

Delgamuukw - The implications for the Prairie Treaty First Nations<sup>1</sup>

On September 17, 1999, the Supreme Court of Canada made a very important ruling with respect to the spirit and intent of the Treaties. In the case of *Marshall v. The Queen*, the court found:

Firstly, even in a modern commercial context, extrinsic evidence is available to show that a written document does not include all of the terms of an agreement.

Secondly, even in the context of a treaty document that purports to contain all of the terms, this Court has made it clear in recent cases that all extrinsic evidence of the historical and cultural context of a treaty may be received even absent any ambiguity on the face of the treaty.

Thirdly, where a treaty was concluded verbally and afterwards written up by representatives of the Crown, it would be unconscionable for the Crown to ignore the oral terms, while relying on the written terms.<sup>2</sup>

Even though the *Marshall* case dealt with the Treaty of 1760-61<sup>3</sup>, the decision has huge ramifications for Treaty First Nations in the West. It is continuing the process started in *Simon*<sup>4</sup> and *Van der Peet*<sup>5</sup> and elaborated in *Delgamuukw*<sup>6</sup>, where the court finally recognized that First Nations oral tradition is the equivalent of the written word. Consequently, these decisions will allow First Nations to achieve a contemporary understanding of their sacred Treaties.

First, I will set out the various interpretation principles as enunciated and culminating in *R. v. Badger*<sup>7</sup>. Second, I will examine how the numbered Treaties were considered by both First Nations and the British Crown. Third, I will be addressing both the written text and the Elders understanding of the Treaties. Specifically,

I want to analyze the issue of land surrender; peace and friendship agreements; reserves; and the Treaty right to hunt, fish, and trap. Finally, I want to examine the implications of *Delgamuukw* for Treaty First Nations. Specifically, I will be demonstrating how *Delgamuukw* could be used to implement the Treaties without changing the written text.

### Treaty Interpretation Principles

When considering whether the Supreme Court of Canada has properly interpreted the spirit and intent of the Treaties, we must keep in mind the various interpretation principles established by the court. One of the first instances where the court established the Treaty interpretation principles was in the case of *R. v. Nowegijick*<sup>8</sup>. It stated: treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indians.<sup>9</sup> The court also adopted the American decision of *Jones v. Meehan*<sup>10</sup> which states: Indian treaties should be construed, not according to the technical meaning of their words, but in the sense that they would be naturally understood by the Indians.<sup>11</sup> Ultimately, these principles from *Nowegijick* have been adopted in later Supreme Court of Canada decisions. For example, in cases like *Horseman* and *Badger*, the starting point for the court is these principles.

In examining these two principles, it is quite apparent that the court is recognizing that there are problems in legally

understanding the spirit and intent of the Treaties. Therefore, if there are any questions about the meaning of the Treaties, then they must be interpreted in the First Nations favour. More importantly, the court must also take into account the traditional First Nations understanding of the Treaties.

In the case of *Badger*, a case which examines Treaty Eight, the Supreme Court of Canada laid out the following summary of the Treaty interpretation principles:

At the outset, it may be helpful to once again set out some of the applicable principles of interpretation. First, it must be remembered that a treaty represents an exchange of solemn promises between the Crown and the various Indian nations. It is an agreement whose nature is sacred. Second, the honour of the Crown is always at stake in dealing with Indian people. Interpretations of treaties and statutory obligations which have an impact upon treaty or aboriginal rights must be approached in a manner which maintains the integrity of the Crown. No appearance of sharp dealing will be sanctioned. Third, any ambiguities or doubtful expressions in the wording of the treaty or document must be resolved in favour of the Indians. A corollary to this principle is that any limitations which restricts the rights of the Indians under treaties must be narrowly construed. Finally, the onus of proving that an aboriginal or treaty right has been extinguished lies upon the Crown. There must be strict proof of the fact of extinguishment and evidence of a clear and plain intention on the part of the government to extinguish treaty rights.<sup>12</sup>

At face value, these principles should benefit First Nations in their cases. Unfortunately, when it comes to making a decision, the court often ignores these principles and goes back to the written text of the Treaties, or it relies on a precedent that was based on inaccurate, incomplete information.

Understanding the Numbered Treaties

The courts have taken a very narrow view of the numbered Treaties. Very few of the judges recognize that the numbered Treaties are not land surrender Treaties but rather they are peace and friendship Treaties where the Treaty First Nations agreed to share the land with the non-Native settlers. There have been a number of cases that have examined the meaning of the Treaties. First, I will address aspects of the *Re: Paulette*<sup>13</sup> decision. Second, I will look at Wilson J. s dissenting judgment in *Horseman*. Third, I will analyze the notion that Indian treaties are *sui generis* and how the court has defined the Treaties in the *Simon* decision. Finally, I will consider how the court dealt with the oral tradition in the *Delgamuukw* case.

One of the first cases to recognize that the numbered Treaties are peace and friendship treaties was the lower court decision in *Re: Paulette*. The judge accepted the following information about Treaty Eleven:

Most witnesses were firm in their recollection that land was not surrendered, reserves were not mentioned, and the main concern and chief thrust of discussions centred around the fear of losing their hunting and fishing rights, the Government officials always reassuring them with variations of the phrase, as long as the sun shall rise in the east and set in the west, and the rivers shall flow, their free right to hunt and fish would not be interfered with.<sup>14</sup>

It is important that the Elders in the Northwest Territories believe that their numbered Treaties were not land surrender Treaties. I believe that this finding is indicative for any of the numbered Treaties. In addition, this decision demonstrates the

viability of the oral tradition. Based on the information of the Elders, Morrow J. stated:

On the evidence before me I have no difficulty finding as a fact that the area embraced by the caveat has been used and occupied by an indigenous people, Athapascan-speaking Indians, from time immemorial, that this land has been occupied by distinct groups of these same Indians, organized in societies and using the land as their forefathers had done for centuries, and that those persons who signed the caveat are chiefs representing the present-day descendants of these distinct Indian groups.<sup>15</sup>

This finding by Morrow J. is important because it can be applied to some of the First Nations in Canada. It is recognizing that First Nations having been living on Turtle Island since time immemorial. It counteracts the racist Doctrine of Discovery that argues this land was *terra nullius* when the Europeans first came to our traditional territories. This is a first step in recognizing that First Nations held Aboriginal title to their traditional territories.

The final aspect of this case is the recognition by Morrow J. that there are problems with understanding the true nature of the Treaties. He found:

... there was either a failure in the meeting of the minds or that the treaties were mere peace treaties and did not effectively terminate Indian title - certainly to the extent that it covered what is normally referred to as surface rights - the use of the land for hunting, trapping, and fishing.<sup>16</sup>

This is one of the rare occasions where a judge has acknowledged that there are questions about the true meaning of the numbered Treaties. Morrow J. was the first to find that there was no meeting

of the minds on the issue of land surrender. Even though this case<sup>17</sup> was specific to Treaty Eleven, I would argue that Treaty First Nations did not surrender their traditional territories but rather signed Treaties of peace and friendship.

Another judgment to consider is Wilson J.'s dissent in *Horseman*. She stated:

The interpretative principles developed in *Nowegijick* and *Simon* recognize that Indian treaties are *sui generis*. These treaties were the product of negotiation between very different cultures and the language used does not reflect, and it should not be expected to reflect, with total accuracy each party's understanding of their effect at the time they were entered into. This is why the courts must be especially sensitive to the broader historical context in which such treaties were negotiated. They must be prepared to look at that historical context in order to ensure that they reach a proper understanding of the meaning that particular treaties held for their signatories at the time.  
...

