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THE EFFECT OF *DELGAMUUKW* ON TREATIES IN ONTARIO

The Supreme Court of Canada's decision in Delgamuukw¹ involves issues surrounding an Aboriginal right to an historic land mass in the province of British Columbia. The Gitksan and Wet'suwet'en Nations advanced a claim for jurisdiction and title of their traditional territory. There were no treaties signed in this territory between the Gitksan and Wet'suwet'en Nations in British Columbia and representatives of the British Crown or Canada. As a result, in having to write this paper as to Delgamuukw's effect on treaties in Ontario, a difficulty arises because of the fact that there were no treaty relationships formed between the Gitksan and Wet'suwet'en Nations in British Columbia with European colonizers. What can be reviewed, however, is the relationship to the land, as this is a universal concept that is recognized and understood by all Aboriginal Nations.

The most important issue when reviewing treaty relationships and relationships to land is to determine whose interpretation of treaties and history we are going to review. Treaties and history understood from a Eurocentric Crown/government perspective would consist of reading history as it was written by European historians and by simply reading the written text of the treaties. If we analyzed treaties from a true Aboriginal standpoint, the nation-to-nation relationship would be acknowledged as well as the sacredness of the treaty itself. Thus, in examining the history of the treaty relationship through the understandings of Aboriginal peoples, the relationships to land and Aboriginal peoples were considered "caretakers" of the land. This knowledge and recognition of this relationship to land was integrated into stories and oral history that was transferred from one generation to the next generation. It was just common knowledge and acceptance among Aboriginal nations that this was how it was. Based on understandings of Aboriginal people, the legal concept of "Aboriginal title" did not exist prior to colonization nor was there any concept of "ownership". However, the Canadian legal system prior to Delgamuukw recognized "Aboriginal title" as already established prior to colonization.² The court in Delgamuukw suggested that "Aboriginal title crystallized at the time [British] sovereignty was asserted."³

¹Delgamuukw v. British Columbia, [1998] 1 C.N.L.R. 14 (S.C.C.) [hereinafter referred to as Delgamuukw].

²This concept was actually confirmed by the Supreme Court of Canada in Guerin v. The Queen, [1984] 2 S.C.R. 335 at 376-9 per Dickson J. [hereinafter referred to as Guerin]; Roberts v. Canada, [1989] 1 S.C.R. 322 at 340, wherein the court made it clear that Aboriginal title to land existed as a legal right prior to the colonization of North America by Europeans.

³Supra, note 1 at 69

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The concept of title to land was created as a result of Eurocentric beliefs and values of land wherein land was considered a commodity, something of value, something to be bought or sold. Aboriginal title was not created by the Royal Proclamation of 1763 or any other executive or legislative act⁴. Aboriginal peoples' rights to their traditional lands were not derived from the imposed Eurocentric legal systems⁵ but were given to them by the Creator. The legal concept of Aboriginal title as well as the need for that concept was created by an imposed Eurocentric legal system.

Territorial boundaries were already established between Indigenous Nations and were respected; thus, any of the boundaries that were created after colonization (Royal Proclamation of 1763, Treaty of Paris of 1783, Treaty of Fort Stanwix, etc.) as seen by Indigenous peoples were illegal boundaries (or boundaries that were created without Indigenous consent). Writing this paper within the "geographical" confines of Ontario thus creates a "recognition" of these illegal boundaries, which thus deviates from the understandings of many Aboriginal Nations.⁶ Treaties that were made within the geographical confines of Ontario prior to colonization and during pre-Confederation times were made without the current contemporary, international and provincial boundaries. It is interesting to note that Sir William Johnson, the Imperial Superintendent General of Indian Affairs, whom was the main British agent of the Crown prior to Confederation acknowledged the Crown's "occupancy and use" of Aboriginal lands. In his peace communications and treaty negotiations with the Senecas, Sir William Johnson stated:

...Thirdly, a free use of the carrying Place at Niagara, with the Lands from the Fort to the Creek above Little Niagara, the Breadth of 4 Miles from the River, and free liberty to Cut Timber for Building, Fire Wood, &c.

Fourthly, a free open Road through your Country for the passage of the English with Cattle, Carriages or

⁴Guerin, supra, note 2 at 379

⁵Kent McNeil, "The Meaning of Aboriginal Title" in Michael Asch (ed.) Aboriginal and Treaty Rights in Canada (Vancouver: UBC Press, 1997) 135 at 136.

⁶For example, there are members of the Hodinohso:ni Confederacy that "live" within the confines of the Province of Ontario; however there are members that live across provincial and international borders. The community of Akwesasne deals with three distinct borders: Ontario, Quebec, and New York State. Although these borders exist, all members of the Akwesasne community derive from the same Hodinohso:ni Confederacy.

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otherwise with the free Occupancy of the Lakes, Rivers, Creeks &c.

Fifthly, the use of the Harbours of Orundequate and Asserotus with liberty of erecting Places of Security at them.

...

If you cheerfully agree to these Proposals, they shall be considered as Preliminaries to a General Treaty with you, and the Army shall have Orders not to strike you.

[Sir William Johnson Papers, XI, 130-155]

In reviewing Johnson's statements, I believe that he was requesting from the Senecas use of their land to cut timber, to use the open road already existing and to use the lakes and harbours to build their forts. The British Crown were thus recognizing that the Senecas already "owned" the land in order for them to request the use of their land in such a treaty. These statements reverse the Eurocentric legal definitions that were created later to justify the underlying Crown title and reducing Aboriginal title to "occupancy and use" or even "sui generis" title.

There were many forms of treaties that were made in Ontario. Prior to colonization, Aboriginal Peoples were creating nation-to-nation relationships through peace treaties, which were symbolized in wampum belts. There were also peace treaties made during pre-Confederation times between Aboriginal Nations and colonizer nations, such as the British Crown. There were also pre-confederation treaties concerning land rights between Indigenous Nations and the British Crown (eg. The Royal Proclamation of 1763⁷; Treaty of Paris of 1783, etc.). Many of these treaties made with the British in Ontario after The Royal Proclamation of 1763 were considered land surrenders or land cessions.⁸ There were also pre-Confederation treaties and proclamations that were made between colonizer nations that dealt with the rights of Indigenous peoples (eg. such as border crossing rights in The Jay Treaty of 1795). And then, there were numbered treaties that were made after confederation between Canada and Indigenous Nations (e.g. Treaty No. 9 and Treaty No. 3).

⁷John Borrows, "Wampum at Niagara: The Royal Proclamation, Canadian Legal History, and Self-Government" in Michael Asch (ed.) Aboriginal and Treaty Rights in Canada (Vancouver: UBC Press, 1997) at 155 [hereinafter referred to as "Wampum at Niagara"].

⁸Robert J. Surtees, "Land Cessions, 1763-1830" in Edward S. Roberts & Donald B. Smith, Aboriginal Ontario. Historical Perspectives on the First Nations. A Publication of the Ontario Historical Studies Series for the Government of Ontario. (Toronto, Oxford: Dundurn Press, 1994) 92 [hereinafter referred to as "Land Cessions"]. Surtees provides an excellent historical Eurocentric version of land cessions and surrenders in Ontario. This is in contrast with an Aboriginal version wherein all Aboriginal Nations were signing Treaties of Peace and Friendship.

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There are differences between the types of treaties made in Northern and Southern Ontario⁹Also attached as Appendix C are maps depicting the Robinson Treaties as well as the Manitoulin Island Treaty of 1862. Surtees, “Land Cessions”, supra, note 7 at 128-129. On the west side of Manitoulin Island, the Manitoulin Island Treaty of 1862 was signed, which promised financial compensation from the land sales at fair market value.. Because there were numerous treaties made in Ontario, it is beyond the scope of this paper to analyze every treaty or land surrender that was made¹⁰All of the above was found in F. W. Hodge, Handbook of Indians of Canada (Ottawa:

⁹Attached as Appendix A is a map depicting the many numbers of “land surrenders” made in Southern Ontario as well as showing the Royal Proclamation Line of 1763. Ibid. at 103.

Also attached as Appendix B are maps depicting the area of Treaty No. 9 made in Northern Ontario. Grand Council Treaty Nine. Association of Treaty Nine Chiefs. Our Self-Determination for our Spiritual, Cultural, Social and Economic Independence (date unknown)

¹⁰The following provides for other pre-Confederation treaties made in Ontario:

“The Indian title to the portion of southern Ontario that had not previously been acquired by the French was extinguished by a series of purchases of which the following are the most important:

- A. Mississauga - lands purchased prior to 1784
- B. Chippewa - May 19, 1790 for 1,200 pounds cy.
- C. Chippewa - purchased in 1785: northern and eastern boundaries doubtful
- D. Mississauga - Dec. 7, 1792, for L1,180-7-4 stg.
- E. Chippewa - Sept. 7, 1796, for L800 cy.
- F. Chippewa - Sept. 7, 1796, for L1,200 cy.
- G. Chippewa - May 22, 1798, confirming surrender of May 19, 1795; for L101 cy.; 28,000 acres
- H. Mississauga- Aug. 1, 1805, confirming surrender of Sept. 23, 1787; for 10s. ‘and divers good and valuable considerations given on 23rd Sept. 1787.’
- I. Mississauga- Sept. 5-6, 1806, confirming the surrender of Aug. 2, 1805; for L1,000 cy.: 85,000 acres.
- J. Chippewa - Nov. 17-18, 1815 for L4,000 cy.; 250,000 acres
- K. Chippewa - Oct. 17, 1818 for L1,200 cy.; 1,592,000 acres
- L. Mississauga - Oct. 28, 1818, for annuity of L522-10 cy.; 648,000 acres
- M. Mississauga- Nov. 5, 1818, for annuity of L740 cy.; 1,951,000 acres
- N. Mississauga- Nov. 28, 1822, confirming surrender of May 31, 1819; for annuity of L642-10 cy.; 2,748,000 acres
- O. Chippewa - July 8, 1822, confirming surrenders of Mar. 8, 1819 and May 9, 1820; for annuity of L600 cy.; 580,000 acres.
- P. Chippewa - July 10, 1827, confirming surrender of April 26, 1825; for annuity of L1,100 cy.; 2,200,000 acres.
- Q. Chippewa (Saugeens) - Aug. 9, 1836, for annuity of L1,250 cy.; 1,500,000 acres.
- R. Chippewa - Oct. 13, 1854; for “interest of principal sum arising out of the sale of our lands”

In addition to the above, a map following page 632 and titled ‘Surrenders of Indian Lands in Southern

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King's Printer, 1913) at p. 472 cited in Bruce Wildsmith, "Pre-Confederation Treaties" in Bradford W. Morse (ed.), Aboriginal Peoples and the Law: Indian, Metis and Inuit Rights in Canada (Ottawa: Carleton University Press, 1991) at 202-203.. The treaties that will be described in this paper are the wampum treaty belts, Royal Proclamation/Treaty of Niagara of 1784, Haldimand Treaty/Deed made with the Hodinohso:ni, The Robinson Treaties, Treaty No. 3 and Treaty No. 9. In providing this description, it will provide the background to the many types of treaties that were made in the province of Ontario. These treaties were chosen because they are the ones that are the most researched and written about, as well as being reported in many law suits.

Wampum Treaty Belts and Oral History

The entire treaty protocol and process utilized by Indigenous Nations was considered a ceremony and created a respected and sacred relationship. This sacred and respected relationship that was created, rather than the event itself, was considered the most important by Aboriginal peoples. "While the treaties [were] like stones marking a spot in time, the relationship between the nations [was] like two equals, respecting each of their differences but supporting each other for a common position on peace, order and justice for all".¹¹ Many of the relationships with Indigenous nations were "orally based"¹² and were symbolized through the use of wampum.

