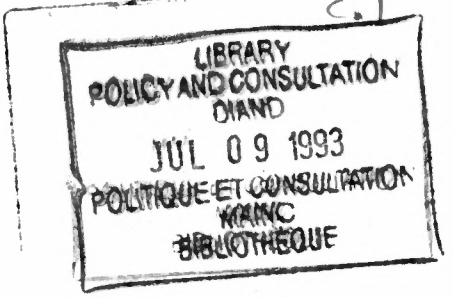
"Diseased Trusteeship" Repairing Canada's Relationship with Indian Nations



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REPAIRING REPAIRING CANADA'S RELATIONSHIP

WITH WITH INDIAN NATIONS

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QU'APPELLE TRIBAL COUNCIL

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REPAIRING CANADA'S RELATIONSHIP

WITH INDIAN NATIONS

INTRODUCTION

Alexander Morris met with assemblies of the Cree and Saulteaux nations at Qu'Appelle Lakes in 1874. His mission was to sign a treaty and thereby obtain the surrender of 75,000 square miles of Indian territory. The result was to be Treaty 4.

Treaty 4 was one of a sequence of eleven numbered post-confederation treaties which, in succeeding years, marked the pace of advancing European settlement into the west and north. With minor variations, all of these treaties were modelled after the Robinson treaties of 1850. The 1850 treaties established a formula consisting of a set of provisions, trade-offs, and a process, designed to separate Indian nations from their lands. To fathom the rationale underlying the numbered treaties, it is necessary to refer back to this earlier model.

Treaty making is a statutory requirement which is rooted in the Royal Proclamation of 1763. It remains so today. This is the statute that compels the Federal government currently to pursue comprehensive claims settlements in the Yukon and Northwest Territories, as well as in British Columbia and elsewhere where the original title of Indian nations remain intact.

The Proclamation is categorical in ruling out "frauds and abuses" as a way of acquiring Indian lands. The statute precribes that Indian lands cannot be acquired by any person or authority except the Crown. Such aquisition can only be done by purchase with the full consent of the Indians concerned. Moreover, such transactions are to be conducted on a nation to nation basis and are to be sanctioned in mutually acceptable treaties.

A requirement in a statute for formal Indian consent to any land surrender, by definition, implies informed consent. In law, the withholding, misrepresentation or intentional distortion of truth to induce another to surrender property or rights is fraud and a cause for legal action.

An examination of Morris' transcripts suggests that Cree and Saulteaux authorities were induced to sign Treaty 4 without any clear appreciation of its substance, meaning, or future

consequences. The evidence also shows that Morris totally misrepresented the treaty to the Indian people assembled at Qu'Appelle Lakes.

Throughout the six days of discussions, Morris made no explicit mention of the central purpose of the treaty. Nothing was said to suggest that the Cree and Saulteaux were expected to surrender forever to the Crown "... all their rights, titles, and privileges", in the words of a treaty that was printed in Ottawa, in a language that Indians could not understand.

Neither did Morris offer any hint of the government's hidden agenda which contradicted in virtually every respect his oral assurrances and promises to the Indian people. Morris' meeting with the Cree and Saulteaux in 1874 was taking place in the shadow of an "Indian Act" which had been in effect since 1868. This racist legislation categorized Indian governmental institutions, laws and customs as "irresponsible" and Indians who subscribe to their traditional political, social and cultural systems as "unfit". The clear aim of this statute was to deny the existence of Indian nationhood, and to reduce Indians to the status of minors, until such time as they were ready for assimilation.

In circumstances where Morris was clearly motivated by improper purpose and the need for evasion, what did he actually say to the Cree and Saulteaux delegates? What the Indians heard were his assertions that a treaty was a means of gaining the Queen's friendship -- that the Queen would be personally offended if the Indian people did not take her hand. Morris explained the treaty in terms of promoting peace and building a lasting alliance from which the Cree and Salteaux people would gain protection, as well as material and educational benefits. Morris described the treaty in terms of a relationship which would enable the signatories to "... live here like brothers".

In the context of Morris' statements, Indians would not see anything too objectionable in allowing "brothers" to share lands, especially those parts that were not needed to support an Indian economy based on hunting, fishing and trapping. The material rewards promised by Morris seemed little more than a kind of rental for the use of Indian land. Such legal niceties as "crown title", "surrender", and "fee simple" had no equivalents in the Cree and Saulteaux languages.

Morris' oral committments and assurances were taken by the Cree and Saulteaux as the actual treaty terms. This is not surprising in societies which, from time immemorial, operated in an oral tradition. No one bothered to explain to them the technical language contained in the printed English version of the treaty. Indeed, it is doubtful whether any of the interpreters employed

by Morris were capable of doing so.[1]

The Cree and Saulteaux simply accepted the printed treaty at face value as a tangible symbol of the terms that Morris had conveyed orally. Indian people were mindful of his solemn assertion that "... the Queen always keeps her word".

Treaty 4 is clearly a result of a process where, in observing the letter of the Royal Proclamation of 1763, the government of the day conveniently overlooked this statute's prohibition of "frauds and abuses". Morris represented himself to the Indian people as the Queen's personal delegate and he was accepted as such. In fact, Morris was representing the interests of a government in Ottawa headed by Alexander MacKenzie. Neither the Queen in England, nor her representative, the governor-general of Canada, was involved in the treaty making process in any way except in name.

Yet, an imperial treaty with the Cree and Saulteaux, made on the strength of the Queen's promises, is not something to be taken lightly. What was not recorded in the printed version of the treaty, and was quickly forgotten by the politicians in Ottawa, remains an integral part of the oral tradition of Cree and Saulteaux peoples. This tradition is the real treaty. It is the substance of the real treaty that can provide the guidlines for a new and mutually beneficial relationship between the Federal government and the Cree and Saulteaux peoples.

Recent court decisions have established that treaties between the Crown and Indian nations are legally enforceable agreements. Courts have also adopted rules of treaty interpretation which allow for the fact that printed versions of treaties do not necessarily reflect agreements that were actually struck.

Reference to international law and the trends being set by Canadian courts, applied to the spirit and intent of Treaty 4 as embodied in the oral tradition of the Cree and Saulteaux peoples, results in a totally different definition of rights, obligations, sharing, and other features of the agreement that was made. This paper undertakes such an analysis in the hope that it will be

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[1] The interpreters used by treaty Commissioners frequently saw themselves as employees of the government and obligated to adopt the same style of evasion and misrepresentation as their employers. This observation was made by a number of persons who expressed concern about the treaty making process. For example, a member of Parliament noted "It is easy enough to collect a body of Indians and if there are plenty of provisions, and if the interpreters and half-breeds were on the side of the government, it was easy to induce them to make treaty". HANSARD (Schultz), March 24, 1876, p. 821.

useful in establishing a basis for negotiation, or, if necessary, litigation.