In other words, to put it simply, Indian treaties must be given the effect the signatories obviously intended them to have at the time they were entered into even if they do not comply with today's formal requirements. Nor should they be undermined by the application of the interpretative rules we apply today to contracts entered into by parties of equal bargaining power.<sup>18</sup>

I have to agree with most of what Wilson J. said about the numbered Treaties. It is important to consider what the signatories were considering when they were negotiating the Treaties. There were two very distinct cultures<sup>19</sup> involved and because of that, there was going to be some challenges. However, I would add one aspect to Wilson J.'s dissent. I would refer to the case of *Sparrow* and the definition of existing Aboriginal rights. It suggests that those

rights are affirmed in a contemporary form rather than in their primeval simplicity and vigour.<sup>20</sup> I would respectfully argue that this definition would also apply to Treaty rights. As such, the court must look at the Treaty rights in a current manner<sup>21</sup>. This means it must consider what the Treaty rights mean today and not when the Treaties were signed. If this process is followed then it will have the effect of modernizing<sup>22</sup> the Treaty and, more importantly, it will reflect what our forefathers intended when they signed the Treaties.

Another case to consider is *Simon*. This is one of the few cases where Treaty First Nations were successful. The court recognized that a treaty with the Indians is unique, that it is an agreement *sui generis* which is neither created nor terminated according to the rules of international law.<sup>23</sup> It is hard to comprehend what the court means by *sui generis*. Academics John Borrows and Leonard Rotman argue that:

in making *sui generis* determinations of Aboriginal rights, courts must look to notions of collective, physical, and cultural survival, as well as specific Aboriginal laws, customs and practices. Reading both of these elements into the jurisprudence would serve as a more appropriate interpretative prism through which the courts may find resolution to Aboriginal rights disputes.<sup>24</sup>

I believe that the court used this term to describe the Treaties because they do not know how to accurately define the Treaties. It is going to take time for the courts to be able to comprehend the importance of the Treaties and then properly determine the meaning

of the Treaties.

It is interesting how the court defined the Treaties in *Simon*. It stated:

In my view, Parliament intended to include within the operations of s.88 of the Indian Act, all agreements concluded by the Crown with the Indians, whether land was ceded or not. None of the Maritime treaties of the eighteenth century cedes land. To find that s.88 applies only to land cession treaties would be to limit severely its scope and run contrary to the principle that Indian treaties and statutes relating to Indians should be liberally construed and uncertainties resolved in favour of the Indians.<sup>25</sup>

The court has taken a literal approach to the numbered Treaties. It is inferred that because of the written text of the Treaties that the numbered Treaties are land cession treaties. There is definitely a question over the issue of land<sup>26</sup> as it relates to the numbered Treaties. The Federal Crown believes the Treaties are land surrender Treaties. Treaty First Nations believe that their Treaties are of peace and friendship, whereby they agreed to share six inches of topsoil with the non-Native settlers. It is obvious that sharing does not correspond to land surrender. It will be demonstrated later in this paper that the oral tradition is very clear that Treaty First Nations did not sell their traditional territories.

The final case that I will examine is *Delgamuukw*. Although this case deals with Aboriginal title and the land claims of the Gitskan and Wet suwet en Nations, Chief Justice Lamer, writing the principle judgment, made a very important finding. He stated:



Notwithstanding the challenges created by the use of oral histories as proof of historical facts, the laws of evidence must be adopted in order that this type of evidence can be accommodated and placed on an equal footing with the types of historical evidence that courts are familiar with, which largely consists of historical documents. This is a long-standing practice in the interpretation of treaties between the Crown and Aboriginal peoples. ... To quote Dickson C.J., given that most Aboriginal societies did not keep written records, the failure to do so would impose an impossible burden of proof on Aboriginal peoples, and render nugatory any rights they have. This process must be undertaken on a case-by-case basis.<sup>27</sup>

This is an important finding by the court. It has recognized the equivalency of the oral tradition to the written word. This is important because it allows Treaty First Nations to present oral tradition so that their Treaty rights will finally be fully implemented. In addition, it should eventually lead to the recognition that the numbered Treaties were peace and friendship Treaties and that all First Nations agreed to do was share six inches of topsoil with non-Native settlers.

#### Understanding the Treaty-Making Process

The treaty making process in Canada has a long history. The First Nations, the British Crown and to a small extent, the French, have had considerable practice in this area. Originally, treaties between either the British Crown or French and First Nations were made for peaceful purposes, alliances, or to ensure neutrality. The recent Report of the Royal Commission On Aboriginal Peoples (hereinafter cited as RCAP) stated:

Treaties between the Aboriginal and European Nations (and

later between the Aboriginal nations and Canada) were negotiated and concluded through a Treaty making process that had roots in the traditions of both societies. They were the means by which European nations reached a political accommodation with the Aboriginal nations to live in peaceful co-existence and **to share the land and resources** of what is now Canada. [emphasis added]<sup>28</sup>

Prior to European contact, the First Nations made many treaties between individual Nations and Confederacies<sup>29</sup>. The treaties could deal with sharing land between the respective Nations or it could deal with treaties of alliance. RCAP found:

When the Europeans arrived on the shores of North America they were met by Aboriginal nations with well established diplomatic processes - in effect, their own continental treaty order. Nations made treaties with other nations for purposes of trade, peace, neutrality, alliance, the use of territories and resources, and protection.

Since interaction between the nations was conducted orally, and the peoples involved often had different languages and dialects, elaborate systems were adopted to record and maintain these treaties. Oral traditions, ceremonies, protocols, customs and laws were used to enter into and maintain commitments made amongst the various nations.

Aboriginal nations formed alliances that continued into [and throughout] the contact period, with treaties serving to establish and solidify the terms of the relationship. Protocols between nations were maintained conscientiously to ensure that friendly and peaceful relations prevailed.<sup>30</sup>

Contrary to popular mythology, Treaty First Nations knew what they were getting into when they were negotiating the numbered Treaties. Treaty First Nations had a wealth of prior experience negotiating treaties with other First Nations. In addition, they spent a lot of time meeting and visiting<sup>31</sup> with other First Nations. This enabled First Nations to have a good grasp of what the Treaty Commissioners

were offering and whether or not they could trust<sup>32</sup> the Federal Government.

European Nations also had a long history of treaty making. The basis for this process comes from Roman Law. RCAP found:

As the political power of the church dwindled and feudal aristocratic hierarchies crumbled, the leaders of the emerging nation-states struggled for survival and trade by making alliances among themselves. Many European treaties of this early nation-building period were constitutive in nature - that is, they secured recognition of the independence and sovereignty of nations both from one another and from the pope.

European jurists began to systemize their understanding of treaty law in the seventeenth century, drawing on Roman legal treatises as well as a growing body of European diplomatic precedents. From Roman law, they adopted the essential principle *pacta sunt servanda* - treaties shall be honoured in good faith.<sup>33</sup>

Looking at the whole situation, it is clear that both the Federal Government and the Treaty First Nations had a long history of treaty making. The Treaties may have been written in English along the lines that the Europeans knew but it is important to note that they also followed the First Nations traditions when the negotiations began. This is affirmed in the RCAP Report:

While European treaties borrowed the form of business contracts, Aboriginal treaties were modeled on the forms of marriage, adoption, and kinship. They were aimed at creating living relationships, and like a marriage, they required periodic celebration, renewal and reconciliation. Also, like a marriage, they evolved over time; the agreed interpretation of the relationship developed and changed with each renewal and generation of children, as people grew to know each other better, traded, and helped defend each other. This natural historic process did not render old treaties obsolete, since treaties were not a series of specific promises in contracts; rather they were intended

to grow and flourish as broad, dynamic relationships, changing and growing with the parties in context of mutual respect and shared responsibility.

