

XI

Canada's Treaties with Aboriginal Peoples

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CANADIAN TREATY-MAKING with Aboriginal peoples has evolved through several distinct forms from the first such agreements in the eighteenth century. However, the keeping of treaty promises has conformed to a more uni-dimensional pattern of avoidance and inaction. Judicial consideration of the subject by the Supreme Court of Canada since 1982 should increase the pressure for fulfillment of outstanding treaty obligations.

I. The First Treaties, 1763-1850

Europeans seeking the wealth of the western hemisphere have enslaved, fought, infected, or feigned partnership with Aboriginal peoples from the time of first contact. The universal theme was that every resistance to European invasion ended in some form of conquest. In what became Canada (1867), the prelude to subjugation¹ was normally a treaty. The first in the eighteenth century were of "peace and friendship" negotiated by representatives of the crown and Native peoples, either for military alliance or neutrality towards competing colonial powers. The French entered such alliances earlier than the British, but more informally. Britain solemnised its simple arrangements with a written text: in return for Aboriginal peace and friendship, British negotiators promised not to disturb the other side in its essential hunting and fishing territories. At the end of the era of inter-imperial rivalry, from the time of Britain's occupation of the St. Lawrence valley in 1760, British generals made their peace with Native peoples formerly allied with the French.²

Several "peace and friendship" treaties followed elsewhere in the Atlantic region after 1760. Supremacy of Great Britain in North America, formalised by the Peace of Paris in 1763, set the stage for a new kind of treaty-making announced by a royal proclamation on 7 October 1763. This multi-faceted document indicated how Quebec was to be assimilated into the newly expanded empire and how colonial expansion, unfettered by inter-imperial war, might proceed westward without expensive conflicts with Native peoples. The Quebec aspects of the Proclamation were

¹ John Tobias attacks the notion that the treaties were a good faith accommodation of Native people in "Canada's Subjugation of the Plains Cree, 1879-1885" (1983) 64 *Canadian Historical Review* at 519-548. Less harshly critical is Jean Friesen, "Magnificent Gifts: The Treaties with the Indians of the Northwest, 1869-76" (1986) 1 *Transactions of the Royal Society of Canada (Series 5)* at 41-51.

² The "peace and friendship" treaties are discussed in George Brown and Ron Maguire, *Indian Treaties in Historical Perspective* (Ottawa: Department of Indian Affairs, 1979), 11, 19-20, 49. See the essay *supra*. by Henderson for the pre-1763 Aboriginal perspectives on "treaty federalism."

soon replaced by other arrangements repudiating its proclaimed assimilationist intentions, but key aspects of Aboriginal-colonial relations announced as British policy in 1763 were never repudiated by Great Britain, nor by the Government of Canada after Confederation in 1867. On that account, the significance of the Royal Proclamation of 7 October 1763 for Canadian Aboriginal treaty matters was and continues to have primary importance.³

While asserting that absolute proprietary title, the base for political sovereignty, was vested in the British crown, the Proclamation conceded that the power to dispose of land, *plenum dominium*, even by the crown itself, depended upon prior surrender of the Aboriginal interest in lands sought by others. Moreover, representatives of the crown specifically commissioned for the task were the sole and exclusive agents for negotiating such agreements with Native people. In the language of the Proclamation:

Whereas it is just and reasonable, and essential to our Interest, and the security of our Colonies, that the several Nations or Tribes of Indians with whom we are connected ... should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to or purchased by Us.... we do therefore ... declare it to be our Royal Will and Pleasure, that no Governor or Commander ... in any of our Colonies ... presume, upon any pretence whatever, to grant warrants of Survey, or pass any Patents for Lands ... not having been ceded to or purchased by Us ... And We do hereby strictly forbid ... all our loving Subjects from making any Purchases or Settlements whatever, or taking Possession of any of the Lands above reserved, without our especial leave and Licence for that Purpose first obtained.⁴

