EXECUTIVE SUMMARY

Before the arrival of the Europeans, Indian nations customarily entered into treaties which were recorded by memory and continually renewed. The colonial powers into treaties of alliances with the Indian nations using the unwritten diplomatic protocol established by the Indian nations. With these treaties alliances, the Europeans were fairly consistent in obtaining the consent of the Indian nations. The procedures for treaty-making were related to the substance of the rights and the principle of consent was the connecting factor between substance and procedure.

Once the European powers became stronger, they asserted their own form of property rights to the land now occupied by Canada and began the practice of asserting title without first obtaining the consent of the Indian nations.

Today, whether informed consent was first obtain from the Indian nations as evidenced by the written treaties, is at the heart of many First Nations grievances.

An alternative court to the present administration of justice system should be established first by means of new treaty between First Nations and the Governments of Canada. It must incorporate the unique cultural perspective of the First Nations; give full weight to the available oral evidence and establish canons of construction recognizing the international nature of the Indian treaties yet providing for rules of interpretation which reflect the fiduciary relationship between the Governments of Canada and the First Nations.

An alternative dispute resolution tribunal which adjudicates on treaties is obligatory. Such a court must be prepared to look to the substance of the treaty rights by the consideration of oral promises and without regard to technical rules.

THE NATURE AND STATUS OF THE ORAL PROMISES IN RELATION TO THE WRITTEN TERMS OF THE TREATIES

By Delia Opekokew

Prepared for the Royal Commission on Aboriginal Peoples

TABLE OF CONTENTS

THE NATURE AND STATUS OF THE ORAL PROMISES IN RELATION TO THE WRITTEN TERMS OF THE TREATIES

by Delia Opekokew

1 INTRODUCTION[1]

The written treaties between the First Nations and the Crown have frequently been the subject of litigation in Canadian courts. These treaties were drafted by the Crown's representatives and it is the contention of the Indian beneficiaries that the treaties, as written, do not correspond with their meaning as understood by the Indian parties.

Indian people have asserted but rarely established in court, that their understanding of the treaties based on oral discussions at the time of the treaty signing differs from the written text of the treaties as interpreted by Anglo-Canadian law. The most significant differences asserted by Indian people are that they had agreed only to share the land, or had signed treaties only of peace and friendship, even in the case of treaties with express land cession provisions, and that they certainly had not agreed to extinguish aboriginal title to the lands.

In order to understand the Indian concerns regarding the terms of the treaties we will consider how Indian people interpret them. We will then explore the status of treaties within domestic Canadian law, examine that law's limitations, and finally, propose reforms for correcting those limitations.

It is contended that since the Indian laws, cultures, customs, and methods of record-keeping have rarely been taken into consideration by the Canadian courts, the Canadian law relating to the status and nature of oral promises in Indian treaties remains outstanding and poorly developed.[2]

---

[1]. The paper was written in 1993, however, certain updates have been made in order to incorporate the latest case law. The primary subject of this paper are the historical treaties with the cutoff date being the treaties made in the Northwest Territories in the 1920's. It was my understanding that other writers were retained by the Royal Commission on Aboriginal Peoples to explore the status and scope of the modern treaties such as the *James Bay and Northern Quebec Agreement of 1977*. I would like to thank Susan D. Roger of Goodman & Carr, for her assistance with the final chapter, in particular, on the models for alternative dispute resolution.

[2]. See for example, B. Slattery, *Understanding Aboriginal Rights* (1987), 66 Can. Bar Rev. 727 at p.735, where he follows the Canadian legal system's pattern of excluding the Indian legal

The Canadian political system already has a precedent for accommodating the unwritten rules of a distinct society: Quebec. The special constitutional relationship with Quebec is grounded in historical acts and practices that collectively have lent recognition to the Quebecois' right to retain a distinct religion, language, culture and laws, and to live under a separate government with powers sufficient to sustain the society's unique character. Constitutional entrenchment has transformed these customs, usages and conventions into law. The Quebecois people of Canada, with their own customs and Civil code, participated in the identification and definition of their rights, and federal Canadian courts have made decisions reflecting these customs, and laws and not solely Anglo-Canadian laws.

Indian peoples have their own landmarks: the treaties between Indian Nations, and the European based Nations, the Royal Proclamation of 1763[3], section 91(24) of the *Constitution Act, 1867*[4], and, most importantly, section 25 and 35(1) of the Constitution Act, 1982[5].

The United States provides us with another example which is particularly attractive to Indian peoples, especially given the close bonds that exist between the Indigenous peoples of the two countries. Indian people in the two countries are of the same cultures and race and many are related and continue to maintain their family ties and kinship. Indian people tend not to separate their identity into Canadian or American, but recognize each other as fellow Indians first.

---

system from his analysis of Aboriginal Rights which analysis is based on how the courts are now interpreting section 35 of the *Constitution Act, 1982*, Both issues are, of course, legal, and cannot be resolved simply by looking at the facts. Rules are needed to determine which facts are relevant and to assess their significance. At least three legal systems are available for the task: international law, the domestic law of the claimant European state, and the domestic law of the native people whose lands are claimed. The resolution of the issues depends in part on which system is chosen as an initial vantage point. In this paper, we will adopt the perspective of a Canadian court, rather than a disinterested international tribunal or a native society. Our focus, then, will be on the position in Canadian law, leaving the other perspectives to be explored on another occasion.

3. R.S.C. 1985, App. 11, No. 1.

4. *Constitution Act*, *1867*, R.S.C. 1985, App. II, No. 5.

5. Schedule B of the Canada Act, 1982.

In many cases the claims of North American Indian Nations are recognized by the domestic law of the United States and not by Canadian domestic law. Important doctrines not recognized in Canada include the doctrine of inherent sovereignty, under which the United States courts have interpreted the treaties as recognizing and guaranteeing sovereignty and territory, even though many of the Indian treaties are as vague in wording as they are in Canada. To do this the courts have developed unique codes of construction in interpreting the treaties, which codes are guided by the classic opinion of Chief Justice Marshall in *Worcester* v. *Georgia*[6]. The United States courts have stated they "will construe a treaty with the Indians as 'that unlettered people' understood it, and 'as justice and reason demand, in all cases where power is exerted by the strong over those to whom they owe care and protection' and counter pose the inequality 'by the superior justice which looks only to the substance of the right without regard to technical rules."[7]

In analyzing the current Canadian case law, we find that it tends to loyalty to the technical rules and not to substance. It is my submission that when prejudicial to the substance, the treaties must be interpreted, and oral promises considered in the light of the substance of the right without regard to the technical rules.

It is the contention of Indian people that since 1492, the colonial powers have imposed non-representative regimes and constitutions on Indian peoples and their territories and have encouraged the systematic influx of foreign immigrants while evicting, and displacing the Indian populations, particularly in the earlier era. The treaties which have been the subject of litigation mirror this practice of evicting and displacing Indian populations from their territories.

The argument that Indian people did agree to surrender huge tracts of land in exchange for as little as four ($4.00) or five ($5.00) a year for each beneficiary is a flimsy foundation for some of the unfair practices which have evolved into hard core domestic law in the form of Canadian Indian written treaties. Yet the courts continue to adhere to formalistic rules such as those restricting the use of the oral evidence of elders when Indian people attempt to prove their title to their historic

---

[6]. 3 U.S. (Pet.) 515 (1832).

[7]. Robert N. Clinton, "The Curse of Relevance: An Essay on the Relationship of Historical Research to Federal Indian Litigation" (1986), 28 Arizona Law Review 29 at 44-45 quoting *United States* v. *Winans*, 198 U.S. 371, 380-81 (1905) and *Worcester*, above at pp. 548-56, and 582.

lands. The fact that their oral submissions have been given little weight is seen by Indian litigants and other Indian people as an example of arbitrary rules being used to perpetuate injustice against Indian people.

When dealing with Indian treaties, judges make decisions by reference to statute, precedent and the common law derived from colonial regimes. Judges' learning and experience requires that they focus on a narrow literal and written approach which is inhospitable to the holistic and unwritten approach of the Indian cultures.

In order to review the nature and status of oral promises under the existing Canadian domestic law, the treaties must first be identified.

As in any legal analysis of Indian treaties, the written history used as a source in this paper is problematic. The problem has been articulated many times by Indian peoples. The American legal scholar Robert N. Clinton has identified this problem in relation to law and history as being a simple Machiavellian fact about the nature of federal Indian law.

> It is a law imposed by a dominant, originally colonial, non-Indian society...*relevant* Native American legal history generally must look primarily to conventional non-Indian sources. These sources reflect the will of the dominant colonial authority and the manner in which the federal government established and altered the legal relationship that form the core of the legal history of the regulation of cultural contact between Indian societies and more newly arrived non-Indian governments.[8]

Clinton points out that questions of perspective are critical in Indian legal history. A scholar's views about the development of legal relations between Indians and non-Indians shapes that scholar's research agenda, analysis and formulation of historical conclusions. In addition, a scholar conducting legal research comes face to face with the adversarial system. The adversarial system pushes historical analysis into extreme positions. Issues of law and history are presented in black and white, whereas true historical objectivity requires that a scholar avoid extreme readings of what may be an ambiguous historical record. This problem has to be considered at all times in the conduct of legal historical analysis.

In examining the written history of Indian treaties we are faced with a desire between sources which have a bias toward legitimizing the colonial expropriation of Indian resources and the displacement

---

[8]. *Ibid.* at p. 44.

of Indian Nations by Europeans, and sources which view history as the evolution of cross-cultural relations between two nations, the Indians, and the non-Indians. I have chosen to use as my sources the works of historian Olive Patricia Dickason, and the legal historians Professor Douglas Sanders[9], and Brian Slattery, who all to an extent fall in the latter category of sources.

Before one can understand the Indian people's distress over the written treaties, one must understand their historical practices and customs based on oral treaties which are now superseded in Canadian law by the written treaties. The French and Indian Nations' Treaties entered into during the period of 1534 to about 1760, and the English and Indian Nations' Treaties made between 1670 to 1713, established the practice of recognizing the validity of unwritten treaties made with Indian Nations[10].

---

[9]. P. A. Cumming and N. H. Mickenberg (eds.), *Native Rights in Canada* (2nd. ed., 1972) version is the second volume and is based on the first version originated by Professor Sanders, whom many, including the writer, considers to be the pre-eminent scholar in this field.

[10]. See Cumming and Mickenberg, *supra*, footnote 9 at p. 93 concludes:

> When the first English and French explorers arrived on the shores of what is now Canada, pragmatic, unwritten alliances were made with the Indians, in pursuit of the profits of the staple trades.

B. Slattery, *Understanding Aboriginal Rights* (1987), 66 Can. Bar Rev. 727 refers to these unwritten treaties as "formal verbal treaties" as he explains on pp. 733-734:

> Small colonies of French and English settlers sprang up along the eastern coasts of America, and extensive webs of relations developed with near and distant Indian groups, until the whole of the eastern and northern continent was affected.(21) In early times, these relations were usually conducted on a basis of rough equality. They generally took the shape of formal verbal treaties dealing with matters of trade and alliance, war and peace, the cession of lands and the drawing of boundaries, reparation for past wrongs and promises of right-doing in future.(22) They were strongly influenced by Indian concepts and ceremonial, and were often renewed in annual sessions.(23)

B. Slattery, *First Nations and the Constitution* (1992), 71 Can. Bar Rev. 261 at pp. 271-272 gives constitutional weight to the practices relating to the unwritten treaties:

> The third collective facet of the Canadian constitutional trust is the special fiduciary relationship between the Crown and Aboriginal peoples, recognized by the Supreme Court of Canada (41). This relationship is grounded in historical practices that emerged from dealings between the British Crown and Aboriginal nations in eastern North

2 EARLY TREATIES

2.1 Treaties Among Indian Nations

Indian people had the experience of entering into treaties before their relations with the French and English. Prior to the coming of the Europeans to the Americas, Indian nations recognized each other's sovereignty by forming compacts, treaties, trade agreements and military alliances. Alliances were customary among Indian Nations in order to promote trade and peace.

These agreements were customarily sealed by an exchange of gifts as well as hostages, which led to the formation of blood ties.[11]

....

> Gifts were metaphors for words; and treaties, once agreed on, were not regarded as self-sustaining. To be kept alive, they needed to be fed every once in a while by ceremonial exchanges. Later, during the colonial wars, periodic distributions would be essential in maintaining the alliances that proved so useful to the colonizing powers; this would be the only pay the allies received for their services as guerrillas.[12]

These alliances were extensive and wampum was commonly used as a record of the transactions. Among many instances, the Mohawks at Akwesasne[13] are cognizant of the existence of a wampum

---

> America, especially during the formative period extending from the founding of colonies in the early 1600s to the fall of New France in 1760(42). By the end of this period, the principles underlying these practices had crystallized as part of the basic constitutional law governing the colonies, and were reflected in the Royal Proclamation issued by the British Crown on October 7, 1763(43).

Olive Patricia Dickason's, *Canada's First Nations, A History of Founding Peoples from Earliest Times*, (McClelland & Stewart Inc., 1992) at pp. 103, 119, 141-142, 146, and 179 are referred to as oral treaties.

[11]. See Dickason, *Ibid.* at p. 76.

[12]. Dickason, *Ibid.* at p. 78.

[13]. As told to the author by Chief Mike Mitchell and other representatives of the Mohawk Nation at a series of joint meetings held to renegotiate a treaty of trade and commerce between members of the Cree and Mohawk Nation at Akwesasne in 1988 and 1989.

which recorded their trading with the Cree from the area now known as Northern Quebec.

Periodic gift giving as a tool for maintaining the alliances is crucial for our understanding of the Indian position that treaties were not static and required actions for renewal. This requirement for renewal, translated today as the necessity for periodic amendments to the treaties to accommodate changing circumstances, is one of the oral promises which were considered important but which were not recorded in the written treaties.

During the time of the treaties with the colonialists, the Indian Nations continued treaties amongst one another. In 1673, the Iroquois negotiated a treaty with the Odawa by which they promised to provide the latter with trade goods in return for pelts.[14]

2.2 French-Indian Treaties - 1635-1760

The colonial powers also recognized the sovereignty of Indian nations by entering into treaties with them. According to Alexander Morris:

> One of the gravest of the questions presented for solution by the Dominion of Canada, when the enormous region of country formerly known as the North-West Territories and Rupert's Land, was entrusted by the Empire of Great Britain and Ireland to her rule, was the securing the alliance of the Indian tribes, and maintaining friendly relations with them.[15]

No formal alliances appeared to have developed in the first contact with Europeans and Indian peoples as evidenced by the Beothuk and European relationship which was marked by feuding over territory[16] and over a three-hundred year period the European whalers and fishermen hunted down

---

[14]. E.B. O'Callaghan and J.R. Brodhead, eds., *Documents Relative to the Colonial History of the State of New York*, 15 vols., (Albany: Weed Parsons, 1853-1887), IX, p. 95, Journal of Count de Frontenac's Voyage to Lake Ontario in 1673 as quoted by Dickason, *Canada's First Nations*.

[15]. Alexander Morris, *The Treaties of Canada with the Indians*, (Toronto: Coles Publishing Co. (Reprint), 1979) at p. 9. Alexander Morris had negotiated the revisions to Treaty One and Two when he was the Chief Justice of the Manitoba Court of Queen's Bench, and was later the Commissioner who negotiated Treaties Four, Five and Six.

[16]. See Dickason, *Supra,* f.n. 10 at p. 87.

and eventually exterminated the Beothuks.

Once the Europeans started to make serious forays on the land, a different arrangement was necessary for their survival. Towards the securing of peaceful relations with the Indian Nations, and the creation of trade relations, France entered into numerous unwritten treaties with the Indian Nations of Canada. The first set of treaties[17] between the Indian Nations and the Europeans were between the French and the Mi'kmaq's, the Maliseets, Montagnaix-Naskapi, Huron, and the Abenaki Nations, primarily for the purposes of securing the Indian Nations as allies, as the French were quite fearful of other Indian Nations, particularly the Iroquois, and other European nations, particularly the English[18]. Champlain started the treaty making process between Europeans and Indian Nations by proposing a trade treaty with the Abenaki involving the exchange of food supplies and trade goods.

France had started off as dependent allies of the Indian Nations but by the mid-1600's, the Indians, having become weakened, became dependent allies of the French. These early relationships were based on peace and friendship, and on trade. It was the Indian and French view that these treaties required constant renewal in order for them to survive.

> The French were as quick to take advantage of the new source for furs offered by Canada as they had been previously with the dye-wood in Brazil, and they did so by the same technique: alliances with the Amerindian who controlled the source of supply. As in Brazil, they adopted Amerindian diplomatic protocol and negotiated these accords by means of gift distributions accompanied by feasting and speeches. Maintaining the agreements meant repeating these occasions, which came to be annual events. In the reasoning of the French, an alliance was effective only insofar as it was understood and honoured by both parties; the European practice of written contracts would have been meaningless to the Amerindians. The written agreements between French and Amerindians that have survived have all been with enemies, usually with allies of the English.[19]

The practice was established early on to adopt Indian diplomatic protocol including constant renewal of the treaty by means of gift distributions accompanied by feasting and speeches.

---

[17]. Dickason, *supra*, footnote 10 at 112.

[18]. Dickason, *supra*, footnote 10 at 149-156.

[19]. Dickason, *supra*, footnote 10 at p. 103.

Alliances among the Indian Nations and the Europeans were consummated through gift giving and the awarding of medals and honours. Such evidence of these alliances became important in all the treaties with Indian people in Canada. Indian elders will often display the medal that was given to their ancestors at the time of the treaty. Along with the treaty flag, these are given the greatest respect and reverence; they are seen as evidence of their relationship as allies to the Queen.

With evidence of the French success in attracting Indian Nations to their cause, the English began their own relations with the Indian Nations. They undermined the French position by offering better deals in trading and by informing the Indian Nations that France had given up to the English Indian lands without consulting or informing the Indian Nations. This angered the Indian Nations.