I THE FICTION OF "CROWN TITLE"

In April 1989, Judge James Igloliorte of the Newfoundland Provincial Court, dismissed public mischief charges against four Innu Indians who protested military flights over their hunting grounds. In rendering his decision, the judge observed that "... I am satisfied that the four believe their ancestors predate any Canadian claims to ancestry on this land". In effect, the judge raised a fundamental legal question about the source and validity of so called crown title on Indian lands. This question is relevant for all Indian nations.

Doctrine of "Terra Nullius"

To trace the concept of crown title in Canada back to its origins is to enter an era when European colonial expansion was rationalized by an overlay of racism, greed and a drive for wealth, power and ascendency. Countering this drive to acquire new lands and resources was an emerging international legal code that argued against the right of any nation to assert sovereignty over lands that were already occupied by other peoples. Exceptions to this rule were recognized only in instances where lands were not populated, or in cases of war and conquest.

The British got around these moral and legal issues by adopting the doctrine of "terra nullius", which had been invented by Spaniards. Translated from the Latin, "terra nullius" means a land that "belongs to no one". In accordance with this doctrine, one simply had to declare a people in another land to be in need of "protection" and "civilization" because their culture, beliefs, life styles or whatever did not meet the standards of the colonizer. In these circumstances, war and conquest were not necessary and, in any case, was riskey and expensive. It was simply sufficient to declare sovereignty over such another nation of "nobodies", and assist them to become "somebody" by exchanging their sovereignty for bibles and the privilige of becoming British subjects.

The doctrine of "terra nullius" was incorporated into the Royal Proclamation of 1763, which declared that crown title was to be extended to the lands of all known and unknown Indian nations in accordance with "... our Royal will and pleasure". To reduce the possibility of war and possible defeat at the hands of Indian nations, some of which were perceived to be powerful, the Proclamation prescribed rules of conduct for British representatives in the colonies. Thus, Indian nations were to retain rights of possession and use over their lands, though the underlying title was seen as belonging to the Crown. Also, Indian nations were not to be "molested or disturbed" on their

lands, and any land cessions were to be obtained by treaty only if the ".... Indians were inclined to dispose of the said lands".

Few if any Indian nations knew about the Proclamation or its provisions. Indeed, there were Indian people who had never even encountered a representative of the alien authority who presumed to exercise sovereignty over their lands.

In line with Judge Igloliorte's comments, it seems relevant to ask whether there is any real substance to the concept of crown title where the lands of Indian nations are concerned. Is a doctrine of "terra nullius" sufficient to support the assertion of crown title over Indian territories simply to satisfy a "Royal will and pleasure"? By inference or in some other fashion, do subsequent statutes invoked without the consent of Indian nations, or treaties as such, legitimize or entrench the concept of "crown title"?

To address these questions, it is necessary to refer to the international arena where the doctrine of "terra nullius", treaties, statutes, and similar initiatives by colonizing nations have come under recent scrutiny and comment.

Decision of the International Court of Justice

In 1884, ten years after Treaty 4 was signed with the Cree and Saulteaux people at Qu'Appelle Lakes, Spain declared sovereignty over the Western Sahara in North Africa. Spanish colonizers justified this action on the basis of "terra nullius". Spain argued that the people inhabiting the Western Sahara were trading off this sovereignty for "protection" and "civilization". In other words, Spain was applying the same rationale that the British had expressed in the Royal Proclamation of 1763 and which the Canadian government invoked in 1874 when Morris puzzled his audience by stating that "... the land belongs to the Great Spirit (but) ... the lands are the Queen's under the Great Spirit".

The inhabitants of the Western Sahara resisted being absorbed by Spain and finally, referred the issue to the United Nations. The U.N. General Assembly in turn asked the International Court of Justice to rule on the legality of "terra nullius".

The International Court is made up of seven senior judges selected from as many countries, who are empowered to render an "Advisory Opinion". In effect, this Court's ruling does not impose a decision on any country; it simply indicates what their decision would be if they were operating in that country.

In the case of the Western Sahara, the International Court ruled in 1975 that:

(a) "Terra nullius" cannot be applied to lands that are previously inhabited by people having a social and political organization.

(b) Sovereignty over other peoples cannot be gained simply by unilateral declaration.

(c) To obtain land cessions from another people, treaties are necessary.

(d) A treaty does not necessarily mean that a people are giving up their sovereignty, their lands or their resources.

(e) A colonizer can never obtain original title to another peoples' lands. Whatever title is gained is derived from the treaty, and depends on the terms of the treaty.

In September 1989, the Advisory Opinion of the International Court was incorporated into a "Draft Universal Declaration on Indigenous Rights". This declaration is being developed by a United Nations Working Group on Indigenous Populations, a sub-group of the U.N. Commission on Human Rights. In Part III, article 15 of the draft declaration, it is stated that indigenous peoples have:

> "The right to reclaim land and surface resources or where this is not possible, to seek just and fair compensation for the same, when the property has been taken away from them without consent, in particular, if such deprival has been based on theories such as those related to discovery, terra nullius, waste lands or idle lands. Compensation, if the parties agree, may take the form of land or resources of quality and legal status at least equal to that of the property previously owned by them"

Implications

Translated into the historical and legal context in which Treaty 4 materialized, the decision of the International Court of 1975, and the more recent provision of the United Nations declaration, have enormous significance. These international decisions and declarations suggest that:

(1) The Crown's assertion of underlying title to all Indian lands does not rest on any sound legal foundation. The only title that has meaning and legal substance is original Indian title.

(2) The requirement for Indian consent with respect to any matters affecting their lands, resources, institutions, laws, or external relations is rooted in their inherent sovereignty. The Proclamation of 1763 simply recognized this fact; it did not

create this right.

(3) Whatever rights to lands and resources the Crown obtained by treaty depends on the terms of the treaty. Such rights do not rest on any underlying crown title but on the treaty itself, and can be exercised by the Crown only so long as the treaty remains in effect.

(4) Given the clear evidence that Morris was operating on questionable legal premises at Qu'Appelle Lakes and was employing manipulation, intimidation and misrepresentation to obtain Indian consent to a treaty, it is necessary to resurrect the Indian understanding of its terms and to implement these as the real treaty.

(5) All statutes passed unilaterally by the Canadian government with the informed consent of Cree and Salteaux peoples, do not supercede their aboriginal or treaty status as sovereign nations because there are legal grounds for denying that they ever agreed to come under the sovereignty of the Crown.

(6) The Consitution Act of 1982 recognizes and affirms "... existing aboriginal and treaty rights" which, properly interpreted, means that Indian sovereignty can be accommodated within Canada's federal system at some future date on mutually acceptable terms and conditions. In the interim, Canada can be said to be under a constitutional obligation to exercise a form of trusteeship over Indian sovereignty which guarantees the survival of Indian nations as distinct societies.

The traditional territories of the Cree and Saulteaux, which became the target of Treaty 4 negotiations in 1874, clearly were not taken by conquest. Indeed, following the Riel rebellion of 1869-70, the government in Ottawa was fearful of continuing Indian unrest on the prairies and persuaded of the urgency of reaching a peaceful accommodation with them.

