

DELGAMUUKW AND TREATIES: AN OVERVIEW*

Aboriginal title received its first significant review under section 35 of the *Constitution Act 1982* in the 1997 decision of *R. v. Delgamuukw*¹. The Supreme Court of Canada's decision in *Delgamuukw* considered the Gitksan and Wet'suwet'en² peoples' claim to Aboriginal title and self-government over approximately 58,000 square kilometers of land in (what is now called) north-western British Columbia.³ The decision indicated that Aboriginal title was a constitutionalized "right to the land itself", which could be used "for a wide variety of purposes".⁴ The decision created the potential for conflicting claims to land between Aboriginal peoples and the Crown throughout British Columbia. To resolve this impasse the Supreme Court of Canada suggested that negotiations were more appropriate than litigation to resolve issues of Aboriginal title. For example, in the decision Mr. Justice La Forest wrote that "the best approach in these kinds of cases [dealing with title] is a process of negotiation and reconciliation that properly characterizes the complex and competing interests at stake".⁵ Chief Justice Lamer similarly wrote that s. 35 provides a solid base on which negotiations about Aboriginal rights can be built. He observed the "Crown is under a moral, if not a legal, duty to enter into and

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¹ [1997] 3 S.C.R. 1010.

² The Wet'suwet'en are an Athabaskan speaking people, and the Gitksan are associated with the Tsimshian language group. Their territories are located in or near villages sites on the Skeena, Babine and Bulkley Rivers. Gisday Wa and Delgam Uukw, *The Spirit in the Land* (Gabriola, B.C.: Reflections, 1992).

³ Hereditary Chief Alice Jeffery summarized their action: "The Gitksan people feel we have absolute title and ownership to our land", Alice Jeffery, Remove Not the Landmark, in Frank Cassidy, ed., *Aboriginal Title in British Columbia: Delgamuukw v. The Queen* (Lantzville, B.C.: Oolichan Books, 1992) 58 at 61.

⁴ *Delgamuukw*, supra, note 1 at paras. 140 and 117.

⁵ *Ibid.* at para. 207

conduct those negotiations in good faith”.⁶ The decision as a whole therefore seems to support the idea that the parties should resolve the issue of Aboriginal title through negotiation.

The Royal Commission on Aboriginal Peoples earlier arrived at the same conclusion. It wrote that negotiations concerning Aboriginal lands should be placed in a treaty framework and resolved in a principled way. They observed: “Negotiation is the best and most appropriate way to address these issues, and land claims policies should be replaced by treaty processes, primarily under the auspices of regional treaty commissions, with Aboriginal Lands and Treaties Tribunals performing supplementary functions”.⁷ In dealing with issues of Aboriginal title the Royal Commission recommended enlarging the woefully inadequate land base of Aboriginal peoples in recognition of the historic wrongs that had been perpetrated against them,⁸ and to provide an economic base on which they could build their communities.⁹ As is apparent from the Royal Commission’s approach to treaty issues, they envisioned that the best way to deal with Aboriginal land was “through

⁶ Ibid. at para. 186.

⁷ The Royal Commission on Aboriginal Peoples was initiated in the months following the failure of Constitutional reform in the Meech Lake Accord and the armed confrontation between the Mohawks and the Canadian state at Oka, Quebec. It was established on August 26, 1991 and issued its final report five years later in November 1996. The mandate of the Commission was to “investigate the evolution of the relationship between aboriginal peoples...the Canadian government, and Canadian society as a whole.” Furthermore, the Commission was asked to “propose specific solutions rooted in domestic and international experience, to the problems that have plagued those relationships...”, *Report of the Royal Commission on Aboriginal Peoples, Vol 2* (Ottawa: Supply and Services, 1996) at 430.

⁸ The Commission noted however, that efforts to increase the Aboriginal land base extend beyond remedies and entitlements. They observed:

Expanding the Aboriginal land base is not just about honouring past obligations or paying a moral debt to Aboriginal people. It is about laying a firm consensual foundation for a new relationship between Aboriginal and non-Aboriginal Canadians, one of fair sharing of Canada’s enormous land mass, of mutual reconciliation and peaceful co-existence.

Ibid.

⁹ The Commission noted in this regard: “Without adequate lands and resources, Aboriginal peoples will be pushed to the edge of economic, cultural and political extinction”. Ibid. at 574.

legitimate processes of consultation and negotiation enshrined in legislation”.¹⁰ They further developed their reliance on negotiations and attempted to expand the scope of these negotiations by defining Aboriginal title in a broad and generous way.¹¹ In support of this central supposition, that the law of Aboriginal title could support a negotiation-based regime to increase the Aboriginal land base, the Royal Commission devoted a lengthy chapter to issues of lands and resources in the second volume of its Report.¹²

The changes produced by the Court and suggested by the Commission are significant. The idea of Aboriginal title that largely prevailed until *Delgamuukw* produced a regime that discounted Aboriginal title, and did not create many incentives to creatively deal with Aboriginal peoples. The broader characterization of the nature of Aboriginal title in *Delgamuukw* and the Commission’s Report should support the provision of “lands that are sufficient in size and quality to foster Aboriginal self-reliance and cultural and political autonomy”.¹³ Furthermore, the Court’s view suggests that negotiation will play an important role in developing the parties relationships when infringements of Aboriginal title can only be justified where governments “accommodate” the participation of Aboriginal peoples in the development of resources, conferral of fee simples, and

¹⁰ Ibid. at 570.

¹¹ Specifically the Commissioner’s observed:

The law of Aboriginal title provides a firm foundation for contemporary protection of Aboriginal lands and resources. It imposes extensive obligations on the Crown to protect them. These duties of the Crown oblige Parliament to enact fair and effective institutional processes to facilitate negotiated solutions. The law requires government not to rely simply on the public interest as justification for limiting the exercise of Aboriginal rights but to act in the interests of Aboriginal peoples when negotiating arrangements concerning their lands and resources Ibid. at 568.

¹² This chapter covered concerns such as the significance of land to Aboriginal peoples, the loss of most of this land to settlers through misunderstanding and injustice, and the inadequacy of current federal claims processes to deal with the loss that Aboriginal peoples experienced.

¹³ *Delgamuukw*, supra, note 1 at para. 574.

reduction of economic barriers to Aboriginal peoples use of their land¹⁴,. These holdings could support the regime recommended by the Royal Commission where land is selected and allocated on the basis of different categories that give differing degrees of control to the Crown and Aboriginal peoples.¹⁵ Thus, the *Delgamuukw* decision's alignment with many of the Royal Commission recommendations creates an environment that fosters the negotiation and creation of a treaty relationship.

In particular, the sending of the *Delgamuukw* case back trial because of a defect in the pleadings, and the expansion of the rules of evidence to incorporate Aboriginal oral history, both potentially create enough uncertainty for both parties to make negotiation, and the recommendations of the Royal Commission, appear more attractive. Furthermore, the decision's expanded scope of Aboriginal title as a "right to exclusive use and occupation of land"¹⁶ in areas where the province has conventionally considered itself as holding full Crown title may also create some incentives for the province to enter into negotiations. On the other hand, the fact that Aboriginal title can be infringed by the provincial government through "compelling and substantial" legislative objectives that can justify the infringement of Aboriginal title¹⁷ may bring Aboriginal groups to the table.

This paper will examine whether negotiation and treaties are in fact the most appropriate way to deal with Aboriginal title in the aftermath of the *Delgamuukw* decision.