> ...the Abenaki shared with the Mi'kmaq a stunned disbelief at the actions of their French allies. In words that would become all too familiar in later confrontations, the Amerindians asked, "by what right did the French give away a country that did not belong to them" and which the Amerindians had no intention of quitting?[20]

By the Treaty of Utrecht of 1713[21], France gave up control over much of her purported Maritimes possessions to the British but retained Cape Breton Island, Ile St. Jean and the islands in the Gulf of St. Lawrence. The contention that Indian title was never surrendered by the Indian Nations in the Maritimes continues to be visited to this day. Professor Brian Slattery, in a major article[22] posed the question:

> Finally, the Supreme Court has held that Aboriginal land rights survived the Crown's acquisition of sovereignty, but that they could be extinguished by legislation or voluntary surrender. In large sectors of Canada, notably in British Columbia and the Atlantic Provinces, there were no land cession agreements or statutes terminating Aboriginal title in explicit terms. Does this mean that all lands in these areas are still subject to Aboriginal title, including lands occupied by private parties?[23]

---

[20]. Dickason, *supra*, footnote 10 at p. 117.

[21]. Dickason, *supra*, footnote 10 at p. 117.

[22]. Brian Slattery, *First Nations and the Constitution: A Question of Trust* (1992), 71 Can. Bar Rev. 261.

[23]. *Ibid.* at p. 264.

In *R.* v. *Sparrow*[24] 1990, the Supreme Court of Canada ruled that:

> The test of extinguishment to be adopted, in our opinion, is that the Sovereign's intention must be clear and plain if it is to extinguish an aboriginal right.[25]

This issue was also recently considered in an Australian land mark case, *Mabo* v. *Queensland*[26]. In this case it was held that the traditional title of native peoples cannot be extinguished by generally-worded statutes.

It is clear according to the wording of the alliances, the oral tradition of the First Nations and the lack of extinguishment clauses in those alliances that the alliances reached with the Indian Nations during the French era were treaties of peace and friendship and trade, and that there was no intention by the Indian Nations to cede their land title to the colonists. In the course of these early dealings, historical practices evolved, including the recognition that unwritten treaties with the Indian people were sacred and having force and effect.

Throughout this period, the Iroquois (from 1609 to 1701)[27] fought with the French. Finally, the Five Nations entered into a peace treaty with the French in 1701 in Montreal. In the same year, they signed a treaty of peace with the English in Albany[28].

Numerous treaties[29] were then agreed to by the different Indian Nations both to confirm old alliances and to build new ones for the purposes of joining against the French or English. Further

---

[24]. [1990] 3 C.N.L.R. 160.

[25]. *Ibid.* at p. 174-175.

[26]. *Mabo* v. *Queensland*, (1992) 107 A.L.R. 1 (Australian High Court). See case comment: Richard H. Bartlett, *The Landmark Case on Aboriginal Title in Australia: Mabo v. State of Queensland*, [1992] 3 C.N.L.R. 4.

[27]. Dickason, *supra*, footnote 10 at p. 149.

[28]. Dickason, *supra,* footnote 10 at p. 155.

[29]. Dickason, *supra,* footnote 11 at p. 176.

treaties were entered into among several of the Indian Nations and the French. Alliances were also formed during the Fox War against the French, and the Mi'kmaq war against the English.

In conclusion, the key element of the early Indian - European treaty process was that it conformed to the traditional treaty-making processes practiced by the Indian Nations among each other, and not to the European model.

2.3 The English-Indian Treaties - 1670-1713

The second set of treaties was between the English and the First Nations.

The treaties between the English, through the Hudson's Bay Company, and the Cree, who were the largest group of Indians located in the area now known as Canada, were entered into in this period. These treaties enlisted the Cree as trading partners only as war was not a concern between these two nations.

> The English sought to secure their position by entering into alliances or "agreements," the records of which have not survived, although there are references to them. Bostonian Zachariah Gillaim (1636-82), captain of the 1668 expedition, is reported to have negotiated the first of these "treaties," as they were called at the time.[30]

....

They appear to have been oral agreements on the French/Indian model.[31]

From 1670, the instructions to the Hudson's Bay Company's expeditions were to make treaties with Indian Nations. As Dickason notes, the Indians would have been negotiating for an alliance, without which trade would have been insecure, but "absolute propriety" was a concept they would not have understood, as it was completely foreign to them. As we have heard from elders in interviews obtained in the 1970s to the present, Dickason concludes that (300 years previous to

---

[30]. Cumming & Mickenberg, *supra*, footnote 9 at p. 142, quoting E. E. Rich, *Hudson's Bay Company, 1670-1870*, 3 vols. (Hudson's Bay Record Society, London: 1958) vol. 1 at pp. 62-63.

[31]. Dickason, *supra*, footnote 11 at p. 142.

those statements of recent elders), the inference is that the Indian Nations felt that the Hudson's Bay Company was paying them "rent".

The early relationship between Indian Nations and Europeans was grounded in sharing the land, goods and services as evidenced in the unwritten treaties, which were kept alive by their renewal with gifts, feasts and assemblies. These treaty-making practices were based on Indian concepts and ceremonies, which were often renewed in annual sessions. It is arguable that the treaties recognized and confirmed by the *Constitutional Act, 1982* includes the Indian customs, usages and conventions surrounding the treaty-making process. These treaties were so fundamental to Indian-Canadian relations that the oral promises included in the later written treaties must form part of our recognized history and law.

3 **THE WRITTEN TREATIES - 1713 - PRESENT**

It was the English, who, not trusting oral agreements, insisted on European-style written treaties, which means they assumed the presence of a hierarchy and centralized authority in Indian societies. The written Indian treaties were recorded by only one of the negotiating parties; one whose concepts, practices and language were foreign to the other party.[32] The most significant aspect of these early written treaties was that they were not land cession treaties but treaties of peace and friendship.[33]

As Professor Michael Jackson[34] has written, the procedures within which the rights of the Indian

---

[32]. Dickason, *supra*, footnote 10 at p. 93:

> As white settlements grew and became more firmly entrenched in the Maritimes, relations with the Indians became more formalized.

[33]. See Cumming, *supra*, footnote 9 at p. 95:

> The first recorded treaty or agreement between the Maritime Indians and the English, The Submission and Agreement of the Delegates of the Eastern Indians was signed on December 15, 1725, in Boston, Massachusetts. The main object of the agreement was to end the hostilities which had begun in 1722, and in which the Indians had been actively supported and encouraged by the French. This agreement indicates the general pattern followed by many of the succeeding treaties.

[34]. Michael Jackson, "*The Articulation of Native Rights in Canadian Law*" (1984), 18

tribes of North America were asserted and recognized in colonial law were significantly related to the substance of those rights; the principle of consent was the connecting factor between substance and procedure. It was through the process of consensual treaty-making, (i.e., the consent of the Indian Nations was a prerequisite to the occupation of the lands used by them), that early Indian policy crystallized. In 1758, a conference was held in Easton, Pennsylvania among representatives of the Iroquois and the colonial and British authorities. They negotiated an alliance between the Indian Nations and the British. Many of the terms of the treaty reached by mutual accord were later restated in the *Royal Proclamation of 1763*.

The Royal Proclamation of 1763 is of fundamental importance in Canadian constitutional law because it acknowledged and formalized the historical practice of dealing with Indian Nations through treaties[35]. It is declaratory and confirmatory of the Indian Nations' jurisdiction. It establishes a procedure - the treaty making process - for all land transactions between the Crown and the Indian people but does not interfere in the internal affairs of Indian Nations. This is a restatement of the principles previously agreed to with Indian Nations in the early treaties. The Crown declares that the several Nations or Tribes live under its protection and that they should not be molested or disturbed in the possession of their lands.

The issue in *R.* v. *Sioui*[36] (to be discussed later in detail) turns on a 1760 treaty between the English and the Huron. Under the provision of the treaty the Huron Nation promise peace and the English guaranteed save passage for the Huron and the free exercise of religion, customs and trade with the English.

Another prototype of an early written treaty which is still recognized is the Treaty of 1779. It guarantees, "[t]hat 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."[37] One of the beneficiaries to that treaty, the Eel River Bar

---

U.B.L.Rev. 18 (No. 2) 255 at 257.

[35]. Woodward, *Native Law*. Toronto: Carswell, 1989, at p. 197.

[36]. [1990] 3 C.N.L.R. 127 (S.C.C.).

[37]. Claims and Historical Research Centre, Department of Indian Affairs and Northern Development (DIAND), File X-92, at p. 93.

First Nation, continues to live and practice the rights they have exercised since time immemorial in and around the Bay of Chaleurs in New Brunswick.

After the *Royal Proclamation of 1763*, the priorities of the written treaties changed from peace and friendship to land. Land treaties were signed in the area now known as Ontario, the Prairie Provinces, the Northeast corner of British Columbia and the southern portion of the North West Territories.

Hundreds of written treaties and treaty-like instruments[38] such as surrenders have been signed since 1763. Some were entered into for the Crown and Indian Nations to end hostilities and for peace and friendship, and others for land provisions. The standard is for the Crown to promise protection to the Indians along with the normal land and resource provisions.

Some of the treaties or adhesions thereto (to be discussed in detail later) were entered into within the last 100 years or more, but all were based on earlier treaties. Some examples of these treaties include: Treaty No. 1[39] (The Stone Fort Treaty), which was entered into by the Chippewa, and Swampy Cree Nations on August 3, 1871; Treaty No. 2 (The Manitoba Post Treaty), which was entered into by the Ojibway and Cree Nations on August 21, 1871;[40] Treaty No. 3[41] (The North-West Angle Treaty), which was first entered into by the Saulteaux Tribe of Ojibway Indians on October 3, 1873; Treaty No. 4 (The Qu'Appelle Treaty), which was signed by the Cree, Ojibway and Assiniboine Nations on September 15, 1874, with adhesions signed in 1875, 1876, and 1877;[42] Treaty No. 5 (The Lake Winnipeg Treaty), which was signed by the Cree and Ojibway Nations in 1875, with adhesions signed in 1876, 1908, 1909, and 1910;[43] Treaty No. 6 (The Treaty of Forts

---

[38]. See, Canada, *Indian Treaties and Surrenders*, Vol. 1 and 11, (Toronto: Coles Publishing Company (Reprinted) 1971) and see the Claims and Historical Research Centre, Department of Indian Affairs and Northern Development (DIAND).

[39]. The text of the Treaty appears in Morris, *supra*, footnote 15 at p. 313.

[40]. Copy of Treaties 1 and 2, Ottawa, Queen's Printer, Reprint 1947.

[41]. Morris, *supra*, footnote 15 at p. 321.

[42]. Copy of Treaty No. 4, Ottawa, Queen's Printer. Reprint 1966.

[43]. Copy of Treaty No. 5, Ottawa, Queen's Printer. Reprint 1969.

Carlton and Pitt), which was signed on August 23 and 28 and September 7, 1876, with adhesions signed in 1877, 1878, 1879, 1882, 1889, 1944, 1950, 1954, and 1956 by the Cree, Assiniboine and Dene Nations;[44] Treaty No. 7 (the Blackfeet Treaty), which was signed by the Blackfeet, Blood, Peigan, Sarcee, Stony, and other Nations, on September 22, 1877[45]; Treaty No. 8, which was signed by the Cree and the Dene Nations in 1899, with adhesions signed in 1900;[46] Treaty No. 9 (The James Bay Treaty), which was signed by the Cree and Ojibway Nations in 1905 and 1906, with adhesions signed in 1929 and 1930;[47] Treaty No. 10, which was signed by the Cree and Dene Nations in 1906 and 1907[48]; and Treaty No. 11[49], which was signed by the Dene Nation, including the Slave, Dogrib, Loucheux, Hare and other Indians in 1921.

In the written treaties, such as in Treaty No. 9, the Indian Tribes in 1905 and 1906 purportedly "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..." These lands covered approximately 90,000 square miles of Northern Ontario. The King, however, agreed "with the said Indians that they shall have the right to pursue their usual vocations of hunting, trapping, and fishing throughout the tract surrendered... subject to such regulations as may from time to time be made by the government of the country, acting under the authority of His Majesty, and saving and excepting such tracts as may be required or taken up from time to time for settlement". For the government the purpose for obtaining these treaties was to extinguish the land title; for the Indians, it was to continue their way of life under the protection of the Crown.[50]

---

[44]. Copy of Treaty No. 6, Ottawa, Queen's Printer. Reprint 1964.

[45]. Morris, *supra*, footnote 15 at p. 368.

[46]. Copy of Treaty No. 8, Ottawa, Queen's Printer. Reprint 1966.

[47]. Copy of Treaty No. 9, Ottawa, Queen's Printer. Reprint 1964.

[48]. Copy of Treaty No. 10, Ottawa, Queen's Printer. Reprint 1966.

[49]. The text of this treaty appears in Father Rene Fumoleau, OMI, *As Long as This Land Shall Last: A History of Treaty 8 and Treaty 11, 1870 - 1939* (Toronto: McClelland and Stewart, 1975) at p. 165.

[50]. See, R. v. *Batisse* (1977), 19 O.R. (2d) 145 (Dist. Ct.).

Other provisions common in the written treaties, include the following:

> Reserve lands were to be established within the territories purportedly ceded for the use of the Indian Nations signing the treaties;
>
> Small cash payments were paid to the chiefs and their people, and thereafter annuity payments from four ($4.00) or five ($5.00) dollars per year were made in the numbered treaties;
>
> Farming implements and supplies were provided as an initial outlay, and thereafter assistance in farming and stock-raising or ammunition and other hunting and fishing materials were to be furnished;
>
> Schools were to be established and maintained on reserves or a school teacher was to be provided;
>
> Suits of clothing, flags, and medals were provided to the chiefs and headmen;

In the case of Treaty No. 6, a "medicine chest" was to be provided.

4 THE ORAL PROMISES AND PROBLEMS

The convention first established by the French-Indian unwritten treaties, pursuant to which the treaties were negotiated based on the Indian Nations' diplomatic protocol and guidelines for negotiations, were emulated in later treaties, such as Treaty No. 6. The minutes[51] of the Commissioners party describe in great detail the ceremony observed by the Indian Nations prior to the grand assembly. Various members of the Indian Nations, including the chiefs, other spiritually powerful men, councillors, singers, drummers and citizens, performed a ceremony which required a grand entrance on the grounds of the treaty assembly. This set the stage for the treaty discussions.

For the Indian negotiators, who brought to the negotiations an oral tradition, the promises

---

[51]. *Supra*, footnote 15, at p. 198.

> and discussions during the negotiations formed the centrepiece of the agreements. For the negotiators on the Canadian Government's side, it was the written text of the treaty which determined its scope and meaning.[52]

The disparity between the Indian understanding of the treaties and the actual contents of the written documents would be reduced if the verbal promises, assurances and guarantees given by the Treaty Commissioners during negotiations were regarded as an integral part of the Treaty agreements. It was the understanding of the Indian people, that those promises would eventually be contained in the written text; it was their understanding that the treaties would be amended. The attempts at the destruction of the Indian way of life by the Crown's representatives, the Indian agents, after the events of the late 19th century put a stop to that plan not only in the prairies but in other parts of Canada, such as the area covered by Treaties 8 and 11.

One example of the disparities between the written treaties and the deliberations is the discussions of Treaty No. 4, as recorded by M. G. Dickieson, Private Secretary to the Minister of the Interior, which should be read with the caveat that it is only the version of one side. Mr. Alexander Morris attached the secretary's transcript and described them as "accurate short-hand reports of the proceedings at Qu'Appelle and Fort Ellice, which, were made, at the time, by Mr. Dickieson, who, was present, at the treaty, as secretary to the Commissioners."[53]At no time does Mr. Dickieson record any negotiations or discussions between the parties that establishes the intention of the Indian Nations to surrender their land. Because Mr. Morris' attests to the accuracy of Mr. Dickieson's record supports the Indian accusation that the written text is a carbon copy of other treaties and does not incorporate the actual negotiations specific to each treaty. In the case of Treaty No. 9, when the Indian parties to the treaty wished to hire a lawyer to assist in their negotiations, the officials provided them with a copy of a written treaty.[54]

Mr. Morris had been chosen as the spokesman for the Government party for these negotiations. The six days of debates focussed on the Indian concern about proper representation, because many

---

[52]. *Supra*, footnote 22 at p. 262.

[53]. *Supra*, footnote 15 at p. 79.

[54]. Dickason, *supra*, footnote 10 at 277. See, Brian Titley, *A Narrow Vision: Duncan Campbell Scott and the Administration of Indian Affairs in Canada*, (Vancouver: University of British Columbia Press, 1986), chapter on Scott and Treaty No. 9.

of the Indian leaders were not present, and because of the extraordinary pressure from Mr. Morris that they provide him with their elected representatives. The chiefs refused to participate in the deliberations except through their appointed orator, the Gambler. Only the Cree Chief Loud Voice, was initially present. Although the Saulteaux informed the Treaty Commission that they had authority to represent themselves, the Commissioner pressed for the attendance of Chief Cote who eventually arrived. Cote, however, refused to speak. Each time Morris tried to present his position on the first and second day, the Indian Nations stated their position that "We are not ready yet, we have not gathered together yet."

The main speaker Gambler informed Morris that each day more people were arriving and he eventually expressed concern about the location of the meetings, which was inside the Hudson's Bay Company grounds. Like the Abenaki and Mi'kmaq, the Cree and Saulteaux Nations were opposed to the unilateral taking of their lands by the Crown, and the alleged transfer of such lands to Hudson's Bay Company.

