive change in the way fiscal resources are targeted and delivered.[22]

* Identifying the structural adjustments necessary to provide for the exercise of Indian Nations' jurisdiction and the fulfilment of their treaty responsibilities (building the "exit doors" for provincial and federal jurisdiction, as required).

* Identifying the structural changes needed to ensure that the Crown is able to fulfil its fiduciary and trust responsibilities, and maintain the standard of conduct required of a fiduciary.

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[22] This cost/benefit analysis must take into account transaction and transfer costs; ie., not just 'program dollars' but also the overhead and operations of the bureaucracy itself.

* A significant and sustained effort at public education to foster a positive climate of support in which to implement fundamental change.

[Note: Some of the elements set out above also could form the basis of the mandate and workplan for a National Treaty Commissioner's Office.]

Essential to this stage is a willingness on the part of the Crown's representatives to seriously revisit the ways in which they organize their accounts and divide up the world. In other words, they must relinquish the monopoly which they have asserted over the power of defining political "reality."

The 'changing of accounts' has been a recurring theme throughout Part I of this paper. Were the full costs of the current "administration" of Indians to be known, it might be possible to re-cast the parameters of the negotiating game, at least as far as financial encumbrances are concerned, in "positive-sum" terms.

The deconstruction of the treaty relationship and its fragmentation into various compartmentalized policies and programs has been another theme in this analysis. So has the definition and division of 'property' and the rights & interests associated with it. In both of these areas, a return to holism and comprehensive consideration of the issues is a prerequisite to success. In the same sense, the literalist focus on specifics normally pursued by non-Indian governments needs to give way to a broader discussion of principles and objectives.

Stage III: Framework of Bilateral Treaty Principles and Standards - Table of National Recognition, Coexistence and Reconciliation.

If successful, Stage II will have set in train a series of positive developments in Indian country and in the corporate culture of the federal and provincial bureaucracies. This creates the possibility of progress along a wider front: politicians - and the public - will be aware of the enormous costs of "administering" Indians; the political costs of failure to deal with a radical (if not nihilistic) and younger Indian population will be more apparent (and imminent); the federal-provincial sets of conundrums will have ripened further; bureaucrats might more amenable to changes in their roles and duties respecting Indians; the focus of international attention might be more closely focused on the treatment of Indians.

Setting a date for a "Conference," "Council" or "Table" of "National Recognition, Coexistence and Reconciliation" early in Stage I or II would create a climate more positive for the sort reforms noted above. It would accentuate the positive effects of these reforms and focus activities on fundamental over-arching goals.

The subject of such a conference or council would be the renewal and continuation of bilateral treaty and treaty-making processes. The primary objective would be mutual agreement on

cornerstone principles and standards for treaty renewal.

Option A: A constitutional conference of Indian Nation representatives with the federal government.

From a maximalist - and legally correct - Indian perspective, the object of such a conference would be the constitutional entrenchment of the treaty relationship, including fundamental priinciples and standards.

Because of the inter-play among Indian treaty and aboriginal rights and the division of federal/provincial powers it is unlikely that the Federal Government would agree to such a conference. The absence of the provinces would give such a conference an entirely legal character in which, because of the division of powers and responsibilities, the Federal Government would not be in the position of being able to discuss the full range of treaty issues.

Option B: a full constitutional conference encompassing the provinces, the Federal Government and Indian Nation representatives.

The Charlottetown Accord - and the role of Indians in producing it - must be accorded exceptional status; the circumstances and coalitions that produced the Charlottetown process are not likely to be repeated (in the foreseeable future). From the vantage point of the Indian Nations, the presence of the provinces would
render the entrenchment of treaty rights problematic and be a cause for internal divisiveness. The main agenda items of such a conference would refer only tangentially to treaty concerns and aboriginal rights. Indeed, as has happened in the past, the treaty agenda could easily "get lost" in the process of federal-provincial negotiations.

The legal expression of rights and responsibilities arising specifically out of the treaty relationship need not only come about through a constitutional amendment. With treaty and aboriginal rights recognized and affirmed in s. 35 of the Constitution Act, 1982, there already exists a firm legal foundation in settler law for renewal of the treaty process.[23]

Option C: An International Treaty Council similar to the Councils held at Kahnawake in 1760 and Niagara in 1764.

This option would represent a renewal of the long established tradition of the Crown meeting with many Indian Nations at one time to discuss and confirm overall principles and rules of

[23] In Sparrow, the Supreme Court of Canada stated clearly that the recognition and affirmation of aboriginal and treaty rights found in s. 35(1) of the Constitution Act, 1982 provides a solid foundation for the negotiation of these matters.

conduct through treaty. The result would be a "framework" or "umbrella" treaty between the Federal Crown (Canada) and the Indian Nations, setting out basic principles which would apply to the treaty relationship and also perhaps a process for subsequent treaty implementation and treaty-making activities at the level of each Indian nation or in each treaty area.
This option would not require constitutional amendment, since the Federal Crown would be exercising the executive's prerogative to enter into treaty. The result, however, would be constitutional entrenchment of treaty principles and standards via Sec. 35 of the Constitution Act, 1982.

This option would not require direct provincial participation or consent in strict terms, although as a practical matter, any principles touching on provincial heads of power would require some sort of provincial consultation - at least with respect to treaty implementation principles. In this regard, parallel government-to-government discussions between the Indian Nations, the federal and provincial governments (primarily at a senior officials level) could be deployed on a tripartite or bilateral-bilateral basis in each region of the country or each treaty area.

Of the three options identified here, we recommend Option C, an international Treaty Council, as being the one which most closely conforms to the history and principles of the treaty relationship which we have outlined throughout this paper.

Stage IV: Nation-based Treaty-making and Treaty Implementation.

Stage I is intended to set the overall process in motion and frame the context. Stage II is intended to empower Indian Nations and inform/reform Federal Crown agencies. Stage III gives expression to that empowerment in a national agreement on treaty and treaty-making principles and standards.

Stage IV implements fully the right of Indian Nations to enter into treaties or treaty-implementation agreements with respect to their lands, resources, economies, societies, and other key interests of their respective peoples. With principles and standards secured by mutual agreement in Stage III, treaty implementation can proceed in Stage IV on a tripartite or a bilateral-bilateral basis, while treaty-making can commence on a nation-to-nation and government-to-government (bilateral-bilateral) basis.

In summary, the series of processes established in each of these four stages provide a means whereby Indian rights can find practical expression through direct, principled negotiations focused on renewed treaty-making and treaty implementation.

APPENDIX I:

EVALUATION CRITERIA FOR BILATERAL PROCESSES.

Regardless of the route that will be followed and the stops along the way, we assume that some kind of bilateral process associated with the treaties will be eventually be put into place. Some criteria should be considered for use in the process of development, and as an aid in performance evaluation. We therefore offer the following as a possible basis for assessing the ability of a bilateral structure to produce equitable results. These were developed by the Assembly of First Nations' Centre for Treaty Advocacy in 1989-90, built upon by the Union of Nova Scotia Indians in 1993, and with some minor adjustments, are presented below.[24]

Appropriate Political Authority.

An early signal of the parties' commitment to a process can be found in the authority under which the forum is set up, and the authority of those who are designated to represent the parties themselves.

Mutual Agreement: An Equitable Forum.

A forum that recognizes the principle of equality between the parties will allow each to introduce issues and agenda items, and prevent one party from refusing to discuss them on policy or other grounds.

Effectiveness.

The process must be able to produce results and resolve real problems. It should encourage meaningful progress in a timely manner.

Comprehensiveness.

[24] Chris Printup "Alternative Mechanisms for Treaty Implementation: A Review of Past and Current Approaches" (AFN Centre for Treaty Advocacy, March 1990); Peter DiGangi "Bilateral Discussions - Examples and Considerations" (Union of Nova Scotia Indians, 5 October 1993): pp. 5-9.

Many matters of mutual importance to the treaty parties cut across Ministerial responsibilities and policy mandates, as well as Indian organizational affiliations. The process should be able to move beyond these barriers and deal with problems and solutions holistically. The comprehensive nature of the process should only be limited by the parties' respective authority.

Flexibility.

The process will need to be able to respond to unforseen circumstances and priorities as they arise in a way that accommodates the interests of the parties.

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In addition to these primary criteria, there are other situational factors which also bear mention:

Representation.

Each party must be confident that they and their counterparts are duly mandated to represent their respective constituents in substantive discussions.

The Power of the Bureaucracy.

The impact of officials - through their attitudes, advice and conduct - on any bilateral initiative should not be discounted, and stands to impact significantly on commitments that may be made at the political level. Bureaucracies by their very nature are unresponsive to change, and, if the change is perceived as a threat to their own interests, they can be hostile. This is particularly true with respect to 'Indian programs', since their very existence is predicated upon the maintenance and administration of Indian dependency. Other agencies, whose mandate relates to 'Crown' lands, 'Crown' revenues, and 'Crown' resources, will also have their perceived interests to protect.

Motivation.

Both parties must be seriously committed to resolving issues that stand between them, and willing to look at different perspectives and options with an open mind.

Resources.

Adequate resources - for both parties - will be required for development, consultation, negotiations and ultimately, implementation. There should be a shared understanding with respect to the availability, level, and timing of both human and fiscal resources.

Good Faith, Partisan Politics and Relations with the Crown.

If long term solutions are being sought then a fundamental objective should be to establish a process that will stand the test of time and provide for ongoing formal relations between the Indian Nations and the Crown - relations which are above the vagaries of partisan politics and not subject to arbitrary measures resulting from the election of a new party to power.

Public Perceptions and Opinion.

Clear communications and a focus on public education can assist in bringing the public on side, and should probably be viewed as essential to the ultimate success of any agreements that may be reached.

Technical Expertise & Continuity.

The knowledge and competence of officials, and continuity in representation and participation, are key to fostering effective dialogue and finding workable solutions.

ADDENDUM:

TREATIES AND THE BILATERAL RELATIONSHIP

A. THE INDIAN-CROWN TREATIES - BACKGROUND.

B. BILATERAL AND OTHER PROCESSES, 1970-1992.

C. MISCELLANEOUS NOTES.

A. THE INDIAN-CROWN TREATIES - BACKGROUND.

1.0. HISTORICAL PERSPECTIVES.

1.1. INTRODUCTION.

Originally, colonization needed no justification other than Aristotelian beliefs that one race of people was inherently superior to others - or, as expressed by Christians, that God had intended them to have dominion over the Earth. The first challenge to these beliefs was issued at the University of Salamanca in Spain by the theologian Francisco de Vitoria, an early contributor to the canon of international law. Vitoria affirmed that Indians were human, entitled to enjoy civil and political rights, and were the true owners of their lands.[1] The Spanish had only the right to evangelize and trade. Unfortunately, Vitoria went one step further: Spain could assume rights over Indians and their lands "for their own benefit". This view served to legitimize colonialism by suggesting a valid doctrine of trusteeship.[2]

Vitoria's views, combined with the campaign of Bishop Bartelemo de las Casas, became official Spanish policy through the New Laws of the Indes of 1542 and the Papal Bull, *Sublimis Deus*, which asserted that Indians were to be protected in their liberty and property. Similar legal reforms took place in Portugal. Although often church laws were ignored and unenforced, they nonetheless laid a legal foundation for the treaty-making process between Indigenous and European Nations.[3]

When colonial settlement came to North America, the eminent English jurist, Lord Blackstone, saw a need treaties in order to acquire rights of settlement. Later, treaty-making with the Indian Nations went beyond land transactions to encompass political relations. Private purchases from Indians were prohibited by law. Only agents of the Imperial Crown were permitted to enter into treaty with the Indian Nations.

In Part I, we have already reviewed the historical background and principles related treaty-making in North America between Indian nations and European states up to Confederation. In this section, we will review the events following the Royal Proclamation of 1763, including developments in the new United States and after Confederation in Canada. This review is intended to provide background to the discussion that took place in Part II.

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[1] Vitoria, *De Indis et de Jure Belli Relectiones,* Classics of International Law. New York: Oceana Publications, 1964.

[2] Sanders, Douglas, *The Re-Emergence of Indigenous Questions in International Law,* 1983.

[3] See, for instance, writings of Felix Cohen in the 1930s as solicitor for the Bureau of Indian Affairs. "The Spanish Origin of Indian Rights in the Law of the United States", *Georgia Law Review,* 31:1, 1942.

1.2. THE ROYAL PROCLAMATION & BRITISH NORTH AMERICA.

The *Royal Proclamation* of 1763 issued by George III was intended, among other things, to calm Indian Nations' concerns about encroaching settlement from Britain's North American colonies. The *Royal Proclamation* is Canada's first constitutional instrument. It set the pattern for Canadian settlement and formalized the relationships among the local colonial governments (now the provinces), the Imperial Crown and the Indian Nations. It specified that only the Imperial Crown could enter into treaty with the Indian Nations, while the local colonial governments were required to honour the treaties and the treaty frontier.

The *Proclamation* codified as imperial (later, Dominion) policy the treaty-making practices that had evolved in British North America. It is justly recognized as a constitutional foundation of treaty-making in Canada. Between 1763 and 1956, the Imperial Crown and the Dominion Crown entered into numerous treaties with the Indian Nations. As previously discussed, there were well-founded reasons for a separation of Indian Affairs from local governments. Colonial and provincial legislatures could not be trusted to act in good faith when the interests and prejudices of their citizens ran counter to the rights and interests of the Indian Nations.

1.3. THE UNITED STATES.

Before we turn to Canada's post-Confederation period, some discussion of events in the new United States of America is warranted.

After the War of Independence, there were opinions expressed that the treaties made with the British Crown no longer protected Indian Nations in their lands in the new United States. General Haldimand said in a letter of 27 November, 1783:

> Entertain no idea ... that the King either has ceded or had a right to cede their territories or hunting grounds to the United States of America. These people, My Lord, have as enlightened ideas of the nature and obligations of treaties as the most civilized nations have, and know that no infringement of the treaty in 1768 [Fort Stanwix] which fixed the limits between their country and that of the different provinces in North America can be binding upon them without their express concurrence and consent ... [4]

[4] Haldimand to North, PAC, Colonial Papers, XXIII, 46-47.

The Americans quickly adopted the British treaty system, maintaining the principles of the *Royal Proclamation* in the U.S. Constitution. Only the federal executive could enter into treaties with the Indian Nations. In Congress, power was vested in the "upper house," the Senate "to regulate Commerce with foreign nations, and among the several states, and with the Indian Tribes."[5] State governments had no constitutional role or powers vis-a-vis Indian Nations.

The first U.S. Indian treaty was signed with the Delaware Nation on September 17, 1778. On May 1, 1783, Congress directed the Secretary of War, Major General Benjamin Lincoln, to inform the Indian nations that the war of independence had ceased, military posts in Indian Territory would "speedily be evacuated," and that the U.S. would be "disposed to enter into friendly treaty with the different Tribes."[6] Accordingly, two days later Major Ephraim Douglass of Princeton, New Jersey, was appointed to carry out the instructions of Congress. The *Northwest Ordinance of 1787* provided for "the utmost good faith in dealings with the Indians."[7]

The Indian Nations possessed permanent populations, defined territories, governments, and the inherent authority to enter into treaty relations with other nations. Prior to the War of Independence, the Indian Nations were acknowledged as equal powers by the British. Their sovereignty was respected while the settler community was small and struggling. It was possible to impose treaty terms on Indian Nations only after their economic independence had been undermined.

American jurisprudence evolved earlier than that of Canada, and tended to uphold Indian Nations' view that treaty-making was an explicit recognition of their sovereignty and independence. In *Worcester v. Georgia*, the U.S. Supreme Court ruled that Europeans had applied international law in entering into Indian treaties.

> 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 understood meaning. We have applied them to Indians as we have applied them to other nations of the earth: they are applied to all in the same sense. ....
>
> Certain it is that our history furnishes no example from the first settlement of our country of any attempt on the part of the Crown to interfere with the internal affairs of the Indians farther than to keep out

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[5] U.S. Constitution, Article I, section 8, clause 3.

[6] Cited in Frank H. Severance, "The Niagara Peace Mission of Ephraim Douglass in 1783," *Buffalo Historical Society Publications*. Buffalo: 1914, XVIII, 115-42.

[7] 1 Stat. 50.

> the agents of foreign powers, who as traders or otherwise, might seduce them into foreign alliances. The King purchased their lands when they were willing to sell, at a price they were willing to take, but never coerced a surrender of them. He also purchased their alliance and dependence by subsidies, but never intruded into the interior of their affairs or interfered with their self-government ...
>
> ... the settled doctrine of law is that a weaker power does not surrender its independence -- its right to self-government -- by associating with a stronger and taking its protection.[8]

In *Cherokee Nation v. Georgia*, the Supreme Court recognized the Cherokees as "a state, as a distinct political society, separated from others, capable of managing its own affairs and governing itself."[9]

It is ironic that the United States, in exercising its independence, followed the policy of the *Royal Proclamation*, while the Canadian government allowed it to lapse. The U.S. institutionalized the *Proclamation* and early on developed jurisprudence around its principles. Canada, on the other hand, allowed the *Proclamation* to fade into obscurity and found that when it emerged again as a constitutional document in 1982, its principles were largely disconnected from Canadian jurisprudence and federal policy.