What followed after 1763 was a new kind of negotiation with Native people: face to face meetings between specially commissioned agents and representatives of “the several Nations or Tribes” to negotiate lump-sum payments for lands needed by an expanding settler population. Ironically, one of the first applications of the new policy was to accommodate a displacement of persons from older British colonies. Having first declared themselves independent from Great Britain, in protest partly against the Proclamation of 1763 and other administrative adjustments over which colonists had no control, they achieved victory in their separatist war against their former mother country in 1783. The first large-scale application of the treaty-making requirement enunciated in 1763 was, therefore, to make land available for Loyalist refugees after the American Revolution. Over the next thirty years almost twenty other “land surrenders” negotiated purchases from Native people, prior to the crown opening such areas to settlers.⁵

By the 1810s, imperial authorities complained that existing means of fulfilling the purpose of the Proclamation placed excessive demands on the colonial treasury. In 1818 a third kind of treaty replaced lump-sum payment for each surrender of

³ According to Brown and Maguire, *supra* note 2 at 49, “the most significant date in Canadian Indian Treaty matters is 7 October 1763 when ... the British Sovereign directed that all endeavours to clear the Indian title must be by Crown purchase.”

⁴ The full text of the Proclamation is readily available, reprinted most recently as a documentary introduction to Ian A.L. Getty and Antoine S. Lussier, eds., *As Long as the Sun Shines and Water Flows: A Reader in Canadian Native Studies* (Vancouver: University of British Columbia Press, 1983) at 29–37.

⁵ See tabulation in Brown and Maguire, *supra* note 2 at xvii–xix.

Aboriginal land for settlement. J.R. Miller describes the new approach as one that shifted the cost of extinguishing Aboriginal title from the crown to the Natives themselves. What followed was a scheme of district by district promises of annual payments, "annuities," at first amply funded by revenue flowing to the crown from sales of Aboriginal lands to settlers. In Miller's characterisation, "the Indians indirectly funded most of the purchase price of their land through instalment payments made from revenues derived from the land."⁶ Almost twenty such arrangements, all in present-day southern Ontario, were made over the next several decades as the new norm for meeting the terms of the Proclamation of 1763.⁷

II. The Robinson Treaties, 1850s

A final step in the evolution of Canadian treaty-making occurred in 1850. The newly autonomous Province of Canada, an experimental union of present-day Ontario and Quebec created in 1840, began to anticipate exploitation of mineral resources and pockets of agricultural land in the geographically enormous, thinly populated territory north of Lakes Huron and Superior (i.e., north of modern-day Sudbury and west beyond Thunder Bay). William Benjamin Robinson, the commissioner for the task, negotiated a surrender of Aboriginal title to the whole vast region in two brief meetings with representatives of Aboriginal occupants on 7 and 9 September 1850. Since the "Robinson treaties" affected twice as much territory as all previous treaties combined, in that aspect alone they signaled a bold departure from earlier practice. They represented an equally important step in the evolution of the Canadian form of treaty-making with Native people in another respect. In addition to the standard commitments to pay annuities, and ceremonial assurances that Native people could continue to hunt and fish on ancestral lands as before, the second innovation was a promise of a reserve of territory for each band signatory to the treaty. Robinson explained to his superiors that while the reserve-promise was a novelty, it was necessary as a cost-saving measure:

In allowing the Indians to retain reservations of land for their own use I was governed by the fact that they in most cases asked for such tracts as they had heretofore been in the habit of using for purposes of residence and cultivation By securing these to them and the right of hunting and fishing over the ceded territory, they cannot say that the Government takes from their usual means of subsistence and therefore have no claims for support⁸

Had Robinson negotiated cession of all rights without some land reserved for exclusive use and benefit, then Native people, in his opinion, would burden the crown with responsibility for maintenance of every Native person in a territory larger than all the settled parts of Canada combined. The promise of reserves emerged, then, as the cost-effective means for securing extinguishment of Aboriginal title over much

⁶ J.R. Miller, *Skyscrapers Hide the Heavens: A History of Indian-White Relations in Canada* (Toronto: University of Toronto Press, 1989) 93.

