Treaty Making in the Spirit of Co-existence

AN ALTERNATIVE TO EXTINGUISHMENT

Royal Commission
on Aboriginal Peoples

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Canadian Cataloguing in Publication Data

Main entry under title:
Treaty making in the spirit of co-existence: An alternative to extinguishment

Issued also in French under the title: *Conclure des traités dans un esprit de coexistence : une solution de rechange à l'extinction du titre ancestral*

ISBN 0-660-15818-3
Cat. no. Z1-1991/1-41-5E

1. Native peoples – Canada – Government relations.
2. Native peoples – Canada – Politics and government.
3. Native peoples – Canada – Legal status, laws, etc.
I. Canada. Royal Commission on Aboriginal Peoples.
II. Title: An alternative to extinguishment

E92.T873 1994 323.1'197071 C95-980024-7

Available in Canada through
your local bookseller
or by mail from
Canada Communication Group – Publishing
Ottawa, Canada K1A 0S9

Cat. no. Z1-1991/1-41-5E
ISBN 0-660-15818-3

Canada	Groupe
Communication	Communication
Group	Canada
Publishing	Édition

Royal Commission on Aboriginal Peoples

CANADA

Commission royale sur les peuples autochtones

To His Excellency
the Governor General in Council

May It Please Your Excellency

We have the honour to submit to you, pursuant to paragraph 9 of Order in Council P.C. 1991-1597, dated August 26, 1991, the Report of the Royal Commission on Aboriginal Peoples entitled *Treaty Making in the Spirit of Co-Existence: An Alternative to Extinguishment.*

Respectfully submitted,

René Dussault, j.c.a.
Co-Chair

Georges Erasmus
Co-Chair

Paul L.A.H. Chartrand
Commissioner

J. Peter Meekison
Commissioner

Viola Robinson
Commissioner

Mary Sillett
Commissioner

Bertha Wilson
Commissioner

February 1995
Ottawa, Canada

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Members of the Royal Commission on Aboriginal Peoples

René Dussault, j.c.a.
Co-Chair

Georges Erasmus
Co-Chair

Paul L.A.H. Chartrand
Commissioner

J. Peter Meekison
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Viola Marie Robinson
Commissioner

Mary Sillett
Commissioner

Bertha Wilson
Commissioner

Introduction

During the numerous discussions, consultations, and hearings conducted thus far by the Royal Commission on Aboriginal Peoples, we have heard many concerns in relation to federal policy requiring extinguishment of Aboriginal title to ancestral lands as a precondition for entering into comprehensive land claims agreements with Aboriginal communities. In light of our mandate to "make recommendations promoting reconciliation between aboriginal peoples and Canadian society as a whole" and concerning "the process for resolving comprehensive...claims",[1] we promised to examine the merits of federal extinguishment policy. This report represents the fruits of our efforts. It incorporates the words we heard and also engages in a frank assessment of the arguments for and against the federal policy of extinguishment.

Our hearings and research on the subject of extinguishment have borne at least one fundamental insight. Disagreement between Aboriginal people and the federal government over the merits of the federal extinguishment policy is the tip of a much deeper disagreement concerning the nature of the relationship between human beings and their natural and social environments. As our hearings and research studies have consistently revealed, and as the first chapter of this report illustrates in some detail, Aboriginal systems of land tenure and governance do not find easy expression within traditional Canadian legal terminology.

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[1] Royal Commission on Aboriginal Peoples, *Terms of Reference*, P.C. 1991-1597, Schedule 1, paragraphs 1 and 3.

While there are many distinctive Aboriginal perspectives, Aboriginal people in general view land in profoundly spiritual terms. Land is the giver of life. In the words of Venus Walker of the Haudenasaunee Confederacy, "We look to the earth as a sacred mother who holds everything in the palm of her hand to give us things so that every day and every night our families are in good health."[2] Spiritual beliefs concerning the earth are not restricted to Aboriginal people who live in Canada. Joy Harjo of the Creek people, located in the United States, captures these unique spiritual beliefs in the following terms:

> All landscapes have a history, much the same as people exist within cultures, even tribes. There are distinct voices, languages that belong to particular areas. There are voices inside rocks, shallow washes, shifting skies; they are not silent. And there is movement, not always the violent motion of earthquakes associated with the earth's motion or the steady unseen swirl through the heavens, but other motion, subtle, unseen, like breathing. A motion, a sound, that if you allow your inner workings to stop long enough, moves into the places inside you that mirror a similar landscape; you too can see it, feel it, hear it, know it.[3]

In this light, Aboriginal peoples tend to see their relationships to land in terms of an overarching collective responsibility to protect, nurture, and cherish the earth as the giver of life. Aboriginal rights with respect to ancestral territory are understood by Aboriginal peoples as particular expressions of this more general and fundamental responsibility to the earth.[4]

Although spiritual relationships to land are not limited to Aboriginal nations, Canadian law structures Aboriginal and non-Aboriginal relationships with respect to land by precepts that emphasize rights of use and enjoyment of land as property entitlements. Canadian law treats the Crown as possessing underlying title to all its territory.[5] Canadian law also recognizes a variety of rights of

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[2] Venus Walker, Royaner, Wolf Clan, Oneida, presentation before the House of Commons Special Committee on Indian Self-Government, 1 June 1983, *Minutes of Proceedings and Evidence of the Special Committee*, Issue no. 21 (translated from Oneida).

[3] Joy Harjo, *Secrets from the Center of the World* (1989).

[4] See, generally, Michael Jackson, "A New Covenant Chain: An Alternative Model to Extinguishment for Land Claims Agreements", draft research study prepared for the Royal Commission on Aboriginal Peoples (1994). This study, like others cited in this report, was conducted under the auspices of the Royal Commission's research program and as such will be part of the information base available to scholars, researchers and other interested parties in a variety of forms after the Commission completes its work.

[5] *R.* v. *Sparrow*, [1990] 1 S.C.R. 1075 at 1103 ("while British policy toward the native population was based on respect for their right to occupy their traditional lands,...there was from the outset never any doubt that sovereignty and legislative power, and indeed the underlying title, to such lands vested in the Crown").

use and enjoyment of property by owners and users of land. A property owner's freedom of use and enjoyment of land is subject to the competing demands of the community. Property, in Canada at least, can be regulated and indeed expropriated by legislative action.

One set of rights of use and enjoyment of land recognized by Canadian law is Aboriginal title.[6] An Aboriginal community that enjoys Aboriginal title to certain lands possesses rights of occupancy, use, and enjoyment of such lands. This report refers occasionally to Aboriginal rights associated with Aboriginal title as incidents of Aboriginal title and as Aboriginal land rights. Before 1982, Canadian law provided that Aboriginal title could be regulated and, in some circumstances, extinguished by legislation.[7] As of 1982, Aboriginal rights enjoy explicit constitutional recognition. Section 35(1) of the *Constitution Act, 1982* recognizes and affirms existing Aboriginal and treaty rights.[8] As a result, any federal, provincial or territorial law that interferes with the exercise of such rights must undergo searching constitutional scrutiny.[9] Jurisprudence on section 35 is still in its formative stages, and numerous ambiguities concerning the nature and scope of Aboriginal rights remain to be clarified by the courts.

Many of these ambiguities result from the fact that it is difficult to integrate Aboriginal systems of land tenure and governance in traditional Canadian legal

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[6] See, generally, Kent McNeil, *The Common Law of Aboriginal Title* (Oxford: Oxford University Press, 1989). See also J.C. Smith, "The Concept of Native Title" (1974) 24 U.T.L.J. 1.

[7] See, generally, Bruce Ryder, "The Demise and Rise of the Classical Paradigm in Canadian Federalism: Promoting Autonomy for the Provinces and First Nations" (1991) 36 McGill L.J. 308. Even before 1982, however, Aboriginal title received constitutional protection from a number of sources. See the *Royal Proclamation of 1763* (U.K.), reprinted in R.S.C. 1985, App. II, No. 1 (discussed in Chapter 2); the instruments transferring Rupert's Land and the Northwest Territory from the Hudson's Bay Company to the Crown (*Rupert's Land and North-Western Territory Order*, 1870 (U.K.), reprinted in R.S.C. 1985, App. II, No. 9; *Adjacent Territories Order*, 1880 (U.K.), reprinted in R.S.C. 1985, App. II, No. 14); and the protection afforded by section 91(24) of the *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3.

[8] The original text of the *Constitution Act, 1982* is found in Schedule B of the *Canada Act, 1982*, Statutes of the United Kingdom, 1982, chapter 11. Section 35 was amended by the *Constitution Amendment Proclamation, 1983*, SI/84-102, which added subsections 35(3) and 35(4). In its current form, section 35 reads as follows:

> (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
>
> (2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.
>
> (3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.
>
> (4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

[9] See, for example, *R.* v. *Sparrow*, cited in note 5.

conceptions of property and jurisdiction. As stated by the Supreme Court of Canada,

> [t]he inescapable conclusion from the Court's analysis of Indian title up to this point is that the Indian interest in land is truly *sui generis*. It is more than the right to enjoyment and occupancy, although...it is difficult to describe what more in traditional property terminology.[10]

In part because it is difficult to house Aboriginal relationships with land in traditional Canadian legal concepts, Aboriginal peoples have looked to treaties with the Crown as a means of achieving co-existence with non-Aboriginal society. Treaties offer parties much-needed flexibility, as well as an opportunity to devise lasting arrangements on a nation-to-nation basis.

A comprehensive land claims agreement is a type of treaty that allocates to Aboriginal communities, the Crown, and third parties a variety of rights and responsibilities with respect to ancestral lands of an Aboriginal nation. Such rights typically include rights of full or partial ownership and use of certain lands, as well as limited rights of governance and regulation. By reconciling and integrating Canadian legal principles with distinctive Aboriginal relationships with land and systems of governance, a comprehensive agreement can enable an Aboriginal nation to obtain greater control over its identity and future.

Despite the fact that the comprehensive claims process holds promise for Aboriginal communities in their quest for greater self-sufficiency, many Aboriginal people spoke to us about the need to reform federal policy and to chart a new course, one that does not rely on a policy of extinguishment. Grand Chief Matthew Coon Come of the Grand Council of the Crees, for example, stated that "Canada's repudiation of the principle of extinguishment would be a dramatic step and mark a new beginning in its fundamental relationship" with Aboriginal peoples.[11] In a similar vein, Alex Christmas, President of the Union of Nova Scotia Indians, stated that "if future agreements are to provide for coming generations and reflect our unique constitutional relationship with the Crown, they must be based on the recognition of our Aboriginal and treaty rights, not on their extinguishment."[12]

According to the federal government, current federal policy concerning comprehensive claims is designed to "conclude agreements with Aboriginal groups that will resolve the debates and legal ambiguities associated with the...concept

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[10] *Canadian Pacific Ltd.* v. *Paul*, [1988] 2 S.C.R. 654 at 678, the Court.

[11] Transcripts of the Public Hearings of the Royal Commission on Aboriginal Peoples, Montreal, Quebec, 28 May 1993, p. 1164 [cited hereafter as Transcripts].

[12] Transcripts, Eskasoni, Nova Scotia, 6 May 1992, p. 162.

of Aboriginal rights."[13] From the perspective of the federal government, comprehensive agreements ought to provide *clarity* with respect to the rights and obligations of the parties and *certainty* with respect to Crown title and existing and future third-party interests.[14] To this end, the federal government in recent years has attempted to obtain

> confirmation from Aboriginal groups that the rights written down in claims settlements are the full extent of their special rights related to the subjects of the agreements. To accomplish this, Aboriginal groups are asked to relinquish undefined Aboriginal rights which they may have with respect to lands or resources, in favour of the rights and other benefits which are written down in the settlement agreement.[15]

For ease of reference, and notwithstanding the fact that the federal government does not explicitly use the phrase, this report refers to the strategy just quoted as *federal extinguishment policy*. 'Extinguishment', in legal terms, refers to "the destruction or cancellation of a right".[16] In the context of Canadian law as it pertains to Aboriginal peoples, the term is used to describe two different legal consequences. First, as stated, Canadian law has held that Aboriginal rights could, in some instances, be extinguished by legislation before 1982.[17] Second, 'extinguishment' refers to the legal effect of a provision in an agreement or treaty whereby an Aboriginal community agrees to cede or surrender certain Aboriginal rights in exchange for treaty-based rights and benefits. While this report touches on both meanings of the term, its primary focus is on the latter meaning of extinguishment, namely, extinguishment by treaty or comprehensive agreement.

A treaty or agreement can purport to accomplish either *blanket extinguishment* or *partial extinguishment* of Aboriginal rights. By 'blanket extinguishment', we mean a clause in a treaty that seeks to erase or eradicate completely all Aboriginal land

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[13] Indian and Northern Affairs Canada, *Federal Policy for the Settlement of Native Claims* (March 1993), p. 5. This 1993 policy statement elaborates but does not significantly alter the federal policy with respect to extinguishment outlined in Indian Affairs and Northern Development, *Comprehensive Land Claims Policy* (Ottawa: Supply and Services, 1986).

[14] According to the 1993 *Federal Policy for the Settlement of Native Claims*, p. 5, the purpose of the comprehensive land claims process in general and federal extinguishment policy in particular is to provide "a clear, certain and long-lasting definition of rights to land and resources."

[15] *Federal Policy for the Settlement of Native Claims*, p. 9.

[16] *Black's Law Dictionary*, 6th ed. (St. Paul: West Publishing, 1990). For an exhaustive analysis of extinguishment, see Paul Joffe and Mary Ellen Turpel, "Extinguishment of the Rights of Aboriginal Peoples: Problems and Alternatives", draft research study prepared for the Royal Commission on Aboriginal Peoples (1994).

[17] See, for example, *R.* v. *Sparrow*, cited in note 5.

rights of an Aboriginal party to an agreement.[18] 'Partial extinguishment' refers to provisions that seek to eliminate some, but not all, Aboriginal land rights throughout the territory in question.

This report also refers to rights of Aboriginal peoples that exist by way of agreement with the Crown as 'treaty rights' and to rights of Aboriginal peoples that exist independently of any agreement as 'Aboriginal rights'. Consistent with our earlier discussion paper, *Partners in Confederation: Aboriginal Peoples, Self-Government, and the Constitution*, this report also views Aboriginal rights as including rights associated with Aboriginal title.[19] Although the federal government has yet to acknowledge formally that section 35(1) of the *Constitution Act, 1982* recognizes and affirms Aboriginal or treaty rights of self-government,[20] Aboriginal and treaty rights are now constitutional rights, recognized and affirmed as such by section 35. Federal extinguishment policy accordingly requires Aboriginal people to exchange, or agree to extinguish, one set of constitutional rights – Aboriginal land rights – in return for another set of constitutional rights – treaty rights.

The fact that disagreement over federal extinguishment policy reflects a much deeper debate concerning Aboriginal and non-Aboriginal relationships to land and systems of governance suggests that the problem may be an intractable one. In our view, the insight that different conceptions of land and governance underpin the debate about the merits of federal extinguishment policy points the way to a possible solution. It suggests there exists a pressing need for land claims agreements that permit the co-existence of divergent worldviews on the relationship between people and land. Properly structured, a process whereby Aboriginal nations can negotiate comprehensive land claims agreements with federal, provincial and territorial governments is not only a means of achieving clarity and certainty with respect to land and resources; it is a critical component in the larger and pressing objective of achieving Aboriginal and non-Aboriginal co-existence in Canada.

We are publishing this report at this time because of the urgency surrounding disagreement over the merits and demerits of current federal extinguishment policy. The report's subject-matter is limited to current federal policy on extinguishment as it relates to Aboriginal nations that have yet to complete comprehensive negotiations with Canada. Our final report will address other aspects of the

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[18] For judicial use of this phrase, see *Delgamuukw* v. *British Columbia* (1993), 104 D.L.R. (4th) 470 (B.C.C.A.) at 660, Lambert J.A.

[19] Royal Commission on Aboriginal Peoples, *Partners in Confederation: Aboriginal Peoples, Self-Government, and the Constitution* (Ottawa: Supply and Services, 1993), p. 9 ("Aboriginal rights include rights to land, rights to hunt and fish, special linguistic, cultural, and religious rights, and rights held under customary systems of Aboriginal law.").

[20] See *Comprehensive Land Claims Policy*, cited in note 13.

comprehensive claims process, including its structure and funding mechanisms. In our view, given that the comprehensive land claims process is critical to Aboriginal governance, self-sufficiency, and co-existence with non-Aboriginal society, and that disagreement about the merits of extinguishment appears to be stalling negotiations, an immediate assessment of federal extinguishment policy is necessary. We propose an alternative approach, one based on the recognition and affirmation of Aboriginal rights. This approach, while substantially accommodating valid federal objectives of clarity and certainty, also advances the objective of achieving lasting co-existence between Aboriginal and non-Aboriginal people in Canada.

Although this report concentrates on federal extinguishment policy, we want to emphasize at the outset that provincial and territorial governments ought to work together with the federal government and Aboriginal nations to reach agreements that recognize and affirm Aboriginal rights. While Parliament has special responsibilities with respect to "Indians, and Lands reserved for the Indians",[21] the task of achieving lasting co-existence between Aboriginal and non-Aboriginal systems of land tenure and governance also involves provincial and territorial governments.[22] Indeed, this task goes to the heart of the future of Aboriginal-Crown relations in Canada, and in this respect all governments – federal, provincial, territorial, and Aboriginal – bear fundamental responsibilities in shaping our future together.

In Chapter 1 we discuss at greater length Aboriginal relationships to land. Chapter 2 locates current concerns with respect to federal extinguishment policy within a broader account of the settlement of North America by European nations and the history of extinguishment policy since contact. A review of this history assists in understanding the role of contemporary federal extinguishment policy in efforts to reach lasting agreements between the Crown and Aboriginal peoples. Chapter 3 outlines the nature and purpose of current federal extinguishment policy. It reviews the development of federal extinguishment policy in light of political and constitutional developments in the 1970s and 1980s. It also identifies federal objectives furthered by extinguishment policy.

Chapter 4 is devoted to assessing the merits of federal extinguishment policy in light of its history, nature and purpose. In that chapter, we assess the effect of the policy on Aboriginal relationships with land, as well as the extent to which the policy conforms to constitutional principles, including principles laid down in the *Royal Proclamation of 1763* and the *Constitution Act, 1982*. Chapter 5 proposes

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[21] *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, s. 91(24).

[22] See *Constitution Act, 1867*, s. 92(5) (provincial jurisdiction with respect to management and sale of public lands); s. 92(13) (provincial jurisdiction with respect to property and civil rights); s. 92A (provincial jurisdiction with respect to natural resources); and s. 109 (provincial ownership of lands, mines, minerals, and royalties).

an alternative means of achieving valid objectives currently served by federal extinguishment policy, an alternative that does not extinguish – but instead recognizes and affirms – Aboriginal rights. We hope that our views and our recommendations on this subject will assist in ushering in a new relationship between Aboriginal and non-Aboriginal people in Canada.

1

Aboriginal Perspectives on Land

Since time immemorial, Aboriginal peoples have lived on the North American continent with complex systems of governance reflecting and regulating unique relationships to the land. Under such Aboriginal systems, authority to manage land cannot be dissociated from duties owed to land. While it recognizes the existence of Aboriginal title, Canadian property law, in its current form, does not fully capture the richness of Aboriginal systems of land tenure and governance, nor can it generate arrangements sufficiently tailored to the diverse needs of particular Aboriginal communities. In the view of the Commission, a properly structured comprehensive land claims process is therefore critical to achieving lasting co-existence of Aboriginal and non-Aboriginal systems of land tenure and governance. As Chapter 4 of this report reveals, however, federal extinguishment policy is a major stumbling block to achievement of this objective. This present chapter explores in greater detail the unique nature of Aboriginal systems of land tenure and how Canadian law has attempted to incorporate and give expression to Aboriginal title.