In an address to the American Bar Association Convention Panel on Indian Self-Government in August, 1988, Roberta Jamieson, then Commissioner of the Indian Commission of Ontario, formerly *ex officio* member of the Parliamentary Special Committee on Indian Self-Government (1983) and now Ombudsman of Ontario, noted that both countries "have cut Indian policy from the same cloth," there were some fundamental differences in the evolution of the legal system:

> Canada does not have the body of law which has built up in the U.S. on aboriginal rights or self-government. In the 1970s, the U.S. Supreme Court heard 33 cases involving Indian law, while the Canadian Supreme Court reached only one decision.
>
> The U.S. recognizes limited sovereignty of the First Nations, while Canada does not.
>
> The U.S. understands Indian government powers to be inherent, while Canada has understood them to be delegated authority.

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[8] 31 U.S. 515 (1833), p. 544-547.

[9] 30 U.S. 1 (1831) p. 16.

In the U.S., there are tribal courts; in Canada none have been established.

Recognized powers of U.S. tribal councils include jurisdiction over many subjects which are not recognized powers of Canadian First Nations.

In the U.S., state laws do not apply on Indian lands unless Congress clearly intends, whereas in Canada, Parliament has expressly applied provincial laws to Indian lands except where it specifies to the contrary.

In the U.S., courts have determined Indian rights to their lands and resources, whereas Canadian law has, at best, placed Indian lands and resources under the jurisdiction of the federal government.

The U.S. understanding of trust responsibility obliges the federal government to represent Indians in pressing their claims.

The U.S. established an Indian Claims Commission, while the Canadian Government has reserved to itself the power to adjudicate claims against it.[10]

The above is not meant to overlook or minimize the militaristic, genocidal, and assimilationist character of American policy towards the Indian Nations, especially in the 19th and early 20th centuries. However, with respect to treaties, it is important to consider relevant policies and practices south of the border for renewal of the bilateral treaty relationship in Canada.

[10] In 1992, Canada also established an Indian Specific Claims Commission. However, it has the power only to look into claims which had already been rejected by the Government, and then only to make recommendations, all within the confines of an existing federal policy which has been discredited. It is a far-cry from the quasi-judicial model used in the United States, although it has been observed that even the U.S. model was not without its problems.

1.4. CANADA: POST-CONFEDERATION.

When the British colonies of north eastern North America federated under the British North America Act, 1867, the Indian Nations were not invited to join in Confederation. Politically, however, they remained separate from the new Dominion but were tied to it, nevertheless, by their relationship with the Imperial Crown and its successor, the Crown Dominion. The two levels of government established under the B.N.A. Act - federal and provincial - divided all subjects of jurisdiction among themselves. That was not necessarily a problem until it was combined with the ethnocentric and self-interested theory that unceded Indian lands were owned by and under the jurisdiction of the provinces.

A second problem arises with the manner in which the federal Parliament has used Sec. 91(24) of the B.N.A. Act, which was intended to perpetuate the principles of the *Royal Proclamation* by providing the federal parliament with sole authority for matters relating to Indians and lands reserved for Indians. Prior to 1867, legislation in British North America with respect to Indians was limited to *An Act for the Better Protection of the Lands and Property of Indians in Lower Canada* (1857), *An Act for the Better Protection of Indians in Upper Canada from Imposition and the Property Occupied or Enjoyed by Them from Trespass and Injury* (1858), *An Act Respecting Civilization and Enfranchisement of Certain Indians* (1859).

It was not until 1876, with passage of the Consolidated Indian Act, that Parliament chose to interpret its power under Sec. 91(24) to intervene in the most intimate aspects of Indian life and interfere with the internal governance of Indian Nations. This was the year in which the Crown was entering into treaties #5 and #6, which made no mention that it would be the Indian Act, not the treaties, which henceforth would define the bilateral relationship.

According to Lord Denning's 1981 ruling, however, the purpose of Sec. 91(24) was not to superimpose laws on the Indian Nations, but rather to provide Parliament with the means to carry out its trust responsibilities.

> ... as a matter of public policy, it was of the first importance to pay great respect to their laws and customs and never to interfere with them except when necessary in the interests of peace and good order. It was the responsibility of the Crown of England - and those representing the Crown - to see that the rights of the indigenous people were secured to them, based upon by the selfish or the thoughtless or the ruthless ...

By Section 109 of the B.N.A. Act, the provinces were bound to respect Canada's trust relationship with the Indian Nations. The powers of provinces with respect to lands, mines, minerals and royalties were "subject to any trusts existing in respect thereof and to any interest other than that of the province in the same."

Whatever status the Indian Nations had at Confederation they continue to have afterward. In the Calder case, Mr. Justice Emmett Hall said in his Supreme Court of Canada decision:

> The Proclamation was an Executive Order having the force and effect of an Act of Parliament and was described ... as the 'Indian Bill of Rights'. Its force as a statute is analogous to the status of *Magna Carta,* which has always been considered to be the law throughout the Empire .... The Proclamation must be regarded as a fundamental document upon which any just determination of original rights rests.

Lord Denning came to the same conclusion in 1981 when he ruled the *Royal Proclamation* continues to be binding:

> .... I have no doubt that all concerned regarded the *Royal Proclamation* of 1763 as still of binding force. It was an unwritten provision which went without saying. It was binding on the legislatures of the Dominion and Provincial governments just as if there had been included in the statute a sentence, "The aboriginal peoples of Canada shall continue to have all their rights and freedoms as recognized by the *Royal Proclamation* of 1763."

While financial responsibility for implementing Indian policy was off-loaded from England to the Canadian colonies even before Confederation, the Imperial Crown maintained responsibility for political relations with Indian Nations, even with respect to the treaties negotiated after Confederation. However, as noted in Part I above, the responsibility was more evident in the breach than in practice. Generally, the British government was unwilling or unable to regulate the conduct of Canada, to whom it had delegated administrative responsibility for the trust relationship with the Indian Nations.

In all, historic "land cession" treaties cover the territories now forming the prairie provinces, as well as large parts of Ontario, northeastern British Columbia, and the western Northwest Territories. In addition, between 1850 and 1854, fourteen "Douglas Treaty" agreements were signed by Indian Nations with the Hudsons' Bay Company Chief Factor, James Douglas, covering 358 square miles on Vancouver Island between Sooke, Saanich, Nanaimo and Port Hardy. Douglas called the agreements "purchases" or "deeds of conveyance"[11] However, as the result of Clifford White and David Bob testing their rights to hunt and fish in 1954, the courts have ruled that "notwithstanding the informality of the transaction on the part of the

[11] See Madill, Dennis, *British Columbia Indian Treaties in Historical Perspective.* Ottawa: DIAND Research Branch, 1981. See also Duff, Wilson, "The Fort Victoria Treaties", *B.C. Studies,* Fall, 1969.

Hudson's Bay Company, it was just as much an act of state as if it had been entered into by the Sovereign herself."[12]

In compliance with the *Royal Proclamation,* after Confederation the Governor General appointed commissioners to negotiate Indian treaties as a Crown prerogative power - an aspect of his general prerogative power to appoint commissioners or to enter into treaties with other nation-states. The Commissioners who negotiated treaties with the Indian Nations said they represented the Queen who lived in England and wanted to establish peaceful relations.

> When you hear his [the Commissioner's] voice, you are listening to your Great Mother the Queen, whom God bless and preserve long to reign over us. Your Great Mother the Queen wishes to do justice to all her children alike. ... She wishes order and peace to reign through all her country... [13]

The negotiators did not refer to the Government in Ottawa or to the Canadian Prime Minister. The Queen's role as head of the Empire was made clear. These Crown treaties were not ratified by Canadian legislation -- compliance with the instructions of George III was sufficient to complete the treaty-making process.

Treaty-making continued in Canada until well after World War II, when the federal government accepted adhesions to Treaty Nº6 in 1950, 1954, and 1956.

For several decades following Confederation, federal legislation precluded private acquisition of federal lands in respect of which aboriginal title remained unextinguished. British Columbia's first enactment dealing with its public lands, in 1875, was disallowed by the federal government because there was no exemption from its operation for unsurrendered Indian title. Eventually, a political accommodation was arrived at bypassing (temporarily) the aboriginal title issue.

Over the years, successive Canadian federal governments undercut the fact of Indian Nation sovereignty and self-government by minimizing the significance of both the *Royal Proclamation* and Sec. 91(24). As part of an authoritarian policy of assimilation and removal, Canada attempted to reduce Indian governments to less-than-municipal status. It failed to uphold its trust obligation to protect Indians and Indian lands against provincial and private interests.

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[12] Regina v. Clifford White and David Bob. Reasons for Judgment of the Honourable Mr. Justice Norris, December 15, 1964, pp. 35, 40. Affirmed by the Supreme Court of Canada.

[13] Negotiation of Treaty Nº1, 1871, Lieutenant Governor A.G. Archibald introducing the chief Commissioner, Weymss Simpson.

Between 1867 and 1951, Parliament passed a series of "Indian Acts" which, at best, misapplied federal powers under Sec. 91(24). Rather than conferring unlimited plenary powers on the federal government, Sec. 91(24) is a vehicle for Parliament to administer the Crown's trust obligations. Accordingly, Parliament can supervise agreements between the federal government and Indian Nations but not rule over Indian Nations as "subjects" of the Crown.

For many decades, a long string of court decisions validated only the motives of the Crown in entering treaties. Indian Nations' motives - and laws - were not considered or given legitimacy. As the noted B.C. scholar Wilson Duff put it, the written treaty

> ... is a white man's certificate of a transaction, initiated by him, to unburden the land of its Indian ownership. Being written in the white man's language, it tends to incorporate his concepts of polity and of property. To read a treaty is to understand the white man's conception (or at least his rationalization) of the situation as it was and of the transaction which took place.[14]

The tendency for written treaty terms to express the wishful thinking of only one side was noted in 1751 by Indian Superintendent, Sir William Johnson, in writing to General Thomas Gage:

> I find in the Minutes of 1751 that those who made ye entry say that Nine different Nations acknowledged themselves to be his Majesty's Subjects, altho I sat at that Conference, made entrys of all the Transactions, in which there was not a Word mentioned which would imply a Subjection. ... Our People too readily adopt & insert a Word very different in Signification and never intended by the Indians.[15]

The result of courts looking only at one side of the ledger were decisions unfavourable to Indian Nations' treaty rights.

In 1889, the Judicial Committee of the Privy Council had to deal with a federal-provincial dispute over a treaty. The Canadian courts had viewed the treaty as being absent of legal significance, but the Judicial Committee overruled to give the documents legal meaning.[16]

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[14] Duff, Wilson, "The Fort Victoria Treaties", *B.C. Studies,* Fall, 1969., pp. 3-4.

[15] Sir William Johnson Papers, XI:395.

[16] St. Catherines Milling v. The Queen (1889) 14 Appeal Cases, 46.

In the Indian Annuities Case,[17] Lord Watson described the two pre-Confederation Robinson treaties as being "mere promises and agreements which were nothing more than personal obligations by the Governor of the Province of Canada".

In Rex v. Syliboy (1928),[18] Judge Patterson ruled that the Mik'maq Grand Chief Syliboy had no treaty-protected rights to hunt because "a civilized nation first discovering a country of uncivilized people or savages held such country as its own until such time as by treaty it was transferred to some other civilized nation. The savages' rights of sovereignty even of ownership were never recognized." (However racist the principle is in the light of modern times, interestingly enough the Court utilized international law criteria to reach the conclusion that neither party was competent to enter a treaty, the Governor of the Province of Nova Scotia never having been given authority by Great Britain to enter into a proper treaty.)

The Court ruled the treaty of 1752 was, therefore, not a treaty at all, since the Indian Nation did not have status to enter into it.[19]

Prior to the 1970s, then, there was no authoritative judicial decision dealing squarely with the question of the legal status of aboriginal title. There had been a series of cases, including those mentioned above, which touched on the question obliquely, but those decisions dealt with disputes concerning the respective rights and obligations of federal and provincial governments and their respective responsibilities for continuing obligations. None of the cases involved an assertion of aboriginal title by Indian Nations.[20]

In the 1970s, however, the Alaska Native Claims Settlement Act became law in the U.S. and attracted much interest in Canada. The Nis'ga Nation filed the Calder case in British Columbia (in which Supreme Court Judge Emmett Hall stated that treaties were a recognition of aboriginal title), the Kanewat case was filed with respect to the James Bay Cree, and in the Northwest Territories, sixteen Chiefs filed a caveat against land titles to protect the aboriginal title in what became the Paulette case.

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[17] Attorney General of Canada vs. Attorney General of Ontario; Attorney General of Quebec. Attorney General of Ontario (1897) A.C. 199 (P.C.).

[18] 50 C.C.C. 389, (N.S. Co.Ct.)

[19] Discussed in *The Anomalous Legal Position of the Canadian Indian Treaties,* an essay by Donald J. Auger for Professor J. Noel Lyon's course in Native Law, Queen's University, 1983.

[20] Lysyk, Kenneth, Dean, Faculty of Law, University of British Columbia, "Developments in the Law Relating to Indian Title and Indian Treaties: An Overview." Special Lectures of the Law Society of Upper Canada, 1978.

Further, the federal government issued a policy statement on August 8, 1973, announcing its readiness to negotiate comprehensive claims settlements through a process which the government would define and control. As Professor Lysyk points out, "As a result of these developments in the 1970s, the focus of attention has moved within a short space of time from a debate concerning the existence of Indian title to discussion concerning settlement of the comprehensive land claims based upon it."[21]

In 1951, a new Indian Act became Canadian law. It included the double-edged sword, Section 88: "Subject to the terms of any treaty and any other Act of the Parliament of Canada, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province." While one edge at least recognized that treaties were superior to provincial law, the other subjected Indian Nations to general provincial laws. Indian Nations consider Sec. 88 to be a violation of their aboriginal and treaty rights. (In R. v. White and Bob, the Supreme Court said that in Sec. 88, the word "treaty" was "not a word of art and in my respectful opinion it embraces all such agreements made by persons in authority as may be brought within the term 'word of the white man ...."[22])

On the preservation of hunting and fishing rights, in 1966 Regina v. White and Bob settled that provincial laws could not override treaty guarantees.[23] However, courts continued to rule that *federal* legislation, such as the Migratory Birds Convention Act, could override Indian treaties.[24] (This situation would continue until passage of the Constitution Act, 1982.) White and Bob also affirmed the rule used in the American case of Worcester v. Georgia that "the language used in treaties with the Indians should never be construed to their prejudice."[25]

The same rule was adopted by the Supreme Court of Canada in Nowegijick v. the Queen on January 25, 1983:

> It is legal lore that to be valid, exemptions to tax laws should be clearly expressed. It seems to me, however, that treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indian. If the statute contains language which can reasonably be construed to confer tax exemption, that construction, in my view, is to be favoured over a more technical construction which might be available to deny exemption. In *Jones v. Meehan.* 175 U.S. 1, it was held that Indian treaties must be construed

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[21] *Ibid.*

[22] 52 D.L.R. (2d) 481 (S.C.C.).

[23] *Ibid.*

[24] *Sikyea* (1964) S.C.R. 642; *George* [1966] S.C.R. 267; *Daniels* (1968) 2 D.L.R. (3d) 1.

[25] Cited in Delia Opekokew, "Optional Paper on Treaties and Treaty Rights," Assembly of First Nations, August 24, 1983.

> not according to the technical meaning of their words, but in the sense in which they would actually be understood by the Indians.

In 1981, the Supreme Court of Canada showed its willingness to consider all relevant circumstances when interpreting treaties, including promises not included in the body of the text. In R. v. Taylor and Williams, it upheld a lower court decision that an 1818 treaty between the Mississauga and the Crown included oral terms recorded in the minutes of the Council Meetings that preceded and followed the signing of the treaty, thus preserving rights to hunt and fish on Crown lands in the area covered by the treaty.

In 1984, the Supreme Court of Canada issued a fundamental decision on aboriginal title and rights in Guerin vs. the Queen.[26] The Court ruled that aboriginal land title is a legal right derived from Indian Nations' historic occupation of their lands. That title pre-dates and survives the claims to sovereignty made by European nations in colonizing North America. Although aboriginal title was recognized in the Royal Proclamation, it has an independent basis in Canadian common law. The Crown serves as an intermediary between the Indian Nations and the settler governments - in fact, strictly speaking, even between Indian Nations and the settler federal government.

The Guerin decision shifted the burden of proof to the federal government which must now show that aboriginal land rights were lawfully extinguished in the past, or acknowledge their continuing existence.[27] It also provides a standard for the interpretation of treaty promises made by the Crown to Indian peoples, and also for interpreting legislation that affects aboriginal and treaty rights. Guerin reopened the door to treaty interpretation in accordance with proper rules to identify the full range of obligations owed by the Crown as a result of treaties.