Insofar as the Cree and Saulteaux peoples were concerned, their previous dealings with the Hudson's Bay Company was never perceived by them to be anything more than a mutually beneficial trading relationship. At the same time, they had never compromised their essential sovereignty by being party to any agreement or understanding that ascribed an underlying crown title to lands which they regarded as their own.

The only "crown title" that the Indians recognized was the one held by the "Great Spirit", under whose dominion they were obliged to protect their lands.

It seems therefore that under international law, Indian title to their lands and reserves amounts to a great deal more than simply rights of "possession and use". Moreover, there are ample legal

grounds for questioning the real meaning of the treaty which, in Morris' words, was expressed in terms of "... sharing the land for the good of all" and "... living here like brothers".

The following analysis attempts to explore in more depth the potential meaning and application of Treaty 4.

II TREATY 4: A "SHIELD" FOR INDIAN SOVEREIGNTY

Treaty 4, like the other Indian treaties, was concluded by the British Crown using the conventions and procedures that applied to international treaties. This means that Treaty 4 is an Imperial treaty and, as such, does not require to be ratified or confirmed by the Canadian Parliament. In undertaking the treaty obligations of the British Crown, Canada is simply obligated to implement the terms of its provisions. To do so, consititutional or legislative measures may be needed, which are the exclusive responsibilities of Parliament. The concurrence of provincial legislative bodies is not required.

The international nature of Indian treaties was pointed out in 1897 by the Hon. J.J. Curran, Q.C., Solicitor General of Canada. He stated:

> "We contend that these treaties are governed by international, rather than municipal law. They were made with the tribes under the authority of the Sovereign, and the faith of the nation was pledged ...".[2]

In effect therefore, Treaty 4 can be described in these terms:

(1) In dealing with the Cree and Saulteaux, the Crown was conducting arms length negotiations with sovereign Indian nations.

(2) Treaty 4 has all the attributes of an international treaty and is subject to international rules of treaty interpretation.

(3) As an Imperial treaty, it has the force of law which can only be abrogated, modified or changed with the consent of all parties to the original agreement.

(4) Should Canada choose to cancel the treaty unilaterally by means of legislation or in some other fashion, any rights that it gained by treaty to Indian lands and resources are also cancelled in accordance with international law.

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[2] From the records of the Federal-Provincial Arbitrations (Unsettled Accounts Arbitration), Indian Claims, Robinson Treaties, vol. 5.

(5) It is a recognized convention that statutory enactments do not intend to prevent the application of international law in the absence of clear language to that effect.

(6) Treaty 4 embodies and makes it possible to implement the whole range of rights that are necessary for the political and economic survival of Indian nations. In this sense, Section 35(1) of the Consitution Act is a "full box" contrary to the assertions of Federal authorities.

Recent court decisions in Canada are moving away from earlier precedents which today are viewed as having been coloured by racist values. The trend increasingly seems to be one that supports the Indians' view about the nature of their titles, the significance of their treaties, and the implications of a treaty relationship with the Crown.

A brief review of the more important of these court decisions illustrates that the burden of proof now falls on the Crown to show that it has properly extinguished Indian title to lands and resources, as well as other rights. In relevant cases, it is also the Crown that is expected to prove that it has fulfilled its legal obligations to Indian peoples.

Indian litigants moreover are no longer confined by strict rules of evidence as in the past. Courts are prepared to admit as evidence Indian oral tradition and history, as well as anything else that they believe will support their case.

Rules of Treaty Interpretation

At the high court levels, there is an evident trend to apply rules of interpretation to Indian treaties much along the same lines as is used in international adjudication. For example, in R v. Taylor and Williams (1981) the judge stated in his written decision that:

> "Cases on Indian or aboriginal rights can never be determined in a vacuum. It is of importance to consider the history and oral traditions of tribes concerned and the surrounding circumstances at the time of treaty, relied on by both parties, in determining the treaties' effect.

Later on in this judgement, a number of other principles of treaty interpretation were identified, namely:

> In approaching the terms of a treaty quite apart from the other considerations already noted, the honour of the Crown is always involved and no apparent "sharp dealing" should be sanctioned ... ".
>
> Further if there is ambiguity in the words or phrases used,

> not only should the words be interpreted as against the powers or drafters of such treaties, but such language should not be interpreted or construed to the prejudice of the Indians... ".
>
> Finally, if there is evidence by conduct or otherwise of the terms of the treaty then such understanding and practice is of assistance in giving context to the term or terms".

This inclination of courts to give treaties a broad and liberal interpretation in favour of Indians was also evident in the decision of Mr. Justice Dickson of the Supreme Court in the case of Nowegijick (1983). The judge wrote in his decision that:

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

In the Simon case, the judge suggested that in interpreting treaties, the construction should not be so limited as to make the treaty promises useless today.

In the Sioui case, the Quebec court placed the burden of proof on the Crown to show that a 1760 letter of understanding from a colonial governor was not in fact a treaty that was still good today. In this instance, the Crown could not prove its case and lost.

In one of the most recent decisions, the B.C. Court of Appeal in the case of Claxton vs Sannichton Marina Ltd et al (1989) considered the significance of a treaty signed in 1852 between the Tsawout people and governor Douglas. This treaty amounts to only seventeen printed lines and, on the surface, appears to be little more than a bill of sale for land.

The three judges ruled in this instance that:

> "... the right granted by the treaty is broader than the words the treaty say on their face indicate".

In their decision, the judges allowed a property right to a fishery, which was merely inferred in the treaty, to override private property interests granted by the province. The court described the rights conferred on Indians by treaty as "unique" because they have a special protection which is independent of Canadian law or the constitution. Another implication of this decision is that it seems to recognize a treaty right to fish which excludes federal or provincial authority to impose regulations. Finally, the court asserted that:

> "The province cannot act to contravene the treaty rights of Indians, nor can it authorize others to do so".

To arrive at its decision, the B.C. Court of Appeal used rules of treaty interpretation that are somewhat broader than those applied by earlier courts. The principles were stated 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 a sense that they would naturally be 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 wording 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".

When this particular decision was handed down by the Court of Appeal, both the government of Canada and the province decided that it would be imprudent to appeal further to the Supreme Court. This decision, therefore, stands as a precedent.

In another recent case of Denny, Paul and Syllibov (1990) the Micmacs argued that their fishing rights off their reserve lands remained good because their treaty had never given up these rights. The Micmacs took the position, in addition, that their treaty confirmed pre-existing aboriginal rights, of which the right to fish throughout their traditional territory was only one.

The Supreme Court of Nova Scotia upheld this position and dismissed the charges against the three Micmacs. The judge referred to Section 35(1) and 52 in the Consitution Act as reinforcement in Canada's fundamental law of both aboriginal and treaty rights.