As stated in the introduction to this report, many Aboriginal nations have relationships with land in which concepts akin to ownership merge with a concept of stewardship foreign to Canadian property law. In this light, Professor Leroy Little Bear writes:

> Tribal territory is important because Earth is our Mother (and this is not a metaphor: it is real). The Earth cannot be separated from the actual being of Indians. The Earth is where the continuous and/or repetitive process of creation occurs. It is on the

> Earth and from the Earth that cycles, phases, patterns, in other words, the constant flux and motion can be observed and experienced. In other words, creation is a continuity, and if creation is to continue, then it must be renewed, and consequently, the renewal ceremonies, the telling and re-telling of the creation stories, the singing and re-singing of songs, which are the humans' part in the maintenance of creation. Hence, the annual sundance, the societal ceremonies, the unbundling of medicine bundles at certain phases of the year. All of these are interrelated aspects of happenings that take place on and within Mother Earth.
>
> Customs with regard to external relations include peace and friendship with other tribes and nations, trade with outsiders, visitors and adoption of outsiders, warfare and defence of territory. Utilization of resources would include customs such as collective hunting and harvesting of game and plants, the equal share of the same.[23]

Relationships such as those described by Professor Little Bear inform unique Aboriginal land tenure systems. To take one example, the basic social unit of the Blackfoot Confederacy, whose territory traditionally covered much of present-day Alberta and Montana, is the extended family. A tribe comprises many extended families. The Confederacy consists of the Pikuniwa, Kainaiwa, and Siksikawa tribes, and the Confederacy has adopted the Stoney and Sarcee peoples. Each tribe informally occupied different parts of Confederacy territory. All tribes relied for food, clothing, and material and spiritual needs primarily on the buffalo, which at one time roamed freely on the plains of the continent. Considered sacred by the Blackfoot, the buffalo was treated as the first animal provided to the Blackfoot by the Creator and was accorded respect through spiritual ceremonies such as the sundance.

For present purposes, what is important about Blackfoot social organization is its respect for land. Again, as stated by Professor Leroy Little Bear,

> The land was considered a mother, the giver of life. On the land were many sacred places and sites where religious ceremonies both collective and individual were visited and used. These include the mountains, rivers, hills, rocks, and lakes. The land, in addition to the plant and animal life it supported, provided sites for vision quests, burials, and places to plant special types of plants that were very important in the religious life of the

[23] Leroy Little Bear, "Relationship of Aboriginal People to the Land and the Aboriginal Perspective on Aboriginal Title", draft research study prepared for the Royal Commission on Aboriginal Peoples (1994), pp. 48-49.

> Blackfoot such as tobacco. It also provided material such as ochre used in painting and religious ceremonies, and sacred rocks used to mark sacred places such as medicine wheel and burial sites.
>
> The Blackfoot, in their movement about their territory, did not move around at random as is often portrayed by missionaries and social scientists. In fact, the seasonal movements were largely synchronized with the movement of the buffalo and other animals, and the ripening of plant foods and medicine. For the bands, there were rather fixed patterns of movement out on to the plains during the summer following, for instance, the buffalo, and movement back onto sheltered places closer to the mountains during the winter. All in all, the Blackfoot made full use of their territory. The use and relationship that was part of the Blackfoot Way continues today, although somewhat restricted, in some cases, to the reserve. But hunting is still exercised, plants are still used for food, medicine, and religion, in addition to the agricultural use that has been introduced by the "white man".
>
> One thing that cannot be overlooked is the role religion plays. Over and above the extended families, the band, the tribe, and the confederacy, are many different religious societies whose memberships transcend the above social organizational layers. Each of these societies has their customs and laws, totems, plant use, and sacred sites. Medicine bundles are associated with most if not all of these societies. These bundles are regularly transferred to new members. Consequently, the land, animal, plant use and relationship of these societies slowly but surely makes its circulation throughout the Confederacy.[24]

Responsibilities to and harmony with land evident in Blackfoot society also structure the social organization of the Gitksan and Wet'suwet'en peoples of the interior of British Columbia. Delgam Uukw, a hereditary Gitksan chief, describes the social structure and land tenure system of his people:

> My House owns territories in the Upper Kispiox Valley and the Upper Nass Valley. Each Gitksan...House owns similar territories. Together, the Gitksan and Wet'suwet'en Chiefs own and govern the 22,000 square miles of Gitksan and Wet'suwet'en territory.

[24] Little Bear, "Relationship of Aboriginal People to the Land", pp. 10-12.

> For us, the ownership of territory is a marriage of the Chief and the land. Each Chief has an ancestor who encountered and acknowledged the life of the land. From such encounters come power. The land, the plants, the animals and the people all have spirit – they all must be shown respect. That is the basis of our law.
>
> The Chief is responsible for ensuring that all the people in his House respect the spirit in the land and in all living things. When a Chief directs his House properly and the laws are followed, then that original power can be recreated. That is the source of the Chief's authority.
>
> My power is carried in my House's histories, songs, dances and crests. It is recreated at the Feast when the histories are told, the songs and dances performed, and the crests displayed. With the wealth that comes from respectful use of the territory, the House feeds the name of the Chief in the Feast Hall. In this way, the law, the Chief, the territory and the Feast become one. The unity of the Chief's authority and his House's ownership of its territory are witnessed and thus affirmed by the other Chiefs at the Feast.[25]

Dr. Richard Daly has described Gitksan and Wet'suwet'en relationships with land in terms of reciprocity and stewardship:

> The relationship between the land and its owners is that of reciprocal interaction, not at all unlike the relationship that carries on between two founding clans in a village. ...
>
> The House group's proprietary representative, its leader or chief, exercises a reciprocal stewardship vis-à-vis the land, and at the same time, a proprietary right towards this land vis-à-vis the claims of other groups or nations. One the one hand, the land is dealt with as a property object between two potentially competitive groups. As such it is subject to ownership. ... At the same time, ownership in such societies entails a responsibility to care for that which is owned. Management and stewardship in such societies require a blend of ownership and tenantship, aggressive control and careful respect. The resultant interweave of competitiveness and rights to ownership, with respectful

[25] Gisday Wa and Delgam Uukw, "The Spirit in the Land", opening statement of the Gitksan and Wet'suwet'en Hereditary Chiefs in the Supreme Court of British Columbia, 11 May 1987 (Gabriola, B.C.: Reflections, 1989), pp. 7-8.

> reciprocation, is manifest in many features and institutions of Gitksan and Wet'suwet'en culture.[26]

Despite their many differences, what unites the social organization of the Blackfoot and Gitksan and Wet'suwet'en peoples is the fact that both societies operate according to systems of land tenure that emphasize stewardship and harmony with the earth. The Blackfoot and Gitksan and Wet'suwet'en nations are not alone in this regard. Profound spiritual relationships with the land are also evident in Inuit patterns of seasonal migration, Haida spirituality of climatic elements, and Métis respect for sacred sites, to take but a few examples.

Land tenure systems that reflect and promote such relationships do not fit comfortably in Canadian property law, with its emphasis on individual entitlements to exclusive use and enjoyment of land as property. In this vein, Professor Michael Jackson writes:

> Fee simple tenure is the most complete form of land tenure that can be held under the common law system, being of indeterminate duration and carrying with it full rights to beneficial enjoyment and freedom of alienation *inter vivos* or by will. That beneficial enjoyment is circumscribed only by the law of nuisance and other laws of general application. Fee simple title is defined primarily, both in the contemplation of common law and in most Canadians' understanding, by reference to the *rights* that flow from this form of land tenure. For most First Nations, their relationship to their territories is defined principally in terms of the responsibilities that flow from that relationship and is best captured by the concept of stewardship. The *responsibilities* of stewardship and conservation for future generations are now being advanced increasingly as a moral and legal value to be adopted by non-Aboriginal governments and by the international community. Although this value is embraced by the environmental movement and is reflected in particular pieces of federal and provincial legislation, particularly those relating to environmental protection, it cannot be said that thus far it has affected the concept of fee simple. Put another way, it cannot be said that fee simple owners of land in Canada are under a legal obligation to conserve their land and its resources for future generations. To the extent that First Nations have always had this ethic of conservation and concern for future generations built into their relationship with their territories and wish to retain that relationship in relation to certain parts of their territories,

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[26] Opinion report of Dr. Richard Daly, "Their Box Was Full", vol. 1, pp. 245-249, quoted in Jackson, "A New Covenant Chain", cited in note 4, p. 76.

> it is not an accurate statement of that Aboriginal title to define it by reference to equivalency to fee simple.
>
> Aboriginal title, as understood by First Nations, is different from fee simple; its differences are not only palpable in the ways First Nations speak about their relationship to their territories, it is also definable in land claims agreements.[27]

It is true that Canadian property law recognizes Aboriginal territorial interests under the rubric of Aboriginal title. Yet, as stated in the introduction to this report, it is difficult to use traditional property concepts to describe Aboriginal understandings of Aboriginal title. Such understandings involve a truly distinctive mix of principles of ownership, responsibility, stewardship and governance.[28] Moreover, litigation is time-consuming and expensive and proceeds on a case-by-case basis. Aboriginal nations, as well as the Crown, have long recognized the need for negotiated agreements to provide protection to Aboriginal ways of life beyond that currently provided by Canadian law. In the following chapter, we address the history of attempts by Aboriginal peoples and the Crown to negotiate agreements permitting peaceful co-existence of otherwise incompatible systems of land tenure and governance.

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[27] Jackson, "A New Covenant Chain", pp. 94-95. See also James Young Blood Henderson, "Land in British Legal Thought", draft research study prepared for the Royal Commission on Aboriginal Peoples (1994), p. xii ("[t]he penetrating core of the truth about *sui generis* Aboriginal tenures is that they are unlike British land law").

[28] See text accompanying notes 2-4.

2

The History of Federal Extinguishment Policy

Independent of the recognition of Aboriginal title provided by Canadian law, Aboriginal peoples sought and continue to seek, by treaty, to retain traditional authority over their ancestral territories and to govern their communities free of external interference. From early times of contact, assertions of territorial sovereignty by European nation-states, buttressed by indefensible claims of religious, cultural and political superiority, threatened the stability of Aboriginal systems of land tenure and governance.[29] Aboriginal nations attempted to regularize their relations with colonial governments and the Crown by treaty in order to preserve their ancestral lands, systems of governance and distinctive ways of life. Successive colonial governments and the Crown also found it in their interests to enter into treaties with Aboriginal peoples.

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[29] As described by Chief Justice John Marshall of the United States Supreme Court, in *Johnson* v. *M'Intosh* (1823), 21 U.S. 543 at 573:

> [T]he character and religion of [North America's] inhabitants afforded an apology for considering them as a people over whom the superior genius of Europe might claim an ascendancy. The potentates of the old world found no difficulty in convincing themselves that they made ample compensation to the inhabitants of the new, by bestowing on them civilization and Christianity, in exchange for unlimited independence.

See also William Edward Hall, *A Treatise on International Law*, ed. A.P. Higgins, 8th ed. (1924), p. 47 (international law governs only those states that are "inheritors of that civilization"); Charles Hyde, *International Law Chiefly as Interpreted and Applied by the United States* (1922), p. 164 ("native inhabitants possessed no rights of territorial control over which the European explorer or his monarch was bound to respect"); and John Westlake, *Chapters on the Principles of International Law* (1894), pp. 136-38, 141-43 drawing a distinction between "civilization and want of it"). For

Today, several hundred treaties structure relationships between Aboriginal nations and the Crown. Since the announcement of the federal government's claims policy in 1973, ten comprehensive agreements have been reached, and a number of other claims are at various stages of the process.[30]

This chapter considers one component of the history of treaty making, namely, the history of Crown policy with respect to extinguishment of Aboriginal rights as an integral part of its comprehensive land claims policy. As will be seen, treaties between Aboriginal nations and the Crown contain a range of techniques designed to mediate and resolve competing interests with respect to land. Generally speaking, early treaties between the Crown and Aboriginal nations did not extinguish, in an exhaustive manner, all Aboriginal land rights of Aboriginal parties in exchange for treaty-based rights and responsibilities. In the nineteenth and early twentieth centuries, however, the Crown began increasingly to require treaty clauses that purported to accomplish blanket extinguishment.

We have commissioned several studies examining Aboriginal understandings of particular treaties and of the treaty-making process in general.[31] In addition, our final report will review and assess Aboriginal perspectives on treaties and the treaty-making process in greater detail. For present purposes, it should be noted that treaties are to be interpreted in a manner befitting their unique status and

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criticism of the legitimacy of assertions of territorial sovereignty by European states in North America, see Dick Spaulding, "Doctrines and Theories of Dispossession", draft research study prepared for the Royal Commission on Aboriginal Peoples (1995); Patrick Macklem, "Distributing Sovereignty: Indian Nations and Equality of Peoples" (1993), 45 Stan. L. Rev. 1311; Georges Erasmus and Joe Sanders, "Canadian History: An Aboriginal Perspective", in *Nation to Nation: Aboriginal Sovereignty and the Future of Canada*, ed. Englestad and Bird (1992), pp. 3-11; Brian Slattery, "Aboriginal Sovereignty and Imperial Claims" (1991) 29 Osgoode Hall L.J. 681; Robert A. Williams, Jr., "Encounters on the Frontiers of International Human Rights Law: Redefining the Terms of Indigenous Peoples' Survival in the World" (1990) Duke L.J. 660; James Anaya, "The Rights of Indigenous Peoples and International Law in Historical and Contemporary Perspective" (1989) Harvard Indian Law Symposium 191; Michael Asch, *Home and Native Land: Aboriginal Rights and the Canadian Constitution* (1984).

[30] The claims concluded since 1973 are the *James Bay and Northern Quebec Agreement* (1975); the *Northeastern Quebec Agreement* (1978); the *Inuvialuit Final Agreement* (1984); the *Gwich'in Agreement* (1992); the *Nunavut Land Claims Agreement* (1993); the *Sahtu Dene and Métis Agreement* (1993); and four *Yukon First Nation Final Agreements* (1993), based on the *Council for Yukon Indians Umbrella Final Agreement* (1993) and corresponding self-government agreements for the Vuntut Gwich'in First Nation, the First Nations of Nacho Nyak Dun, the Teslin Tlingit Council, and the Champagne and Aishihik First Nations. Other claims to lands located in British Columbia, Quebec, Labrador, and the North are at various stages of negotiations.

[31] See Jackson, "A New Covenant Chain", cited in note 4; Leroy Little Bear, James Young Blood Henderson and Tony Long, "Relationship of Aboriginal Peoples to the Land and the Aboriginal Perspective on Aboriginal Title", draft research study prepared for the Royal Commission on Aboriginal Peoples (1994); Delia Opekokew, "The Interpretation of the Treaties Entered Into by the First Nations and the Crown and the Nature and Status of the Oral Promises in Relation to the Written Terms of the Treaties", draft research study prepared for the Royal Commission on Aboriginal Peoples (1993).

importance and "should be liberally construed and doubtful expressions resolved in favour of the Indians."[32] The written terms of a treaty often will "not suffice to determine the legal nature of the document."[33]

It should not be assumed that an Aboriginal nation that is party to a treaty containing an extinguishment clause shares the Crown's view of the legal effect of such a provision. For example, Regena Crowchild, President of the Indian Association of Alberta, stated:

> When the non-indigenous people came into our territory in the last century, the Crown...sent representatives to our peoples. The Crown wished to enter into a treaty with our peoples. Over a period of years, a number of treaties were entered into. In all the treaties, the indigenous peoples agreed to share our lands with the non-indigenous peoples. We never sold our lands. We never surrendered our lands. We never relinquished title to our lands. We agreed to share our lands to the depth of a plough. We never surrendered or sold our waters. We never surrendered or sold our trees. We never surrendered or sold our mountains. These things are sacred to us.[34]

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

Accordingly, generalizations about policies pursued by the Crown in the course of negotiating numerous treaties in diverse circumstances have limited application to an informed understanding of the terms and conditions of any single treaty. Moreover, treaty objectives on the part of Crown representatives alone varied significantly within the periods surveyed and were influenced by a broad range of factors, including the immediate agenda of the government of the day and the particular mandate of the negotiators. Any historical survey of federal treaty policy is necessarily subject to these qualifications.

Nonetheless, a general survey of Crown policy contributes to an understanding of the evolution of the current comprehensive land claims process. It is especially instructive for analysis of a policy whose rationale relies, as federal extinguish-

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[32] *Nowegijick* v. *The Queen*, [1983] 1 S.C.R. 29 at 36, Dickson J. (as he then was). See also *Mitchell* v. *Peguis Indian Band*, [1990] 2 S.C.R. 85 at 98, Dickson C.J. ("aboriginal understandings of words and corresponding legal concepts in Indian treaties are to be preferred over more legalistic and technical constructions"); *R.* v. *Cooper* (1969), 1 D.L.R. (3d) 113 (B.C.S.C.) at 115 ("[t]he document embodying this larcenous arrangement must have been drawn by or on behalf of the Hudson's Bay Company (the signing Chiefs being unable to write) and so any ambiguity must be construed in favour of the exploited Chiefs").

[33] *R.* v. *Sioui*, [1990] 1 S.C.R. 1025 at 1049.

[34] Transcripts, Edmonton, Alberta, 11 June 1992, p. 38.

ment policy does, on historical precedent. For example, the federal government's 1986 *Comprehensive Land Claims Policy*, discussed at greater length in Chapter 3, characterizes modern comprehensive land claims policy as a renewal of a historical tradition of treaty making:

> The basis for any comprehensive land claims policy, therefore, is self-evident. It is the fulfillment of the treaty process through the conclusion of land claims agreements with aboriginal groups that continue to use and occupy traditional lands and whose traditional title has not been dealt with by treaty or superseded by law.[35]

In light of such claims, it is instructive to identify the varied means by which the Crown and Aboriginal peoples attempted to achieve co-existence by treaty throughout the history of Aboriginal-Crown relations and to determine the extent to which extinguishment of Aboriginal rights was a condition of agreement.

This chapter covers terrain similar to that addressed by our earlier discussion paper, *Partners in Confederation: Aboriginal Peoples, Self-Government, and the Constitution*. There we described relations between Aboriginal peoples and European settlers in the early era of treaty making. We analyzed the British government's declaration of fundamental policy toward Indian nations – the *Royal Proclamation of 1763* – a policy that has been called the Indian Bill of Rights and that continues to govern the making of treaties between the Crown and Aboriginal peoples. We also traced the genesis of the doctrine of Aboriginal rights and reflected on the constitutional watershed represented by the recognition and affirmation of existing Aboriginal and treaty rights in the *Constitution Act, 1982*.

Early Treaty Negotiations

In *Partners in Confederation*, we reviewed some of the basic features of early French and English policy on treaty making with Aboriginal peoples in North America. With respect to relations between Aboriginal nations and the French Crown, *Partners in Confederation* referred to the French Crown's 1603 Royal Commission issued to the Sieur de Monts[36] to illustrate how Aboriginal-French

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[35] Cited in note 13, p. 6.

[36] The Sieur de Monts was instructed to

> *traiter & contracter à méme effet paix, alliance & confederation, bonne amitié, correspondance & communication avec lesdits peuples & leurs Princes, ou autres ayans pouvoir & commandement sur eux...*

Text in Marc Lescarbot, *L'Histoire de la Nouvelle-France*, 3rd ed. (Paris: Adrian Perier, 1618), reproduced in *The History of New France by Marc Lescarbot*, ed. W.L. Grant and H.P. Biggar (Toronto: Champlain Society, 1907-14), vol. II, p. 491.

alliances served French ambitions to colonize New France in the service of trade and Aboriginal peoples' need to preserve their territories and governmental autonomy. We examined the text of a peace treaty between the French Crown and four Aboriginal nations, entered into in December 1665[37] and ratified the following year. The four nations – the Tsonnontouans (Seneca), the Oneidouts (Oneida), the Onontagués (Onondaga), and the Goyogouins (Cayuga) – belonged to the Iroquois Confederacy.[38] From the perspective of France, the peace treaty would act as proof of possession of territory as against rival European powers.[39] Negotiations were conducted in Iroquois and French and opened according to Iroquois protocol, which required negotiators to wipe their eyes and clear their throat and ears, so that each would speak sincerely. Each mourned the dead of the other, to demonstrate that they no longer rejoiced in the killing of one another.

Treaty clauses were concluded by exchanging gifts. The written terms of the treaty confirmed a state of peace between the parties, called for an exchange of prisoners, and announced that raids, including those between the Iroquois, Hurons and Algonquins, would no longer occur. No land was ceded, but the Iroquois agreed to receive two missionaries, an armourer, a surgeon, and a number of families into their territory, while the French agreed to receive Iroquois families among them.[40] The peace treaty indirectly acknowledged continuing title of the Aboriginal parties to their territories. Certain territorial rights of the French Crown in the settlements of Montreal, Trois-Rivières, and Quebec City were also acknowledged implicitly. The treaty thus confirmed a relationship of alliance and reciprocity between Aboriginal peoples and the French Crown, without purporting to extinguish Aboriginal rights and title with respect to the territory subject to the treaty.