On April 1, 1985, Prime Minister Brian Mulroney wrote the Prairie Treaty Nations Alliance: "I do appreciate the special relationship which the treaty Indian people have with Canada, and I understand the value of bilateral discussions as a means of renewing that relationship." He referred to Minister David Crombie's appointment of Frank Oberle to represent him in renovating Treaty 8,

> ... a process which I am watching with great interest.... I want you to know I recognize the importance of the treaties. I appreciate your own efforts to work together in making the spirit and intent of the treaties useful to us in moving to the future. I am asking Mr. Crombie to continue to work with you.

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[26] [1884] 2 S.C.R. 335.

[27] Slattery, Brian, "Understanding Aboriginal Rights", *Canadian Bar Review,* vol. 66, p. 730.

In a subsequent letter dated April 27, Mr. Mulroney assured the PTNA "of the importance which the government places on the treaties and of my personal interest in this area."

In 1988, the Canadian Bar Association issued a report calling for a Royal Commission to inquire into and report on treaty issues and on processes to resolve them. It also recommended the establishment of a Special Joint Committee of Parliament to examine Sec. 91(24) issues, as well as a commission to adjudicate special claims. A final recommendation, that a commission take up, investigate, and give advisory opinions on aboriginal rights and claims, was partially implemented when an Indian Specific Claims Commission was established by oder-in-council in 1992.

In June, 1990, DIAND announced that it would sponsor a Treaty Branch Workshop at Montebello, Quebec, and that a "Treaty Policy Unit" would be set up within the Lands, Revenues and Trust division of the Department. Three key federal departments did not attend the Montebello meeting, however: Justice, Finance, and Federal-Provincial Relations. DIAND Deputy Minister Harry Swain gave the opening address, calling the dialogue on "spirit and intent" as being long overdue. There was a need for new approaches, he said. Presentations were made on historical perspectives, legal interpretation, and the "medicine chest" and taxation provisions of the treaties.

However, the Treaty Policy Unit was never provided with a policy mandate or any authority to substantively deal with the treaty relationship. Its efforts focused primarily on research and did not provide for equitable access to resources for developmental work. Today, the Treaty Policy Unit is essentially dormant and Canada remains without a coherent "treaty policy".

Still, however, the situation remains: there is little consensus or common understanding among the Indian Nations, the Federal Government and the provinces on aboriginal and treaty rights, and implementation of treaties and treaty-making in Canada.

2.0. INTERNATIONAL LAW PERSPECTIVES[28]

The legal status and legal rights of the Indian Nations in Canada are anterior to and independent of the British North America Act, 1867. Indians' status and rights derive from customary and general international law whose principles are, by definition, universal in application and binding upon all peoples. They can only be altered by the free and informed consent of an Indian Nation, usually through treaties concluded with the Crown.

Legal conceptions based on Anglo-Saxon common-law have often been used to downgrade or otherwise to dispute the binding legal character of the obligations automatically assumed by the European colonizing powers upon first entering Canada, quite apart from any formal treaty or contractually-based obligations.

These views are categorically rejected in the most authoritative legal jurisdictions. They have their roots in an untenable and racist distinction between "civilized" Western colonizing nations and "uncivilized" non-Western indigenous people which served to justify lesser standards and degrees of legal protection. The World Court scornfully rejected this distinction:

> The discrimination between civilised nations and uncivilised nations which was unknown to the founding fathers of international law ... is the legacy of the period, now passed away, of colonialism, and of the time long-past when a limited number of Powers established the rules of custom or of treaty-law, of a European law applied in relation to the whole community of nations... European international law had been defended by jurists of indisputable authority...
>
> However great and powerful the thinking of these renowned jurists may be, their concept of a family of European and North Atlantic nations is nonetheless beginning to be blurred by the reality of the universal community in the thinking of the internationalists of a new age.[29]

The concept of *terra nullius* as the principal source of claim and title to Canada has difficulty standing up to contemporary assessments in light of the Principle of Intertemporal Law (as

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[28] Views in this section are largely drawn from a legal opinion by the eminent constitutional expert, Professor Edward McWhinney, Q.C., September 30, 1980.

[29] Judge Ammoun, in his separate majority opinion in the World Court, in *North Sea Continental Shelf,* 1969, I.C.J. Reports, 1969, p. 3.

restated by the Institute of International Law). Ambassador Bedjaoui[30] has traced the limited *terra nullius* concept to Roman antiquity, where any territory which was not Roman was considered *nullius*, European colonial expansion in the 16th and 17th centuries, during which any territory not belonging to a Christian sovereign was considered *nullius*, on to the 19th century when any territory not belonging to a so-called "civilized State" was considered to be *nullius*.[31]

The practical consequences of moving from an essentially Western-based International law to a contemporary, inclusive, pluralistic International law are immediate and far-reaching. As specifically noted by Judge Ammoun, Judge Forster and Judge Boni in their separate majority opinions in the Western Sahara case in 1975,[32] the very concept of *terra nullius* as the sole legal basis of European claims to lands belonging to indigenous peoples is rooted in legally unacceptable and inelegant principles and assumptions. In short, Canada must depend on treaties for a legally-valid right to settle upon and share Indian territories in North America.

Professor Edward McWhinney described the Canadian regard for treaties in 1980:

> The term "treaty" is subject to a certain, apparently deliberate and contrived semantic confusion within Canadian federal and provincial ... usage and practice. There is no doubt that the original treaties concluded by the British Crown with the leaders of the Indian People were represented to the Indian People by the Imperial officials concerned, acting in complete good faith on their part, as binding legal accords between fully sovereign peoples.
>
> There have been temptations for later generations of Canadian federal and provincial officials and their lawyers to rest on the claimed distinction between 'civilized' and 'uncivilized' peoples and to argue, therefore, that such treaties fall into some lesser juridical category of accord, assimilated more or less to the legal status of ordinary municipal laws and thus subject to over-riding amendment or recall by later inconsistent legislation enacted by the legislature concerned.

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[30] Cited in *Western Sahara*, I.C.J. Reports, 1975, p. 12, at p. 86. Also see Mohammed Bedjaoui, *Terra Nellius, "droits" historiques et autodétermination* (1975).

[31] Judge Ammoun had also noted in the World Court that as early as the 16th century, the jurist Francisco de Vitoria had protested against the application to North American Indians of the concept of *res nullius* in order to deprive them of their lands.

[32] Western Sahara, Advisory Opinion, *I.C.J. Reports 1975*, p. 12, at p.83, p. 103, p.173. This case involved an indigenous nomadic people. Rather than viewing their lands as "unoccupied" and therefore available for "discovery" and "occupation", the ICJ rejected the concept of *terra nullius* and held that the local population had legal rights in relation to the land and their self-determination.

> Whatever its seeming persuasiveness in bygone juridical eras, such an argument cannot stand up against the principles of the new international law. ... Such treaties made between the Crown and the Indian People ... are incapable of subsequent alteration except with the full and free consent of both of the original contracting powers.

As to whether treaties concluded between the Crown and the Indian Nations could have been changed by subsequent accords, these accords are subject, like the original treaties themselves, to the ordinary international law principles covering "unequal" or Leonine treaties, recently restated and reinforced by the *Vienna Convention on Treaties*, the so-called "Treaty on Treaties."[33] These principles hold that upon demonstration of undue influence or of pressure resulting from patent inequality in political bargaining power on the part of one of the parties, there could be subsequent legal correction and rectification.

These principles would apply particularly to the purported alienation of Indian Nations lands and natural resources, including subsurface mineral and oil deposits. Any dispute over natural resources, including taxation powers, is not exclusively a federal-provincial question. Indian Nations are an essential party and must be included in the resolution of such disputes. As Professor McWhinney has stated:

> The right of the Indian people to national self-determination within Canadian Confederation includes not merely the preservation and extension of their own special ethnic-cultural identity, but also the control and protection of the historical lands and natural resources (including mineral and oil deposits) necessary to their full social and economic development. Such right .... derives from international law, both customary and treaty-based, and could not be validly abridged except with the full and free consent of the Indian People, the burden of proof of such full and free consent falling upon the party contending for it, having regard to the patent inequality of bargaining power between the respective parties.
>
> In particular, current claims by Provincial political leaders for a monopoly of constitutional competence over natural resources, including taxation powers, with the present provincial boundaries, should be treated with reserve, and as subject, in any case, to the prior legal claims of the Indian People existing under customary and also treaty-based international law.

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[33] *Vienna Convention on the Law of Treaties*, 23 May, 1969, especially Part V, Articles 46-53, Art. 62, Art. 64. Also see, S. Rosenne, *The Law of Treaties: A Guide to the Legislative History of the Vienna Convention* (1970).

3.0. SOME FEDERAL GOVERNMENT PERSPECTIVES.

An oft-repeated federal government view of treaties over the years has been that in Canada, as well as elsewhere in the British Empire, treaties were merely formalities of accommodation intended to legitimize the taking of indigenous peoples' lands for white settlement. Treaties, in this view, were intended to diminish or extinguish completely whatever rights the Indian signatories might have enjoyed before signing.

Further, it has been the consistent position of Canada that none of the treaties with the Indian Nations are international agreements. The Indian Nations never had an inherent sovereignty in the past and have none now; nor do they have any special rights to self-government, except those contained in the express provisions of the Indian Act. (This historic position may be shifting in certain limited respects under the federal government elected in 1993.)

On related issues, the federal government has rigidly maintained the following positions.

> "Aboriginal title" raises such a complex series of legal and policy issues that we should discuss other matters first. Indian people would be better to exchange (extinguish) "undefined" aboriginal title and rights for expressly defined rights with greater legal certainty.
>
> At Confederation, Canada inherited responsibility for the peace and friendship offered in the "pre-Confederation treaties." However, there are no other obligations and, as a result, constitutional protection is not an issue since nothing would be lost or gained.
>
> Section 91(24) of the British North America Act was intended to give Parliament the authority to override any treaty provisions which might stand in the way of federal ventures into the hinterlands.
>
> Despite the Guerin decision, treaties are "empty boxes" to be "filled" by "express undertakings." Canada has only a "political trust," not a "legal trust," and can shape its relationship with Indian Nations by "fiscal and legislative choices ... with which aboriginal peoples do not necessarily agree."[34]

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[34] *Fiduciary Relationship of the Crown with Aboriginal Peoples: Implementation and Management Issues: A Guide for Managers.* Report of an interdepartmental Working Group to the Committee of Deputy Ministers on Justice and Legal Affairs, July, 1993.

> Canada can take unilateral actions which might violate treaty agreements, and only if the Indian Nation reacts is an issue created. Resolution of that issue would be intended to fit only that particular situation. It would not be applicable to other Indian Nations or set a precedent.

Claims and rights issues arising out of treaties currently have no means of expression within the federal government's policy framework. There are no processes to interpret, apply, and implement treaties. Even the *James Bay Agreement* (1975) has yet to be fully implemented because there is no room to do so within existing federal policy.

The federal government interprets treaties as extinguishing aboriginal title and rights, while Treaty Indian Nations interpret their treaties as an affirmation of their sovereignty and inherent (aboriginal) rights. Where so-called "modern-day treaties" are still to be negotiated, such as in British Columbia, federal policy calls for these agreements to be on a tripartite rather than a nation-to-nation basis with the aim of extinguishing aboriginal title and rights in all traditional territories outside of existing reserves.

Where treaties are silent on a matter, Canada considers that the aboriginal rights pertaining thereto have been extinguished. For example, if a treaty does not mention surrender of mineral rights, it considers them to have been extinguished.

The federal government says it will honour its "lawful obligations" arising from the treaties. However, there is no common agreement with the Treaty Indian Nations on what these lawful obligations are. More often than not, the federal government has chosen to force litigation upon Treaty Indian Nations, rather than seek negotiated agreements on implementation of treaty rights.

4.0. SOME INDIAN NATION PERSPECTIVES.[35]

The Indian Nations view treaties as constitutional documents entered into by sovereign nations, each party giving and receiving benefits. The treaties are regarded, therefore, as bilateral nation-to-nation agreements with the primary purpose of defining relationships and accommodations for the mutual benefit of the parties for the present and into the future.

The treaties implicitly confirm aboriginal rights, including the right of self-determination throughout treaty territories. Treaties did not extinguish aboriginal title and rights or Indian jurisdiction over the reserve and traditional land base. Federal and provincial laws apply on

[35] This section should be read in conjunction with Part I, section B, above.

Indian lands only to the extent that Indian Nations have expressly given their free and informed consent to their application.

Treaties are essentially international agreements signed by sovereign nations. Treaties are binding upon the Crown, and the Canadian Government is under a strict obligation to uphold them.[36]

The treaties formalize aspects of the trust relationship between Indian Nations and the Crown. By virtue of the treaties, Indian Nations have the right to access through the Federal government sufficient economic, educational, administrative, health, and other resources to ensure their survival and flourishing as distinct peoples into the future. (Sec. 91(24) of the B.N.A. Act entrenches in the constitution exclusive federal trust obligations in this regard.)

It was not necessary for the federal government to pass any laws to give it the authority to enter into treaties. Treaties were commissioned by the Crown using its prerogative powers. The prerogative power of the Crown to enter into treaties is retained by the Crown today with respect to renewal and implementation of the treaties, as well as treaty-making.

To determine what powers and jurisdiction the Indian Nations retained and relinquished by treaty, one must look to the speeches recorded at the treaty councils and to inferences of reason, since those who set down in writing the treaties' terms often recorded only matters of importance to the federal government.

The Provinces are related to Canada through the Constitution. These governments regulate their relationship through federal-provincial agreements, First Ministers' Conferences, exchanges of letters and concurrent legislation. In a similar vein, it is through the treaties that Indian Nations are related to Canada, and it is the bilateral treaty process through which this relationship is regulated.

The Grand Council Chief of the Anishinabek Nation expressed an often-heard position to the Parliamentary Special Committee on Indian Self-Government on March 28, 1983:

> We began our relationship with the Crown on an equal basis, as evidenced in the *Royal Proclamation* of 1763, and in the signing of treaties both before and after Confederation. We want to continue our relationship in the same government-to-government fashion.

Treaty principles held out by the First Nations include the following:

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[36] Delia Opekokew, *Political and Legal Options of Implementing Indian Government Within Confederation.* Saskatoon: FSI, 1979.

Treaties are political agreements which do not abrogate, diminish, or derogate from aboriginal title and rights - they confirm them.

If a treaty has not been honoured by the Crown, the Crown may not insist upon the Indian Nation honouring the treaty.

Treaty rights are specific to signatory Indian Nations.

The spirit and intent of treaties must be recognized, affirmed and honoured.

Promises made by the Crown at treaty councils and understandings accepted by Indians that do not appear in the text of treaties nevertheless are binding on the Crown - this constitutes evidence of their "spirit and intent.".

Wampum, oral traditions, correspondence, etc., also are evidence of the treaties' "spirit and intent."

"Treaties and the treaty-making process may well represent the practical means for the manifestation, implementation, and enforcement of good relations between indigenous peoples and States in accordance with the standards to be proclaimed by the United Nations for the protection of indigenous peoples."[37]

"Our treaty is the base of all that we do and the foundation of our relationship with Canada, and the means by which we identify ourselves. We are signatories to Treaty 6 entered into in 1876. That treaty is still in force and effect. It is a continuing and living instrument and is enforceable today. Our treaties are a contemporary issue and not a historical one. ... Our treaties intended that we live in peaceful co-existence with the Crown without external interference by either party."[38]

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[37] Statement of Grand Council of the Crees (of Quebec) to the Commission on Human Rights, *Sub-Commission on Prevention of Discrimination and Protection of Minorities, Working Group on Indigenous Populations*, Sixth Session, August, 1988.

[38] Submission of the Four Nations of Hobbema, *Working Group on Indigenous Populations, United Nations Commission on Prevention of Discrimination and Protection of Minorities*, August, 1988.

B. BILATERAL AND OTHER PROCESSES, 1970-1992.

1.0. BILATERAL BALANCE AND MULTILATERAL ABUSE.

Most Indian treaties were signed with the Imperial Crown before the concept of a "divisible Crown" - a "Federal Crown" and a Provincial Crown" - had been articulated and deployed to justify the intrusion of "local" settler interests in Indian-Crown relations. Most treaties covered lands having "territorial" status, as opposed to "provincial" status.

As a result, most treaties were transacted pursuant to a unitary Indian Nation-Crown bilateral negotiation process.[39] The Superintendent General of Indian Affairs was considered to be the Crown's sole representative, the embodiment of the Crown's trust responsibilities.

The Indian Nations argue that the bilateral treaty relationship recognizes and affirms an inherent, pre-existing Indian order of government in Canada. No further constitutional changes are necessary, although the need for mutual agreement on this fundamental principle of interpretation is critical.[40]

Indian Nations complain that Canada interprets the treaties unilaterally to minimize its obligations. Canada fails to consider the spirit and intent of treaties and refuses to consider Indian Nations' interpretation of the treaties.

