The Spirit and Intent of Treaty Eight: A Sagaw Eeniw Perspective

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Chapter One: Introduction

My name is Sheldon Cardinal[1] and I am from the Sucker Creek Cree Nation which is in Treaty Eight, Alberta. I have decided to examine the spirit and intent of Treaty Eight. It has been my experience that most of the non-Native society does not understand the complexity of our sacred Treaty relationship with the Federal Crown. I have heard many uninformed comments with respect to the Treaties. I have heard people ask "Why do First Nations[2] get everything for free?" or "Why do First Nations not pay taxes?" It is with these uninformed attitudes in mind that I have decided to analyze the spirit and intent of Treaty Eight from my perspective as a Cree (*Sagaw eeniw*) individual.

Over the past century, the courts have generally not recognized the spirit and intent of the Treaties[3]. However, on September 17, 1999, the Supreme Court of Canada made a very important ruling with respect to the spirit and intent of the Treaties. In the case of *Marshall* v. *The Queen*, the court found:

> Firstly, even in a modern commercial context, extrinsic evidence is available to show that a written document does not include all of the terms of an agreement.
>
> Secondly, even in the context of a treaty document that purports to contain all of the terms, this Court has made it clear in recent cases that all extrinsic evidence of the historical and cultural context of a treaty may be received

> even absent any ambiguity on the face of the treaty.
>
> Thirdly, where a treaty was concluded verbally and afterwards written up by representatives of the Crown, it would be unconscionable for the Crown to ignore the oral terms, while relying on the written terms.[4]

Even though the Marshall decision dealt with the Treaty[5] of 1760-61, the decision has profound implications for all Treaty First Nations. It is continuing the process started in *Simon*[6], and *Van der Peet*[7] and elaborated in *Delgamuukw*[8], where the court recognized that the oral tradition is the equivalent of the written word. Consequently, these decisions allow First Nations to achieve a contemporary understanding of their sacred Treaties either through the courts or negotiations with the Federal Crown.

In 1899, Treaty Eight was signed between the Cree, Saulteaux, and Dene Nations and the Treaty Commissioners representing the Federal Crown. Unfortunately, since Treaty Eight was signed, there has been major problems with understanding the true meaning of the Treaty. The Federal Government believes that the only Treaty rights, that First Nations enjoy, come from the written text of the Treaty[9]. From a First Nations' point of view, we believe that the Treaty Commissioners made many verbal promises to our ancestors during the Treaty negotiations. These promises did not make it into the written text[10] of the Treaties. Through various government policies and inaction, the Federal Government has breached our Treaty rights on many occasions in the past century.

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The recent Royal Commission on Aboriginal Peoples recognized that there was a problem with understanding the true nature of the Treaties. As such, it made the following recommendations:

> To bring about the fulfillment and renewal of the historical treaties, we recommend that Canadian governments:
>
> *honour the provisions of the existing treaties as recorded in the treaty text and supplemented by oral evidence
> *interpret the terms of each treaty in a broad and liberal way, in keeping with the spirit and intent of the agreements reached
> *act as protectors of Aboriginal interests, not adversaries, and reconcile the interests of society as a whole with the terms of the treaties
> *recognize that First Nations did not consent to loss of title to their lands or to extinguish all rights when they signed treaties - a more reasonable interpretation is that they consented to share and co-manage lands and resources
> *recognize by entering into treaties with Aboriginal peoples, the Crown of Canada acknowledged their inherent right of self-government, their right to control their own affairs, and their right to enter into intergovernmental arrangements with other nations
> *establish a process for fulfilling and renewing existing treaties, on the basis of these principles[11]

There was a fundamental disagreement between the First Nations and the Federal Crown on the purpose of the Treaty. Both parties have different understandings as to the true meaning of the Treaties. This disagreement forms the basis for the Treaty First Nations' reliance on the spirit and intent of the Treaties.

This thesis will focus on the spirit and intent of Treaty Eight. In chapter two, it will look at traditional Treaty making principles from a First Nations and Canadian perspective. Second, it will examine some of the history leading up to the signing of

Treaty Eight. Third, it will analyze the spirit and intent of Treaty Eight. Some of the areas to be addressed are: land surrender and peace and friendship; reserves; education; and the Treaty right to hunt, fish, and trap.