¹⁴ Ibid. at para. 167.

¹⁵ *Report of the Royal Commission on Aboriginal Peoples, Vol. 2*, supra, note 7 at 581, Recommendation 2.4.10:

Negotiations aim to describe the territory in question in terms of three categories of land. Using these three categories will help to identify, as thoroughly and precisely as possible, the rights of each of the parties with respect to lands, resources and governance.

Aboriginal peoples would have full rights of ownership and jurisdiction of Category I lands, Category II lands would facilitate co-management regimes, and Category III lands would be Crown lands.

¹⁶ Ibid. at para. 117.

¹⁷ Ibid. at 161.

It will review the history of treaty interpretation before the courts, and argue that the flaws in this sphere create pressing problems for Aboriginal peoples thinking about negotiation as an alternative to litigation. However, by examining some of the recommendations of the Royal Commission this paper will also take a more constructive turn and suggest appropriate steps that can be taken to overcome some of the difficulties Aboriginal peoples encounter in treaty relationships.

HISTORIC TREATIES

Before non-Indigenous peoples came to the shores of great turtle island (North America) Aboriginal peoples often made treaties between their nations to establish relationships with one another and their lands.¹⁸ The alternative to such measures could be distrust, petty grievance, violence and war. These treaties were recorded on wampum, rock, and trees, and were written in the hearts and minds of respected record keepers within these nations. These treaties were sacred and were often given the highest regard and respect. Failure to abide by these agreements could bring economic hardship, political instability and/or war to those parties who failed to abide by their meaning.¹⁹ This early pattern of treaty making was well entrenched in North America when people not Indigenous to this continent arrived from distant shores. These agreements recognized the ability of peoples to pursue different paths, and became a model to guide early relationships between the peoples.²⁰

¹⁸ For examples in the Great Lakes area see Victor Lytwyn, "A Dish With One Spoon: The Shared Hunting Grounds Agreement in the Great Lakes and St. Lawrence Valley" in David Pentland, ed., *Papers of the Twenty-Eighth Algonquian Conference* (Winnipeg: University of Manitoba, 1997) at 210.

¹⁹ Conflict between Aboriginal nations prior to contact in the Great Lakes area is recounted in Vernon Kinietz, *The Indians of the Western Great Lakes, 1615-1760* (Ann Arbor: University of Michigan Press, 1940) at 53, 60, 82-89, 123, 133, 196-202, 251-62, 356-359, 362, 402-404.

²⁰ Robert A. Williams Jr., *Linking Arms Together: American Indian Treaty of Visions of Law and Peace 1600-1800* (New York: Oxford University Press, 1997).

i) Peace and Friendship Treaties

The first treaties entered into between Aboriginal peoples and non-Indigenous others were of peace, friendship and respect. Their terms recognized the idea that different peoples should be free to pursue different objectives. They were frequently made according to the protocols and form that Aboriginal peoples had established amongst themselves prior to the arrival of Europeans.²¹ They were also recorded on wampum, rocks and trees, and written in the hearts and minds of respected leaders. However, in time, a change in the old forms eventually began to occur and these treaties were also recorded in writing by the newly settling peoples. While these treaties were still regarded as sacred and were to be given the highest honor and respect, their interpretation could no longer be made solely within the world of Aboriginal perspectives. Interpretation had to be attentive to the ideas and attitudes of those on the other side of the agreement - the non-Aboriginal peoples. Treaties became, more than ever, the product of a cross-cultural dialogue.²² This was bound to raise differing views about their meaning, and great misunderstandings often developed which led to distrust, petty grievance, violence and war.²³ Somehow, despite these setbacks, treaties remained the basis on which the parties

²¹ William Fenton, "Structure, Continuity and Change in the Process of Iroquois Treaty Making" in Francis Jennings, et.al., *The History and Culture of Iroquois Diplomacy* (Syracuse, 1985) at 3; Wilbur R. Jacobs, *Diplomacy and Indian Gifts: Anglo-French Rivalry Along the Ohio and North-west Frontiers* (Stanford: Stanford University Press, 1950).

²² Richard White, *The Middle Ground: Indians, Empires and Republics in the Great Lakes Region 1650-1815*; White explores this thesis throughout his book.

²³ Unfortunately, armed conflict was not uncommon between Aboriginal and non-aboriginal peoples east of Lake Huron when treaties broke down. See F.W. Rowe, *Extinction: The Beothucks of Newfoundland* (Toronto: McGraw, Hill, Ryerson, 1977); A.G. Bailey, *The Conflict of European and Eastern Algonkian Cultures, 1504-1700: A Study in Canadian Civilization* (Toronto: University of Toronto Press, 1937); Olive P. Dickason, *Canada's First Nations: A History of Founding Peoples from Earliest Times* (Toronto: McClelland and Stewart, 1992) at 149-162;

directed their relationships, land and resource use. As such, these early treaties of peace, friendship and respect still have meaning in Canada.

Canadian courts have considered the meaning of these treaties on many occasions in recent years. They have adopted special interpretive principles to respect the ancient origins and cross-cultural context in which these first treaties were negotiated. Earlier cases such as *Jones v. Meehan*²⁴ in the United States, and *R. v. White and Bob*²⁵ and *R. v. Taylor and Williams*²⁶ in Canada, were significant in developing principles that help to span the cultural and temporal divide which separate the courts from these ancient agreements. In 1985 the Supreme Court of Canada affirmed these unique canons of construction when examining a 1752 treaty of peace and friendship in the case of *R. v. Simon*,²⁷ and these ideas were further judicially entrenched in 1990 when examining a 1752 treaty in the case of *R. v. Sioui*.²⁸ Most recently, in 1999, the Supreme Court gathered these principles together and applied them to another 1760 peace and friendship treaty in the case of *R. v. Marshall*.²⁹ The principles these cases espouse are important in understanding Aboriginal difference because they lead the interpreter to contemplate the possibility that the written words of a treaty document alone may not contain their full meaning.³⁰ They direct the courts to take a large, liberal and generous approach to the issues at hand, resolving any ambiguities in favour of Aboriginal people. They are to be construed as the Aboriginal peoples understood them, and interpreted in a purposive,

²⁴ (1899) 175 U.S. 1 (U.S.S.C.).

²⁵ (1964) 50 D.L.R. (2d) 613 (B.C.C.A.); *affd.* (1965) 52 D.L.R. (2d) 481n (S.C.C.).

²⁶ (1981) 34 O.R. (2d) 360 (C.A.).

²⁷ (1985) 24 D.L.R. (4th) 390 (S.C.C.).

²⁸ (1990) 70 D.L.R. (4th) 427 (S.C.C.).

²⁹ [1999] 2 S.C.R. (S.C.C.).