> Too often the arrangements offered are after-the-fact, project-specific, cosmetic, and merely ameliorative. The big questions are not faced, let alone answered. The opportunity to work together on a plan for the future which accommodates everyone's needs has been lost.[41]

Canada has taken the position that it must give greater consideration to the interests of provincial governments and other third parties. These parties invariably insist that Canada

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[39] However, there are some anomalies. Largely as a result of the Privy Council cases, Ontario came to play an increasing role in treaties within the boundaries of that province. It had veto power over the selection of Treaty #3 reserves, and named it's own commissioners - as well as dictated some of the terms - with respect to Treaty #9 and the 1923 Williams Treaty. More recently, the James Bay Northern Quebec Agreement and the B.C. Treaty Commission process also provide examples of provincial participation and veto.

[40] *Report of the Parliamentary Special Committee on Indian Self-Government*, 1983, p. 45.

[41] Jamieson, Roberta, address to the American Bar Association Convention Panel on Native Self-Government, August, 1988.

reflect their interests, usually to the prejudice of the Indian Nations and the Crown's treaty obligations. This is a frequent occurrence:

> Where a treaty has been broken, whether it be modern or historic, the passage of time mitigates against reasonable redress. States become habituated to historic claims and grievances. The indigenous people exhaust their resources and their will, and are forced to turn their attention to essential matters of food and shelter.... The original unsettled claim mounts in size. Alienated lands are sold to third parties, developed, and become more valuable. Lost revenues accrue. Eventually, the original claim is perceived by the State as unreasonably large.
>
> If such a dispute is finally heard before a court, ... the laws and jurisprudence under which judgment is rendered are also creations of the State, which may have devised the very laws with the disputed question at issue.... It is not surprising that indigenous treaties have been seriously abused by States.[42]

Multilateral abuse of treaties and treaty-making is a motive force behind Indian Nations' call for bilateral processes with the Federal Crown.

Also underpinning the calls for bilateral treaty and treaty-making processes is the need to accommodate and equitably balance aboriginal and settler rights and ownership titles. Treaty-making begins with the recognition of aboriginal title and rights. A treaty then provides the foundation from which the Crown can establish its own titles and rights for purposes of settlement in Indian territories. Since aboriginal rights flow from aboriginal title, there is a need to accommodate and balance aboriginal and settler (Crown-issued) titles without requiring that the former be extinguished to make way for the latter. Afterward, as circumstances change, a "living" bilateral treaty process can readjust this balance as required.

2.0. THE JOINT CABINET/NATIONAL INDIAN BROTHERHOOD COMMITTEE.

In 1969, the Government tabled its controversial "*White Paper.*" The uproar was so widespread that Prime Minister Trudeau agreed to a meeting of the full Cabinet with the National Indian Brotherhood on June 4, 1970. At that event, the Brotherhood presented the Prime Minister with its "*Red Paper*" which proposed a new, more open and cooperative relationship between Indian Nations and the federal government.

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[42] Statement of the Grand Council of the Crees (of Quebec) to the *Working Group on Indigenous Populations*, 6th Session, 1988.

The succeeding years were times of confrontation. In 1974, after a demonstration on Parliament Hill and the occupation of offices of the Minister of Indian Affairs, an attempt was made under the leadership of NIB President George Manuel and Harold Cardinal, head of the Indian Association of Alberta, to put Indian Nation-Crown relations on a positive footing. As Dr. Sally Weaver described it, a joint committee "was born as a unique experiment in joint policy formulation" in the winter of 1974-75 through discussions with Marc Lalonde, then chairman of the Cabinet's Social Policy Committee. It was agreed the National Indian Brotherhood and the Cabinet would have a formal meeting in April, 1975 as a bilateral forum for dialogue on important issues. Agreement was reached and meetings were held, with Lalonde acting as chairman.[43]

An early bilateral discussion item was articulating a model for "Indian Rights Negotiations" to settle Indian claims, resolve past grievances and work out future alternatives. Both parties would send representatives to the Joint Committee which would make recommendations directly to Cabinet. Various ministers would participate on the Committee as appropriate. This Committee would meet twice a year. In the meantime, joint subcommittees would meet frequently and have fuller opportunity for discussion.

The Joint Committee would be supported by a secretariat, while an "Impartial Advisory Commission" would chair meetings, facilitate discussion and assist in resolutions. Members of the Commission would be expected to provide objective input. The Commission would have authority to consult, report and recommend to all parties. It would have powers under the Inquiries Act to facilitate broad investigations. It would act as an impartial tribunal to arbitrate differences.

A series of Joint Committee "Working Groups" would be established to address distinct topics. The principal focus was to be on "Indian rights and the claims process" and revisions to the Indian Act.

One concrete element of the bilateral structure was establishment of an independent *Canadian Indian Rights Commission.* The structure was approved at the Joint Committee's second meeting in December, 1975. Cabinet accepted the proposal in February 1976 but made significant changes unilaterally to the original concept.[44] An eighteen-month-long impasse followed over the subpoena powers to be accorded the *Canadian Indian Rights*

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[43] Weaver, Dr. Sally M., "The Joint Cabinet/National Indian Brotherhood Committee: A Unique Experiment in Pressure Group Relations". *Canadian Public Administration,* Summer, 1982, vol. 25, no. 2, pp. 211-239.

[44] This experience foreshadowed events in 1991-92 surrounding the terms of the order-in-council establishing an Indian Specific Claims Commission.

Commission.[45] The matter eventually was resolved and the NIB pressed for the Joint Committee to reconvene.

Two meetings were held with new players on both sides. In the second meeting, a frank discussion on Indian rights brought an end to the government's sidestepping of the issues. Differences came to a head and, disenchanted with the Federal Government's intransigence, the NIB withdrew from the Joint Committee in April, 1978.

Noel Starblanket, the new NIB President, called the Joint Committee "a farce" and accused the government of foot-dragging and trying to manipulate the process to co-opt the Indian leadership. The Minister of Indian Affairs said the NIB withdrawal was a "cop-out." Leon Mitchell, one of the Commissioners, came to the conclusion the joint process was simply unworkable.[46]

3.0. PATRIATION AND THE CONSTITUTIONAL PROTECTION OF TREATY RIGHTS.

Before patriation of the Constitution, the existence of the treaties between the British Crown and the Indian Nations gave the Indian Nations legal standing to approach the British Crown with respect to trust obligations and the observance of treaty terms. With patriation, the Government of Canada assumed the responsibility of meeting the Crown's obligations through the doctrine of State Succession and Commonwealth constitutional law. However, the act of repatriation, as a matter of law, did not affect the existing inherent aboriginal and treaty rights of the Indian Nations.

When the patriation of the Canadian Constitution was being discussed in 1980, the government objected to any reference in the *Charter of Rights and Freedoms* to "aboriginal and treaty rights," claiming there was lack of adequate legal definition for what these terms meant.

Section 35(1) of the Constitution Act, 1982 now provides: "the existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed." This section

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[45] For further detail, see Price, Richard, *Indian Land Claims in Alberta: Politics and Policy Making (1968-1977),* master's thesis for Department of Political Science, University of Alberta, 1977, pp. 116-25.

[46] Mitchell, Leon, "An Analysis of the Joint Process as Contemplated by Order in Council 177-702," March 17, 1977.

is not a part of the *Charter* and therefore is not subject "to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

Section 51(1) of the Constitution Act, 1982 specifies that "the Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect." "Any law" is not confined to statutes but includes all acts done pursuant to powers granted in law, *e.g.*, Orders-in-Council, regulations.

These two sections of the Constitution Act forever altered the rules of play between Indian Nations and settler governments in Canada. Instead of legislation prevailing over treaties as had been the case for over a century, treaties could now override legislation. Prior to section 35, Parliament and legislatures could ignore aboriginal and treaty rights and frequently did so.

For example, under the Migratory Birds Convention Act, federal regulations limiting the hunting of game birds out of season had been applied to treaty Indians, notwithstanding that this violated hunting rights set out in the treaties. However, after April 17, 1982, with the Constitution coming into force, the Act's regulations were rendered inoperative whenever they interfered Indians exercising their hunting rights under treaty.[47] The same principle rendered inoperative some Fisheries Act regulations.

4.0. THE "BILATERAL PROCESS," 1982-85.

The Indian Nation-Crown bilateral process reemerged in the 1980s as an alternative to the multilateral First Ministers' Conferences (FMCs) prescribed by the new Constitution to "identify and define" aboriginal rights.[48] For several years, the Assembly of First Nation resisted participation in such multilateral conferences, actively pursuing the alternative of a bilateral constitutional process with the federal government alone. Indian Nations found it unacceptable that after years of refusal by the Federal Government to protect Indian rights against provincial interests and intrusions, Canada was now insisting that the only way to

[47] See: *R. v Flett*, Manitoba, 1989.

[48] Representatives of aboriginal organizations were invited to attend one and then three additional constitutional conferences of provincial premiers, leaders of territorial governments, and Canada's Prime Minister, *"respecting constitutional matters that directly affect the aboriginal peoples of Canada, including the identification and definition of the rights of those people to be included in the Constitution of Canada."*

achieve constitutional protection for aboriginal and treaty rights was by involving all provincial governments in amending the Constitution.[49]

The Indian position was expressed by the Federation of Saskatchewan Indians in a letter to Minister of Indian Affairs John Munro dated January 19, 1982. Among its other concerns that the FMC "is an insufficient and inappropriate mechanism to realize its stated purposes", the FSI stated:

> Since Indian treaties were made between the Indian Nations and the Imperial Crown with the Federal Government as the administrative agent of the Imperial Crown, the decision-making authority given to the Provincial Premiers in this process is both legally and politically improper. Our rejection of Provincial authority over the definition or our rights does not preclude on-going dialogue with the Provinces with regard to the impact and implementation of these rights.

The FSI presented a paper advocating an "Indian Rights Protectorate Office," which it felt would address many of its concerns.

The federal government's point of view was expressed in a letter dated October 12, 1982 from Prime Minister Pierre Trudeau to Assembly of First Nations National Chief David Ahenakew, stating that it was not

> ... appropriate for the federal government to take on the role of broker between yourselves and the provincial governments.... In addition, in the federal-provincial context, the federal government represents all the people of Canada, not just the Indian people, and therefore there might be many positions which you would wish to take which the Government of Canada could not support.
>
> Though the federal government has a special relationship with the Indian peoples, the provincial governments are integral to the governance of Canada and of all its peoples.
>
> I suggest it is not in the interest of the Indian peoples to decide that they will deal with one order of government in Canada and ignore the other.[50]

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[49] As noted above, constitutional amendment was not the only way to achieve constitutional protection for aboriginal and treaty rights.

[50] This exemplifies the conflict of interest which the federal government has in attempting to fulfill its responsibilities to the Indian Nations, as it is obligated to do under treaty, and attempting at the same time to fulfill what it perceives to be its responsibilities to all citizens of Canada. The federal government's conflict is exacerbated by the Constitution, which

It was Indian Nation's expectation that the National Chief of the Assembly of First Nations would deal directly with the Prime Minister or the Minister of Indian Affairs with respect to national issues.

Following a series of meetings in 1982, a bilateral process (first proposed by the AFN in February), including a meeting on June 22, 1982 between the AFN and Prime Minister Trudeau, was formalized in an exchange of letters between the National Chief and the Prime Minister in November and December, 1982. The AFN informed the federal government future participation in the FMCs would depend on "a significant degree of progress being made in our bilateral process." The bilateral process was given status in the Canadian Constitution through an accord in 1983. The AFN was forced to complain months later that the federal government had failed to fulfil its obligations under the accord.

The Indian Nations saw the bilateral process addressing the full range of issues arising from the "special relationship" between the Federal Crown and Indian Nations, including programs and services, legislation, and interpretation of federal 91(24) responsibilities. The AFN saw such a formal negotiation process as a means to protect the special relationship during a period of major transition created by patriation of the Constitution. The bilateral process, it was hoped, could address all unfinished business at the regional as well as national levels.

For the AFN, the bilateral process began with the premise that there was already an inherent Indian order of government in Canada. Through the bilateral process, the relationship could be formalized, brought up to date and renewed. The bilateral process was also premised on the fact that the federal government had the authority to recognize Indian Nations as self-governing polities without further constitutional change.[51]

Treaty Indian Nations insisted that the bilateral process be given formal status. Years of government "consultations" with minimal results fostered disappointment, anger, and suspicion. Too often, consultation was used by the federal government to smooth the path for a course of action it had already decided upon. A formal process was seen by the Indian Nations as necessary to restore honesty and respect to their relationship with the Crown. The Assembly of First Nations asked to have the bilateral process affirmed in three ways: by a constitutional amendment, in framework legislation on Indian self-government, and through a political accord.

Treaty Indian Nations considered the First Ministers Conferences to be a violation of the bilateral treaty relationship. A unanimous resolution of the Joint Council of the National

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guarantees protection of aboriginal and treaty rights in the face of Canadians' civil rights under the *Charter*.

[51] A *Discussion Paper for an Independent Secretariat for the Canada/First Nations Bilateral Process*, April, 1984.

Indian Brotherhood stated that Indian Nations would "pursue a political solution of the constitutional problem regarding the entrenchment and protection of aboriginal title and aboriginal and treaty rights."

On May 31, 1982, AFN National Chief David Ahenakew sent a letter to the provincial premiers:

> The Chiefs of the First Nations, whom I represent, hold firmly to the view that since s.91(24) of the Constitution Act, 1867, gives to the Federal Government exclusive legislative authority over Indians and lands reserved for Indians, there is no legal basis for the involvement of Provincial Governments in our affairs.

A meeting with the Prime Minister took place on June 22, and agreement was reached that discussions would take place between officials with respect to establishing a bilateral process. When the AFN proposed that the federal government sign a memorandum to set up the bilateral process, Prime Minister Trudeau responded on July 26, 1982:

> It has not been customary for me, on behalf of the Government, to sign memoranda of understanding with one or another of the many elements that make up the Canadian population.

That response echoed Mr. Trudeau's position in 1969 when he discussed treaty rights:

> It is 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. ... I do not think we should encourage the Indians to feel that their treaties should last forever within Canada.

By November, nonetheless, seven meetings had taken place between federal and AFN officials. On November 29, National Chief Ahenakew wrote the Prime Minister that the officials had agreed to an exchange of letters instead of the Memorandum of Understanding proposed by the AFN. The officials also had agreed that the bilateral process would be characterized as "discussions with a view to reaching agreement between the federal Government and the Assembly of First Nations on constitutional matters related to Indian people."

The officials' proposed agenda: a) aboriginal title and aboriginal and other related rights; b) treaty rights, c) constitutional review "and in particular sections 6, 15, 25, 35, 38 (including consent by Indian peoples), 42, 49, 50, and 52."

> The bilateral process is aimed at a political solution, i.e., it will culminate at a political level... I might reiterate that the AFN is fully cognizant of the role of

> the provincial governments in the Canadian Constitution and we have no intention of placing the federal government in the role of broker between us and the provincial governments.
>
> It is understood that now that the AFN leadership has decided to participate in the First Ministers' Conference and related process ... the bilateral process will continue. In other words, the two processes are not mutually exclusive.
>
> I feel sure that given good faith and the political will on both sides, our bilateral process would be productive and rebound to the benefit of Canada.

At the March, 1983 First Ministers Conference, the AFN rejected the federal government's constitutional proposals, an action which Mr. Trudeau characterized as deciding that "half a loaf was not better than none." The FMC resulted in agreement on a constitutional amendment mandating further meetings.

In August, 1983, the AFN developed a draft Memorandum of Agreement to be signed by the National Chief and the Prime Minister. The memorandum provided for the establishment of a formal AFN/Crown Bilateral Commission to manage the bilateral process.

A draft memorandum of agreement on "a bilateral process of discussions" also was prepared by DIAND officials for the signatures of the Minister and the National Chief. Five objectives were identified: to resolve issues on federal programs and policies; to identify means and resources to improve economic conditions; to ensure means and resources to protect cultural distinctiveness; to explore means of establishing self-government by Indians within the Canadian constitutional framework; and to assist the federal government in carrying out its responsibilities. Top-level meetings would be held four times a year. The first item of business would be discussion of the Report of the Parliamentary Special Committee on Indian Self-Government (the "Penner Committee"). The draft agreement never went forward and remained unsigned.

The bilateral process was identified in the Penner Committee report (November, 1983) as one of several means by which the implementation of self-government could be pursued.

> Witnesses asserted that the treaty-making process could be revived, and that the federal government and Indian Nations could make all necessary arrangements by agreement. Therefore the bilateral process was seen by some as the preferred route to self-government. No legislation and no further constitutional change would be required to proceed in this manner.[52]

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[52] *Report of the Parliamentary Special Committee on Indian Self-Government*, 1983, p. 46.

As a result of the Penner Committee recommendations, Indian Affairs Minister John Munro established a bilateral "Transition Committee" with the Assembly of First Nations at the Regional Directors-General level. In what was called the "Third Stream," a moratorium was placed on all DIAND initiatives inconsistent with the bilateral process. Some 200 initiatives were identified for review.[53]

The Federal Government's formal response to the Penner Committee Report was tabled in Parliament in March, 1984. The government acknowledged the importance of continued bilateral discussions on policy and legislative matters and indicated its intention to establish bilateral committees for "consultation"[54] on policy and legislative matters. Also in March, 1984, a committee of officials under the co-chairmanship of the Assistant Deputy Minister of Corporate Policy of DIAND and the Director of the AFN's Bilateral Directorate began to discuss formal structuring of the bilateral process.