On the third day, when asked if they were ready, Loud Voice said "There is no one to answer." The lack of a joint agenda, which is supports my position that there was a lack of a meeting of the minds is evident as Morris began his side of the negotiations notwithstanding the Indians' unwillingness. Although Loud Voice told him, "I wonder very much at your conduct..." Morris continued with his offer of a treaty the terms of which included:

> The Queen and her Councillors would like you to learn the cunning of the white man. When the fish and buffalo are scarce or gone, we want you to start farming, and we will set up a reserve for you.
>
> We will give you money every year, cattle if you settle, and seed. We will give you for twenty years, ammunition and twine for nets.
>
> When you go to the reserve we will give you a school and schoolmaster.
>
> If you shake hands and make a treaty, we will give you presents.

The cultural clash, and conflicts in concepts of ownership, are evident in the Commissioners' requirement for hierarchical representatives, the Indian people's desire to have full representation, the Indian people's anger over the Hudson's Bay Company selling their land, and Mr. Morris' extraordinary pressure on the Indian people to enter into a treaty.

On the fourth day, the Commissioners were asked to hold the meeting outside the Hudson's Bay Company fort and they complied. It was only then that more of the Indian Nation representatives were willing to meet with them. Mr. Morris warned them that they were only one of a small band of all of the Queen's children, and that she was their protector, and wanted them to enjoy the blessings of her protection. He repeated his promises under the treaty for the benefit of the Saulteaux who had not been represented, or refused to attend the meetings on the Hudson's Bay Company lands. Again, Morris made no reference to the fact that the Indian Nations would be ceding 75,000 square miles if they agreed to the treaty.

Loud Voice, the Cree Chief, advised the Commissioner that he could not speak because of an obstacle, and he requested that the spokesman, Gambler, speak. Gambler reiterated that the obstacle to the negotiations was that the Queen had bought from the Hudson's Bay Company land which was rightly Indian land.

Throughout the negotiations there had been moments of tension leading to near violence. Morris reported that,

> Eventually, both the Crees and the Saulteaux met us, with their Chiefs, when I addressed them. They asked time to deliberate and we appointed the 11th at ten o'clock for the next conference.
>
> The Crees then left the tent suddenly, under constraint of the Indian soldiers, who compelled the Chiefs to go.
> On the 11th we sent a bugler round to summon the Indians to the appointed conference, but they did not come.
> Instead the Saulteaux send word that they could not meet us except in their own soldiers tent, distant about a mile from the militia encampment, but we refused to do so.
> The Crees were ready to proceed to the marquee, but were prevented by the Saulteaux, a section of whom displayed a turbulent disposition and were numerically the strongest party.[55]

Their anger stemmed from the taking of their land by the Hudson's Bay Company, and their demand that the payment for the land made by the Crown to the Hudson's Bay Company be turned

---

[55]. *Supra*, f.n. 15 at p. 81.

over to the Indian Nations. Gambler said that the Company had stolen the "earth, trees, grass, stones, all that which I see with my eyes." The Commissioner rejected the condition precedent of the Indians that the three hundred thousand Pounds be paid to them as the owners of the land. Morris utilized the Indian doctrine of land ownership to reply to their position:

> "Who made the earth, the grass, the stone, and the wood? The Great Spirit. He made them for all his children to use, and it is not stealing to use the gift of the great Spirit. The lands are the Queen's under the Great Spirit..."

He did not recognize the priority claim of the Indian Nations and the requirement for that claim to be extinguished by the treaty.

On the fifth day, the spokesman, Gambler, advanced the position that only if the Company kept to their post and not beyond would the Indians negotiate and sign a treaty. The Commission again refused to deal with the concerns of the Indians about the Company. The Cree Chief, Loud Voice, said that he was at a loss and that the Cree and Saulteaux were not united. Chief Cote said, on behalf of the Saulteaux, that he could not speak for anyone because he was not on his land; the Fort Qu'Appelle lands did not belong to the tribes present but to the Assiniboine and other Saulteaux tribes, who were not present; he said the tribes present were very uncomfortable about entering into a treaty without the tribes who were from the area.

The Commissioner did not appear to understand; he advised Cote that he had as much right as any Indian to be there. He threatened that if they did not enter into the treaty they would look foolish to the Queen.

> Why are you not of one mind? Have you tried to be of one mind? Must we go back and say we have had you here so many days, and that you had not the minds of men - that you were not able to understand each other? Must we go back and tell the Queen that we hold out our hands for her, and her red children put them back again? If that be the message that your conduct to-day is going to make us carry back, I am sorry for you, and fear it will be a long day before you again see the Queen's Councillors here to try to do you good.[56]

Gambler replied,

---

[56]. *Ibid.* at p. 113.

> We do not understand you and what you are talking about. I do not keep it from you; we have not chosen our Chiefs; we have not appointed our soldiers and councillors; we have not looked around us yet, and chosen our land, which I understand you to tell us to choose.[57]

At this point, on the fifth day, the negotiation broke down. Loud Voice wanted more time and Cote wanted to return to his home. Morris begged Cote to reconsider and to try to understand his brothers, the Saulteaux, of the Lake of Woods, who had agreed to Treaty No. 3 in the previous year.

On the sixth day, September 15th, 1874, the Crees agreed to a treaty. The Saulteaux initially advised the Commissioner that they could not agree because they were not all present and represented. Morris told them that their brothers in Treaty No. 3 had not all been present, but had still signed the treaty. At this point Kan-oo-ses, a Saulteaux Chief, asked:

> "Is it true you are bringing the Queen's kindness? Is it true you are bringing the Queen's messenger's kindness? Is it true you are going to give my child what he may use? Is it true you are going to give the different bands the Queen's kindness? Is it true that you bring the Queen's hand? Is it true you are bringing the Queen's power?"[58]

The Chief was assured by the Commissioner that was the case. Kan-oo-ses also asked if it was true that his child would not be troubled by what the Commissioner was bringing him and was assured that the Queen's power would protect him. After further discussion in which Morris repeatedly referred to the Treaty No. 3 precedent. Kan-oo-ses agreed to a Treaty similar to Treaty No. 3, with the qualification that not all the Nations were present, which indicated his refusal to represent all the Nations.

The secretary did not make any express reference to the Indian representatives ceding 75,000 square miles of land. The only reference to the 75,000 square miles is the written treaty and in Morris's main text of his book, wherein he reported,

---

[57]. *Ibid.* at p. 114.

[58]. *Ibid.* at p. 117.

> ...the Indian title was extinguished in a tract of country, embracing 75,000 square miles of territory.[59]

For his purposes, Mr. Morris adopted the Indian concept of coexistence. He claimed that no one owned the land and alluded to the Queen managing the land on behalf of everyone. In his deliberations, he never referred to the treaty as the vehicle to extinguish the Indian title to the land.

There is perhaps a valid concern that the Indian speeches may not have been properly recorded because they had to be translated, and because they were being recorded by a person from a different culture. However, the speeches of the appointed Government spokesman, Alexander Morris, were recorded accurately according to his own verification. His words signify a treaty of peace and friendship and not the land terms set out in the written treaty.

Former Chief Gordon Oaks, of the Nikaneet Band of Indians, in the Province of Saskatchewan, near the Town of Maple Creek, is a record keeper for the Indian version of Treaty No. 4. He and his band are beneficiaries of Treaty No. 4, otherwise known as the Qu'Appelle Treaty. He has provided us by sworn affidavit with the information that he has been asked to safeguard. His testimony, which is edited, is the following:

> I was educated by Sewepiton, who was present at the signing of Treaty No. 4 in Fort Qu'Appelle, for the first thirteen years of my life. I did not attend a school during that period and received my education in the traditional Indian way. Sewepiton was already a young man in 1874 when he attended the treaty assemblies between the Indian peoples and the Queen's representatives. Sewepiton spoke four languages, Cree, Saulteaux, Assiniboine and Blackfoot. He understood and related to me the different tribes' comprehension of the meaning and terms of the treaty.
>
> At the treaty assemblies, the Queen's representative's interpreter spoke Cree. Sewepiton understood that it was two nations bargaining. It was one nation asking for the approval and right to enter the land and the other nation agreed but only in exchange for certain rights which promises include education, tax exemption, medicine, and land.
>
> One of the more important points was that the interpreter said we can never repay you back for the land. We will bring in four kinds of immigrants from Europe, the English, the French, the German and the Scotsman to farm and we will tax those people and use that tax to pay for the treaty rights such as your education. We will use that right to open the door

---

[59]. *Supra*, footnote 15 at p. 79.

> for you to be well educated. That way you can stand on your own two feet like that one there as "he pointed to a well-educated man from the Queen's treaty party." The Queen's representative added that the Indians would be educated so that they could survive on or off the reserve. He told them we will provide education for you so that you can function anywhere. The Queen's representative stated that "you will be as well educated as a lawyer." The Queen's representative added that we will teach you to farm so that you can use the saws, and the files.
>
> Sewepiton advised me that they only gave up the top soil in exchange for certain rights such as education. The Queen's representative told them that the future generations will continue to use the treaties and enjoy the treaty rights such as education, and provisions in cases of famines, and pestilence. The Queen's representative stated that we will never be able to pay you fully for the land. Later we will assemble with you to hold further discussions in order to get your approval for our digging up of minerals. At that time we will arrive at the amount we will pay you for the minerals. Right now we can only bargain with you for your approval for the coming of immigrants, the farmers. This is only the first phase as we will only discuss the top soil now. We will negotiate later about minerals but they never did that. Sewepiton advised me that he understood that the whiteman would dig for minerals and the Indians would be paid the money. The Queen's representative told them that later that would happen but before it happens we will negotiate with you. The Queen's representative treated them as the landlord. The negotiators really believed that they were giving the top soil in exchange for certain rights. But many of the things that were said were not properly written into the treaties.
> Sewepiton died on April 24, 1946 when he was 90 years old. I was 13 years old, old enough to know and remember.

The nature of the land and resource provisions is evidenced by two vastly different sources: treaty text and Indian elders. The elders indicate that it was a limited release, directly contradicting the text of Treaty No. 4.

According to Walter Gordon[60] in his monograph, *Elders' Interpretation of Treaty 4*, the difference between the two interpretations of the land and resources provision is best described by reference to the elders' understanding of their rights with respect to wildlife, subsurface rights, and the status of lands, including waters, not utilized for agriculture. Gordon concludes that the subject of wildlife,

---

[60]. *Elders' Interpretation of Treaty 4 - A Report on the Treaty Interpretation Project*, Federation of Saskatchewan Indians, n.d. This project was prepared by Walter Gordon in the 1970s when he founded the Treaty Rights and Research section of the Federation of Saskatchewan Indians.

while conventionally framed in terms of Indian hunting, fishing and trapping "rights", "right of access" or "right to use", was included as an element or feature of the land because the Indian people believed that they continued to own or have priority use of wildlife. Specifically, the elders attest that wildlife continues to belong to the Indian people as an element in the inventory of unceded resources. It is affirmed repeatedly that the Crown assumed a treaty obligation to protect wildlife populations for continuing Indian use.

Gordon, now deceased, was himself a keeper of the record of Treaty No. 4. He was a former Chief of the Pasqua First Nation, whose sources were his father, Andrew Gordon, whose colleague was Chief Ben Pasqua, the son of the Chief Pasqua who was a signatory to Treaty No. 4. Dickieson's minutes record that Chief Pasqua participated on the fourth day. Mr. Morris asked what was troubling the Indian Nations and Chief Pasqua replied, as he pointed to the Hudson's Bay Company representative, "You told me you had sold your land for so much money, 300,000 (pounds). We want that money."

Gordon[61] has given an account of the subsequent conduct, in about 1875 to 1880, of the signatories to the treaty. Conduct is one of the factors which may be referred to in interpreting a treaty. Their actions contradict the written treaty clause providing that:

> And Her Majesty the Queen hereby agrees, through the said Commissioners, to assign reserves for said Indians, such reserves to be selected by officers of Her Majesty's Government of the Dominion of Canada appointed for that purpose, after conference with each band of the Indians, and to be of sufficient area to allow *one square mile for each family of five...*[62] ('emphasis added')

Shortly after the signing of the treaty at Fort Qu'Appelle in 1974, Head Chief Cheecuck, (who not having been present at the original treaty signed an adhesion to Treaty No. 4 on behalf of the Saulteaux and Assiniboine Indians on September 8th, 1875), instructed the Muscowpetung and Pasqua Headmen to survey all unsurrendered lands. They understood that they had reserved to

---

[61]. *Opekokew, Delia, "The First Nations: Indian Government and the Canadian Confederation",* (Saskatoon, Canada: Federation of Saskatchewan Indians, 1980) at p. 28.

[62]. *Supra*, footnote 42 at p. 6. [This averages out to treaty land entitlement of 128 acres per person].

themselves all of their traditional land, and not just the small acreage recognized in the written treaty as the land entitlement. This land selection was effected in accordance with their understanding of the treaty that they would continue to have sovereignty, not only over their own people, but also over the land including the natural and mineral resources.

Cheecuck supervised the work of marking the boundary lines. Pat Cappo, who was a great-grandson of Cheecuck, was told that approximately one hundred young men and women were employed in the survey. By night they would take a fix on the stars to make sure that the north to south line was exact. Using four arrows and two staff shafts as instruments, sights were taken four times at night, in the early evening shortly after dark, at midnight, between midnight and sunup, and when the stars were still visible just before daylight. They were said to be able to locate the north even on a cloudy day or night.

Cheecuck set up the first cornerstone monument two miles north of the Fort Sanatorium; from there the line ran due south to the Old Hudson's Bay post about three or four miles south of Qu'Appelle, west over to Boggy Creek, just north of Regina, then straight north across the Qu'Appelle Valley. This encompasses an area of 50 miles by 40 miles, which is approximately 2000 square miles or approximately 200,000 acres. The monuments of a conical shape were set up every one-half mile. The corner monuments were about eight feet in diameter and the intermediate one were somewhat smaller, about 4 feet. In the center of each monument was a large stone, surrounded by smaller stones of fairly even size, each the size of a man's fist.

Chief Cheecuck was in his nineties at the time and he succumbed to heart failure in 1880 just when the final monument was being erected. In accordance with tradition and custom, everything stopped when the Chief of Chiefs died. The selection of a new leader took at least a month, and in that period of time some indignant whites destroyed the north-east corner monument along with a majority of the line monuments. The R.N.W.M.P. visited the Indians where they were camped in the Qu'Appelle Valley, which location is now the present Village of Craven. Their orders were to dispense the Indians and prevent them from completing their work. The Indian people believe that if the Old Chief had not died, history would have been different.

The disparity between the existing reserve of Muscowpetung, which comprises 21,059 acres, and what was considered by the Indians to be the land reserved to the Indian Nations is tremendous.

Mr. Gordon recounted that after Chief Cheecuck's death in 1880, Chief Pasqua travelled to Winnipeg to protest the Government's failure to carry out its share of responsibilities for the survey of the Indian reserve according to the treaty terms. Chief Pasqua was also concerned about the Government's lack of control over the actions of certain white people. He had personally witnessed Mr. Morris's repeated statements of the Queen's protection of the Indian people against white intruders if they signed the treaty. Pasqua threatened to use his own forces in order to protect his own people. (Pasqua, under the Head Chief Cheecuck, had been chief of policing.)

The buffalo had virtually disappeared from the plains by 1879, forcing the Indians to seek the new way of life promised by the treaties. But the broken promises included the government's unilateral assignment of small reserves to the bands, the failure to provide farm machinery and the failure to provide adequate instructions in agricultural techniques. These failures left the Indian people dependent upon the government for food.

Indian agitation for the proper implementation of the treaties (as they understood the terms of the treaties on the basis of deliberations rather than the written treaties) commenced in this early period. From Gordon we have reports on the actions of the treaty signatories. Following Pasqua's return from Winnipeg, the chiefs occupying the Qu'Appelle Valley assembled and formed a stronger alliance. The first allied meeting was convened by Pasqua on the Muscowpetung ground in the early 1890s. Chiefs Pasqua, Piapot, and Muscowpetung were the leaders at the convention. Chief Piapot sponsored a sundance. Pasqua's allies from the Elphinstone and Russell, Manitoba regions, along with the Fort Pelly Headmen, were in attendance. This was the first all-chiefs conference since the signing of the treaties. Gordon stated that the main topics of the conference were the following:

"1. To continue to maintain their Nationhood and sovereignty over their lands and resources;
2. To reaffirm the role of the Queen and to pressure her government to carry out their part of the treaties;
3. To keep within the promises they [Indians] had made in the treaty;
4. To ensure that their traditions and customs were handed down to the younger generations of Indians despite the controls and restrictions imposed on them by the white educational system."[63]

[63]. Records in the possession of Walter Gordon in 1980 of meeting of early 1890's sponsored by Chief Piapot.

Other political movements for the advancement of the proper implementation of the treaty promises sprang up in and around Saskatchewan and Manitoba with the signatories of the treaties leading the movements because of their distress that the government had failed to fulfill those promises as they knew them. Treaty No. 6 chiefs such as Poundmaker and Big Bear were desirous of uniting the Indian people to advocate the fulfillment of the true treaty terms. Poundmaker, a Cree Chief, conferred with his adopted father, Crowfoot, the principal chief of the Blackfoot, about the peoples suffering, which included starvation, and planned a peaceful show of force in order to pressure for renegotiation of the treaties.

The events of 1885 overtook them and, although they shared a common enemy, the Government, the Metis and Indian wanted different concessions from the government. The animosity related to the treaties had grown so much that many Indian people were participants in the 1885 combats. Poundmaker, Big Bear and many Indians were punished. Canadians are aware of the hanging of Riel, but in fact the greatest number of hangings were of Indian people. Eight people were hanged on November 27, 1885. These eight people are considered freedom fighters by their people:

Kah-Paypamahchukways (Wandering Spirit)
Pahpahmekeesick (Walking the Sky)
Manchoose (Bad Arrow)
Kitahwahkeni (Miserable Man)
Nahpase (Iron Body)
Apischaskoos (Little Bear)
Itka (Crooked Leg)
Waywahnitch (Man Without Blood)

All the Indian students at the Battleford Industrial School were ordered to witness the hangings as a lesson of the power and authority that the government had over Indian people[64]. It was the start of the dictatorship of the Indian agents and the dominance of the *Indian Act* over the treaties. To this day, the treaties have not been positively implemented by the Government and have only been kept alive in the Canadian legal system by Indian litigants charged with hunting and fishing offences, who in turn, have used the treaties as a defence.