In chapter three, the focus will be on whether the Supreme Court of Canada has properly interpreted the spirit and intent of the Treaties. Specifically, I will examine how the courts have addressed the Treaty right to hunt. First, this chapter will examine the various Treaty interpretation principles as enunciated in the case of *R.* v. *Badger*[12]. Second, I will examine how the courts have interpreted the meaning of the Treaties. Third, I will analyze the effects of Section 12 of the *1930 Natural Resource Transfer Agreement* [hereinafter the 1930 NRTA] on the Treaty right to hunt, fish, and trap. Specifically, I will consider the honour of the Crown and the duty created by Section of the 1930 NRTA for Alberta, Saskatchewan, and Manitoba. Fourth, I will examine the case of *R.* v. *Horseman*[13]. Fifth, I will address the ludicrous decision by Cory J. in this case. Finally, I will examine the Treaty right of commercial hunting and whether it should be protected by Section 88 of the *Indian Act.*

In chapter four, the emphasis will be on possible solutions to the problems faced by First Nations. From chapter three, it will be evident that the Supreme Court of Canada has, on certain occasions,

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wrongly interpreted the spirit and intent of the Treaties. Therefore, this chapter will examine possible changes to the Supreme Court of Canada. First, the Federal Government could appoint First Nations' judges to the Supreme Court of Canada. It would be based on the principle that the membership of the Supreme Court of Canada is reflective of the two founding Nations, the French and English, and First Nations are absent. Therefore, First Nations should also be guaranteed representation. Second, the recommendation of the Royal Commission on Aboriginal Peoples of a Treaty Tribunal to consider Treaty grievances will be considered. The tribunal would include members of Treaty First Nations and representatives of the Federal Government to discuss the various Treaty concerns. Finally, I will examine the role of the Office of the Treaty Commissioner in dealing with the Treaty disputes between the Federation of Saskatchewan Indian Nations and the Federal Government. It is my belief that the work currently being done by the Treaty Commissioner, Judge David Arnot is invaluable and will eventually lead to the implementation of the true spirit and original intent of the numbered Treaties.

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1.I am honoured to be writing on the spirit and intent of Treaty Eight. I am from the Sucker Creek Cree Nation of Treaty Eight. It was twelve miles from the present location of my reserve where Treaty Eight was signed on June 21, 1899.

I am a direct descendant of the original signatories of Treaty Eight. My late grandfather, Frank Cardinal was the last hereditary Chief of our community. As a leader, he spent a lot of time away from our community fighting to protect our sacred Treaties. My grandfather was one of the founders of the Indian Association of Alberta.

My father, Harold Cardinal is a former Chief of our reserve. He is remembered more for his tireless work in the 1960's and 1970's, when as President of the Indian Association of Alberta, he fought with Prime Minister Pierre Trudeau and the then Minister of Indian Affairs, Jean Chretien to preserve our rights. My father wrote a book called the Unjust Society which was his response to the infamous 1969 White Paper.

My great grandfather was known as Francois. His father was Osichachees. Osichachees was part of Kinosayo's Band. Osichachees' brothers were Kinosayo, Moostos, Okeymaw, Whitgo, and Nesochesis. It was these brothers who each selected family reserves at Sucker Creek, Driftpile, Swan River, and Sawridge surrounding Lesser Slave Lake.

2.With respect to terminology, I will be using three main terms: Indians, Aboriginal, and First Nations. First, Indians is a term first coined by Columbus when he got lost and "discovered" North America. Unfortunately, this term became widely used and is still referred to in the Federal Government's legislation. I will only be using this term in reference to the *Indian Act*, and usage by the Supreme Court of Canada, and the Royal Commission on Aboriginal Peoples.

Second, the term Aboriginal Peoples has gained acceptance because of its inclusion in Section 35 of the *Constitution Act, 1982* which defines Aboriginal Peoples as including the Indians, Inuit, and the Métis. For the most part, I am not going to be using this term because of my preference and the significance of the term, First Nations. However, Aboriginal Peoples is used quite extensively by the Royal Commission on Aboriginal Peoples. As a result, in the quotes taken from the Royal Commission on Aboriginal Peoples, the predominant term is Aboriginal Peoples.

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Third, throughout most of this thesis, I will use the term First Nations. The reason for this choice is simple. First Nations were the first peoples on this land. We have been living on Turtle Island since time immemorial. In addition, this term has gained wide spread acceptance by First Nations in Canada. Most Bands have altered their names to signify this acceptance. For example, my band has changed its name to the Sucker Creek Cree Nation.