³⁰ Leonard Rotman, "Taking Aim at the Canons of Treaty Interpretation in Canadian Aboriginal Rights Jurisprudence" (1997) 46 *U.N.B.L.J.* 1.

flexible manner. This approach holds great promise for Aboriginal peoples who want to preserve ancient understandings of their relationship to the land. It comprehends considerable space for Aboriginal people who understand that their relationship with non-Aboriginal peoples will be on somewhat different terms from those the settlers establish amongst themselves.³¹

Despite the presence of principles of liberal treaty interpretation however, many decisions can still be found which perfunctorily recite these canons without seeming to apply them in any genuine way. This is detrimental to the implementation of these agreements and helps to facilitate assimilation. Each time a court stumbles over a treaty's meaning because they lack information or evidence, this creates a bias in favour of the Crown, to the detriment of Aboriginal people. This bias occurs since Aboriginal peoples most often must bear the burden of proof in treaty cases, while the Crown does not have to substantiate which benefits it receives from the agreements. The Crown's position is unexplainedly the default position, when this was not discussed or agreed to by the parties during the negotiations. As a result, doubt is cast on Aboriginal peoples treaty claims for differential treatment, and Crown rights are automatically assumed to be the standard by which Aboriginal rights and conduct are judged. This homogenizing tilt constrains Aboriginal difference and pressures Aboriginal peoples towards assimilation. For example, Crown land use within treaty areas is exercised with very few barriers or restrictions. On the other hand, Aboriginal peoples often have to struggle against numerous constraints and obstacles to exercise treaty rights hunt, fish or harvest resources on these same lands.

³¹ James Sakej Youngblood Henderson, "Empowering Treaty Federalism" (1994) 58 *Sask. L. Rev.* 241 at 25-269.

It is not clear in law why the Crown and not Aboriginal peoples should receive more benefits from treaty rights.

An example of this process is illustrated in the decision of *R. v. Thomas Peter Paul*,³² concerning a right to harvest trees for commercial purposes under early peace and friendship treaties on Canada's east coast.³³ Here, the New Brunswick Court of Appeal did not seem to take any steps to implement generous interpretive principles and held that Mr. Peter Paul had not established the treaty rights he asserted. This failure to apply these principles stifles Aboriginal understandings of the treaty and reinforces the status quo.³⁴ In fact, immediately after noting the need to interpret treaties in a broad and liberal manner, the Court in its next paragraph wrote: "In any event...", and then went on to quote from the clause at issue in the treaty, without stating how this clause would benefit from these doctrines. The Court's (non)use of the interpretive principles in this fashion makes it appear as if the special canons of treaty construction are irrelevant. Furthermore, when the Court reviewed the findings of the lower courts concerning commercial harvesting rights it held there "was insufficient evidence upon which a consistent conclusion could be reached".³⁵ The lack of evidence on this point led the Court to write: "Even though a

³² [1998] 3 C.N.L.R. (N.B.C.A.) 221.

³³ For descriptions of Mi'kmaq/Crown relations in this period see William Wicken, "Re-examining Mi'kmaq-Acadian Relations 1635-1755 in Sylvie Departie, et. al., *Vingt an apres, Habitants et marchands: Lectures de l'histoire des XVIIe et XVIIIe siecles canadiens* (Montreal: McGill-Queen's Press, 1998); William Wicken, "Heard it From my Grandfather: Mi'kmaq Treaty Tradition and the Syliboy Case of 1928 (1995) 44 *U.N.B. Law Journal* 146; William Wicken, "The Mi'kmaq and Wuastukwiuk Treaties (1994) 43 *U.N.B. Law Journal* 43.

³⁴ I want to be clear that in the argument that follows I am focusing on the Court's manipulation of legal principles. I am not saying anything about the substantive outcome in the *Paul* case. For example, there may or may not be a treaty right covering these facts, but that does not excuse the Courts from following well established treaty and constitutional presumptions in making their case.

³⁵ *Peter Paul*, supra note 32 at 233.

liberal interpretive approach is required, the result must be realistic”.³⁶ They held “conjecture...cannot result in the realistic interpretation of the Treaty”.³⁷ Through such reasoning the status quo is preserved, and the Crown is not disturbed in its use or possession of land when it has not legally justified its assumed pre-eminent position. This domestication of colonialism places Aboriginal peoples in a subordinate position relative to the Crown.³⁸

There is a legal inconsistency when a static approach is taken to what can be fairly regarded as a constitutional document (a treaty)³⁹ when dealing with Aboriginal issues. The history of Canadian federalism reveals that this path has not generally been followed in other constitutional cases.⁴⁰ For example, in the 1998 *Quebec Secession Reference* case the Supreme Court wrote that the federal system was only partially complete “according to the precise terms of the *Constitution Act 1867*”⁴¹ because the “federal government retained sweeping powers that threatened to undermine the autonomy of the provinces”.⁴² As a result, they noted, courts have had to “control the limits of the respective sovereignties” since “the written provisions of the Constitution do not provide the entire picture”⁴³ of the Canadian federal structure. In this vein the courts helped to facilitate “democratic participation by distributing power to the government thought to be most suited to achieving the particular societal objective”, having regard to the diversity of

³⁶ Ibid.

³⁷ Ibid. at 234.

³⁸ Isabelle Schulte-Tenckhoff, “Reassessing the Paradigm of Domestication: The Problematic of Indigenous Treaties” (1998) 4 *Review of Constitutional Studies* 239.

³⁹ Treaties have been described as constitutional documents in the *Royal Commission, Vol. 2*, supra, note 7 at 22, 36-37.

⁴⁰ P. Bobbit, “Methods of Constitutional Argument” (1989) 23 *University of British Columbia Law Review* 449.

⁴¹ *Reference Re Quebec Secession* [1998] 2 S.C.R. 217 at para. 55.

⁴² Ibid.

the component parts of Confederation.⁴⁴ The court's historic approach has resulted in the sharing of political power in Canada between two orders of government - the provinces and the central government. Provincial power has been significantly strengthened under this interpretation.

Applying these principles to treaty interpretation, would it not also be possible to strengthen the position of Aboriginal peoples in the Constitution and regard the federal system as only partially complete in relation to Aboriginal peoples?⁴⁵ Could it not be similarly argued, that the "federal government retained sweeping powers" relative to Aboriginal peoples contrary to most treaty relationships "which threatened to undermine the autonomy" of Aboriginal groups? Furthermore, since the "written provisions of the Constitution does not provide the entire picture" relative to aboriginal peoples, and treaties can be read to present a more balanced picture, could not the courts also "control the limits of the respective sovereignties" by distributing appropriate powers to the aboriginal governments? If the courts can strengthen provincial powers by drawing on federalism's unwritten principles to fill in the "gaps in the express terms of the constitutional text"⁴⁶, why can they not then do the same thing to "facilitate the pursuit of collective goals"⁴⁷ of Aboriginal nations, by drawing on the written and oral principles embodied in the treaties? Federalism could be applied in this manner when interpreting treaties to question assertions of Crown sovereignty that purportedly diminished Aboriginal powers to function as an equal integral part of the federal structure in Canada.

⁴³ Ibid.

⁴⁴ Ibid. at 58.

⁴⁵ See Bruce Ryder "The Demise and Rise of the Classical Paradigm in Canadian Federalism: Promoting Autonomy for the Provinces and First Nations (1991) 36 *McGill Law Journal* 309.

⁴⁶ *Quebec Secession* case, supra, note 41, at para. at 53.

The fact that the courts choose not to follow this familiar course when delineating treaty rights reveals a skewed application of constitutional law. It creates a bias in law against treaties and in favour of other non-Aboriginal constitutional instruments.