Despite these differences, Europeans found no difficulty adapting to Aboriginal protocols in North America. They learned to make condolence before a conference with the Six Nations, to give and receive wampum, to smoke the pipe of peace on the prairies, to speak in terms of brothers (kinship relations), not terms and conditions (contract relations). Whatever may have come later, diplomacy in the first centuries of European contact in North America was conducted largely on a common ground of symbols and ceremony. The treaty parties shared a sense of solemnity and the intention to fulfill their promises.<sup>34</sup>

It is difficult to comprehend why it has taken so long to have the spirit and intent of the Treaties recognized. It is obvious that if the Treaty Commissioners followed First Nations traditions when negotiating the treaties then the interpretation of the Treaty rights should not follow only what is written down. There were two sides to the negotiations and as a result, equal weight should be given to the Treaty First Nations understanding. The following sections will demonstrate the importance of the spirit and intent of the Treaties.

#### The Spirit and Intent of the Treaties

The Federal Government has maintained that the only treaty rights that will be recognized are those found in the written text of the treaties<sup>35</sup>. The Treaty First Nations know that the treaties are much more than what was written down. This is why the Treaty First Nations want to focus on the spirit and intent of the treaties. The reason for the different viewpoints is cultural.

Research into Treaty Seven has found:

Even aside from the possibility that the government deliberately misrepresented its intentions just to get the First Nations to sign, there are many areas where there was room for misunderstanding and miscommunication. Perhaps more importantly, the two sides had different cultural traditions for remembering their history. In the Euro-Canadian cultures, history was written down, whereas in the First Nations cultures, history was transmitted orally in stories passed on by the elders. It was important that these stories be accurate precisely because they were not written down. The First Nations people [were] facing an incoming and soon-to-be-dominant [Euro-Canadian] culture [which] could formally record its own discourse and that viewed the Aboriginal culture as inferior.<sup>36</sup>

To deal with differences, I will focus on the spirit and intent of the treaties.

#### Land Surrender And Peace and Friendship

To understand the numbered Treaties, the issues of land surrender and Peace and Friendship must first be considered. The Federal Government takes the position that the Numbered Treaties are land surrender treaties. This is supported by the written text of the Treaties.<sup>37</sup> For example, Treaty Six states:

And Whereas, the said Commissioners have proceeded to negotiate a Treaty with the said Indians, and the same has finally been agreed upon and concluded, as follows, that is to say: -

The Plains and the Wood Cree Tribe of Indians, and all other Indians inhabiting the district hereinafter described and defined, DO HEREBY CEDE, RELEASE, SURRENDER AND YIELD UP to the Government of the Dominion of Canada, for Her Majesty the Queen and Her successors forever, all their rights, titles and privileges, whatsoever, to the lands included within the following limits, ...(emphasis added)<sup>38</sup>

The written text of the Treaty contradicts the First

Nations understanding. The First Nations believe that their Treaties are Peace and Friendship Treaties. It was the Treaty First Nations' belief that they had no right to sell the land. The Creator owns the land and we cannot sell what is not ours<sup>39</sup>. As a result, our forefathers would have only agreed to share the land with non-Native settlers.

The question then becomes did the Treaty Commissioners explain this issue properly? Did they negotiate with First Nations for the sale of their traditional homelands? RCAP does not think so.

Throughout the negotiation of the numbered treaties the commissioners did not clearly convey to First Nations the implications of the surrender and cession language in treaty documents. The discussion about land proceeded on the assumption, on the First Nations side, that they would retain what they considered to be sufficient land within their respective territories, while allowing the incoming population to share their lands. Many nations believed they were making treaties of peace and friendship, not treaties of land surrender. It is probable that treaty commissioners, in their haste to conclude the treaties, did not explain the concept of land surrender.<sup>40</sup>

I would go one step further than the Royal Commission. The Treaty Commissioners could not have explained to First Nations that by signing the Treaties they were surrendering their land. It was impossible to do so because they did not speak the languages of First Nations nor did they have the services of competent translators<sup>41</sup> who could explain the European notions about ownership of land. Instead, the First Nations believed that they were signing Treaties of peace and friendship<sup>42</sup>. All that was agreed by First

Nations was that they would share<sup>43</sup> six inches of top soil for some of their traditional territories that would be required for agricultural livelihood for the non-Native settlers. Eva Louise Laboucan (Driftpile First Nation) had this to say about the Treaty:

They were promised that the land was still theirs. They never surrendered. The Queen asked them if the white people came this way, could they use this land for living. The First Nations told them "just six inches, just the top from the ground, just the ploughing and nothing else."<sup>44</sup>

In support of this notion that the Treaty was of peace and friendship, one only has to refer to the Treaty Commissioner's Report and the Treaty First Nations oral understanding. In the Treaty Eight Treaty Commissioner's Report, he stated that the purpose of the negotiations was:

to obtain the consent thereto of Her Indian subjects inhabiting the said tract, and to make a Treaty, and arrange with them, so that there may be **peace and goodwill** between them and Her Majesty's other subjects...(emphasis added)<sup>45</sup>

This quotation supports the First Nations viewpoint that one of the main reasons for the Treaties was to ensure peace and friendship between First Nations and non-Native people. If you add in the fact that the Federal Government wanted to negotiate Treaty Eight because the Indians might start killing the non-Native settlers<sup>46</sup>, then this issue becomes even clearer. The Federal Government wanted to sign a Treaty of peace and friendship with Treaty First Nations.

I do not think it matters where you go in First Nations

country. In discussions with Elders, they will all say the same thing. We did not surrender our traditional territories. For example, Elder Adam Delaney from Treaty 7 stated:

The world is round and each society has been given the right to exist in this world within its territory, This is how the Creator arranged it. Therefore, the traditional territory of the Blackfoot Nation was given to our people by our Creator. We respected and protected this traditional territory with our minds and our hearts and we depended on it for what it encompasses for our survival. Everything that we needed for our way of life and survival existed in our traditional territory, such as herbs for medicine, roots, rivers, game animals, berries, vegetables, the buffalo ... Because of the way we hold this land, **I do not believe that our Indian leaders at Blackfoot Crossing gave up this territory but offered to share it with the White man in exchange for peace and friendship between each other and other tribes.** (emphasis added)<sup>47</sup>

RCAP made the following overview of the peace and friendship issue:

The Crown asked First Nations to share their lands with settlers, and First Nations did so on the condition that they would retain adequate land and resources to ensure the well-being of their nations. The Indian parties understood they would continue to maintain their traditional governments, their laws and their customs and to co-operate as necessary with the Crown. There was substantive agreement that the treaties established an economic partnership from which both parties would benefit. Compensation was offered in exchange for the agreement of First Nations to share. The principle of fair exchange and mutual compensation in the form of annual payments or annuities, social and economic benefits, and the continued use of their lands and resources.