⁷ Brown and Maguire, *supra* note 2 at xix-xxi.

⁸ William Robinson to British Superintendent General of Indian Affairs, 24 September 1850 in Alexander Morris, *The Treaties of Canada with the Indians* (Toronto: Belfords, Clarke, 1880) at 17, 19.

larger tracts than had been the case in any negotiations before 1850. The two Robinson treaties were so effective, they became normal legal form for the new Dominion of Canada, ambitious to colonise the even larger areas west of Lakes Huron and Superior.⁹ In fact, every Canadian treaty after Confederation fit the basic Robinson recipe: negotiated by specially commissioned officers of the crown to extinguish title to relatively large expanses of territory, offering vague assurances for existing hunting and fishing rights, and promising reserves as well as annuities. All fit the terms of the Proclamation of 1763. All were cheaper means of taking surrenders than the earlier British form, and cheaper still than the American alternative of dictating treaty terms after military conquest.

Cost considerations, however, were not the only reason for continuity in treaty making from 1850 beyond 1867. Great Britain reasserted its principles from the Proclamation of 1763 for transfer to Canada of the old proprietary tenure of the Hudson's Bay Company, over Rupert's Land and the North West Territories, vast areas that the new Dominion of Canada intended to "colonise" after 1870. Britain's "Rupert's Land Order" of 1870 guaranteed cash compensation for the Company and called for fair treatment for any other "corporation, company, or Individual" already situated in the territories

And, furthermore, that upon the transference of the territories in question to the Canadian Government, the claims of Indian tribes to compensation for lands required for purposes of settlement will be considered and settled in conformity with the equitable principles which have uniformly governed the British Crown in its dealings with the aborigines.¹⁰

Since Canada knew well the established treaty-making tradition before Confederation, the Robinson-style treaties that followed 1870 were entirely predictable responses to the Rupert's Land Order, respecting Native people on the Prairies. The only improvisation was to extend the principles of 1763 from "tribes" of Native people to any other "corporation, company, or Individual" in the territory at the time of transfer. The reason was simple: Métis peoples in the Company's District of Assiniboia, present day southern Manitoba, had taken direct action under Louis Riel to secure such recognition in 1869–70, and Britain pressured Canada into a negotiated settlement in April 1870.¹¹ A bill to give effect to results of the negotiations appeared in the Canadian Parliament in May. The *Manitoba Act* made the small District of Assiniboia the fifth province in Confederation, with special rights for Métis because of their dual Native and European ancestry. Britain's Order in Council of 23 June 1870 thus required a similarly equitable treatment for persons anywhere in the transferred territory, Manitoba or elsewhere.

Over the next decade, the flurry of Robinson-style treaties with prairie Natives did not, however, include similar concessions for Métis people outside Canada's fifth province. Still, by revision of the *Dominion Lands Act* in 1879,¹² Canada did take

⁹ Gerald Friesen, *The Canadian Prairies: A History* (Toronto: University of Toronto Press, 1984) 136.

¹⁰ Schedule A in Order in Council of Great Britain (23 June 1870).

¹¹ D.N. Sprague, *Canada and the Metis, 1869–1885* (Waterloo: Wilfrid Laurier University Press, 1988) at 40–58, 69–70.

account of the oversight and appeared to set the stage for orderly accommodation of all interests in any territory prior to development under Canadian auspices. In effect, Canada promised a three stage sequence of accommodation for all Native peoples prior to any future territorial development. The first step would be that already in place on the Prairies by 1879: negotiation of treaties with the Native peoples. The second step involved surveys to fit the land into a pattern of legally describable parcels of expected development. Then the "metes and bounds" of promised reserves would be ascertainable. At the same time, the pattern of occupancy of original settlers would be documented¹³ settlers of part Native-ancestry would receive special grants in recognition of inherited shares of the Aboriginal title. The last stage would involve administrative confirmation of Aboriginal reserves and original settler claims. Then all other lands would be opened for development. In theory, no conflicts could arise between competing claims of Native peoples and succeeding waves of European newcomers because such claims would be known and accommodated in advance of granting any grants of resources to incoming companies or individuals. In practice, however, major shortcomings and failures at every procedural stage of the process and in every geographical locale developed where treaty activity occurred between 1871 and 1921, the first and last years of Canadian treaties with Native peoples after Confederation.