Not all cases, however, are deficient in their recitation and application of generous interpretive principles. For example, in the 1999 *Marshall* decision the Supreme Court appropriately used these canons to refuse to “turn a positive Mi’kmaq trade demand” in a 1760 treaty “into a negative Mi’kmaq covenant”.⁴⁸ The issue in dispute was whether a treaty clause stating that the Mi’kmaq could only trade in government appointed “Truck houses” protected a contemporary right to trade for commercial purposes, given that Truck houses ceased to exist over two hundred years ago.⁴⁹ The Court held that a contemporary commercial right could be sustained. It arrived at this conclusion through a flexible approach to the evidence that chose from “among the various possible interpretations of the common intention...the one which best reconciles the Mi’kmaq interests and those of the British Crown”.⁵⁰ As a result, this case is an excellent example of the application of liberal and generous interpretive principles. It effectively demonstrates how a court can be attentive to Aboriginal perspectives in the adjudication of their rights. Nevertheless, despite this positive treatment, the Court still managed to interpret the treaty as a whole in a way that subordinates Aboriginal peoples within Canada. The aspects of the decision that potentially imperil Aboriginal difference appear when the Court subjects

⁴⁷ *Ibid.*, at 59.

⁴⁸ *Marshall*, supra note 29 at para. 52.

⁴⁹ For the role of historians in this case see John Ried, et. al., “History, Native Issues and the Courts: A Forum” (1998) 28 *Acadiensis* 3-28.

⁵⁰ *Marshall*, supra note 29 at para. 13.

treaty rights to unilateral governmental regulation, and limits their scope to sustenance purposes.

The Court's unfortunate circumspection of the right in question was prompted by the Crown's concern that Mi'kmaq trading rights "would open the floodgates to uncontrollable and excessive exploitation of the natural resources".⁵¹ While this potential exists in any group's use of a resource, there was no discussion of the legal limits imposed on Aboriginal fisher's right to trade by Mi'kmaq law and custom.⁵² The background of Aboriginal law would presumably form part of the backdrop against which the treaty should be interpreted. Furthermore, the Court did not acknowledge the fact of the Crown's own culpability in facilitating an uncontrollable use and excessive exploitation of the resource in question over the past one hundred years.⁵³ Despite the Crown's mismanagement of the resource and the continuing existence of Mi'kmaq law, the Court nevertheless chose to grant the right to regulate the fishery to the federal government. It did not explore the possibilities for enforceable Mi'kmaq management or co-management regimes that solely or equally called upon Mi'kmaq law-making authority in the regulation of the resource,⁵⁴ as the Royal Commission counseled.⁵⁵ Furthermore, the Court restricted the scope of the Mi'kmaq right to "necessaries" which were described as "not a right to trade for economic gain" or the "accumulation of wealth", but for "day-to-day" needs that "would not exceed a sustenance life-style".⁵⁶ Such an approach demonstrates the Court's

⁵¹ *Ibid.* at 57.

⁵² For the importance of Aboriginal law and custom in Aboriginal rights litigation see John Borrows, "With or Without You: Aboriginal Law (in Canada) (1996) 41 *McGill Law Journal* 629.

⁵³ D.R. Matthews "Constructing Fisheries Management" (1995)18 *Dalhousie Law Journal* 44.

⁵⁴ Claudia Notkzke, "A New Perspective in Aboriginal Natural Resource Management: Co-management" (1995) 26 *Geoforum* 187.

⁵⁵ Co-management is discussed in the Royal Commission's Report, Vol. 2, *supra* note 12, at 665-679.

⁵⁶ *Marhsall*, *supra* note 29 at 58-60.

view that the Crown is the paramount party in the treaty relationship. The characterization of Aboriginal peoples' rights under treaties as "narrow in ambit and scope",⁵⁷ while the Crown's rights under the same treaty are broad and plenary, illustrates the continuing colonial nature of the Crown/Aboriginal treaty relationship. It demonstrates the problems Aboriginal people still encounter in attempting to pursue a course of life that is guided by the own principles and objectives.

The restrictive findings in the *Marshall* case were strongly confirmed a few weeks later in a judgement known as *Marshall II*. In this decision the Court was asked to rehear the first decision (*Marshall I*) by the West Nova Fisherman's Coalition, who were concerned that about the potential lack of non-Mi'kmaq regulatory authority over the east coast fishery. In the aftermath of violent clashes and vociferous public criticism arising from the first decision, the Supreme Court of Canada used this opportunity to clarify its earlier opinion while simultaneously dismissing the application to rehear the case.⁵⁸ In doing so the Court re-framed the context of the original decision and placed the treaty's limitations in very plain terms. For example, it observed that the treaty did not support a general right to take resources throughout the province.⁵⁹ It emphasized that *Marshall I* could not be extended to support a right to take resources other than eels.⁶⁰ It reiterated

⁵⁷ Ibid. at para. 57 and 58.

⁵⁸ *R. v. Marshall* (S.C.C.)[hereinafter *Marshall II*]. The West Coast Fisherman's Coalition sought a rehearing of the *Marshall* case, and a further trial on the issue of justification for the infringement of treaty rights. They were concerned about the potential application of the judgement to lobster fishing. The Court denied the rehearing saying the issue of justification was not raised in argument of dealt with in the courts below. Furthermore, the Court said the Coalition's application was based on a misconception of the scope of the former *Marshall* opinion. The earlier decision concerned eels fishing under a particular treaty, not a general right to take resources throughout the province.

⁵⁹ The Court wrote that the "treaties were local and the reciprocal benefits were local. In the absence of a fresh agreement with the Crown, the exercise of the treaty rights will be limited to the area traditionally used by the local community with which the separate but similar treaty was made." Ibid., at para. 17.

⁶⁰ The Court wrote:

that both the provincial and federal governments had to regulate the rights guaranteed within the treaty.⁶¹ It highlighted that the government could regulate the right to fish for “necessaries” to a “produce a moderate livelihood” and not even be found to be infringing the treaty right.⁶² Finally, the Court accentuated the notion that the government could regulate the treaty right in such a manner as to give priority to non-Aboriginal interests in situations where “regional/economic dependencies” may warrant.⁶³ In summary, the Court found that present Mi’kmaq treaty rights are largely contingent on Canadian judicial recognition, subject to national and local infringement and regulation, did not extend to the accumulation of wealth, and could give way to non-Aboriginal objectives.

In *Marshall II* one sees the domesticating elements of state relations that caused so much concern amongst Aboriginal peoples testifying before the Royal Commission. Aboriginal peoples, by and large, view peace and friendship treaties as creating bi-lateral relationships that are not subject to the over-riding authority of any one party. They do not interpret peace and friendship treaties as giving non-Aboriginal governments the power to determine ultimate allocations of lands and resources. They believe that power was to be shared, and decisions about the treaties’ meanings were to be resolved through further treaty councils. With these understandings they therefore conclude that they did not ultimately submit to the Dominion of the Crown in matters of livelihood and the

The September 17, 1999 majority judgement did not rule that the appellant had established a treaty right “to gather” anything and everything physically capable of being gathered. The issues were much narrower and the ruling was much narrower.

Ibid. at para. 20

⁶¹ On the governments power to regulate treaty rights see paras., 24-28. It held that: the “government’s power to regulate the treaty right is repeatedly affirmed”; “the government’s general regulatory power is clearly affirmed”. It also observed that treaty rights were “limited by the rights of others”, and therefore “the government must ultimately be able to determine and direct the way in which rights interact”.

⁶² Ibid. at para. 36.