These principles, which were part and parcel of the treaty negotiations, were agreed upon throughout the oral negotiations of Treaties 1 through 11. They were not always discussed at length, and in many cases the written versions of the treaties are silent on them. In these circumstances, the parties based their negotiations and consent on their own understandings, assumptions and values, as well as on



the oral discussions. First Nations were assured orally that their way of life would not change unless they wished it to. They understood that their governing structures and authorities would continue undisturbed by the treaty relationship. They also assumed, and were assured, that the Crown would respect and honour the treaty agreements in perpetuity and that they would not suffer - but only benefit - from making treaties with the Crown. They were not asked, and they did not agree, to adopt non-Aboriginal ways and laws for themselves. They believed and were assured that their freedom and independence would not be interfered with as a result of the treaty. They expected to meet periodically with their treaty partner to make the necessary adjustments and accommodations to maintain the treaty relationship.<sup>48</sup>

It becomes clearer that the Treaty Commissioners only asked to share the land with First Nations. There was no sale of any First Nations traditional territories. Two principles came out these negotiations. One: Treaty First Nations believe that the Treaties were peace and friendship agreements. Two: Treaty First Nations agreed to share the land with the non-Native settlers to maintain peace between the two Nations. Therefore, the Eurocentric concept of ceding the Treaty First Nations territories was not discussed at the negotiations. The reason is that these concepts are not compatible with the Treaty First Nations world-view. Concepts of land surrender and of ownership are something that still to this day, Treaty First Nations have a hard time accepting. Although it may be easier to understand these notions today, ceding and surrendering is something that would not and could not have been agreed to at the time Treaties were signed.

Aboriginal Title

An issue that must be considered is First Nations Aboriginal title to their traditional territories. This issue is very complicated. In the case of *Delgamuukw*, Chief Justice Lamer made the follows findings as it relates to Aboriginal title. He stated:

Aboriginal title is a right in land, and as such, is more than the right to engage in specific activities which may be themselves Aboriginal rights. Rather, it confers the right to use land for a variety of activities, not all of which need to be aspects of practices, customs, and traditions which are integral to the distinctive cultures of Aboriginal societies. Those activities do not constitute the right per se; rather, they are parasitic on the underlying title. However, that range of uses is subject to the limitation that they must not be irreconcilable with the nature of the attachment to the land which forms the basis of the particular groups Aboriginal title. This inherent limit, . . . , flows from the definition of Aboriginal title as a *sui generis* interest in land, and is one way in which Aboriginal title is distinct from a fee simple.<sup>49</sup>

One of the problems with this statement is the inherent limit envisioned by Chief Justice Lamer. I find it hard to believe that First Nations would get involved in strip mining or turning their traditional territories into parking lots<sup>50</sup>. This characterization by the court is not helpful. The problem is this inherent limit established by the court. Patricia Monture-Angus made the following points on this limit:

The simple fact is that threats to Aboriginal lands have not historically been internal rather than external (from commercial interests such as mining and lumber companies or hydroelectric development, or from governments). It was not Haudenosaunee people at Oka who attempted to build nine more holes of a golf course over a burial ground. Lamer's limitation and the need for such a limitation must be

realistically and not sensationally justified. Kent McNeil notes a concern of a similar nature:

isn't it paternalistic for the Supreme Court to impose restrictions on Aboriginal title in the interests of cultural preservation - which seems to be what this is all about - if the Aboriginal community in question does not want them? (McNeil, 1998:13)

The extreme nature of Lamer's examples contributes to the insult that Aboriginal people themselves would treat sacred lands in such a manner. Again, the real question, as McNeil identifies, is who gets to determine to what use Aboriginal title lands could be put. The manner in which the Court has imagined this limitation rule may in fact mean that there is little advantage for Aboriginal nations to hold their lands as Aboriginal title lands - as it may mean becoming subject to yet another level of regulation over internal decision making.<sup>51</sup>

Treaty First Nations should be able to undertake economic ventures that they want to in order to help out their communities. I believe that the ventures should not be limited to practices, customs, and traditions which are integral to the distinctive cultures of Aboriginal societies. The court is contradicting its judgment in *Sparrow* by not allowing Aboriginal rights to evolve naturally over time.

Another aspect that Justice Lamer referred to was the fact that Aboriginal title is held communally. He found:

A further dimension of Aboriginal title is the fact that it is held communally. Aboriginal title cannot be held by individual Aboriginal persons; it is a collective right to land held by all members of an Aboriginal nation. Decisions with respect to that land are also made by that community. This is another feature of Aboriginal title which is *sui generis* and distinguishes it from normal property interests.<sup>52</sup>

This statement reflects traditional First Nations values. It was

one of our strengths in the past how we worked together and survived as communities. We now have the opportunity to embrace these values and gain strength as First Nations.

### Reserves

The issue of Aboriginal title also has significant relevance to First Nations reserves. Treaty First Nations believe in a notion called *skun gun* which means the lands that we retained for ourselves. This belief is contrary to how the Federal Crown and the court interpret the Treaty. In *Delgamuukw*, Lamer found:

The principal provision is s. 18(1), which states that reserve lands are held for the use and benefit of the bands which occupy them; those uses and benefits, on the face of the *Indian Act*, do not appear to be restricted to practices, customs, and traditions integral to distinctive aboriginal cultures. The breadth of those uses is reinforced by s. 18(2), which states that reserve lands may be used for any other purpose for the general welfare of the band. The general welfare of the band has not been defined in terms of aboriginal practices, customs, and traditions, nor in terms of those activities which have their origin pre-contact; it is a concept, by definition, which incorporates a reference to present-day needs of aboriginal communities. On the basis of *Guerin*, lands held pursuant to aboriginal title, like reserve lands, are also capable of being used for a broad variety of purposes.<sup>53</sup>

The court is trying to link the *Indian Act* to reserves. I believe that the court is wrong in doing so. The court should be examining the oral tradition. In discussions with Harold Cardinal<sup>54</sup>, from the Sucker Creek Cree Nation, he made it clear that there was no discussion of the *Indian Act* during the Treaty negotiations. If the Federal Crown had wanted the *Indian Act* to apply to our Treaties

then these negotiations should have taken place. The first official *Indian Act* was passed in 1876. Treaties 6, 7, and 8 were negotiated in 1876, 1877, and 1899. Treaty Eight First Nations may have the strongest argument to have the *Indian Act* annulled. Therefore, it is incumbent on Treaty First Nations to sit down with their Elders and do more oral research on the spirit and intent of the Treaties.

When considering the reserve issue from a Treaty First Nations viewpoint, three important concerns come up. First, there are the considerable concerns with the problematic size of the reserves. Second, location of the First Nations reserves must be examined. Third, the issue of fraudulent losses must be addressed.

The Federal Government had a specific plan for the size of the First Nations reserves. It is spelled out in the text of the Treaty Six:

And Her Majesty the Queen hereby agrees and undertakes to lay aside reserves for farming lands, due respect being had to lands at present cultivated by the said Indians, and other reserves for the benefit of the said Indians, to be administered and dealt with for them by Her Majesty's Government of the Dominion of Canada; provided, all such reserves shall not exceed one square mile for each family of five, or in proportion for larger or smaller families, in manner following, that is to say: that the Chief Superintendent of Indian Affairs shall depute and send a suitable person to determine and set apart the reserves for each band, after consulting with the Indians thereof as to the locality which may be found to be most suitable for them.<sup>55</sup>

One of the main problems that occurred because of the written text was the reserve size. The text is quite clear that all the Treaty Commissioners were offering was one square mile per

family of five. What will be demonstrated in this section is that the Treaty First Nations understood that they were retaining much more land than their present reserves. The Treaty First Nations intended to keep most of their lands to maintain their traditional livelihoods. All that they agreed to do was share the land with the non-Native settlers.