Lamer, C.J., in Delgamuukw had to "adapt the laws of evidence so that the Aboriginal perspective on their practices, customs and traditions and on their relationship with the land, are given due weight by the courts." Why should an Aboriginal "perspective" be given due weight when oral history is recognized by Aboriginal people just the way it is said. Oral history is part of their traditional laws and their way of life. However, according to Chief

Ontario Prior to 1854" contains in the "Legend" the following two items:

- S. Six Nations - Oct. 25, 1784, granted by Gov. Haldimand; confirmed by Lt.-Gov. Simcoe. Jan. 14, 1793; 17 townships; strip "six miles deep from each side of the (Grand River)," in "consideration of the early attachment to his cause." This tract was purchased from the Mississaugas for £2,000, by the crown.
- T. Mohawks - April 1, 1793, grant by Lt.-Gov. Simcoe, of Tyeudiuga township.

¹¹Niagara Treaty Conference, Twenty Four Nations Wampum Belt - document in author's possession.

¹²John Borrows, "Wampum at Niagara", supra, note 7 at 155.

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Justice Lamer, oral history, or rather an “aboriginal perspective ” cannot strain “the Canadian legal and constitutional structure”¹³; thus, if evidence of oral history goes against the Canadian legal and constitutional structure, then it will not be acknowledged by the courts. As Lamer states, “The difficulty with these features of oral histories is that they are tangential to the ultimate purpose of the fact-finding process at trial - the determination of historical truth.”¹⁴ This, again, is a difference in understanding what oral history means to Aboriginal peoples. Oral histories according to Aboriginal peoples are accepted as the truth and as part of their traditional law. Amongst the people, there is no difficulty in accepting it as truth. In the way of sharing this knowledge, there are checks and balances in place to ensure that it is the truth.

With respect to extrinsic evidence, the Supreme Court of Canada in R. v. Horse¹⁵ has held “that extrinsic evidence should not be used as an aid to interpreting a treaty in the absence of ambiguity or where the result would be to alter its terms by adding or subtracting words from the written agreement.”¹⁶ Alternatively, the Supreme Court in Sioui held that written terms alone often will “not suffice to determine the legal nature of the document”.¹⁷ The Court in Sioui has also stated “that the judiciary should not automatically interpret written terms of a treaty by reference to non-Aboriginal understandings.”¹⁸ It has also held that “extrinsic evidence of the parties’ intent to enter into a treaty and of facts closely associated with the signing of the treaty are to be examined to determine its legal effect”.¹⁹ This general approach has been affirmed in recent Supreme Court of Canada cases such as Badger²⁰,

¹³Supra, note 1 at 48.

¹⁴Ibid. at 49.

¹⁵ R. v. Horse (1988), 47 D.L.R. (4th) 526 (S.C.C.)

¹⁶Ibid. at 537. Quoted material from Patrick Macklem, “The Impact of Treaty 9 on Natural Resource Development in Northern Ontario” in Michael Asch (ed.) Aboriginal and Treaty Rights in Canada (Vancouver: UBC Press, 1997) 97 at 99 [hereinafter referred to as “Impact of Treaty 9”].

¹⁷R. v. Sioui, [1990] 1 S.C.R. 1025; [1990] C.N.L.R. 127 at 143 [C.N.L.R.] [hereinafter referred to as Sioui].

¹⁸Ibid.

¹⁹Ibid.

²⁰R. v. Badger, [1996] 2 C.N.L.R. 77 [hereinafter referred to as Badger].

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Mitchell v. Peguis Indian Band²¹, R. v. Horseman²² and Simon²³.

In following R. v. Van der Peet²⁴, the Supreme Court in Delgamuukw has held that: In determining whether an aboriginal claimant has produced evidence sufficient to demonstrate that her activity is an aspect of a practice, custom or tradition integral to a distinctive aboriginal culture, a court should approach the rules of evidence, and interpret the evidence that exists, with a consciousness of the special nature of aboriginal claims, and of the evidentiary difficulties in proving a right which originates in time where there were not written records of the practices, customs and traditions engaged in. The courts must not undervalue the evidence presented by aboriginal claimants simply because that evidence does not conform precisely with the evidentiary standards that would be applied in, for example, a private law torts case.²⁵

When dealing with treaties, the oral evidence that can be produced is the ceremonial practices and customs that accompanied the negotiations of that treaty. These practices and negotiations were never part of the written treaty.

Notwithstanding the challenges created by the use of oral histories as proof of historical facts, the laws of evidence must be adapted 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: Sioui, supra, at 1068; R. v. Taylor (1981), 62 C.C.C. (2d) 227 (Ont. C.A.), at p. 232. 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 that they have (Simon v. The Queen, [1985] 2 S.C.R. 387, at p. 408) This process must be undertaken on a case by case basis.²⁶

Thus, in allowing oral evidence to be on “equal footing” as any other historical document, the sacred customs and practices of an Aboriginal treaty protocol, as will be discussed further on in this paper, must be of major importance.

Also, in reviewing the intention of parties to treaties on a case by case basis in Ontario, one would have to rely on the oral history of every Aboriginal nation that exists in Ontario because each ceremonial practice may have been different. Although Hodinohso:ni and Anishnaabe²⁷ ceremonial treaty practices varied slightly, there is no doubt

²¹Mitchell v. Peguis Indian Band (1990), 71 D.L.R. (4th) 193 (S.C.C.).

²²R. v. Horseman, [1990] 1 S.C.R. 901 [hereinafter referred to as Horseman].

²³Simon v. The Queen, [1985] 2 S.C.R. 387, [1986] 1 C.N.L.R. 153 [hereinafter referred to as Simon].

²⁴R. v. Van der Peet, [1996] 2 S.C.R. 507 [hereinafter referred to as Van der Peet].

²⁵Delgamuukw, supra, note 1 at 47.

²⁶Delgamuukw, supra, note 1 at 49.

²⁷This is the word used by Ojibway peoples in Ontario to describe themselves.

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that each Aboriginal Nation has an oral history as to their participation and intention on entering a treaty.

What arises out of reviewing treaty negotiations are the differences in language and interpretations of certain concepts. James Morrison states in his review of the difficulties of cross-cultural communications in treaty negotiations:

Translation was therefore not simply a linguistic problem. It required far more than a working knowledge of Aboriginal and European languages to convey radically different assumptions about such matters as governance or the ownership and management of lands and resources. If these cultural factors were not properly understood, there could be no communication even if there was conversation and an eventual agreement.²⁸

As noted by Delia Opekokew:

The written treaties between the First Nations and the Crown have frequently been the subject of litigation in Canadian courts. These treaties were drafted by the Crown's representatives and it is the contention of the Indian beneficiaries that the treaties, as written, do not correspond with their meaning as understood by the Indian parties. Indian people have asserted, but rarely established in court, that their understandings of the treaties based on oral discussions at the time of the treaty signing differs from the written text of the treaties as interpreted by Anglo-Canadian law. The most significant differences asserted by Indian people are that they had agreed only to share the land, or had signed treaties only of peace and friendship, even in the case of treaties with express land cession provisions, and that they certainly had not agreed to extinguish Aboriginal title to lands.²⁹

As a result of the ruling in Delgamuukw, oral histories of Aboriginal nations can be produced as evidence of proof of Aboriginal title pre- and post-sovereignty and may be given significant weight. However, the oral evidence of Aboriginal people will be weighed against the Canadian legal and constitutional structure. If this evidence of oral history goes against the Canadian legal and constitutional structure, the oral historic evidence will not be considered given that it would be in conflict with the Canadian legal and constitutional structure. This ultimately means that when analyzing Aboriginal oral histories, it will no longer be accepted as truth, but rather analyzed to determine whether it is historic truth - but based on whose truth? The common knowledge and acceptance of Aboriginal

²⁸James Morrison, "The Robinson Treaties of 1850: A Case Study" prepared for The Royal Commission on Aboriginal Peoples, Treaty and Land Research Section found in For Seven Generations, An Information Legacy of the Royal Commission on Aboriginal Peoples, CD-Rom (Ottawa: Libraxus Inc., 1997) (no page numbers) [hereinafter referred to as "The Robinson Treaties"].

²⁹Delia Opekokew, "The Nature and Status of the Oral Promises in Relation to the Written Terms of the Treaties" prepared for The Royal Commission on Aboriginal Peoples, Project Area 3: Perspectives and Interpretation of Treaties found in For Seven Generations, An Information Legacy of the Royal Commission on Aboriginal Peoples, CD-Rom (Ottawa: Libraxus Inc., 1997) (no page numbers) [hereinafter referred to as "Oral Promises"].

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perspectives of history and treaties becomes examined, cross-examined and torn apart in order to accommodate the adversarial Eurocentric legal system.

In any trial that deals with Aboriginal and treaty rights, a trial judge must have an understanding of the underlying values of oral history. In Attorney General for Ontario v. Bear Island Foundation et al³⁰, Justice Steele admitted oral history; however, held that the oral history was in contradiction with other evidence and that the court should have been given “the best evidence”³¹. The trial judge did not take into account the oral history that was presented by the Chief, Gary Potts because he felt that there must have been better evidence that could have been presented other than the Chief, such as a respected Elder. Ultimately, oral evidence is examined by a trial judge who will determine whether or not the person or persons who are presenting the evidence is the “best” person capable of producing this evidence. If a judge will only believe traditional Elders, this means that when litigating any cases dealing with Aboriginal and treaty rights and in order to obtain Aboriginal oral histories, Elders must be called as witnesses to testify.

There are also “wampum-keepers” who have the responsibility of holding and reciting the wampum treaties. Many Elders and/or wampum keepers may be unwilling to testify especially in such an adversarial and foreign atmosphere such as the courtroom. Most oral histories of Aboriginal peoples are delivered from one generation to another generation through their languages. Thus, interpreters must also be involved in court proceedings in order to effectively translate a particular Aboriginal nation’s oral history through the relevant Aboriginal language into English and/or French. This is a very complex exercise to accomplish and one that may cause frustration and difficulties for Elders and wampum-keepers.

Wampum was considered as an instrument for establishing as well as maintaining oral communications between both parties³². Michael Foster states:

³⁰(1984) 49 O. R. (2d) 353.

³¹“The court should always be given the best evidence. The court has an obligation, first, to weigh the evidence and consider what evidence is the best evidence, and second, if such best evidence is not introduced, to consider making an adverse finding against the person who has failed to produce it.” Opekokew, “Oral Promises”, supra, note 29.

³²Michael K. Foster, “Another Look at the Function of Wampum in Iroquois-White Councils” in F. Jennings (ed.)

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The motive on presenting wampum was thus to elicit a response, and this is a forward-looking rather than a backward-looking activity. Indeed, from a larger communicative perspective, one can view the exchange of wampums across the fire as the principal means for regulating the flow of the council's business and promoting the orderly succession of speakers from the two sides. In brief, while wampum served during the invitation phase of a council to *establish* contact, during the business phase it served to maintain or prolong communication, and, eventually, to terminate it³³.