⁶³ Ibid. at para. 41.

preservation of relationship to land, despite suggestions to the contrary found in some of the written terms of these treaties. Parliament or the courts have yet to accept this interpretation of peace and friendship treaties. The lack of consensus between Aboriginal peoples and Canada on this point makes peace fragile and friendship somewhat elusive.

ii) **Numbered Treaties**

Many of the same challenges that are apparent in the interpretation of peace and friendship treaties also manifest themselves in the construction of the more recent post-confederation numbered treaties. Number treaties were signed between 1871 and 1921, and geographically cover most of northern and western Ontario, the three prairie provinces and the newly re-aligned North-West Territories.⁶⁴ There are substantial questions about the effect and meaning of these treaties. While the courts frequently characterize these treaties as “sacred”,⁶⁵ it is also increasingly becoming clear that these “solemn promises” can be modified, infringed or extinguished by the Crown as long as they can justify this course of action.⁶⁶ Why the Crown should have plenary power in treaty matters when they did not acquire or reserve it to themselves in the negotiated oral agreements is not clear. Thus, while the recognition of the sacred nature of these agreements facilitates Aboriginal choice, their subjugation to wider Canadian legislative objectives simultaneously narrows the bounds within which this choice can be exercised. The circumscription of treaty rights in this manner makes it difficult for Aboriginal peoples to pursue objectives that may differ from Canada’s. For example, according to current

⁶⁴ Negotiations for certain of these treaties are partially recorded in Alexander Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories including the Negotiations on which they were Based* (Saskatoon: Fifth House, 1991).

⁶⁵ *R. v. Badger*, (1996) 133 D.L.R. (4th) 324 (S.C.C.).

⁶⁶ *Ibid.*; *R. v. Cote* (1996) 138 D.L.R. (4th) 185 (S.C.C.).

treaty law, it will be very hard to choose to exercise an Aboriginal right to hunt, if this exercise is found to be “visibly incompatible” with an non-Aboriginal right to take up the land for settlement purposes.⁶⁷ Similarly, under certain treaties it will be extremely difficult to choose to use the land for Aboriginal spiritual purposes, if the Crown occupies the land in a manner “incompatible with the exercise of [Aboriginal religious] activities.”⁶⁸

There are many examples of treaty interpretation that contemplate creeping pan-Canadian rights at the expense of diminishing Aboriginal control. The Supreme Court in *R. v. Horseman* expressed the Crown’s supposed “pre-eminent” position in this way when speaking of the federal government’s modification or merger of treaty 8 under the Natural Resources Transfer Agreement of 1930: “the power of the federal government to unilaterally make such a modification is unquestioned...”.⁶⁹ Why the federal government should have this power when it was not contemplated or agreed to by the parties is unclear; the simple Court cites earlier unreflective case law and does not indicate where this power came from.⁷⁰

Similarly, creeping pan-Canadianism at the expense of Aboriginal choice is also evident in *R. v. Badger*.⁷¹ In this case the Supreme Court found that land “required or taken up” for settlement, mining, lumbering, trading and other purposes would not be available for Indians “earning a livelihood” in the same manner in which they had before the treaty existed.⁷² The Court found this reduction of Aboriginal choice was acceptable even though there was a “promise that this livelihood would not be affected was repeated

⁶⁷ Ibid.

⁶⁸ *Sioui*, supra, note 28.

⁶⁹ *R. v. Horseman*, [1990] 3 C.N.L.R. 95 at 105.

⁷⁰ See Justice Wilson’s dissent in *Horseman*, Ibid. that raises this issue.

⁷¹ *Badger*, supra, note 65.

to all bands who signed the treaty”.⁷³ Aboriginal choice is diminished by this interpretation because visible non-Aboriginal development is sufficient to defeat the treaty right. There seems to be no brake on development that would adequately protect areas of land for Aboriginal peoples to pursue their traditional livelihood. Yet the shrinking land base available to Aboriginal people under the notion of “visible incompatible use” seems to be nowhere contemplated in the treaty.⁷⁴ In fact, in *Badger* the Court observed that when negotiating Treaty Eight neither the Crown nor Aboriginal peoples ever envisioned that Aboriginal choice would become as bounded as it is today.⁷⁵ Given the absence of agreement on the largely unforeseen effects of subsequent settler development on treaty lands, it is not clear why treaties should be construed in a way that decreases Aboriginal rights for the benefit of the Crown.

These issues raise important questions about the scope of both the peace and friendship and numbered treaties, and the adequacy of law to determine the answer to these questions. If, as the Royal Commission wrote: “it is doubtful in many cases that the First Nations participating in the numbered treaties knew that the written texts they signed

⁷² *Ibid.* at 97.

⁷³ *Ibid.*

⁷⁴ In fact, in one notable case concerning treaty 11, *Paulette v. Register of Titles (No.2)*, the Court held that

it was almost unbelievable that the Government party could have ever returned from their efforts [to sign a treaty] with any impression but that they had given an assurance in perpetuity to the Indians in their territories that their traditional use of land was not affected. (1973) 42 D.L.R. (3d) 8 (N.W.T.S.C.); rev'd on other grounds 63 D.L.R. (3d) 1 (N.W.T.C.A.); aff'd on other grounds 72 D.L.R. (3d) 161 (S.C.C.).⁷⁴ A close examination of many of the numbered treaties raises these same doubts; see Treaty 7 Elders and Tribal Council et. al., “Aboriginal and Government Objectives in the Treaty Era” in *The True Spirit and Intent of Treaty 7* (Montreal: McGill-Queen’s Press, 1996), especially at 210-212; Rene Fumoleau, *As Long as this Land Shall Last: A History of Treaty 8 and 11* (Toronto: McClelland and Stewart, 1976).

⁷⁵ The Court wrote in this regard:

Since the Treaty No. 8 lands were not well suited to agriculture, the government expected little settlement in the area... . No doubt the Indians believed that most of Treaty No. 8 land would remain unoccupied and so would be available to them for hunting, fishing and trapping.

differed from the oral agreements they concluded”,⁷⁶ it should be asked why Aboriginal peoples and not the Crown are watching their land use options narrowed in such circumstances. On the whole, the court’s liberal interpretative principles do not seem to be up to the task of addressing this larger issue.⁷⁷ The courts are institutionally limited to issuing opinions on a case-by-case basis that usually can not comment on the larger treaty context.

If the courts do not effectively comprehend and organizationally implement treaties one wonders whether they are the most appropriate body to entrust with this task. There is much dissatisfaction concerning treaties on all sides. What is needed, as the Royal Commission suggested, is a two pronged approach to place the resolution of treaty disputes in a broader policy and institutional context. First, the terms of the treaties must be capable of being revisited to implement, revise, enter, and renew these agreements.⁷⁸ Second, institutions need to be created which take the burden of treaty matters out of the courts and into a more responsive, broad and flexible framework.⁷⁹ These recommendations from the Royal Commission on Aboriginal Peoples and the state of their fulfillment will now be addressed.

Badger, supra, note 65 at 97 and 99.

⁷⁶ *Report of the Royal Commission on Aboriginal Peoples, Vol. 1 Looking Forward, Looking Back* (Ottawa: Supply and Services, 1996) at 173. See also the comments of Justice Morrow, in *Paulette v. Registrar of Titles (No. 2)*, (1973) 42 D.L.R. 8 (N.W.T.S.C.); rev’d on other grounds 63 D.L.R. (3d) 1 (N.W.T.C.A.); aff’d on other grounds 72 D.L.R. (3d) 161 (S.C.C.), where he wrote “it is almost unbelievable that the Government party could have ever returned from their efforts with any impression but that they had given an assurance in perpetuity to the Indians in their territories that their traditional use of land was not affected”.