As a result of Government policy, the reserves in Treaty Eight are much smaller than is needed for First Nations. In the Treaty and Aboriginal Rights Research interviews, the following point supports that claim: Several Elders believe that their reserves are too small and one, William Okeymaw, insists that the treaty promised that more land would be provided if the reserves became overcrowded.<sup>56</sup> As First Nations populations are increasing, it is apparent that more land<sup>57</sup> is needed to counter this trend. There is not enough land for either meaningful economic development or agriculture. If the Federal Crown was to comply with its promises of more land to Treaty First Nations then reserve size would not be an issue.

The approach of the Federal Crown has resulted in First Nations reserves being smaller than needed. This approach has resulted in the reserves in Treaty Eight comprising roughly .0034% of the total land base<sup>58</sup>. These figures are based on the existing reserves within Treaty Eight measured against the approximately 325,000 square miles contained therein.

This problem can be illustrated by examining the current size of the Sucker Creek Cree Nation Reserve. Currently, Sucker Creek has 15,000 acres of land. Utilizing the Treaty formula, 15,000 divided by 128 acres per person (based on 640 acres per family of five), Sucker Creek is set up for a population of approximately 117 people. Currently, Sucker Creek has a population of 2000 people. This means that Sucker Creek members currently have 7.5 acres per person.

This limited amount of land is insufficient for Treaty First Nations to conduct any meaningful economic development. It does not allow First Nations to get involved in any forms of livelihood established in the Treaty. There is not enough land for either the individual or the community. Therefore, more land is needed.

If we use the Treaty formula and current population figures then Sucker Creek should have a reserve of 256,000 acres (2000 people times 128 acres per person). This figure increases when we use the land in severalty formula then Sucker Creek should have a reserve of 320,000 acres (2000 people times 160 acres per person). We can find support for the notion that the Sucker Creek Cree reserve should receive more land by referring back to the Treaty Commissioner s promise. He said that First Nations would have secured to them in perpetuity a fair portion of the land .

The problem that Treaty First Nations are facing is that

the Federal Crown contends that the surveying of the reserves was to be a one-time grant. Treaty First Nations disagree with this notion vehemently. We believe the size of the reserves would increase as our population figures rose. Our reserves are becoming overcrowded. Treaty First Nations need and are owed more land. This issue is something that needs to be addressed in the future.

One of the first things that had to be done after the Treaty signing was for the First Nations to choose the locations of their reserves. Former President of the Indian Association of Alberta, Dr. Harold Cardinal, contends that the First Nations tended to take their reserves around the waterways:

Many of the reserves that were taken by the Indians were situated around or in close proximity to lakes and rivers. The underlying purpose in so locating the reserves was to give the people access to one of their traditional means of livelihood - fishing. Therefore, when the land was taken for a reserve, the headland-to-headland concept was adopted. This means that parts of the waters, lakes or rivers were incorporated into the reserves so that the Indians there could continue to fish and hunt water fowl unmolested. The government has yet to acknowledge ownership by the Indians of those portions of land under water.<sup>59</sup>

This statement by Dr. Cardinal is important because there are many problems with the lakes and rivers in the Treaty Eight region. By having ownership of the lands under water, the Treaty First Nations should have more security in protecting the cleanliness and pristineness of the water supply. I believe that before economic development could occur in our traditional territories that permission would have to be granted by First Nations and this requirement should be seen as a Treaty right. This process would



help alleviate the problems of off-reserve pollution.

Another problem is the Federal Government fraudulently took a lot of reserve land from First Nations. RCAP found:

Some prairie treaty nations never received their full entitlement of reserve lands and therefore never had the opportunity to try farming. Moreover, in the land rush that accompanied the building of the Canadian Pacific Railway, many First Nations lost parts of their reserves. In Southern Saskatchewan alone, close to a quarter million acres of reserve land had been sold by 1914. In very few instances were First Nations willing vendors; usually they were subject to relentless pressure from government officials and local settlers to part with their land. Sometimes reserve lands were expropriated for railway easements or the needs of neighboring municipalities. In other cases, reserve lands were lost through questionable transactions involving government officials and land speculators. In a famous case, documented in the 1970 s by the Federation of Saskatchewan Indian Nations, forensic evidence established that fraudulent deeds for lands belonging to the White Bear First Nation Community had been typed up in the office of the local Indian Superintendent.<sup>60</sup>

As a result of the demonstrated fraudulent losses, all Treaty First Nations should examine this area closely. First Nations people need to: discuss these issues with their Elders; review any documents pertaining to leasing or surrendering reserve land(s); and if necessary, survey<sup>61</sup> their reserves. This will ensure that First Nations can claim their full allotment of reserve land. It could also give First Nations an idea of how much more reserve land will be needed for future generations.

#### Hunting, Fishing, and Trapping Rights

The next area that I want to examine is the Treaty right to hunt. One of the major stumbling points to the signing of Treaty

Eight for the Treaty First Nations was the ability of First Nations to continue their usual hunting, fishing, and trapping practices. The First Nations were adamant in the treaty negotiations and stated that if their demands were not met then there would be no treaty. Their fears were allayed when the Commissioner made the following promise:

Our chief difficulty was the apprehension that the hunting and fishing privileges were to be curtailed. The provision in the treaty under which ammunition and twine is to be furnished went far in the direction of quieting the fears of the Indians, for they admitted that it would be unreasonable to furnish the means of hunting and fishing if laws were to be enacted which would make hunting and fishing so restricted as to render it impossible to make a livelihood by such pursuits. But over and above that provision, we had to solemnly assure them that only such laws as to hunting and fishing as were in the interest of the Indians and were found necessary in order to protect the fish and fur-bearing animals would be made, and that **they would be free to hunt and fish after the treaty as they would be if they never entered into it.** (emphasis added)<sup>62</sup>

It is interesting to note that despite the promises made to First Nations that "they would be still free to hunt, fish, and trap as if they had never entered into treaty", the written text of the Treaty has had a negative impact on First Nations opportunities to hunt, fish, and trap. Treaty Eight states:

And Her Majesty the Queen HEREBY AGREES with the said Indians that they shall have the right to pursue their usual vocations of hunting, trapping, and fishing throughout the tract surrendered as heretofore described, subject to such regulations as may from time to time be made by the Government of the country, acting under the authority of Her Majesty, and saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes.<sup>63</sup>

In considering the importance of the Treaty right to hunt, I

want to examine both archival and documentary evidence and Elders testimony to demonstrate that the written text does not reflect the Elders understanding. In an affidavit by James K. Cornwall<sup>64</sup>, he said that the Treaty Commissioner made the following promises to our leaders:

- Nothing would be allowed to interfere with their way of making a living, as they were accustomed to and as their forefathers had done.
- The old and the destitute would always be taken care of, their future existence would be carefully studied and provided for, and every effort would be made to improve their living conditions.
- They were guaranteed protection of their way of living as hunters and trappers, from white competition; they would not be prevented from hunting and fishing as they had always done, so as to enable them to earn their living and maintain their existence.
- Much stress was laid on one point by the Indians, as follows: They would not sign under any circumstances, unless their right to hunt, trap, and fish was guaranteed and it must be understood that these rights they would never surrender.<sup>65</sup>

Mr. Cornwall's affidavit raises some interesting points on the content of the Treaty. It demonstrates that Treaty Eight was like most of the numbered treaties. The Commissioner's made promises to Treaty First Nations that did not make it into the written text of the treaty. Cornwall's affidavit supports the validity of the Elders statements. Fred Oliver Okeymaw, an Elder from the Driftpile Reserve in Northern Alberta, made the following statement on the Treaty right to hunt:

First Nations were not supposed to lose anything by entering into the Treaty. They were supposed to keep all of their hunting and fishing rights and their way of life. They were gaining their medical, schooling and they were given equipment for farming. This was supposed to lead to a better way of life

instead of just hunting, trapping, and fishing.<sup>66</sup>

Another interesting aspect is the true meaning of this treaty right. If you ask any First Nations person what the right to hunt means he/she will invariably respond that it includes hunting for food, social, ceremonial, and commercial purposes. This belief was ultimately recognized and supported in the Horseman case. The court made two findings. First, it found:

An examination of the historical background leading to the negotiations of Treaty 8 and the other numbered treaties leads inevitably to the conclusion that the hunting rights reserved by the treaty included hunting for commercial purposes. The Indians wished to protect the hunting rights which they possessed before the treaty came into effect and the federal government wished to protect the native economy which was based on those hunting rights.<sup>67</sup>

Second, it adopted Arthur Ray's submission that the Treaty right to hunt included commercial rights. Ray found:

The Indians indicated to the Treaty 8 Commissioners that they wanted assurances that the government would look after their needs in times of hardship before they would sign treaty. The Commissioners responded by stressing that the government did not want Indians to abandon their traditional economic activities and become wards of the state. Indeed, one of the reasons that the Northwest Game Act of 1894 had been enacted was to preserve the resource base of the native economies outside of the organized territories. The government feared that the collapse of these economies would throw a great burden onto the state such as had occurred when the bison economy of the prairies had failed.

[C]ommercial provision hunting was an important aspect of the commercial hunting economy of the region from the onset of the fur trade in the late 18th century. However, no data exists that makes it possible to determine what proportion of the native hunt was intended to obtain provisions for domestic use as opposed to exchange.

Furthermore, in terms of economic history, I am not sure any

attempts to make such distinctions would be very meaningful in that Indians often killed animals, such as beaver, primarily to obtain pelts for trade. However, the Indians consumed beaver meat and in many areas it was an important component of the diet. Conversely, moose, caribou, and wood buffalo were killed in order to obtain meat for consumption and for trade. Similarly, the hides of these animals were used by Indians and they were traded. For these reasons, differentiating domestic hunting from commercial hunting is unrealistic and does not enable one to fully appreciate the complex nature of the native economy following contact.<sup>68</sup>

As a result of this testimony, the Supreme Court of Canada finally accepted the notion that the Treaty right to hunt encompassed more rights than it thought. The treaty right to hunt was not only for food purposes but it also included the right to hunt for commercial purposes. This was a great moral and legal victory for Treaty First Nations because it demonstrated that the Elders' statements on these rights were correct. Unfortunately, the Supreme Court, after acknowledging the Treaty right to hunt for commerce, took away this right in the *Horseman* case.

#### 1930 Natural Resource Transfer Agreement

One of the most despicable actions of the Federal Government was to transfer responsibilities of the wildlife and natural resources to the three Prairie provinces (Manitoba, Saskatchewan, and Alberta) without consulting First Nations. The problem that has arisen is that First Nations have no historic relationship with any of those provinces. Alberta and Saskatchewan did not even exist when Treaty Eight was negotiated. As a result, Treaty First Nations want to maintain their bilateral relationship with the Federal

Government. The unfortunate result of the 1930 Natural Resource Transfer Agreement<sup>69</sup> (hereinafter referred to as the 1930 NRTA) is the impact on the Treaty right to hunt, fish, and trap. Section 12 of the 1930 NRTA reads:

12. In Order to secure to the Indians of the Province the continuance of supply of game and fish for their support and subsistence, Canada agrees that the laws respecting game in force in the Province from time to time shall apply to the Indians within the boundaries thereof, provided, however, that the said Indians shall have the right, which the province hereby assures to them, of hunting, trapping, and fishing game and fish for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access.

Section 12 of the 1930 NRTA serves three purposes. First, the three Prairie Provinces have to establish Wildlife Acts to ensure that there is enough wildlife for First Nations subsistence. The cases of *Cardinal*, *Horseman*, and *Badger* found that First Nations have to abide by Provincial laws<sup>70</sup> unless they are hunting on unoccupied Crown lands or lands that they have the right of access. Second, the treaty right has been restricted to hunting, fishing, and trapping for food purposes. This is a remarkable change in the Treaty right to hunt and it has severely limited the scope of the Treaty right. First Nations can only hunt, without being subject to provincial laws, on unoccupied Crown lands and lands to which we may have a right of access. This is contrary to the promise that First Nations would be free to hunt and fish after the Treaty as they would be if they never entered into it.

First Nations were not pleased with the way that the 1930

*Natural Resource Transfer Agreement* came into effect with their Treaty. The bitterness with this agreement is echoed in the statement made by Mr. Okeymaw:

None of the reserves had any knowledge of the changes that were made in 1930. (*1930 Natural Resource Transfer Agreement*) No one was approached. No Chief and Council were approached and told that they (the Federal Government) were giving the provinces these powers. **No consent was obtained.** (emphasis added)<sup>71</sup>

I believe that the Federal Government had no right to negotiate the 1930 NRTA without consulting First Nations. When the treaties were made, both the Federal Government and Treaty First Nations were equal parties. This is the basis of the bilateral relationship. You do not and cannot change the relationship without the consent of the other party. This would violate the notion of the honour of the Crown. It is akin to the Federal Government making a Treaty with the United States of America and the United States unilaterally changing the treaty to suit their own purposes. Why do the same thing to First Nations?

The overall effect of game laws is discussed in Rene Fumoleau's As Long as This Land Shall Last:

The restrictions imposed on him by game laws were incomprehensible to the Indian. He understood that some were necessary for the protection of wildlife, but he believed that they should be strictly applied to the ones wasting the resources, not the Indian who depended on hunting for his existence. Instead of protecting the Indian's freedom to hunt, trap and fish, the Government first allowed it to be eroded, and then restricted. This was the cause of immeasurable physical suffering, and a rapid deterioration of the Indians economic structure. Failure to honour this Treaty obligation was a serious breach of trust on the part of the Canadian

Government.<sup>72</sup>

I believe that this quote is very revealing. To my knowledge, the sun has not stopped shining, the rivers have not stopped flowing and the grass has not stopped growing. Therefore, it would be safe to assume that Treaty First Nations' hunting, fishing, and trapping rights still exist. As a result, I believe that the Federal Government has seriously breached its obligations to Treaty First Nations. Accordingly, the federal government should provide financial compensation to First Nations for restricting their Treaty rights.

### **Conclusion**

I believe that Treaty First Nations have a tremendous opportunity because of the *Delgamuukw* decision. We are able to use the oral tradition in order to demonstrate the spirit and intent of the Treaties. We will finally be able to have the Treaties implemented in the manner that our forefathers had naturally intended. We will be able to prove that our Treaties are for peace and friendship and not land surrender. We will be able to show that we had intended to retain significant portions of our traditional territories. In addition, we can make stronger arguments in order to protect the Treaty right to hunt, fish, and trap.

As it is with any case from the Supreme Court of Canada, *Delgamuukw* has its own problems. I disagree with the restrictions imposed upon Treaty First Nations by the court's definition of



Aboriginal title. I do not like the notion that our reserves are tied to the *Indian Act*. I am also aware of the dangers of bringing our sacred Treaties into a foreign court system. Therefore, I would hope that our leaders, both of the Federal Crown and Treaty First Nations, would be able to sit down and negotiate nation to nation on the meaning of the Treaties. We have direction from the court to utilize the oral tradition to determine the meaning of the Treaties. I hope and pray that we are able to negotiate in an efficient manner so that future generations may benefit.