The 1665 peace treaty between the French and the Iroquois is an illustration of early efforts to achieve peaceful co-existence between Aboriginal nations and newcomers to the continent. While the French intended it to stand as proof of possession as against rival European powers, the document accomplished neither the subjection of Aboriginal peoples nor the cession of territory to France.

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[37] *Treaty of Peace between the Iroquois and Governor de Tracy* [translated from the French], New York Papers 111 A28. The text of the treaty can also be found in Clive Parry, ed., *The Consolidated Treaty Series* (Dobbs Ferry: Oceana, 1969-1986), vol. IX, p. 363; and E.B. O'Callaghan, ed., *Documents Relative to the Colonial History of the State of New York* (Albany: Weed, Parsons, 1856-61), vol. III, p. 121.

[38] The fifth nation of the Confederacy, the Agniers (Mohawk), were not party to the treaty.

[39] This is evidenced by the fact that the colonial minister who approved the treaty in the King's name congratulated colonial authorities on their efforts to "acquire a possession against the present or future claims of the nations of Europe". (Archives Nationales, Paris, Archives des Colonies, C[11] A-2-294.

[40] Archives Nationales, Paris, Archives des Colonies, C[11] A-2-235, C[11] A-2-189v.

Instead, it signified an Aboriginal-French alliance based on mutual respect. However, it would be an overstatement to claim that the 1665 peace treaty is representative of all treaties negotiated during the seventeenth and eighteenth centuries in North America. European-Aboriginal relations during this period were fluid and ambiguous. Treaty provisions varied. Some treaties settled conflicts;[41] others involved acquisition of land.[42]

Despite this variety, a common thread runs through early efforts to achieve peaceful co-existence by agreement. The Quebec Superior Court later characterized French-Aboriginal relations during this period as follows:

> The enterprise and trading operations of...companies and the French colonists generally extended over vast regions of the northern and western portions of this continent. They entered into treaties with the Indian tribes and nations, and carried on a lucrative and extensive fur trade with the natives. Neither the French government, nor any of its colonists or their trading associations, ever attempted, during an intercourse of over two hundred years, to subvert or modify the laws and usages of the aboriginal tribes, except where they had established colonies and permanent settlements, and, then only by persuasion...[43]

While each varied in nature and scope of subject-matter, the few French-Aboriginal treaties entered into in this era typically followed this pattern of non-interference, whereby alliances were struck and recorded but entitlements of all parties were expressed in terms that left Aboriginal title, generally speaking, undisturbed.

We noted in *Partners in Confederation* that British treaty policy differed from French practice. Early British-Aboriginal treaty making, from the perspective of

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[41] See, for example, the Treaty of 1693 between tribes of the Penobscote, Kennebeck, Amarascogin, and Saco rivers and the British Crown, reproduced in Cumming and Mickenberg, ed., *Native Rights in Canada*, 2nd ed. (Toronto: General, 1974), pp. 295-296.

[42] The general treaty signed at the Albany Congress in June 1754 between the Iroquois Confederacy and the British Crown, for example, provided as follows:

> ...the Six Nations aforesaid and every one of them have given, granted, bargained, sold, released and confirmed, and by these Presents do and every one of them doth give, grant, bargain, sell, release and do confirm unto Thomas Penn and Richard Penn, Proprietaries of the province of Pennsylvania,...All the lands lying within the said Province of Pennsylvania bounded and limited as follows...

See Michael Jackson, "A New Covenant Chain", cited in note 4, p. 19, quoting the Report of the Pennsylvania Commissioners at the Albany Congress, 5 August 1754, *Early American Indian Documents*, Col. II, pp. 339-340. For analysis of the oral basis of this treaty and the differing understandings of the parties respecting cession of Aboriginal title, see Jackson, pp. 11-14.

[43] *Connolly* v. *Woolrich* (1867), 17 R.J.Q. 75 (Q.S.C.); also reported in 11 L.C. Jurist 197.

the British Crown at least,[44] regularly contemplated and provided for land cession. For the British, treaties were principally a means, less drastic and more orderly than warfare, of securing lands required for settlement.

For present purposes, what is noteworthy about the early British-Aboriginal treaties is that the British Crown did not insist upon blanket extinguishment of Aboriginal rights and title when seeking to secure lands required for settlement. This mode of dealing with Aboriginal title – blanket extinguishment in exchange for treaty-based rights granted back to the Aboriginal party – first appeared in treaty texts in the latter nineteenth century and has reappeared, with certain exceptions discussed below, in modern comprehensive claims policy.

Some early British-Aboriginal treaties confirmed and undertook to respect the mutual land holdings of the parties, in the way of the French-Iroquois peace treaty referred to above.[45] Others ceded a limited title to the British, reserving certain incidents of Aboriginal title to the Aboriginal party.[46] Others simply ceded certain lands, leaving the remainder of the Aboriginal party's land base

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[44] Aboriginal parties generally viewed these transactions differently than their European counterparts. See, for example, the analysis of differing understandings of the parties respecting extinguishment clauses in Jackson, "A New Covenant Chain", cited in note 4. See also text accompanying notes 32-34.

[45] See, for example, the treaty signed at Boston, 15 December 1725, between representatives of King George and of the Penobscot, Maridgwalk, St. John, Cape Sables and other tribes inhabiting New England and Nova Scotia, providing as follows:

> That His Majesty's Subjects the English Shall and may peaceably and quietly enter upon Improve and forever enjoy all and singular their Rights of God and former Settlements properties and possessions within the Eastern parts of the said province of the Massachusetts Bay Together with all Islands, inletts Shoars Beaches and Fishery within the same without any molestation or claims by us or any other Indian and be in no ways molested or disturbed therein.
>
> Saving unto the Penobscot, Naridgwalk and other tribes within His Majesty's province aforesaid and their natural Descendants respectively all their lands, Liberties and properties not by them convey'd or sold to or possessed by any of the English Subjects as aforesaid. As also the priviledge of fishing, hunting and fowling as formerly.

Text in Cumming and Mickenberg, ed., *Native Rights in Canada*, cited in note 41, pp. 300-302.

[46] A New England treaty in 1648, for example, provided as follows:

> The sayed satchems have covenanted to have libertie freelye to fish in anie or all creekes and ponds and hunt up and downe in the woods without molestation (they giving to the Inglishe inhabitants no just offence or injurie to their goods or chattels). Likewie, they are to have the finnes and tayles of all such whales as shall be cast uppon their proper right... Allso they reserve libertie in all conveyent places shells to make wampum, allso if the Indians hunting any deer they shall chase them into the water and the Inglishe should kill them, the Inglishe shall have the bodie and the satchem the skin.

Indian Deed for the Town of East Hampton, 29 April 1648, reproduced in *Early American Indian Documents*, vol. VII, p. 113, ex. 1244-20, quoted in Jackson, "A New Covenant Chain", cited in note 4, pp. 11-12.

intact.[47] If any British-Aboriginal treaty of this era purported to extinguish an Aboriginal party's entire title, it did not reflect the ordinary practice of the British Crown.

When war between the British and the French broke out in North America in the 1750s, the British sought to break alliances between the French and Aboriginal nations. The British established a naval blockade to prevent the French from supplying Aboriginal allies. In 1758, in Easton, Pennsylvania, the British signed a treaty with Indian nations located in and near Ohio. In return for a promise to remain neutral in the war against the French, British authorities undertook to prevent settlement west of the Appalachians, implicitly regarding the interior of the continent as Indian territory.[48]

After the fall of Quebec in 1759 and shortly before Montreal fell in 1760, British authorities also signed a treaty of alliance with Aboriginal nations living near French colonists. By this treaty, signed in Swegatchie, New York, the British guaranteed maintenance of possessions, freedom of trade, and free exercise of religion and customs to the Hurons of Quebec, the Abenakis of Odanak, the Algonquins of Trois-Rivières and Kanesatake, the Nipissings of the same village, and the Iroquois of Kahnawake, Akwesasne, and Kanesatake.[49] In subsequent years, the British signed similar treaties with other Aboriginal nations previously aligned with the French.

The United States Supreme Court characterized the British Crown's treaty-making policy in the following terms:

> 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 relations of the Indians, farther than to keep out 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

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[47] See, for example, the general treaty of 1754 between the Iroquois Confederacy and the British Crown, quoted in note 42.

[48] See Francis Jennings, *Empire of Fortune, Crowns, Colonies, and Tribes in the Seven Years War in America* (New York: W.W. Norton, 1988), pp. 274-280, 342-348, and 396-403.

[49] Jean-Pierre Sawaya, "Les Sept Nations du Canada: Traditions d'alliance dans le Nord-Est, XVIII^{e}-XIX^{e} siècles", draft research study prepared for the Royal Commission on Aboriginal Peoples (1994), pp. 169-177. See *Franck Côté* v. *R.*, [1993] R.J.Q. 1350 (C.A.) (Swegatchie alliance is a "treaty" within the meaning of s. 35(1) of the *Constitution Act, 1982*).

> interfered with their self-government, so far as respected themselves.[50]

These early policies and practices of French and British authorities were rooted in relations based on reciprocity and respect for the autonomy of Aboriginal peoples. Indeed, all the former Aboriginal allies of the French became part of the British network of alliance known as the Covenant Chain, of which the Iroquois were the chief spokespersons. As was the case with French-Aboriginal relations, relations between the British and Aboriginal nations, both before and after 1760, were structured less by notions of conquest and discovery than by principles of alliance. Reflection on these origins leads us to ask not why Aboriginal title was often retained in early treaties, but why the Crown later began to require blanket extinguishment of Aboriginal title.

The *Royal Proclamation of 1763*

The federal government has stated that its modern treaty policy, since its inception in 1973, has been grounded in principles established by the *Royal Proclamation of 1763*.[51] In its 1973 policy statement, "Claims of Indian and Inuit People", for example, the federal government, referring to its then-new land claims policy and its commitment to honour existing treaties, undertook "to reassure the native peoples concerned, and the people of Canada generally, that its policy in this regard is an expression of acknowledged responsibility."[52] It stated further:

> This assurance [to honour existing treaties] and the present policy statement signify the Government's recognition and acceptance of its continuing responsibility under the British North America Act for Indians and lands reserved for Indians. The government sees its position in this regard as an historic evolution dating back to the Royal Proclamation of 1763, which, whatever differences there may be about its judicial

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[50] *Worcester* v. *Georgia* (1832), 6 Peters 515, quoted in *Connolly* v. *Woolrich*, cited in note 43, at 86. This quotation does not fully capture coercive practices engaged in by the Crown to achieve control over Aboriginal territories on the continent. For an antidote to the view that "peaceful purchase" was the norm, see Francis Jennings, *The Invasion of America: Indians, Colonialism and the Cant of Conquest* (1975).

[51] The most accurate printed text of the Proclamation is provided in Clarence S. Brigham, ed., *British Royal Proclamations Relating to America*, Transactions and Collections of the American Antiquarian Society (Worcester, Mass.: American Antiquarian Society, 1911), vol. 12, pp. 212-18. A less accurate version is reproduced in R.S.C. 1985, App. II, No. 1. The original text, entered on the Patent Roll for the regal year 4 Geo. III, is found in the United Kingdom Public Record Office, c. 66/3693 (back of roll).

[52] Indian Affairs and Northern Development, "Statement made by the Honourable Jean Chrétien, Minister of Indian Affairs and Northern Development, on Claims of Indian and Inuit People" (Ottawa: 8 August 1973), p. 2 [cited hereafter as "Claims of Indian and Inuit People"].

> interpretation, stands as a basic declaration of the Indian people's interests in land in this country.

The federal government's most recent statement on land claims reiterates the central importance of the Royal Proclamation:

> Early in the history of British North America, the *Royal Proclamation of 1763* set out a process prohibiting settlers within its geographic area of application from acquiring lands which were occupied by Aboriginal peoples and which had not been ceded to or purchased by the Crown. With Confederation, Canada assumed responsibility for applying this principle. ...
>
> In Canada, uncertainties over the nature of Aboriginal rights have traditionally been dealt with through the signing of treaties. Following the principles set down in the *Royal Proclamation of 1763*, Aboriginal rights to lands and resources have, in many cases, been purchased by the Crown before non-Native peoples moved into an area in any significant numbers.[53]

Federal acknowledgement of the importance of the Royal Proclamation to the fashioning of land claims policy conforms to judicial interpretation of that document as appearing to have the force of an imperial statute[54] and as "a fundamental document upon which any just interpretation of original rights rests."[55]

In *Partners in Confederation*, we examined the historical conditions that gave rise to the Royal Proclamation provisions concerning Indian relations: the cession of New France to the British Crown, the prospect of an Indian war, and the consequent need to win the trust of France's former Indian allies and placate Britain's

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[53] *Federal Policy for the Settlement of Native Claims*, cited in note 13, pp. 1, 2. See also *In All Fairness: A Native Claims Policy – Comprehensive Claims* (Ottawa: Indian Affairs and Northern Development, 1981), p. 9 (describing the Royal Proclamation as the "best known expression" of the British colonial policy toward Indians from which future treaty procedures evolved); and *Comprehensive Land Claims Policy*, cited in note 13, p. 5 (describing the modern policy as a renewal of the "tradition of treaty-making").

[54] As examples of authorities supporting this view, see *Calder* v. *A.G.B.C.*, [1973] S.C.R. 313 at 394-395, Hall J., dissenting on other grounds; and the judgement of Lord Denning in *R.* v. *Secretary of State for Foreign and Commonwealth Affairs, ex parte Indian Association of Alberta*, [1982] 2 All Eng. L.R. 118 at 124-125. See also *R.* v. *Lady McMaster*, [1926] Ex. C.R. 68 at 72-73; *Easterbrook* v. *The King*, [1931] S.C.R. 210 at 214, 217-18, aff'g [1929] Ex.C.R. 28 at 29-30; *R.* v. *White and Bob*, [1964] 50 D.L.R. (2d) 613 (B.C.C.A.) at 636, 644, 662, Norris J.A., cited in *R.* v. *Isaac* (1975), 13 N.S.R. (2d) 460 at 478, 485, 496 (N.S.S.C. App. Div.).

For commentary to the same effect, see Brian Slattery, "Understanding Aboriginal Rights" (1987) 66 Can. Bar Rev. 727 at 774-775; Gérald A. Beaudoin, *La Constitution du Canada* (Montreal: Wilson & Lafleur, 1990), p. 5; Bruce Clark, *Native Liberty, Crown Sovereignty* (Montreal and Kingston: McGill-Queen's University Press, 1990), p. 107.

[55] *Calder*, cited in note 54, at 395, Hall J., dissenting on other grounds.

dissatisfied Indian allies.[56] The Proclamation observed that "great Frauds and Abuses" had been committed by individuals purchasing lands from the Indians[57] and that it would be both strategic and equitable to take preventive action in the future.[58] According to imperial dispatches and correspondence sent in advance of the Proclamation, the course chosen was to guarantee to Indian nations "a Readiness upon all occasions to do them Justice"[59] and, in particular, to afford them "Royal Protection from any Incroachment on the Lands they have reserved to themselves, for their hunting Grounds, & for their own Support & Habitation".[60]

The Proclamation forbids the purchase of Indian lands from persons other than the Crown.[61] It establishes ground rules to govern the voluntary cession of Indian lands to the Crown "if, at any Time, any of the said Indians should be inclined to dispose of the said Lands".[62] These are the provisions of the Proclamation

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[56] *Partners in Confederation*, cited in note 19, pp. 15-16.

[57] "And whereas great Frauds and Abuses have been committed in purchasing Lands of the Indians, to the great Prejudice of our Interests, and to the great Dissatisfaction of the said Indians", *Royal Proclamation of 1763*, cited in note 51.

[58] In *Province of Ontario* v. *Dominion of Canada*, [1909] 42 S.C.R. 1 at 103, Justice Idington of the Supreme Court of Canada characterized the policy of the Royal Proclamation as "begotten of prudence, humanity and justice"; cited with approval by Hall J. in *Calder* v. *A.G.B.C.*, cited in note 54, at p. 395.

[59] Circular letter from Lord Egremont to the Superintendent for the Southern Indians and several colonial governors, in William L. Saunders, ed., *The Colonial Records of North Carolina*, 10 vols. (Raleigh, N.C.: P.M. Hale, 1886-90), pp. 974-976 (ordering a promise be made to the Indians to dispel the idea that the English "entertain a settled Design of extirpating the whole Indian Race, with a View to possess & enjoy their lands").

[60] Egremont, Secretary of State for the Southern Department, to Amherst, Commander in Chief of the British forces in America, 27 January 1763, "Fitch Papers", *Collections of the Connecticut Historical Society* (Hartford: Connecticut Historical Society, 1860-1967), vol. 18, p. 224.

[61] The Royal Proclamation, cited in note 51, states:

> In order, therefore, to prevent such Irregularities for the future, and to the End that the Indians may be convinced of our Justice and determined Resolution to remove all reasonable Cause of Discontent, We do, with the Advice of Our Privy Council strictly enjoin and require, that no private Person do presume to make any Purchase from the said Indians of any Lands reserved to the said Indians, within those Parts of Our Colonies where, We have thought proper to allow Settlement; but that, if at any Time any of the said Indians should be inclined to dispose of the said Lands, the same shall be Purchased only for Us, in Our Name, at some publick Meeting or Assembly of the said Indians, to be held for that Purpose by the Governor or Commander in Chief of our Colony respectively within which they shall lie: and in case they shall lie within the limits of any Proprietary Government, they shall be purchased only for the Use and in the name of such Proprietaries, conformable to such Directions and Instructions as We or they shall think proper to give for that purpose.

[62] See note 61. See also *Mitchel* v. *U.S.*, 9 Pet. 717 (U.S. Fla., 1835) at 747; *R.* v. *Koonungnak* (1963), 45 W.W.R. 282 at 302 (N.W.T. Terr. Ct.); *Doherty* v. *Giroux* (1915), 24 Que. K.B. 433 at 435; *R.* v. *Baby* (1855), 12 U.C.Q.B. 346 at 360.

cited most commonly in modern treaty policy statements.[63] They mandate the Crown, and the Crown alone, to negotiate land cessions with Aboriginal peoples.[64] In Chapter 4, we assess whether contemporary federal extinguishment policy can be said to conform to the spirit of the Royal Proclamation.

1763-1867

This era marks a dramatic shift in the balance of military and economic power between the Aboriginal peoples of eastern and central Canada and the British Crown.[65] Following the American Revolution and the War of 1812, the importance of Aboriginal peoples as military allies to the British diminished.[66] Perhaps partially as a result, treaty-making authority passed from the British military to civilian authorities,[67] and local authorities assumed progressively greater control over the implementation of treaties.[68] The agricultural development of Upper

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[63] See, for example, *In All Fairness*, cited in note 53, p. 9, referring to the parallel provision (applicable to a specific range of Indian lands) prohibiting all subjects "from making any Purchases or Settlements whatever, or taking Possession of any of the Lands above reserved, without Our especial Leave and Licence for that Purpose first obtained." See also *Federal Policy for the Settlement of Native Claims*, cited in note 13, p. 2.

[64] See *R.* v. *Lady McMaster*, [1926] Ex. C.R. 68; and *Guerin* v. *The Queen*, [1984] 2 S.C.R. 335 at 383, Dickson J. A limited exception to this rule is the Proclamation's allowance that lands within the limits of any "Proprietary Government", such as the lands within what was then Pennsylvania, "shall be purchased only for the Use and in the name of such Proprietaries, conformable to such Directions and Instructions as We or they shall think proper to give for that Purpose".

[65] See, generally, J. R. Miller, *Skyscrapers Hide the Heavens: A History of White-Indian Relations in Canada* (Toronto: University of Toronto Press), pp. 59-98; Cumming and Mickenberg, ed., *Native Rights in Canada*, cited in note 41, pp. 93-119; and Bruce H. Wildsmith, "Pre-Confederation Treaties", in *Aboriginal Peoples and the Law: Indian, Metis and Inuit Rights in Canada*, ed. Bradford W. Morse, rev'd. 1st ed. (Ottawa: Carleton University Press, 1989), pp. 122-271.

[66] Miller, *Skyscrapers Hide The Heavens*, cited in note 65, pp. 83-98.

[67] Britain's Indian Department was detached from the military and became the civilian Department of Indian Affairs in 1830, when it concentrated its efforts on purchasing and selling Indian lands in Upper Canada. See Darlene Johnston, "First Nations and Canadian Citizenship", in *Belonging: The Meaning and Future of Canadian Citizenship*, ed. William Kaplan (Montreal: McGill-Queen's University Press, 1993), p. 353.