This latest court decision is significant because it enlarges on the rules of treaty interpretation. The judge said in effect, that rights that are not explicitly traded off by treaty, are retained by Indian nations. This suggests that Indian nations have treaty rights which describe the mutual obligations and responsibilities that have been assumed by the signatories, as well as aboriginal rights that were never given up by the

treaty.[3]

In international law, the rule is that the Crown cannot gain any rights to the lands and resources of Indian nations except by treaty. The assertion of crown title over Indian lands and resources therefore may be a legal fiction. At the same time, with some recent exceptions such as the Bear Island decision, the courts are producing a body of case law based on rules of treaty interpretation which offer considerable scope, substance and application to treaties. These trends provide an entirely new legal framework within which the potential significance of aboriginal and treaty rights can be examined. The following section attempts to do this with respect to treaty 4.

The Requirements for Indian Consent

The Royal Proclamation of 1763 commanded its governors in the colonies to respect the boundaries of Indian nations, while at the same time declaring the Crown's sovereignty, protection and dominion over them. Any hope that the British could acquire Indian territories by force of arms receeded in 1763 when they experienced a number of disasterous defeats at the hands of Chief Pontiac and his forces.

As an alternative to conflict, where outcomes can never be guaranteed, the British crown adopted the expediency of dealing with Indian nations as responsible political authorities. The necessity to maintain peaceful relations with Indian nations in turn required that an international convention be adopted which required that any accords or agreements between foreign nations are based on negotiation and mutual consent.

At the same time, Indian nations were not party to the Proclamation, which was essentially a unilateral colonial law intended to keep British governors in check. To all intents and purposes, Indian nations continued to recognize no other sovereignty except their own.

The Crown's presumption to underlying Crown title to all Indian lands, as stated in the Proclamation, does not stand up in the light of international law as it existed in 1763, and as it is

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[3] One cloud on the horizon which may effect treaty interpretation is the decision of the Ontario Court of Appeal in the Bear Island case (1989). This court ruled that the Robinson-Huron treaty of 1850 extinguished all aboriginal rights of the Temagami Indians; and that in any case, a treaty is nothing more than the expression of the will of the sovereign to extinguish aboriginal rights, which can even be done without a treaty. In other words, the Crown can expropriate Indian lands at will. This decision is being appealed to the Supreme Court.

now being elaborated. What does survive is the recognition that Indian peoples are organized and distinct societies whose relations with other nations are governed by negotiations and consent.

It follows that there is a requirement for consent because that is the only way independent nations can maintain peaceful relations. This is not a right that is provided by one party to another. It is inherent in the status of each party as separate nations.

A treaty relationship previously established between two nations therefore cannot be changed, modified or abrogated by the actions of one party without seeking the informed consent of the other. Given the full import of Indian treaties both in terms of international and domestic law, the absence of consent to measures which effect the interests of one of the parties is cause to seek damages and redress in the courts.

Possible Causes for Legal Action

(a) The Ruperts' Land Act of 1868

This statute transferred Ruperts' Land as a territory wherein the Hudson's Bay Company exercised a trading monopoly, to the jurisdiction of the Canadian government. This transaction did not take into account the third party interests of the Indian nations who believed that they exercised sovereignty over their traditional lands. As a vitally concerned third party, there is no indication that Indian consent was either sought or given.

Spokespersons for the Cree and Saulteaux at Qu'Appelle Lakes made an issue of a deal between the Crown and the Hudson's Bay Company affecting lands which they owned. Morris took great care to avoid addressing or explaining the concerns of the Indian people.

Unaware as the Cree and Saulteaux were about the questionable doctrine of "terra nullius", they challenged the propriety of a transaction where the Canadian government paid the H.B.C. for an interest in lands which neither owned. A Saulteaux Chief asserted that the company had no right to any Indian lands outside the confines of their trading posts. He stated that "... it is the Great Spirit that gave us this (land), where we stand is the Indians' property and belongs to them".

The only reference to the interests of Indian nations in the Ruperts' Act is as follows:

> "Any claim of Indians to compensation for lands required for purposes of settlement shall be disposed of by the Canadian government, and the Company shall be relieved of all responsibility in respect of them".

The wording of this clause in the statute seems to relegate the lands of the Cree and Saulteaux to a kind of land bank which Indians could use until such time as Canada expropriated it for settlement. There is no hint that informed Indian consent is a pre-requisite to Indian land cessions, except possibly as a mere formality, which could be obtained in the guise of a peace treaty or some other underhanded way. This was, in fact, how Morris handled treaty making at Qu'Appelle Lakes in 1874.

A further questionable aspect about the Ruperts' Land deal is a Deal of Surrender dated November 18, 1869. In accordance with this Deed, the Hudson's Bay Company retained a one-twentieth interest in all the lands. Subsequently, the Company sought to claim 1/20 of any Indian lands surrendered for sale as well as prior title to a number of Indian reserves that were being set aside following the signing of Treaty 4.

In December 1924, by Order-in-Council no. 2158, the Hudson's Bay Company and the Crown entered into an agreement whereby the Company agreed to release certain lands within Indian reserves which lay within this 1/20 allotment. This was to be done in exchange for other lands.

Following this agreement, those parts of the reserves released by the Company were vested in the Crown. On January 14, 1927, Order-in-Council no. 71 withdrew the lands from the operation of the Dominion Lands Act and transferred them to the Department. By 1972, these lands still had not been added to the reserves concerned (see: Appendix A). These lands include both surface and mineral rights.

What the 1869 Deed of Surrender suggests is that the Canadian government had committed itself to give away 1/20 of Cree and Saulteaux lands to the Company four years before a treaty had been signed. The Company had no prior interest in Indian lands under its Charter outside the sites in which its posts were located. Neither had the Canadian government any legal right to earmark Indian lands as future Company reserves in the absence of a treaty.

In total, throughout what later became the province of Saskatchewan, the Hudson's Bay Company acquired 3,350,000 acres of land compared to 1,650,000 acres which after 1874, was set aside as Indian reserves. Subsequently, over 400,000 acres of these reserves were lost, most during the regime of Duncan Campbell Scott who ruled the Department of Indian Affairs between 1913 and 1932, and operated in the belief that "white men" made better use of the land than did Indians. (See: Appendix B - Pending Land Claims in the Treaty 4 Region.)

(b) <u>National Reserve Transfer Act 1930</u>

The Ruperts Land Act of 1868 involved a land deal between Canada and the Hudson's Bay Company which left the actual owners standing on the side-lines. In 1930, this oversight, and its potential legal consequences, was compounded further when Canada transferred title to so-called Federal Crown lands to the Prairie provinces under the Natural Resources Transfer Act of 1930.

The relevant clauses in the agreements with Manitoba, Saskatchewan and Alberta are identical, namely: Canada brought each of the prairie provinces within the ambit of Section 109 of the British North America Act 1867 by providing that:

> "... the interest of the Crown in all Crown lands, mines, minerals precious and base) and royalties derived therefrom within the Province, and all sums due or payable from such lands, mines, minerals or royalties shall from and after the coming into force of this agreement and subject as therein otherwise provided, belong to the Province, subject to any trusts existing in respect thereof, and to any interest other than the Crown in the same ...".