⁷⁷ In fact, in this century following the numbered treaties there was a select number of “modern” treaties signed between Aboriginal peoples and the Crown. The Williams Treaty of 1923 in Ontario and the 1975 James Bay and Northern Quebec Agreement in Quebec. These courts have found that these treaties should not benefited from the large, liberal and generous interpretive principles of earlier agreements, see *R. v. Howard* [1994] 2 S.C.R. 299 at 306 and *Eastmain Band v. Canada* [1993] 1 F.C. 501 at 518 (F.C.A), leave to appeal to S.C.C. denied [1993] 3 S.C.R. vi.

⁷⁸ *Royal Commission, Vol. 2*, supra, note 7 at 49-87, recommendations 2.2.2 to 2.2.14.

iii) Treaty Initiatives

a) Entering, Implementing and Renewing Treaties

The Royal Commission made numerous recommendations for the Crown and Aboriginal peoples to enter, implement and renew treaties.⁸⁰ While there has been some noteworthy and high-profile initiatives in this regard, surprisingly, the parties' approach to treaty making has largely fallen short of the proposals put forward by the Commission. The Commission recommended that the treaty process proceed through a coordinated legislative effort by enacting a new Royal Proclamation and creating a detailed legislative scheme to administer the treaty process. This has not occurred, and the provincial, federal and First Nations governments have, for the most part, elected to proceed with treaty efforts under province-wide or regional policy initiatives. While this approach may allow for a greater responsiveness to local conditions, a policy approach does not impose the same discipline and accountability on the actors as would be found in a legislatively mandated initiative. This policy paradigm also suggests that Aboriginal peoples are being mostly being "managed" by governments as an internal municipal concern, instead of being treated as peoples with distinct and separate rights and responsibilities. Some may describe this process as the domestication of colonialism, when Aboriginal peoples are treated as entities that ultimately must be bounded by the Canadian state.⁸¹

Even more problematic, however, than the failure to create an executive and legislative framework for treaty-making, is that in many instances the contemporary treaty process is reducing rather than enhancing Aboriginal difference. The Royal Commission

⁷⁹ Ibid. at 87-94, recommendations 2.2.15-2.2.17.

⁸⁰ *Royal Commission*, supra, note 7.

did not see the purpose of treaties in this way and noted “treaty making does not require the parties to surrender their deepest beliefs and rights as a precondition for practical arrangements for co-existence”.⁸² Treaty making should be a means of bringing about justice and reconciliation,⁸³ to recognize and affirm the unique relationships that Aboriginal peoples have with their lands and the newcomers.⁸⁴ Treaties, therefore, should not require the modification of either society in order to “fit” within the framework of the other, where this would substantially damage the fabric or values of their respective communities. However, this view of the treaty relationship does not seem to be being adequately fulfilled. In fact, in many cases it seems as if the contemporary treaty relationship is pressing Aboriginal conformity to Canadian practices, customs, laws and traditions.

For example, while there are many positive developments in the pursuit of treaty relationships (found in examples such as the Yukon and Nunavut Land Claims Agreements, the Nisga’a and Sechelt treaties, the Manitoba Framework Agreement, etc.), in my opinion, these developments may contain as much cause for concern as for celebration. While these agreements certainly increase the options available to Aboriginal people, they simultaneously limit their alternatives to pursue objectives that may differ from Canada’s in very significant ways. Perhaps this circumscription is to be expected in any negotiated process where “give and take” is found on both sides of the table. However, my reading of these agreements leads me to believe that, on balance, Aboriginal

⁸¹ Isabelle Schulte-Tenckhoff “Reassessing the Paradigm of Domestication” (1998) *Review of Constitutional Studies* 239.

⁸² *Royal Commission*, Vol. 2, supra, note 7 at 20.

⁸³ *Ibid.* at 37-38.

peoples are giving up much more in this process than they are gaining. On the other hand, Canada seems to be giving up much less in regard to the structure of their governmental structure and system of land holding. The notion of reconciliation, which underlies and justifies treaties in the Royal Commission's view, is more concerned with reconciling Aboriginal peoples to Canada, than it is with reconciling Canada to the existence of different social, cultural and political Indigenous entities within the state. For the most part, therefore, treaties are requiring Aboriginal peoples to conform to Canadian values and law, and not enjoining Canada to simultaneously conform to Aboriginal ideologies and law. The imbalance that is being replicated in contemporary treaty relationships does not bode well for the survival of Aboriginal social and political regimes that differ from those found in the rest of Canada. An example may be helpful to illustrate this point.

The Nisga'a Final Agreement is an attempt by the governments of Canada, British Columbia and the Nisga'a Tribal Council to produce a "just and equitable settlement" that "will result in reconciliation and establish a new relationship among them".⁸⁵ The good faith and efforts of so many Nisga'a and Canadian citizens to arrive at the Final Agreement is worthy of the highest honour and praise. The Agreement is an ambitious one, providing for collective Nisga'a ownership of approximately 2,000 square kilometres of land in the Nass Valley watershed in north-western British Columbia. The proposed treaty covers such diverse issues as: land titles, minerals, water, forests, fisheries, wildlife, governance, the administration of justice, fiscal relations (including taxation), cultural property, and dispute resolution. Many of these provisions provide significant benefits for Nisga'a

⁸⁴ See The Royal Commission on Aboriginal Peoples, *Treaty Making in the Spirit of Co-existence: An Alternative to Extinguishment* (Ottawa: Supply and Services, 1995).

⁸⁵ *Nisga'a Final Agreement*, initialed August 4, 1998 at 1.

people which are far greater than anything contemplated under the *Indian Act*.⁸⁶ These benefits can not be ignored, particularly when they appear to have the broad support of the people for which they were negotiated. However, an appropriate question to ask is whether escaping the *Indian Act* is the only relevant standard for judging the agreement. This is a tricky inquiry to pursue, particularly when there numerous criterion against which the agreement could be measured, many of which are of a positive nature. Yet, in keeping with the theme of this paper, it is perhaps relevant to ask whether the Nisga'a Final Agreement should also be judged by the scope it allows to the Nisga'a to pursue a path to development that is different from Canada's own pervasive economic, social and political structures. In my judgement, while there is much that is laudable in the Nisga'a Agreement, there is also much which foreshadows a substantial loss for the Nisga'a in economic, social and political terms.⁸⁷

The potential losses the Nisga'a may encounter in their Agreement are as follows: approximately 1,992 square kilometres of land which the Nisga'a will hold as a fee simple interest in the treaty can be alienated⁸⁸ and thus conceivably be unavailable for Nisga'a use or possession at some time in the future;⁸⁹ if any future Aboriginal rights are found by the courts to exist they will be held by Canada and not the Nisga'a;⁹⁰ the structure of Nisga'a

⁸⁶ Indian Act, R.S.C. 1985 c. I-5.

⁸⁷ For differing opinions on the Nisga'a Agreement see the special issue of (1998/99) 120 *BC Studies* for commentary devoted to the Agreement.

⁸⁸ Nisga'a Final Agreement, Chapter 3, s. 4(a), *supra*, note 85 at 32

⁸⁹ While it may seem unlikely that Nisga'a people will lose access to their land given the government power they will retain over alienated land, its potential future loss to them should not be entirely dismissed. The Alaska Land Claims Settlement provided that Indians lands would be held in fee simple, and while the provisions there were given in a different context, many groups lost their lands; see Thomas Berger, *Village Journey* (Vancouver: Douglas and McIntyre, 1988).