The agenda agreed upon for the March, 1984 First Ministers Conference had four topics: equality rights; aboriginal title/aboriginal rights/treaties and treaty rights; land and resources; and aboriginal or self-government. The federal government proposed a Constitutional Accord which failed to win approval.[55]

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[53] The bilateral Transition Committee ceased meeting a month later when it became apparent that, although it had a political mandate from the Minister, there was no mandate from the Deputy Minister and officials on the Committee had no authority to take action.

[54] The constant effort to convert any AFN request for "negotiations" to "consultations" has, in the government's eye, a purpose that goes beyond semantics. As Arnold Goodleaf, coordinator of the AFN Constitutional Working Group, was told in a letter from Michael Kirby: *"It is important, perhaps, as we contemplate a developing relationship between the Assembly of First Nations and the Government of Canada to be clear about the meaning of the word "negotiations." While I do not wish to engage in an exercise in semantics, you should realize that the word "negotiations" is understood by the government in its broad sense of consultation and discussion, not in the narrow sense of the kind of negotiation that takes place internationally between sovereign states or domestically in a federation between component elements each disposing of a measure of sovereignty."*

[55] Clause 2 of the *Proposed 1984 Constitutional Accord on the Rights of the Aboriginal Peoples of Canada,* tabled by the Prime Minister of Canada on March 8, 1984, had the flavor but not the substance of treaty-making: "The Government of Canada and the provincial governments are committed to negotiating with representatives of the aboriginal peoples of Canada to identify and define the nature, jurisdiction, and powers of self-governing institutions that will meet the needs of their communities, as well as the financing arrangements relating to those institutions, and to presenting to Parliament and the provincial legislatures legislation to give effect to the agreements resulting from the negotiations."

An alternative proposal more consistent with the bilateral nation-to-nation relationship might have read: "The Government of Canada and the provincial governments are committed to

A meeting of senior federal officials and AFN officials was held on March 29 to discuss the bilateral process. In April, two further topics were added to the bilateral agenda: fiscal arrangements and taxation. It was agreed that separate task forces would be set up for each topic but task force meetings were never held on the treaties.

The AFN proposed a multi-level structure for the bilateral process. At the political level, the federal government was represented by a lead Minister appointed for that purpose, with other Ministers participating as appropriate to the issue under discussion. The Assembly of First Nations would be represented at this level by the National Chief. Other members of the Chiefs' Commission on the Bilateral Process, other AFN commissions, or individual Indian Nations would participate as appropriate. The terms of reference for this level were the identification of agenda items and establishing priorities; final dispute resolution; confirmation of agreements; overall responsibility the process; approving resources to support the process; appointing mutually-acceptable chairpersons for each Task Force.

A Bilateral Steering Committee of senior officials of the government and the AFN was proposed. Task Force leaders would participate as appropriate. The Steering Committee would develop and implement a framework for the bilateral process, manage the process, resolve minor disputes, develop terms of reference for independent task force chairpersons, coordinate their respective sides to support meaningful discussions, and establish an independent secretariat for the process.

Task Forces would work on specific agenda items, identifying key issues for resolution at higher levels. Each party would have a task force leader. An independent chairperson would facilitate discussions.

The Task Forces would have independent chairpersons to facilitate discussions and resolution of issues as objective third parties. The terms of reference for the chairpersons were: a) to assist the Task Force in resolving issues; b) to assist the parties to identify areas of agreement and disagreement; c) to provide suggestions and recommendations in writing regarding the resolution of issues; d) to set deadlines for work assignments; e) to require formal responses to any tabled positions within a reasonable timeframe; f) to convene meetings; g) to suspend discussions where they were no longer considered meaningful and report suspensions to the Steering Committee, outlining the reasons; h) to provide reports on progress, issues, concerns to the Steering Committee on a regular basis.

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requesting the Governor General, acting on behalf of the Crown, to appoint Treaty Commissioners to negotiate with the various Indian Nations treaties, or agreements based on existing treaties, which would implement their spirit and intent with respect to lands and resources, jurisdiction, financial arrangements and other matters of mutual concern, and to present to Parliament and the provincial legislatures legislation to give effect to the treaties or agreements resulting from these negotiations."

An Independent Secretariat would provide logistical support to the Bilateral Steering Committee, Task Forces and independent chairpersons. It would maintain minutes, providing agendas, etc. The Secretariat would provide a neutral environment and forum for discussions. It would supply continuity.

DIAND had also been developing proposals for internal discussion regarding the organizational framework for the bilateral process[56]. It saw certain advantages to the process in meeting the government's objective of bringing greater coordination to the development of all native policy. As well, DIAND saw the possibility of having its own mandate expanded as manager of the Process.

An April, 1984 discussion paper for the senior DIAND Management Committee focused on maintaining control of the process.

> ... the AFN's desire for permanence for the Process and independence for its secretariat is balanced by our concern for maintaining an appropriate degree of control, particularly in respect of financial accountability.... The Department could enter into a contract with a consulting firm to provide the Secretariat services required... which would give the Government ultimate control over the Secretariat and would not ensure any degree of permanency.

The DIAND proposal recommended there be a "Clearinghouse" involving the Minister of Indian Affairs, the Minister of Justice, and the AFN. Subsidiary to it would be two parallel processes: "The Non-Constitutional Stream" which would involve the Minister of Indian Affairs, and the "Constitutional Stream" which would involve the Minister of Justice and the Office of Aboriginal Constitutional Affairs (OACA).

DIAND saw the same group of officials involved in both the multilateral FMC process and the bilateral process - an arrangement certain to be rejected by the AFN. DIAND saw conclusive decisions being taken at the FMCs. The AFN saw the conclusive decisions being reached bilaterally, with the FMC being nothing more than a signing ceremony.

DIAND, unsure of its mandate for the bilateral process, recommended that OACA be involved in government planning for the non-constitutional stream. When matters were under discussion involving health, justice, or employment, DIAND felt those Departments should be involved. DIAND felt this arrangement would isolate discussion of non-constitutional matters by the AFN, thereby allowing for the realization of a "new negotiating relationship" with native peoples on all issues.

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[56] A *Proposal for the Establishment of the Canada/First Nations Bilateral Process*, April, 1984.

On May 17th, senior DIAND officials met with officials from Justice, OACA, and the Privy Council Office to review the AFN's proposals and draft accord. The reaction to the AFN draft was negative. The OACA was reluctant to entertain any formalization of the bilateral process because of the precedent-setting effect on similar demands by other aboriginal groups. The PCO representative advised that recent deputy ministerial and Cabinet discussions indicated the Government was likely to reject formalizing the bilateral process.[57]

On July 6th, 1984 Chief Robert Manuel, coordinator of the Chiefs' Commission on the Bilateral Process, wrote the new Indian Affairs Minister, Douglas Frith, to request a meeting to discuss the bilateral process. Chief Manuel wanted to brief the Minister on the historical background and current status,

> ... and to dispel some myths which have, unfortunately, circulated among government members and officials regarding the implications of the establishment of this process... This process is directed at formalizing, defining, and updating the special relationship which exists between Indian Nations and the Federal Government.

The meeting was scheduled for the following week. Officials briefed the new Minister, warning him of the importance of words: Manuel was calling the process "a negotiating forum,"

> ... whereas AFN officials have agreed in our discussions with them that the process is one of consultation and not one of negotiation or joint decision-making. The Government will want to be assured that there is a clear understanding and agreement on the nature of the process to be established.[58]

The new Minister was also warned that the institutions required to support the bilateral process fell within the realm of "machinery of government" and thus the purview of the Clerk of the Privy Council, who was undertaking a confidential study on institutions bearing on the Government's relationship with all aboriginal peoples. The Minister was advised to tell the

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[57] N.B.: The U.S. Congress on September 17, 1987, reaffirmed the constitutionally-recognized government-to-government relationship with the Indian Tribes *"which has historically been the cornerstone of this nation's official Indian policy."* In the same resolution, *"the Congress also acknowledges the need to exercise the utmost good faith in upholding its treaties with the various tribes, as the tribes understood them to be, and the duty of a great nation to uphold its legal and moral obligations for the benefit of all its citizens... ."*

[58] Deputy Minister Lafontaine to Minister Frith, July 11, 1984.

National Chief "it may be some time before the question can be fully addressed." The AFN should be urged to carry on the bilateral process "informally."[59]

From DIAND's viewpoint, the bilateral process would be a type of "formalized consultation with Indian People." It saw the process in organizational terms rather than as a new relationship with the Indian Nations.[60]

By November, DIAND's Corporate Policy officials were considering the implications of withholding AFN funding for the bilateral process "pending further consideration." Actually, no funding had yet been provided. "So much uncertainty remains both within the government and the AFN with regard to the establishment of the process, the degree of formalization, its authority, and its scope."[61]

An attempt to jump-start the bilateral process came on January 16, 1985, when National Chief David Ahenakew wrote Prime Minister Brian Mulroney about "the historical and continuing relationship between the First Nations and Her Majesty's government in Canada."

> In its form most acceptable to the Indian Nations, this relationship is bilateral in nature. Since earliest colonial times, this ideal bilateral relationship between equals has deteriorated through the actions or neglect of Her Majesty's representatives...
>
> The *Royal Proclamation* ... presently recognized in the Constitution Act, set forth the principles explicitly and implicitly upon which the relationship between the Crown and the Indian Nations is to be based. The nationhood of the diverse peoples indigenous to this continent is recognized, as well as their capability of entering into direct relationships with the Crown. The territorial rights of these Indian Nations is confirmed, along with a process whereby treaties relating to the land and other bilateral matters might be addressed...
>
> Notwithstanding the essential bilateral nature of the relationship, the sacred trust, and the solemn treaties, representatives of the Crown adopted methods of unilateral policy and decision-making, spawning a massive overburdening bureaucracy... Your government has inherited this legacy of the Crown.
>
> There are two major elements.. : constitutional entrenchment of the inherent rights of the Indian Nations within the polity of Canada, and the renewal of the essential bilateral relationship between the Crown in Right of Canada and the

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[59] *Ibid.*

[60] DIAND Paper, "Consultation Processes With Indian People", October 12, 1984.

[61] Briefing Note by R.L.McCaw & Clovis Demers, November 15, 1984.

> Indian Nations... The previous government recognized the need to establish a bilateral process. Such a process would be by definition a definite systematic relationship. It would be an issue-oriented working relationship...
>
> There is a very real need to address the issue of a bilateral process with your government. We must continue the development of an acceptable "new relationship" on both the constitutional and bilateral fronts.
>
> Your Minister of Indian Affairs has indicated that your government has adopted the "Penner Report": as a basis for Indian Nations policy. It is obvious, then, that a bilateral process is a necessity. I can assure you that we are ready, willing, and able to move ahead with a new spirit of optimism towards the development of the bilateral process. What remains is for your government to commit itself to the development of such a process.

There was no action on the National Chief's letter to the Prime Minister.

Despite the commitments made by the federal government, by the end of May, 1985 the bilateral process was dead. Clovis Demers, the senior official on the government side, had left the Department. The Minister was advised by his replacement, acting ADM Neil Overend, that when the AFN asked him to get the bilateral process moving, "You may wish to indicate your preference for direct consultation with Chiefs and Councils of Indian First Nations as opposed to a formally structured process at the national level."[62]

The multilateral First Ministers Conferences did not fare much better. At the end of the exercise, not only did the objective for the meetings as stated in the Constitution fail to be met, but the parties to the conferences could not reach agreement even as to what the objective really was.

In early 1991, an effort to revive the bilateral process was made by Georges Erasmus, then National Chief of the Assembly of First Nations. Noting the continuing difficulties in constitutional negotiations and the recent history of the provinces scuttling discussions on self-government, the AFN pointed out to the federal government that whatever power it had to sign treaties historically, it continued to have those same powers and could proceed without the provinces to negotiate treaties on Indian self-government. Such treaties would automatically have the same protection

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[62] Graham Swan to Minister, May 30, 1985.

afforded by the Constitution which is afforded existing treaties. As Erasmus pointed out, "the only thing stopping them is political will."[63]

[63] Canadian Press release, April 26, 1991.

5.0. PROPOSALS FOR AN ABORIGINAL AND TREATY RIGHTS PROTECTION OFFICE.

In the 1980s, the Indian Nations proposed the creation of an *Aboriginal and Treaty Rights Protection Office.* It was called for in 1980 in the *Declaration of First Nations*, when chiefs from across Canada set up the AFN. The Federation of Saskatchewan Indians prepared a discussion paper on the subject, drawing upon a multitude of models and experiences.[64]

Four models were advanced for consideration by the FSI:

* an advocacy office to represent Indian interests utilizing non-judicial approaches;

* a permanent advocacy office which would act within the existing legal system;

* a permanent advocacy office with modified court procedures, rules, and/or definitions of trusteeship;

* an advocacy office and special adjudicatory bodies to replace the conventional court system.

In 1983, after hearing from a number of witnesses on the matter,[65] the Penner Committee recommended that such an advocacy office be established under Indian

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[64] Among the models which the FSI considered were the United States Indian Claims Commission, two bills introduced in the House of Commons in the 1960s for the creation of a Canadian Indian Claims Commission, terms of reference and recommendations of the Indian Claims Commission of Dr. Lloyd Barber, terms of reference and the recommendations of the Canadian Indian Rights Commission of Commissioners Pratt and Hartt, terms of reference of the Indian Commission of Ontario, a proposal for an Indian Trust Authority by the Executive of the United States, recommendations of the American Indian Policy Review Commission (1976), draft proposals for a specific claims resolution process by DIAND (1979), studies commissioned by DIAND using labor arbitration models for resolving claims disputes (1980), and the Canadian legal system.

[65] Among them was the Special Committee of the Northwest Territories Legislative Council on Constitutional Development, which recommended that "a mechanism to protect aboriginal rights be established and included in the institutions of government once aboriginal rights settlements are concluded."

Nation auspices. Among other responsibilities, it would represent Indian Nations' interests in legal disputes affecting their rights. The Special Committee reported:

> Effective representation of Indian Nations' interests particularly in aboriginal and treaty rights cases and other litigation relating to Indian lands and resources, would be significant in ensuring respect for Indian Nations' rights within the Canadian legal system. An organization providing legal assistance to Indian Nations would help to develop a new body of legal precedents. With funding at a level comparable to that available to opposing interests in litigation, it could help to bring equity to the legal process.

DIAND unilaterally began to elaborate the design of the proposed Office. As officials saw the proposal, the Office's mandate would be to protect and preserve the rights and privileges of the aboriginal peoples of Canada as set forth in sections 25 and 35 of the Constitution. It would report every two years to Parliament, provincial and territorial legislatures, and aboriginal peoples as to whether it found any infringement by legislation, administrative or private act of any right or privilege of an aboriginal person, a summary of all complaints received, etc.

It would investigate complaints, intervene in judicial or administrative proceedings, carry on a public education program, and would convene a constitutional conference every five years to be chaired by the Governor General at which premiers and Prime Minister would report steps taken to rectify infringements of rights. As an alternative, DIAND considered federal legislation to establish a similar agency.

In many respects, the DIAND-designed Office was proposed as a means of avoiding, rather than addressing, substantive rights questions. Since the Office would deal only with rights defined in the Constitution itself, other rights, including legislated rights, would not be covered. For instance, DIAND saw exemption from taxation as a privilege conferred by the Indian Act and therefore outside the jurisdiction of the Office. Rights which aboriginal people consider to be derived from aboriginal title similarly would be excluded.

As conceived by DIAND, the Office also would have no remedial power - it could only state its opinion. In spite of this, the Office was intended to be the final word about rights - Canadians would be encouraged to look to this one source of information about the constitutional rights of aboriginal peoples. The Office would also have public relations value for Canada internationally, where it would be held out as a shining example of Canada's seriousness about preserving and protecting the constitutional rights of its aboriginal peoples.

6.0. TREATY #8 RENOVATION: THE OBERLE REPORT.

In 1984, Minister of Indian Affairs David Crombie met with chiefs in northern Alberta and heard a litany of complaints of violations of Treaty N°8. Rather than deal with the complaints individually, he suggested that the time had come to "renovate" Treaty 8. When he was later pressed to define the word "renovate," he told the chiefs: "The term belongs to us. Together we will define it to mean what we want it to mean."

In February, 1985, Frank Oberle was appointed to consult with representatives of the Treaty 8 Indian Nations and to report on treaty renovation as a process to resolve outstanding treaty issues and as a forum on the development of an improved relationship between the Indian Nations and the federal government. Mr. Crombie wrote the Treaty 8 chiefs about the renovation exercise, as he saw it:

> While I am willing to consider the articles of the treaty, the Report of the Treaty Commissioners, other written contemporary reports, 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. 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 proceed...[66]

During the First Ministers Conference of 1985, Prime Minister Mulroney confirmed the treaty renovation process.