Other clauses in this Act make specific reference to Indian reserves, indicating that these are to remain Federal Crown lands administered by the Government of Canada. The Act provides that proceeds from the surrender of Indian reserves are not to be managed by the Province, or the proceeds paid to the provinces. In addition, the provinces are not to share in the administration of resource development on reserves, or in mineral revenue or royalties. [4]

A final clause guarantees the right of Indians to hunt, fish and trap for food, subject to provincial laws, so long as these laws do not restrict the right to carry out these activities at all seasons of the year on all unoccupied Crown lands, and on any other lands to which Indians have a right of access.

The Natural Resource Transfer Acts have constitutional status as a result of an amendment to the British North America Act in 1930.

Implications

A review of international and domestic legal precedents and trends in the preceeding sections of this paper indicate that:

(a) In the Royal Proclamation of 1763, the British Crown

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[4] In British Columbia an "Indian Reserves Resources Transfer Act" provides that half the revenues collected from royalties and other resource activities on reserves will belong to the province.

observed the international protocol of the day with Indian peoples as distinct and separate nations. The Crown's declaration of limited sovereignty has been shown to have no basis in international law. What is recognized in the Proclamation as an imperative is a requirement for consent to any measures affecting the interests of Indian nations.

(b) The Hudson's Bay Company had a trading charter which the Indian nations accepted as beneficial to them, and to which they consented. This consent did not involve the alienation of their lands nor was there such a provision in the Company's trading charter.

(c) In 1868, Canada extended its dominion to the western prairies unilaterally without reference to Indian interests or wishes. This expansion of jurisdiction entailed the surrender of the Hudson's Bay trading charter as well as substantial land concessions to the company made by Deed in 1869.

(d) In 1874, Canada induced the Cree and Saulteaux peoples to sign Treaty 4 in circumstances where the government's real intentions were disguised so that the Indians were given a totally different understanding of the treaty's purpose and future effect.

(e) An application of rules of treaty interpretation as developed by Canadian courts provides grounds for asserting that, in the Cree and Saulteaux understanding of this treaty, they retained substantial rights throughout their traditional territories. These would include not only hunting, fishing and trapping rights that were explicitly promised, but also an aboriginal right to resources which were not specifically given up.

(f) The Natural Resources Transfer Act of 1930 effects the surrender by the Crown to the provinces of Crown lands, mines, minerals and royalties in circumstances where the proper Indian "share" of these resources, as promised in the treaty discussions, remains to be determined. In short, the Crown pre-empted Indian interests without their consent by disposing of resources to which they had an equitable "share", in the words of treaty promises made by Morris. [5]

(g) The right of Indian nations to be consulted, and to give or withhold consent in any transactions initiated by

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[5] In explaining the provisions of Treaty 4, Morris said that the land was "... made for all his (the Great Spirits) children to use". He also said that the treaty was a means "... to share land for the good of all".

the Federal government which effect their interests, is an aboriginal right. This principle is inherent in a nation to nation relationship governed by treaty. This principle also holds true in a treaty relationship which includes elements of trusteeship. [6]

(h) A requirement for consent is recognized in the Royal Proclamation of 1763, in various federal statutes and policy directives, and was the substance of Section 37 of the Consitution Act in establishing First Ministers' Conferences on aboriginal and treaty issues. It follows therefore that the Ruperts Land Act of 1868, the Deed of Surrender of 1869, and the Natural Resources Transfer Act of 1930 are examples of Federal initiatives which stand in violation of Canada's own constitutional provisions.

Contemporary Significance of Treaty 4

The full political significance, and contemporary applications, of the agreement that the Cree and Saulteaux peoples believed they had reached with Morris in 1874, can be mapped in general terms by applying rules of treaty interpretation. As has been shown, such rules are currently in use in cases of treaty litigation.

In line with the legal precedents that have already been set out, Treaty 4 can be defined in these terms:

> "The treaty is an agreement between the Crown in right of Canada and the Cree and Saulteaux nations which is governed by international law, which is permanent in nature, and which is legally enforceable by the courts. The meaning and contemporary application of the treaty is to be derived from the printed version where the provisions are understood in the same way by all the signatories, as well as from the oral histories and traditions of the Cree and Saulteaux, Commissioners transcripts, other relevant documents, and by inference based on what is reasonable, just, and equitable".

One further consideration can be mentioned as a factor to take into account in any analysis of treaty terms. This is the fact

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[6] In the Supreme Court of Canada, the court ruled in the case of Guerin (1984) that the Crown was obliged to follow the instructions of the Indians concerned in disposing of their property. The court recognized the right of Indians to decide and instruct the Crown as to the scope of the Crown's discretion, and to remove the Crown's discretion by an unequivocal instruction. This principle would seem to apply to a land surrender by the Crown to a province where Indians retained an interest in the land and its resources.

that a similar "spirit and intent" must be assigned to all Indian treaties, even though there may be variations in emphasis, terms and detail. To do otherwise would be to inject a large degree of discrimination into the ways the mutual obligations and responsibilities represented in a treaty relationship are defined.

An interpretation of Section 15(2) and Section 25 of the Canadian Charter of Rights and Freedoms suggests that it is not discriminatory for Canada to maintain a unique or preferential relationship with Indian nations. However, the courts could decide that it is discriminatory if Canada shapes its relationship with Indian nations so as to create major distinctions among them. These constitutional provisions suggest that regardless of the specific provisions of any given treaty, there should be consistency in the rights enjoyed by all Indian nations.

If this non-discriminatory rule is not applied to treaties, a situation could arise where the "medicine chest" provision in treaty 6 could become a sanction for free health services, which is denied where treaties do not contain this provision.

What follows under appropriate sub-headings is another way of interpreting Treaty 4. Relevant clauses in the treaty text are singled out for interpretation in accordance with rules that are being applied by the courts.

Economic Implications

> "Cede, Surrender and yield up ... forever, all their rights, titles and privileges whatsoever, to the lands ...".

The Cree and Saulteaux peoples understood that they were agreeing to "share" certain features of their country. What these features were supposed to be was not explained by Morris. Nor did he explain what the implications of the printed words meant.

What is clear from the transcripts is that the Indians were persuaded that the treaty would not seriously impede their hunting, fishing and trapping economy, that they would continue to derive benefits from the whole of their traditional territories into the indefinite future, and that the word of the Queen could be trusted to fulfill these promises.

In applying the rule of non-discrimination among different treaties, some light can be thrown on Morris' statements at Qu'Appelle Lakes by reference to the Robinson treaties of 1850.

The Robinson treaties addressed the issue of Indian mineral rights both on and off reserves. With respect to on-reserve

rights, the treaties stated that:

> "... should the said Chiefs and their respective Tribes at any one time desire to dispose of any part of such reservations, or of any mineral or other valuable productions thereon, the same will be sold or leased at their request by the Superintendent General of Indian Affairs ... for their sole benefit, and to the best advantage".