⁹⁰ The Nisga'a have agreed to release any other Aboriginal rights that are not dealt with in the Agreement to Canada:

governance significantly departs from, and in most respects replaces, the traditional House (wilps) system of government;⁹¹ some important Nisga'a law-making authority will be subject to certain provincial and federal laws either through equivalency or paramountcy provisions;⁹² Nisga'a institutions or court decisions will ultimately be subject to the discipline of the British Columbia Supreme Court;⁹³ individual Nisga'a taxation will be collected under general revenues;⁹⁴ disagreements in respect of the disagreement are supervised by non-Nisga'a Canadian courts.⁹⁵ These and other provisions could represent a substantial challenge to Nisga'a attempts to fashion their lives in different economic, social and political terms. Therefore, though the treaty represents some of the highest aspirations of Aboriginal peoples and Canadians in creating a relationship of mutuality and respect, it also contains a number of elements which potentially make Canadian visions of law, politics and development the standard against which Nisga'a life ultimately may be judged.

b) Treaty Institutions: Getting Out of the Courts⁹⁶

In addition to recommending the creation, renewal and implementation of treaties, a second prong of the Royal Commission's approach to treaties involved

If, despite this Agreement and the settlement legislation, the Nisga'a Nation has an Aboriginal right, including Aboriginal title, in Canada, that is different in attributes or geographical extent from, the Nisga'a section 35 rights as set out in this Agreement, the Nisga'a Nation releases that Aboriginal right to Canada...

Supra, note 85, General Provisions s. 26 at 21.

⁹¹ Many of the responsibilities of wilps will be effectively replaced by the Nisga'a Lisims Governments and Nisga'a Village Governments. While this is not expressly in the agreement a review of the powers of these governments makes this evident, see Ibid., Chapter 11, Nisga'a Government, ss. 2 - 8 at 159-160.

⁹² See the Final Agreement, Ibid., at pages 25 (incidental impact provisions), 66-68 (forestry equivalency provisions), 159 (federal/provincial "paramountcy in environmental protection),

⁹³ See the Final Agreement, Ibid., at pages 162-163 (judicial review of administrative decisions by Nisga'a Institutions), 193 (appeal from Nisga'a court to the B.C.S.C.)

⁹⁴ See the Final Agreement, Ibid., at page 217.

⁹⁵ See the Final Agreement, Ibid., at page 239.

recommendations that institutions be created to remove treaty disputes from the courts and place them in a more responsive, broad and flexible framework. In particular the Commission suggested that both Treaty Commissions, and an independent Lands and Treaty Tribunal be created.⁹⁷ The Commission's objective for each institution was to produce an administrative structure and environment that would "promote and permit treaty processes to proceed".⁹⁸ Treaty Commissions were to be established by Canada or relevant provinces as permanent, neutral and independent bodies that would "facilitate and oversee negotiations in the treaty process"⁹⁹. They would accomplish this goal by fact finding, monitoring and setting standards for negotiation, conducting research, supervising cost sharing, mediating disputes, providing remedies, and engaging in binding or non-binding arbitration to resolve certain disputes. They would be hands-on organizations that ensured the day to day integrity of negotiations was maintained.

A Lands and Treaty Tribunal, on the other hand, would be more modest in its operation and deal with the resolution of specific claims (outstanding treaty implementation issues) and more strictly procedural matters relative to treaty creation and renewal.¹⁰⁰ In specific claims the Tribunal would review federal funding, monitor the good

⁹⁶ *Royal Commission on Aboriginal Peoples, Vol. 2*, supra, note 7 at 87-94, recommendations 2.2.15-2.2.17.

⁹⁷ The Royal Commission was not the first body to recommend the creation of an Indian Claims Commission, though the institutions proposed by the Commission contemplate broader authority than previously recommended Treaty Tribunals and Commissions. An Indian Claims Commission was proposed by the Trudeau government in the White Paper of 1969 when they intended on ending most Indian rights, and an Indian Claims Commission was created in the United States in 1946, see Ken Lysyk, "The United States Indian Claims Commission" in Peter Cumming and Neil Mickenberg, *Native Rights in Canada* (Toronto: Indian-Eskimo Association, 1972) at 243-264.

⁹⁸ *Royal Commission on Aboriginal Peoples, Vol. 2*, supra, note 7 at 90-91.

⁹⁹ *Ibid.* at 92.

¹⁰⁰ *Ibid.*, Recommendation 2.4.32, at 602:

The tribunal be established by federal statute operative in two areas:

- a) settlement of specific claims, including those removed by the Aboriginal party from the broader treaty-making, implementation and renewal process, and

faith of the bargaining process, and adjudicate claims and provide remedies to Aboriginal claimants where such action would be appropriate.¹⁰¹ They could, inter alia, review the adequacy of funding, supervise the negotiation of interim relief agreements, and on a consensual basis arbitrate disputes referred to it.¹⁰² Both of these institutions (Commissions and the Tribunal) are absolutely necessary for Aboriginal peoples to gain greater control of their lands and resources, and the Royal Commission on Aboriginal Peoples strongly recommended their use. The expertise, neutrality and independence of these Commissions and Tribunal would assist in widening the scope of the treaty relationship in this way.

These institutions were suggested to overcome the problems surrounding the application of interpretive principles, the assumptions underlying the rising crescendo of Crown land use, and the presumptions about the diminishing nature of Aboriginal land use. In fact, it is likely that the courts, Crown, and federal and provincial legislatures will continue to subjugate Aboriginal peoples within their structures, leaving little room for Aboriginal innovation and difference, without these more or less neutral and independent institutions to supervise treaties.

In keeping with the importance of treaty institutions, First Nations and Canadian governments have recently made some progress in inaugurating them. For example, there have been detailed discussions and negotiations between the federal government and Aboriginal groups to replace the Indian Claims Commission with an independent claims

b) treaty-making, implementation and renewal processes.

¹⁰¹ Ibid. at 602.

¹⁰² Ibid.

body to improve the effectiveness of the specific claims process.¹⁰³ While sadly the implementation of this body has reportedly been stalled over a disagreement about the size of the fiscal envelope for the new tribunal, the fact that discussions have occurred indicates that there is some recognition of the desirability of an independent institution to deal with land claims. Until an independent Lands and Treaty Tribunal is established there is very little hope that Aboriginal peoples will overcome the colonial nature of the management of their lands and resources.

There has been a little more success in introducing Treaty Commissions to explore issues relative to historic treaties, or oversee negotiations in modern agreements. Two significant examples representing different models of how Commissions may function are apparent in Saskatchewan and British Columbia. While both were introduced prior to the Royal Commission's final report, the Commission cited them each as examples of what could be accomplished if the parties worked together.¹⁰⁴ While the British Columbia Treaty Commission has recently had success in overseeing the successful negotiation of its first Agreement in Principle with the Sechelt Nation of the sunshine coast,¹⁰⁵ it has had some difficulties in persuading the parties to the process to follow some of its recommendations.¹⁰⁶ The Saskatchewan Treaty Commission, on the other hand, is an excellent example how institutions can work to bridge the historic and future treaty relationship of the parties.

¹⁰³ Department of Indian and Northern Affairs, Press Release, "Gathering Strength Anniversary Marks Progress", January 7, 1999.

¹⁰⁴ *Royal Commission on Aboriginal Peoples*, Vol. 2, supra, note 7 at 90.