The Oberle Report on Treaty 8 renovation was submitted to Minister David Crombie on January 31, 1986. It stated that treaty renovation made sense "only if Treaty 8 is restored to its rightful place as a fundamental Indian charter."

The Oberle Report proposed the renovation process should follow a number of steps:

> 1) the approval of the Indian Nations would be sought, followed by Cabinet approval of the process;
>
> 2) a treaty Commission led by a Minister of State, independent of Indian Affairs, would carry out the renovation on behalf of the Crown;

[66] Letter from Minister David Crombie to Treaty 8 chiefs.

3) continuing education would keep the Indian Nation communities informed;

4) a consensus would be reached based on the political relationships, rather than strict legal interpretations;

5) the operation of the Indian Act would be suspended with respect to the Treaty 8 Indian Nations and the renovated treaty would be the legal and political basis of the relationship - a protocol would insure the carrying out of federal obligations; and

6) the renovated treaty and a final protocol would be added as a schedule to the Constitution Act, 1982.

Subsequently, Mr. Crombie was moved to another portfolio. Oberle was appointed to Cabinet as Minister of Science and Technology, making it difficult for him to comment on his report. The Report itself was referred to the Department of Justice for review, where it was buried and never heard from again. The federal government never found itself obligated even to reject the report.

7.0. OFFICE OF THE TREATY COMMISSIONER OF SASKATCHEWAN.

7.1. BACKGROUND.

Most of the prairie treaties provide for one square mile of land (i.e., one section or 640 acres) for each treaty Indian family of five (128 acres per person).[67] The record is clear that Indian Nations could postpone the selection of reserve lands, if they so wished, until a future date. As note above in Part I, the official rationale for treaty land allocations and selections had Indian economic self sufficiency as its primary objective.

The *Natural Resource Transfer Agreements* of 1930 (NRTAs), which purported to transfer the 'ownership' of Crown lands to the prairie provinces, provided for

[67] Treaties 1, 2, and 5 are exceptions, providing only a quarter section (160 acres) per family of five.

outstanding treaty land entitlements (TLE) to be fulfilled.[68] The NRTAs also incorporated provisions of the 1924 *Indian Lands Agreement* between Ontario and Canada. This agreement assigned 50% of the royalties from mineral development **on reserve** to the province, and in the case of the prairies was to apply to all reserves set aside after 1930.

Over time, prairie Indian Treaty Nations found themselves with an increasing population on a decreasing land base. Outstanding TLE therefore was increasingly perceived by these Nations as an important resource for resolving social and economic pressures.

The prairie provinces, however, showed little interest in addressing the TLE land issue. They viewed it as a charge against their stock of capital (the land) and an impediment to non-Indian economic development. Federal authorities also dragged their feet because their policy was to facilitate the dispersal and absorption of the Indian Nations. To increase the size and number of Indian reserves by fulfilling TLE would be counter productive. The preferred federal course for settling legal obligations was financial compensation.

The impasse over TLE continued into the 1970s. In 1976, the deadlock seemed to be broken when the Federation of Saskatchewan Indians (later the Federation of Saskatchewan Indian Nations - FSIN) and the province agreed on a formula for meeting treaty land entitlement.

A long contentious question had to do with the relation between land entitlement quantum and population. Although each of the treaties in the prairies set out how many acres each family was to receive, there was no sunset clause on when reserves could be selected, and no cap on population. Saskatchewan had always insisted on using the population of each Band at the date of first survey - a yardstick that was unacceptable to most of the Indian nations. The province now seemed to be prepared to meet treaty obligations on the basis of 'present population X 128 acres per person minus land already received'.[69] The means for addressing TLE in the southern regions of the province where most lands were now occupied by third parties, remained an open question.

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[68] The treaties and the NRTA are ambiguous about how entitlements are to be calculated, the quality of land that was to be set aside for Indians, whether governments were confined to Crown lands as the only source for meeting entitlements, and what compensation should be paid in the event that suitable lands were not available.

[69] The governments of Alberta and Manitoba rejected this approach, and at the time remained committed to date-of-first-survey population.

Saskatchewan was not prepared to make any firm commitments about where the entitlement lands would come from, and the federal government chose to remain vague about its financial contribution to the settlement. Negotiations faded over time to a mere understanding that the federal government would try to handle TLE on a band-by-band basis. A collective approach to resolving TLE in Manitoba during this same period met the same fate.[70] This state of affairs continued until 1986 when the FSIN began to lobby the federal government for a bilateral treaty process.

The position put forward by the FSIN appeared to be based in large part on the Treaty 8 renovation initiative of 1985. A discussion paper that detailed a bilateral approach to treaty implementation, based on rules of interpretation, had been circulated in the prairie region. However, the treaty renovation initiative was eclipsed almost immediately by the Neilsen Task Force report (1986), which called for a completely opposite course in Indian affairs policy: the "Buffalo Jump of the 1980s." [71]

7.2. OBTAINING A BILATERAL TREATY PROCESS.

In 1988, the FSIN approached Bill McKnight, successor to David Crombie as Indian Affairs Minister, with a detailed proposal for a bilateral treaty process. Unfulfilled TLE was to be one priority that would be addressed among others. The process was to be managed and mediated by a Treaty Commissioner based in Saskatchewan, reporting to both the FSIN and Parliament.

Prior to his departure from Indian Affairs to the Department of National Defence, McKnight offered conditional support to the FSIN proposal - on the condition that the Treaty Commissioner report to DIAND and that his full attention at the start was to be given to TLE. The province of Saskatchewan was to be involved on an 'as required' basis.

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[70] There were at least two stated reasons for lack of progress. First, the Department of Justice took the position that the '1976 formula' was "beyond lawful obligation." Secondly, federal officials came to recognize that negotiations with the Indian Nations on a collective basis changed the power relationship between the parties and that the process had begun to take on the characteristics of a 'level playing field.' Rem Westland, Director of the Specific Claims Branch, candidly admitted that this latter point was a major reason for 'shutting down' the province-wide negotiations that were taking place in Saskatchewan and Manitoba. Instead, DIAND would turn to Alberta with the intent of *"picking off the bands one by one."* (personal communication, Rem Westland to Peter DiGangi, autumn 1986).

[71] Union of B.C. Indian Chiefs, *Warning Indian Nations: The Buffalo Jump of the 1980s*, bulletin poster, 1987.

On June 8, 1989, a new Indian Affairs Minister, Pierre Cadieux, entered into a formal agreement with the FSIN to establish an "Office of the Treaty Commissioner." (The agreement came on the eve of an FSIN court action on Treaty Land Entitlement coming to trial, and at the height of protests that cuts to the post-secondary education programme violated Indian Nations' aboriginal and treaty rights.) A "Memorandum of Agreement and Undertaking," dated June 7, 1989, became the instrument that established the bilateral treaty implementation process. Five months later, Clifford Wright, a former mayor of Saskatoon, was appointed to be the Treaty Commissioner for Saskatchewan.

The Office was mandated to review and investigate unresolved treaty issues and to make recommendations to the FSIN and the federal government. It was also mandated to make recommendations "concerning the rules for application in interpreting the terms of the treaty."

7.3. TREATY LAND ENTITLEMENT.

A year later, in May 1990, the Treaty Commissioner submitted his "Report and Recommendations on Treaty Land Entitlement." It included a lengthy FSIN statement which set out the respective roles of the FSIN and the federal government within a bilateral treaty relationship. Various sectors were identified as well where the province would be included. The Commissioner identified in another section the major concerns of the province and developed his recommendations accordingly. His addendum spelled out in detail the elements of a land entitlement agreement, which clearly would require tripartite support.

On September 22, 1992, the province, the FSIN and the federal government agreed to a TLE settlement rivaling in length and complexity comprehensive claims agreements.

A review of the TLE agreement shows that it contains provisions similar in many respects to the extinguishment provisions of comprehensive claims settlements. For example:

* The agreement (15.01) the Bands to "cede, relinquish and abandon unto Canada and forever discharge and release Canada... from all claims, rights, title and interest of such entitlement bands under treaty...."

* The agreement is predicated on Canada's definition of Indian title, i.e., that Indian reserve land is owned by the Crown and that Indians have rights of possession and use only.

* Land acquisition procedures seemed to be stacked against Indian interests because the province, municipalities and the federal government reserve the right to veto land selections made by the Indian nations.

* An "Equity Formula" is based on the principle that in regions where land selections are difficult because of third parties, a monetary payment will be made to enable Bands to purchase land on a 'willing seller-willing buyer' basis.

* The settlement excludes water rights except for wholly enclosed bodies of water within acquired lands and some shoreline rights at the high water mark.

* All lands acquired are subject to the federal "Additions to Reserves" policy which stipulates that "reserve status should only be considered where other forms of land tenure are either impossible or inappropriate". Cost implications to the federal government for housing, infrastructure etc. on lands that would attain reserve status would also be a consideration.[72]

* The agreement could be affected by subsequent constitutional or legal changes.

The treaties and the NRTA commit Canada and the province to provide reserve lands. The agreement changed this treaty obligation by allowing the province and Canada to provide money instead, in effect off-loading the responsibility for actually obtaining land onto the Treaty Nations themselves. In addition, the release and indemnity clauses contained in the agreement appear to foreclose any future TLE processes for the signatory Nations. (A once-and-for-all-time TLE exercise.) Unfortunately, it appears that the land acquired under the TLE Agreement will be less than that actually required to realize full economic self sufficiency for the Treaty Nations.

7.4. IMPLEMENTATION IN AN URBAN SETTING.

A partial offset to the extinguishment provisions of the agreement are the competitive tax advantages of an expanded reserve land base. However, few settler governments have been willing to allow Indian Nations the full benefit of these competitive advantages. This has

[72] Federal Policy statement on "Additions to Reserves" (DIAND November 1991): Chapter 9.

been the case with respect to the Muskeg Lake Cree First Nation in their efforts to obtain reserve land within the city limits of Saskatoon.[73] After years of negotiations involving the Band, Canada, the province and the Municipality of Saskatoon, a 35 acre reserve was set aside through Order-in-Council in August 1991. It houses the "McKnight Commercial Centre," named in honour of the former Minister of Indian Affairs. Under the Agreement, the competitive advantages available to the Band were restricted and reduced to "assure a level playing field" for non-Indian businesses located in the city but outside of the new reserve.[74] On the reserve, the Band has "jurisdiction over normal municipal matters,"[75] but

> ... development and use of the land shall at all times be in accordance with the laws of Saskatchewan and the bylaws of the City of Saskatoon. Should the Nation wish to exercise any of its powers under the Indian Act to pass bylaws which in any way effect the land or the use and development thereof, the Nation agrees that such bylaws will be consistent with the laws of Saskatchewan and the bylaws of the City of Saskatoon.[76]

Non-Indian businesses and occupants of the Centre are licensed, assessed and taxed by the City of Saskatoon, although a 1993 Municipal Servicing Agreement between the Band and the city now recognizes the Band's right to tax, "subject to such taxes being at least equal to those which would be assessed by the City were the property fee simple."[77] In turn, the Band will pay to the city all monies collected, except the amounts normally levied by the city for schools, which the Band retains.

The Band now has an opportunity for commercial development in an urban setting, but on a parcel of "reserve land" that has been stripped of all but "the residual rights of reserve status".[78]

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[73] See: "McKnight Commercial Centre - an Urban Reserve Case Study," research report for RCAP, August 1993.

[74] *Ibid.*: p. IV.

[75] *Ibid.*: p. IV.

[76] *Ibid.*: p. 19.

[77] *Ibid.*: p. 42.

[78] Ibid.: p. 21.

7.5. EDUCATION.

Although TLE was the first priority of the Office of the Treaty Commissioner, other items were also identified for study and action, particularly the interpretation of the treaties as the apply to education. The inclusion of this agenda item was in many ways precipitated in 1989 by Canada's move a few years ago to cap post-secondary assistance to Indian Nation students.

To date, there have been no substantive results from this effort to reach an understanding on the nature and scope of the treaties as they concern Indian education.

7.6. COMMENTARY.

Given previous experiences, it is significant that the FSIN was able to obtain a formal treaty process at all. Certainly, reaching agreement on outstanding TLE after over a century of denial and obfuscation on the part of federal and provincial governments was a substantial accomplishment - but an accomplishment not without substantial costs.

One cost was a change in the treaties themselves and in the parties' respective obligations under treaty. Another cost was the application of extinguishment and indemnity clauses which cannot be legally challenged on the same basis as the surrender clauses in the original treaties. In fact, the extinguishment clauses in the modern TLE Agreement may have the side-effect of validating the surrender provisions in the earlier treaties.

Although formally established as a bilateral process, in practise the Indian nations were drawn into formal multilateral negotiations to obtain a framework agreement. Following this - at least in the case of the Muskeg Lake Cree First Nation - individual Bands have also been required to engage in an array of multilateral negotiations and agreements in order to actually realize the benefits of the framework agreement.

Each stage of this process appears to have contributed in various ways to altering the treaties and, in the case of Muskeg Lake, the conditions applying to reserve land status.

With respect to education, although research and discussion have taken place through the auspices of the Treaty Commissioner, no significant progress appears to have been made.

In sum, it seems that a process which was initially considered as a vehicle for breathing life into the treaties and expanding their scope may have produced a contrary result. This observation is not intended to question the legitimacy of the process or the participants. Rather, it is offered as an illustration of what can happen in negotiations which are

characterized by a major power imbalance and in which the Crown's agents essentially play a grudging game of coercive hardball.

C. MISCELLANEOUS NOTES.

1.0. INTERNATIONAL MODELS OF DISPUTE RESOLUTION.

1.1. INTERNATIONAL STATUS OF TREATIES WITH INDIGENOUS PEOPLES.

In 1988, the United Nations Human Rights Commission undertook a study of treaties involving indigenous people. One of the Commission's Working Groups is crafting a Declaration regarding indigenous people which could have an impact on international perceptions and pressures regarding treaties with indigenous peoples.

If Indian Nations do not find some accommodation for their position on treaties, they will continue to seek impartial international scrutiny. It is likely that in the international arena, they will apply pressure not only for implementation of the content of the treaties but also for formal recognition of the treaties as international instruments.

As we have seen above, Canada firmly opposes recognition of its treaties with Indian Nations as international documents, arguing that this would abrogate Canadian sovereignty. However, this has not always been the case. In 1897, a dispute with the Province of Ontario prompted the Solicitor General for Canada, J.H.Curran, to argue that the "Robinson Treaties" were indeed international treaties.

> We contend that these treaties are governed by international rather than municipal law. They were made with the tribes under the authority of the Sovereign, and the faith of the nation was pledged in dealing with those annuities. The Crown is a trustee in those matters, and occupies a special relationship towards those Indians, and is bound to watch over their interests and enforce their rights, and will not be allowed to set up its own laches as a defence against these claims. All these claims are safeguarded in a manner that is quite a different manner from any claim that would arise between two different subjects of Her Majesty who might come before any Court to have their matters adjudicated upon.[79]

1.2. AUSTRALIA: ABORIGINAL LAND COMMISSION.

Australia's history is not unlike Canada's. There were early concerns with aboriginal land rights but colonial settlement proceeded without formal recognition or treaties. Some "reserves" were established but had legal status only as Crown lands.

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[79] Transcript, Federal-Provincial Arbitrations (Unsettled Accounts Arbitration), Indian Claims, Robinson Treaties, vol 5., p. 63, January 12, 1897.

In 1976, the Parliament of Australia passed the Aboriginal Land Rights (Northern Territory) Act, which established an Aboriginal Land Commission to decide on aboriginal claims to traditional lands in the Northern Territory.[80] There was no consultation, negotiation, or agreement with the aboriginal peoples prior to passage of the legislation.

The Act specifies that the Aboriginal Land Commissioner must be a judge of the Supreme Court of the Northern Territory, which gives the institution a judicial character, but decisions of the Commissioner are recommendations to the federal Minister of Aboriginal Affairs, making the process advisory. The first Commissioner, Mr. Justice John Toohey, was appointed to the Supreme Court specifically so he could be designated as Commissioner. He developed "Practice Directions" or procedures appropriate to the situation. His advisory role became judicial in that the Minister routinely confirmed his decisions. Limiting the process to the territories avoided the problem of involving the state governments.

Claims were heard, decisions rendered and substantial tracts of lands transferred to aboriginal ownership at a rate unknown in Canada's land claims processes. The Commissioner's rulings set out:

a) number of persons with traditional attachments to the land who would be benefitted by an award;

b) detriment to other persons, communities, and other aboriginal groups;

c) the effect of the award on the existing or proposed patterns of land use;

d) the cost of acquiring the interests of third parties.

However, the Commissioner emphasized the formal or legal criteria for establishing a claim and left it to the Minister to balance that with other factors.