The most typical shortcoming of stage one was that large numbers of people were left out of the treaty-making process, then brought in later without compensation for intervening damages or never placed under treaty at all. The Métis, left out of treaty discussion on the Prairies beyond Manitoba, did not receive consideration of their claims until long after most treaties were negotiated. The token payments granted were usually considered derisory amounts in comparison with value received.¹⁴ In more northerly parts of the territories, comprehensive claims remained a matter of inconclusive negotiations. In British Columbia, instead of negotiating treaties and reserves, the pre-Confederation colonial government assigned reserve parcels without troubling to extinguish Aboriginal title.¹⁵ The one valid generalisation concerning the making of treaties was that extinguishment negotiations occurred sporadically, and only where Canada hoped for large returns from areas of expected boom:

12 The amendment of the 1872 statute empowered the cabinet to set aside land "to such extent, and on such terms and conditions, as may be deemed expedient" to satisfy "half breed" claims: *An Act to amend and consolidate the several Acts respecting the Public land of the Dominion* S. C. 1879, c. 31, s. 125(e).

13 The *Dominion Lands Act* provided two ways of confirming the titles of original settlers: free grants by virtue of occupation from a time before any Aboriginal treaty; or free grants by virtue of occupation for agricultural development after a treaty but before the date of a general survey. See s. 114 under "Homestead" and s. 6(g) under "Powers of Governor in Council" of the *Dominion Lands Act* (1872). The same rights continued to the last revision of the same statute in 1927: R.S. C. 1927 c. 113, ss. 10 and 74(c).

14 E.g., Clem Chartier, "Aboriginal Rights and Land Issues: The Metis Perspective" in Menno Boldt and J. Anthony Long, eds., *The Quest for Justice: Aboriginal Peoples and Aboriginal Rights* (Toronto: University of Toronto Press, 1985) at 58–60.

15 Brown and Maguire, *supra* note 2 at 41–43. See also Dennis Madill, *British Columbia Indian Treaties in Historical Perspective* (Ottawa: Department of Indian and Northern Affairs, 1981).

Treaties 1 to 7 (1871–1877) extinguished Aboriginal title to the Prairies and Northwestern Ontario to clear the way for the Canadian Pacific Railway and agricultural settlement; Treaty 8 (1899–1900) covered access to the Yukon Territory, established as an administrative district separate from the North West Territory in 1898 after the gold rush that began in 1897; Treaty 9 (1904) followed silver discoveries and expected hydroelectric, pulp and paper developments along the routes of newly projected rail lines in northern Ontario; Treaty 10 (1909) served a similar purpose in northern Saskatchewan; and Treaty 11 (1921) followed Imperial Oil's first gusher at Norman Wells in 1920.¹⁶ Other vast areas of the north, like most of British Columbia, have been indisputably Canadian in political geography for over a century; but Aboriginal title, within the terms of the Proclamation of 1763 and Rupert's Land Order of 1870, remained unextinguished.¹⁷

Stage two, requiring surveys of resources to be reserved for the exclusive use and benefit of Native people, was pursued even more haphazardly than treaty-making. Two factors limited the scope of surveying. One was cost. Many Native bands and Métis located in areas relatively remote from settlers' societies. Consequently, selections for Aboriginal reserves might be accepted in principle, even sketched on paper, but cost-conscious officials reluctantly surveyed large areas of difficult terrain for small numbers of persons, especially if traditional resource bases were not directly in the path of disruption. Alternatively, bands located in the way of imminent development also faced the same official reluctance to "lock up" large tracts of valuable farm or timber as Aboriginal reserves.¹⁸ Either way, the result was the same: many bands were located on reserves significantly smaller than their treaty entitlement of 130 acres per person, the typical reserve promise, or had no reserve at all. Still, the right to the treaty entitlements continued undiminished.¹⁹