At the same time, the Ojibway nations were to receive regular treaty annuities derived from off-reserve mineral revenue. These payments were not fixed sums, but lump sums for the whole treaty areas which were calculated on the basis of expected annual revenue from government sales of mineral locations throughout the traditional Indian lands. The annuities were to remain proportionate, up to a certain limit, to the revenues derived by government.

There was no specific reference made to minerals during discussions that took place at Qu'Appelle Lakes. It seems likely that the reason for this was that no significant mineral resources were known to exist on the prairies. Canada's primary interest was in agricultural lands. However, a general treaty committment to the effect that the benefits of the land were to be shared, has to be taken at face value. Reference to the principle established in the Robinson treaties of 1850 suggests that the Cree and Saulteaux do have a claim on a share of resource revenues that have been derived in the past, and are being obtained currently, throughout their traditional territory.

What the Robinson treaties also do is provide a rationale for the principle of annuities established in all subsequent treaties. In the present day, treaty annuity payments fixed at rates set more than one hundred years ago, have little economic significance. However, if annuities were adjusted to reflect the value which Canada, and subsequently the provinces have derived from lands encompassed by Treaty 4, then they assume substantial economic importance for Indian people.

"Laying Aside Reserves"

Treaty 4 states that the Queen agrees "to assign reserves for said Indians" in consultation with the Indians on the basis of one square mile for a family of five, scaled proportionately to family size. There is no direct statement in the treaty that assigns any particular type of title to lands designated as reserves, unless one can assume that such lands were also part of the general surrender of the whole territory to the Crown.

It seems clear from the transcripts that the Cree and Saulteaux did not appreciate the full significance of a land surrender let

alone the government's intent to also take ownership of lands on which they were supposed to live and prosper. Neither was there any reference made by Morris to the type of land regime that was provided by the Indian Act of 1868, which translated "protection" to "paternalism".

Insofar as the Cree and Saulteaux were concerned, the lands set aside for their exclusive use preserved their original title, as they understood it, and was to be inalienable.

If the government's intent was to protect Indian interests by taking ownership of Indian reserve lands, subsequent events were to prove this motive to be without substance. For example, the present reserve land base in the Treaty 4 region amounts to 549,596 acres, totaling an area roughly a third the size of Prince Edward Island. In accordance with the Saskatchewan formula of 1976 (which excludes the Treaty 4 reserves in Manitoba), unfulfilled treaty entitlements amount to another 216,540 acres. These treaty obligations have yet to be met. In the interim since the treaty was signed, at least eight of the reserves in the Saskatchewan sector of Treat 4 have dissappeared. If "protection" indeed was the agreement's motive in assigning Crown title to Indian reserves, there are grounds for saying that the Indians would have done a far better job of protecting their own interests. (Appendix "B" shows how the lands in Saskatchewan were distributed, including those in the Treaty 4 region of the province.)

A proper interpretation of the treaty would designate present reserve lands, as well as those which are still to be provided in accordance with entitlements, to be under original Indian title. In short, such lands mark the boundaries of Indian nations and as such, are immune to surrender, alienation, or any other kind of rearrangement of borders to suit private or government interests.

If the present and future jurisdiction of Indian governments is to have any meaning, it has to be related to a land which is not vulnerable to alienation. This can only be done by ascribing to reserve land an aboriginal title which signifies exclusive ownership, sovereignty, or jurisdiction by an Indian nation. Once an Indian nation becomes a part of Canada's federal system in a proper consitutional sense, Indian reserve land can be designated as "Crown land in right of the Cree nation or Saulteaux nation", or whatever.

Whether fee simple systems of allocating land holdings within a reserve are adopted or not, should be exclusively the decision of an Indian government, in circumstances when the underlying title is clearly recognized to be aboriginal. Fee simple arrangements are theoretically feasible on top of aboriginal title (which excludes both Federal and provincial title). This is because such lands would always remain under the jurisdiction of Indian

governments and laws, no matter to whom they were sold.

For nations to adopt fee-simple land regimes when the underlying title is held by the Crown ensures that such lands ultimately come under the jurisdiction of provincial or territorial governments through the mechanism of sale, expropriation, or seizure for debts. Indian nations who, at present, are busy signing comprehensive claims agreements with the Federal government are falling into this trap. They are programming themselves for ultimate extinction as Indian nations.

Under the terms of Treaty 4, as understood by the Cree and Saulteaux at the time of treaty-making, lands set aside as reserves remain under an aboriginal title under the jurisdiction of Indian governments. As such, reserves can never be alienated from the jurisdiction of Indian governments except by war and conquest. It follows therefore that if the courts uphold this interpretation of the treaty, all past surrenders of reserve land are in violation of the terms of Treaty 4 and should be restored.

Hunting, Trapping and Fishing Rights

Treaty 4 stipulates in the written version that the Indians "... shall have the right to pursue their avocation of hunting, trapping and fishing throughout the tract surrendered", subject to regulations and restrictions on lands granted to other interests.

The Migratory Birds Convention Act of 1952, about which Indians were not consulted, and to which they did not consent, imposed further restrictions on original treaty rights to hunt for food.

During Morris' meetings with the Cree and Saulteaux at Qu'Appelle Lakes, he said:

> "What I have offered does not take away your way of life, you will have it then as you have it now, and what I offer is put on top of it",

This is a sweeping statement. As a treaty promise, it is certainly not reflected in either the written treaty, or the provisions of the Indian Act which came to be applied to the Indians.

On the strength of this treaty promise, Indian people can be forgiven for believing that they had the Crown's undertaking not to interfere in any way with their pre-existing hunting, trapping or fishing rights. This was their understanding of the treaty and this is the way therefore that the treaty should be interpreted and applied.

In the Agawa Case 1988, the issue of a treaty right to fish was

being adjudicated. The decision by the lower court was that this treaty right was protected by Section 35 of the Consitution Act. The court held that a treaty right to fish had never been extinguished though it was subject to reasonable regulation.

The Agawa decision ruled that all unextinguished rights which are either implicit or explicit in a treaty are protected by Section 35. And the courts are clearly increasingly reluctant to rule that such rights have been extinguished.

This decision questions the validity of such statutes as the Migratory Birds Convention Act, and the limitations on fishing that are defined in the Fisheries Act. (The Agawa case is being taken further to the Supreme Court.)

If the Supreme Court upholds the lower court's Agawa decision, the Indian interpretation of their treaty rights to hunt, trap and fish would take precedence over other statutes.

Purchase of Ammunition, Provision of Agricultural Implements and Stock

In his oral presentations to the Cree and Saulteaux peoples, Morris did not suggest any time limit for this assistance, such as is implied in the written treaty with respect to implements and stock.