In analyzing the success of the ALC, Professor Douglas Sanders has cited as factors:

a) the skill of the Commissioner;

b) the development of flexible procedures which allowed the tribunal to hear the traditional aboriginal claimants on their lands;

c) the use of specific criteria for decision-making, thereby depoliticizing the process by excluding social, economic, and policy factors;

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[80] See: Sanders, Douglas, "The Australian Aboriginal Land Commissioner," University of British Columbia, June 3, 1989.

d) the authority of the tribunal as "legal" and the Commissioner as a judge;

e) the exclusion of the most controversial issues from the jurisdiction of the tribunal;

f) use of expertise, with social scientists acting for the Commissioner and for claimants;

g) a system of assistance for claimants.[81]

1.3. NEW ZEALAND: TREATY OF WAITANGI AND WAITANGI TRIBUNAL.

In 1840, the Crown and the Maori Nation entered into a treaty in which the Crown was granted certain rights to make laws to govern settlement and, in exchange, the Crown undertook the obligation to protect certain aboriginal rights of the Maori people.

In 1975, the Waitangi Tribunal was established by the Treaty of Waitangi Act of the New Zealand Parliament and was given statutory responsibility to interpret "the principles of the Treaty," taking into account both the Maori and Crown point of view. Both treaty partners are represented on the Tribunal. The Tribunal was intended primarily to measure the Crown's compliance with the Treaty and its performance as a treaty partner.

The Waitangi Tribunal has identified key principles of the Treaty:

> The Treaty implies a partnership, and the duty to act reasonable and with utmost good faith. The precise terms of the partnership have yet to be worked out. Both partners are obligated to act towards each other in utmost good faith.
>
> The Treaty is an agreement that can be adapted to meet new circumstances. It is more than an affirmation of existing rights, not intended to merely fossilize a status quo, but to provide a direction for future growth and development. The Treaty is to be always speaking and to be made relevant to our times.
>
> The needs of both Maori and the wider community must be met, which will require compromises on both sides. It ought not to be forgotten that there were pledges on both sides. A careful balancing of interests is required. It was inherent in the Treaty's terms that Maori customary values would be properly respected, but it was also an objective of the Treaty to secure a British settlement and a place where two people could fully belong.

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[81] *Ibid.*

> The Maori interests are not only recognized by the Crown, but should be actively protected by the Crown. The omission to provide that protection is as much a breach of the Treaty as a positive act that removes those rights. The Treaty assures that despite settlement, Maori would survive, and because of [settlement] they would also progress. The Crown had not merely to protect those natural resources Maori might wish to retain, but to assure the retention of a sufficient share from which they could survive and profit and the facility to fully exploit them.
>
> The granting of the right of pre-emption to the Crown implies a reciprocal duty for the Crown to ensure that the Tangata Whenua (Maori) retain sufficient endowment for their foreseen needs.
>
> The Crown cannot evade its obligations under the Treaty by conferring authority on some other body. When the Crown vests authority, it must provide a proper assurance of Treaty promises.
>
> The Crown has an obligation to recognize Maori authorities. Traditional mechanisms of tribal government are to be respected and maintained. The nub of the problem is the omission of the Crown to recognize the tribal position and to provide the legal foundation and resources for tribes to contribute more fully to local affairs and to take necessary steps for the protection of tribal interests.
>
> Criticism that a tribe has failed to object [to a government practice] is to blame the victim of the historic process for its current condition.
>
> Management of resources must take into account the cultural values of those who have rights to those resources.
>
> Choices of the Maori are not limited to traditional lines and bicultural options may be accepted.

Under New Zealand law, the principles of the Treaty have greater status under statute than the text of the Treaty itself. In seeking to define the principles of the Treaty, Judge Somers of the New Zealand Court of Appeal ruled as follows:

> The principles of the Treaty must, I think, be the same today as they were when it was signed in 1850. What has changed are the circumstances to which those principles are to apply. At its making, all lay in the future. Now much, claimed to be in breach of the principles and of the Treaty itself, lies in the past. Those signing the Treaty must have expected its terms would be honoured. It did not provide for what was to happen

> if, as has occurred, its terms were broken ... A breach of a treaty provision must, in my view, be a breach of the principles of the Treaty.[82]

Matters which have come before the Tribunal include the management of natural and physical resources. While the Crown is not obligated by law to follow the Tribunal's recommendations, it is expected that the Crown will find other ways of redressing breaches of the Treaty. The New Zealand Court of Appeal found that if the Tribunal found merit in a claim and recommends redress, it would only be in very special circumstances that the Crown, as a reasonable treaty partner, could justify withholding some form of redress.[83] Where grievances are established, the State for its part is required to take positive steps in reparation.

When a Parliamentary Commissioner for the Environment was established in 1986, the Commissioner was mandated to take into account the principles of the Treaty of Waitangi.[84] In a report, the Parliamentary Commissioner said the Maori rights are "home country rights and are not to be conduced with the rights of a minority culture." With respect to resource issues, the Commissioner stated:

> The Maori people have their own principles of environmental management. ... There is a unique opportunity for Maori and Pakeha (settlers) principles of environmental management to be considered together. Before this can happen, there has to be a better understanding by the people of New Zealand of Maori culture and the responsibilities imposed by the Treaty of Waitangi. That the Treaty is a living reality needs to be recognized by all.

Similar obligations to take the Treaty into account are mandated in the Conservation Act 1987, and the State-Owned Enterprises Act 1987.

In order to avoid inadvertent violation of the Treaty, the Cabinet established a policy that all future legislation referred to Cabinet at the policy approval stage should draw attention to any implications for the principles of the Treaty, and the financial and resource implications of recognizing the Treaty should be assessed.[85]

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[82] *The Treaty of Waitangi in the Court of Appeal,* New Zealand Maori Council, and *Latimer v. Attorney General and others,* 6 NZAR 353.

[83] Justice Cooke, New Zealand Maori Council, New Zealand Court of Appeal, 1987, pp. 37-38.

[84] *Environmental Management and the Principles of the Treaty of Waitangi: Report on Crown Response to the Recommendations of the Waitangi Tribunal 1983-1988,* New Zealand Parliamentary Commissioner for the Environment, 1988.

[85] New Zealand Cabinet Office Circular CO(86) 10.

Prime Minister David Lange regarded the Treaty of Waitangi as having the potential *"to be our nations most powerful unifying symbol."* In a speech on October 21, 1988, he declared:

> The ethos of the Treaty is the real raw material that makes up the vision of a society all New Zealanders can adhere to: partnership, cooperation, respect, mutual benefit, negotiation, compromise, and good faith. These are the principles we must adopt.

The Lange Government also published a short statement of *Principles on Which the Crown Proposes to Act,* which acknowledges the Maori's right to organize their governments and to control their resources.

2.0. ROLE OF THE PROVINCES IN TREATY RENEWAL AND TREATY-MAKING.

2.1. THE PROVINCES AND THE BILATERAL TREATY RELATIONSHIP.

Although most treaties in Canada are bilateral arrangements between the Indian Nations and the Imperial or Federal Crown, a multiplicity of jurisdictions - federal, provincial and municipal - are found in the political environment in which treaty implementation and treaty-making occur. Examples cited throughout this paper show that the interests of provincial governments are often inimical to those of the Indian Nations.

In 1837, the Select Committee of the English House of Commons on Aborigines in British Settlements confirmed the wisdom of having the executive government, as opposed to the local legislatures, responsible for Indian Nation-Crown relations. The local legislatures were considered to be in an inherent conflict of interest.

> This is not a trust which could conveniently be confided to the local legislatures. In proportion as those bodies are qualified for the right discharge of their proper functions, they will be unfit for the performance of this office, for the local legislature, if properly constituted, should partake largely in the interests and represent the feelings of the settled opinions of the great mass of the people for whom they act.
>
> But the settlers in almost every Colony, having either disputes to adjust with the native tribes, or claims to urge against them, the Representative body is virtually a party, and therefore ought not to be the judge in such controversies.[86]

[86] Extract from the *"Report of the Select Committee of the House of Commons (UK) on the Aborigines of the Brtish Settlements"*, 26 June 1837, quoted in Canada, Journals of the Legislative Assembly 11 Vic. (1847), Appendix "T": General Recommendations.

The fact that "local" jurisdictions, such as the provinces, historically have ben able to constrain Indian Nations in the to exercise of aboriginal and treaty rights does not give rise to provincial rights or a provincial role in defining or interpreting Indian rights in the treaty or treaty-making context. However, the bilateral relationship between Indian nations and the Federal Crown is complicated by the federal government's parallel constitutional relationships with the provinces, particularly the division of powers under the B.N.A. Act, 1867.

Indian Nations in most cases have rejected as a matter of principle the involvement of provinces in their affairs and usually insist upon bilateral relations with the Federal Crown. They point to the *Royal Proclamation*, which was designed to entrench the role of the Imperial/Federal Crown in relations with the Indian Nations and specifically placed limitations on colonial governors and later the provinces.

Resistance to provincial involvement was vehement in 1947, when Dr. Diamond Jenness proposed to Parliament a plan for the "liquidation" of Indian lands, the wholesale integration of Indians, and the diffusion of Indian programs to provincial governments.

A similar proposal in 1969 in the *White Paper* was loudly condemned. The proposal was to phase out Indian Affairs within five years, with Indian services transferred to provincial governments.

When the *Neilsen Task Force* recommended transferring to the provinces many federal responsibilities for Indian Nations and their lands, it was seen as a proposal for termination and extinguishment and labelled "The Buffalo Jump of the 1980s."

Indian Nations in Canada have been keenly aware of similar termination policies in the United States, such as the 1953 legislation which converted the Menominee Reservation into a county of the State of Wisconsin. The results were so disastrous, the legislation had to be reversed several decades later. Similar proposals in Canada to "municipalize" Indian bands and reserves, putting them under provincial jurisdiction, generally have met strong opposition from Indian Nations.

At the same time, many provinces try to avoid accepting responsibilities for Indians, so long as this does not affect their powers, lands or treasuries. Often, especially in recent years, there is a mutual interest between Indian Nations and provinces in opposing "off-loading" by the federal government of its trust responsibilities and financial obligations.

However, the reality is that the current trend to "off-load" federal responsibilities for Indians onto the provinces is accelerating as Ottawa pursues its deficit reduction targets. This has resulted in growing provincial intrusion into Indian affairs and an expansion of provincial power in this field *de facto*.

It is against this backdrop that the future of the bilateral treaty relationship must be assessed. If it is to be discarded in favor of tripartite or multilateral models, what will be lost and what will be gained? If it is to be retained and renewed, how will provincial jurisdiction over critical subjects like lands and resources be accommodated - and what impact will an accommodation on inherent aboriginal and treaty rights? What kind of intergovernmental accommodation is required?

We have seen how the realities of negotiating agreements in a multi-jurisdictional context influenced the TLE process and result in Saskatchewan. Having a 'beneficial interest' in the land, the Province played a role in treaty **implementation** and therefore was directly involved in the TLE negotiations. But the establishment of a formal tripartite mechanism for TLE would have been inconsistent with the FSIN position on the bilateral treaty relationship. The nation-to-nation relationship had to be respected and maintained while dealing with the province's jurisdiction over lands and resources.

In this instance, the problem was averted by appointing a Treaty Commissioner who would deal separately and discretely with the FSIN, the federal government and the province, while officially preserving the principle of a bilateral process with the Federal Crown. The result was a hybrid, compartmentalized bilateral-tripartite exercise that produced a result acceptable to the federal and provincial governments but whose long-term implications for the Saskatchewan Indian Nations have yet to be seen - particularly as regards extinguishment of future TLE.

Another approach has seen Indian Nations and their representative political organizations establish formal bilateral relations with provinces on a **government-to-government** basis, explicitly without derogating from the nation-to-nation relationship with Canada or Canada's trust obligations.

A *Statement of Political Relationship* (SPR) was signed jointly by the Indian Nations in Ontario and the provincial government in the summer of 1991. In this case, principles were stated but a formal bilateral negotiation process and agenda was not established. The ensuing three years have not resulted in substantial progress toward realizing the principles contained in the SPR, largely because of the absence of an agreed upon process and structure for the relationship.

Through the winter and summer of 1993, the FSIN and the government of Saskatchewan established a formal bilateral process to address, among other things, federal off-loading.

In June 1993, the Union of B.C. Indian Chiefs signed a Memorandum of Understanding with British Columbia government establishing a *Joint Policy Council* to address matters of mutual concern falling within the respective jurisdiction of the parties. A formal three-tiered structure was established to implement an ambitious six-item agenda and workplan. This bilateral

exercise bore early fruit in February, 1994 with the signing of an interim agreement on Indian education in provincial schools.[87]

Discussions have been underway for a number of months between the Mi'kmaq and the government of Nova Scotia to establish a process similar to the UBCIC-BC Government model.

The experience gained in each of these initiatives deserves closer analysis and should be considered as an important contribution to future discussion of the role of the provinces in treaty renewal and treaty-making.

Initially, however, the evidence suggests that parallel bilateral relationships between Indian Nations and Canada (nation-to-nation) and Indian Nations and provinces (government-to-government) may hold the greatest promise for producing tangible results without compromising fundamental principles.

Regardless of how legal and political relationships are structured in the future, Indian Nations and the provinces exist in close quarters and their mutual interests are likely to be best served if cooperative relationships can be established on a government-to-government basis.

At the present time, however, the federal government and many provinces are advocates for tripartite relationships and negotiations. Senior DIAND bureaucrats, many of whom are hold-overs from the previous Tory "Buffalo Jump" administration, are particularly resistant to considering alternatives (such as the bilateral-bilateral approach outlined above). In the examples below, we review two tripartite processes to assess the strengths and weaknesses of this relationship and negotiation configuration.

2.2. THE INDIAN COMMISSION OF ONTARIO AND TRIPARTITE DISPUTE RESOLUTION.

The experience over the years of the tripartite Indian Commission of Ontario (ICO) shows that an agreement on negotiating structures, including an independent secretariat, is not enough for a negotiating process to achieve results. An independent secretariat must have effective power to move negotiations along to final resolution. Without this power,

[87] Despite some successes in the first year, the UBCIC is proposing that the *Joint Policy Council* be restructured with only two tiers (Ministers/Chiefs and Deputies/Senior Officials) to ensure that Deputy Ministers play a hands-on role at various stages in the joint policy development process.

negotiations can become a way of life.[88] The ICO was not given the power to compel the governments to implement its recommendations; it was given only the power to report to Parliament, the legislature and the public about the parties' conduct and the successes and failures of negotiations.

The ICO was established by joint orders-in-council in 1978 to assist Canada, Ontario, and Indian Nations in Ontario to identify, negotiate and resolve issues of mutual concern. In some respects, it was the direct descendant of the Canadian Indian Rights Commission established under the Joint Cabinet/NIB Committee arrangement. After serving as Commissioner for the CIRC's brief life, Mr. Justice Patrick Hartt was appointed Commissioner of the newly-created ICO. The Ministers and Indian Nation leaders formed a Tripartite Council to manage the process while the Commissioner facilitated negotiations.

After some limited successes, in 1983 the Tripartite Council ceased to meet. In 1985, Roberta Jamieson was appointed Commissioner and was successful in getting all parties to the table and to agree they would meet at least three times a year. One of the priorities identified was a "Declaration of Political Intent." The Declaration was intended to overcome criticisms levelled by Indian Nations that both federal and provincial governments lacked a solid political commitment to resolve critical issues.

> Indian leadership felt that governments had been unwilling to participate in discussions which went beyond tinkering with existing programs. Any attempt to go to the heart of matters by introducing questions of jurisdiction or self-government was discouraged or rejected outright. First Nations felt the lack of substantive discussions was a key reason why issues remained unresolved. The Declaration of Political Intent was seen as a way for the parties to move together into a new era of cooperation on a fresh agenda of vital matters.[89]

After negotiating the document "word-for-word," on December 20, 1985, the Declaration was signed by seven representatives of various Indian Nations, the Ministers of Justice and Indian Affairs on behalf of the federal government, and by the Minister Responsible for Native Affairs (the Attorney General) on behalf of the Government of Ontario. The Declaration renewed the parties' commitment to negotiate under the auspices of the Commission and identified Indian self-government and jurisdiction as prime agenda items. Forms and institutions of self-government, their legal and constitutional status and source of jurisdiction, land issues, and fiscal relations were to be negotiated.

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[88] The history of the federal comprehensive claims negotiatons, where independent facilitation has been absent entirely, is perhaps the ultimate Canadian experience of negotiations as a way of life.

[89] *Report of the Commission to the Parties, October 1, 1985 - March 31, 1987.*

> Before the ink on their signatures had dried, however, various signatories of the Declaration of Political Intent were expressing different perspectives on what it meant and how it should be interpreted... To date, despite the agreement on an unprecedented Declaration, despite the efforts to clarify its meaning, the ringing commitments which it contains have yet to bear fruit. Why should this be?
>
> One important reason is that the parties did not complement the Declaration with a workplan. As a result, it took a year of discussion after the signing for the parties to reach agreement on a subject for fresh negotiations....

The lack of commitment to a plan of action extended to the tripartite process as a whole.