In 1836, Sir Francis Bond Head, the Lieutenant Governor of Upper Canada recognized the significance of the wampum treaty belts and stated as follows:

An Indian's word, when it is formally pledged, is one of the strongest moral securities on earth; like the Rainbow, it beams unbroken when all beneath is threatened with annihilation. The most solemn form in which an Indian pledges his word is by the Delivery of a Wampum Belt of Shells; and when the purport of this Symbol is once declared it is remembered and handed down from Father to Son with an Accuracy and Retention of Meaning which is quite extraordinary.³⁴

A wampum treaty relationship was established between the Hodinohso:ni and the Anishnaabe nations prior to colonization which has been termed as "A Dish With One Spoon"³⁵. This ceremonial relationship was consistently renewed between these Nations. One of the Onondaga Chiefs, John Buck, recited this wampum treaty belt with the Anishnaabe Nations to renew their relationship when an account of this treaty relationship was provided in a written text as follows:

This treaty was made many years ago, when the great council was held at the east end of Lake Ontario. The belt was in the form of a dish or bowl in the centre, which the chief said represented that the [Ojibways] and the Six Nations were all to eat out of the same dish; that is to have all of their game in common. In the centre of the bowl were a few white wampums, which represented a beaver's tail, the favourite dish of the [Ojibways]. At this council the treaty of friendship was formed, and agreement was made for ever after to call each other BROTHERS. This treaty of friendship was made so strong that if a

The History and Culture of the Iroquois Diplomacy (Syracuse University Press: Syracuse, 1985) at 107 [hereinafter referred to as "Another Look"].

³³Ibid. at 108.

³⁴Correspondence respecting Indians between the Provincial Secretary of State and Governors of British North America 1837 (Queen's Printer), p. 128, cited in Darlene Johnston, "Self-Determination for the Six Nations Confederacy", 44 Univ. of Toronto L.R., Spring 1986 1 at 9.

³⁵Attached as Appendix D is a picture of this wampum belt.

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tree fell across their arms it could not separate them or cause them to unloose their hold.³⁶

This written text of this wampum treaty belt provides the foundational principles of the peace and coexistence relationships between Indigenous nations which were already formulated prior to any interactions with the colonizer nations. As part of the ceremonial relationship of the Anishnaabe Nations, the protocol entailed the smoking of tobacco with a pipe along with a prayer³⁷. It could also involve the giving of presents “because they were regarded as a necessary part of diplomacy which involved accepting gifts in return for others sharing their lands.”³⁸ There would also have been a fire burning “to warm the participants in the treaty council both literally and metaphorically”³⁹. Formal discussions of the treaty would have been held around this fire. Exchange and readings of wampum belts would also have been part of the formal ceremony.⁴⁰ All of these actions and discussions demonstrate principles of customary traditional law.

The treaty relationship between Aboriginal nations was very important because it addressed how they were to relate to one another. They also had an understanding of what was happening to their lands:

...one of the Mohawk Chiefs, John Johnson, addressed the council to this effect: -- That it was their intention to renew treaties of peace and friendship with all of the Indian tribes in the dominions of Her Majesty the Queen: that the interests of all the Indians were one: that they had always supported the British Government, as they were strongly attached to it, and if even that attachment should be lessened, it would not be their fault, but the fault of the government, in not keeping faith with the Indians; that all the Indian tribes *ought to unit in obtaining titles to their lands, as all Indians stood in the same situation with regard to their lands*: that the government and the white people were taking away their lands by fair promises...⁴¹

Further unifying efforts were being made between Aboriginal nations in Ontario. The following is also an English translation of a recital of the wampum treaty belts made between the Hodinohso:ni, Anishnaabe, the Algonquians

³⁶Peter Jones, History of the Ojebway Indians: with special reference to their conversion to Christianity (London: A.W. Bennett, 1861) at 119 [hereinafter referred to as History of the Ojebway].

³⁷Morrison, “The Robinson Treaties”, supra, note 28.

³⁸Borrows, “Wampum at Niagara”, supra, note 7 at 158.

³⁹Morrison, “The Robinson Treaties”, supra, note 28.

⁴⁰Ibid.

⁴¹Ibid. at 120.

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and the Ottawas:

This belt represents the twelve lands of the Otcikwe or Shawnies, a Twakanha' or Algonquian people, who said, after seeing the Law, "We have put the mind and thought of our great company of warriors on this belt."

[Record of Second Belt, seven lines.]

This represents the sentiments of another Twakanha' or Algonquian people. They looked upon this Law of peace and goodwill, and said, "We are glad that we shall never again see the assassination of any person, peace being assured to all the commonwealths." They examined it and added, "It is good. Here also have we put our voice, and upon this have we cast our mind."

[Record of Third Belt, six lines.]

This belt stands for another Twakanha' or Algonquian people, who said, "We accept the Law single-minded; with one accord we cast our minds as one upon this belt. We see that we can by it do our thinking in peace and contentment. As a single body we cast our mind upon it."

[Record of Fourth Belt, nine lines.]

This belt represents the Twi-twi-ho-no' or the Miamis, who said, "We have seen the Law. Representing a vast multitude, we say, It is good. Every one of us will now think of peace only, and we place our entire mind on this belt, where we will leave it."

[Record of Fifth Belt, twenty-one lines]

It says, "This represents the new compact we too renew. I am speaking for twenty-one lands, and we have put our minds together in one place. I who have stood up am of the lands of the Ottawas. We make an agreement and promise with them of the Extended House. The minds of us both shall lie in one place, so that the whole body of people shall not come to trouble and evil things. So, now we both have agreed that the minds of us both shall be in one place; that we two shall have only one head; that there shall be in us only one soul; that we shall have only one tongue. If one member of this compact is stricken by some ill-fortune, we both shall bleed in sympathy. We have rolled together the minds of this vast multitude into one, and we place it there on the Law."

[Record of Sixth Belt, ten lines]⁴²

It is interesting to note that the speaker spoke for the "twenty-one lands" and was not speaking on behalf of their Nations. This is a prime example of how the Indigenous Nations, at this time, continued to relate specifically to their relationships to their lands.

A typical Hodinohso:ni treaty protocol consisted of the following steps. First, the Hodiyahehso (Confederacy Chiefs) met visitors "at the wood's edge"⁴³Foster, "Another Look", supra, note 32 at 104. and a

⁴²Legend of the Iroquois, *The American Anthropologist*, Vol. V., April 1892.

⁴³This was a welcoming ceremony and borrowed from the Condolence Ceremony. "The two groups arranged themselves on opposite sides of a small fire built just for the duration: this arrangement serves to remind all the participants how they will position themselves at the main council later. A speaker for the hosts expresses his side's gratitude that the messengers have arrived safely over the 'long forest path'..There are many things, he says, that

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ceremony was opened with a song and a recital of the Thanksgiving Address. The purpose of the meeting was to welcome the visitors. Then, they were fed and advised to rest for the night. The next day was reserved for any serious meetings as it was felt that the peoples' minds must be clear and good.

A written record of this protocol was made in 1535 following Jacques Cartier's visit to Hochelaga (Hodinoḥso:ni territory):

The City of Hochelaga is six miles from the riverside, and the road thither is a well-beaten and frequented as can be, leading through as fine a country as can be seen, full of fine oaks as any in France, the whole ground being strewn over with fine acorns. When we had gone four or five miles we were met by one of the great lords of the city, accompanied by a great many natives, who made us understand by signs that we must stop at a place where they had made a large fire, which we did accordingly. When we had rested there some time, the chief made a long discourse in token of welcome and friendship, showing a joyful countenance and mark of goodwill.⁴⁴

The next morning, the usual protocol of reciting the Thanksgiving Address was spoken, as it was sacredly done every morning. The Condolence Ceremony was also performed to open up a treaty council to clear peoples' minds of any losses they may have experienced during their journey.

The Hodinoḥso:ni Confederacy, in addition to entering into treaties with other Indigenous nations, also entered into international treaties with European colonizing nations; a process provided for in The Great Law of Peace wherein international relationships were recorded through the use of wampum and creating wampum belts.⁴⁵ From as early as the 1600s, political relations began with European colonizers and statesmen by creating these wampum treaties between the Hodinoḥso:ni Confederacy and those colonialists that represented the British, Dutch, French and American nations. The original treaty that defined the present and future relationship between the colonizers and the Hodinoḥso:ni Confederacy was the *Gahswehda*⁴⁶, Two Row Wampum Belt. Interpretation of this

could have caused them to stumble and fall. During the colonial period, there were physical hardships to contend with.”

⁴⁴Paul Williams and Curtis Nelson, Kaswentha, prepared for The Royal Commission on Aboriginal Peoples, Project Area 1: Early Treaty Making in Canada found in For Seven Generations, An Information Legacy of the Royal Commission on Aboriginal Peoples, CD-Rom (Ottawa: Libraxus Inc., 1997) (no page numbers).

⁴⁵Tehanetorens, Wampum Belts, Six Nations Indian Museum, Onchiota, N.Y. (year of publication unknown).

⁴⁶Literally translated as a River or River of Life. The written language being used here is in the Cayuga (one of the

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treaty belt can be summarized as follows:

There is a bed of white wampum which symbolizes the purity of the agreement. There are two rows of purple, and those two rows have the spirit of your ancestors and mine. There are three beads of wampum separating the two rows and they symbolize peace, friendship and respect.

These two rows will symbolize two paths or two vessels, travelling down the same river together. One, a birch bark canoe, will be for the Indian people, their laws, their customs and their ways. The other, a ship, will be for the white people and their laws, their customs and their ways. We shall each travel the river together, side by side, but in our own boat. Neither of us will try to steer the other's vessel⁴⁷.

This wampum belt represented separate but equal⁴⁸ coexistence between two parties: one being the Hodinohso:ni and the other being the colonizer. The agreement was binding between all parties "as long grass grows green, as long as the water runs down hill, and as long as the sun rises in the east and sets in the west"⁴⁹Oren Lyons' Statement to the United States Senate, Hearing before the Select Committee on Indian Affairs, 100th Congress, First Session on S. Con. Res. 76, December 2, 1987, Washington, D.C. at 7..

Another symbol of the relationship made in the early 1600s between the same European colonies and the Confederacy was the Silver Covenant Chain which was described as "pure, strong and untarnished" and "bound those who grasped it, binding nations together without causing them to lose their individual characters, or their independence"⁵⁰. It was further described as follows:

The Covenant Chain is designed for expansion, with new links being added as other nations join their arms into the compact. Each Nation with its arms in the chain is equal to each other. Though some nations might have certain functions in maintaining or renewing the Chain, the equality of the nations within the Chain is an important part of its strength. Any nations guilty of a breach of commitments, a lack of faith, or inattentiveness, allows the Chain to 'slip from one's

Six Nations) language.

⁴⁷Hodinohso:ni: Confederacy Presentation to the Canadian Parliament. Canada. House of Commons. Indian Self Government in Canada. Report of the Special Committee (Ottawa: Queen's Printer, 1983) [hereinafter referred to as Report of the Special Committee].

⁴⁸Richard Hill, "Oral Memory of the Haudenosaunee: Views of the Two Row Wampum", in Jose Barreiro (ed.) Indian Roots of American Democracy (Cornell University, N.Y.: Akwekon Press, 1992) at 159.

⁴⁹None of these things have changed. Therefore, in the eyes of the Hodinohso:ni, those parties who agreed to the terms of this agreement are still bound.

⁵⁰Report of the Special Committee, supra, note 47 at 31A:8.

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There were many further important treaties and negotiations made between the years 1613 and 1913 involving the Hodinohso:ni Confederacy, other Indigenous Nations and European colonialists. The importance of recognizing the Two Row Wampum Treaty Belt and the Silver Covenant Chain is to acknowledge the foundational background to the relationships between the Aboriginal nations and the European colonizers. In order to commence any relationships of alliances, a complex protocol had to be established and maintained. All of these relationships are remembered as a part of the oral histories and cultures of each Indigenous nation.