[68] Previously, colonial legislatures played a limited role in the administration of local Indian relations. Upper Canada's legislature first enacted protective legislation respecting Indian reserve lands in 1839. Nova Scotia and New Brunswick enacted their first statutes respecting reserve lands in 1842 and 1844 respectively. Lower Canada enacted legislation respecting lands and possessions and lands set aside for some Aboriginal communities in 1850 and 1851. See *An Act for the better protection of the Lands and Property of the Indians of Lower Canada*, 1850, c. 42; *An Act to repeal in part and to amend an Act, entitled: An Act for the better protection of the Lands and Property of the Indians in Lower Canada*, 1851, c. 59; *An Act to authorize the setting apart of Lands for the use of certain Indian Tribes in Lower Canada*, 1851, c. 106. In 1857, the Province of Canada passed the

Canada in the early nineteenth century, the end of the Montreal-based fur trade, and an influx of United Empire Loyalists reduced the influence of the Aboriginal peoples of these parts of Canada as trading partners and intensified settler demand for land.[69]

Despite these developments, the Crown did not pursue blanket extinguishment of Aboriginal title as a standard treaty policy in this period. Some Maritime treaties signed early in this era continued simply to confirm Aboriginal rights in recognized hunting grounds.[70] In Upper Canada, the text of some treaties executed after the War of 1812 continued to cede limited lands and to reserve other lands expressly to the Aboriginal party in their original tenures.[71] The text of still other Upper Canada treaties ceded only a portion of the Aboriginal party's lands, leaving the remainder to be dealt with as need arose.[72]

Much of what is now the Golden Horseshoe of Southern Ontario was purportedly purchased outright for cash, annuities or both during this period, and portions of the Georgian Bay region of Lake Huron were purportedly surrendered for lesser consideration.[73] The beginnings of a Crown policy of blanket extinguishment can perhaps be traced to these agreements, but relatively small tracts of lands were involved in comparison to later treaty practice, and the practice was far from uniform. The text of the two treaties of this period covering the largest territory – the Robinson-Huron and Robinson-Superior treaties of 1850 – reserved to the Aboriginal parties portions of their territory, as well as hunting

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Act to Encourage the Gradual Civilization of The Indians, foreshadowing the federal *Indian Act*. See Darlene Johnston, "First Nations and Canadian Citizenship", cited in note 67, pp. 353-354; and Cumming and Mickenberg, *Native Rights in Canada*, cited in note 41, pp. 103-104. In 1860, Britain delegated legislative authority over Indian affairs to the Province of Canada. See Miller, *Skyscrapers Hide the Heavens*, cited in note 65, p. 111.

[69] In Upper Canada, the total population increased tenfold, from 95,000 to 952,000, between 1812 and 1851. See Miller, *Skyscrapers Hide The Heavens*, cited in note 65, pp. 83-98; and Cumming and Mickenberg, *Native Rights in Canada*, cited in note 41, pp. 107-117.

[70] The Treaty of 1779, for example, quoted in Wildsmith, "Pre-Confederation Treaties", cited in note 65, p. 199, provided as follows:

> That the said Indians and their Constituents shall remain in the Districts before-mentioned Quiet and Free from any molestation of any of His Majesty's Troops or other his Good Subjects in their Hunting and Fishing.

[71] The text of the Chippewa Treaty of 10 July 1827, for example, ceded certain lands to the Crown but exempted from the cession certain Aboriginal lands "for their exclusive use and enjoyment". See Wildsmith, "Pre-Confederation Treaties", cited in note 65, p. 203, note 3.

[72] See, for example, the 1790 surrender of lands in the vicinity of Niagara Falls and the 1784 treaty with the Mississaugas to set aside Grand River lands for Britain's Six Nations allies, discussed in Cumming and Mickenberg, *Native Rights in Canada*, cited in note 41, pp. 108 and 110 respectively.

[73] See Cumming and Mickenberg, *Native Rights in Canada*, cited in note 41, pp. 109-115; and Wildsmith, "Pre-Confederation Treaties", cited in note 65, pp. 201-204.

and fishing rights throughout the otherwise-ceded area, subject to certain third-party protections.[74]

During this era, treaties were also negotiated in western Canada. The texts of the Douglas treaties of Vancouver Island dealt with Aboriginal title in much the same way as did the texts of the Robinson treaties of central Canada.[75] Aboriginal title to the lands reserved to the Aboriginal parties remained undisturbed, as did Aboriginal rights to hunt and fish throughout most of the ceded territory.

The most influential innovation in the Crown's Aboriginal relations policy of this era was the policy of assimilation and, in particular, assimilation in conjunction with settlement on reserves. The following Crown instructions established the basic contours of the policy:

> [T]he most effectual means of ameliorating the condition of the Indians, of promoting their religious improvement and education, and of eventually relieving His Majesty's Government from the expense of the Indian department, are, —1st. To collect the Indians in considerable numbers, and to settle them in villages, with due portion of land for their cultivations and support. 2d. To make such provision for their religious improvement, education and instruction in husbandry, as circumstances may from time to time require. 3d. To afford them such assistance in building their houses, rations, and in procuring such seed and

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[74] The text of the Robinson-Huron treaty provides as follows:

> the said Chiefs and principal men, on behalf of their respective tribes or bands, do hereby fully, freely and voluntarily surrender, cede, grant and convey unto Her Majesty, her heirs and successors forever, all their right, title, and interest to, and in the whole of, the territory above described, *save and except the reservations...shall be held and occupied by the said Chiefs and their tribes in common, for their own use and benefit.* (emphasis added)

See Alexander Morris, *The Treaties of Canada with the Indians of Manitoba and the Northwest Territories* (Saskatoon: Fifth House Publishers, 1991), p. 305. The final phrase of the Robinson-Superior treaty substitutes "for the purposes of residence and cultivation" for the final phrase quoted above. For analysis of this provision in the Robinson-Huron treaty, see Kent McNeil, "The High Cost of Accepting Benefits from the Crown: A Comment upon the Temagami Land Case" [1992] 1 C.N.L.R. 40.

[75] The text of the first Douglas treaty, named after the governor of the colony, which was in fact signed in blank and subsequently filled in, provides that the Aboriginal parties "do surrender entirely and forever" the described lands, and that

> The Condition of, or understanding of this Sale, is this, that our Village Sites and Enclosed Fields are to be kept for our own use, for the use of our Children, and for those who may follow after us: and the land, shall be properly surveyed hereafter; it is understood however that the land itself, with these small exceptions becomes the Entire property of the White peoples for ever; it is also understood that we are at liberty to hunt over the unoccupied lands, and to carry on our fisheries as formerly.

Text in Paul Tennant, *Aboriginal Peoples and Politics: The Indian Land Question in British Columbia*, 1849-1989 (Vancouver: University of British Columbia Press, 1990), pp. 18-19.

> agricultural implements as may be necessary, commuting where practicable, a portion of their presents for the latter.[76]

Indian reserves, incorporated into Crown policy in the 1830s, served two related purposes: the opening up of the predominant portion of Indian lands for non-Indian settlement, and the establishment of a regime to inculcate Aboriginal peoples in European values and ways of life.[77] Once the reserve system was introduced, it became standard practice to set aside reserves in the very treaties that secured the Crown-Aboriginal relationship.[78] The assumption of virtually unlimited control over reserve land by colonial governments during this period logically preceded Crown policy concerning Aboriginal title pursued during negotiations of the numbered treaties, that is, to eliminate any Aboriginal 'burden' on Crown title. The principle of reciprocity upon which Crown-Aboriginal relations had been founded originally was to be discarded by the Crown in its drive to acquire Aboriginal territory and absorb Aboriginal peoples into the Canadian populace. The protective promise of the *Royal Proclamation of 1763* was to be forgotten.

From 1867 to the White Paper

Soon after Parliament acquired jurisdiction with respect to "Indians, and Lands reserved for the Indians" in 1867, it enacted the *Indian Act, 1876*,[79] which

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[76] Sir J. Kempt to Lt.-Gov. J. Colborne, 16 May 1829, *British Parliamentary Papers* (Irish University Press Series), "Correspondence and other Papers Relating to the Aboriginal Tribes in British Possessions", 1834, no. 617, pp. 40-41, quoted by Miller, *Skyscrapers Hide the Heavens*, cited in note 65, p. 99.

[77] Unlike the concept of protection evident in the *Royal Proclamation of 1763*, the protective intention implicit in the goal of assimilation was rooted in convictions of European superiority and Aboriginal inferiority. In 1876, Sir Hector Langevin was to defend the protective coercive provisions of the *Indian Act*, in these terms:

> Indians were not in the same position as white men. As a rule they had no education, and they were like children to a very great extent. They, therefore, required a great deal more protection that [*sic*] white men.

Miller, *Skyscrapers Hide the Heavens*, cited in note 65, p. 191, quoting from Canada, House of Commons, *Debates*, 1876, p. 752.

[78] Darlene Johnston, *The Taking of Indian Lands in Canada: Consent or Coercion?* (Saskatoon: University of Saskatoon Native Law Centre, 1989), p. 49.

[79] *Indian Act, 1876*, S.C. 1876, c. 18. This statute was preceded by *An Act Providing for the Organization of the Department of the Secretary of State of Canada, and for the Management of Indian and Ordinance Lands* (S.C. 1868, c. 42) and *An Act for the Gradual Enfranchisement of Indians and the Better Management of Indian Affairs* (S.C. 1869, c. 6), passed in 1869. For analysis of these statutes and their colonial predecessors, see Darlene Johnston, "First Nations and Canadian Citizenship", cited in note 67; John L. Tobias, "Protection, Assimilation, Civilization: an Outline History of Canada's Indian Policy", in *Sweet Promises: A Reader on Indian-White Relations in Canada*, ed. J. R. Miller (Toronto: University of Toronto Press, 1991), p. 127; John S. Milloy,

consolidated an Indian relations policy aptly described as "coerced assimilation".[80] The principal features of the policy were the resettlement of Indians upon small,[81] federally controlled[82] Indian reserves, the establishment of residential schools,[83] prohibitions on Aboriginal cultural and spiritual expression,[84] and federal control over membership in and enfranchisement from Aboriginal political bodies.[85] The structure and effects of this assimilation policy will be examined in several research studies and in our final report. For present purposes, it is sufficient to consider its importance to federal control of Indian lands and to reflect

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"The Early Indian Acts: Developmental Strategy and Constitutional Change", in *Sweet Promises*, p. 145; and Miller, *Skyscrapers Hide the Heavens*, cited in note 65, esp. pp. 83-115.

[80] Miller, *Skyscrapers Hide The Heavens*, cited in note 65, p. 273. Duncan Campbell Scott, a federal negotiator for Treaty 9, explained the ultimate aim of the policy upon his retirement in 1920 as Deputy Superintendent of Indian Affairs:

> ...Government will in time reach the end of its responsibility as the Indians progress into civilization and finally disappear as a separate and distinct people, not by race extinction, but by gradual assimilation with their fellow citizens.

Quoted by S.D. Grant, "Indian Affairs under Duncan Campbell Scott: The Plains Cree of Saskatchewan 1913-1931" (1983) 18 J. Can. Studies 21. See also John L. Tobias, "Canada's Subjugation of the Plains Cree, 1879-1885" (1983) 64 Can. Hist. Rev. 519.

[81] Reserves granted in the numbered treaties were based on a standard formula of either 160 acres per family of five (Treaties 1, 2, 5, and 8) or 1 square mile per family of five (Treaties 3, 4, 6, 7, 9, 10, and 11). See Cumming and Mickenberg, *Native Rights in Canada*, cited in note 41, pp. 124-125.

[82] Measures of Crown control over reserve land included provision for 'location tickets' severing lots from communal reserve lands and given to individuals 'enfranchised' by the federal government (first introduced in 1857); vesting of general powers of "control and management of the lands and property of the Indians" in a departmental official (introduced in 1868); provision for a non-Aboriginal form of band government, confinement of band jurisdiction to municipal powers, compulsory enfranchisement and severance of lands in limited circumstances, and imposition of a ministerial power of disallowance over band government laws and a power to remove elected chiefs (introduced in 1868); and certain direct powers of federal regulation (introduced in 1876). See Milloy, "The Early Indian Acts", cited in note 79, pp. 147-152; and Johnston, "First Nations and Canadian Citizenship", cited in note 67, pp. 357-363.

[83] On-reserve day schools first received regular public funding in Canada in the 1830s; off-reserve residential schools designed to physically separate Indian children from indigenous cultural influences first received such regular funding in the 1840s. The federal government's Indian education policy for western Canada and British Columbia shifted from day schooling to residential schooling in the 1880s, and the residential school program expanded thereafter until the 1920s, continuing to operate in some parts of Canada until the 1960s. See Miller, *Skyscrapers Hide the Heavens*, cited in note 65, pp. 105-108, 195-198.

[84] Amendments to the *Indian Act* introduced in 1885 banned participation in the Potlatch festival and the Tamanawas dance. (*An Act to further amend "The Indian Act, 1880"*, S.C. 1884, 47 Vict., c. 27, s. 3. See also Katherine A. Pettipas, *Severing the Ties that Bind: Government Repression of Indigenous Religious Ceremonies on the Prairies* (Winnipeg: University of Manitoba Press, 1994).

[85] Governments representing the Crown first assumed authority in 1850 to define who is an Indian. The definition was progressively restricted until 1876, when it took the form that it kept in

on the manner in which the federal government sought to satisfy this imperative in its treaties with Aboriginal peoples.

The acquisition of territory was also important to the Dominion in the late nineteenth century for reasons unrelated to Aboriginal relations. A transcontinental railroad was to be built and the West opened up for non-Aboriginal settlement. Non-Aboriginal settlement was already proceeding in territories west of Ontario, but Aboriginal nations had protested incursion into their territories and threatened to obstruct settlement unless their rights were respected. At the same time, and in step with then-popular racialist and social Darwinist theories, federal policy makers were engaging throughout Canada in social engineering premised upon non-Aboriginal cultural superiority, believing they were furthering the cause of progress.[86] Federal assimilation policy thus coincided with independent economic objectives of the Dominion, since the ultimate aim of assimilation was to remove Aboriginal peoples from the legal landscape.[87]

In 1870, the Parliament of Canada enacted the *Manitoba Act*,[88] creating the province of Manitoba out of part of what was then called Rupert's Land. Section 31 of the *Manitoba Act* imposed obligations on the federal government to set aside 1.4 million acres of public lands for the benefit of Métis people.[89] The original purpose of section 31 was in conformity with the federal policy of assimilation referred to previously, namely, that Métis families be provided with

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Indian Acts until 1950. Enfranchisement, or the stripping of individuals and families of Indian status and rights in return for limited civil, political and economic rights, was first introduced by the Province of Canada in 1857. See Miller, *Skyscrapers Hide the Heavens*, cited in note 65, pp. 109-110; and Tobias, "Protection, Assimilation, Civilization," cited in note 79.

[86] For discussion of the popularity of racialist and social Darwinist views during this era and their influence on contemporary Aboriginal relations policy, see Miller, *Skyscrapers Hide the Heavens*, cited in note 65, pp. 96-98; Dan Gottesman, "Native Hunting and the Migratory Birds Convention Act: Historical, Political, and Ideological Perspectives" (1983) 16 J. Can. Studies 67; Grant, "Indian Affairs under Duncan Campbell Scott", cited in note 80.

[87] For analysis of the factors influencing federal Aboriginal relations policy in the latter part of the nineteenth century, and treaty policy in particular, see Cumming and Mickenberg, *Native Rights in Canada*, cited in note 41, pp. 119-131; Olive Patricia Dickason, *Canada's First Nations: A History of Founding Peoples from Earliest Times* (Toronto: McClelland and Stewart, 1992), pp. 273-289; Miller, *Skyscrapers Hide the Heavens*, cited in note 65, pp. 152-169; René Fumoleau, *As Long As This Land Shall Last* (Toronto: McClelland and Stewart, 1974); Richard Price, ed., *The Spirit of the Alberta Indian Treaties* (Edmonton: Pica Press, 1987); Tobias, "Canada's Subjugation of the Plains Cree", cited in note 80, p. 212; John Leonard Taylor, "Canada's North-West Indian Policy in the 1870s: Traditional Premises and Necessary Innovations", in *Sweet Promises*, cited in note 79, p. 207.

[88] R.S.C. 1985, App. II, No. 8.

[89] The *Dominion Lands Act*, S.C. 1879, c. 31, and the *Dominion Lands Act*, S.C. 1883, c. 17, also made provision for the granting of lands to Métis people. See, generally, Paul L.A.H. Chartrand, *Manitoba's Métis Settlement Scheme of 1879 (Saskatoon: Native Law Centre, 1991).*

a land base in order to assist economic adjustment to the emergent agricultural economy in western Canada.[90] This purpose was not borne out in practice, as the mode of distribution of individual alienable grants of land only to children of heads of families operated to fuel an expansive real estate economy and resulted in a massive dispossession of Métis landholdings in the province.[91]

Aboriginal people initiated negotiation of most of the numbered treaties entered into between 1870 and 1921[92] and consistently wrought concessions that stretched the mandate of federal negotiators.[93] From the perspective of federal policy makers, however, Indian treaties had come to be viewed as a means of removing an impediment by relatively humane and inexpensive means.[94] Aboriginal needs and aspirations had negligible impact on the general policy of the federal government. The federal government regarded treaties "as the final, once-and-for-all means of opening up Indian lands for settlement and development."[95] In accordance with this vision, the texts of the first two of the numbered

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[90] See, generally, Paul L.A.H. Chartrand, "Aboriginal Rights: The Dispossession of the Métis" (1991) 29 Osgoode Hall L.J. 457.

[91] Litigation has commenced assessing the constitutionality of the land distribution scheme. See *Dumont* v. *Canada (A.G.)*, [1990] 1 S.C.R. 279.

[92] Canada, *Indian Treaties and Surrenders from 1680 to 1890* (Saskatoon: Fifth House, 1992), indexed pp. lv-lvi as Treaties nos. 1-7; Fumoleau, *As Long As This Land Shall Last*, cited in note 87 (Treaties 8 and 11, pp. 70-73 and 165-168 respectively). Adhesions to the numbered treaties continued to be made until 1930. See Dickason, *Canada's First Nations*, cited in note 87, p. 273.

[93] See Miller, *Skyscrapers Hide the Heavens*, cited in note 65, pp. 162-169; and Taylor, "Canada's North-West Indian Policy", cited in note 87.

[94] Miller gives the following example of a cabinet minister's justification for the terms of a contemporary treaty:

> My commissioners have made further treaty arrangements with certain of the Indian tribes of the North-West Territories, by which their title is extinguished to a very large portion of the territories west of Treaty No. 4; and, although some of the provisions of this treaty are of a somewhat onerous and exceptional character, I have thought it nonetheless advisable on the whole to ratify it...The expenditure incurred by the Indian treaties is undoubtedly large, but the Canadian policy is nevertheless the cheapest, ultimately, if we compare the results with those of other countries; and it is above all a humane, just and Christian policy. Notwithstanding the deplorable war waged between the Indian tribes in the United States territories, and the Government of that country, during the last year, no difficulty has arisen with the Canadian tribes living in the immediate vicinity of the scene of hostilities.

Canada, House of Commons, *Debates*, 8 February 1877, 3, quoted by Miller, *Skyscrapers Hide the Heavens*, cited in note 65, p. 162.

[95] Dickason, *Canada's First Nations*, cited in note 87, p. 275.

treaties guaranteed farm implements to the Aboriginal treaty party but made no reservation or grant of hunting, trapping or fishing rights.[96]

The treatment of Aboriginal title was virtually identical in the text of all the numbered treaties. In each case, blanket extinguishment of Aboriginal title was an objective of the Crown. In each treaty, Aboriginal parties were said to

> cede, release, surrender and yield up to the Government of the Dominion of Canada, for His Majesty the King and His Successors forever, all their rights, titles, and privileges whatsoever to the lands included within the following limits...[97]

The areas encompassed were so vast that, for most of the Aboriginal parties, their entire territories fell within the treaties' terms. The Crown's original purpose for this measure is sufficiently clear. Possible limitations upon Crown ownership and control of Aboriginal lands or upon Crown regulation of Aboriginal rights, beyond those expressly defined in treaties, were to be eliminated. Blanket extinguishment would clear the way for the assimilation of Aboriginal peoples and the opening of their lands for non-Aboriginal settlement.