---

[64]. Unpublished thesis of Sharon Venne.

Notwithstanding the numerous attacks on the treaties and the leadership of the Indian people, the Indian people continued to agitate for implementation of the true treaty terms or their amendment to accommodate their concerns.

Gordon's account provides us with important background information about this period of Indian resistance. He records that with the passing of the old people who were part of the treaty signing, the new leadership became weaker because of their people's poor economic conditions. Confused by imposed government laws and regulations under the *Indian Act*, their sovereign position became weaker and fragmented.

They were mobilized, however, by surrenders of their lands under the administration of William Graham, the Indian Commissioner for Western Canada in the early 1900s, and began to resist the taking of their lands. With the return of Indian veterans of World War I, and of young people from the residential schools, there emerged a new type of leadership. These new leaders continued to fight for the proper implementation of the treaties, a struggle which continues today.

In other parts of Canada, similar problems with written treaties and oral promises abound. Other authors[65] have recorded these disparities. Some courts have questioned the written treaties, these decisions will be discussed later.

Cultural and linguistic differences compounded the divergent interpretations of what was negotiated by the treaty-making parties. The interpreters were attempting to communicate culturally-based concepts, which would not have an equivalent meaning in the other language. Language is the means of expression of a people's shared cultural values and world-view. It would have been difficult to find concepts that have the same meaning for each side in the negotiating stage. To attempt to set these concepts down in written form in the language of only one of the parties, so that it corresponds to the understanding of another party having an oral tradition, would be exceedingly difficult, if not impossible. Leaving aside the question of bad faith bargaining, the cultural and linguistic differences alone resulted in misunderstandings.

Using the example of the cession language in the later treaties one must look at the cultural

---

[65]. See Rene Fumoleau, OMI, *Supra*, footnote 49, and Richard Price ed., *The Spirit of the Alberta Indian Treaties*. (Montreal: Institute for Research on Public Policy, 1979).

meaning of the words "cede, release, surrender and yield ...forever their rights, titles and privileges whatsoever to the lands" and endeavour to understand what those words meant to each party. There is not a meeting of the minds. Another factor is the customs, habits, and experiences of modern judges, who are faced with the task of identifying and interpreting the treaty terms in court. Similarly relevant are the customs, habits, and experiences of the elders who seek to convey and interpret the true oral promises underlying the treaties. We are faced with the insurmountable problem of not only language problems but cross-cultural problems. It has been recognized that the person who "has never lifted the `language curtain' behind which other people move and talk and think and feel in a way which is peculiar to them, may not even suspect that there is a way of living which is distinct from his own, let alone understand it."[66].

Unfortunately, only the Anglo-Canadian system of law, based on customs, values, and practices foreign to Indian people, is applied in interpreting Indian treaties. The mistakes which arise from such a practice are overwhelming. A language has specialized vocabularies reflecting a people's unique solutions and explanations of their concepts. The language used in the treaties refers to and explicates a landholding system, and deals with concepts such as the surrender of and rights to the land that are foreign to Indians. The European concept of land holding does not have an equivalent in the Indian cultures. There was a meeting of the minds when treaties dealing in these concepts were signed.

Much of Indian history is unwritten, it is based on the oral traditions of accounts, parables, stories, and legends passed on from generation to generation. This form of record keeping is at odds with the Anglo-Canadian legal system. Judges have expressed frustration over this form of history.[67] The oral terms of aboriginal and treaty rights have been placed before them by Indian witnesses in a manner that they cannot understand.

---

[66]. *Report of the Royal Commission on Bilingualism and Biculturalism*: General Introduction (Ottawa: Queen's Printer, 1967) (Chair: A. Laurendeau) at p. xxxiii (quoting UNESCO, *The Teaching of Modern Languages* (Volume of studies deriving from the International Seminar organized by the Secretariat of UNESCO at Nuwara Eliya, Ceylon, in August 1953) (Paris, 1955), 11.

[67]. Toby Morantz, *The Judiciary as Anthropologists: New Insights into Social Organization: The Teme-Augama Aninishnabay Case*, Papers of the Twenty-Third Algonquian Conference, pp. 285-287 and see also, *Anthropology and History in the Courts*, B.C. Studies 95 (Autumn 1992).

Even Indian people often find it difficult to obtain the information from other Indian people. The first serious problem we encounter in obtaining such information is that there are very few people who can communicate with the keepers of the stories, namely, the elders, who communicate in their own languages.

Indian languages have specialized vocabularies reflecting their unique ties to the land, only careful study of each such language would enable us to determine whether concepts that allowed them to "cede, release, surrender and yield ...forever their rights, titles and privileges whatsoever to the lands" existed.

Even if we are able to extract the intent of the treaties from the Indian perspective, we are still faced with the difficult task of having that information accepted by a rigid legal system which believes that it is objective and more rigorous than other systems of thought. This claim to superiority is a barrier to the introduction and opening to the wisdom, knowledge, and information of the Indian parties to the treaties.

Some judges in Canada have been sensitive to these issues and have considered the oral promises of the treaties as understood by the Indian parties. The most significant case which has gone outside the written words of the treaty to determine the underlying meaning is *Re Paulette et al and Registrar of Titles (No.2)*[68], decided by Judge William Morrow of the Northwest Territories Supreme Court in 1973. In that case, the different conceptions of the Indian treaties was central. The issue was whether there was a reasonable argument that Treaties 8 and 11 had not extinguished the aboriginal title in the Northwest Territories, although the text of the treaties indicated that they had. The court had the benefit of archival evidence, anthropological evidence and oral evidence "from many of the chiefs who had actually signed the caveat as well as testimony from Indians and

---

[68]. *Re Paulette's Application to File a Caveat*, (1973), 42 D.L.R. (3d) 8, [1973] 6 W.W.R. 97 (N.W.T.S.C.).

The written judgment of this case [not the transcripts of the witnesses testimony], and cases on the interpretation of treaties were first examined for the Federation of Saskatchewan Indian Nations by D. Opekokew & A. Pratt, "The Treaty Right to Education in Saskatchewan" (1992), 12 Windsor Y.B. Access to Just., 3.

others still living who remembered the treaty-making negotiations..."[69]

When he was receiving oral evidence by witnesses who were not at the original treaty sessions, Morrow admitted the oral history into evidence as an exception to the hearsay rule.

According to the oral testimony gathered by the court, despite the unequivocal nature of the language of the treaties, it had not been intended by the Indian people that all rights in the land be given up. Justice Morrow summarized this evidence by saying:

> Most witnesses were firm in their recollection that land was not to be surrendered, reserves were not mentioned, and the main concern and chief thrust of the discussions centred around the fear of losing their hunting and fishing rights, the Government officials always reassuring them with variations of the phrase that so long as the sun shall rise in the east and set in the west, and the rivers shall flow, their free right to hunt and fish would not be interfered with.[70]

Mr. Justice Morrow concluded with respect to the treaties:

> To me, hearing the witnesses at first hand as I did, many of whom were there at the signing, some of them having been directly involved in the treaty making, it is almost unbelievable that the Government party could have ever returned from their efforts with any impression but that they had given an assurance in perpetuity to the Indians in the territories that their traditional use of the land was not affected.[71]

In light of the evidence, the court held that a *prima facie* case had been made out by the caveators that they had certain aboriginal rights in the land in question which had not been extinguished by the treaties.

Unfortunately, the decision was overturned by the Northwest Territories Court of Appeal on the purely technical ground that a caveat could not be filed where there is no Crown grant or agreement

---

[69]. *Ibid.* at p. 12.

[70]. *Ibid.* at pp. 16-17.

[71]. *Ibid.* at p. 33.

by the Crown to issue a grant.[72] This decision was affirmed by the Supreme Court of Canada on the same narrow basis.[73] No dispute was taken with Mr. Justice Morrow's findings. Apparently, Mr. Justice Morrow's approach was ahead of its time, and no other court has yet gone as far as he did in attempting to articulate another vision of the meaning of the Indian treaties, using the material from the peoples themselves to radically vary the words of the treaty document.

The evidence that Justice Morrow heard included the sworn testimony of Father Rene Fumoleau, OMI, author of *As Long as This Land Shall Last: A History of Treaty 8 and Treaty 11*, 1870 - 1939[74], which work has been cited by Canadian courts, most recently the Supreme Court of Canada in *R.* v. *Horseman*[75].

Father Fumoleau had been a missionary to the Indians of Treaty No. 8 and 11 since 1953. He was familiar with the practice of elderly persons, who could not read or write in English, affixing an "X" as their signature. Father Fumoleau was shown Treaty No. 8 as signed by the Chipewyan Indians of Slave River at Smith's Landing (now Fort Fitzgerald) on July 17, 1899. The signatories were Chief Pierre Squirrel, Michael Mandeville, the Headman, and a third, whom Father Fumoleau was not able to identify. Father Fumoleau noted that the X's used to sign the treaties were quite well rounded. Based on his experience, Father Fumoleau swore that it was his professional opinion that the X's signed by the Indian signatories as evidence of their agreement with the terms of Treaty No. 8 and 11 are very regular. He swore under oath that it was his experience that the crosses made by an Indian person are "much more irregular than this and much more shaky"[76]. Counsel for the caveators asked "So it would be your opinion that it is unlikely that those X's were made by the

---

[72]. *Re Paulette et al and Registrar of Land Titles* (1975), 63 D.L.R. (3d) 1 (N.W.T.C.A.).

[73]. *Paulette et al* v. *R.* (1976), 72 D.L.R. (3d) 161 (S.C.C.).

[74]. Supra, footnote 64.

[75]. [1990] 1 SCR 901.

[76]. Transcript of "In the Supreme Court of the Northwest Territories before the Hon. Mr. Justice W. G. Morrow, In The Matter of: An Application By Chief Francis Francois Paulette et. al., to lodge a certain Caveat with the Registrar of Land Titles for the Northwest Territories at Yellowknife and other communities in the Northwest Territories, commencing July 9, 1973, Book Number One, at p. 49.

persons -"[77] was stopped in mid-sentence. The court stopped any further questioning on this point because the action was not one of rescission and the court could not rule on the validity of the treaties but only on a reference with respect to the caveat. Doubt was raised, however, as to whether the Indian people did sign the treaty.

In *Paulette*, Baptiste Cazon, Chief of the Slavey Band of Fort Simpson was a witness. Born in 1918, he had been chief for 20 years at the time he testified. He had been a Commissioner in 1959 on the Nelson Commission, the members of which were Chairman Walter Nelson, a private lawyer, Mr. Brown, a lawyer from the Government of Canada, and Chief Cazon, representing the Indians of the Northwest Territories. The Commission was formed to investigate Treaty 8 and Treaty 11 in the Northwest Territories. On examination in chief and cross examination, Chief Cazon testified that the Indians had not surrendered their rights to the land by Treaty No. 11. He informed the court that he had rights to all of the land as a treaty Indian. The Chief said "we own the land".

The Crown did not attend the community hearings. It absented itself on the grounds that the Crown had presented its arguments for two days and would not appear again until the court was ready to pronounce judgment. The Judge remonstrated with the Crown that saying that it had taken an unusual position and that the government's interests were still at issue. In essence, because the government boycotted the proceedings, the judge was forced to appoint a lawyer to act as *amicus curiae*, to perform the role, among other things, of cross examining the witnesses so that the judge would not have to do so and could remain objective and fair. The judge said, "[f]orty-eight hours ago they were determined to prevent me proceeding. Having for the moment failed in the attempt, one might have thought they would feel obliged to return here to represent the Government's interest until the proceedings were completed." But he was forced to proceed without them.

The *amicus curiae* asked the Court whether he should cross examine on the question of the extent and nature of ownership of the land, given the Chief's statement that "we own the land" and given that counsel for the caveators had earlier conceded that the paramount title of the Federal Crown was recognized. The Counsel for the caveators indicated that he would call on anthropologists to give expert evidence on the definition of land ownership.

---

[77]. *Ibid.* at p. 49.

The Chief's statement that they owned the land notwithstanding the express written surrender provisions of the treaties at issue is evidence that Indians do not define land ownership in the same manner as the Anglo-Canadian law. It is also evidence that there may not be a meeting of the minds on matters related to whether the Indians did in fact surrender their title to land even according to the tenets of Anglo-Canadian law.

Another case which established that there are different and conflicting understandings of the treaties is *Dreaver* v. *The King*[78], decided in 1935. In this case, the Exchequer Court had to construe the terms of Treaty No.6. Chief Dreaver had been present at the signing of the Treaty in 1876 and remembered the promises made by the Commissioners. He testified, among other things, that the negotiators had promised that the Indians party to the treaty were to have free medicine, drugs and medical supplies, and that this was what the "medicine chest" clause in Treaty No. 6 meant. Mr. Justice Angers accepted Chief Dreaver's testimony and found:

> ...the treaty stipulates that a medicine chest shall be kept at the house of each agent for the use and benefit of the Indians at the direction of the agent. This, in my opinion, means that the Indians were to be provided with all the medicines, drugs or medical supplies which they might need entirely free of charge.[79]

Although *Dreaver* has been viewed by Indian people for decades as a landmark decision on treaty rights, it made so little impact upon the legal community that it was not reported until the 1970s.[80]

Dreaver was weakened in *R.* v. *Johnston*[81] where the Saskatchewan Court of Appeal was called upon to construe the "medicine chest" clause of Treaty No. 6. Mr. Justice Culliton held that in interpreting the clauses of a Treaty, "one must first look to the words used and give to those words the ordinary meaning that would be attributed to them at the time the treaty was made."[82] In order

---

78. (1935), 5 C.N.L.C. 92 (Exch. Ct.).

79. *Ibid.* p. 115.

80. When it was published by the University of Saskatchewan Native Law Centre's Canadian Native Law Cases series.

81. (1966), 56 W.W.R. 565 (Sask. C.A.).

82. *Ibid.* p. 569.

to interpret these provisions Mr. Justice Culliton stated that resort could be had to "whatever authoritative record may be available of the discussion surrounding the execution of the treaty."[83] After "perusing" *Treaties of Canada with the Indians of Manitoba, the North-West Territories and Kee-Wa-Tin* by the Hon. Alexander Morris, P.C., Mr. Justice Culliton concluded that he could not find anything:

> historically, or in any dictionary definition, or in any legal pronouncement, that would justify the conclusion that the Indians, in seeking and accepting the crown's obligation to provide a "medicine chest" had in contemplation a provision of all medical services, including hospital care.[84]

Mr. Justice Culliton distinguished *Dreaver* on its facts, and, while he expressed no opinion as to whether Judge Angers interpreted the "medicine chest" clause correctly, he found nothing to support Judge Angers' definition of the phrase "medicine chest" to reflect modern reality in Treaty No. 6 to include all medical services, including hospital care.

As time evolved, changes to accommodate Indian concerns did take place in Canadian courts. In the 1981 case, *Taylor and Williams*[85] Associate Chief Justice McKinnon of the Ontario Court of Appeal accepted the agreement of counsel from both parties that the oral promises guaranteeing the right to hunt and fish discussed prior to the treaty signing but not included in the written terms of the 1818 treaty, were as much part of the treaty as the written articles. In considering the interpretation of Indian treaties, he ruled:

> Cases on Indian or aboriginal rights can never be determined in a vacuum. It is of importance to consider the history and oral tradition of the tribes concerned, and the surrounding circumstances at the time of the treaty, relied on by both parties, in determining the treaty's effect. Although it is not possible to remedy all of what we now perceive as past wrongs in view of the passage of time, nevertheless it is essential and in keeping with established and accepted principles that the courts not create, by a remote, isolated current view of past events, new grievances.[86]

---

83. *Ibid.* p. 569.

84. *Ibid.* p. 571.

85. *R. v. Taylor and Williams*, (1981), 34 O.R. (2d) 360.

86. *Ibid.* at p. 364.

In 1983, the Supreme Court of Canada in *Nowegijick* v. *R.*[87] advanced the law that "...It seems to me, however, that treaties and statutes relating to Indians should be liberally construed and doubtful expressions received [sic "resolved] in favour of the Indians..."[88]

Another recent exception to my thesis that non-native Canadian history and law have misunderstood, misstated and misapplied the early treaties is the 1990 case of *R.* v. *Sioui*.[89] This is a Supreme Court of Canada judgment on a 1760 treaty between the Huron and the English. By the terms of the treaty, the Huron in exchange for making peace, were guaranteed safe passage back to their homeland and the free exercise of their religion, customs and trade with the English. The Supreme Court of Canada held that courts should show flexibility in determining the legal nature of a document recording a transaction with the Indians. The historical context and perception each party might have as to the nature of the undertaking contained in the document must be taken into account.

The Indian people argued that the treaty guaranteed their right to carry on their customs and religious rites in the territory of the park at issue. As the treaty does not define the territory over which those rights may be exercised, those rights must be interpreted by the intention of the parties at the time the treaty was concluded. The court took the historical context into serious consideration and concluded that both the British and the Hurons contemplated that the rights guaranteed by the treaty could be exercised over the entire territory used by the Hurons at the time so long the rights were not incompatible with the Crown uses of the land. The Court assumed that the parties intended to reconcile the Hurons' need to protect the exercise of their religion and the desire of the British to expand. The court in *Sioui* was able to use extrinsic evidence:

> As this Court recently noted in *R.* v. *Horse*, ...extrinsic evidence is not to be used as an aid to interpreting a treaty in the absence of ambiguity or where the result would be to alter its terms by adding words to or subtracting words from the written agreement....However, a more flexible approach is necessary as the question of the existence of a treaty within the meaning of s. 88 of *Indian Act* is generally closely bound up with the circumstances existing

---

87. *Nowegijick* v. *R.*, [1983] 1 S.C.R. 29, [1983] 2 C.N.L.R. 89.