> A principal reason that progress has not met earlier expectations is that the parties have appreciated neither the nature and the significance of the negotiation efforts to which they committed themselves, nor do they seem to fully appreciate the value of using the Tripartite Process to resolve long-standing issues.
>
> . . .
>
> Evidence of the lack of understanding can be seen in the frequency with which negotiations are delayed or ineffectual because representatives of the parties either have not been given instructions on which to base their participation, or their instructions are inappropriate to the situation, or their instructions are outdated and as a result conflict with new policy initiatives and statements made by members of the Tripartite Council.[90]

Few political leaders on the governments' side had indicated to their negotiators that participation in the tripartite process was a government priority. Neither had they given their negotiators proper instructions.

> Generally, program officials given responsibility for negotiations maintain their regular positions in the bureaucratic hierarchy. As a result, they have limited access to decision-makers, and no authority or means of changing policies enforced at the bureaucratic level to be consistent with new positions taken at the political level, particularly those expressed at the Tripartite Council.[91]

On the Indian Nations' side, another critical problem was inadequate resourcing for effective participation in negotiations. The resourcing failed to match basic needs, given the responsibilities which fell upon Indian shoulders.

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[90] *Ibid.*
[91] *Ibid.*

> Governments tend to presume that initiatives for changing the status quo must come from the Indian Nations. This leaves the responsibility for pre-negotiation consultation, research, formulation or presentation of an issue and views on its resolution with Indian Nations. Often, neither Indian Nations nor groups which represent them have sufficient personnel and/or resources to keep up with current demands, let alone move into new areas or initiate change.
>
> Several negative situations result. The party with the least resources is expected to carry on the most costly activity, that of initiating change... Governments are permanently cast in the role as critics, rather than innovators....
>
> ... each party has two parallel responsibilities: first to ensure that sufficient human and fiscal resources are available to enable it to participate effectively in the resolution of an issue; secondly, if one or more Indian Nations lacks sufficient resources, the parties must cooperate to correct the deficiency.[92]

Claims negotiations were not much more successful. In some cases, negotiations had been in abeyance for two or three years awaiting the response of one or more parties. Deadlines set by the Commission, even with the consent of the parties, generally were not met.

While the mandate of the Commission provided for a variety of recommendations to assist in the resolution of claims, including non-binding arbitration, binding arbitration, formal mediation, and reference of an issue to a court, the Commission required the consent of the parties to use those mechanisms. Canada and Ontario usually did not evince a willingness to try new approaches. Indian Nations were willing to agree to non-binding arbitration in several cases but neither Canada nor Ontario would give their consent.

> Settlement requires compromise, and knowledge that non-binding arbitration or other independent review is unlikely encourages officials to maintain inflexible positions since they see no reason to compromise. If the parties do from time to time accept arbitration, officials will then know that their positions might be put to the test of outside opinion, rather than taking comfort in the knowledge that their positions will never be challenged by independent evaluation.[93]

In her 1978 *Report*, Commissioner Jamieson listed key failings of the tripartite ICO process to-date:

> The parties fail to empower their negotiators, i.e., to give them a mandate and instructions and authority to act on their behalf.

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[92] *Ibid.*
[93] *Ibid.*

The parties have not organized themselves so they will have a capacity to negotiate productively.

Indian Nations are left with sole responsibility to develop creative options.

The Commission's role continues to be misunderstood by the parties.

The parties do not develop a common understanding of the nature of the problems which must be addressed.

The parties lack a mutually-acceptable database to inform negotiations.

The parties make commitments which realistically they cannot fulfill.

A party's negotiating position contradicts its public commitments.

The parties seek guarantees which pre-empt negotiations.

Canada provides little evidence that it is willing to bring the necessary flexibility to negotiations so as to arrive at Ontario-specific arrangements.

The parties reach agreement on the principles and shape of a program, but are fundamentally at odds as to if and how Canada and Ontario will share the costs.

The subject of negotiations tends "to follow the money."

Parties take independent actions as if negotiations were not in progress.

The Tripartite Process is used merely to consult with other parties as a substitute for negotiating mutually-acceptable solutions.

Representatives of a party contradict each other.[94]

When the federal and Ontario governments failed to respond to her recommendations, Commissioner Jamieson resigned.

Following Jamieson's resignation, the parties had an independent evaluation conducted to assist in determining the ICO's future. The evaluation zeroed in on a basic problem.

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[94] *Ibid.*

> The wresting back of control by the First Nations from the existing governments is an historic and awesome task . . . It is as difficult to give up control as it is to exercise it without previous experience.
>
> ... Fundamentally, each issue revolves around the dismantling or adaptation of mechanisms institutionalized by governments of the past to manage Indian people, lands and resources. Control over resources and institutions - Indian self-government - is what the issues are really about.[95]

The Union of Ontario Indians observed that after ten years, it was "increasingly difficult for the Indian leadership to defend the relative lack of progress - the lack of hard results at the community level."

> The lack of significant movement on major outstanding issues such as fishing, social services, land claims, policing, and to a lesser degree, self-government initiatives, means the process loses credibility and significance at the level of the individual First Nations.[96]

The independent evaluation of the ICO identified additional problems with the tripartite process. Each party was conscious of the complexities in its own universe but tended to oversimplify the context in which the other parties operated. As a result, each party found itself entertaining higher expectations than the other parties could deliver.

The governments, for example, expected Indian leaders "to deliver" consensus and to have their decisions obeyed as if they were potentates. They expected that Indian Nations would bargain and reach agreement with each other as well as with interested aboriginal groups. When this result was not achieved, the governments avoided making decisions by blaming the "divergent views amongst aboriginal peoples."

The parties differed in their approach to the problem of their own internal complexity. The Indian Nation leadership was usually willing to take positions which it believed would subsequently be approved by their constituencies. The reverse position was taken by the government negotiators. Their approach was not to take a position until they had the prior approval of their bureaucratic or political masters.

The Indian Nations generally preferred to start negotiations with fundamental principles and proceed to the specific issues at hand. The governments, on the other hand, wanted to know the precise specifics first and then generalize principles from them. It should be noted that

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[95] Fred Boden, Peter Turner and Associates, *ICO Evaluation Report*, July 1989.

[96] Union of Ontario Indians, *Issues Relating to the Future of the Ontario Tripartite Process*, Discussion Paper, November, 1988.

this latter approach is used less often in federal-provincial or inter-provincial negotiations, where the parties have greater confidence in predicting the consequences of adopting a principle.

The problems encountered in the ICO tripartite process have not been overcome to date, though limited successes continue to be achieved. Disparities in resources, power and political will continue to constrain effective participation by Indian Nations in negotiations. Lack of agreement on fundamental principles, along with the limited powers of the Commission continue to hamstring dispute resolution and the achievement of significant results.

3.3. THE B.C. TREATY COMMISSION AND ALTERNATIVE.

In September, 1992, the First Nations Summit, Canada and British Columbia signed an agreement to establish a tripartite *B.C. Treaty Commission*, which is to serve as "keeper" of a new tripartite "Made-in-B.C." treaty-making process. The Commission was established pursuant to the June, 1991 report and recommendations of the tripartite *B.C. Claims Task Force*. The Task Force called for a Treaty Commission "to facilitate the process of negotiations" and identified a six-stage process for negotiations.[97]

The B.C. Treaty Commission is composed of a Chief Commissioner, jointly appointed by the parties, two commissioners appointed by the Indian Nations, and one each by the federal and provincial governments. The structure is similar to the ICO tripartite model but also reflects the long history of joint federal-provincial commissions that have dealt with Indian affairs in British Columbia.[98]

In a break with previous federal policy, the treaty negotiation process is "open to all First Nations in British Columbia" without a limit on the number of negotiations underway at one time. It can also include negotiations on "treaty implementation" for the Treaty 8 Indian Nations and those with pre-confederation "Douglas Treaties."[99]

It is noteworthy that with respect to third-party interests, the Task Force recommended that they be represented at the treaty table by both the federal and provincial governments. There

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[97] *Report of the British Columbia Claims Task Force*, June 28, 1991, recommendation 3.

[98] *British Columbia Treaty Commission Agreement*, September 21, 1992, pp. 5-6; *Task Force Report*, recommendation 4. The Union of B.C. Indian Chiefs took note of this historic pedigree in its Task Force critique, *"Buffalo Stampede of the 1990s,"* (August, 1991), commenting that "far from being innovative, [the tripartite Treaty Commission] resonates with the history of failure of the Indian reserve commissions in British Columbia's past... ."

[99] *Task Force Report*, recommendation 6 and p. 48.

was no recommendation with respect to the federal government's fiduciary obligations toward Indian Nations in treaty negotiations.[100]

The Treaty Commission was slow to get organized. Its initial task was to receive statements of intent to negotiate from First Nations. At the present time, it has accepted for negotiation statements of intent from approximately 45 "First Nation" parties consisting of slightly more than 100 of the 197 Indian Bands in British Columbia.

The Treaty Commission is to receive negotiation funding requests from First Nations and "allocate funds which have been provided to enable First Nations to participate in negotiations, in accordance with criteria agreed to by the Principals." The Commission does not have the power to change federal funding criteria or compel that specific funding levels be provided.[101] (In April, 1994, the First Nations Summit agreed to the federal government's policy of providing loans against future settlements to fund Indian participation in the Treaty Commission process.)

The B.C. Treaty Commission has been given a facilitation role in future negotiations - but not a mediation role, *per se*. It is to "assess the readiness of the Parties to commence negotiation," "encourage timely negotiations ... by monitoring their progress in meeting deadlines," and "assist Parties to obtain dispute resolution services at the request of all the Parties." The Commission itself does not have the power to recommend specific forms of dispute-resolution nor a direct role in dispute-settlement.[102] (Governments' general reluctance to seek independent dispute-settlement in Indian negotiations was noted above.)

Neither the Task Force Report nor the Treaty Commission Agreement reflect a common understanding by the parties on fundamental principles and standards to guide the treaty-making and treaty renewal processes. Most importantly, the federal government's extinguishment comprehensive claims policies remain in play under the Treaty Commission process.

The Union of B.C. Indian Chiefs rejected an invitation to participate in the Task Force in December, 1991, explaining to the bands and tribal councils in the province:

> The task force will lead First Nations into negotiations under the existing comprehensive claims policy, which requires extinguishment of aboriginal rights and title. ... the terms of reference for the task force are limited to the mechanics for

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[100] *Ibid.*, recommendation 10.
[101] *Treaty Commission Agreement*, p. 7.
[102] *Ibid.*, pp. 7-8.

> starting up negotiations under the extinguishment policy. The goal of the task force is clear: accelerating the pace of extinguishment in British Columbia.[103]

In the event, the Task Force recommended that "each of the parties be at liberty to introduce any issue at the negotiation table which it views as significant to the new relationship" and suggested "for guidance only" topics including self-government, natural resources, financial compensation, government services, "certainty," amendment and implementation of treaties. The recommendation completely side-stepped the need for mutual agreement on fundamental principles and standards if the treaty-making process is to avoid breakdowns and coerced solutions.[104]

Indeed this recommendation was meaningless since parties to a negotiation are always free to introduce 'their issues.' What matters is what happens after an issue is introduced. In the case of extinguishment to achieve "certainty," it has been the end result of every comprehensive claims agreement concluded to date - the so-called "modern treaties."

The B.C. Treaty Commission is a significant development because it represents the first time that the federal and provincial governments have agreed with Indian Nations on a structure for negotiating settlements of the 130-year-old B.C. "Indian Land Question."

It is also significant because it represents the first time that a sizeable group of Indian Nations have agreed explicitly to negotiate a new tripartite relationship with Canada and the Province, presumably to replace their existing bilateral relationship with the Imperial/Federal Crown.

The B.C. Treaty Commission process is unabashedly tripartite, with the Province sitting at the negotiation table as a "full and equal partner" with Canada and the Indian Nations. The words "nation-to-nation" do not appear once in the 1991 Task Force Report and the First Nations Summit has been careful to distinguish their process from the bilateral, two-stage, nation-to-nation "framework treaty" proposal put forward by the Union of B.C. Indian Chiefs in June, 1990.

The status of the Indian "party" in the B.C. Treaty Commission process is clouded, as is Indian nationhood. The Treaty Commission Agreement defines "First Nation" as:

> an aboriginal governing body, however organized and established by aboriginal people within their traditional territory in British Columbia, which has been mandated by its

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[103] Memorandum, Chief Saul Terry to all B.C. First Nations/Tribal Councils, December 10, 1990.

[104] *Task Force Report*, pp. 21-32.

constituents to enter into treaty negotiations on their behalf with Canada and British Columbia.[105]

The looseness of this definition appears to have caused nervousness among some government officials, who have already perceived the complexity and cost of carrying on upwards of possibly fifty treaty negotiations at one time. Thus, it is likely that the Treaty Commission process will prove increasingly unmanageable as the number of negotiations coming 'on stream' increases in the future.

While it is too early to assess the B.C. Treaty Commission process in terms of results, it can be measured against the experience of the tripartite Indian Commission of Ontario. The B.C. Treaty Commission appears to have followed the ICO tripartite model without significant alterations to provide for independent facilitation and effective dispute-settlement, adequate negotiation funding or agreement on fundamental principles and standards. It is likely, therefore, that many of the same frustrations and disappointments experienced in Ontario will be occur under the B.C. tripartite process.

It should be noted, however, that on July 30, 1990, the Union of B.C. Indian Chiefs tabled with the federal government a proposal for bilateral, nation-to-nation negotiations on a *Comprehensive Framework Treaty* to set out fundamental principles, policies and standards for treaty-making in British Columbia. The Framework Treaty proposed facilitation of negotiations and dispute-settlement in the person of former Supreme Court of Canada Chief Justice Brian Dickson. It also proposed a moratorium on the issuing of new resource extraction licences by the Province in the traditional territories of the Indian Nations.[106]

Similar to an "umbrella agreement," the UBCIC Framework Treaty was to be a multi-Indian-Nation effort and the first stage of a two-stage bilateral treaty-making process. The second stage would see each distinct tribal nation negotiate with Canada and separately with British Columbia on clearly defined issues pertaining to their respective jurisdictions.

On October 23, 1990, Indian Affairs Minister Tom Siddon rejected the Framework Treaty proposal, stating that the Federal Government was not prepared "to accept substantive positions in advance of negotiations" with each claimant group. (He opted for the process-oriented B.C. Claims Task Force approach six weeks later.)[107]

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[105] *Treaty Commission Agreement*, p. 5.

[106] Union of B.C. Indian Chiefs, *Comprehensive Framework Treaty between First Nations in British Columbia and Her Majesty the Queen in Right of Canada*, draft, July 30, 1990; abridged revised draft, May 15, 1991.

[107] DIAND Minister Tom Siddon to Chief Saul Terry, October 23, 1990.

The *B.C. Treaty Commission* model awaits testing in real tripartite negotiations and the results will either confirm or contradict the experience of the ICO. Meanwhile, the UBCIC *Comprehensive Framework Treaty* proposal warrants further scrutiny as a model for bilateral treaty renewal and treaty-making. It can inform the development of new bilateral-bilateral approaches incorporating both nation-to-nation and government-to-government components. In the end, this may be the most viable way to accommodate Indian Nation principles, federal obligations and "local" provincial interests.

Indian Nation experiences in bilateral and tripartite negotiations in Quebec have not been reviewed for this project and also warrant review and assessment.

3.0. LEGISLATION TO IMPLEMENT TREATIES.

Where provisions of a treaty conflict with domestic law, it is common practice to pass legislation after the signing of international agreements to give effect to the treaty in Canadian law where such effect is necessary, i.e., where existing laws conflict with the treaty, or where legal authority is required to implement terms of the treaty. No such legislation was passed by Parliament with respect to treaties with First Nations. One of the regular demands of First Nations is that "treaty legislation" be passed.

In Francis v. The Queen,[108] the Supreme Court of Canada said that implementation of a treaty may call for both legislative and judicial action. To be enforceable in the Courts, a treaty has to be incorporated in municipal law.

That situation has been modified only by the Constitution Act, 1982, which renders contradictory legislation invalid, but still does not make the treaty provision enforceable.

In Canada, unlike the United States, it is not necessary for a treaty to be ratified for it to have legal effect, since treaties are made in the name of the Crown.

In Howard v. Attorney General of Ontario et al.,[109] the Supreme Court of Canada said it was not necessary for a treaty to be valid that it be approved by Order in Council.

It should be noted that although the courts have now sent a clear message to federal and provincial authorities regarding the need to 'fix' existing legislation that is prejudicial to, or

[108] (1956) S.C.R. 618.

[109] Unreported Supreme Court of Canada decision, May, 1994.

offensive to, treaty & aboriginal rights, little if any substantive measures have been put into place to remove legislative impediments to the free and full exercise of these rights.

Any discussion of the relationship between federal (and provincial) legislation must acknowledge that to date federal use of its 91(24) powers has been largely prejudicial to the rights and interests of the Indian nations. Much work needs to be done to satisfy Indian nations that Canada intends to use its legislative powers in a positive sense to affirm and implement the treaties.

At the same time, too little attention has been paid to the important role that Indian law and legislation can and should play with respect to ratification and implementation of treaty agreements. Certainly each party to the treaty relationship must be assured that their legislative authority can be reconciled with that relationship.