Royal Proclamation/Treaty of Niagara

The courts have mistakenly held that the Royal Proclamation on its own is not a treaty but is “a unilateral promise from the King and presumably (despite some of the flexibility in its language) binding on those to whom the promise was made.”⁵² In St. Catherines Milling and Lumber Company v. The Queen⁵³, the Privy Council interpreted the Royal Proclamation as being a declaration of sovereignty of the British Crown in which "Indian tribes" then lived under the "sovereignty and protection of the British Crown."⁵⁴ However, the transactions that were made by the Crown in producing the Royal Proclamation of 1763 to Indian Nations was “evidence of the King’s commitment to secure them justice in land issues” and “met all the legal requirements of a treaty, and the Proclamation’s promises became an element of that treaty.”⁵⁵ The Aboriginal perspective of the Royal Proclamation is quite different than the court’s and the Crown’s interpretations of the Royal Proclamation. In understanding its historical context according to Indigenous peoples, John Borrows states:

Contextualization of the Proclamation reveals that one cannot interpret its meaning using the written words of the document alone. To interpret the principles of the Proclamation using this procedure would conceal

⁵¹Ibid.

⁵²Paul Williams, “The Royal Proclamation of 1763, document received on disk from author; See also R. v. George (1966), 55 D.L.R. (2d) 386 (S.C.C.) [hereinafter referred to as “The Royal Proclamation of 1763”].

⁵³ (1888), 14 App. Cas. 46 (P.C.).

⁵⁴ Ibid. at 54.

⁵⁵Williams, “The Royal Proclamation of 1763”, supra, note 52.

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First Nations perspectives and inappropriately privilege one culture's practice over another. First Nations chose to chronicle their perception of the Proclamation through other methods such as contemporaneous speeches, physical symbols, and subsequent conduct.⁵⁶

Despite the court's ruling that the Proclamation is not a Treaty on its own, from an Aboriginal perspective, the Royal Proclamation was considered a treaty of peace and alliance⁵⁷. Early treaties of peace and alliance are not mentioned as treaties by Canada but are described as transactions relating to the sale or surrender of land.⁵⁸ Borrows states:

Since First Nations were likely to speak and act in accordance with their understandings of the Proclamation, subsequent conduct illustrates First Nations perspectives towards the Proclamation and demonstrates that Native consent was required to any alteration of First Nation land use and governance.⁵⁹

When looking at the historical background of Treaty of Niagara of 1764, one should agree with Borrows that the Proclamation is evidence of and formed part of the Treaty of Niagara⁶⁰. For example, The Royal Proclamation did become a treaty because it was affirmed and accepted by all of those First Nations who were present at the signing of the Treaty of Niagara.⁶¹ In fact, when the Proclamation was presented by Sir William Johnson at the negotiations of the Treaty of Niagara, he followed Indigenous treaty protocol and presented belts of wampum. He also exchanged gifts "to certify that the binding nature of the promises"⁶² were being exchanged.

The Treaty of Niagara involved 24 Indigenous Nations (Mohawks, Oneidas, Tuscaroras, Onondagas, Cayugas, Senecas, Kahnawake (whom also spoke on behalf of Akwesasne), Cannesadagas, Nanticokes, Conoys, Mohicans, Anishnaabe, Ottawas, Menominees, Sauks, Foxes, Winnebagoes, Crees, Hurons, Algonquins, Nippisings

⁵⁶Borrows, "Wampum at Niagara", supra, note 7 at 156.

⁵⁷Ibid. at 166.

⁵⁸ Canada Indian Treaties and Surrenders, (Ottawa: Queen's Printer, 1891)

⁵⁹Borrows, "Wampum at Niagara", supra, note 7 at 165.

⁶⁰Ibid. at 155.

⁶¹Ibid. at 161.

⁶²Ibid. at 163.

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and Toughkamiwons. Delegates attending the conference also spoke for the Sioux, the Shawnees and the Delawares⁶³). It established a new peace based on free trade and land rights.⁶⁴ “The Niagara Treaty served several vital functions. It brought peace and re-established trade. It was also Sir William Johnson’s first large council with the western nations--conducted in the ways he had learned from the Haudenosaunee”.⁶⁵ Also, the significance of the Treaty of Niagara reaffirmed the land rights which were confirmed in the Royal Proclamation of 1763. It was noted by Borrows that the Covenant Chain and wampum belts were presented with a speech by Sir William Johnson. After his speech, the Indigenous nations presented the Two Row Wampum, which reflected their understanding of the relationship with the British as well as their understanding of the treaty of Niagara and the words of the Royal Proclamation.⁶⁶

A treaty was made between the Seneca Nation (one of the Hodinohso:ni Nations) and the British through Sir William Johnson in which a cession of a strip of land from Lake Ontario to Lake Erie, four miles on each side of the Niagara River was given “only for the King’s purpose” and not patented to any private individuals. “While the King was to be empowered to build forts there, and to secure the land for military purposes, the land was also to remain Seneca hunting grounds”.⁶⁷ The one side of the land mentioned in this treaty is now lands that are situated in Ontario. Although the treaty contained a surrender of the “Niagara Strip”, “the land on the Canadian side has been almost entirely patented to private individuals.”⁶⁸

With respect to the Canadian side of the Niagara River, Sir John Johnson took a surrender of the four-mile-wide strip from the Mississaugas twenty years later, in 1784. There have been questions as to whether the

⁶³Niagara Treaty Conference, Twenty Four Nations Wampum Belt - document in author’s possession.

⁶⁴Paul Williams, “The Treaty of Niagara, July, 1764” unpublished document received on disk by author.

⁶⁵Ibid.

⁶⁶Borrows, “Wampum at Niagara”, supra, note 7 at 166.

⁶⁷Williams, “The Treaty of Niagara, July 1764”, supra, note 64.

⁶⁸Ibid.

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Mississauga Nation had “actual” title to the lands in order for the Crown to negotiate a surrender of these lands. Within the Niagara Strip Treaty, the Seneca Nation is the Nation who treated with the British Crown for both sides of the Niagara River. Thus, this issue begs the question of whether the Mississauga Nation had actual “title” in order to surrender the Canadian side of the Niagara Strip. Although there may be questions as to which Aboriginal Nation had “title”⁶⁹, the Crown did not question that there was Aboriginal title in order to accept such a surrender.

It is important to note here the test for proof of aboriginal title that Chief Justice Lamer stated in

Delgamuukw:

In order to make out a claim for aboriginal title, the aboriginal group asserting title must satisfy the following criteria: (i) the land must have been occupied prior to sovereignty, (ii) if present occupation is relied on as proof of occupation pre-sovereignty, there must be a continuity between present and pre-sovereignty occupation, and (iii) at sovereignty, that occupation must have been exclusive.⁷⁰

This means that in order to claim a right of possession, an Aboriginal nation can provide evidence of present occupation as proof of prior occupation. Proof that a certain Aboriginal nation’s land was occupied prior to sovereignty stems from the basic fact that treaties were necessary on the British Crown’s part to legitimize its presence on Aboriginal lands and to accommodate settlers and squatters on Aboriginal lands.

In order for an Aboriginal nation to prove occupation of certain lands prior to sovereignty, they must prove a continuous occupation of those lands between the present and pre-sovereignty times and that their occupation was exclusive. Lamer concluded that “Aboriginals must establish occupation of the land from the date of the assertion of sovereignty in order to sustain a claim for aboriginal title.”⁷¹ The pre-Confederation treaties, such as the Treaty of Niagara, provide proof of prior occupancy of Aboriginal Nations prior to British sovereignty based on the fact that these treaties were made to allow for settlement of British colonizers. The danger in recognizing pre-Confederation treaties only as evidence of Aboriginal title, as could be done as a result of Delgamuukw, is that they will be recognized only as evidence and may not be recognized as true treaties that are required to be fully implemented by

⁶⁹Ibid.

⁷⁰Delgamuukw, supra, note 1 at 69.

⁷¹Ibid. at 70.

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the Crown.

Lamer, in Delgamuukw, also stated that “circumstances subsequent to sovereignty may never be relevant to title or compensation; this might be the case, for example, where native bands have been dispossessed of traditional lands after sovereignty.”⁷² This is exactly what has happened with treaty negotiations and subsequent treaties with Aboriginal nations. The written treaties did not correspond with the oral promises and agreements that were made. For example, the Hodinohso:ni Confederacy were dispossessed of their traditional lands after sovereignty of the British Crown based on the fact that they became allies of the British Crown. This issue is quite relevant regarding the Haldimand Deed created by the British Crown and the Hodinohso:ni Confederacy despite Lamer’s comments in Delgamuukw.

At the Six Nations Grand River Territory, Sir William Johnson, the Superintendent-General of Indian Affairs granted the Haldimand Treaty/Deed to the members of the Six Nations on October 25, 1784 which provided as follows:

Whereas His Majesty having been pleased to direct that in Consideration of the early Attachment to His Cause manifested by the Mohawk Indians, & of the Loss of their Settlement they thereby sustained that a Convenient Tract of Land under His protection should be chosen as a Safe & Comfortable Retreat for them & others of the Six Nations who have either lost their Settlements within the Territory of the American States, or wish to retire from them to the British - I have, at the earnest Desire of many of these His Majesty's faithful Allies purchased a Tract of Land, from the Indians situated between the Lakes Ontario, Erie & Huron and I do hereby in His Majesty's name authorize and permit the said Mohawk Nation, and such other of the Six Nations Indians as wish to settle in that Quarter to take Possession of, & Settle upon the Banks of the River commonly calls Ours [Ouse] or Grand River, running into Lake Erie, allotting to them for that Purpose Six miles deep from each Side of the River beginning at Lake Erie & extending in that

⁷²Ibid.

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Proportion to the Head of the said River, which them & their Posterity are to enjoy for ever.

According to the members of the Hodinohso:ni Confederacy, this Haldimand Deed was actually a Treaty and it was an important factor in enforcing their sovereign status. They took the following position with respect to their acceptance of this treaty:

Having been driven from our home lands in that war by the revolting colonies, King George III, in fulfilment of his promise, invited us to accept a home beyond the limits of the new United States, on the banks of the Grand River, in place of our guaranteed home-lands then lost to our people. We, through our great Chief, Joseph Brant, accepted this offer of the King confirmed by his Governor-General of Canada, Sir Frederick Haldimand, whereby the Grand River lands were bestowed upon us and our prosperity forever, under the express condition that we should enjoy them forever as separate people we have ever been and with the assurance of British protection renewed.⁷³

Based on the Confederacy's allegiance to the British Crown and in accepting the Crown's offer to the Grand River lands, the Hodinohso:ni Confederacy considered this transaction as a treaty relationship.

Questions were being raised at the time as to the meaning of the Haldimand Grant. Joseph Brant⁷⁴Surtees, "The Iroquois in Canada", in Francis Jennings et al (eds.) The History and Culture of the Iroquois Diplomacy. An Interdisciplinary Guide to the Treaties of the Six Nations and Their League (Syracuse, N.Y.: Syracuse University Press, 1985) at 76, n. 59. was leasing and selling Confederacy lands to white settlers. Lieutenant-Governor Simcoe became involved, as the British Crown were of the opinion that Brant could not sell or lease the lands within the Haldimand Grant according to the terms of the Royal Proclamation. The lands could only be sold through the Crown. Brant argued that the Royal Proclamation did not apply to the "Six Nations" land, as the land was granted in fee simple by the Haldimand Grant. However, Lieutenant-Governor Simcoe did not agree with this interpretation and issued his "Patent" on January 14, 1793. This Patent included all that was in the Haldimand Grant as well as his

⁷³Petition to the Government of Netherlands, PAC, Indian Affairs, (RG 10, Volume 2285, File 57 169-1B Pt. 3) [documents in author's possession received from the Hodinohso:ni Council at Six Nations Grand River Territory]

⁷⁴Joseph Brant was considered by the British as the leader of the Hodinohso:ni Confederacy as a result of his allegiance to them. He was also associated with the Hodinohso:ni Confederacy in New York. (There was some controversy as to whether Brant had the authority from the Hodinohso:ni Council to negotiate and give land away.) The British disliked the fact that Brant was associated with the Confederacy on both sides of an international border, so they insisted that Brant promise loyalty to them based on the fact that "Canada was thought to be in danger of attacks by the Spanish and French".