88. *Ibid.* at p. 61.

89. *Supra.* f.n. 36.

> when the document was prepared...In any case, the wording alone will not suffice to determine the legal nature of the document before the Court. On the one hand, we have before us a document the form of which and some of whose subject-matter suggest that it is not a treaty, and on the other, we find it to contain protection of fundamental rights which support the opposite conclusion. The ambiguity arising from this document thus means that the Court must look at extrinsic evidence to determine it [sic] legal nature.[90]

Sioui applied the factors established by the Ontario Court of Appeal in *Taylor and Williams* to analyze the historical background:

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

Notwithstanding these exceptional cases, the courts remain trapped between contract interpretation rules and the developing exception rules to Indian treaties. The question remains that in the case of written treaties such as those that expressly and clearly indicate that the Indians are surrendering land, it would appear that based on *Sioui*, those treaties would be read according to the text because there may be a lack of ambiguity to open them up to extrinsic evidence.

5 INTERNATIONAL CHARACTER OF THE TREATIES: UNITED STATES AND CANADIAN EXPERIENCE

The problem of the status and nature of the treaties in Canada requires consideration within the context of United States Indian law where that problem has been partially resolved by the "reading in" by judges of rules of international law for treaties.

Since 1832, the United States Supreme Court[91] has expressly accorded to Indian treaties the same dignity as is given to treaties with foreign nations. United States legal theory also accords Indian

---

[90]. *Ibid.* at p. 143.

[91]. See, Cohen, Felix S., *Handbook of Federal Indian Law,* 1982 ed. Charlottesville, Va.: Michie Law Publishers.

tribes the status of "domestic dependent nations." This means that, although Indian tribes lost external powers of sovereignty, they retained their internal sovereignty, subject to Acts of Congress under the federal "plenary" power to legislate in relation to Indians. Tribes are free to maintain or establish their own form of government based on practical, cultural, historical or religious considerations.

Justice Marshall of the United States Supreme Court, in the 1832 decision *Worcester* v. *Georgia*[92], concluded that international law was invoked by the Europeans when entering into treaties with the Indians:

> The words "treaty" and "nation", are words of our own language, selected in our diplomatic and legislative proceedings, by ourselves, having each a definite and understood meaning. We have applied them to Indians as we have applied them to other nations of the earth; they are applied to all in the same sense.[93]

The United States Supreme Court has explained that a treaty is an agreement, league or contract between two or more nations or sovereigns, formally signed by properly authorized commissioners, and solemnly ratified by the sovereigns or the supreme power of each state. The Supreme Court has recognized Indian nations as states for the purposes of entering into the treaties. Because a treaty is an agreement which is binding in international law, a treaty can only be made by an entity having an international legal personality. A "treaty" is not only law but is also a contract between two nations and must, if possible, be construed so as to give full force and effect to all its parts.

In the 1876 case of *United States v. 43 Gallons of Whiskey*,[94] the Supreme Court affirmed that "the power to make treaties with the Indian tribes is, as we have seen, coextensive with that to make treaties with foreign subjects of diplomacy."[95]

Treaties with Indians tribes, however, differ from foreign treaties in at least two important respects.

---

92. *Supra*, footnote 6.

93. *Ibid.* at p. 559.

94. *United States v. 43 Gallons of Whiskey*, 93 U.S. 188 (1876).

95. *Ibid.* at 197.

Through the application of special canons of construction, Indian treaties are construed in favour of the Indians. Further, United States courts will not find that Indian treaties have been abrogated by later treaties or legislation unless abrogation was clearly and specifically intended. Neither of these rules applies to treaties with foreign nations; the rules are based upon the trust relationship with Indian tribes, a factor not present in international affairs.

In accordance with the general rule applicable to foreign tribes, the courts will not inquire into whether an Indian tribe is properly represented during negotiations of a treaty or whether such a treaty was procured by fraud or duress[96]. It is this last rule which causes the most difficulty to Canadian Indians who otherwise admire the United States' application of international standard to Indian treaties. There are many incidents of fraud or duress in the origins of Indian treaties.

The inequities and weaknesses of the Canadian treaties were canvassed and the issue of duress was acknowledged in a Canadian court decision by His Honour Judge Bernstein in *R.* v. *Batisse.*[97] Judge Bernstein noted that

> Indians have been hunting and fishing in Northern Ontario from time immemorial. Since the earliest days of colonization their rights to occupy and use their ancient lands have been recognized, and hence all North American Governments have taken steps to reach agreements with the Indians to regulate those rights and control development in Indian lands. When Treaty No. 9 was negotiated, the parties to the Agreement were on grossly unequal footings. Highly skilled negotiators were dealing with illiterate people, who, though fearful of losing their way of life, placed great faith in the fairness of His Majesty, as represented by federal authorities.[98]

Justice Bernstein then made certain conclusions:

> As a matter of fact, a careful reading of the Commissioner's Reports makes it fairly obvious that the Indians thought they were dealing with the King's personal representatives and were relying on the word of His Majesty rather than officials of Government. They agreed to give up their interest in their land for a few reserves (carefully chosen by the Government to

---

96. *Supra*, footnote 91 at p. 62

97. R. v. Batisse (1977), 19 O.R. (2d) 145 (Dist. Ct.)

98. *Ibid.* at p. 151.

> be far away from any potential sources of hydro power) and a few dollars per year per family. As a result, approximately 90,000 square miles of resource-rich land was acquired by the Crown, free of any beneficial Indian interest, for an absurdly low consideration (even for that time). It is still not clear whether Indian treaties are to be considered basically as private contracts or as international agreements. If the former, then the very validity of this treaty might very well be questioned on the basis of undue influence as well as other grounds".[99]

In the United States the concept of the federal trust responsibility to Indians has a much earlier history than in Canada. It began judicially in the 1831 case, *Cherokee Nation* v. *Georgia*[100]. The courts have used the trust principles articulated in *Cherokee Nation*, to establish and protect Indian rights.

> Trust obligations define the required standard of conduct for federal officials and Congress. Fiduciary duties form the substantive basis for various claims against the federal government. Even more broadly, federal action toward Indians as expressed in treaties, agreements, statutes, executive orders, and administrative regulations is construed in light of the trust responsibility.[101]

The primary canons of construction in relation to Indians were first developed in cases involving treaties. In construing Indian treaties, the courts have developed the following canons of construction:

1. The treaties must be liberally constructed to favour Indians[102],
2. That ambiguous expressions in treaties must be resolved in favour of the Indians[103],
3. That treaties should be construed as the Indians would have understood them[104], and

---

[99]. *Ibid.* at p. 151.

[100]. 30 U.S. (5 Pet.) 1 (1831).

[101]. *Ibid.* at p. 220-221.

[102]. *Choctaw Nation* v *United States*, 318 U.S. 423, (1943); *Choate* v. *Trapp*, 224 U.S. 665, (1912); *United States* v. *Walker River Irrig. Dist., 104 F. 2d 334, (9th Cir. 1939).*

[103]. *McClanahan* v. *Arizona State Tax Comm'n*, 411 U.S. 164 (1973); *Carpenter* v. *Shaw*, 280 U.S. 363 (1930); *Winters* v. *United States*, 207 U.S. 564 (1908).

[104]. *Choctaw Nation* v. *Oklahoma*, 397 U.S. 620; *United States* v. *Shoshone Tribe*, 304 U.S.

4. That the unequal bargaining position, superior negotiating skills, and knowledge of the language of the United States is to be acknowledged.[105]

In *Choctaw Nation* the United States Supreme Court declared that "[m]ore important is the fact that these treaties are not to be considered as exercises in ordinary conveyancing". The Court, on facts that are similar to the Canadian situation, said that

> [t]he Indian Nations did not seek out the United States and agree upon an exchange of lands in an arm's length transaction. Rather, treaties were imposed upon them and they had no choice but to consent. As a consequence, this Court has often held that treaties with the Indians "must be interpreted as they would have understood them."[106]

Other courts[107] have followed *Choctaw Nation*. In a 1992 case, the Court explained that because Native Americans were put at a disadvantage in their negotiations with the governments, their treaties should be interpreted liberally to compensate for their lack of bargaining power[108]. Another court in 1992 affirmed that the "rule has long been that "treaties with the Indians must be interpreted as they would have understood them...and any doubtful expressions in them should be resolved in the Indians' favor.""[109]

In a major New York case in 1992[110], the court interpreted the particular treaty by using the canons of construction that ambiguous expressions in treaties must be resolved in favour of the Indians and that the treaties must be liberally constructed in favour Indians as had been articulated by

---

363 (1938), *Jones* v. *Meehan*, 175 U.S. 1 (1899).

105. *Washington* v. *Fishing Vessel Ass'n*, 443 U.S. 658 (1979)

106. *Supra*, footnote 104 at 630-631.

107. The decisions I refer to which have followed *Choctaw Nation* and *McClanahan* begin in 1990. See Mike Townsend, "Congressional Abrogations of Indian Treaties: Reevaluation and Reform" (1989), 98 Yale Law Journal 793 for a summary of the law up to February, 1989.

108. *Sokaogon Chippewa Community* v. *Exxon*, 805 F. Supp. 680 at p. 692.

109. *U.S.* v *State of Wash.*, 969 F. 2d 752 at 753 (9th Cir.1992).

110. *Cayuga Nation of New York* v. *Cuomo*, 758 F. Supp. 107 at 111 (N.D.N.Y. 1991).

McClanahan and *Choctaw Nation*, respectively. The Indians in this case included Canadian Indians. The Indian tribe sought a declaration concerning their current ownership of land based on the 1794 Treaty of Canandaigua which recognized title in their land. The State of New York argued that they had abandoned the land by actions including their relocation to Canada. The court ruled that abandonment was not a defence to the tribe's lawsuit notwithstanding that the tribe was out of possession for almost 200 years.

The United States District Court in 1990 had also used *Choctaw Nation* and *McClanahan* to find in favour of the *Crow Tribe of Montana* that their treaty protected the territorial integrity of the reservation and the sovereignty of the Tribe, though the state government argued that the treaty clause was narrowly aimed at keeping the peace.[111]

From a Canadian perspective, one of the most significant aspects of these cases is that many inherent rights have been held by the United States courts to be reserved implicitly by treaties. The doctrine of inherent tribal sovereignty is the source of many Indian rights in the United States and is given the force of law by the courts. Important resource rights such as reserved water rights and the right to hunt and fish are implied from treaties and agreements by which Indian reserves were created. As expressed by Professor Bartlett[112], in his book on Indian water rights,

> The existence of an intention to set apart water rights along with lands when reserves were set apart by executive act has been authoritatively considered in the courts of the United States.
> ....
> The United States jurisprudence dictates that executive orders be generally construed so as to reserve water "to the extent reasonably necessary to supply the needs of the Indians". (referring to United States v. Walker River Irrigation District, 104 F.2d. 334 9th Cir. 1939).[113]

American courts have ruled that water rights were appropriated along with the reserves set apart by

---

[111]. *The Crow Tribe of Montana* v. *The United States of America*, 789 F. Supp. 398 (D.D.C. 1990) at 402.

[112]. Bartlett, Richard, *Aboriginal Water Rights In Canada: A Study of Aboriginal Title to Water and Indian Water Rights*, (University of Calgary: 1988).

[113]. *Ibid.* at p. 39.

treaty so that the objectives for which the lands were set apart could be met. The courts hold that the honourable intention of the government in setting apart reservations by treaty contemplated contemporary as well as traditional uses of the land and water.

In the *Walker River* case, water rights had not been precisely defined in the document establishing the reservation. The Court ruled that the waters of the river were reserved to the extent necessary to supply the irrigable lands, and sought to restrain the appropriation of water by upriver settlers to that extent. The Court agreed that the reservation of such water rights was implied, in the setting apart of the land. It was held that it was not necessary to find any express language in either a treaty or agreement upon which to found such water rights:

> The good faith of the attempt to induce the Indians to make their homes on the reservation, and to remain there, seems inconsistent with a purpose of reserve lands only, leaving the waters of the stream to be diverted without limit by settlers above.[114]

By the international principle that only nations make treaties, the courts have assumed that no reasonable nation would give up its sovereignty and have ruled that the Indians reserved their self-government powers free of state jurisdiction.[115] From the Canadian legal view this is extraordinary. Yet the implication is based on principles of fairness and good faith. These same basic principles should be adopted as rules of construction in Canada.

It is only now that the Canadian legal system is attempting to develop a theory to define the nature and status of Indian treaties. The legal system still does not accord international status to those treaties. Instead, they are termed "*sui generis*"*:*

> An Indian treaty is unique; it is an agreement sui generis which is neither created nor terminated according to the rules of international law.[116]

---

[114]. Supra, note 102 at p. 339.

[115]. *McClanahan* v. *Arizona State Tax Comm'n*, 411 U.S. 164 (1973); *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515 (1832).

[116]. *Simon* v. *R.*, [1985] 2 S.C.R. 387 at 404.

For example, in the leading 1985 case of *Simon* v. *R.*, which deals with a "treaty of peace and friendship" entered into in 1752, Indian treaties were found to be neither mere contracts, nor treaties in the international law sense.

Professor Sanders[117] has pointed out that even if the Indian treaties *were* found to be international law treaties, this would not give them any greater status in the law of Canada. In Canadian law, international treaties do not become part of the domestic law until they are implemented by statute. However, the historical reality is that Indians believed that they had signed international treaties. This is a crucial point for them and until that position is acknowledged and fully understood by non-Indians, a great schism will continue between Indians and non-Indians in Canada. Granting the treaties international status is recognition that Indian people were equal people, and that their Nations were equal to other states, with the capacity and authority to enter into relations as a people. The ethnocentric assumption that the land was there to be discovered and that Indian people lacked the capacity to deal with their land because they were lower in the human social scale continues to taint Indian/non-Indian relations. It is necessary that if Indian treaties are granted international status, that preferential rules of construction, and enforcement mechanisms must be developed concurrently to prevent their being weakened legally and politically on the basis of Crown-Indian fiduciary relationship.

The assumption that Indians do not have the capacity and authority to function equally to other human beings seems to have been adopted in the March 8, 1991 decision of Justice McEachern, Chief Justice of the British Columbia Supreme Court in his decision in Delgamuukw[118]. It is his view that, in their original pre-contact state, the lives of the Gitksan and Wetsu'wet'en were "nasty, brutish and short."[119] This view of the Indian people is not isolated in Canadian jurisprudence; the belief that Indians are uncivilized and lack any concepts of property ownership or self-governmental powers is widespread as recorded in case law in Canada. If Indians are not recognized as having the capacity to enter into international treaties, the result will be denial of their status as a "people" with the right to self-government. In other words, it is the Indian view that

---

[117]. Sanders, "Pre-existing Rights: The Aboriginal Peoples of Canada", in Beaudoin and Ratushny, eds., *The Canadian Charter of Rights And Freedoms*, 2nd. ed., at p. 730.

[118]. *Delgamuukw* v. *B.C.*, [1991] 5 C.N.L.R. 5, [1991] 3 W.W.R. 97.

[119]. *Ibid.* at p. 11.

Canadian laws are premised on the idea that the land was empty and could be taken notwithstanding the Indian Nations' ownership of the land. This is discriminatory, and, at best, racist.

Yet, with the advent in 1982 of the *Constitution Act, and the 1983 amendments*, in particular, sections 25, 35, and 52, the trust principle advocated in the United States is beginning to be followed in Canada. The Supreme Court of Canada has said:

> The *sui generis* nature of Indian title, and the historic powers and responsibility assumed by the Crown constituted the source of such a fiduciary obligation. In our opinion, *Guerin*, together with *R. v. Taylor and Williams* (1981), 34 O.R. (2d) 360, 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.[120]

Canada's constitution now provides protection which the Indian tribes of the United States do not enjoy. The United States treaties may be overridden or even repealed by Congress. This is no longer possible in Canada, unless the First Nation is first consulted. In reality, however, there are almost no treaty rights in law that a treaty Indian in Canada can use today because the government has failed to use the treaties as the basis for Indian legislation. In the United States, on the other hand, the whole foundation of modern Indian law is based on the treaties. As a result, the treaty rights of the United States Indians are substantive but the substantive treaty rights of the Canadian Indians are not. Therefore, even with what appears to be a superior status in Canadian law, the treaty rights have not been identified and defined in Canada and, are therefore weak within the context of Canadian law. Treaty rights in the United States are given weight by legislation or by the courts.

6 **INTERPRETATION OF TREATIES**

The rules of the interpretation of treaties went through a profound change with the passage of the *Constitution Act, 1982*. Before 1982, the doctrine of parliamentary supremacy empowered

---

[120]. *Sparrow* v. *R.*, [1990] 3 C.N.L.R. 160 at 180 (S.C.C.).

Parliament to pass legislation that superseded Indian treaties, and treaties could thus be modified. Under section 35 of the *Constitution Act, 1982* treaty rights are recognized and affirmed and by virtue of section 52, such constitutional rights are given supremacy.

Section 25 provides that the equality provisions in the *Charter of Rights and Freedoms* cannot derogate from treaty rights. Section 35.1 requires that aboriginal representatives be consulted before any changes are made to treaty rights.

With these fundamental constitutional guarantees, the courts have been more willing to make broad statements honouring treaty terms.

In *Horseman*[121], the Supreme Court of Canada, affirmed, both in the majority and dissenting decisions, that a liberal construction should be applied in interpreting the treaties. In the recent British Columbia Court of Appeal majority decision, *Delgamuukw* v. *British Columbia*[122], however, Justice Macfarlane appears to weaken this principle of liberal construction in favour of Indians without regard to the literal interpretation of a treaty or statute. He said:

In *R.* v. *Horseman*, [1990] 1 S.C.R. 901..., a case decided about three weeks before *Sparrow*, Cory J. said at p. 930, referring to *Simon*, that:

> ...the onus of proving either express or implicit extinguishment upon the Crown.
>
> In my opinion express language such as "all aboriginal rights are hereby extinguished" is not required. The intent to extinguish aboriginal rights may be inferred from less explicit language.[123]

---

[121]. *Supra*, footnote 75.