After 1930, Crown-Aboriginal treaty making ceased temporarily, and Aboriginal title drew little attention from the federal government until 1969, when the federal government issued a White Paper on Indian policy.[98] The White Paper contended that any lasting differential treatment of Aboriginal individuals under the law is racially or ethnically discriminatory and envisioned a "just society" in

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[96] Treaties 1 and 2, texts in *Indian Treaties and Surrenders from 1680 to 1890*, cited in note 92, pp. 282 and 291 respectively. At an earlier stage of development of assimilation policies, a Royal Commission had advised that the disappearance of game would benefit Indians more greatly than its preservation for their use, because the Indians would then have to depend upon cultivation of their lands for sustenance. See Cumming and Mickenberg, *Native Rights in Canada*, cited in note 41, p. 115, citing Canada, *Report on the Affairs of the Indians of Canada, Journal of the Legislative Assembly*, 1847, VI, app. 1, appendix T, p. 382. Between 1828 and 1858, there were six formal government inquiries into Indian administration and social conditions of Aboriginal peoples. See, generally, John F. Leslie, *Commissions of Inquiry Into Indian Affairs in the Canadas, 1828-1858: Evolving a Corporate Memory for the Indian Department* (Ottawa: Indian Affairs and Northern Development Canada, 1985).

[97] *Indian Treaties and Surrenders from 1680 to 1890*, cited in note 92, pp. 283 (Treaty 1); 292 (Treaty 2); 304 (Treaty 3); 314 (Treaty 4); 17, vol II (Treaty 5); 36, vol II (Treaty 6); 56, vol II (Treaty 7); Fumoleau, *As Long As This Land Shall Last*, cited in note 87, pp. 71 (Treaty 8) and 166 (Treaty 11). Treaties 1 and 2 do not refer to the Government of the Dominion of Canada and substitute "all lands" for "all their rights...whatsoever".

[98] Department of Indian and Northern Affairs, *Statement of the Government of Canada on Indian Policy, 1969* (Ottawa: Queen's Printer, 1969) [cited hereafter as White Paper].

which such discrimination would be eliminated.[99] The White Paper proposed the mutual termination of the historical treaties by their parties and near abolition of distinct legal status for Aboriginal peoples. Ignoring the *Royal Proclamation of 1763* and judicial precedent,[100] the White Paper described Aboriginal land claims as grievances with no basis in law.[101]

The White Paper's proposals were short-lived. Aboriginal groups quickly denounced the White Paper "with a resounding nationalism unparalleled in Canadian history."[102] Its subsequent withdrawal by federal authorities presaged another reversal in federal policy. Beginning in the 1970s, the federal government began again to negotiate with Aboriginal peoples with respect to lands that had not previously been the subject of treaties. Despite a new-found willingness to embark on a voyage of reconciliation with Aboriginal peoples, however, the federal government continued to require blanket extinguishment of Aboriginal title. The next chapter addresses in some detail the nature and purpose of current federal policy on treaty negotiations, including the federal government's requirement that Aboriginal communities agree to the extinguishment of Aboriginal land rights in exchange for treaty-based rights and responsibilities.

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[99] White Paper, p. 8. The White Paper would have granted Indian bands fee simple title to their reserve lands, of the same nature as the ownership interest that may be held by a private corporation. Legal recognition of collective Aboriginal entities was otherwise to be phased out.

[100] The leading case at the time recognizing the legal existence of Aboriginal title in Canada was the decision of the Judicial Committee of the Privy Council in *St. Catherine's Milling & Lumber Co.* v. *The Queen* (1888), 14 A.C. 46.

[101] The White Paper, p. 11, adjudged claims of Aboriginal title to be "so general and undefined that it is not realistic to think of them as specific claims capable of remedy except through a policy and program that will end injustice to Indians as members of the Canadian community." According to the paper, "end[ing] injustice to Indians as members of the Canadian community" meant, among other things, termination of all distinct legal entitlements for Aboriginal peoples, other than temporary benefits and fee simple to Indian reserve lands.

[102] Sally M. Weaver, *Making Canadian Indian Policy: The Hidden Agenda 1968-1970* (Toronto: University of Toronto Press, 1981), p. 5.

3

The Nature and Purpose of Current Federal Extinguishment Policy

As stated in the introduction to this report, current federal extinguishment policy exists within the broader context of comprehensive land claims policy, where the federal government has established a process facilitating negotiations with provincial and territorial governments and certain Aboriginal communities that enjoy Aboriginal rights with respect to land that has not previously been made the subject of a treaty with the Crown. As will be seen, federal extinguishment policy has evolved in recent years to require either blanket or partial extinguishment of existing Aboriginal title to ancestral lands in return for rights guaranteed by the agreement or treaty itself. Typically such treaty-based rights include full ownership of certain lands in the area covered by the agreement, wildlife harvesting rights, participation in land, water, wildlife, and environmental management, financial compensation, resource revenue sharing, economic development rights and responsibilities, and a role in the management of heritage resources and parks in the claims area. Generally speaking, such rights are constitutionally recognized and affirmed by virtue of sections 35(1) and (3) of the *Constitution Act, 1982*.

Although its roots reach back into the history of treaty making canvassed in the previous chapter, current federal extinguishment policy was immediately triggered by the Supreme Court of Canada's famous split decision in *Calder* v. *A.G.B.C.*[103] In *Calder*, a Nisga'a community on the coast of British Columbia requested a declaration that they possessed unextinguished Aboriginal title to

[103] Cited in note 54.

certain lands within the province. Six judges of the Supreme Court of Canada held that Aboriginal title was a right known to Canadian law, but the Court divided on whether Nisga'a title had been extinguished by a series of colonial proclamations before British Columbia joined Confederation.[104]

Shortly after the Court's confirmation that Aboriginal title exists in Canadian law, the government of Canada announced that it would reverse its policy of refusing to enter into treaties with Aboriginal groups. The government stated that it was willing to accept a responsibility "dating back to the Royal Proclamation of 1763" to negotiate with qualified Aboriginal parties "an agreed form of compensation or benefit...in return for their interest."[105] The policy described the desired agreements as "settlements" of "claims" or "long-standing grievances" involving money, land and the "loss of a way of life."[106] Compensation would be for the "loss and relinquishment" of the Aboriginal land interest.[107]

More precisely, the federal government announced that it would seek to conclude comprehensive land claims agreements in those parts of Canada where Aboriginal communities could demonstrate, to the satisfaction of federal authorities, continued use and occupation of ancestral lands and where Aboriginal groups agreed to "exchange" undefined Aboriginal rights and title in return for treaty-based rights and responsibilities. Settlements would aim to "contribute positively to a lasting solution of cultural, social and economic problems that for too long have kept the Indian and Inuit people in a disadvantaged position within the larger Canadian society."[108] The statement emphasized that the policy would operate "in the context of other policies intended and designed to remove the sense of grievance and injustice which impedes the relationships of the Indian and Inuit peoples with the governments concerned and with their fellow Canadians."[109]

The first treaty concluded under the 1973 policy – the 1975 *James Bay and Northern Quebec Agreement* – incorporates almost verbatim the wording of the blanket extinguishment clauses of the numbered treaties referred to in the previous chapter. The Aboriginal parties to the James Bay agreement are said to "cede,

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[104] The Court split 3-3 on the issue. As a result, the plaintiffs were denied the declaration on the basis of a narrow procedural point.

[105] "Claims of Indian and Inuit People", cited in note 52, pp. 2, 4.

[106] "Claims of Indian and Inuit People", pp. 3, 4.

[107] "Claims of Indian and Inuit People", p. 7.

[108] "Claims of Indian and Inuit People", p. 4.

[109] "Claims of Indian and Inuit People", p. 8.

release, surrender and convey all their native claims, rights, titles and interests, whatever they may be, in and to land in the Territory and in Quebec."[110]

Although the federal government announced its intention to negotiate comprehensive land claims agreements in 1973, it was not until 1981 that it released a policy paper entitled *In All Fairness*, describing in detail its preferred approach to comprehensive claims negotiations.[111] The publication of *In All Fairness* focused public attention on the strengths and weaknesses of federal comprehensive land claims policy. Criticisms were levied against continuing federal insistence on blanket extinguishment of Aboriginal title.[112] And while federal policy, in principle at least, indicated a preference for negotiation over litigation, it insisted that Aboriginal self-government, other than in a municipal form, not be included in negotiations concerning land claims. Federal comprehensive claims policy was quickly overshadowed by more fundamental constitutional developments – constitutional recognition of existing Aboriginal and treaty rights by section 35 of the *Constitution Act, 1982*, as well as the holding of several constitutional conferences addressing Aboriginal concerns.[113] As a result of these developments, the federal government established a Task Force to Review Comprehensive Claims Policy, chaired by Murray Coolican.

In its report, *Living Treaties, Lasting Agreements*, the Task Force proposed a dramatic break from existing federal policy.[114] It recommended that comprehensive claims policy should aim to

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[110] *James Bay and Northern Quebec Agreement* (Quebec City: Éditeur officiel du Québec, 1976), subsection 2.1.

[111] *In All Fairness*, cited in note 53.

[112] See, for example, *National and Regional Interests in the North* (Ottawa: Canadian Arctic Resources Committee, 1984).

[113] The 1983 First Ministers Conference on Aboriginal Affairs resulted in the *Constitutional Amendment Proclamation, 1983*, cited in note 8, which defines "treaty rights" referred to in sections 25 and 35(1) of the *Constitution Act, 1982* as including rights that Aboriginal people possess or will acquire in the future by way of land claims agreements and provides that Aboriginal representatives participate in any future discussions concerning constitutional amendments that affect Aboriginal people. The 1984 First Ministers Conference resulted only in a federal statement approving Aboriginal self-government in principle. Two other first ministers conferences were held in 1985 and 1987. In all four conferences, the parties failed to obtain the consent necessary for the entrenchment of a right of Aboriginal self-government. For an account of these negotiations, see David C. Hawkes, *Aboriginal Peoples and Constitutional Reform: What Have We Learned?* (Kingston: Institute of Intergovernmental Relations, 1989); Georges Erasmus, "Twenty Years of Disappointed Hopes," in *Drumbeat: Anger and Renewal in Indian Country*, ed. B. Richardson (Toronto: Summerhill, 1989), 1-42; Bryan Schwartz, *First Principles, Second Thoughts: Aboriginal Peoples, Constitutional Reform and Canadian Statecraft* (Montreal: Institute for Research on Public Policy, 1986).

[114] Task Force to Review Comprehensive Claims Policy, *Living Treaties, Lasting Agreements* (Ottawa: Department of Indian Affairs and Northern Development, 1985).

- define the relationship between governments and Aboriginal peoples in Canada;
- establish a framework of certainty concerning land and resources that accommodates the interests of Aboriginal peoples and other Canadians;
- provide the opportunity for the development of economically viable Aboriginal societies;
- preserve and enhance the cultural and social well-being of Aboriginal societies for generations to come; and
- enable Aboriginal societies to develop self-governing institutions and to participate effectively in decisions that affect their interests.[115]

To this end, *Living Treaties, Lasting Agreements* proposed a new comprehensive claims policy. For present purposes, the most important component of its proposed new policy was the recommendation that "blanket extinguishment of all aboriginal rights and title should no longer be an objective" of the federal government.[116]

In December 1986, the federal government responded to the Task Force report by issuing a new comprehensive claims policy. In a policy statement entitled *Comprehensive Land Claims Policy*, the federal government noted the "growing dissatisfaction" with "the practice of seeking to extinguish all aboriginal rights and interests in and to the settlement area in exchange for the benefits provided through the settlement agreement."[117] Although it was not prepared to abandon completely its stance on blanket extinguishment, the federal government indicated that "alternatives to extinguishment may be considered" in negotiations.[118]

In particular, the federal government listed blanket extinguishment *or* partial extinguishment as two acceptable options. The *Comprehensive Land Claims Policy* worded these options as follows:

1. the cession and surrender of aboriginal title throughout the settlement area in return for the grant to the beneficiaries of defined rights in specified or reserved areas and other defined rights applicable to the entire settlement area; or
2. the cession and surrender of aboriginal title in non-reserved areas, while

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[115] *Living Treaties, Lasting Agreements*, pp. 30-31.

[116] *Living Treaties, Lasting Agreements*, p. 31.

[117] *Comprehensive Land Claims Policy*, cited in note 13.

[118] *Comprehensive Land Claims Policy*, p. 12.

- allowing any aboriginal title that exists to continue in specified or reserved areas;
- granting to beneficiaries defined rights applicable to the entire settlement area.

While acknowledging dissatisfaction with a policy that seeks to extinguish all Aboriginal rights in exchange for treaty rights, the 1986 policy reiterated federal interests in ensuring clarity and certainty in successful negotiations of comprehensive land claims agreements:

> The purpose of settlement agreements is to provide certainty and clarity of rights of ownership and use of land and resources in those areas of Canada where aboriginal title has not been dealt with by treaty or superseded by law. Final settlements must therefore result in certainty and predictability with respect to the use and disposition of lands affected by the settlements. When the agreement comes into effect, certainty will be established as to ownership rights and the application of laws. Predictability will be established for the future as to how the applicable provisions may be changed and in what circumstances. In this process the claimant group will receive defined rights, compensation and other benefits in exchange for relinquishing rights relating to the title claimed over all or part of the land in question.[119]

In a recent restatement of policy, the federal government reasserted its position requiring that Aboriginal communities "exchange" at least some Aboriginal rights in return for treaty-based rights and responsibilities, arguing that this is needed to achieve clarity and certainty in comprehensive agreements:

> The primary purpose of comprehensive claims settlements is to conclude agreements with Aboriginal groups that will resolve the debates and legal ambiguities associated with the common law concept of Aboriginal title. Uncertainty with respect to the legal status of lands and resources, which has been created by a lack of political agreement with Aboriginal groups, is a barrier to economic development for all Canadians and has hindered the full participation of Aboriginal peoples in land and resource management.[120]

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[119] *Comprehensive Land Claims Policy*, p. 9.

[120] *Federal Policy for the Settlement of Native Claims*, cited in note 13, p. 5. With respect to comprehensive claims, the 1993 policy announces reforms to the negotiation process (p. 11) and elaborates on the rationale for extinguishment (pp. 1-2, 5 and 9); otherwise the 1993 statement does not purport to modify the 1986 statement.

Because of such "ambiguities" and "uncertainty", the federal government seeks to obtain Aboriginal consent to "relinquish undefined Aboriginal rights which they may have with respect to lands or resources, in favour of the rights and other benefits which are written down in the settlement agreement."[121] According to the federal government, the function of this requirement is to provide "confirmation from Aboriginal groups that the rights written down in claims settlements are the full extent of their special rights related to the subjects of the agreements."[122]

When it speaks of "ambiguities" and "uncertainty" associated with Aboriginal rights, no doubt the federal government is referring, in part at least, to the fact that existing Aboriginal rights recently received constitutional recognition and affirmation by section 35 of the *Constitution Act, 1982*. Although the Supreme Court of Canada's decision in *R.* v. *Sparrow* has provided rich insight into the nature and scope of Aboriginal rights, many issues remain unresolved.[123] Because of the evolutionary nature of constitutional interpretation and the vagaries of the litigation process, the full implications of the enactment of section 35 have yet to be determined judicially.

The federal extinguishment policy thus seeks to sidestep uncertainties associated with judicial delineation of the nature and scope of Aboriginal title, by substituting a relatively concrete list of rights and responsibilities within the terms of a comprehensive agreement. In the absence of an extinguishment clause, trade-offs enshrined in the agreement could be upset by a judicial finding of continuing Aboriginal title with respect to some or indeed all of the settlement area. Such a holding might permit an Aboriginal group to rely on a right associated with Aboriginal title to prevent governmental or third-party action authorized by the terms of the agreement. Federal extinguishment policy seeks to ensure that any land rights enjoyed by Aboriginal parties to an agreement flow from the agreement itself, and that an Aboriginal party to a treaty cannot rely on continuing Aboriginal land rights to accomplish an objective not contemplated or authorized by treaty. By extinguishing Aboriginal title, governments and authorized third parties are free to use and take up lands throughout the claims area unless restricted by the terms of the agreement itself.

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[121] *Federal Policy for the Settlement of Native Claims*, p. 9.

[122] *Federal Policy for the Settlement of Native Claims*, p. 9.

[123] *R.* v. *Sparrow*, cited in note 5. For commentary on *Sparrow*, see Kent McNeil, "Envisaging Constitutional Space for Aboriginal Governments" (1993) 19 Queen's L.J. 95; Brian Slattery, "First Nations and the Constitution: A Question of Trust" (1992) 71 Can. Bar Rev. 261; Michael Asch and Patrick Macklem, "Aboriginal Rights and Canadian Sovereignty: An Essay on *R.* v. *Sparrow* (1991) 29 Alta. L. Rev. 498; Patrick Macklem, "First Nations Self-Government and the Borders of the Canadian Legal Imagination" (1991) 36 McGill L.J. 382; W. Binnie, "The Sparrow Doctrine: Beginning of the End or End of the Beginning?" (1990) 15 Queen's L.J. 217.

Several recent reforms to the precise means by which extinguishment is effected, undertaken in response to the Task Force report, *Living Treaties, Lasting Agreements*, deserve mention. First, the federal government has ceased to require treaty approval of legislative extinguishment of Aboriginal title, as well as legislative extinguishment in the course of ratifying treaties.[124] Second, the federal government has also stated its intention that Aboriginal rights other than those associated with the "use of and title to land and resources" are not to be included among the rights surrendered in land claims treaties.[125] A federal policy paper issued in 1993 suggests further that the federal government may not require the extinguishment of resource rights.[126]

Most significant, since 1986 the federal government has entertained an alternative means of achieving "certainty in respect of lands and resources" in comprehensive claims negotiations.[127] As stated, the 1986 policy proposes two options, one of which is to require partial extinguishment, that is, extinguishment of Aboriginal title in all lands not set aside for the Aboriginal party under the treaty, but continuation of any existing Aboriginal title in the selected or lesser areas.[128]

In our view, federal acceptance of partial extinguishment, recommended by the Task Force report[129] and inspired by the Robinson treaties and similar precedents, breaks the conceptual trap into which federal treaty policy had fallen since the era of the numbered treaties. In the limited context of the lands set aside for Aboriginal parties, federal acceptance of partial extinguishment recognizes that Aboriginal rights have continuing and future value to Aboriginal nations and that blanket extinguishment of Aboriginal title is not always necessary to the stability of future relations among owners and users of land and resources. This option was apparently adopted in the 1993 *Council for Yukon Indians Umbrella*

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[124] This practice, introduced with the *James Bay and Northern Quebec Agreement* (1975) and continued in the *Northeastern Quebec Agreement* (1978) and the *Inuvialuit Final Agreement* (1984), was discontinued after the Task Force To Review Comprehensive Claims Policy recommended its abandonment. *See Living Treaties: Lasting Agreements*, cited in note 114, p. 43.

[125] *Comprehensive Land Claims Policy*, cited in note 13, p. 12.

[126] *Federal Policy for the Settlement of Native Claims*, cited in note 13, p. 9 ("Aboriginal groups are asked to relinquish undefined Aboriginal rights which they may have with respect to lands *or* resources" [emphasis added]).

[127] *Comprehensive Land Claims Policy*, cited in note 13, p. 12.

[128] *Comprehensive Land Claims Policy*, p. 12. The 1993 statement, prepared after ratification of the Yukon Umbrella Agreement modelled on this alternative, adds the following description:

> Under the 1986 Comprehensive Land Claims Policy a claimant group may retain any Aboriginal rights that it may have with respect to the lands it will hold following a settlement, so long as such rights are not inconsistent with the final agreement.

Federal Policy for the Settlement of Native Claims, cited in note 13, p. 9.

[129] *Living Treaties: Lasting Agreements*, cited in note 114, pp. 41-42.

Final Agreement.[130] As will be seen, this option contains the seeds of a new federal policy – one that emphasizes reconciliation and co-existence between Aboriginal peoples and the Crown.