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interpretation of the Royal Proclamation that any of the land sold needed the approval of the Crown.⁷⁵

The Hodinohso:ni Confederacy "put forward a claim to special status"⁷⁶ and adamantly stated that they have never been conquered by the British, but were allies and continued to be allies and not subjects of the Crown. However, British and Canadian colonialists viewed this as a problem. A report was prepared by a Mr. Justice Macauley to Sir George Arthur in 1839 which stated as follows:

As to the exercise of civilized rights, the resident Tribes are peculiarly situated, being in point of fact naturalized or natural born subjects, and domiciled within the organized portion of the Province, it would be difficult to point out any tenable grounds on which a claim to an exempt or distinctive character could be rested. The Six Nations have, I believe, asserted the highest pretensions to separate Nationality, but in the Courts of Justice they have been always held amenable to, and entitled to, the protection of the Laws of the land...⁷⁷

The Hodinohso:ni Confederacy do take note whose "laws of the land" are being protected.

The Haldimand Treaty/Deed dated October 25, 1784 and the Simcoe Treaty/Deed dated January 14, 1793 provided a grant of land to the Hodinohso:ni: described as being six miles on both sides of the Grand River from its mouth to its source. The Hodinohso:ni's submission to the United Nations on April 13, 1945 was reiterated in that they maintained that they were faithful allies of the British Crown and that they requested that their fundamental rights to the land in the Haldimand and Simcoe Deed be guaranteed and protected.⁷⁸ The Crown has continually argued that the Simcoe Deed replaced the Haldimand Treaty/Deed and was part of the contentious issue in Logan v. Attorney-General of Canada⁷⁹.

King, J. in Logan stated that because the Six Nations Indians settled on the deeded lands, they did so under

⁷⁵Ibid. at 77.

⁷⁶E. Brian Titley, A Narrow Vision. Duncan Campbell Scott and the Administration of Indian Affairs in Canada (Vancouver: University of British Columbia Press, 1986) at 112.

⁷⁷Malcolm Montgomery, "The Legal Status of the Six Nations Indians in Canada" (1963) Ontario History Vol. LV, No. 2, at 96.

⁷⁸ Darlene Johnston, "Self-Determination for the Six Nations Confederacy", 44 Univ. of Toronto L.R., Spring 1986 1 at 21.

⁷⁹[1959] 20 D.L.R. (2d) 416 [sub nom. Logan v. Styres et al.].

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the protection of the British Crown. Therefore, by accepting this protection, they then owed allegiance to the Crown and became subjects of the Crown.⁸⁰ And therefore, as a result of becoming subjects, the Six Nations Indians were no longer considered as faithful allies. The argument made by the Hodinohso:ni: was that they were not within the jurisdiction of the British North American Act and therefore, the Indian Act did not apply to them; therefore, any Orders in Council made under the Indian Act provisions were inapplicable to the Confederacy. King, J.'s opinion was as follows:

..the Six Nations Indians are entitled to the protection of the laws of the land duly made by competent authority and at the same time are subject to such laws. While it might be unjust or unfair under the circumstances for the Parliament of Canada to interfere with their system of internal Government by hereditary Chiefs, I am of the opinion that Parliament has the authority to provide for the surrender of Reserve land, as has been done herein and that Privy Council Order P.C. 6015 was not ultra vires.⁸¹

Although King, J. provided that Parliament had authority under S.91(24) of the B.N.A. Act, he did not provide an answer to the question as to how the Hodinohso:ni: came under the jurisdiction of the British North American Act especially when the only evidence that was provided to the court was the Hodinohso:ni: Hodiyanehso's (Chiefs) submissions. Their submissions would have been based on oral history. As a result of oral history not being recognized (which is now recognized in Delgamuukw), their historic evidence was completely ignored⁸². Even though oral history is now recognized as evidence in court, this does not resolve the issue that this case as well as any other cases based on racist ideologies can still be used as precedent. There is no process or method in Canadian law that resolves this.

In June and July of 1970, members of the Hodinohso:ni: Confederacy Council decided to padlock the doors

⁸⁰ Ibid. at 422.

⁸¹ Ibid. at 424.

⁸²This is very similar to Chief Justice MacEachern's refusal to accept oral evidence in the trial division of Delgamuukw v. British Columbia (1991), [1991] 3 W.W.R. 97, [1991] C.N.L.R., xiii, 79 D.L.R. (4th) 185.

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prohibiting the elected Band Council from entering. Their reasoning was that the Hodinohso:ni Confederacy Council was the proper traditional governing body of the Six Nations territory. Since 1924, when the RCMP attended at the Six Nations territory and forced the Indian Act elected system, there was and has been continual animosity between the traditional council and the elected council regarding this contentious issue. This resulted in legal proceedings, Isaac et al. v. Davey et al⁸³ which was commenced in 1973 by the elected Chief Councillor, Richard Isaac against the traditional Confederacy Council and went to the Supreme Court of Canada in 1977.⁸⁴ The issues at trial were whether the lands granted to the Hodinohso:ni in the Simcoe Deed were lands reserved for the Indians specified under S.91(24) of the British North American Act, or whether they were lands as defined in the Indian Act: of which legal title is in the Crown.

At the trial level, Osler, J. held that "the Simcoe grant was effective to pass title to all members of the Six Nations Band in fee simple"⁸⁵ and not to the Crown. The passing of the Indian Act had no effect to the "quality of the grant or the title held under it."⁸⁶ Based on this decision, Osler, J. held that "those sections under which the Governor purported to act had no application to the lands in question"⁸⁷ based on the conclusion that the lands as defined within S. 2(d) and (i) were not lands "of which legal title is vested in the Crown". Therefore, the Orders in Council were held invalid. As a result of the invalidity of the Orders in Council, the elected Council had no authority under the Indian Act to occupy or control the Council House. "It was admitted by all parties that the Council House was built in 1886 at a time when beyond all question the Hereditary Chiefs had the management and control of the lands."⁸⁸ It was claimed by the elected council that even if they had no statutory rights, they represented all other members of the Six Nations except the defendants. Based on the evidence that was presented,

⁸³ Isaac et al. v. Davey et al. (1974), 38 D.L.R. (3d) 23.

⁸⁴ (1977) 77 D.L.R. (3d) 481 (S.C.C.).

⁸⁵ *Supra*, note 83 at 30.

⁸⁶ Ibid.

⁸⁷ Ibid., at 32.

⁸⁸ Ibid. at 33.

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Osler, J. held that "the system imposed by the Indian Act was not supported by more than a small fraction of the population in question but that at least certain of the plaintiffs were elected by a very small fraction of those eligible."⁸⁹

The appeal was heard in 1974⁹⁰ and a unanimous decision was made wherein Arnup, J.A. followed the reasons in R. v. St. Catherines Milling & Lumber Co.⁹¹ in that Indian title was "a personal and usufructuary right dependent upon the good will of the Sovereign".⁹² Therefore, the Crown had underlying title to the Six Nations lands. He held as follows:

It was to confer upon the loyal subjects of the Crown within the Six Nations Confederacy who had come to Upper Canada the same rights as were enjoyed by those Indians who had always been there. Both documents [Haldimand Proclamation, 1784 and the Simcoe Grant, 1793] were in accord with and implemented the policy enunciated in the Proclamation of 1763.⁹³

In keeping with the policy of the times, the Haldimand Proclamation and the Simcoe Grant were within the same policy accorded in the Royal Proclamation of 1763, as decided by Chancellor Boyd in the St. Catherines Milling case. Therefore, the Hodinohso:ni: were "under the [Crown] Sovereign's protection and dominion".

In reviewing the St. Catherines Milling case in Delgamuukw, Justice Lamer stated that the Privy Council's choice of terminology, specifically describing aboriginal title as a personal and usufructuary right, "is not particularly helpful to explain the various dimensions of aboriginal title". Justice Lamer specifically held that aboriginal title is *sui generis* and that it must be understood by both reference to common law and aboriginal perspectives. In recognizing that the Royal Proclamation of 1763 is not the only source of aboriginal title, as it was

⁸⁹ Ibid.

⁹⁰ (1974) 51 D.L.R. (3d) 170.

⁹¹ (1885), 10 O.R. 196.

⁹² Ibid.

⁹³ *Supra*, note 90 at 181.

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found in St. Catherines Milling, the court found that aboriginal title arises from the prior occupation of Aboriginal people. Specifically, Lamer states that “What makes aboriginal title *sui generis* is that it arises from possession before the assertion of British sovereignty”.

When Isaac. v. Davey went to the Supreme Court of Canada, the question of title to Hodinohso:ni lands were thought to be the most important issue. However, the court did not make a final decision regarding title to the land. It seems that the court was not willing to acknowledge that the Hodinohso:ni had possession of their lands before the assertion of British sovereignty. They held, instead that the Order in Council was valid under S.2(1)(a) of the Indian Act which provided that a "band" means a body of Indians "for whose use and benefit in common, moneys are held by His Majesty." Therefore, the lands in question were within the definition of "reserve" and "band" within the Indian Act as legal title was vested in the Crown.

Thus, there was no recognition of the Haldimand Grant/Treaty nor the Simcoe Grant as a treaty nor was it implemented as one.

Description of Further Treaties in Ontario after the War of 1812

The following provides a brief description of some of the treaties that were made in the territorial boundaries of Ontario after the War of 1812. Many of the treaties that were made prior to the War of 1812 “were relatively simple arrangements. The Crown made a single, one-time payment in goods in return for a specific portion of territory.”⁹⁴ After the War of 1812 to accommodate the heavy immigration of newcomers, “the government concluded six major land-cession agreements that brought nearly three million more hectares into its hands.”⁹⁵ Robert Surtees provides a description of the changes to the terms of treaties that were made by Britain during this era:

Henceforth the bands would receive a small annual payment, in perpetuity, rather than a considerably larger, but one-time only payment. This annuity system was designed to save money. After purchasing land from the Indians, the government would then sell it to settlers whose interest payments on their purchases were expected to cover the cost of the annuity paid to the band. In this fashion, the colonists, not the British taxpayers, would pay. This system began in 1818, and while it did not work quite as neatly as

⁹⁴Surtees, “Land Cessions”, supra, note 8 at 112.

⁹⁵Attached as Appendix E is a copy of a map depicting “The Post War Cessions: 1815-1827”. Ibid.

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planned, it has continued ever since.⁹⁶

There were six major agreements⁹⁷ made in Southern Ontario that were forerunners to the Robinson Treaties of 1850 namely, The Treaty of 1818 also known as Treaty No. 20⁹⁸, The Rideau Purchase Tract⁹⁹, Lake Simcoe-Nottawasaga Purchase¹⁰⁰, Mississauga Tract¹⁰¹, Long Woods Purchase¹⁰², and the Huron Tract Purchase¹⁰³.