[122]. [1993] 5 W. W. R. 97.

[123]. *Ibid.*, at p. 155.

He explained that:

> To summarize: in relation to traditional property rights, if the intention to disturb the rights is clear and plain, the presumptions against such a result will not apply. Such an intention may be declared *expressly or manifested by unavoidable implication.*
>
> In my view, the clear and plain test should be applied with as much vigour to aboriginal title as it is to traditional property rights.[124]

In the dissenting decision in *Horseman*, Madam Justice Wilson concluded that the *Wildlife Act* did not apply in this case. She began her judgment by setting out the important guidelines for the interpretation of Indian treaties. It appeared initially that her discussion of these principles may remain significant for the numbered treaties and the pre-confederation treaties because Mr. Justice Cory, who wrote the majority decision, never really addressed what a "large and liberal" approach should be. Madam Justice Wilson said:

> ... Indian treaties must be given the effect the signatories obviously intended them to have at the time they were entered into even if they do not comply with to-day's formal requirements. Nor should they be undermined by the application of the interpretive rules we apply to-day to contracts entered into by parties of equal bargaining power.[125]

Taken to its next step, this approach would reverse the *Horse* and *Sioui* requirement for ambiguity. Madam Justice Wilson said of the treaties:

> These treaties were the product of negotiation between very different cultures and the language in them does not reflect, and should not be expected to reflect, with total accuracy each party's understanding of their effect at the time they were entered into. This is why the courts must be especially sensitive to the broader historical context in which such treaties were negotiated. They must be prepared to look at the historical context in order to ensure that they reach a proper understanding of the meaning that particular treaties held for their signatories at the time.[126]

---

[124]. *Ibid.* at p. 156.

[125]. *Supra*, footnote 75 at p. 907.

[126]. *Ibid.* at p. 907.

Her Ladyship referred to the works of Fumoleau[127], and the articles in *The Spirit of the Alberta Indian Treaties*[128], for the conclusion that Indians understood the treaty right to hunt and fish extended beyond subsistence. Putting Treaty 8 in its historical context, Madam Justice Wilson said:

> To read Treaty 8 as an agreement that was to enable the government of Canada to regulate hunting, fishing and trapping in any manner that it saw fit, regardless of the impact of the regulations on the "usual vocations" of Treaty 8 Indians, is not credible in light of oral and archival evidence that includes a Commissioners' report stating that a solemn assurance was made that only such laws "as were in the interest of the Indians and were found necessary in order to protect the fish and fur-bearing animals would be made."[129]

Even though her judgment was in dissent, her comments have been referred to favourably, as recently as in the decision handed down on April 26, 1993 by His Honour, Judge Fairgrieve of the Ontario Court Provincial Division in *R.* v. *Jones*[130].

But on March 24, 1993, the Alberta Court of Appeal followed the majority decision of *Horseman*, in *R.* v. *Badger*[131], by ruling that the decision in *Horseman* applies in that the entrenchment of treaty rights in section 35(1) of the *Constitution Act, 1982* has no application to hunting rights conferred by Treaty 8 in Alberta. Treaty hunting rights were extinguished by paragraph 12 of the *Natural Resources Transfer Agreement*[132], and the *Wildlife Act* applies over the treaty. The court appears to be using the "clear and plain" test as opposed to the "large and liberal" interpretation test espoused by Mr. Justice Cory and Madam Justice Wilson.

---

[127]. *Supra*, footnote 49.

[128]. Richard Price ed. *The Spirit of the Alberta Indian Treaties*. (Montreal: Institute for Research on Public Policy, 1979).

[129]. *Supra*, footnote 75 at pp. 912-913.

[130]. *R.* v. *Jones and Nadjiwon*, [1993] 3 C.N.L.R. 182.

[131]. [1993] 3 C.N.L.R. 143.

[132]. *Constitution Act, 1930.*

The cases on the interpretation of treaties remain confusing but an expansive approach was taken by the British Columbia Court of Appeal in the 1989 case *Claxton* v. *Saanichton Marina Ltd.*[133] In this case, the issue was whether an agreement between the Saanich people and Governor Douglas entered into in 1852 was a treaty for the purpose of section 88 of the *Indian Act*. If it was a treaty, a further issue was whether the right to carry on a fishery guaranteed in the treaty was a qualified right. The Court of Appeal held that the agreement was a treaty and that the right to carry on a fishery was unqualified.

In coming to this conclusion the Court laid out the general rules which should be applied in interpreting Indian treaties. The Court summarized them as follows:

(a) The treaty should be given a fair, large and liberal construction in favour of the Indians;

(b) Treaties must be construed not according to the technical meaning of their words, but in the sense that they would be naturally understood by the Indians;

(c) As the honour of the Crown is always involved, no appearance of "sharp dealing" should be sanctioned;

(d) Any ambiguity in writing should be interpreted as against the drafters and should not be interpreted to the prejudice of the Indians if another construction is reasonably possible;

(e) Evidence by conduct or otherwise as to how the parties understood the treaty is of assistance in giving it content.[134]

7 INTERPRETATION OF LAND CLAIMS AGREEMENTS AS TREATIES

It would appear that the land claims agreements of today are not considered the same as the historical treaties. Land claims agreements were intended to be treated the same as historical treaties by the drafters of the constitution of Canada. In the *Constitution Act, 1982*, section 35 was

---

[133]. *Claxton v. Saanichton Marina Ltd.*, [1989] 3 C.N.L.R. 46 (B.C.C.A.).

[134]. *Ibid.* p. 50.

first composed of only two subsections, to wit,

35 (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 Metis peoples of Canada.

By the *Constitution Amendment Proclamation, 1983*, the rest of the subsections were added:

(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 the Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

It was certainly the intention of the Indian negotiators which intention was accepted and understood by the Governments of Canada, that subsection 35(3) was included for the purpose of recognizing land claims agreements such as the *James Bay and Northern Quebec Agreement of 1977*(JBNQ Agreement) as treaties.

However, according to the Federal Court of Appeal in *Eastmain* v. *Canada (Federal Administrator)*[135], the rules of interpretation do not apply to land claims agreements. The decision stands as the Supreme Court of Canada refused the Indian party's application for appeal. The Federal Court ruled that in a modern document such as the JBNQ Agreement, the rules of interpretation of Indian treaties do not fully apply. Justice Decary found that the *Nowegijick* dictum that "treaties and statutes relating to Indians should be liberally construed and doubtful expressions received [sic "resolved] in favour of the Indians...", does not apply to the JBNQ Agreement. The court cautioned that one must be careful not to blindly follow the principles laid down by the Supreme Court of Canada for analyzing treaties entered into in an earlier era. The principle that ambiguities must be construed in favour of the Indians rests, in the case of historic treaties, on the unique vulnerability of the Indian parties, who were not educated and were compelled to negotiate with parties who had superior bargaining positions in terms of language and

[135]. [1993] 3 C.N.L.R. 55.

with legal concepts. The court ruled that there was no such vulnerability in the case of the negotiations for the JBNQ Agreement.

In addition, the Court ruled that the principle of construing ambiguities favourably to Indians in statutes relating to Indians does not apply to the JBNQ Agreement as this agreement does not strictly concern a statute relating to Indians. The federal Act which confirmed the JBNQ Agreement does not express the will of Parliament; rather, it expresses the will of the parties to the Agreement.

Such a ruling confirms that the playing field continues to be one sided in favour of the Government parties. In the case of land claims settlements, the usual impetus for settling a claim is the government objective to exploit natural resources. Where that objective is absent or lacking, Indian rights generally are not respected. Only under such economic initiatives will government attempt to deal with Indian rights and usually in those situations, great pressure is brought to bear on the Indian people, and decisions are made without proper consultation, and without proper consideration of the long term effects. Therefore, in my view, rules for interpreting these agreements must recognize these contingencies of unequal bargaining position. Accordingly, the rules of interpretation for these agreements should be the same for the historic treaties. The intent of the 1983 constitutional changes was to apply the same rules to modern treaties, as the historical treaties. This constitutional intent is not being honoured.

8 CANADIAN CASE LAW ON INDIAN ORAL HISTORY

Even if the courts apply the fair, large and liberal construction rule, the Indians continue to experience serious problems in having their side of the story accepted. To the dismay of Indian First Nations in Canada, and notwithstanding *Paulette* and *Dreaver*, the courts have tended to follow technical rules.

In the Canadian legal system, oral history is characterized as "hearsay" because the declarant is unavailable so the court is unable to test the truth of what is alleged to have been said. Although the courts have sometimes accepted oral history in the absence of written records of Indian history, they usually have rejected oral history or given it little weight.

In all cases, the courts prefer what is called "best evidence". The courts have described the best

evidence as that given by those best able to give such evidence, such as the oldest living recipients of a long line of uninterrupted recounting of the oral history. Oral history which is clearly hearsay can only be admitted if all those who had first-hand knowledge of the historical event are dead.

As many of these people as possible should testify in order to create a "concurrence of voices". Also, the oral history should be confined to historical fact and not "anecdote", though the courts have not finally decided on the question of where anecdote ends and history begins. If an anecdote seems relevant it might be accepted by the court. However, this too might be bias because Indian ways of telling history may, by cultural pattern. be anecdotal.

It is impossible to remove the problem presented by the fact that the culture which determines relevance and weight is not the culture presenting the testimony. Human thinking is clearly motivated by cultural attitudes, which attitudes may be biased intentionally or unintentionally against a different culture.

It is my contention that these guidelines are unjust because these guidelines have been developed under the traditional standards of Canadian law. The attitudes of Canadian courts, therefore, have been unjust because they have not taken into account the domestic law of the Indian people who are one half of the parties to the treaties. The judgments of British and Canadian courts are based on statutes, precedents and common law principles, values and customs, which have their source in colonial laws, and are known as "white man's law" by Indian people. They are developed in an adversarial system which is foreign to Indian cultures. While Indian people now have some familiarity with these statutes, precedents, principles, values and customs, they certainly did not understand these things when the treaties were entered into. The treaties must be read in this context.

The *Delgamuukw*[136] case stands as a prime example of the harsh use of technical rules to exclude or marginalize Indian evidence. The plaintiff Chiefs alleged that from time immemorial they and their ancestors had occupied and possessed approximately 22,000 square miles in northwest British Columbia, and that they and the Indian people they represented were entitled to their land, as against the province of British Columbia. They sought a judgment declaring that they owned the territory and that they were entitled to govern the territory by aboriginal laws which were

[136]. *Supra*, footnote 118.

paramount to the laws of British Columbia. Alternatively, they claimed that they had unspecified aboriginal rights to use the territory and claimed damages for the loss of all lands and resources transferred to third parties or removed from the territory since the establishment of the colony.

Mr. Justice McEachern dismissed the claim as against the Federal Crown. With respect to the claims against British Columbia, he dismissed the claims for ownership of and jurisdiction over the territory, and for aboriginal rights in the territory. He ruled in favour of the plaintiff Chiefs, acting on behalf of their people, only to the extent that they were entitled to a declaration, subject to the general laws of the province, of a continuing legal right to use unoccupied or vacant Crown land in the territory for the purposes of aboriginal sustenance. The plaintiff Chiefs' claims for damages were dismissed, and there was no order for costs.

Mr. Justice McEachern ruled that much of the evidence of the plaintiff Chiefs could not withstand the objective tests of evidentiary rules. He said:

> I have heard much at this trial about beliefs, feelings and justice. I must again say, as I endeavored to say during the trial, that courts of law are frequently unable to respond to these subjective considerations. When plaintiffs bring legal proceedings, as these plaintiffs have, they must understand (as I believe they do), that our courts of law which labour under disciplines which do not always permit judges to do what they might subjectively think (or feel) might be the right or just thing to do in a particular case. Nor can judges impose politically sensitive non-legal solutions on the parties. That is what legislatures do, and judges should leave such matters to them.
>
> Instead, cases must be decided on admissible evidence, according to law. The plaintiffs carry the burden of proving by a balance of probabilities not what they believe, although that is sometimes a relevant consideration, but rather facts which permit the application of the legal principles which they assert. The court is not free to do whatever it wishes. Judges, like everyone else, must follow the law as they understand it.
>
> What follows, therefore, is my best effort to determine whether the plaintiffs have proven, by a preponderance of admissible evidence, the facts which they have alleged in their pleadings, and whether such facts establish legal rights which are recognized by the law of this province.
>
> I am sure that the plaintiffs understand that although the aboriginal laws which they

> recognize could be relevant on some issues, I must decide this case only according to what they call "the white man's law..." [137]

It should be noted that such "white man's law" is certainly made only by those who are known as white men by Indian people in Parliament and the Legislatures without the participation of Indian people. This reliance on one side's institutions confirms the Indian Nations' belief that the laws are discriminatory.

It seems ironic, in light of Justice McEachern's general position, that he endorsed the approach enunciated by Justice Dickson in *Kruger* v. *R.*[138] that when dealing with Indian cultures and record keeping:

> Claims of aboriginal title are woven with history, legend, politics and moral obligations. If the claim of any Band in respect of any particular land is to be decided as a justiciable issue, and not a political issue, it should be so considered on the facts pertinent to that Band and to that land, and not on any global basis.[139]

However, the relatively liberal approach of *Kruger* does not address the fundamental flaw in Canadian law put in evidence so recently by Justice McEachern's decision in *Delgamuukw*. This flaw is the assumption that the Indian Nations did not and cannot function as a government, and that they did not and do not have the capacity to own land.

Delgamuukw is relevant to the question of the interpretation of the written treaties because, as Justice McEachern recognized,

> [t]hese treaties or agreements are of fundamental importance to the understanding of the legal authorities which were so much discussed at trial. They furnish the background for the development of the law...[140]

---

137. *Ibid.* at p. 6.

138. *Kruger* v. *R.*, [1978] 1 S.C.R. 104.

139. *Ibid.* at p. 109.

140. *Supra*, footnote 118, at p. 19.

Unless the courts develop new evidentiary rules unique to Indian claims, which allow Indian oral history to be admitted in evidence and given weight, the Indian people will find it nearly impossible to press such claims. In the 1985 case of *Simon*[141], the Supreme Court of Canada overturned the Court of Appeal's finding that Simon had not proven that he was a direct descendent of the Micmacs who had entered into the Treaty of 1752 and that therefore, even if the treaty were valid, he could not come within its protection. The Supreme Court found to the contrary, that Simon had succeeded in proving that he had a sufficient connection to the tribe in question. Chief Justice Dickson went on to say:

> True, this evidence is not conclusive proof that the appellant is a direct descendant of the Micmac Indians covered by the Treaty of 1752. It must, however, be sufficient, for otherwise no Micmac Indian would be able to establish descendancy. The Micmacs did not keep written records. Micmac traditions are largely oral in nature. To impose an impossible burden of proof would, in effect, render nugatory any right to hunt that a present day Shubenacadie Micmac Indian would otherwise be entitled to invoke based on this treaty.[142]

Notwithstanding this generous ruling, Indians labour under a crushing evidentiary burden. Most of the cases which have dealt with the admissibility of evidence in Indian rights cases have involved aboriginal land claims. In these cases, the courts have heard vast amounts of evidence.

At issue in the 1984 Ontario case, *Attorney General for Ontario* v. *Bear Island Foundation et al*,[143] heard by Steele, J., was an Indian claim to an interest in unpatented lands. The Court concluded that the defendants had no right, title or interest in the land in question and that the province of Ontario was entitled to a declaration that all unpatented lands in the Land Claim Area were public lands within the meaning of the *Public Lands Act*[144]. Justice Steele explored issues preliminary to the suit, among them the question of the admission of oral history. He summed up the requirements by saying:

---

[141]. *Supra*, footnote 84.

[142]. *Ibid.* at p. 407.

[143]. *Attorney General for Ontario v. Bear Island Foundation et al*, [1985] 1 C.N.L.R. 1 (Ont. S.C.).

[144]. R.S.O. 1970, c. 380.

> Indian oral history is admissible in aboriginal land claim cases where their history was never recorded in writing. However, this does not detract from the basic principle that the court should always be given the best evidence. The court has an obligation, first, to weigh the evidence and consider what evidence is the best evidence and, second, if such best evidence is not introduced, to consider making an adverse finding against the person who has failed to produce it.[145]

Justice Steele was concerned that the oral history advanced by the Indians on direct evidence may not have been accurate and might be contradicted by other evidence. He said that, like other evidence, oral history is to be weighed and that consideration should be given to the effects of poor memory.

Justice Steele was disappointed that he was not presented with what he considered to be the best evidence in this case. The old people who could have given the oral history in this case did not testify. Instead the oral history was related in the main by Chief Potts who, Justice Steele concluded, did not have a good claim to knowing first-hand the oral history of the band. I have been told that the elders were not called because of concerns that the adversarial system was too alien to them, and the impact of being on the stand could damage their health. If our system recognized the treaties as being international in nature, the elders' testimony would not be necessary as judges could read in principles of international law where applicable. In the United States, treaties with Indian nations are on a par with international treaties so that, as an example, internal powers of a nation are read into those powers retained by Indian nations within the context of modern reality. Treaties with Indians tribes, however, differ from foreign treaties in at least two important respects. Through the application of special canons of construction, Indian treaties are construed in favour of the Indians. Further, United States courts will not find that Indian treaties have been abrogated by later treaties or legislation unless abrogation was clearly and specifically intended. Neither of these rules applies to treaties with foreign nations; the rules are based upon the trust relationship with Indian tribes, a factor not present in international affairs.

Justice Steele found that the knowledge of those witnesses who were called was limited in time to what they had been told by their immediate grandparents. While he did not refuse to admit the evidence, it is clear that he gave it little weight, regretting that,

---

[145]. *Supra*, footnote 143, at p. 16.