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1. My name is Sheldon Cardinal and I am Cree from the Sucker Creek Cree Nation in Treaty Eight, Alberta. It is an honour to be writing an article on the implications of Delgamuukw for Treaty First Nations. I am aware that Delgamuukw is largely an Aboriginal title case but I believe that it has relevance for Treaty First Nations. Throughout this article, there will be numerous references to Aboriginal title and oral tradition which will help strengthen the spirit and intent of the Treaties.

There are a number of people that I would like to thank for their assistance in completing this article. First, I would like to thank the Delgamuukw National Review Research Group for the opportunity to do this article. Second, I would like to thank Kent McNeil, Patricia Monture-Angus and Beverley Jacobs for their recommendations in revising this article. Finally, I would like to thank my family for their support: Harold and Maisie Cardinal; Cory, Nicole, Gabriella and C.J. Cardinal; Raymond Cardinal; Jaret and Becky Cardinal; Cheryl and Jason Cardinal-Gordon; Sara Cardinal; Beverley Jacobs; and my son, Lukas Cardinal.

2. *R. v. Marshall*, [1999] 4 C.N.L.R. 161 at 172.

3. The Treaty of 1760-61 involves the British Crown, the Mi kmaq, Maliseet, and Passamaquoddy Nations and it was signed March 10, 1760 at Halifax.

*R. v. Marshall*, [1999] 4 C.N.L.R. 161 at 168.

4. *R. v. Simon*, [1986] 1 C.N.L.R. 153 [hereinafter *Simon*]

5. *R. v. Van der Peet*, [1996] 4 C.N.L.R. 177.

6. *Delgamuukw v. British Columbia*, [1998] 1 C.N.L.R. 14 [hereinafter referred to as *Delgamuukw*]

7. *R. v. Badger* [1996] 2 C.N.L.R. 77 [hereinafter *Badger*]

8. *R. v. Nowegijick* [1983] 2 C.N.L.R. 83. [hereinafter *Nowegijick*]

9. **Ibid.** at 94.

10. *Jones v. Meehan* 175 U.S. 1 (1899)

11. **Ibid.** at 10-11.

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12. *Badger*, *supra* note 7 at 92.

13. *Re: Paulette s Application* [1973] 6 W.W.R. 97 [hereinafter *Re: Paulette*]

14. **Ibid.** at 123.

15. **Ibid.** at 129.

16. **Ibid.** at 141.

17. *Re: Paulette et al* was reversed on other grounds by the NorthWest Territories Court of Appeal and the Supreme Court of Canada. See *Re: Paulette et al and the Registrar of Titles*, [1976] 2 W.W.R. 193.

18. *R. v. Horseman*, [1990] 3 C.N.L.R. 95 at 109. [hereinafter *Horseman*]

19. In considering the two distinct cultures, I am referring to First Nations and representatives of the Federal Crown. I am aware that there are many independent First Nations who signed the Treaties. For example, Treaty Eight was signed by the Cree, Ojibway, and Dene Nations.

20. *R. v. Sparrow* [1990] 1 S.C.R. 1075 at 1091.

21. There are a couple of cases that support the notion that existing Treaty rights must be examined in a contemporary manner. In the case of *Simon*, it was recognized that using a truck, rifle and ammunition was within the Treaty right. In *Sundown*, building a cabin is a contemporary way of providing shelter for hunting that was served by a lean-to when the Treaty was signed.

See *R. v. Simon*, *supra* note 4 and *R. v. Sundown* [1999] 2 C.N.L.R. 289.

22. It will be demonstrated throughout this paper that there are problems in understanding the true meaning of the Treaties. For too many years, the Federal Government's reliance on the written text of the Treaty was the only way to interpret the Treaties. Both *Delgamuukw* and *Marshall* allow First Nations to utilize their oral tradition to finally achieve the proper understanding of the spirit and intent of their Treaties. The next issue that Treaty First Nations will have to address is the implementation of their Treaty rights.

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23. *Simon, supra* note 4 at 169.

24. John Borrows and Leonard Rotman, *Aboriginal Legal Issues: Cases, Materials & Commentary*, (Toronto: Butterworths, 1998) at 335.

25. *Simon, supra* note 4 at 174.

26. There has been an abundance of research conducted by Treaty First Nations to address the spirit and intent of the Treaties. For example, the Treaty 7 Elders and Tribal Council worked with Sarah Carter, Walter Hildebrandt and Dorothy First Rider in developing The True Spirit and Original Intent of Treaty 7. In Saskatchewan, the Office of the Treaty Commissioner requested two reports, one of the Federal Government interpretations and one on the oral tradition of the First Nations. The Federal Government viewpoint was researched by Professors Frank Tough, Arthur Ray, and J.R. Miller. The report on oral tradition was conducted by Harold Cardinal and Walter Hildebrandt. Finally, there is going to be an abundance of research forthcoming on Treaty Eight. On June 21, 1999, it was our centennial. This will provide a wealth of information on the spirit and intent of the Treaties.

This research is important because we have finally reached a point where the courts are accepting oral tradition as the equivalent of the written word. The *Delgamuukw* decision has laid the groundwork for the courts to finally recognize that the numbered Treaties are peace and friendship Treaties.

27. *Delgamuukw, supra* note 6 at 49-50.

28. Canada, *Report of the Royal Commission on Aboriginal Peoples, Looking Forward, Looking Back*, Volume 1, 1996, at 119. [hereinafter RCAP]

29. An example of the Treaties between First Nations was referred to in Report of the Royal Commission on Aboriginal Peoples. It found:

Among nations occupying overlapping territories, confederacies were formed in part to protect boundaries on all sides and to regulate resource use within the common area. This was the case for the plains nations, which used large territories for their hunting economies and whose alliances created relationships based on mutual respect and non-interference. One nation could not interfere in the internal

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affairs of another but might intervene at the request of a member nation.

**Ibid.** at 120-121.

30. **Ibid.** at 119-120.

32. For example, in Treaty 4, the following happened:

In the end, and in part because of all the difficulties in negotiating the treaty, Morris offered and the chiefs present agreed to accept the terms of Treaty 3, the terms which had already been communicated to them by the Ojibwa with whom they were in close communication.

**Ibid.** at 168.

32. In Harold Cardinal's book, The Unjust Society, he talks about the perceptions of the Indians when they entered into the treaties with the White Man.

To the Indians of Canada, the treaties represent an Indian Magna Carta. The treaties are important to us, because we entered into the negotiations with faith, with hope for a better life with honour. We have survived for over a century on little but that hope. Did the white man enter into them with something less in mind? Or have the heirs of the men who signed in honour somehow disavowed the obligation passed down to them? The Indians entered the treaty negotiations as honourable men who came to deal as equals with the queen's representatives. Our leaders at the time thought they were dealing with an equally honourable people. Our leaders pledged themselves, their people and their heirs to what was done then.

Cardinal, Harold, The Unjust Society, Hurtig Publishers, Edmonton, 1969, at 28. [hereinafter *The Unjust Society*]

33. RCAP, *supra* note 28 at 121.

34. **Ibid.** at 129-130.

35. The notion that the numbered Treaties are nothing more than the written text of the Treaty has been examined by various academics. James Frideres stated:

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In general, however, the government negotiators had by far the best of the bargaining. Indeed, most treaties were written by the government and simply presented to the Indians for signing. The terms, for example, of Treaty No. 9 were determined by the Ontario and Canadian governments well in advance of discussions with Aboriginals. Moreover, there is evidence that, in many cases, hard-won oral promises have never been recognized nor acted upon by the government.