¹⁶ Subtle differences in the specific terms of treaties 1 to 7 are discussed in Friesen, *supra* note 2 at 138–146. Canada's overall intentions are described by R. Fumoleau, *As Long as This Land Shall Last: A History of Treaty 8 and Treaty 11, 1870–1939* (Toronto: McClelland and Stewart, 1973) and E. Brian Titley, *A Narrow Vision: Duncan Campbell Scott and the Administration of Indian Affairs in Canada* (Vancouver: University of British Columbia Press, 1986).

¹⁷ Hoping for imminent development of northern mineral resources, Canada has resumed treaty activity in the far north under the rubric of "comprehensive claims" policy, the history and possible future of which is described in the "Collican Report": Murray Collican, *Living Treaties—Lasting Agreements: Report of the Task Force to Review Comprehensive Claims Policy* (Ottawa: Department of Indian Affairs and Northern Development, 1985). With respect to British Columbia, however, Canada maintains that the pre-Confederation reserve policy of the colonial government was adequate to extinguish Aboriginal title, a point Native people deny. Two important cases concern B.C. claims: one, the Nishga claim to the Nass Valley, narrowly failed in the Supreme Court of Canada in *Calder, et al. v. British Columbia (AG)* [1973] S.C.R. 313; the other, the more ambitious claim of the Gitksan Wet'suwet'en chiefs to 22,000 square miles of central British Columbia, was tried for 374 days between 11 May 1987 and 30 June 1990 as *Delgamuukw v. British Columbia* (1991), 79 D.L.R. (4th) 185 before the B.C. Supreme Court. The 394 page reasons for judgment found against the plaintiff. The matter may currently be appeal to the Supreme Court of Canada.

¹⁸ Canada's remarkably parsimonious administration was described most fully by Titley, *supra* note 16.

¹⁹ David C. Knoll, "Unfinished Business: Treaty Land Entitlement and Surrender Claims in Saskatchewan" in Donald J. Purich, ed., *Introduction to Native Law Issues: Aboriginal Rights, Treaties*

Canada's reluctance to survey Métis communities in a timely manner, after concluding treaties with Native peoples, had the effect of diminishing even the acknowledged right of Métis settlers to their resources. Norway House, for example, one of the oldest Métis settlements in Canada, dated from the 1820s at the north end of Lake Winnipeg. The community was situated in a district covered by Treaty 5 in 1875, but the first Dominion survey, not undertaken until 1916, merely located homesites for Métis "squatters" to purchase. The Department of the Interior never intended to map the pattern of resource utilisation, preparatory to recognition of first-settlers' claims. They took no account of locations of individuals' fish camps and traplines, only of locations of winter homes in the settlement; everyone was then ordered to pay at the rate of three dollars per acre for the land thus occupied. Such was the attention received by Métis communities in the mid-north, when surveyed at all. Scores of others were overlooked entirely.²⁰

III. Federal-Provincial Stalemates

Cost considerations meant that many Aboriginal land rights were either ignored or remained inchoate. The other obstacle to reserving Aboriginal resources was Canadian federalism, first encountered in Ottawa's relations with Ontario in the 1870s. The bands in the vicinities of Lake of the Woods and Rainy Lake made treaties with Canada in 1873. Many reserve locations agreed to in principle over the next several years were surveyed in the optimistic belief that all of the territory was Dominion land of comparatively small value. In 1878, however, federal-provincial arbitration moved the border of Ontario from provisional lines set in 1867 well to the west, to encompass virtually all of the Treaty 3 area. Since Ontario was a province in control of its resources, questions concerning the status of the reserves arose immediately. In 1888, the highest level of judicial opinion at the time, the Judicial Committee of the Privy Council in London, ruled that while beneficial interest in the lands selected for reserves was Ontario's, Canada had acted within its sphere of responsibility to negotiate a surrender of the "usufructuary" Aboriginal title. Furthermore, the province could not prevent the federal government from fulfilling obligations incurred by the treaty.²¹