> [U]nlike many other Indian land claim cases, the present case has not been presented through a concurrence of many voices with respect to the oral tradition of the band. There has really been only one voice, that of Chief Potts. Obviously, even in the context of oral history, the best evidence rule permits the court to seriously consider the weight to be given to the evidence of Chief Potts under these circumstances.
>
> Chief Potts, who is thirty-eight years old, has a white mother and a father who is not of pure Indian ancestry, and whose Indian ancestry descended from persons who arrived on the lands about 1901, long after most of the issues in dispute had occurred. It could not be said that his own ancestors had any direct oral knowledge of the events in question. He was therefore merely giving evidence of oral history he had accumulated from other members of the band. He cannot speak the native language and therefore has difficulty in communicating fully with some of the oldest members, although they speak English.[146]

The Ontario Court of Appeal affirmed Justice Steele's decision and summed up this concern about Chief Potts' testimony by saying:

> His evidence was not, in any sense, the best evidence available and there were available, older band members who could recount oral tradition.[147]

The Supreme Court of Canada, although they agreed that an appellate court should not reverse the trial judge on his findings of fact, did not agree with the legal findings based on the facts. They ruled that, on the facts as found by the trial judge, the Indians had exercised sufficient occupation of the lands in question throughout the relevant period to establish an aboriginal right.[148] In other words, the Supreme Court of Canada gave weight to the facts given by Chief Potts and others.

The prospects for the acceptance by courts of elders' evidence to establish oral promises suffered a setback in 1993 in the Federal Court of Appeal case of *Apsassin* v. *The Queen*[149]. In that case,

---

146. *Ibid.* at pp. 17-18.

147. *Ontario (A.-G.) v. Bear Island Foundation* (1989), 68 O.R. (2d) 394 (C.A.), at p. 399.

148. *Ontario (A.G.)* v. *Bear Island Foundation*, [1991] 3 C.N.L.R. 79.

149. *Apsassin* v. *Canada*, [1993] 2 C.N.L.R. 20.

judges could not understand the elders and the elders had difficulties communicating in the courtroom setting. The Federal Court of Appeal affirmed the trial judge's decision[150] to reject all of the testimony advanced by the Indian witnesses, elders who were direct witnesses to the events which were the subject of the court action and which took place in 1940, 1944, and 1945. The Court instead accepted the evidence of the Crown's witnesses.

In this case, Joseph Apsassin, as Chief of the Blueberry River Indian Band, and Jerry Attachie, as Chief of the Doig River Indian Band, acting on their own behalf and on behalf of all members of their respective Bands as well as present descendants of the Beaver Band of Indians, sued the Government of Canada. The Bands had originally been one Band, the Beaver Band of Fort St. John, British Columbia. For governmental administrative purposes, this Band was called the Fort St. John Band, from 1962 until 1977. In 1977, it was divided into two band: the Blueberry River Indian Band and the Doig River Indian Band.

Ancestors of these two Bands resided in and occupied their traditional territory. They belong to the Indian people collectively known as the "Dunne-Za Cree" which is a combination name for the Beaver, and the Cree.

The Beaver Band of Fort St. John entered into Treaty No. 8 in May, 1900. No reserve was immediately set aside on their behalf because of the Crown undertaking given to the Dunne-Za Cree that they could continue to have free access to their traditional territory. Pursuant to the land entitlement provision of the treaty, Indian Reserve 172(I.R. 172) comprised of 18,168 acres, which was their full treaty land entitlement, was set aside on their behalf in 1916. Thereafter, pressure was exerted upon the Crown by the settlor population to allow the use of I.R. 172 by settlers, in particular veterans. This pressure was at resisted by the Crown but was eventually acceded to. In 1940, there was a surrender of the minerals in I.R. 172, and in 1945 all of I.R. 172 was surrendered, including the minerals (even though they were not expressly referred to in the surrender documents or the surrender process).

It was found by the trial judge, and confirmed by the majority of the Federal Court of Appeal, that the Dunne-Za Cree had exercised their informed consent to the relinquishment of I.R. 172 at a Band meeting of September 22, 1945.

---

[150]. *Apsassin* v. *Canada*, [1988] 1 C.N.L.R. 73.

The proposed sale of I.R. 172 had first been discussed with the Dunne-Za Cree at a July 19, 1944 meeting of the Band by the Indian Agent. It was the Indian Agent's opinion that the Band was prepared to consent to a cash sale to the Government of Canada on certain terms. What was known as I.R. 172 was transferred in 1948 to the Director of the Veterans' Land Act for eventual transfer to individual veterans and others. It was found that throughout this time, "most of the Band members eked out what was at best a squalid existence as squatters on Provincial lands." They eventually received replacement land in three (3) reserves in 1950, comprising approximately 6,194 acres.

There was a considerable amount of documentary evidence and oral evidence led by both sides pertaining to the question of informed consent. There was sufficient evidence adduced by the plaintiffs to put in issue from a factual standpoint the question of whether there was informed consent to the 1945 surrender.

At the time of the trial judge's decision in 1988, there were thirteen members of the Band alive who had attended the 1944 meeting, and fourteen alive who were present at the 1945 meeting. Only six members provided evidence regarding the events in the years preceding the 1945 surrender meeting and the details of what actually happened at that meeting. The evidence of three of these witnesses had been taken on commission in 1980, and the remaining three testified at the trial. Five of the six Indian witnesses testified in their native language. All of the Indian witnesses' evidence was rejected by the trial judge. The following is a summary of his comments:

> 1. On the videotaped evidence: The interpreters appeared to lack any experience as legal interpreters and were members of the plaintiff bands who were interested personally in the outcome of the trial as their elders. The questioning of the witnesses was not properly conducted by counsel, in that the examination had merely begun when, instead of addressing questions directly to the witness, they addressed inquiries to the interpreter indicating the substance of the information they wished to obtain from the witness. The interpreter addressed the witness, at times at length and with exchanges between only the interpreter and witnesses, and then the interpreter would turn to counsel to deliver what was often a short answer after the lengthy exchange. This manner of proceeding was improper. After the judge ordered that the interpretations be verified, counsel agreed that the interpretation of the commission evidence of one of the Indian witnesses was so inaccurate

that it had to be disregarded, and the evidence of another witness was modified. The trial judge made several observations in respect of the videotaped evidence, including that taping should include the direct frontal close-ups of the witnesses' faces so that the judge could observe the demeanour of the witness; commission evidence should be taken before a legally trained person or a judge, and that videotaping of oral testimony should be provided for in the Rules of Court.

2. On the Indian witnesses: the general thrust of the evidence was that they personally had not consented to the surrender. Some stated that others had been opposed or had been hardly consulted but the main complaint seemed to be that they had been promised by the Chief at the time that they would receive a lot of money of which they saw little or, indeed, none at all. Their testimony was found to be unreliable or coached. They could not recollect the meeting, retracted their statements on cross-examination or were not responsive to questions. The Judge found that the Indian witnesses' testimony was founded on the fact that oil was discovered on the reserve some thirty years later rather than on a true recollection and description of what actually took place.

The judge found, in the main, that the evidence of the defence witnesses was accurate.

The trial judge's comments are of assistance to us in appreciating and understanding the nature and scope of how evidence is viewed by judges, and how the process for proving evidence can be foreign and adverse to the Indian manner of oral history. The comments of the trial judge in respect of the defence witnesses may be summarized as follows:

1. The Indian Affairs official who presided at the surrender meeting and took the surrender was feeble, tired, quite senile and suffering from considerable memory loss when he testified. However, the judge found him to be sincere and sympathetic towards the Indian people because of one comment to the Indian litigants' counsel that, "And it is nice to know you are interested in the Indian people." Accordingly, because of the manner in which he gave his testimony the judge was convinced that he was not the sort of person who would trick the Indians, or fail to conduct the meeting in a fair and conscientious manner. The judge found that his conduct particularly during cross-examination added credibility and weight to the letters, reports and documents signed by him pertaining to the matter in issue.

2. An individual who had been a R.C.M.P. Constable in 1945, testified to a treaty meeting of July 25th and 26th, 1945 in which the proposed surrender was discussed extensively by

the Department of Indian Affairs with the Indian people. His testimony contradicted the Indian witnesses, who said that the subject of a surrender was first raised at the crucial September surrender meeting, without giving them a chance to think it over. This witness had written a report on the July meeting. The judge was impressed by the evidence of this witness and considered him to be absolutely independent and disinterested in the outcome. This witness testified in cross-examination that the Chiefs had told the Indian Agent at the time that they wanted to sell the reserve and were assured that other land would be obtained for them closer to their traplines. The testimony that the Indians knew of the proposed surrender well in advance was reinforced by the game warden who had met with some of the Indian people and Department of Indian Affairs officials about the proposed selection of alternate sites for a reserve, at which time allegedly the proposed process for a surrender was discussed. The judge found the warden's recollection of the events to be good and convincing. His recollection was refreshed by his reference to his personal diary.

3. The Indian agent, testifying on commission in 1981, described the events of the surrender meeting. The judge found that his recollection appeared to be true and accurate. He was able to refresh his memory from his own diary. He testified that the surrender vote was conducted fairly, and the process he described established, in the judge's view, that the true informed consent of the Indians was obtained.

4. The judge accepted the official government documents of the day describing the events that led him to accept the testimony that the informed consent of the Indian people was obtained and rejected the oral testimony of the elders.

The judge's earlier statements about the nature and scope of the court process are of assistance to us in understanding and identifying the cross-cultural problems that arise in litigation.

In an earlier written decision[151] on a motion to have certain documents admitted as evidence, Judge Addy issued reasons in which he mentioned general principles of the court process. With respect to the law governing exceptions to the hearsay rule, he wrote:

At no time, in recent memory at least, could the law governing exceptions to the hearsay rule have been accurately characterized as either clear, absolute or certain: it has constantly been re-examined and subjected to equivocal casuistic distinctions arising from the unceasing search for truth which preoccupies both lawyers and Judges. During this search they

[151]. *Apsassin* v. *The Queen*, 17 C.P.C. (2d) 187, (1987),

> frequently feel unjustly and unfairly hampered by precedent, artificial rules and procedural barriers prescribing various limits to exceptions to the hearsay rule and therefore regularly seek to push beyond them. There do exist however distinct limits beyond which the search cannot extend, without seriously jeopardizing that very goal and indeed, at times, compromising the twin principles of reasonableness and fairness which must govern the whole judicial process.
>
> The testing of the accuracy of any statement of a fact is, generally speaking, every bit as important as the evidence itself. Since one of the most effective tools for carrying out this task is the cross-examination of the person purporting to have direct knowledge of the matter, this means of testing evidence must always be protected and never circumvented or thwarted where it is reasonably possible to trust the evidence by employing it. The substance of hearsay is not subject to effective testing at trial by cross-examination.[152]

It is the contention of the Indian people that such principles of the court process create fundamental problems for Indian people because of cultural differences. The gulf between the Indian cultures and the Anglo-Canadian culture, on which the court process is based, can be overwhelming. A Crown Attorney familiar with Indian witnesses has commented that,

> Acts are never merely acts. They are also signals of attitude. Those signals, however, are often culture specific. When acts are seen, but their signal content misinterpreted, it is impossible to avoid forming inaccurate interpretations of others. Until we understand what particular acts mean to the other, we will continually ascribe motivations and states of mind which are well off the mark.[153]

As an example, in the case before Addy, J., he stated that the videotaped evidence should include direct frontal close-ups of the witness's face so that the judge could concentrate on and observe the demeanour of the witness. However, looking someone straight in the eye is not necessarily seen as implying honesty in the Indian cultures. In fact it means that you consider a person inferior. The proper way to send a person respect, as Rupert Ross notes, is "to look down or to the side, with only occasional glances up to indicate attention."[154]

---

[152]. *Ibid.* at p. 189-190.

[153]. Rupert Ross, *Dancing with a Ghost: Exploring Indian Reality* (Octopus, 1992) at p. 3.

[154]. *Ibid.* at p. 3-4.

Courts in Canada sometimes have made an exception to the hearsay rule in Indian cases, thereby admitting the oral history and tradition of the tribe as retold by the elders of each generation. In *Paulette*[155], Justice Morrow admitted the oral history that the Indian people had not surrendered their rights in the land through witnesses who were not present at the treaty sessions, into evidence as an exception to the hearsay rule:

> Similarly, in my treatment of the sometimes repetitious statements of the many Indians witnesses as to what their ancestors did, I have considered them as coming within the exception to the hearsay rule relating to declarations of deceased persons about matters of public and general rights: Milirrpum et al. v. Nabalco Pty, Ltd. et al. (1971), 17 F.L.R. 141.

In *Delgamuukw 1*, Chief Justice McEachern for the British Columbia Supreme Court said:

> Much important evidence in this massive action for aboriginal title is admissible, if at all, only by an exception to the hearsay rule. This is because the plaintiffs seek to establish by declarations made by deceased persons not just many details of their history, laws, traditions and cultures but, in addition, the antiquity or "time depth" of these important matters.[156]

This exception to the hearsay rule is rarely invoked and, therefore, the Courts have not developed extensive guidelines for its use.

Clay McLeod is a winner of the William Morrow Essay Contest of January, 1992, which contest is named after Judge William Morrow of the Northwest Territories Supreme Court, who among other cases, ruled on the *Paulette* case. Mr. McLeod wrote on the issue of judges' problems with oral history.[157] He argues that when rules of evidence are applied in a culturally relevant, unbiased fashion, it becomes clear that oral histories can be admitted as evidence and that it is proper for courts to accept oral history as evidence. He argues that judicial notice can be taken of the aboriginal perspective.

---

[155]. *Supra*, footnote 68.

[156]. *Uukw v. R.*, [1988] 1 C.N.L.R. 188 (B.C.S.C.), [correct name is Delgamuukw and Uukw.

[157]. C. McLeod, (1992), 30 Alta. L. Rev. 1276.

In *Sioui*, Justice Lamer, as he then was, commented on this point:

> I am of the view that all the documents to which I will refer, whether my attention was drawn to them by the intervenor or as a result of my personal research, are documents of a historical nature which I am entitled to rely on pursuant to the concept of judicial knowledge.[158]

Justice Lamer quoted Justice Norris of the British Columbia Court of Appeal in *White and Bob*[159] that the court is entitled to take judicial notice of the facts of history, and is entitled to rely on its own historical knowledge. Judicial knowledge, however, is based on each individual person's view of history. Mr. McLeod found this to be a problem that each individual will give weight to only certain historical sources, in his reference to certain judicial reasons including those of Steele J. in the *Bear Island* case that oral history "may be contradicted by factual records."[160].

> Steele J. let his ethnocentric biases in favour of the literacy of his own culture blind him to the value of oral histories; oral histories are just as capable of contradicting "factual records" as "factual records" are of contradicting oral history. In the dissent in the *Horseman* case, Wilson J. also fell victim to her own ethnocentric biases. She asserted that oral history evidence regarding the meaning of Treaties is relevant "where it confirms the archival evidence with respect to the meaning of the treaty." By regarding oral history evidence as a source of confirmation of archival evidence Wilson J. implicitly denies that it is useful as a primary source of historical knowledge.[161]

Because the cultural and historical gulf between the concept of the validity of oral history and the Canadian judicial system is so vast a system outside the present court process is required for the proper interpretation of treaties.

One of the most recent written 1995 judgements, *Chippewas of Kettle and Stony Point* v. *Attorney*

---

158. *Supra*, footnote 36, at p. 144.

159. *R.* v. *White and Bob*, 52 D.L.R. 2d 481.

160. *Supra*, footnote 143, at p. 17.

161. *Supra*, footnote 157, at p. 1282.

General of Canada, et.al.[162], followed technical rules as opposed to looking carefully at the substance of the right. The First Nation was suing for, amongst other things, a declaration that an order-in-council giving force to a surrender of reserve land was a nullity. Judge Killeen had this comment on the Indian evidence:

> The evidence [the First Nation evidence] to the contrary is the rankest form of hearsay and opinion evidence and cannot stand beside the Crown evidence.[163]

In his ruling in favour of the Crown against the First Nation, the judge was guided by the trial-level decision *Apsassin*[164] in its use of technical rules.

9 **RECOMMENDATIONS FOR A TREATY TRIBUNAL**

In the United States, it has been found that some important treaties were consummated by methods amounting to bribery, or were signed by representatives of only small parts of the signatory tribes.[165]

These same questions remain outstanding with respect to many Canadian treaties, such as Treaty No. 4 and Treaty No. 9.

In the United States the courts have been able to update the treaties by:

9.1 Their creative use of the concept of the international nature of Indian treaties so that all internal powers of self-government and rights to an economic livelihood by the ownership and exploitation of resources are deemed to have been retained by the Indian Nations and,

9.2 By the use of the trust responsibility, i.e., by interpreting the treaties as if it were the intention

---

[162]. 24 O.R. (3d) 654.

[163]. *Ibid*, at p. 689.

[164]. *Supra*, footnote 150.

[165]. *Supra*, footnote 91, at p. 63.

> of the United States government to treat the Indian people with honour.

The method of interpretation based only on the trust responsibility, and not on the concept of the international status of treaties, is now receiving consideration in Canada. In *Taylor and Williams*, Associate Chief Justice MacKinnon raised the issue of the intent of a treaty:

> If the Indians were to remain in the area one wonders how they were to survive if their ancient right to hunt and fish for food was not continued.[166]

The Court of Appeal dealt with the problem by reading the oral promises into the treaty.

The effective implication of a trust responsibility would assist the survival of the Indian people within the modern context. The treaties would have wider implications. This avenue of bringing redress to episodes in our history, rather than being bound by agreements made in an era dominated by a colonial society, is consistent with democratic theory. An American author has argued for the change of federal Indian law from a "twentieth century anachronistic remnant of our colonial traditions to a body of jurisprudence more conducive to and sympathetic with the cultural preservation, autonomy, and adaptation of evolving Native American tribal institutions."[167]

It is my recommendation that Canada, after receiving the consent of the First Nations under the provisions of a new treaty, use section 101 of the *Constitution Act, 1867* to establish, in the words of that provision, "any additional courts for the better administration of the laws of Canada", to create a specialized federal tribunal as the court of first instance with respect to Indian treaties. The parties in an action would have the right of appeal to the Supreme Court of Canada. This court would have the authority to deal with all treaty litigation.