¹⁰⁵ Department of Indian and Northern Affairs, Press Release, "Progress Continues as Canada, British Columbia and Sechelt Release Consultation Draft Agreement in Principle" (January 26, 1999).

¹⁰⁶ In 1997-1998 there was a period of turmoil within the British Columbia Treaty Commission as the Chief Commission, Alex Robertson, left the commission because of failures of government parties to respond to recommendations concerning interim measures and aboriginal title.

The Office of the Treaty Commissioner in Saskatchewan was established in 1989 to review issues surrounding treaty land entitlement and education in that province. With some success in its initial efforts the Office was reconstituted in 1997 and the parties established guiding principles¹⁰⁷ and a work plan¹⁰⁸ to discuss issues of mutual interest. This has led to some impressive results, including the collection of Saskatchewan treaty elders' understandings of the relationship, and the establishment of an Exploratory Treaty Table to explore issues such as child welfare, education, shelter, health, justice, treaty annuities and hunting, fishing, trapping and gathering. Following an extensive review of these issues the Office of the Saskatchewan Treaty Commissioner made some sound recommendations to the parties to further build upon their relationship.¹⁰⁹ A central suggestion was that a new paradigm be created based on the treaty partnerships rather

¹⁰⁷ Guiding principles included statements that:

- The treaties are a fundamental part of the relationship between Treaty First Nations in Saskatchewan and the Crown
- It is desirable to arrive at a common understanding of Treaties 4, 5, 6, 8, and 10 as they apply in Saskatchewan
- There are differences in views over the content and meaning of the treaties, which the parties are committed to exploring. The Treaty First Nations believe that the treaties have not been implemented according to their spirit and intent, including oral promises, while the Government of Canada relies primarily on the written texts of the treaties as the embodiment of the Crown's obligations.
- Respect...
- A renewed Office of the Treaty Commissioner will be an effective intergovernmental mechanism to assist both parties in the bilateral process, and in the identification and discussion of treaty and jurisdictional issues.

Office of the Saskatchewan Treaty Commissioner, *Statement of Treaty Issues: Treaties as a Bridge to the Future* (October, 1998) at 4.

¹⁰⁸ The Work Plan included three objectives:

- to build on a forward-looking relationship that began with the signing of the treaties in Saskatchewan
- to reach a better understanding of each other's views of the treaties and of the results expected from the exploratory treaty discussions; and
- to explore the requirements and implications of treaty implementation based on the views of the two parties.

Ibid.

¹⁰⁹ Ibid. at 71 - 82.

than on the outmoded and troublesome *Indian Act*.¹¹⁰ Building on recommendations found in the Royal Commission of Aboriginal Peoples, the Treaty Commission stated that a new paradigm in Saskatchewan could only be initiated as the general public became more aware of the context of the treaty relationship and the benefits *they* receive as a result of these historic agreements. The Treaty Commission hopes that the further identification and resolution of issues of mutual concern will proceed, such as the continuance of Common, Exploratory, Fiscal and Governance Treaty Tables, as a greater appreciation for the treaty relationship develops through public acts of renewal,¹¹¹ and general public education. The actions of the Office of the Saskatchewan Treaty Table appear to be among the most encouraging initiatives within Canada to strengthen and renew the treaty relationship. Unlike the courts, where little can be done in a holistic way to address the variety of issues that need attention, Treaty Commissions can provide the mechanisms for people to create and rebuild a common stock of positive experiences through official and unofficial interactions. Such actions are critically important for Aboriginal peoples in gaining and maintaining a measure of control over the affairs of their governance and economic development.

iv) Treaties: Summary

¹¹⁰ This paradigm shift was suggested not only for the Crown, but for First Nations who “may wish to reconsider how they are organized politically”. In so noting the Treaty Commission picked up on the Royal Commission’s recommendation that Aboriginal peoples reconstitute themselves as Nations, *Report of the Royal Commission on Aboriginal Peoples, Vol. 2*, supra, note 7 at 234 - 236, Recommendation 2.3.7. The Treaty Commission noted in support of its position: “Indian Act Bands, created by the federal government during an earlier era, may not be appropriate building blocks for First Nations in a treaty partnership” Office of the Saskatchewan Treaty Commissioner, *Statement of Treaty Issues*, supra, note 107 at 73.

¹¹¹ The Office of the Saskatchewan Treaty Commissioner suggested such acts as: placing monuments at treaty-making sites, holding annual treaty gatherings, delivering programs on treaties in the schools, exploring the reissuance treaty suits, medals and flags, initiating essays and scholarships on treaties, proclaiming a treaty awareness day. *Ibid.* at 75.

As this paper has shown, the treaty relationship between Aboriginal peoples and the Crown is being simultaneously diminished and strengthened. The courts are interpreting historic treaties in a manner that will, over time, significantly erode the land base on which Aboriginal peoples depend for their livelihood. Furthermore, the parties are negotiating new treaties in which Aboriginal peoples largely conform to non-Aboriginal structures, values and processes. Finally, other treaty initiatives are being managed through policy forms without the benefit of the discipline and accountability that legislative enactment can provide. At the same time however, there are numerous other activities currently underway which positively attempt to renew, strengthen, implement or create treaty relationships. In this respect the suggestions of the Court in *Delgamuukw* and the recommendations of the Royal Commission are being adhered to in their broadest detail, as the Supreme Court of Canada Commission placed negotiation in a central position for building the relationship between Aboriginal peoples and the Crown. In fact, the initiatives in this regard are so numerous that time and space does not allow an examination of many more of the extremely significant actions taking place. Significant by their absence in this brief overview is a discussion of other recent developments. Many important steps have been taken in the Yukon Land Claims and Final Agreement,¹¹² the Nunavut Agreement,¹¹³ treaty land entitlement agreements in Manitoba,¹¹⁴ the Labrador

¹¹² This Umbrella Agreement between the Council for the Yukon Indians, the Government of Canada and the Government of the Yukon sets out substantive benefits and a process that will guide individual Yukon First Nations in individually negotiated agreements.

¹¹³ Nunavut became a public government on April 1, 1999, and is a significant exercise of public government by the Inuit of the Eastern Arctic.

¹¹⁴ The *Manitoba Treaty Land Entitlement Framework Agreement* will transfer 445,452 hectares of land to 19 First Nations to make up for a shortfall in allocation at the time the reserve's were created, under treaties 1, 2, 3, 4, 5, 6, and 10.

Inuit land claim and Agreement in Principle,¹¹⁵ the initiation of treaty processes in the Treaty 8 area,¹¹⁶ and the Treaty Commemoration Statement signed by the Nova Scotia Mi'kmaq, Canada and Nova Scotia to acknowledge their long-standing treaty relationship.¹¹⁷ These actions are both significant and substantial, and illustrate the parties' commitment to treaties as an instrument for building their relationship. However, despite these gains and the others reviewed in this paper, the concurrent concerns that work to constrict this relationship reveal that much more needs to be done before Aboriginal peoples can confidently follow *Delgamuukw*'s advice, and negotiate a treaty relationship they can live with .

¹¹⁵ This claim by the Labrador Inuit was submitted in 1977 and an Agreement in Principle was announced on December 18, 1998.

¹¹⁶ A Declaration of Intent was reached with Treaty 8 Nations to begin a treaty and self-government process.

¹¹⁷ The Mi'kmaq of Nova Scotia have also entered into an innovative legislative arrangement to transfer administration jurisdiction over education in a document called the *Mi'kmaq Education Act*.