Ontario then demanded plans of every reserve selected, as well as justification for the overall area in each case. Canada complied in 1890. However, several years' delay followed as the province proved reluctant to confirm selections mutually acceptable to the Dominion and the Native peoples. In 1894 Ontario did agree not to withhold concurrence without "good reason." Reasons surfaced during the next twenty years, most frequently about locations too near to hydroelectric sites or reserve selections that included valuable agricultural, timber, or mining lands.

and the Constitution (Saskatoon: Native Law Centre, 1987) at 1-11.

²⁰ The overall scope of Dominion surveys, therefore, and the general neglect of Métis settlements, is shown graphically on the last Dominion map extant of a survey produced in 1929 in the National Archives of Canada, National Map Collection, number 18829. The evidence for the particular case of Norway House is found in Manitoba Department of Mines and Natural Resources, Crown Lands Branch, microfilm reels R-1312 and R-1297.

²¹ *St. Catherine's Milling and Lumber Co. v. R.* (1888), 14 Appeal Cases 46.

Sporadic litigation and negotiation ended in 1915 when Ontario finally agreed to most reserve selections made in the 1870s.²²

The frustrating experience with Ontario was not beyond memory for federal officials negotiating provincial control of natural resources with the prairie provinces in the 1920s. Since 1870, all unalienated crown land between Ontario and British Columbia had remained "Dominion Lands" under the control of the federal government, to insure fulfillment of "Dominion purposes." One such purpose was to set aside land according to treaties negotiated in the 1870s; but as late as the 1920s, the obligation was still unfulfilled, mainly because of cost. Duncan Campbell Scott, the Canadian representative in the last, most frustrating meetings with Ontario to confirm the Treaty 3 reserves, was Deputy Superintendent General of the Department of Indian Affairs at the time of Canada's negotiations of resource transfers to the prairie provinces. To avoid repetition of the Ontario experience in triplicate on the Prairies, Scott insisted that "the Provinces be obligated to provide lands for Indian reserves free of cost to the Dominion in order to carry out treaty obligations."²³ The final wording of the *Natural Resources Transfer Agreement (NRTA)* signed in December 1929, to come into effect in 1930, did except "reserves selected and surveyed but not yet confirmed as well as those confirmed." The transfer of lands was qualified further by a second proviso that Canada would need additional lands, unspecified as to quantity and location, for reserves as yet unselected or surveyed. "Such areas" were to be made available "from time to time," to the point of fulfillment of Canada's "obligations under the treaties with the Indians." Upon "agreement" by the province, the additional lands were to be transferred back to Canada, without cost, "in the same way in all respects as if they had never passed to the Province."²⁴ The requirement of provincial agreement, of course, meant that the Ontario experience would be repeated, as Scott had feared: a Saskatchewan band sought a reserve on Candle Lake in 1931, Canada approved, the province vetoed the selection in 1933. It preferred to see the site developed as a resort area, and a mutually acceptable alternative²⁵ was not found until 1951. In Alberta, a band agreed to a reserve in a remote northern part of the province in 1937;²⁶ but the provincial

²² The tortuous course of negotiation and litigation is described fully by Lise C. Hansen, "The Rainy River Indian Band Land Claim ... Research Report" for the Ontario Office of Indian Resource Policy (31 December 1986).

²³ Scott to Charles Stewart, Minister of the Interior and Superintendent General of Indian Affairs, 9 March 1922, National Archives of Canada, RG 10, Vol. 6820, file 494-4-2, part 1.