The Robinson Treaties of 1850¹⁰⁴, namely the Robinson Superior Treaty and The Robinson Huron Treaty of 1850 were negotiated at Sault Ste. Marie and Penetanguishene in the Province of Canada (now the Province of Ontario)¹⁰⁵. These treaties were considered integral to the creation of future numbered treaties in Canada as much of its wording was incorporated into them. Such wording includes:

THAT for and in consideration of the sum of two thousand pounds of good and lawful money...and for the further perpetual annuity of five hundred pounds...the same to be paid and delivered to the said Chiefs and their Tribes...,they the said chiefs and principal men do freely, fully and voluntarily surrender, cede, grant and convey unto Her Majesty, Her heirs and successors forever, all their right, title and interest in the whole of the territory above described, save and except the reservations set forth...,which reservations shall be held and occupied by the said Chiefs and their Tribes in common, for the purpose of residence and cultivation, --and should the Chiefs and their respective Tribes at any time desire to dispose of any mineral or other valuable productions upon the said reservations, the same will be at their request sold ... for their sole use and benefit, and to the best advantage.

The key elements to this written text of the treaty is that the Anishnaabe people who were the subjects of this treaty were to surrender their rights and title to their land and that reservations will be set aside for them to

⁹⁶Ibid., at 112-113.

⁹⁷For an explanation of each purchase, see Surtees, "Land Cessions", *ibid.* at 113-119.

⁹⁸See Appendix E, No. 20. The Treaty of 1818 at what is now believed to be Port Hope, Ontario, with six chiefs of the Chippewa Nation, was the subject of R. v. Taylor and Williams (1981), 34 OR (2d) 360 (C.A.)

⁹⁹See Appendix E, No. 21

¹⁰⁰See Appendix E, No. 22

¹⁰¹See Appendix E, No. 23

¹⁰²See Appendix E, No. 24

¹⁰³See Appendix E, No. 25

¹⁰⁴Attached as Appendix C are maps exhibiting the Robinson Treaties.

¹⁰⁵Morrison, "The Robinson Treaties", *supra*, note 28.

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reside and farm. The Crown agreed to make the annuity payments and provided for hunting and fishing rights over the ceded lands, “saving and excepting only such portions of the said territory as may from time to time be sold or leased to individuals, or companies of individuals, and occupied by them with the consent of the Provincial Government.” Morrison stated:

There are many reasons, in fact, to see those agreements, not as the continuation of some earlier wise practice, but as a new beginning-for they were the direct result of conflict between Indian people and the government of the Province of Canada over two related issues. One was the perceived need, on the part of the provincial government, to regularize settlement in the northern border regions of Canada West (now Ontario) and to assert British jurisdiction against American incursions there. The second was the settler government’s decision to encourage mineral exploration and development on the north shores of Lakes Huron and Superior.¹⁰⁶

This was confirmed by Alexander Morris, the Manitoba Lieutenant-Governor, who negotiated several of the numbered treaties after the 1850 Robinson Treaties.¹⁰⁷ Morris stated:

“In consequence of the discovery of minerals, on the shores of Lakes Huron and Superior, the Government of the late Province of Canada, deemed it desirable, to extinguish the Indian title, and in order to that end, in the year 1850, entrusted the duty to the late Honorable William B. Robinson...”¹⁰⁸

This provides some proof of the reasons for the desirability of the Crown to create a treaty in this territory and extinguish Aboriginal title - to gain access to the mineral rights and development in this area.

In his case study of the Robinson Treaties, Morrison stated that the Anishnaabe nation succeeded in negotiating two very significant agreements and that they “can even be considered a victory for the Ojibway side”.

Examples of its significance were that

“treaty annuities were not fixed. If resource revenues went up, then so too would the annuity payments. Continued Ojibway harvesting rights over the territory covered by the treaty were defined broadly enough to include commercial as well as subsistence harvesting - and such rights were not made subject to government regulations. Nor were reserves limited in size to an arbitrary formula imposed by the Crown. Indeed, some of the reservations identified under the 1850 treaties were as large or larger than any created before or since. This is because the Native delegates - particularly those from Lake Huron - endeavoured to select lands which would be sufficient for the future needs of their communities.”¹⁰⁹

¹⁰⁶Ibid.

¹⁰⁷The Hon. Alexander Morris, P.C., 1880, The Treaties of Canada with the Indians (Toronto: Belfords, Clarke & Co. Publishers, 1862; Toronto: Coles Publishing Company, 1979) at 16.

¹⁰⁸Ibid.

¹⁰⁹Morrison, “The Robinson Treaties”, supra, note 28.

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However, the future needs and the considerations and negotiations of the Anishnaabe nation was forgotten and was definitely not a victory. After the Confederation of Canada in 1867, both the federal and provincial governments unilaterally interpreted the Robinson treaties wherein treaty annuities were never increased, harvesting rights were limited to on-reserve lands only, reserve lands “were improperly surveyed, so that their size was much smaller than anticipated”. And “[w]ithin a decade of the treaty, many bands were being coerced into parting with all or most of their reserve lands as part of [the] modified reserve policy.”¹¹⁰ These differences of interpretation are the cause of most disagreements and perceptions of the treaties made between the Crown and the Anishnaabe nations of northern Lake Superior and Lake Huron.

North West Angle Treaty (Treaty No. 3) of 1873

According to the Anishnaabe Elders of the Grand Council of Treaty No. 3, the traditional land, covered by the 25 Anishnaabe bands of the Grand Council of Treaty No. 3, exceed more than that covered under the written Treaty No. 3. Anishnaabe elders orally confirmed the boundaries of the traditional land and confirmed that the Anishnaabe have been an independent nation controlling and occupying their traditional territory since time immemorial. It was common for the bands to come together seasonally and to gather at specific areas within the territory to harvest sturgeon, wildlife and other necessities.

The Grand Council of Treaty 3 stated that there were in fact variations of the oral treaty to that of the written treaty and that no single document completely covered all terms of the Agreement known by the people as Treaty No. 3.¹¹¹ The tract of land that the written treaty covered consisted of approximately 55,000 square miles. The treaty area covered from the watershed of Lake Superior to the north-west angle of Lake of the Woods, and from the American border to the height of land from which the stream flows toward the Hudson’s Bay.¹¹² In

¹¹⁰Ibid.

¹¹¹“We Have Kept Our Part of the Treaty” The Anishnaabe Understanding of Treaty #3. Kenora: Grand Council Treaty No. 3, 1995)

¹¹²Treaty No. 3 between Her Majesty the Queen and the Saulteaux Tribe of the Ojibbeway Indians at the Northwest Angle on the Lake of the Woods with Adhesions. (Ottawa: Queen’s Printer, 1966)

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contrast to what was stated in the written version of Treaty No. 3, the Anishinaabe traditional land base included the area just beyond the west side of the Red River, flows up to northern Lake Winnipeg. It proceeded to the north of Lac Seul and Sturgeon Lake. It continued southwest to Lake Superior following it until Sandy Lake. From there, it continued to Leech Lake, and then back to the Red River.

The Crown's primary purpose and object of the treaty was to obtain a surrender of the tract of land defined in Treaty No. 3. The written treaty contained a series of promises made by the federal and provincial government in return for the purported agreement of Aboriginal people to surrender certain rights to 55,000 square miles of ancestral lands. This land was required to open up the route referred to as the "Dawson's Route", which extended from Prince Arthur's Landing on Lake Superior to the north-west angle of the Lake of the Woods.¹¹³ The route secured "the passage of emigrants and of the people of the Dominion generally".¹¹⁴ It also enabled the Government to allow settlement on any portion of the land which might be susceptible to improvements and profitable occupation.¹¹⁵ Thus, the Canadian Pacific Railway route to the Northwest Territories was established¹¹⁶ and exposed the extensive lumber and mineral region.¹¹⁷

The subject of the law suit in the St. Catherines Milling and Lumber Company v. The Queen¹¹⁸ was the North West Angle Treaty of 1873 (Treaty No. 3). The Privy Council held that the underlying title to the lands in relation to which Indian claims had been surrendered or extinguished by the North West Angle Treaty of 1873 belonged to the Crown in Right of Ontario, and not to the Dominion¹¹⁹.

¹¹³Morris, "Treaties", supra, note 107 at 44.

¹¹⁴Ibid.

¹¹⁵Ibid.

¹¹⁶G. Brown & R. Maquire, Indian Treaties in Historical Perspective (Ottawa: Dept. Of Indian and Northern Affairs, 1979 at xiv.

¹¹⁷Morris, "Treaties", supra, note 107 at 5.

¹¹⁸ (1888), 14 App. Cas. 46 (P.C.).

¹¹⁹S. Barry Cottam, "Indian Title as a 'Celestial Institution': David Mills and the *St. Catherines' Milling Case*" in Kerry Abel and Jean Freisen (eds.) Aboriginal Resource Use in Canada: Historical and Legal Aspects (Winnipeg,

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Treaty No. 9 - James Bay Treaty

Treaty 9 was negotiated and signed in 1905 and 1906 between representatives of the federal government and provincial government of Ontario with the Cree-Anishnaabe Nation. Treaty-signing ceremonies occurred at Osnaburgh, Fort Hope, Marten Falls, Fort Albany, Moose Factory, New Brunswick House and New Post in the summer of 1905, and at Abitibi, Matachewan, Mattagami, Long Lake, and Flying Post in the summer of 1906.¹²⁰

The following provides a brief account of the oral history of the issues surrounding the signing of this treaty:

Missabay then spoke, expressing the fears of the Indians that, if they signed the treaty, they would be compelled to reside upon the reserve to be set apart for them, and would be deprived of the fishing and hunting privileges which they now enjoy.

On being informed that their fears in regard to both these matters were groundless, as their present manner of making their livelihood would in no way be interfered with, the Indians talked the matter over among themselves.

The next morning...the chief spoke, stating that full consideration had been given the request made to them to enter into treaty...and they were prepared to sign, as they believed nothing but good was intended.¹²¹

The written text of the treaty contains a series of promises made by the federal government in return for the apparent agreement of Aboriginal people to surrender certain rights. In 1929-30, adhesions were made to Treaty 9 extending its coverage over an additional 128,000 square miles to Ontario's present border with Manitoba. Signing ceremonies occurred at Trout Lake in 1929, and Windigo River, Fort Severn and Winisk in 1930. Treaty 9 currently covers more than two-thirds of present-day Ontario.¹²² There are over 40 Aboriginal communities scattered throughout the area; 30 are only accessible by air. The population of Band Members exceeds 20,000. This represents 28.5 percent of the total Aboriginal population of Ontario.¹²³

Manitoba: University of Manitoba Press, 1991) at 247.

¹²⁰Patrick Macklem, "The Impact of Treaty 9 on Natural Resource Development in Northern Ontario" in Michael Asch (ed.) Aboriginal and Treaty Rights in Canada (Vancouver: UBC Press, 1997) 97.

¹²¹A. Rickard, Chief, Grand Council Treaty #9, Basic Issues and Priorities of Grand Council Treaty Nine (Cobalt, Ont: Highway Bookshop, 1977) at preface.

¹²²Ibid.