Translated into contemporary terms, this provision in Treaty 4 has to be understood as a Crown committment to support the development of a viable Indian economy. An Indian economy that makes any sense, however, requires that Indian people have a sufficient land base, a fair equity in resource wealth, and the scope to make economic decisions within the framework of their own laws and institutions.

A treaty requirement to assist Indians to become economically viable as nations, is not necessarily the same thing as assisting individual Indian entrepreneurs with economic development projects. The former entails a recognition that it is the Indian governments who make decisions about the direction, pace and manner in which their economies should develop, consistent with their nations' resources, priorities and choices. This principle is the one that can be translated into contemporary treaty terms.

Most economic development initiatives of the Federal government in the past have failed because their efforts have focussed on particular individuals, rather than on the collective rights and needs of an Indian nation. The result frequently has been to promote conflict within Indian communities, corruption, and the further erosion of treaty rights.

Retained Aboriginal Rights Under Treaty

The point has been made previously in this paper that, in accordance with rules of interpretation, it is evident that the Cree and Saulteaux peoples have a legitimate claim to a fair share of resources throughout their traditional territories.

It has also been established that the Cree and Saulteaux peoples retain an aboriginal right to be consulted about any initiative that could effect their treaty sovereignty or relationship, either directly or indirectly. This aboriginal right entails a prerogative to either offer or refuse consent.

Other aboriginal rights that are retained within a treaty relationship can be enumerated as follows:

(1) Nationhood: The United Nations Charter defines a "people" or a "nation" as collectivities whose share the same culture, customs, laws, traditions and geographic area. Treaty 4 has never ceded this right to identity.

(2) Self-government: Treaty 4 does not compromise, either explicitly or by implication the inherent rights of Cree and Saulteaux peoples to their own political insitutions or systems of government. Indeed, Morris affirmed this by proposing what amounted to a treaty of peace and friendship. One or two passing references to Indians being "subjects" of the Queen are unlikely to have had any meaning and may not even have been translated.

Many of the treaty medals depict a symbolism which in many respects, captures the significance of the pact in terms which were understood by Indians. The medals reveal, on one side, the head of Queen Victoria, as a party to the treaty. The obverse side shows a representative of the Queen shaking hands with an Indian authority representing his nation. Between their feet rests a war hatchet, its sharp edge buried in the ground. An Indian villiage nestles against a peaceful scene where the sun shines, the waters flow, and the grass is presumably green.

The treaty medal is a clear statement which portrays in graphic form the consent of two sovereignties agreeing to live together in peace, harmony and friendship, and in Morris' words "sharing" a land that is large enough to accommodate both.

Treaty Trust Defined:

The Guerin Decision 1984 discussed two possible models for a fiduciary relationship between the Crown and Indian nations, namely "ordinary trust" and "agency". Although this decision relates to an Indian nation who never signed a treaty with the

Crown, it is equally relevant in instances where treaties exist.

An "ordinary trust" is usually established to provide a trustee with discretionary powers in the management of property and moneys in instances where the beneficiary is incompetent or absent. This is the type of trust that was incorporated into the Indian Act 1968, and has remained a feature of succeeding Indian Acts to this day.

The Indian Act definition of trust can be described as a "diseased trust" because it violates the spirit and intent of treaties, and treats Indians as apprentices in training to become "white men".

An "agency trust" defines Parliament as an "agent" of Indian nations who discharges responsibilities under treaties through what is known in law as a "Prime Agent", that is, the Department of Indian Affairs. Within such a relationship, Indians are assumed to be competent to issue instructions on all matters over which their "agent" exercises a trusteeship. In the capacity of "agent", Parliament and the responsible department, are obliged to follow the directions of Indian nations.

The essential features of an "agency" trust relationship based on treaties therefore can be summarized as follows:

(a) Treaties between the Crown and Indian nations consitute a legal relationship which the courts define as unique and approximating an agency trust.

(b) An agency relationship based on a treaty is always based on consultion, and a requirement for consent. Such a relationship has the attributes of a contract that can never be extinguished except by mutual and informed consent.

(c) Within a treaty relationship, an "agent" cannot exercise discretionary powers to unilaterally abrogate any treaty provision, or to alter in any way the legal relationship which is implicit in these agreements.

(d) The exercise of an "agency" trust, within the framework of a treaty, obliges the Government of Canada to protect the integrity of Indian nationhood from third party enroachments (as promised by Morris).

(e) It is also the duty of the government of Canada as "agent", to facilitate the self-determination of Indian nations as distinct societies and political entities, and to entrench, on mutually acceptable terms, a sphere of sovereignty within the Consitution Act 1982.

The implications of an "ordinary trust" as defined by the"Indian

Act" can be summarized as follows:

(a) The purpose of an "ordinary trust" is to manage the assimilation of Indian people, the extinguishment of their right to nationhood, and the termination of aboriginal and treaty rights and sovereignty. Because the Indian Act defines Indians as minors, their consent to Federal initiatives which serve these purposes is not considered to be necessary.

(b) At present, an ongoing "Lands, Revenues, and Trusts Review" seeks to accelerate the attainment of assimilation and termination by re-writing the "Indian Act" in its totality. A new statute, which is due to appear this year, will have the effect of dismantling the Crown's trust responsibilities, cancelling the Crown's legal relationship to Indian nations as defined by treaties, and shifting Indians and their lands by degrees to provincial jurisdiction.

The present Indian Act wrongly assumes an "ordinary trust" which relates to Indian property and money exclusively. In its current drive to reduce costs, a new act is being drafted in order to get rid of these responsibilities. At the same time, because the Federal government does not recognize treaty rights nor accepts the concept of "agency trust", there are no plans to implement them. Indeed, there is some suspicion that an effort will be made to link the new legislation to the Constitution Act in such a way as to sanction termination in Canada's supreme law.

Canada's arsenal of measures which are being applied to move Indian nations away from their treaties and over the "Buffalo Jump" are discussed in the following section.

V THE "SHIELD" BECOMES A "SWORD"

Neither the Parliament of Canada, nor the Department of Indian Affairs and its Minister, have fulfilled a role so far that can be described in terms of an "agency trust". If anything, the "protector" has become an adversory posing a serious threat to the aboriginal and treaty rights of Indian nations.

If the present government suceeds in carrying out its strategy, the losers will be Indian nations, as well as provinces who will be left saddled with major new costs.

There is ample evidence to show in which direction Federal policies are going. For example:

(1) In 1983, a Special Committee of Parliament on Indian

Self-government arrived at an all-Party agreement and recommended that the political and other aboriginal rights of Indian nations be entrenched in the Constitution Act 1982. This Committee specifically adivised against any effort to amend the "Indian Act" as an avenue to self-government. This report was submitted to Parliament, but subsequently was shelved by the present government. Today, it remains a dead letter in the government's files.

(2) A series of meetings over four years to amend the Constitution of Canada in order to bring Indian nations into Canada's federal system came to naught. At a final meeting in 1986, Canadian authorities attempted to introduce an amendment, the effect of which would have been to provide explicit constitutional sanction for Canada's assimilation and termination policies. Indian nations succeeded in blocking this move.