²⁴ *Natural Resources Transfer Agreement (Constitution Act, 1930)* consisted of three virtually identical agreements between Canada and the three prairie provinces with covering constitutional clauses to bring the three agreements into effect, as appended schedules to the *Constitution Act*. The sections of the schedules most pertinent to the analysis presented here are the sections defining the intended scope and purpose of the transfer (paragraph 1 of all three agreements) and the sections excepting certain lands needed to fulfill treaty obligations with Native people (paragraph 10 in the Alberta and Saskatchewan Agreement, paragraph 11 in the agreement with Manitoba).

²⁵ The controversy is fully documented by Department of Justice correspondence in the National Archives of Canada, RG 13, accession 86-87/361, box 54, file 362/1933.

²⁶ Alberta's early refusal to transfer land with mineral rights is discussed in Fumoleau, *supra* note 16 at 291.

Minister of Mines and Resources insisted on retention of mineral rights and provincial intransigence consumed seventeen years of negotiation before confirmation of that reserve in 1954. In Manitoba the blanket obstacle was retention of riparian, river-bank rights to facilitate hydroelectric development.²⁷ As late as 1974, when Canada finally created an Office of Native Claims to catalogue outstanding entitlements and other matters arising from defective administration of the treaties, literally millions of acres came into consideration; but federal-provincial wrangling continues to block settlement of most such matters in 1995.

While Canadian federalism blocked fulfillment of Indian treaty land entitlements, no level of government has denied that obligations remain outstanding. In the case of inchoate rights of Métis peoples under the Rupert's Land Order of 1870, responsibilities, however, have been systematically denied. No provincial surveys corrected neglect of the matter by the Department of the Interior. No provincial government has recognised ancestral rights with free grants and assurances of continued usage or appropriate compensation for interruption of traditional means of subsistence.²⁸ Métis interests have been regarded simply as "squatters" claims. In certain parts of Alberta, Métis "squatters" have received a measure of consideration, but as a matter of public charity here and there rather than an Aboriginal right worthy of systematic recognition.²⁹

Notwithstanding deplorable delays and denials of Aboriginal land rights, creation of the Office of Native Claims by Canada in 1974 was a good-faith gesture that, for the brief period of 1976 through 1978, extended even to Métis claims. However, repudiation of any federal responsibility for Métis claimants in 1980, and the slow progress in settling validated breaches of treaty promises to Native people, exposed a glaring contradiction between the "specific claims" process as advertised and the unstated presuppositions that effectively set the pace and direction of claims resolution. Briefly those presuppositions were that:

1. the basis of Aboriginal claims remained more contractual in nature than as a matter of primary legal obligation;
2. for protection of the interests of society as a whole, governmental response to Aboriginal claims must be adversarial; and,
3. claims resolution had to be sensitive, often subordinate, to the larger demands of numerically more significant constituencies.

²⁷ Leon Mitchell, *Report of the Treaty Land Entitlement Commission* (Winnipeg, 1983).

²⁸ S. 34 of the *Crown Lands Act*, Chapter 340 in the current statutes of Manitoba (R.S.M. 1987 c. 340) is typical in its declaration that unauthorised occupants of crown lands have no pre-emptive claim to ownership "by any length of possession."

²⁹ See Dr. Grant MacEwan, *Foundations for the Future of Alberta's Metis Settlements: Report of the MacEwan Joint Metis-Government Committee to Review the Metis Betterment Act and Regulations* (Edmonton, 1984).

With such a pattern of presuppositions informing and deforming the treaty claims processes; one could not expect more than what in fact occurred: less than 30 settlements out of more than 400 validated cases by 1987.³⁰ By 1990, however, it seemed that Canada had reached the threshold of a significant breakthrough, because of a new pattern of legal realities enunciated by the Supreme Court of Canada, interpreting constitutional changes proclaimed in April 1982.

IV. The Supreme Court of Canada

The role of the Court has since been significant because the language of the constitution is remarkably unclear. According to s. 35 of the Constitution Act (1982):

(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

(2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit, and Métis peoples of Canada.