¹²³Grand Council Treaty Nine. Association of Treaty Nine Chiefs. Our Self-Determination for our Spiritual, Prepared by Beverley K. Jacobs, January 19, 2001

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The following statements reiterate the opinions of Grand Council of Treaty No. 9 in respect to their Nation's relationship to their traditional lands:

At no time, have we felt that we were staking a claim to this vast area of Ontario that was, is and always will be, one with the people. We stated a basic fact of our Cree and [Anishnaabe] belief regarding real estate and land ownership. It must be understood by all people that the concept of land ownership as practised by the larger Canadian society or the Euro-Canadian, is completely different from that of the North American Native peoples. To map out surveyed areas of land into concessions and lots, and drive into the ground, iron bars or erect cement monuments and fence them in as private property, is a concept that is foreign to the North American Aborigine."¹²⁴

To ensure our survival on the land we say that our Aboriginal hunting and fishing rights will never be taken away. We do not recognize the fish and game laws which have eroded our way of life. We encourage and support our people; (a) to hunt and fish in any part of Treaty #9 for their own consumption during any season; (b) to trap anywhere in the Treaty #9 area; and (c) to trap without the infringement of tax regulations. If necessary, we will encourage our people to fill your courtroom in our fight for our aboriginal rights.¹²⁵

It must be recognized that these Aboriginal beneficiaries of Treaty 9 have a connection to the lands that reflects their traditional way of life. When laws were passed to extinguish aboriginal rights to land, the Cree and Anishnaabe people of the Treaty 9 area did not forget their relationships to the land and their traditional way of life. Based on the strong statements made by the Grand Council of Treaty 9, it is inevitable that they will continue to follow their traditional way of life and will continue to survive on their lands.

In analyzing the brief descriptions of the above-noted various types of treaties that were made in Ontario, there are similarities between all of them. They provide the background to the differences between the Aboriginal and the Eurocentric interpretations. Starting with the Royal Proclamation and the Treaty of Niagara, the 24 varying Aboriginal nations interpreted its meaning quite differently than the Crown's interpretation. The Hodiho:ni Confederacy interpret the Haldimand Treaty/Deed quite differently than the Crown. The so-called land surrender treaties, for example, The Robinson Treaties of 1850, Treaty 3 and Treaty 9, are also interpreted differently by the

Cultural, Social and Economic Independence (date unknown)

¹²⁴Grand Council Treaty #9, Press Release, July 26, 1977. File No. 110-5-2.

¹²⁵Grand Council Treaty #9, A Declaration of Nishnawbe-Aski (The People of the Land) by the Anishnaabe-Cree Nation of Treaty #9 to The People of Canada, Delivered by the Chiefs of Grand Council Treaty #9, to Ontario Premier William Davis and his Cabinet in the City of Toronto, Wednesday, July 6, 1977.

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various Anishnaabe and Oji-Cree Nations in Ontario. The difference being that the Aboriginal people have remembered the relationships of these treaties like they have remembered their relationships to land. It is a spiritual, binding relationship that cannot be broken.

In Delgamuukw, Justice Lamer has made a distinction between the relationship of common law and pre-existing systems of Aboriginal law and that they should both be considered when determining a second source of aboriginal title.¹²⁶ When analyzing treaties in this context, there is a difference between the interpretations of treaties at common law and the interpretations of treaties according to oral history; oral history being a source of traditional Aboriginal law. The courts have interpreted treaties differently and have created its own rules and binding precedents in interpreting treaties made with Aboriginal peoples. The general principles of interpreting these treaties has only recently been attempted in Canadian law wherein the “pre-existing” systems of Aboriginal law have not been applied.

The legal history of dealing with treaties made with Aboriginal Peoples is not a long one. For example, it was not until 1983 that the Supreme Court of Canada dealt with treaties in Nowegijick v. The Queen wherein the court held that treaties “should be liberally construed, and doubtful expressions resolved in favour of the Indians”¹²⁷. In 1985, the Supreme Court of Canada has stated in Simon that treaties entered into by the Crown and Aboriginal peoples are *sui generis* agreements. It was not until 1990, that the Supreme Court of Canada in Sioui defined what characterizes an Aboriginal treaty:

....what characterizes a treaty is the intention to create obligations, the presence of mutually binding obligations and a certain measure of solemnity.¹²⁸

In 1996, in Badger, the Supreme Court of Canada stated that Aboriginal treaties were sacred and that “any limitations which restrict the rights of Indians under treaties must be narrowly construed.”¹²⁹

¹²⁶Delgamuukw, supra, note 1 at 59.

¹²⁷Nowegijick v. The Queen (1983), 144 D.L.R. (3d) 193 (S.C.C.)

¹²⁸ Sioui, supra, note 17 at 1044, S.C.R.

¹²⁹Badger, supra, note 20 at 92.

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In Calder, which was affirmed in Sparrow, the Supreme Court of Canada decided that Aboriginal people have a legal right to ancestral lands where their title has been neither surrendered nor validly extinguished.¹³⁰ The onus of proving that a treaty or Aboriginal right has been extinguished lies upon the Crown. In Badger, the court found that there must be a “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.¹³¹ Justice Lamer in Delgamuukw confirmed the strictness of proof in Badger by stating that the standard of proving extinguishment is “quite high”¹³². He was concerned “that the only laws with the sufficiently clear and plain intention to extinguish aboriginal rights” would be federal laws and that provincial laws would never extinguish aboriginal rights as it would take the law outside provincial legislation.¹³³ In fact, the pronouncement of Lamer in applying treaty rights cases in Delgamuukw regarding extinguishment equally advances the areas of Aboriginal rights and treaty rights.

The question then becomes whether treaties were surrenders of land and if so, whether the treaties extinguished Aboriginal rights to land. If treaties are surrenders of land and extinguished Aboriginal title, the Crown must demonstrate that there was a clear and plain intention¹³⁴ that treaties extinguished Aboriginal title.. While oral histories of Aboriginal peoples can be presented to provide proof of Aboriginal title, the Crown will most likely use written treaties as proof of extinguishment of aboriginal rights to land. The Royal Commission on Aboriginal Peoples addressed the federal policy of extinguishment of Aboriginal title to ancestral lands. As noted by the Commission, “it should not be assumed that an Aboriginal nation that is party to a treaty containing an extinguishment clause shares the Crown’s view of the legal effect of such a provision”.¹³⁵ Because there is such a

¹³⁰Calder v. Attorney General of British Columbia, [1973] S.C.R. 313.

¹³¹Ibid.

¹³²Delgamuukw, supra, note 1 at 84.

¹³³Ibid.

¹³⁴Ibid. at Page 119 of Persky’s book

¹³⁵Royal Commission on Aboriginal Peoples, “Treaty-Making in the Spirit of Co-existence, An Alternative to Extinguishment” found in For Seven Generations, An Information Legacy of the Royal Commission on Aboriginal Peoples, CD-Rom (Ottawa: Libraxus Inc., 1997) (no page numbers) [hereinafter referred to as “Treaty-Making”].

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huge difference of interpretation of what these treaties intended, “it cannot always be said with certainty that the written terms of an extinguishment clause will determine the clause’s legal effect.”

There are various types of treaties made in Ontario depicting different eras of time as to the Crown’s relationship and intentions with respect to Aboriginal title to traditional lands. As noted by the Royal Commission, from between the years 1763 to 1867, “the treaty-making authority passed from the British military to civilian authorities and local authorities assumed progressively greater control over the implementation of treaties.”¹³⁶ According to RCAP, during the early nineteenth century, blanket extinguishments of Aboriginal title was not the Crown’s standard treaty policy during this period. This policy was actually traced to the land cessions of Southern Ontario and the Georgian Bay region of Lake Huron and was integrated into the text of the Robinson Treaties of 1850, which were later used to implement the numbered treaties.

For example, Michael Asch has noted the similarities between Treaties, 8, 9 and 11 and the fact that these treaties did not extinguish Aboriginal title:

In Re Paulette’s Application, Justice Morrow held that notwithstanding language in Treaties 8 and 11 similar to the land-surrender provision in Treaty 9, there existed sufficient doubt whether Aboriginal title had been extinguished, and hinted 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.’¹³⁷

Asch also stated:

When the land-surrender provision contained in the text of Treaty 9 is read in light of the treaty’s guarantee of hunting, trapping, and fishing rights, one is driven to the same conclusion as that reached by Justice Morrow in Re Paulette. Properly understood, the guarantee of hunting, trapping, and fishing rights involves much more than a licence to use Crown lands for those pursuits until they are ‘taken up’ for purposes authorized by the treaty. From the perspective of Aboriginal people in the area, the most important aspect of Aboriginal title appears to have been retained. Aboriginal signatories may have

¹³⁶Ibid.

¹³⁷Macklem, “Impact of Treaty 9”, supra, note 16 at 119.

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thought that they were giving up some of their rights, such as exclusive rights to open mines and engage in lumbering, but they did not view the treaty as surrendering the right to use the lands for their traditional pursuits. Hunting, trapping and fishing rights form part of the bundle of Aboriginal title enjoyed by Aboriginal people in the area under consideration, and in the words of Justice Cory in Badger, have been ‘recognized in a somewhat limited form by the treaty.’¹³⁸

As noted in Delgamuukw, Aboriginal rights to land is not absolute and the rights may be infringed by “both the federal (eg. Sparrow) and provincial (eg. Cote) governments. However, s. 35(1) requires that those infringements satisfy the test of justification.”¹³⁹ The challenge is that courts have not sorted out the relationship between Aboriginal Rights and Treaty Rights and it is difficult to determine whether this justification test will apply to an analysis of extinguishment of treaty rights to land. This is what is causing the complication in trying to analyze a case that only involves an analysis of Aboriginal rights, without reference to treaty rights. The complication arises from the fact that treaty rights to land have not been litigated. There have only been claims of aboriginal title or rights to land. Arguments could then be made that there is no difference between whether an Aboriginal person in Ontario has an Aboriginal right to land as a result of the treaties (a treaty right) that were negotiated between the Crown and their people or whether an Aboriginal person has title to their lands. There is really no difference. However, in law, a distinction is made between Aboriginal and treaty rights according to S. 35(1).

If an Aboriginal person successfully argues that they have a treaty right or aboriginal right (title) to land, the Crown’s argument will then follow the ruling in Sparrow and Gladstone, which set out the general principles governing justification. Gladstone set out a broad range of legislative objectives that can justify the infringement of Aboriginal title. In Lamer’s opinion in Delgamuukw, the following are the kinds of objectives that can justify infringement of Aboriginal title:

the development of agriculture, forestry, mining, and hydroelectric power, the general economic

¹³⁸ Ibid.

¹³⁹ Delgamuukw, supra, note 1 at 107-108.

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development ..., protection of the environment or endangered species, the building of infrastructure and settlement of foreign populations to support those aims...¹⁴⁰

These are all examples of development that has continuously violated treaties that were made between the Crown and Aboriginal peoples not only in Ontario but in other areas in Canada. So-called economic development and development of mining and dams have constantly hindered Aboriginal peoples relationships to their land. Now, however, as a result of Lamer's opinion in *Delgamuukw*, the Crown has been given legal justifications as objectives to infringe upon Aboriginal rights to land.

However, those objectives must pass the second stage of the justification test which is the Crown's fiduciary duty. In *Delgamuukw*, Lamer stated that:

[the] aspect of Aboriginal title suggests that the fiduciary relationship between the Crown and Aboriginal peoples may be satisfied by the involvement of Aboriginal peoples in decisions taken with respect to their lands. There is always a duty of consultation. Whether the aboriginal group has been consulted is relevant to determining whether the infringement of aboriginal title is justified, in the same way that the Crown's failure to consult an aboriginal group with respect to the terms by which reserve land is leased may breach its fiduciary duty at common law: *Guerin*. The nature and scope of the duty of consultation will vary with the circumstances...this consultation must be in good faith, and with the intention of substantially addressing the concerns of the aboriginal peoples whose lands are at issue. In most cases, it will be significantly deeper than mere consultation. Some cases may even require the full consent of an aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to aboriginal lands.¹⁴¹

The duty to consult has always been a contentious issue between Aboriginal peoples and the Crown. The concept of consulting is very different between both parties. However, as Lamer states, some cases may even require "full consent" of an Aboriginal nation. Such is the case in Treaty No. 9 wherein it specifically states that the Crown must have the consent of the Aboriginal beneficiaries of Treaty 9 when it came to selling or disposing of the lands that were described in the treaty. I doubt that the Crown has ever historically or presently consulted with the Grand Council of Treaty 9 or obtained their consent when it came to selling or disposing the land in Treaty 9. In fact, the Crown has never consulted with the Hodinohso:ni Grand Council regarding the Haldimand Deed when its lands were being sold and leased to non-Native settlers and businesses.