This recommendation for a specialized tribunal was first considered as part of the *Charlottetown Accord* in relation to the Native peoples' inherent right of self-government. It was recommended in the *Accord* that the issue of special courts or tribunals be on the agenda of a future First Ministers' Conference on Aboriginal Constitutional matters.

---

166. *Supra*, footnote 85, at p. 367.

167. Clinton, *supra*, footnote 7 at p. 45.

The *Charlottetown Accord*, which was approved by the Government of Canada, and the provincial governments but rejected in a referendum, also adopted an Indian treaty provision which can guide us in the creation of a Treaty Tribunal. The *Accord* stated:

> With respect to treaties with Aboriginal peoples, the Constitution should be amended as follows:
>
> -treaty rights should be interpreted in a just, broad and liberal manner taking into account the spirit and intent of the treaties and the context in which they were negotiated;
>
> -the Government of Canada should be committed to establishing and participating in good faith in a joint process to clarify or implement treaty rights, or to rectify terms of treaties when agreed to by the parties. The governments of the provinces should also be committed, to the extent that they have jurisdiction, to participation in the above treaty process when invited by the government of Canada and the Aboriginal peoples concerned or where specified in a treaty;
>
> -participants in this process should have regard, among other things and where appropriate, to the spirit and intent of the treaties as understood by Aboriginal peoples. It should be confirmed that all Aboriginal peoples that possess treaty rights shall have equitable access to this treaty process;
>
> -it should be provided that these treaty amendments shall not extend the authority of any government or legislature, or affect the rights of Aboriginal peoples not party to the treaty concerned.

This federal, provincial, and aboriginal government draft serves well as a guide for the development of a specialized tribunal on treaties.

10 POSSIBLE MODELS FOR RESOLVING TREATY-RELATED DISPUTES

I have demonstrated, the response of Canadian courts to the interpretation of treaties has not been consistently satisfactory from the perspective of the First Nations of this country. There are two major ways in which Canadian courts have responded which is alien to First Nations'.

1.In the treatment of First Nations peoples accused of violating provincial or federal laws to which First Nations may or may not consider themselves subject, and in connection therewith, in the determination of the appropriate application of such provincial and federal laws to the

peoples of the First Nations.

2. In the interpretation and determination of the extent and implementation of treaty rights.

Specifically, the concerns I have identified in this paper are:

a. The failure of the courts to understand, acknowledge and incorporate into their decisions on treaty rights the unique cultural perspective of the First Nations as to the scope and intent of the treaties.

b. The failure to provide full weight to all the available oral evidence relating to the First Nations' understanding and intentions as participants in the treaty-making process. The application of legalistic rules of evidence prevents the courts from fully incorporating First Nations' evidence, because that evidence has been recorded and kept in a form not fully recognized by existing rules of evidence, (i.e. orally in the form of stories passed through the generations).

c. The failure of the courts to hear complete First Nations evidence because of the alienation of many of the First Nations peoples who could provide such evidence, from the judicial forum in which such decisions are made.

d. The failure of the courts to understand, acknowledge, and incorporate into their decisions, the First Nations' understanding of property rights and rights relating to the land.

e. The failure of the courts to take a clear and consistent approach in defining the constitutional role which First Nations play in this country.

f. The failure of the courts to recognize the Indian treaties as international treaties.

The failures of and limits imposed by the existing judicial system demands the establishment of a more responsive and culturally sensitive process for resolving disputes involving First Nations peoples.

I have suggested that the establishment under Section 101 of the *Constitution Act, 1867* of a

separate, specialized federal justice system to deal specifically with treaty rights cases, including attempts by Indian people to have treaty rights implemented and enforced, and also to deal with alleged transgressions by Indian people of federal or provincial laws would lead to the resolution of many of the present inadequacies.

The specialized court I am proposing should constitute a forum and involve processes which do not alienate Indian people. The court should be comprised of decision makers who are knowledgeable about the scope and application of aboriginal and treaty rights, and responsive to the cultural perspectives and constitutional implications of applying provincial and federal laws to Indian people.

Possible models for such a separate aboriginal court and justice system have been comprehensively discussed in *Aboriginal Peoples and the Justice System - Report of the National Round Table on Aboriginal Justice Issues, (1993)* recently published by the Royal Commission on Aboriginal Peoples. I will not attempt to review the issues so clearly and admirably dealt with in that publication.

It is open to the governments of this country to encourage and pursue creative and innovative ideas for resolving issues arising from the interpretation and implementation of treaty rights.

Looking for an alternative to the court process for the resolution of disputes, in order to achieve a more satisfactory result for all parties, is not a new exercise. Professor Paul Emond, in his paper *Alternative Dispute Resolution: A Conceptual Overview*, summed up the advantages of the adversarial court process as follows:

> "... confrontation and the adversarial process have served North American society well and will continue to do so. There are few better ways of rigorously testing facts, witness credibility and evidence than in the adversarial setting of the courtroom. It is, to use the words of one commentator, the 'greatest legal engine ever invented for the discovery of truth.'"[168]

---

[168]. D. Paul Emond, ed., *Commercial Dispute Resolution, Alternative to Litigation, "Alternative Dispute Resolution: A Conceptual Overview,"* D. Paul Emond, Canada Law Book Inc., 1989, at p. 4.

This implies, however, a general acceptance of the notion that there is a single truth. However, "truth" may have different meanings. In his foreword to the book "Dancing with a Ghost", Basil H. Johnston comments on one view of "truth":

> "The Anishinaubaeg had a high regard akin to reverence for story-tellers, orators, and for language itself. The highest compliment or tribute they could pay a speaker was to say of him or her "w'daeb-wae", taken to mean "he/she is right, correct, accurate, truthful." It is an expression approximating the word for "truth" in the English language except that it means that one casts one's knowledge as far as one has perceived it and as accurately as one can describe it, given one's command of language. In other words, the best one can do is to tell what one knows with the highest degree of accuracy. Beyond this one cannot go. According to this understanding there is or can be no such thing as absolute truth."[169]

Professor Emond confirms the value of alternative dispute resolution, saying:

> "But while there is nothing inherently wrong with adjudication and the judicial process, there is much wrong with using adjudication to solve all problems. The judicial process tends to transform social, political and economic disputes into legal disputes. Not only are some problems ill-suited to a proper or full resolution through the adversarial process, the process may accentuate and exaggerate conflict rather than resolve it."[170]

> "The search for an 'alternative' process, therefore, is the search for a more consensual approach to problem solving, more accessible and community-oriented forms of dispute resolution and less expensive, more efficient ways of resolving disputes.... In short, the search is for a more acceptable process and more satisfying results."[171]

These comments on the benefits of alternatives to the court process for dispute resolution, although intended to apply to commercial disputes also apply to the issues raised in this paper.

Alternatives to the courts for the resolution of disputes include deciding an issue by majority vote, negotiation, conciliation, mediation, consensual or statutory arbitration, and decision-making by administrative tribunals having a particular expertise in the matter to be decided. Negotiation, and mediation already play a material role in the resolution of treaty-related issues. The focus of what

---

169. Foreword by Basil H. Johnston, *Supra*, footnote 140, at p. xii.

170. *Supra*, footnote 168, at p. 4.

171. *Supra*, footnote 168, at p. 3.

follows is on methods of dispute resolution other than the courts, which can be invoked when such approaches fail.

Existing models of alternative adjudication for the resolution of treaty disputes may not be capable of dealing with the cultural, constitutional, political, and social issues inherent in resolving such disputes. However, a comprehensive review of the currently available models could provide the starting point for a process which might come close to meeting the needs of all of the participants in the process or, at minimum, result in a process which does not alienate one of the key participants.

While a comprehensive review of potential models is beyond the scope of this paper, it is hoped that a few brief comments on this issue might suggest directions which might be explored to arrive at a new dispute resolution process dealing with treaty rights.

In reviewing possible treaty alternative dispute resolution (ADR) models, it is important to clearly characterize the relationship between the parties. It is suggested that the following two principles be recognized as the key elements characterizing the relationship between this country's First Nations and the provincial and federal governments:

1. The acceptance of the fiduciary relationship that exists between the governments of this country and the First Nations.

2. The acceptance of the First Nations as a "constitutional order" having a political autonomy within the political structure of this country or outside Canada, depending on the nature of the treaty relationships of each First Nation with Canada, which may be a partnership or an alliance only.

These concepts are discussed at length in Brian Slattery's 1992 article, "First Nations and the Constitution"

> "...when the Crown gained suzerainty over First Nations, it assumed special fiduciary responsibilities, which included the duty of shielding them from the potential depredations of incoming settlers. This fiduciary relationship was a variation on the normal duty of protection owed by the Crown to its subjects. It arose from the tacit arrangement whereby First Nations relinquished the right to defend themselves militarily in return for Crown

protection, while remaining quasi-autonomous political entities."[172]

> "The Crown's fiduciary obligations are owed to Aboriginal nations as corporate entities, even if the individual members of the nations are also affected. This collective aspect of the relationship puts it on a par with the trust relationship implicit in the federal structure, whereby the Provinces enjoy certain powers and rights as collective entities considered apart from their citizens....From the legal perspective, Aboriginal nations are constitutional entities, rather than ethnic or racial groups. Although a First Nation, like a province, may happen to be composed mainly of people of a certain stock, its status does not stem from its racial or ethnic make-up but from its political autonomy."[173]

This fiduciary duty to a politically autonomous entity characterizes as well the relationship between the Provinces and the First Nations.

> "Since Section 91(24) of the *Constitution Act, 1867* makes the Federal government responsible for "Indians and Lands reserved for the Indians", the main burden of the trust relationship clearly falls on its shoulders. However, so long as the Provinces have powers and rights enabling them to affect adversely Aboriginal interests protected by the relationship, they hold attendant fiduciary obligations."[174]

There should be a further recognition that the unique cultural perspective and language of Indian people must be recognized in resolving treaty disputes.

It is suggested that, in addition to the available domestic models, the international models for the resolution of disputes between parties from countries of vastly different culture and language be reviewed and analyzed in order to assess the strengths and weaknesses of each model for our purpose.

It is recommend that any legislation which would implement a treaty ADR process, should be federal legislation passed pursuant to the Section 91(24) of the *Constitution Act, 1867*. While there is abundant judicial interpretation which indicates that provincial laws of general application apply to Indian peoples, and while there are many aspects of the treaties which may involve issues

---

[172]. *Supra*, footnote 10 at p. 289.

[173]. *Ibid.* at p. 273

[174]. *Ibid.*, at p. 274

identified as matters within the exclusive jurisdiction of the provincial legislatures, carefully constructed federal legislation would more likely achieve a consistent approach to dealings on these matters between both levels of government and the First Nations as politically autonomous entities.

While not approaching a complete list, three possible ADR models are suggested here. It is assumed in these suggestions that negotiation and mediation is a precedent to commencing an ADR process.

1. Statute-mandated arbitration, which has been developed and established after the consent of First Nations has been first obtained, to resolve specific issues, supervised by a specialized administrative tribunal responsible for overseeing and determining all disputes relating to treaties and treaty rights, with severely restricted access to the courts. An example of this model is the Canadian Labour Relations Board, and the related arbitration processes established pursuant to the *Canada Labour Code*.[175] Variations on this labour relations model exist in each of the provinces.

2. A consensual arbitration process agreed to by all parties prior to the commencement of negotiation/mediation, with precisely defined and restricted access to the courts once the arbitration process is commenced. Once the arbitration process is commenced it would be governed by the principles and process set out in legislation passed for that purpose. Examples of this model can be found in Ontario's *Arbitration Act, 1991*,[176] and similar arbitration legislation in other provinces.

3. An administrative tribunal which specializes in the unique issues and cultural principles applicable to resolving treaty disputes, without any mandatory or associated arbitration process, and with very restricted access to the courts. Examples of this type of administrative tribunal abound. However, the Ontario Municipal Board established under the *Ontario Municipal Board Act*[177] provides a good example of such a tribunal. This

---

[175]. *Labour Code, Canada*, S.C. 1990, c. L-2

[176]. *Arbitration Act, 1991*, S.O. 1991, c. A.17

[177]. *Ontario Municipal Board Act*, S.O. 1990, c. O.28

tribunal determines matters affecting government, and government policy, land, public interest groups, and other affected parties.

Implementing any or a combination of any of these models would require specific legislation which ensures that the problems identified with the court process are not repeated. A new set of rules could be created which blend the cultural imperatives of the First Nations, the precepts of fairness and justice which otherwise characterize the Canadian judicial system, and the constitutional, political and social realities which provide the background and context for the ultimate resolution of treaty issues.

In particular, the legislation must be carefully crafted so as to ensure the observance of the constitutional law, but does not restrict the decision maker(s) in the leeway and flexibility they need ultimately to resolve the matter. It must also be crafted so as not to offend the Judicature provisions of the *Constitution Act, 1867*. In that regard, much can be learned from a review of the law of other federal administrative tribunals.

If the chosen process is one involving an administrative tribunal, the persons appointed to that tribunal must be knowledgeable about it and responsive to matters relating to the cultures and history of the First Nations. If an arbitration model is chosen, arbitrators should exhibit a similar understanding. Alternatively, a tripartite model might be available. First Nations could appoint one arbitrator, governmental parties one arbitrator, and those arbitrators, by consensus, could each appoint a third. In this way, the parties could express their confidence in the third party "neutrals" who, would chair the tribunal's panels.

The forum and procedures must not be alien or hostile to First Nations witnesses. The principles outlined in this paper which have been established and applied in the American courts should be invoked in the legislation as guiding principles for decision making. Principles respecting the acceptance of oral evidence with respect to the treaty making process must be firmly established. Rules of evidence must permit due consideration of the unique perspectives of the First Nations.

Finally, the submission of the matter to a tribunal or to arbitration should preclude appeal or resort to the court system except in certain precisely-defined circumstances. The Federal Court of Canada should have ultimate jurisdiction, but its powers of intervention should be strictly defined and limited. Examples of privative clauses abound, and only a few examples are referenced here.

Section 22 of the *Labour Code, Canada*[178] precludes reference to the court of decisions of the Canada Labour Relations Board except in certain specific instances outlined in the *Federal Court Act*. The related arbitration process, which is subject to supervision by the Canada Labour Relations Board, is covered by Section 58.[179]

Section 45 of the *Arbitration Act, 1991* of Ontario sets out the principles by which leave to appeal to a court will be granted, and section 46 the basis on which an arbitrator's award will be set aside. However, Section 6 of the Ontario *Arbitration Act, 1991* establishes the four principles for courts to apply in determining when to intervene.

---

[178]. Section 22 of the *Labour Code, Canada* states the following with respect to decisions of the Canada Labour Relations Board:

22(1) Subject to this Part, every order of decision of the Board is final and shall not be questioned or reviewed in any court, except in accordance with paragraph 28(1) of the *Federal Court Act*.

(2)Except as permitted by subsection (1) no order, decision or proceeding of the Board made or carried on under, or purporting to be made or carried on under this Part shall

(a) be questioned, reviewed, prohibited or restrained, or

(b) be made the subject of any proceedings in or any process of any court, whether by way of injunction, certiorari, prohibition quo warranto, or otherwise, on any ground, including the ground that the order, decision or proceeding is beyond the jurisdiction of the Board to make or carry on or that, in the course of any proceeding, the Board for any reason exceeded or lost its jurisdiction.

[179]. Section 58 of the *Labour Code, Canada* states the following with respect to the decisions and proceedings of arbitrations.

(1) Every order or decision of an arbitrator or arbitration board is final and shall not be questioned or reviewed in any court.

(2) No order shall be made, process entered, or proceeding taken in any court, whether by way of injunction, certiorari, prohibition, quo warranto or otherwise, to question, review, prohibit or restrain an arbitrator or arbitration board in any of his or its proceedings under this Part.

(3) For the purposes of the *Federal Court Act*, an arbitrator appointed pursuant to a collective agreement or an arbitration board is not a federal board, commission or other tribunal within the meaning of that Act.

An alternative method for resolving issues relating to First Nations treaties in Canada appears possible. Nevertheless, there is a great deal of work ahead of us to arrive at an appropriate and workable proposal.

Although there are some alternative methods of dispute resolution now available to First Nations (e.g. the Office of the Treaty Commissioner[180], and the Indian Claims Commission[181]) those models differ from the tribunals referred to above because they can only recommend to the Minister of Indian Affairs; their decisions are not binding, and neither are their decisions part of the administration of justice process for appeals. The Office of the Treaty Commissioner is administered by the Lands, Trusts, and Revenues Section of the Department of Indian Affairs, a body which normally is in an adversarial relationship with Indian peoples.

The Indian Claims Commission appears to be more independent, and is developing an expertise that is superior to the present administration of justice system on matters related to historical Indian claims under the *Indian Act*, and the treaties. They hold formal hearings under the auspices of the federal *Inquiries Act*. They make written decisions which are highly technical in law, and yet are cognizant of Indian concerns. It is my experience that their dealings with Indian witnesses are handled with the greatest respect and consequently they are able to obtain the full stories from elders who would have problems in the ordinary courts. It is my recommendation that this body should be given the powers of a true tribunal, so that their decisions are binding and appealable to the Federal Court and the Supreme Court of Canada.

---

[180]. Memorandum of Understanding of June 8, 1989 between the Federation of Saskatchewan Indian Nations and the Minister of Indian Affairs and Northern Development.

[181]. Commission issued 1 September 1992 pursuant to Order in Council PC 1992-1730 (27 July 1992), amending the Commission issued to Chief Commissioner Harry S. LaForme on 12 August 1991) pursuant to Order in Council PC 1991-1329 (15 July 1991).