The Yukon precedent currently stands alone among the modern treaties. Blanket extinguishment clauses similar to that in the James Bay and Northern Quebec Agreement are included in the text of all the other comprehensive land claims agreements negotiated since 1975.[131] One of these agreements is that reached with Inuit to divide the Northwest Territories and create a new political jurisdiction, to be known as Nunavut, out of the central and eastern part of the territory.[132] The Nunavut Agreement provides that Inuit agree to

> cede, release and surrender to Her Majesty in Right of Canada, all of their aboriginal claims, rights, title and interests, if any, in and to lands and waters anywhere within Canada and adjacent offshore areas within the sovereignty or jurisdiction of Canada.[133]

In return, specified Inuit organizations retain rights with respect to 352,000 square kilometres of land, 36,257 square kilometres of which include mineral rights, totalling approximately 9.9 per cent of the 2.6 million square kilometres at issue. Such land can be sold only to the government, as the purpose of land rights, as provided by the agreement, is to ensure "economic self-sufficiency of Inuit throughout time." The Inuit are also entitled to $580 million in compensation, as well as 50 per cent of the first $2 million in royalties earned from Nunavut lands and 5 per cent of royalties earned thereafter. The agreement also establishes a Nunavut Social Development Council to assist in the development of social and cultural policies; an Inuit Heritage Trust to assist in the preservation of archaeological sites; and a Nunavut Wildlife Management Board, along with several other committees and boards, to provide Inuit with significant involvement in land use planning, environmental impact assessments, and wildlife management.

Both the Yukon Agreement and the Nunavut Agreement represent progress with respect to the relationship between land claims and self-government negotiations. In Nunavut, land claims and self-government are linked by legislation creating a new territory and a public form of government. But this form of

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[130] The *Council for Yukon Indians Umbrella Final Agreement* (1993) contemplates self-government agreements with each Yukon First Nation that enters into a land claims final agreement. These agreements provide that they are to be brought into effect by federal and territorial legislation. Four of the fourteen Yukon First Nations have concluded self-government agreements. Such agreements will be brought into force when Bill C-34, *Yukon First Nations Self-Government Act*, as passed by the House of Commons, 22 June 1994, is brought into force.

[131] See the list of agreements in note 30.

[132] See, generally, Donald Purich, *The Inuit and Their Land: The Story of Nunavut* (1992). See also John Merritt and Terry Fenge, "The Nunavut Land Claim Settlement: Emerging Issues in Law and Public Administration" (1990) 15 Queen's L.J. 255.

[133] Cited in note 30, art. 2.7.1.(a).

self-government relies for its success on an Aboriginal majority population in the region and thus is of limited application to other parts of Canada. The Council of Yukon Indians negotiated self-government following resolution of its land claims. However, contrary to its expectations, negotiations were limited to discussing the feasibility of delegating power from the federal government and not based on recognition of an inherent right of self-government.[134]

Moreover, despite its scope, the Nunavut Agreement illustrates that blanket extinguishment remains a central component of federal comprehensive claims policy. The federal requirement of extinguishment continues to encounter deep opposition among Aboriginal peoples. Perhaps the most dramatic illustration of such opposition lies in the fact that, in 1990, a thirteen-year negotiation process between the Dene and Métis of the Northwest Territories and the federal government ended because the Aboriginal parties refused to approve an extinguishment provision.[135]

In short, current federal extinguishment policy is designed to achieve clarity and certainty in a comprehensive land claims agreement. In the view of the federal government, *clarity* is achieved by a relatively straightforward clause indicating that certain or all rights associated with Aboriginal title are extinguished. *Certainty* of Crown title is achieved by ending debate and uncertainty over the constitutional contours of Aboriginal title in the aftermath of a comprehensive settlement and by ensuring that, as much as possible, any burdens on Crown title and existing and future third-party interests are spelled out in the treaty itself. According to the federal government, the surest way to accomplish these objectives is to require Aboriginal people to relinquish Aboriginal rights in exchange for specified treaty-based rights. The 1986 federal policy statement purports to soften previous extinguishment policy by stating that there are acceptable options other than blanket extinguishment that will further the federal interests in clarity and certainty. Nonetheless, current policy continues to require the extinguishment of at least some rights associated with Aboriginal

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[134] In other contexts, the federal government has indicated a willingness to proceed on the basis that section 35 recognizes and affirms the inherent right of self-government and to participate, under the auspices of the B.C. Treaty Commission, in negotiations that do not separate land claims from self-government agreements. See Notes for Remarks by the Honourable Ronald A. Irwin, Minister of Indian Affairs and Northern Development and the Honourable Anne McLellan, Federal Interlocutor for the Métis and Non-Status Indians, to a Meeting of Federal-Provincial-Territorial Ministers and Aboriginal Leaders on Implementation of the Inherent Right of Self-Government, Quebec City, 17 May 1994, pp. 4, 7 (stating that the federal "government has taken the position that the inherent right is an existing section 35 right" and that the B.C. Commission "allows...for the negotiation of land claim and self-government agreements at the same table").

[135] See Richard H. Bartlett, "The Dettah Resolution and the Dene-Metis Land Claim Settlement" (1990) C.N.L.R. 1; and *Federal Policy for the Settlement of Native Claims*, cited in note 13, p. 14.

title in return for treaty-based rights and benefits. And the Yukon Agreement notwithstanding, the federal government appears to have pursued a policy of blanket extinguishment of all Aboriginal title in most, if not all, of its comprehensive negotiations with Aboriginal communities.

4

Assessing Federal Extinguishment Policy

Having identified the nature and objectives of federal extinguishment policy in light of the broader history of treaty making in Canada, we turn to an assessment of the merits of requiring Aboriginal peoples to exchange Aboriginal title for treaty-based rights in the context of comprehensive claims negotiations. As the previous chapter revealed, the overarching objective of current federal extinguishment policy is to achieve clarity and certainty regarding the respective rights and obligations of parties to an agreement and affected third parties. By the extinguishment of relatively undefined rights associated with Aboriginal title in return for relatively specific treaty rights, the federal government is able to plan and govern its affairs and act in the interests of all Canadians with the knowledge that Aboriginal signatories will not be able to appeal to legal entitlements other than those contained in the agreement. The Royal Commission agrees wholeheartedly with the federal government that clarity and certainty are valid and desirable federal objectives that ought to govern all comprehensive land claims negotiations. However, it is our view that current federal extinguishment policy is not an appropriate means to accomplish these objectives. Nor does federal extinguishment policy advance the equally fundamental objective of achieving lasting co-existence of divergent conceptions of land and governance.

Our concerns are fourfold. First and foremost, while federal extinguishment policy furthers valid federal objectives with respect to Crown and third-party interests, blanket extinguishment and, in many cases, partial extinguishment effect a severe discontinuity between, on the one hand, original relationships

that Aboriginal peoples enjoy with their lands and, on the other hand, contemporary expressions of those enduring relationships in land claims agreements. Second, blanket extinguishment runs counter to the spirit, if not the letter, of the *Royal Proclamation of 1763*. Third, federal policy is out of step with the fact that existing Aboriginal rights are constitutionally recognized and affirmed in the *Constitution Act, 1982*. Fourth, it may run afoul of fiduciary obligations owed to Aboriginal peoples by the federal government. The remainder of this chapter expands on each of these concerns. The next chapter identifies a preferred way of accomplishing the valid and legitimate federal objectives of clarity and certainty that accommodates these concerns.

Aboriginal Understandings of Extinguishment

While federal extinguishment policy achieves clarity and certainty with respect to Crown and third-party interests, it does so by purporting to sever historical Aboriginal relationships with the earth. In the words of Chief Edward John of the First Nations Summit of British Columbia,

> [w]hen government asks us to agree to surrender our title and agree to its extinguishment, they ask us to do away with our most basic sense of ourselves, and of our relationship to the Creator, our territory and the other peoples of the world. We could no longer do that without agreeing that we no longer wish to exist as a distinct people. That is completely at odds with our intentions in negotiating modern treaties.[136]

Similarly, speaking during the second round of the Royal Commission's hearings, Chief Jean-Guy Whiteduck of the Algonquins of Maniwaki, Quebec, stated:

> One of the most frustrating things for First Nations and for our people is the issue of extinguishment of Aboriginal rights. ...We think that there is no need for extinguishment. We feel that asking Aboriginal people to extinguish their rights would be equivalent to asking Canadians to give up their Canadian citizenship. Therefore, that is why it is so difficult when it comes to dealing with the comprehensive claim policy for many of our people.[137]

The frustration referred to by Chief Whiteduck is attributable, in no small part, to the fact that extinguishment policy reflects a deeper tension between Aboriginal understandings of Aboriginal title and how Aboriginal title has been viewed traditionally by federal negotiators. On the one hand, as stated by Chief Edward John, Aboriginal peoples understand Aboriginal title to refer to a set of inherent rights defining "our most basic sense of ourselves, and of our relation-

[136] Transcripts, Prince George, British Columbia, 1 June 1993, pp. 414-415.

[137] Transcripts, Maniwaki, Quebec, 2 December 1992, pp. 27-28.

ship to the Creator, our territory and the other peoples of the world."[138] On the other hand, federal policy treats Aboriginal title as a bundle of quasi-property entitlements to use and enjoyment that can be traded irrevocably to the Crown by treaty in return for treaty-based rights with respect to land governed by the treaty. Once such an exchange occurs, federal policy assumes that Aboriginal title no longer exists with respect to 'surrendered' land, unless the treaty explicitly authorizes its continuation with respect to certain locations.

From the perspective of Aboriginal peoples, what treaties ought to accomplish is not the *extinguishment* of Aboriginal title, but the *recognition* of Aboriginal title by agreement. Treaties should serve as solemn acts of mutual recognition of aspects of Aboriginal and Canadian ways of structuring relationships with the land. Aboriginal peoples understand that complete recognition of Aboriginal understandings of Aboriginal title is not possible in many circumstances, given countervailing Crown and third-party interests. In such circumstances, treaty recognition of only some Aboriginal rights with respect to land and governance is appropriate. A treaty ought to be a vehicle whereby certain Aboriginal rights with respect to land and governance are recognized by Canadian society and certain Crown rights with respect to land and governance are recognized by Aboriginal society. Thus framed, a treaty would enable co-existence of otherwise competing systems of land tenure and governance.

In this light, federal extinguishment policy prevents the comprehensive land claims process from accomplishing the fundamental task of bridging and reconciling Canadian and Aboriginal understandings of Aboriginal title. It is true that partial, as opposed to blanket, extinguishment does not, under Canadian law, completely sever historical Aboriginal relationships with the earth. When coupled with partial recognition of continued Aboriginal title throughout part of the territory governed by an agreement, partial extinguishment offers more promise for the comprehensive claims process to serve as a vehicle of true co-existence. Yet, at least in cases where partial extinguishment operates on a large scale, the difference between blanket and partial extinguishment is a difference in degree, not a difference in kind. In such cases, both partial and blanket extinguishment effectively deny the expression of aspects of Aboriginal identity in Canadian law.

The Royal Proclamation Revisited

In Chapter 2 of this report, we described the terms and significance of the *Royal Proclamation of 1763*. As stated, the federal government has supported its policy respecting the negotiation of comprehensive claims agreements as being grounded in principles first articulated in colonial law in the Royal Proclamation.[139] In our view, although the federal government is undoubtedly

[138] Transcripts, Prince George, British Columbia, 1 June 1993, pp. 414-415.

[139] See text accompanying notes 51-64.

correct that the Royal Proclamation signifies a profound responsibility on the part of the Crown to protect the interests of Aboriginal peoples in Canada, we are less sure that a policy of blanket extinguishment conforms to the spirit of the Royal Proclamation.

As stated in Chapter 2, the Royal Proclamation forbids the purchase of Indian lands by persons other than the Crown and establishes ground rules to govern the voluntary cession of ancestral lands by Aboriginal peoples to the Crown. Do the terms of the Royal Proclamation mandate the blanket extinguishment of Aboriginal title? There is good reason to doubt that this is the case. As we have seen, limited cessions and purchases were common in British-Aboriginal treaties of the period.[140] The procedures called for expressly by the Proclamation enhance, rather than reduce, the security of Aboriginal title, a result that accords with the needs and equities pressing upon the Crown at the time. Nothing in the Proclamation's text refers, in particular, to wholesale surrenders of Indian title. It thus cannot be said that the Proclamation requires, or even approves of, such a measure.

In fact, the overarching theme of the Proclamation's relevant terms is a Crown commitment to protect the ancestral lands of Aboriginal peoples. This commitment is affirmed expressly in a preamble:

> And whereas it is just reasonable, and essential to Our Interest and the Security of Our Colonies, that the several Nations or Tribes of Indians, with whom We are connected, and *who live under Our Protection, should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to, or purchased by Us, are reserved to them, or any of them, as their Hunting Grounds...*[141]

As we noted in Chapter 2, imperial instructions preceding the Proclamation emphasized the need for such a commitment.[142] Royal instructions sent to the governor of Quebec shortly after the Royal Proclamation was issued underscored the Crown's protective intention, directing their recipient to "treat with the Indians, promising and assuring them of Protection and Friendship on Our part" and at the same time instructing that "you are upon no account to molest or disturb [the Indians] in the possession of such parts of the said Province as they at present occupy or possess."[143] Although the Proclamation clearly aims to enjoin misconduct by the King's subjects, these latter instructions and the

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[140] See text accompanying notes 44-50.

[141] Cited in note 51 (emphasis added).

[142] See text accompanying notes 56-60.

[143] Royal Instructions to Governor Murray of Quebec, 7 December 1763, in *Documents Relating to the Constitutional History of Canada 1759-1791*, ed. Adam Shortt and Arthur G. Doughty, 2nd ed. (Ottawa: King's Printer, 1918), vol. 1, p. 181.

preamble and historical context of the Proclamation suggest that the Crown itself undertook to give to the Indian nations the same consideration required of its subjects.

It should also be noted that the Proclamation does not require, as a condition of guaranteeing Indian nations security in the possession of their hunting grounds, that Indian nations first surrender title to their lands. On the contrary, "all Persons whatever who have either wilfully or inadvertently seated themselves upon any Lands...which, not having been ceded or purchased by Us, are still reserved to the said Indians as aforesaid" are "strictly enjoin[ed] and require[d]...to remove themselves...". The Proclamation does not merely dedicate the Crown to the purchase of Aboriginal title. By its terms, it protects lands subject to Aboriginal title against encroachment.[144] The Royal Proclamation thus intends to give substantive recognition and protection to Aboriginal title and was in this sense, before the enactment of section 35 of the *Constitution Act, 1982*, the 'Indian Bill of Rights'.[145]

In our view, while it may allow for comprehensive land claims negotiations, the Royal Proclamation does not mandate blanket extinguishment of Aboriginal title by treaty. The purpose and declared intention of the Royal Proclamation suggest the opposite. The Proclamation undertakes to protect Aboriginal title. Its text contemplates and regulates only particular cessions or purchases of Aboriginal lands needed by subjects for settlement, to be negotiated "if, at any Time, any of the said Indians should be inclined to dispose of the said Lands." The Proclamation, above all, is a document designed to safeguard Aboriginal peoples in the possession of their ancestral lands.

The Constitutional Status of Aboriginal Rights

Because it assumes that Aboriginal title can be completely extinguished or exchanged for treaty-based rights, federal extinguishment policy is also based on an outdated understanding of Aboriginal rights as common law rights and ignores the fact that Aboriginal rights currently enjoy constitutional recognition and affirmation. Federal extinguishment policy is steeped in traditional quasi-property law notions of Aboriginal title, as opposed to contemporary principles of constitutional law. Viewing Aboriginal rights merely in terms of the common law tends to lead one to equate Aboriginal rights with other common law rights with respect to land. Federal policy assumes that Aboriginal rights can be

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[144] The Proclamation also forbids individual "Possession" of certain Indian lands "without our special leave and License for that Purpose first obtained", without requiring as a condition preceding the granting of a licence that the Indian land holders surrender their title.

[145] Justice Gwynne so characterized the Royal Proclamation in *St. Catharines Milling and Lumber Co.* v. *The Queen (1887)*, 13 S.C.R. 577 at 652. Justice Hall quoted approvingly of the statement in *Calder* v. *A.G.B.C.*, cited in note 54, at 394-395.

exchanged for other benefits in a manner similar to the sale of a home or a piece of property.[146]

More specifically, one of the central arguments against blanket extinguishment, advanced in 1985 by the Task Force to Review Comprehensive Claims Policy in *Living Treaties, Lasting Agreements*, is that the *Constitution Act, 1982* requires affirmation and recognition of existing Aboriginal rights. The Task Force wrote:

> The enactment of section 35 of the *Constitution Act* cast new light upon the issue of extinguishment. Under the pre-1982 law, the Crown could extinguish aboriginal rights legislatively without the consent of the aboriginal peoples. The elevation of aboriginal rights to a constitutional level has precluded such an approach in the future...
>
> ...[R]ights can still be altered with the consent of the aboriginal peoples. This method poses a grave problem for federal policy because, as we have seen, most aboriginal peoples reject the notion of losing all of their aboriginal rights. Moreover, why would Parliament recognize aboriginal rights in the most important constitutional document of the century, and then extinguish them in the decades that follow?...
>
> ...In keeping with section 35 of the Constitution, agreements should recognize and affirm aboriginal rights.[147]

It is clear that section 35 is intended to mark a turning point in our constitutional history. In *R.* v. *Sparrow*, the Supreme Court of Canada held that Aboriginal rights recognized and affirmed by section 35 protect the cultural identity of Aboriginal peoples.[148] Accordingly, like the cultures in which they are exercised, Aboriginal rights are not frozen in time, but rather have the capacity to evolve with the changing needs and customs of Aboriginal peoples.[149]

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[146] It should be recalled, however, that the common law of Aboriginal title does not allow Aboriginal communities to sell ancestral lands directly to third parties. Aboriginal communities are required to deal with third parties through the Crown, which owes fiduciary obligations to the Aboriginal community to act in its best interests when acting on its behalf with an interested third party. See *Guerin* v. *The Queen*, cited in note 64.

[147] *Living Treaties; Lasting Agreements*, cited in note 114, pp. 40-41, 43.

[148] The Court held that Aboriginal fishing rights "are rights held by a collective and are in keeping with the culture and existence of that group" (cited in note 5, at 1112). In particular, reviewing the evidence that established the existence of the right in question, the Court emphasized that for the Musqueam people, "the taking of salmon was an integral part of their lives and remains so to this day" (at 1094) and that "the salmon fishery has always constituted an integral part of their distinctive culture" (at 1099).

[149] *Sparrow* v. *The Queen*, cited in note 5, at 1093 ("an approach which would incorporate 'frozen rights' must be rejected.").

Section 35 incorporates a fiduciary duty on the part of the Crown in its relations with Aboriginal peoples,[150] requiring governments representing the Crown to treat Aboriginal peoples in a trust-like manner, rather than an adversarial one.[151] As is the case with rights enshrined in the *Canadian Charter of Rights and Freedoms*, Aboriginal rights can be limited by law, although laws that interfere with the exercise of Aboriginal rights are subject to fairly searching constitutional scrutiny.[152] The standard of justification for laws that interfere with the exercise of Aboriginal rights is based upon the Crown's fiduciary duty.[153] According to the Court in *Sparrow*, it requires any such law to possess a pressing and substantial objective[154] and to give foremost consideration to Aboriginal peoples' rights.[155]

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[150] The Court in *Sparrow*, at 1107, 1108 and 1109, stated:

> [R]ecent judicial decisions...have emphasized the responsibility of Government to protect the rights of Indians arising from the special trust relationship created by history, treaties and legislation: see *Guerin* v. *The Queen*...
>
> In our opinion, *Guerin*, together with *R.* v. *Taylor and Williams*,...ground a general guiding principle for s. 35(1). That is, the Government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples. The relationship between the Government and aboriginals is trust-like, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship....
>
> [T]he words "recognition and affirmation" incorporate the fiduciary relationship referred to earlier and so import some restraint on the exercise of sovereign power. [citations omitted]

[151] *Sparrow*, at 1108.

[152] *Sparrow*, at 1108-1109 ("[l]egislation that affects the exercise of aboriginal rights will nonetheless be valid, if it meets the test for justifying an interference with a right recognized and affirmed under s. 35(1)").

[153] *Sparrow*, at 1109 ("federal power must be reconciled with federal duty and the best way to achieve that reconciliation is to demand the justification of any government regulation that infringes upon or denies aboriginal rights").