Since the section is silent as to which rights are "existing" and which are spent, or never had any genuine legal reality, notwithstanding possible wisdom to the contrary, s. 37 called for a conference of leaders of Canada, the provinces, and Aboriginal political organisations to consider: "constitutional matters that directly affect the Aboriginal peoples of Canada, including the identification and definition of rights of those peoples to be included in the Constitution of Canada" By 1985, that conference process had failed. It remained for the Supreme Court of Canada to interpret the meaning of the word "existing" in s. 35 and whether such rights were constitutionally protected, even though the s. 37 process had ended without agreement.

Judicial clarification of constitutionally protected rights has proved more extensive than what even the most optimistic observers had hoped for from political leaders in conference. Most recently the Court has declared that any Aboriginal right is "existing" if by custom or by treaty an Aboriginal group or individual enjoyed a resource or tradition not legally extinguished by 17 April 1982.³¹ The test of legal extinguishment becomes whether the right in question was subject to infringement by a competent authority for a legitimate purpose, and whether such infringement included compensation to the Aboriginal people adequate to do honour to the crown's fiduciary duties based on s. 91(24) of the *British North America Act*, 1867. More important to the court than cataloguing supposed rights has been the process for their enforcement: the burden of proving an infringement is on the Aboriginal group or individual; the obligation to justify is the government's.³² In defining terms for proving infringement and justification of trespass the Supreme Court of Canada has removed any legal basis for presuppositions blocking fulfillment of treaty obligations since creation of the Office of Native Claims in 1974. By 1990, the

³⁰ Knoll, *supra* note 19 at 34. See also Cliff Wright, *Report and Recommendations on Treaty Land Entitlement* (Regina: Office of the Treaty Commissioner, 1990).

³¹ *R. v. Sparrow* [1990] 1 S. C. R. 1075.

³² *Ibid.*

reverse of each presupposition distinguished above had become the constitutionally correct position:

1. Any agreement between competent representatives of an Aboriginal people and the crown that creates mutually binding obligations on the parties is a "treaty,"³³ and all such agreements as well as other existing Aboriginal rights affirmed in s. 35 are more than contractual promises: they are fundamental, constitutionally protected rights defining primary legal obligations.³⁴
2. Canada has a fiduciary responsibility to guarantee the promises of the crown to Aboriginal people³⁵ and the three prairie provinces, in particular, have constitutional obligations not to frustrate Canada in the fulfillment of outstanding treaty land entitlements, as the *quid pro quo* in the *Natural Resources Transfer Agreement* (1929) for enlargement of provincial powers in other respects.³⁶
3. Competition between incoming commercial or individual interests against a constitutionally protected Aboriginal right has to be decided on the basis of meeting the Aboriginal right first; and in accommodating the Aboriginal right, government must err towards the maximum reasonable benefit as originally promised.³⁷

Full implications of these judicial decisions by the Supreme Court of Canada since 1982 can scarcely be projected from the present. Clearly, the current Court expects a dramatic change in relations between governments and Aboriginal peoples. Removal of the legal basis for continuing postponement of Canada's outstanding treaty obligations will make a difference in the future if such delays become recognised as leaving governments vulnerable to losses arising from expensive lawsuits that they are increasingly likely to lose. That perspective on the legal inheritances of Canada's treaties with Native peoples suggests that the country has reached an important turning point, provided that all parties are willing to confront their legal histories and obligations honestly and fairly.

³³ *Simon v. R.* [1985] 2 S. C. R. 387 and *Sioui v. Quebec (AG)* [1990] 1 S. C. R. 1025.

³⁴ *Nowegijick v. R.* [1983] 1 S. C. R. 901; *Horseman v. R.* [1990] 1 S. C. R. 901; and *Sparrow*, *supra* note 31.

³⁵ *R. v. Guerin* [1984] 2 S. C. R. 335 and *Sparrow*, *supra* note 31.

³⁶ *Horseman*, *supra* note 34.

³⁷ *Jack v. R.* [1980] 29 S.C.R. 244; *Simon*, *supra* note 33; and *Sparrow* *supra* note 31.