(3) A detailed study on treaty implementation was promised by the Prime Minister at the 1985 First Ministers' meeting, and subsequently done under the chairmanship of Frank Oberle, M.P. A report, which essentially supported the position of Indian nations with respect to treaties was submitted in 1986. The report was suppressed by the government and most copies were destroyed.

(4) A task force to review federal policies on Indian land claims was completed in 1986. Recommendations favourable to Indians were rejected by the government. A few cosmetic changes made it possible for the government to introduce its old policy and represent it as something new. The old policy had the effect of terminating all aboriginal and treaty rights. The so-called new policy continues to do so.

(5) At present, Canada is pressuring Indian nations to cooperate in an accelerated devolution process. Devolution means that Indian nations have no inherent rights to self-government, and that all such rights come by delegation from the Federal government. Indian nations who believe they have inherent aboriginal rights to self-government by definition, have to reject the principle of devolution.

(6) Canada's so-called "self-government" initiative is identical to the model which it is offering in land claims settlements. The end result is a land regime in "fee simple", which means Indian lands can be sold, or lost for taxes. The other result of this policy is that it establishes municipal-types of local government in Indian communities which are designed to fit into the jurisdiction of the provinces.

Reference has been made previously to Canada's most recent

termination initiative. This is the so-called "Lands, Revenues and Trusts Review" which is expected to legislate accelerated devolution, get rid of the Minister's trust responsibilities, and facilitate termination.

In a meeting held last year in Quebec, a group of politicians and senior bureaucrats agreed that legislative action was needed urgently to stem a tide of claims against the Crown. Secret minutes of this meeting were leaked to the media. They show that the government is greatly concerned about the enormous amount of liabilities where Indian nations have a clear cause to seek damages and redress. Federal authorities are afraid that a series of successful court actions could "break the bank".

As matters now stand, there are more than 260 Indian cases against the Crown underway. By amending the Indian Act the government seems to be hoping to get out of present trust responsibilities and to close the books on past liabilities for fraud, mismanagement, abuse of power, improper purpose, and a host of other treaty violations.

VI REPAIRING A TREATY RELATIONSHIP

It seems too optimistic to hope that the present government in Ottawa will take any initiatives on their own to repair a treaty relationship which, over the years, has become severely damaged. Another consideration is that the apparent impetus of the government's present drive to terminate aboriginal and treaty rights does not offer much time to engage in prolonged lobbying. Past experience suggests that such an effort would be futile in any case.

The most promising course of action perhaps would be to develop a careful litigation strategy. The purpose would be to target a number of key treaty issues and to obtain, if possible, a set of court rulings that reinforce a treaty interpretation of "agency trust", aboriginal title on reserve lands, residual resource rights on traditional territories, inherent political rights, etc.

Reference to the Canadian courts of course is always a risky business because, aside from the costs, the results can never be predicted. There is also the additional factor that the Justice Department in Ottawa tends to place the narrowest possible interpretation on court rulings. For example, their conception of Section 35, which "recognizes and affirms existing aboriginal and treaty rights" is that it is an "empty box" which can be filled with Band by Band self-government agreements. Comprehensive claims agreements and other termination agreements. It seems likely therefore that even favourable court decisions

may not be entirely effective in arresting or diverting the direction in which Federal policies are now moving.

In the final analysis, although Federal authorities may implement some measures, like a new Indian Act, to get itself out of the Indian business, it can never really destroy a people's will to survive. If there is such a will, it must be expressed by local initiatives to prepare Indian people, including children, for what may be a long uphill struggle.

There are many elements to be considered and implemented if Indian people are going to stay in the fight to preserve their aboriginal and treaty rights. Using Treaty 4 as an example:

(a) Ways and means should be considered to organize into a cohesive political entity the whole of the treaty region. This should be attempted without reference to provincial boundaries because the treaty was there before the province.

(b) There are other treaty regions who share the same concerns as the people in Treaty 4. Accords should be negotiated among treaty regions as a way of building a stronger power base and more effective political leverage.

(c) If possible, funds should be raised to finance newsletters, workshops and other information services to keep people in communities fully informed about the nature of their aboriginal and treaty rights as well as legal and policy trends that are shaping these rights.

(d) Well informed communities can be more easily and quickly mobilized in situations where Indian leadership needs the understanding and support of their people for the action that they take.

To demonstrate to the government in Ottawa that Indian people are serious about defending their rights, there are numerous measures that can be taken. A few examples are:

(a) Indian people can and should adopt the position that the only "framework agreement" that they care to talk to Ottawa about is their treaty. Accordingly, Federal inducements to negotiate "framework agreements" on self-government, alternative funding arrangements, or anything else should be categorically rejected as termination initiatives.

(b) The government is pushing program devolution on Indian people with considerable vigour. The reason is that the process allows the Minister of Indian Affairs to set limits on budget transfers and in the longer run, to reduce costs. The result is that the Chief and Council become accountable while the Minister no longer has to answer for the

consequences. Indian people should consider the possibility of adopting a "work-to-rule" attitude. In other words, since the Indian Act defines the Minister as trustee, and denies the Indian people a more constructive fiscal relationship based on treaties, then the Minister should remain responsible for all program costs and delivery. This would have the positive effect of creating enormous pressures on the Department, while at the same time keeping Indian leadership free for more important political action.

(c) Strategies could be developed to gain the support of international agencies on the basis that Canada is not observing major international conventions on human rights that it had peviously endorsed. This is always difficult to do because the United Nations organization cannot easily intrude into situations which Canada in its own case represents as of "domestic concern". However, if enough treaty regions began to submit similar complaints, the U.N. would likely send a mission to Canada to conduct an investigation. Such a development is always embarrassing to the host country and increases pressure for change.

APPENDIX A

Confirmation needed whether or not the following reserves in the Treaty 4 region obtained the following acreage after 1972.

Muscowegan - 640 acres

Muscowpetung - 640 acres

Peepeekeesis - 640 acres

Okanese - 480 acres

APPENDIX B

Total Lands Alienated in Saskatchewan by the Federal and Provincial Governments (including lands in the Treaty 4 region of this province)

Total Area of Saskatchewan	161,100,000 acres
Lands Alienated by Two Levels of Gov't	
1. Railway Land Grants	15,200,000
2. Homestead Lands	30,700,000
3. School Lands	2,800,000
4. National Parks	1,200,000
5. Forest Reserves	5,800,000
6 Hudson's Bay Company	3,350,000
TOTAL	58,850,000 acres
7. Indian Reserves	1,650,000
Surrenders	- 400,000
NET RESERVE LANDS	1,250,000 acres

- The balance of 62.5 per cent of the Saskatchewan land remains Crown land, though much of it may be leased to private interests (forestry, mining, etc.).

- The Hudson's Bay Company "surrender" of its trading charter in 1868 seems to have brought greater returns in land to them than did the Indian "surrender" in 1874.