[154] With respect to permissible objectives of limitations, and in the context of regulation of the fisheries, the Court, p. 1113, ruled:

> If a *prima facie* interference [with an Aboriginal right] is found, the analysis moves to the issue of justification. This is the test that addresses the question of what constitutes legitimate regulation of a constitutional aboriginal right. The justification analysis would proceed as follows. First, is there a valid legislative objective? Here the court would inquire into whether the objective of Parliament in authorizing the department to enact regulations regarding fisheries is valid. The objective of the department in setting out the particular regulations would also be scrutinized. An objective aimed at preserving s. 35(1) rights by conserving and managing a natural resource, for example, would be valid. Also valid would be objectives purporting to prevent the exercise of s. 35(1) rights that would cause harm to the general populace or to aboriginal peoples themselves, or other objectives found to be compelling and substantial....
>
> We find the "public interest" justification to be so vague as to provide no meaningful guidance and so broad as to be unworkable as a test for the justification of a limitation on constitutional rights.
>
> The justification of conservation and resource management, on the other hand, is surely uncontroversial.

Another relevant inquiry is whether the limitation interferes with Aboriginal rights as little as possible.[156]

Section 35 applies to government policy and practice, in addition to legislation.[157] It therefore regulates the process of treaty making and federal policy governing treaties. As with other provisions of the Constitution, the federal government must act in accordance with section 35 independently of court orders.[158] In discharging its general duty to ensure the constitutional validity of its conduct, the federal government has recognized that it carries a heightened responsibility to act in a fiduciary capacity with respect to Aboriginal peoples.[159] Beyond these considerations, section 35 affirms a value for which Canadians have declared their deepest respect. If, as the Supreme Court has reminded us, "[w]e cannot recount with much pride the treatment accorded to the native people of this country",[160] section 35 surely represents our collective resolve to rebuild the country's relationship with Aboriginal peoples on an honourable footing. Accordingly, the spirit of this directive, as well as its letter, should guide the making of modern treaties.

There appears to be no reason in principle why governments representing the Crown should require extinguishment of constitutional rights recognized by section 35 of the *Constitution Act, 1982* on terms and under conditions that would not permit a waiver of constitutional rights guaranteed by the Charter.[161] Indeed, the Crown's fiduciary duty and the more drastic and permanent effects

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[155] *Sparrow*, p. 1114 ("[t]he special trust relationship and the responsibility of the government vis-a-vis aboriginals must be the first consideration in determining whether the legislation or action in question can be justified").

[156] *Sparrow*, p. 1119 ("there are further questions to be addressed, depending on the circumstances of the inquiry. ...These include the questions of whether there has been as little infringement as possible in order to effect the desired result").

[157] In *Sparrow*, p. 1110, the Court stated that section 35 "gives a measure of control over government conduct" and that "legislation or action" is subject to the justification standard (p. 1114). The Court also approved of the Nova Scotia Court of Appeal's unanimous opinion that section 35 directs that "factual as well as legislative and policy recognition must be given" to the Aboriginal or treaty right affected (p. 1117, quoting from *R.* v. *Denny* (1990), 55 C.C.C. (3d) 322 at 339).

[158] *Hunter* v. *Southam*, [1984] 2 S.C.R. 145.

[159] See Report of an Interdepartmental Working Group to the Committee of Deputy Ministers on Justice and Legal Affairs, *Fiduciary Relationship of the Crown With Aboriginal Peoples: Implementation and Management Issues – A Guide for Managers* (July 1993), p. ii ("managers must always consider whether or not any program, policy, legislative or other initiative impacts upon the special fiduciary relationship with aboriginal peoples").

[160] *R.* v. *Sparrow*, cited in note 5, at 1103, quoting MacDonald J. in *Pasco* v. *Canadian National Railway Co.*, [1986] 1 C.N.L.R. 35 (B.C.S.C.).

[161] It is true that the exercise of some constitutional rights may be waived by their holders, subject to strict procedural safeguards. See, for example, *Clarkson* v. *The Queen*, [1986] 1 S.C.R. 383 (right to counsel); *R.* v. *Turpin*, [1989] 1 S.C.R. 1296 (right to benefit of trial by jury);

of extinguishment afford reasons why the standard should be significantly higher in the case of the Crown's demand for extinguishment of Aboriginal title. Generally speaking, it does not befit a fiduciary to seek to obtain by agreement entitlements it is required by law to protect. In stating this view, we do not mean to suggest that truly voluntary consent to blanket or partial extinguishment of Aboriginal title is *per se* constitutionally impermissible. However, in the future, the Crown, as a matter of policy, should not make such consent a precondition for granting treaty protection to Aboriginal communities when less drastic alternatives can accommodate the public interest.

Extinguishment of Aboriginal title in exchange for modern treaty protection also has a freezing effect on the future evolution of constitutional recognition of Aboriginal peoples' interests in land. Whether and to what extent constitutional recognition of Aboriginal rights includes acceptance of the legitimacy of Aboriginal land tenure systems no doubt will continue to be a subject of controversy. However, extinguishment of Aboriginal title prevents an Aboriginal community from enjoying constitutional recognition of incidents of Aboriginal title, related to land but unrelated to the treaty's terms, that may be acknowledged in the future. This, of course, is the other side of the coin of the objectives of clarity and certainty underlying federal extinguishment policy. Given the historical importance to Aboriginal peoples of section 35(1) of the *Constitution Act, 1982*, it is desirable to determine whether there are alternative means of achieving valid federal objectives of clarity and certainty without resorting to a policy that permanently deprives Aboriginal communities of constitutional recognition of their Aboriginal rights.

Of particular concern is the underdevelopment of the very jurisprudence that establishes baseline entitlements enjoyed by Aboriginal groups engaged in treaty negotiations. As the Supreme Court noted in *Sparrow*,

> [f]or many years, the rights of the Indians to their aboriginal lands – certainly as *legal* rights – were virtually ignored. The leading cases defining Indian rights in the early part of the century ...were essentially concerned with settling legislative jurisdiction or the rights of commercial enterprises. For fifty years after the publications of Clement's *The Law of the Canadian Constitution* (3d ed. 1916), there was a virtual absence of discussion of any

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R. v. *Morin*, [1992] 1 S.C.R. 771 (right to a trial within a reasonable time). However, the law permits waiver of certain rights simply because such rights are not meant to be forced upon their holders (*Clarkson* v. *The Queen*, [1986] 1 S.C.R. 383). Nor is the doctrine of waiver intended to facilitate bargaining between the state and rights-holders; it does not appear to permit the offering of inducements by the state to a vulnerable party in exchange for waiver of the party's rights (*Clarkson* v. *The Queen*). Moreover, ordinary constitutional principles of waiver, generally speaking, operate in the absence of a fiduciary relationship between the right-holder and the state. And unlike a waiver of other constitutional rights, extinguishment by consent purports permanently to divest present and future communities of Aboriginal rights.

> kind of Indian rights to land even in academic literature. By the late 1960s aboriginal claims were not even recognized by the federal government as having any legal status. Thus the *Statement of the Government of Canada on Indian Policy* (1969), although well meaning, contained the assertion (at p.11) that "aboriginal claims to land...are so general and undefined that it is not realistic to think of them as specific claims capable of remedy except through a policy and program that will end injustice to the Indians as members of the Canadian community". In the same general period, the James Bay development by Quebec Hydro was originally initiated without regard to the rights of the Indians who lived there, even though these were expressly protected by a constitutional instrument: see the *Quebec Boundary Extension Act, 1912*, S.C. 1912, c. 45. It took a number of judicial decisions and notably the *Calder* case in this Court to prompt a reassessment of the position being taken by government.[162]

Landmark cases concerning the nature of Aboriginal title were decided without representation of the Aboriginal peoples affected. As noted by a special committee of the Canadian Bar Association,

> [e]ven prior to 1927 aboriginal people were often not represented in cases which affected their rights. One astonishing example is the landmark case of *St. Catherine's Milling and Lumber Co.* v. *The Queen*. Here was a case involving the land rights of Indian people – yet they were not parties to the litigation and, accordingly, were not represented. Further, the decision was arrived at in a total vacuum. No evidence was led by any party as to the ways in which the Ojibway have in fact used their lands, or as to the purposes to which they were put over the hundreds of years in which they occupied them.[163]

This lack of representation was in breach of a basic tenet of natural justice well established at the time.[164] Continuing uncertainty surrounding the nature of Aboriginal title in common law also can be attributed to the repression of Aboriginal advocacy effected by the *Indian Act*, which, between 1927 and 1951, made it a punishable offence for anyone to raise funds for the "prosecution of any claim which the tribe or band of Indians to which such Indian belongs...has...for the recovery of any claim or money for the benefit of the said

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[162] *R.* v. *Sparrow*, cited in note 5, at 1103-1104.

[163] *Report of the Canadian Bar Association Committee on Aboriginal Rights in Canada: An Agenda for Action* (Ottawa: Canadian Bar Association, 1988), pp. 10-11.

[164] The rules of natural justice entitle persons whose rights are affected by a judicial decision to be heard. See, generally, Wade, *Administrative Law*, 6th ed. (Oxford: Clarendon, 1988), pp. 496-582.

tribe or band".[165] By requiring the extinguishment of rights associated with Aboriginal title so soon after their constitutional recognition and affirmation, federal extinguishment policy prematurely forecloses the constitutional evolution of Aboriginal rights. It prevents Aboriginal peoples from finally being able to enjoy the fruits of what the Supreme Court of Canada described in *Sparrow* as "a long and difficult struggle in both the political forum and the courts for the constitutional recognition of aboriginal rights."[166] As the next section suggests, federal extinguishment policy is also at odds with fiduciary obligations owed to Aboriginal peoples by the Crown.

The Fiduciary Duty of the Crown

In our view, requiring Aboriginal peoples to extinguish title in order to benefit from the protection of a modern treaty does not fit comfortably with the fact that the Crown is in a fiduciary relationship with Aboriginal peoples. Such a requirement, however well-intentioned, serves to exploit the very vulnerability and impoverished condition of Aboriginal peoples that treaties aim to redress.

In *Sparrow*, the Supreme Court located this fiduciary duty in history, the common law, treaties, and legislation.[167] The Court read into section 35 the Crown's duty, recognized in *Guerin* and the *Royal Proclamation of 1763*, to deal with land for the benefit of the Aboriginal party whenever an Aboriginal party surrenders Aboriginal title to the Crown.[168] This duty may constitutionally require the Crown to act in the interests of an Aboriginal community when the Crown offers an inducement to that community to surrender its Aboriginal title. In *Sparrow*, the Supreme Court held that the fiduciary duty encompassed by section 35 is a general one, applicable whenever the Crown is dealing with Aboriginal rights.[169] The Crown's duty to act in the interests of Aboriginal peoples may well apply before, in the process of, and after any surrender of Aboriginal title.

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[165] *Indian Act*, R.S.C. 1927, c. 98, s. 141. See also Wendy Moss, "History of Federal and Provincial Laws Discriminating Against Aboriginal People" (Ottawa: Library of Parliament, 1987), p. 24; Thomas R. Berger, *A Long and Terrible Shadow: White Values, Native Rights in the Americas 1492-1992* (Toronto/Vancouver: Douglas & McIntyre, 1992), p. 148.

[166] *Sparrow*, cited in note 5, at 1105.

[167] Quoted in note 150, at 1107.

[168] *Sparrow*, at 1108. See also *Guerin* v. *The Queen*, cited in note 64, at 382, Dickson J. ("[t]he nature of the Indians' interest is...best characterized by its general inalienability, coupled with the fact that the Crown is under an obligation to deal with the land on the Indians' behalf when the interest is surrendered").

[169] Quoted in note 150.

Fiduciary obligations exact a "strict standard of conduct"[170] on the part of their bearers:

> The underlying idea that governs the way the law has expounded the nature of the duties owed by a fiduciary is that the fiduciary is to act exclusively to the advantage and benefit of the person to whom he stands in the relationship of fiduciary. Everything must be subordinated to that. His liability is strict; his duty of loyalty is categorical.[171]

It is true that, in the case of the Crown's fiduciary obligation to Aboriginal peoples, the exclusivity of the fiduciary's loyalty is necessarily tempered by the Crown's independent responsibility to serve the public interest.[172] But the vulnerability of Aboriginal peoples, their reliance upon the discretion of the Crown, and their placement of trust in the Crown[173] are unique to the Aboriginal-Crown relationship, such that only some interests of the public constitute sufficient justification for limitations upon Aboriginal rights.[174]

More specifically, to be constitutionally valid, the objective of a limitation upon Aboriginal rights must be "pressing and substantial".[175] Moreover, when the federal government pursues a policy that negatively affects the exercise of Aboriginal rights, it must seek to ensure that the policy in question gives priority to those

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[170] See *Guerin* v. *The Queen*, cited in note 64, at 384, Dickson J. ("where by statute, agreement, or perhaps by unilateral undertaking, one party has an obligation to act for the benefit of another, and that obligation carries with it a discretionary power, the party thus empowered becomes a fiduciary. Equity will then supervise the relationship by holding him to the fiduciary's strict standard of conduct").

[171] G.H.L. Fridman, *Restitution*, 2nd ed. (Toronto: Carswell, 1992), p. 374. See also M.V. Ellis, *Fiduciary Duties in Canada* (Toronto: Carswell, 1993), pp. 1-3.

[172] See Brian Slattery, "First Nations and the Constitution: A Question of Trust" (1992) 71 Can. Bar Rev. 261 at 291; Michael Hudson, "The Fiduciary Obligations of the Crown Towards Aboriginal Peoples", in *Aboriginal Title in British Columbia: Delgamuukw v. The Queen*, ed. Frank Cassidy (Lantzville: Oolichan/IRPP, 1992), p. 48.

[173] See, generally, Fridman, *Restitution*, cited in note 171, p. 367; Ellis, *Fiduciary Duties in Canada*, cited in note 171, p. 1-1; and *International Corona Resources Ltd.* v. *Lac Minerals Ltd.*, [1989] 2 S.C.R. 574 at 62-63. For a similar view in the context of Aboriginal peoples, see *Guerin* v. *The Queen*, quoted in note 64. See also Alain Lafontaine, "La coexistence de l'obligation de fiduciaire de la Couronne et du droit à l'autonomie gouvernementale des peuples autochtones", LL.M. thesis, University of Ottawa, 1993, pp. 114-125.

[174] See *Sparrow*, cited in note 5, at 1118-1119 ("the fact that the objective is of a "reasonable" nature cannot suffice as constitutional recognition and affirmation of aboriginal rights").

[175] See the passage from *Sparrow* quoted in note 154. In addition to conservation and management of natural resources, the Court, at 1113, cited "harm to the general populace or to aboriginal peoples themselves" as examples of compelling and substantial objectives that may justify interference with an Aboriginal right.

rights and pays close consideration to the views of the Aboriginal people affected.[176] Generally speaking, the Crown must also use the least restrictive means of achieving its objective. The relationship between the government and Aboriginal peoples, in the words of the Supreme Court of Canada in *Sparrow*, must be "trust-like, rather than adversarial".[177]

The federal extinguishment policy's objectives of clarity and certainty are valid and legitimate purposes of a comprehensive land claims process, but they should not completely eclipse the fact that the Crown historically insisted on extinguishment of Aboriginal title for reasons that deserve condemnation under contemporary standards of equality and respect. In this light, as the Court noted in *Sparrow*,

> while regulation affecting aboriginal rights is not precluded, such regulation must be enacted according to a valid objective. Our history has shown, unfortunately all to well, that Canada's aboriginal peoples are justified in worrying about government objectives that may be superficially neutral but which constitute *de facto* threats to the existence of aboriginal rights and interests.[178]

According to Professor Peter Hogg, "an objective cannot provide the basis for s. 1 justification if the objective did not in fact cause the enactment of the law."[179] History shows that the federal government traditionally insisted on extinguishment of Aboriginal title for purposes other than clarity and certainty. As described in Chapter 2, extinguishment policy during the era of the numbered treaties was designed to clear Aboriginal title for the sake of non-Aboriginal settlement and Aboriginal assimilation. In combination, these purposes do not merely ignore the interests served by Aboriginal title, they negate them. They amount to a justification of extinguishment for extinguishment's sake. These objectives, in our view, do not merit serious consideration in a constitutional regime committed to fundamental principles of equality and respect for Aboriginal difference.

As discussed in Chapter 3, current federal extinguishment policy is designed to achieve valid and legitimate federal objectives. However, the policy purports to eliminate rights associated with Aboriginal title in order to clarify and render certain Crown and third-party rights. In pursuing these objectives, however,

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[176] *Sparrow*, cited in note 5, at 1111, 1112 ("it is possible, and indeed crucial, to be sensitive to the aboriginal perspective itself on the meaning of the rights at stake" and "the conservation and management of our resources is consistent with aboriginal beliefs and practices, and, indeed, with the enhancement of aboriginal rights").

[177] *Sparrow*, at 1108.

[178] *Sparrow*, at 1112.

[179] Peter Hogg, *Constitutional Law of Canada*, 3rd ed. (Toronto: Carswell, 1993), p. 873.

federal extinguishment policy subordinates Aboriginal interests to the interests of the Crown. The provincial Crown benefits directly from the perfection of Crown title that results from extinguishment of Aboriginal title to lands located within a province, since the provincial Crown enjoys full title to provincial Crown lands upon extinguishment.[180] The Crown perfects its own title by extinguishment in order to protect third-party interests and to facilitate Crown or third-party development in the future. It then grants limited treaty protection to Aboriginal people out of the totality of its own title. This policy fails to give due consideration to Aboriginal interests and is not, in our view, the conduct expected of a fiduciary.[181] The federal government ought to determine whether there are alternative means of accomplishing its objectives in a manner less intrusive to Aboriginal interests. In the next chapter, we advance a less intrusive approach that we believe offers the Crown sufficient clarity and certainty to protect third-party interests and to allow for stable planning for the future.

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[180] See *St. Catherine's Milling* v. *The Queen*, cited in note 100.

[181] Compare *Blueberry River Indian Band* v. *Canada*, [1993] 3 F.C. 28 at 113, Stone J.A.:

> It would seem strange that the Crown could allow the Indians to surrender their interest in the primary asset if it considered or ought to have considered that to do so would not be in their long-term interests but would be detrimental to those interests. In my view, the Crown as a fiduciary was required to put the interests of the Indians ahead of its own interests in the surrendering of the reserve lands.

Also reported as *Apsassin* v. *Canada (Department of Indian Affairs and Northern Development)* (1993), 100 D.L.R. (4th) 504 at 569.

5

Mutual Recognition: An Alternative to Extinguishment

Current federal extinguishment policy raises serious barriers to the capacity of the comprehensive claims process to facilitate the co-existence of Aboriginal and non-Aboriginal systems of land tenure and governance. Accordingly, this Chapter advances an alternative approach. A useful starting point is the federal government's 1986 *Comprehensive Land Claims Policy*, developed in response to the 1985 report of the Task Force to Review Comprehensive Claims Policy, *Living Treaties, Lasting Agreements.* As stated, the federal government announced in 1986 that it would consider either partial or blanket extinguishment of Aboriginal title when negotiating a comprehensive agreement. The *Comprehensive Land Claims Policy* is a significant development in the history of treaty making. It signals that the federal government, for the first time since the nineteenth century, is prepared to move away from a policy that requires blanket extinguishment in all cases. For the reasons given in Chapter 4 of this report, however, any policy that continues to contemplate blanket extinguishment of Aboriginal land rights as a possible option may offend fundamental legal and equitable principles. As such, current policy is not an appropriate mechanism for achieving lasting and harmonious co-existence.

Requiring partial extinguishment as a precondition of negotiations is also an inappropriate means of achieving co-existence. Partial extinguishment often results in the extinguishment of rights to far more territory than the term 'partial' perhaps implies. Because of its permanent effects, any decision to agree to partial extinguishment of Aboriginal title should be made after a careful and exhaustive analysis of alternative options. We do not wish to suggest in this report that an

Aboriginal nation should never be entitled to exchange some of its territory for certain treaty-based benefits.[182] Nor do we wish to foreclose the availability of bargaining solutions that rely in part on partial extinguishment techniques.[183] Nonetheless, we hope that the approach we propose will prove more attractive in most instances.

In the Commission's view, parties involved in comprehensive negotiations should strive to reach an agreement that, with respect to the territory in question, protects existing third-party interests, recognizes Aboriginal and Crown rights with respect to land, and allocates rights of governance among the parties. Under this approach, negotiations would aim to describe the territory in question in terms of several categories of land in order to identify, as exhaustively and precisely as possible, the rights of each of the parties with respect to lands and governance.