¹⁴⁰*Ibid.* at 111.

¹⁴¹*Ibid.* at 113.

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As well as being the Crown's fiduciary duty to consult, it was also the Crown's duty to provide annuity payments, which existed in all of the pre-Confederation (land cessions) and post-confederation treaties (numbered treaties) in Ontario. Specifically, in the "post-war cessions", the Crown, in its own interest, sold lands to settlers and these monies were to pay for the annuities to the specific Aboriginal beneficiaries of the treaties. It is uncertain whether the Crown has ever lived up to this responsibility as each Aboriginal nation who were parties to these agreements would have to be consulted. Based on the fact that the Crown has never provided an accounting to the Six Nations¹⁴², we can assume that the Crown has never followed through in their duty to provide this type of accounting to any other nation.

In Sparrow, the Court recognized the Crown's fiduciary duty to "deal with the land for the benefit of the Aboriginal party whenever an Aboriginal party surrenders Aboriginal title to the Crown. This duty may constitutionally require the Crown to act in the interests of an Aboriginal community when the Crown offers an inducement to that community to surrender its Aboriginal title." This relationship describes a conflict of interest wherein the Crown acts in the interest of an Aboriginal community while it is inducing that Aboriginal community to surrender its rights to land. As RCAP stated, "[h]istory shows that the federal government traditionally insisted on extinguishment of Aboriginal title for purposes other than clarity and certainty", as was required by the Crown. Therefore, the Crown was acting on its own interests rather than their duty to act on the interests of an Aboriginal community. More specifically, RCAP stated:

...[the] extinguishment policy during the era of the numbered treaties was designed to clear Aboriginal title for the sake of non-Aboriginal settlement and Aboriginal assimilation. In combination, these purposes to not merely ignore the interests served by Aboriginal title, they negate them. They amount to a justification of extinguishment for extinguishment's sake. These objectives, in our view, do not merit serious consideration in a constitutional regime committed to fundamental principles of equality and respect for

¹⁴²Currently, Six Nations has launched a suit against the Crown requesting an accounting of their trust monies to determine what has been held and sold as a result of the Haldimand Deed.

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Aboriginal difference.¹⁴³

One example demonstrates the concern and advancement in this area. The Hodinohso:ni believe that the Haldimand Deed is a treaty and can confirm this through their oral traditions and history. In reviewing the written text of the Haldimand Deed, nowhere does it state that the Hodinohso:ni had to cede, surrender or yield any titles to land. In fact, the Hodinohso:ni believe that the lands were “bestowed upon” them forever (fee simple), “under the express condition that we should enjoy them forever as separate people...with the assurance of British protection renewed”.¹⁴⁴ This issue was dealt with in the Court of Appeal by following St. Catharines Milling in that Indian title was a personal and usufructuary right and that legal title vested in the Crown; however the Supreme Court of Canada did not provide an answer to this issue when it was appealed. Delgamuukw has now refuted this definition in St. Catharines Milling in that aboriginal title arises from prior occupation of Aboriginal people.

When reading the written text of the treaties, most Aboriginal nations have either “gave, granted and confirmed” or “ceded, released, surrendered and yielded up” all of their “rights, titles and privileges” to the lands included within each treaty. In return for giving up rights, titles and privileges to land, each Aboriginal nation was provided with either annuities, monetary presents for each man, woman and child, clothes, suits, guns/ammunition, hats, cloth, tools, “goods”, farming equipment, oxen, reserve land, etc. However, what is absent in most of the written treaties was the oral agreements and promises that were made by the Crown representatives. This was confirmed by the Supreme Court in Badger:

In addition, when considering a treaty, a court must take into account the context in which the treaties were negotiated, concluded and committed to writing. The treaties, as written documents, recorded an agreement that had already been reached orally and they did not always record the full extent of the oral agreement...As a result, it is well settled that the words in the treaty must not be interpreted in their strict technical sense nor subjected to rigid modern rules of construction. Rather, they must be interpreted in the sense that they would naturally have been understood by the Indians at the time of the signing.¹⁴⁵

Also, Aboriginal parties to the treaties did not know that they were giving up title to their lands. When looking at

¹⁴³Royal Commission on Aboriginal Peoples, “Treaty-Making”, supra, note 135.

¹⁴⁴Logan, supra, note 79.

¹⁴⁵Badger, supra, note 20 at 95.

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the interpretations of treaties based on the oral histories of Aboriginal peoples, treaties were not surrenders of land, but a “sharing” of land. There was no intention to cede their title to their lands.

Arguments can be made regarding Lamer’s finding that at sovereignty, occupation must have been exclusive and that the aboriginal title includes the right to exclusive use and occupation of land. Lamer states:
Exclusivity, as an aspect of aboriginal title, vests in the aboriginal community which holds the ability to exclude others from the lands held pursuant to that title. The proof of title must, in this respect, mirror the content of the right. Were it possible to prove title without demonstrating exclusive occupation, the result would be *absurd, because it would be possible for more than one aboriginal nation to have aboriginal title over the same piece of land, and then for all of them to attempt to assert the right to exclusive use and occupation over it.*¹⁴⁶[Emphasis made by author]

This portion of proving aboriginal title goes completely against the oral history accompanying the treaty, “A Dish with One Spoon” made between the Hodinohso:ni and the Anishinaabe, as noted earlier. To reiterate the fact that it is not *absurd* to have more than one aboriginal nation to have aboriginal title over the same piece of land, the words of Onondaga chief, John Buck, is, again, provided as follows:

This treaty was made many years ago, when the great council was held at the east end of Lake Ontario. The belt was in the form of a dish or bowl in the centre, which the chief said represented that the Ojebways and the Six Nations were all to eat out of the same dish; that is to have all of their game in common. In the centre of the bowl were a few white wampums, which represented a beaver’s tail, the favourite dish of the Ojebways. At this council the treaty of friendship was formed, and agreement was made for ever after to call each other BROTHERS. This treaty of friendship was made so strong that if a tree fell across their arms it could not separate them or cause them to unloose their hold.¹⁴⁷

and that:

it was their intention to renew treaties of peace and friendship with all of the Indian tribes in the dominions of Her Majesty the Queen: that the interests of all the Indians were one: that they had always supported the British Government, as they were strongly attached to it, and if even that attachment should be lessened, it would not be their fault, but the fault of the government, in not keeping faith with the Indians; that all the Indian tribes *ought to unite in obtaining titles to their lands, as all Indians stood in the same situation with regard to their lands:* that the government and the white people were taking away their lands by fair promises...¹⁴⁸[Emphasis made in original

¹⁴⁶Delgamuukw, supra, note 1 at 73.

¹⁴⁷Jones, History of the Ojebway Indians, supra, note 36 at 119.

¹⁴⁸Ibid. at 120.

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document]

There is still an obvious misunderstanding of Aboriginal peoples' relationship to land.

Conclusion

This paper depicts only a snapshot of the many treaties made within the geographic boundaries of Ontario between Aboriginal Nations themselves as well as with the British Crown. In every treaty, there are at least two interpretations of what these treaties intended: the Aboriginal perspective and the Crown's perspective. All Aboriginal nations have maintained an oral history of their relationships with the Crown whereas the Crown has maintained a written history and a "paper trail" to confirm their intentions. What is missing in these "paper trails" is the oral agreements and the oral interpretations of the written treaties that were made to the Aboriginal nations when these treaties were being negotiated.

In order to obtain the evidence of oral histories that relate to the background and "perspectives" of each historic treaty, each Nation's Elders must be involved. For example, with respect to the wampum treaty belts, evidence of its existence is truly based on oral history. Elders of those specific Nations have the knowledge, background and the teachings that accompany each treaty. There are specific "wampum-keepers" that have been taught these teachings and depending on whether that nation is willing to produce this evidence in court is another story. Many will not provide this kind of information in a public court room and many will not allow it to be orally "delivered" in order for it to be cross-examined. In fact, if this were questioned, it would be considered disrespectful. To me, this is the dilemma in having to present Aboriginal oral history in a court of Eurocentric law to determine the validity of Aboriginal title to land. Although the Supreme Court of Canada has made "great strides" in accommodating "Aboriginal perspectives" into the legal system, I believe the adversarial nature of the system itself causes grave danger to the oral history of Aboriginal cultures, traditions and knowledge.

The Supreme Court of Canada's interpretation of Aboriginal title to lands has been considered a positive decision based on the fact that the concept has never been fully defined. Although the court does define it a little more, the fact that Aboriginal people still have to defend their rights to land is ludicrous. Based on oral history of each Aboriginal nation, especially the Hodinohso:ni and the Anishnaabe in Ontario would no doubt provide a

Prepared by Beverley K. Jacobs, January 19, 2001

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“perspective” that the courts have to consider. The court sets out an inherent limitation that flows from Aboriginal title and states that there must be a “special bond” between the land and Aboriginal peoples. As Patricia Monture-Angus, states, this special bond is defined through Eurocentric values and misunderstandings of Aboriginal peoples relationship to land¹⁴⁹.

With respect to the effects of treaties on the court’s definition of Aboriginal title, the opposing views of the interpretation of treaties has to be dealt with. History of the lands based on Aboriginal people’s oral history has to be incorporated into the negotiations when interpreting treaties. For example, the oral history that accompanies the wampum treaties between Aboriginal peoples must be made known. Although treaties, according to Aboriginal people, confirms their relationship to land, the court has stated that Aboriginal peoples’ right to land is not absolute and that these rights can be infringed by the provincial and federal governments as long as those infringements satisfy the justification test. Delgamuukw does not correct the historic mistakes that past courts have created in its definitions of aboriginal title. There is no method or structure in Canadian Eurocentric law to do so. What must be done in recognizing and implementing the treaties in Ontario is to not following the strict rules of law that has created the definitions of “aboriginal title” but looking at the relationship to land that Aboriginal people have. This must be done by reviewing oral traditions and respecting their oral history as confirmed in Delgamuukw.

One final comment about Delgamuukw that was beyond the scope of this paper but should be mentioned is with respect to the comments made by Justice Lamer regarding the issue of self-government. Treaty relationships form the basis of Aboriginal Nation’s arguments for recognition of sovereignty and self-government. Lamer stated that as a result of the appellants broad argument of the right to self-government, it was therefore not cognizable under s. 35(1); thus, stating, that if an Aboriginal nation were to argue self-government, it must be narrowed to be recognized under s. 35(1). I do not believe that the courts should be in a position to define terms of self-government for Aboriginal peoples. This is determined by Aboriginal peoples themselves. Lamer’s concluding statement, “the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown” affirms the fact that the

¹⁴⁹Patricia Monture-Angus, Journeying Forward. Dreaming First Nations Independence, (Halifax, N.S.: Fernwood Publishing, 1999) at 127.

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courts believe in the Eurocentric ideals that Aboriginal peoples are not and have not been sovereign, but only pre-exist.