Frideres, James, Aboriginal Peoples in Canada: Contemporary Conflicts, Fifth Edition, Prentice-Hall Canada, Scarborough, 1998, at 48. [Hereinafter *Frideres*]

Unfortunately, this is a typical example of the misinformation on the spirit and intent of the numbered Treaties. If the Treaty Commissioners had simply come into First Nations communities and did what Frideres suggests then it is very likely that the Treaty process would have taken a lot longer than the Federal Government had intended. The main problem that the Treaty First Nations are facing is the fact that the hard fought oral promises that Frideres refers to are not included or reflected in the written text of the Treaties.

36. Treaty 7 Elders and Tribal Council with Walter Hildebrandt, Dorothy First Rider and Sarah Carter, The True Spirit and Original Intent of Treaty 7, McGill-Queen's University Press, Montreal, at 124. [hereinafter Treaty 7 Elders]

37. With respect to the numbered Treaties, the Federal Government created a template to follow. In all of the numbered Treaties, it makes reference to the Treaty First Nations surrendering the land. I am providing the wording from Treaty Six to demonstrate the language used in the numbered Treaties.

38 Copy of Treaty No. 6, Between Her Majesty the Queen and the Plains and Wood Cree Indians and Other Tribes of Indians at Fort Carlton, Fort Pitt and Battle River with Adhesions, Queen's Printer and Controller of Stationary, Ottawa, 1964, at 2. [Hereinafter Treaty 6]

39. For example, Mik ai stoowa was a statesman and a well-respected leader of his people for many years. ... he had been asked about his position on lands and surrender. In response he picked up some grass with his left hand and dirt with his right hand, and as he held up his left hand, he said, This you can have ; then, holding up his right hand with the dirt, This is for

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me and my people forever. ... All of our leaders have been well instructed by their teachers in their stewardship responsibilities for the land. They would never knowingly sell or give away their land. According to the spiritual laws of our people, this is a responsibility given to us by the Giver of Life.

Treaty 7 Elders, *supra* note 36 at 18.

40. RCAP, *supra* note 28 at 172-173.

41. For a detailed discussion on the problems with translation, see Sheldon Cardinal, *The Spirit and Intent of Treaty Eight*, forthcoming in 2001.

42. It will become evident in the upcoming pages that Treaty Eight First Nations believed that they were signing Treaties of Peace and Friendship.

43. It is important to note that the Elders are very clear that our forefathers only intended to share six inches of topsoil with the non-Native settlers. It is their belief that First Nations retained jurisdiction of the natural resources. For example, Elder Danny Musqua said that our forefathers asked the Treaty Commissioner whether the natural resources were included in the Treaty. The Treaty Commissioner responded by saying no. All that they (non-Native people) wanted was six inches of topsoil for farming purposes only.

This is an argument that has been put forward by many of the First Nations leaders. They believe that Treaty First Nations are entitled to a share of the natural resources. Unfortunately, it is going to be a difficult battle to have the provincial government accept this argument.

44. Interview with Elder, E.L. Laboucan, (1991), Driftpile, Alberta.

45. Treaty No. 8, Made June 21, 1899 and Adhesions, Reports, etc., Queen's Printer and Controller of Stationary, Ottawa, 1966, at 12.

46. Although I disagree with Frideres' perception of the numbered Treaties, he stated:

The federal government decided to negotiate with the Aboriginals largely because its own agents foresaw violence against the White settlers if Treaties were not established. However, this was not based on particular threats or claims on

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the part of the Aboriginals, who simply wished to carry out direct negotiations with the government to recompense them for the lands they occupied prior to White settlement.

Frideres, *supra* note 35 at 47.

47. Treaty 7 Elders, *supra* note 36 at 85.

48. RCAP, *supra* note 28 at 174 - 175.

49. *Delgamuukw*, *supra* note 6 at 57.

50. **Ibid.**

51. Monture-Angus, Patricia, *Journeying Forward: Dreaming First Nations Independence*, Fernwood Publishing, Halifax, 1999 at 127.

52. *Delgamuukw*, *supra* note 6 at 59.

53. **Ibid.** at 61.

54. Interview with Harold Cardinal, (August 17, 2000), Sucker Creek Cree Nation.

55. Treaty Six, *supra* note 38 at 3.

56. Price, Richard, The Spirit of the Alberta Indian Treaties, Pic Pica Press, Edmonton, 1987, at 97.

57. One of the most interesting facts that came out of the recent Royal Commission on Aboriginal Peoples is the fact the First Nations reserves constitute less than 1% of the land mass in Canada. If you consider the fact that First Nations originally shared the land with the newcomers then it was not done in an equitable fashion. As a result, I would recommend, that Canada begin negotiations with First Nations to make sure that there is an equal sharing of the land.

58. The following information was obtained in an interview with Harold Cardinal.

Interview with Harold Cardinal, (August 17, 2000), Sucker Creek Cree Nation.

59. *The Unjust Society*, *supra* note 32 at 41.

60. Report of the Royal Commission on Aboriginal Peoples,



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Restructuring the Relationship, Part Two, Volume 2, 1996, at 475.

61. In Saskatchewan, it was found that there was a tremendous shortfall of land owed to the Treaty First Nations. When the surveyors came out to survey the reserves, there was an inaccurate calculation of the number of First Nations people living in particular communities. There were people away practicing their traditional livelihood, visiting, joining after the survey or they transferred from other communities. The Office of the Treaty Commissioner utilized a percentage between the current population and the date of first survey. It worked out that Saskatchewan First Nations were entitled to about 1.5 million acres of land.

I believe that Saskatchewan First Nations are leading the way in this area. However, *Delgamuukw* gives other First Nations the opportunity to do the same thing for their peoples. We have to remember what William Okeymaw stated: more land would be provided if the reserves became overcrowded. We have reached that point in many First Nations communities. We need more land and Treaty Land Entitlement can be a template for other First Nations.

In addition, utilizing the oral tradition, we can make arguments that we believed that we retained significant portions of our traditional territories. Using equity principles, we should have more than 1% of the Canadian land mass. We need to explore other ways in order to have the land returned to the First Nations of this country.

62. Treaty No. 8, *supra* note 45 at 6.

63. **Ibid.** at 12.

64. James K. Cornwall was a non-Native man who was present when Treaty Eight was being negotiated in 1899. His statements are important because it reflects First Nations oral tradition and it contradicts the written text of the Treaty.

Fumoleau, Rene, OMI, *As Long As This Land Shall Last*, the Oblate Fathers of the Mackenzie, (Toronto: McClelland and Stewart Limited, 1973), at 74-75. [hereinafter Fumoleau]

65. **Ibid.**

66. Okeymaw, Fred Oliver, Interviews with the Elders of Treaty No. 8, Driftpile, Alberta, 1991.

67. *Horseman*, *supra* note 18 at 100.

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68. **Ibid.** at 101-102.

69. *Constitution Act, 1930* (formerly the *British North America Act, 1930*, 20-21 George V., c. 26 (U.K.))

70. I believe that Section 12 of the 1930 NRTA has created a duty for the provinces to ensure that there is enough wildlife for our subsistence. This is an area that our leaders could address. They need to determine if the provinces are fulfilling their duty to Treaty First Nations.

Cardinal, *supra* note 41.

71. Okeymaw, Fred Oliver, Interviews with the Elders of Treaty No. 8, Driftpile, Alberta, 1991.

72. Fumoleau, *supra* note 64 at 307.