On lands in a first category, "full rights of beneficial ownership and primary, if not exclusive, jurisdiction in relation to lands and resources" would belong to the Aboriginal party in accordance with the traditions of land tenure and governance of the Aboriginal community or communities in question.[184] Aboriginal understandings of Aboriginal title with respect to these lands could be recognized more or less in their entirety, including Aboriginal systems of land tenure and governance. An Aboriginal nation would therefore be free to structure its relationship with land in accordance with its worldview, perhaps by building in legal obligations to serve as stewards of the land for future generations. It could opt for provisions enabling it to grant interests to third parties in the future; these interests could have the attributes of a conventional resource lease or permit.[185] The agreement would also explicitly protect any third parties currently holding

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[182] Although not without ambiguity, partial extinguishment appears to be the technique adopted by parties to the Yukon Agreement. In 1988, Yukon First Nations ratified a Framework Agreement for the settlement of comprehensive land claims. This agreement provides for two types of final agreements. The first, an Umbrella Final Agreement, sets out provisions applicable to all Yukon First Nations. The second is an agreement applicable specifically to an individual First Nation. One such specific agreement, the Vuntut Gwich'in First Nation Final Agreement, retains some Aboriginal rights with respect to certain lands within the claim area but appears to extinguish Aboriginal rights with respect to other lands within the claim area. For more detail on the nature and operation of the Yukon Agreement, see Jackson, "A New Covenant Chain", cited in note 4, pp. 55-74.

[183] Partial extinguishment presents a number of options to parties to negotiations. An agreement could provide for the extinguishment of all Aboriginal land rights with respect to a portion of the territory, the extinguishment of some Aboriginal land rights with respect to all the territory, or the extinguishment of some Aboriginal land rights with respect to a portion of the territory.

[184] Jackson, "A New Covenant Chain", cited in note 4, p. 87.

[185] To the extent that Aboriginal title is inalienable except to the Crown, treaty recognition of Aboriginal title alone may not establish Aboriginal authority to grant interests to third parties. However, we are of the view that an Aboriginal party can be vested with such authority by treaty.

interests located in this category of land from the recognition of Aboriginal title accomplished by the agreement.

On lands in a second category, third-party interests would also be protected, but a number of Aboriginal and Crown rights with respect to land could be recognized by the agreement, and rights of governance and jurisdiction could be shared among the parties. For example, rights to traplines and fishing sites could be recognized in accordance with Aboriginal tenure systems and could co-exist with Crown rights of mineral exploration in accordance with provincial or territorial law. Co-management bodies could be empowered to manage the lands and direct and control development and land use. Co-management could be based on the principle of parity of representation among parties to the treaty. Mutual recognition could allow for revenue sharing based on identified benefits flowing from Aboriginal and Crown rights recognized and affirmed by the agreement.

On lands in a third category, a relatively complete set of Crown rights with respect to land and governance could be recognized by the agreement. Even on lands in this category, however, some Aboriginal rights could be recognized in order to acknowledge that Aboriginal peoples enjoy historical and spiritual relationships with such lands. For example, Aboriginal people, as a matter of protocol, could serve as diplomatic hosts at "significant events of a civic, national or international nature that take place on their territory."[186]

Mutual recognition of Aboriginal and Crown rights respecting land and governance could be achieved by either a single agreement or a series of agreements and by permanent or fixed-term agreements. With respect to a single agreement, negotiations would be premised on the presumption that the Aboriginal party possesses deep ancestral ties to the claim area and would aim to identify, in a single and comprehensive document, Aboriginal and Crown rights that ought to be recognized by treaty and the manner in which jurisdiction ought to be allocated among the parties. With respect to the negotiation of a series of agreements, mutual recognition would proceed on a more gradual basis. In this case, while the overall objective would be to identify, as exhaustively as possible, the respective rights of the parties, negotiations could begin with respect to certain jurisdictional and ownership matters and geographical areas and move on to other areas in accordance with a previously agreed-upon negotiation schedule. By this option, negotiations might produce a series of relatively discrete acts of mutual recognition rather than a single, comprehensive agreement. Parties might also consider it in their interests to conclude permanent agreements respecting the recognition of certain types of rights but to reach shorter-term agreements recognizing other types of rights. For example, parties might see it in their interests to conclude a permanent agreement regarding certain issues of governance and

[186] Jackson, "A New Covenant Chain", cited in note 4, p. 108.

jurisdiction, but might want to negotiate a fixed-term agreement regarding the sharing of revenue from certain resources located within the territory.

Whether it be by a single agreement or a series of agreements or by permanent or fixed-term agreements, an approach that emphasizes mutual recognition is preferable to current federal extinguishment policy. The approach we propose does not require Aboriginal people to 'exchange' Aboriginal rights for treaty rights. Aboriginal rights not recognized by an agreement would not be extinguished; they would continue to exist and would serve to authorize Aboriginal activity subject to the terms of the agreement. In the event of conflict, Crown rights recognized by the agreement or protected third-party interests would take precedence over Aboriginal rights not recognized by the agreement. The more comprehensive the agreement, the less likely such conflict will arise. However, with respect to agreements that are more modest in scope, Aboriginal rights not recognized by the agreement might continue to authorize a significant range of activity unrelated to the terms of the agreement. In the Commission's view, this approach is true to Aboriginal understandings of the nature and purpose of Aboriginal rights, Canadian constitutional principle, and the need for a treaty-making process that is just and fair and facilitates co-existence between Aboriginal and non-Aboriginal people in Canada.

As stated in the previous chapter, the major shortcoming of current federal extinguishment policy is that it purports to extinguish rights that are part and parcel of Aboriginal identity. In so doing, it effects a radical discontinuity between, on the one hand, historical Aboriginal relationships with land and, on the other hand, contemporary treaty rights. The primary value of an approach that emphasizes mutual recognition is that it respects Aboriginal understandings of their relationships with land and seeks openly to minimize jurisdictional disputes and accommodate conflicts between Aboriginal relationships with land and provincial and territorial concepts of property law. Disputes and conflict are minimized by the flexibility that flows from protection of third-party interests and mutual recognition of Aboriginal and Crown rights with respect to land and governance. In this way, the comprehensive land claims process can serve as a means – more flexible than litigation – whereby, in the words of section 35(1) of the *Constitution Act, 1982*, "existing aboriginal and treaty rights of the aboriginal peoples of Canada are...recognized and affirmed."

In the Commission's view, an approach based on mutual recognition provides governments with sufficient clarity and certainty to plan their affairs and to act in the public interest. This approach protects existing third-party interests. This approach also protects Aboriginal and Crown rights recognized by the agreement. Even where parties conclude agreements that do not exhaustively identify their respective rights, clarity and certainty will nonetheless be achieved by the fact that rights recognized by the agreement and protected third-party interests would take precedence over rights not recognized by the agreement in the event

of conflict. As a result, an Aboriginal nation would not be able to exercise any Aboriginal rights not recognized by the agreement in ways that would interfere with Crown rights recognized by the agreement or with protected third-party interests. For example, an Aboriginal community could not exercise an Aboriginal right to fish not recognized by the agreement in ways that would conflict with a Crown right, recognized by agreement, to maintain a fishery.

To eliminate doubt on the matter, an agreement could provide explicitly that Crown rights recognized by the agreement and protected third-party interests take precedence in the event of conflict with Aboriginal rights not recognized by the agreement. Should an Aboriginal nation party to the agreement seek to exercise an Aboriginal right not recognized by the agreement in a manner that conflicts with protected third-party interests or Crown rights recognized by the agreement, such action would be in clear violation of the agreement and could be restrained accordingly.

We acknowledge that the Crown, by exercising superior bargaining power, could easily subvert the specific purpose of such a provision by resorting to drafting techniques that ensure wholesale paramountcy of Crown rights with respect to land and governance. Yet it must not be forgotten that there exists a fiduciary relationship between the Crown and Aboriginal peoples. How this relationship affects the structure and process of comprehensive land claims negotiations is a matter that we will be addressing in greater detail in our final report. It suffices to say here that superior bargaining power must not be exercised in ways that bring the honour of the Crown into question.[187] The Crown should make every effort to reach agreements that recognize as many Aboriginal rights as possible and to ensure that unrecognized Aboriginal rights are not rendered illusory by expansive claims of paramountcy. Aboriginal rights ought to be afforded the opportunity to evolve over time, and Aboriginal people should not be arbitrarily denied the ability to rely on the existence of such rights in the future by treaty language that unfairly privileges Crown rights with respect to land and governance.

We also acknowledge concerns arising from the fact that in the future the judiciary may define Aboriginal rights in ways not contemplated by the parties at the time of signing. Agreements ought to be worded to allow recognized Aboriginal rights to evolve in light of favourable legal developments. Moreover, the fact that the terms of an agreement will take precedence in the event of conflict with unrecognized Aboriginal rights must not, over time, transform an initially beneficial agreement into an instrument that prevents Aboriginal parties from enjoying an expanded set of legal and constitutional entitlements under

[187] Compare *R.* v. *Taylor and Williams* (1981), 34 O.R. (2d) 360 at 367 (C.A.), MacKinnon A.C.J.O. for a unanimous Court ("[i]n approaching the terms of a treaty..., the honour of the Crown is always involved and no appearance of 'sharp dealing' should be sanctioned").

Canadian law. It is unfair, in some circumstances at least, for a Crown right recognized by an agreement to take precedence over an Aboriginal right of which the parties were unaware at the time the agreement was made. We propose that parties be required to engage in good-faith bargaining in the event of an unforeseen significant legal development concerning unrecognized Aboriginal rights occurring subsequent to the signing of an agreement that, but for the agreement, would enure to the benefit of an Aboriginal party. In these circumstances, parties ought to be under an obligation to bargain in good faith in relation to the effects of such developments.

Any uncertainty that attaches to Crown rights resulting from a continuing duty to bargain in this context is, in our view, a necessary price of co-existence. Aboriginal parties should not be required automatically and indefinitely to forgo constitutional entitlements of which they were unaware at the time of signing simply to protect certainty of Crown rights with respect to land and governance recognized by an agreement.

Although an agreement should not prevent an Aboriginal party from benefitting from unforeseen significant legal developments concerning unrecognized Aboriginal rights, the Commission is of the view that such legal developments should not disturb protected third-party interests. Such legal developments should obligate parties to negotiate only with respect to any ensuing conflicts between unrecognized Aboriginal rights and recognized Crown rights, not with respect to conflict involving third-party interests protected by the agreement. Third-party interests in certainty in this context ought to outweigh Aboriginal interests in favourable legal developments concerning unrecognized Aboriginal rights.

Aboriginal rights that receive recognition by agreement will receive constitutional recognition as treaty rights by section 35 of the *Constitution Act, 1982*. A breach of the agreement by the Crown would amount to an interference with section 35 and, as such, would be constitutionally suspect. However, federal reluctance to view rights of self-government as "treaty rights" recognized and affirmed by section 35 raises the possibility that trade-offs respecting matters of governance enshrined in an agreement might be upset in the future by legislation inconsistent with the agreement. To provide certainty to Aboriginal parties in this regard, the Commission also proposes that future agreements provide that Aboriginal rights, including rights of self-government, recognized by agreement are "treaty rights" within the meaning of section 35(1) of the *Constitution Act, 1982*.[188]

Such a provision would ensure constitutional scrutiny of any Crown action

[188] See *Partners in Confederation*, cited in note 19, p. 46 (self-government "treaties would give rise to 'existing treaty rights' under section 35(1) of the *Constitution Act, 1982* and...would be shielded from unilateral repeal by the federal Parliament").

inconsistent with the treaty rights of the Aboriginal nation in question, including action inconsistent with treaty rights of Aboriginal self-government. It would thus provide clarity and certainty to Aboriginal parties. Providing this clarity and certainty ought to be the *quid pro quo* for the clarity and certainty that accrue to governments by the fact that the terms of an agreement will take precedence in the event of conflict with Aboriginal rights not recognized by the agreement.

Although our final report will address this matter in greater detail, the Commission also proposes that negotiations be premised on reaching agreements that recognize an *inherent* right of self-government as opposed to agreements that result in delegated legislative authority. As we stated in *Partners in Confederation*, "Aboriginal peoples are the bearers of ancient and enduring powers of government that they carried with them into Confederation and retain today."[189] The comprehensive claims process is an ideal vehicle to recognize and implement such inherent rights of self-government. Negotiations premised on the principle of mutual recognition would allow parties to balance treaty recognition of inherent rights of self-government with competing jurisdictional interests of the Crown.

Indeed, the wide range of options associated with mutual recognition should not be narrowed arbitrarily by a policy that seeks from the outset to separate land claims negotiations from self-government negotiations. While parties may in fact agree that it might be useful in certain circumstances to separate issues relating to land from issues relating to self-government at the bargaining table, the federal government should not require such a separation as a precondition of negotiations. Removing rights of governance from negotiations concerning mutual recognition of rights with respect to land and vice versa arbitrarily limits the scope of negotiations, frustrates rather than facilitates agreement, and may well result in agreements that do not reflect the true preferences of the parties. For example, an Aboriginal party justifiably may wish to know the extent to which an agreement might recognize its rights of governance before it agrees to recognize a certain Crown right with respect to land. An artificial separation between land and governance will especially distort negotiations concerning the category of land in which ownership and jurisdiction are to be shared among the parties.

A comprehensive land claims agreement is an instrument that ought to establish a continuing relationship based on mutual respect. The strength of the ongoing relationship of the parties, bolstered in part by the legal protections accorded to the interests of each and to mechanisms designed to mediate and resolve disputes, will be the determining factor in addressing and reducing future potential uncertainties. Parties ought to maximize opportunities to reduce and resolve

[189] *Partners in Confederation*, p. 36.

conflict by compromise, negotiation, and mutual consideration of alternative approaches. Agreements ought to provide for mediation available at the request of any party to reduce the risk of any ensuing damage to the parties' relationship that might be caused by judicial enforcement of treaty rights.

Parties also ought to strive for agreements that facilitate adjustment and modification in light of changing circumstances. Short-term agreements, by their very nature, enable adjustment and modification by presenting an opportunity for renegotiation and realignment upon their expiry. The Commission is of the view that permanent agreements ought to provide for automatic periodic review of their terms by the parties. Periodic review would enable the parties to discuss the appropriateness of recognizing other Aboriginal and Crown rights in the future.

It may be that extinguishment of Aboriginal rights and title provides the Crown with greater clarity and certainty than the alternative we propose. But the adverse effects of extinguishment on Aboriginal nations dramatically outweigh any benefits that extinguishment confers on the Crown. Extinguishment denies Aboriginal peoples a fundamental opportunity to see their historical relationships with land finally recognized and affirmed in Canadian law. It is incompatible with the principles of respect, recognition, and reconciliation that ought to underpin relationships between Aboriginal peoples and the Crown. Simple justice demands that Aboriginal people not be required to extinguish their rights. The alternative we propose does not sacrifice Aboriginal relationships with land in the name of clarity and certainty. It provides a mechanism for achieving certainty, but respects the deep historical relationships Aboriginal peoples enjoy with land and seeks to enshrine such relationships within Canadian law.

In 1991, the British Columbia Claims Task Force, which included First Nations, provincial, and federal representatives, recommended the establishment of the British Columbia Treaty Commission, a tripartite organization appointed by First Nations and the federal and provincial governments. The Task Force also recommended that British Columbia not pursue a policy of extinguishment in treaty negotiations with Aboriginal communities in the province. Its report emphasized the need to move beyond current extinguishment policy toward an approach that affirms the continued existence of Aboriginal rights:

> As history shows, the relationship between First Nations and the Crown has been a troubled one. This relationship must be cast aside. In its place, a new relationship which recognizes the unique place of Aboriginal people and First Nations in Canada must be developed and nurtured. Recognition and respect for First Nations as self-determining and distinct nations with their own spiritual values, histories, languages, territories, political institutions and ways of life must be the hallmark of this new relationship. ...

> First Nations should not be required to abandon fundamental constitutional rights to achieve certainty for others. Certainty can be achieved without extinguishment. The parties must strive to achieve certainty through treaties which state precisely each party's rights, duties, and jurisdiction.[190]

We endorse the Task Force's conclusion that true co-existence between Aboriginal peoples and the Crown requires the affirmation, not the extinguishment, of Aboriginal rights. We urge the federal government, as well as provincial and territorial governments, to follow the Task Force's lead and seek to reach lasting agreements with Aboriginal people that recognize and affirm Aboriginal rights.

[190] Report of the British Columbia Claims Task Force (28 June 1991), pp. 16, 29.

Conclusion

The comprehensive land claims process offers a unique opportunity for Aboriginal peoples and the Crown to reach lasting agreements concerning land tenure, land management, and governance of Aboriginal ancestral lands. Given the time, expense, and difficulties associated with integrating Aboriginal interests in land with traditional Canadian legal concepts, negotiations are preferable to protracted litigation of claims of Aboriginal title. However, current federal extinguishment policy threatens the ability of the comprehensive land claims process to serve as a vehicle for reconciling competing Aboriginal and non-Aboriginal systems of land tenure and governance. Requiring the extinguishment of Aboriginal title as a precondition of negotiations is out of step with the spirit and purpose of the *Royal Proclamation of 1763*, the *Constitution Act, 1982*, and the Crown's fiduciary responsibilities. We believe that a policy that recognizes and affirms Aboriginal rights and emphasizes co-existence, mutual recognition, and shared ownership and jurisdiction is to be preferred over current federal extinguishment policy. Federal, provincial, and territorial governments can achieve a sufficient degree of clarity and certainty without requiring Aboriginal nations to agree to extinguish existing Aboriginal rights in exchange for treaty-based rights.

In our view, mutual recognition and an emphasis on shared ownership and jurisdiction recognize the fact that Aboriginal peoples have, since the onset of European contact, promoted a political relationship based on sharing and co-existence. It is consistent with our earlier discussion paper, *Partners in Confederation: Aboriginal Peoples, Self-Government, and the Constitution*. There we

noted that, through conscious acts of statecraft as well as by the daily reality of living side-by-side with each other, Aboriginal peoples and settlers established a relationship based on sharing and mutual respect. In our view, the time is ripe for federal comprehensive claims policy to reflect this ethic of co-existence. We hope our recommendations will be helpful in this regard.

Recommendations

The Commission recommends:

1. That the federal government not seek to obtain blanket extinguishment of Aboriginal land rights in exchange for rights or other benefits contained in comprehensive agreements;
2. That the federal government not require partial extinguishment of Aboriginal land rights as a precondition for negotiating comprehensive agreements, and that parties resort to partial extinguishment in the last resort, only after a careful and exhaustive analysis of alternative options;
3. That the federal government adopt a policy whereby comprehensive agreements can serve as instruments of co-existence and mutual recognition;
4. That parties strive to identify, as exhaustively as possible, their respective rights by agreement;
5. That comprehensive negotiations be aimed at
   (a) Crown recognition of Aboriginal rights with respect to land and governance over part of the claim area;
   (b) Aboriginal recognition of Crown rights with respect to land and governance over another part of the claim area;
   (c) co-jurisdiction and co-management of other land within the claim area; and

(d) the protection of existing third-party interests.

6. That agreements be worded to allow the Aboriginal rights they recognize to evolve in light of favourable legal developments;

7. That parties strive for terms that avoid as much as possible conflict between Crown rights recognized by agreement and Aboriginal rights not recognized by agreement;

8. That agreements provide that, in the event of conflict, Crown rights recognized by agreement and third-party interests protected by agreement take precedence over a party's Aboriginal rights not recognized by agreement;

9. That agreements impose on parties a duty to bargain in relation to the effects of significant unforeseen legal developments concerning Aboriginal rights not recognized by the agreement. This duty would arise where, but for a Crown right recognized by the agreement, such developments would enure to the benefit of an Aboriginal party. This duty would not arise where a protected third-party interest prevents an Aboriginal party from enjoying the benefit of such a legal development;

10. That governments accept that Aboriginal rights, including rights of self-government, recognized by an agreement are 'treaty rights' within the meaning of section 35(1) of the Constitution Act, 1982;

11. That negotiations be premised on reaching agreements that recognize an inherent right of self-government;

12. That separate negotiations over issues relating to land and issues relating to self-government not be a precondition for entering into negotiations; and

13. That parties establish mechanisms, including mediation and periodic review, to facilitate the resolution of conflict and disputes arising out of their continuing relationship.

For further information:
Royal Commission on Aboriginal Peoples
P.O. Box 1993, Station B
Ottawa, Ontario
K1P 1B2

Telephone: (613) 943-2075
Facsimile: (613) 943-0304
Toll-free: 1-800-363-8235 (English, French, Chipewyan)
1-800-387-2148 (Cree, Inuktitut, Ojibwa)