3.For a long time, Treaty First Nations have been struggling to have their oral tradition recognized as being equivalent of the written word. We have had to deal with the Courts saying that our oral tradition was hearsay. (See *Apsassin et al* v. *The Queen In Right Of Canada*, [1987] 4 C.N.L.R. 14 at 16). To get around the hearsay rule, First Nations had to get expert witnesses to corroborate our Elders' testimonies. We have also had to deal with questioning the validity of our oral tradition. Some people believe that our Elders will modify the oral tradition to benefit Treaty First Nations. (For more information on this subject see "Understanding Treaty 6: An Indigenous Perspective" by Sharon Venne in Aboriginal and Treaty Rights in Canada, edited by Michael Asch). However, our Elders made the following points, to the Honourable Judge David Arnot, Treaty Commissioner for Saskatchewan, which refutes that argument:

> "Elders informed the Exploratory Treaty Table that contained within the First Nations' oral history are the laws given by the Creator. A fundamental law that respects the sacredness of these Creator-made laws is the requirement that one cannot embellish, add to, or change these laws. The Elders who informed the Exploratory Treaty Table qualified their statements in two ways. Firstly, they identified the source of their knowledge and secondly, they repeated only that which they heard, no more and no less. ...
>
> Oral history preserves traditions, transfers knowledge, and records events. The Elders describe the process as very rigorous and disciplined and as one which emphasizes the requirement for preserving accuracy, precision and procedural protocols. This procedural and substantive knowledge is passed from one generation to the next. The process of preserving and transferring traditional laws and procedures is a solemn obligation and serious commitment....
>
> The First Nations' perspective about the treaties and the treaty relationship begins with the fundamental relationship

> between the Creator and the First Peoples. Elders informed the Exploratory Treaty Table that to understand the treaties and the treaty relationship one must have some understanding of the First Nations' spiritual traditions. This is because the spiritual traditions contain the First Nations' world-views, customs, and laws that are reflected in and are a fundamental component of the treaties and the treaty relationship."

The Honourable Judge David M. Arnot, Treaty Commissioner for Saskatchewan, Statement of Treaty Issues: Treaties as a Bridge to the Future, Saskatoon, 1998 at 12.

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

5.In Canada, it has been recognized that there are two different types of Treaties. First, in eastern Canada, there are the Peace Treaties signed between the First Nations and either the British or the French. An example would be the Treaty referred to in the *Marshall* case. It was the Treaty of 1760-61 made between the British and the Mi'kmaq, Maliseet, and Passamaquoddy Nations. It is a peace Treaty and it guarantees the First Nations the Treaty right to hunt and fish for food purposes and commercial purposes.

Second, for the First Nations, in Ontario, Manitoba, Saskatchewan, Alberta, and small parts of British Columbia, and the Northwest Territories, we have also signed Treaties of Peace and Friendship. We also have a number of guaranteed Treaty rights. I will be talking about a number of these rights in the second chapter. For the purpose of this thesis, when making reference to Treaty First Nations, I am referring to First Nations of the numbered Treaties from Western Canada.

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

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

8.*Delgamuukw* v. *British Columbia*, [1998] 1 C.N.L.R. 14.

9.

> "One of the fundamental flaws in the treaty-making process was that only the Crown's version of treaty negotiations and agreements was recorded in the accounts of negotiations and in the written texts. Little or no attention was paid to how First Nations understood the treaties or consideration given to the fact that they might have had a completely different understanding of what had transpired."

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Canada. Report of the Royal Commission on Aboriginal Peoples. Looking Forward, Looking Back, Volume 1, (Ottawa: Minister of Supply and Services Canada, 1996) at 176.

10. I am aware that since the *Marshall* decision, the Federal Government's position is now untenable. However, I feel it is important to discuss the Federal Government's viewpoint to give the reader an idea of the issues Treaty First Nations have had to overcome since their Treaties were signed.

11. Canada. Report of the Royal Commission on Aboriginal Peoples. People to People, Nation to Nation: Highlights From the Report of the Royal Commission on Aboriginal Peoples, (Ottawa: Minister of Supply and Services Canada, 1996) at 50-51.

12.*R.* v. *Badger*, [1996] 2 C.N.L.R. 77.

13.*R.* v. *Horseman*, [1990] 2 C.N.L.R. 95.

Chapter Two: The Spirit and Intent of Treaty Eight

2.1 Introduction

In 1982, Prime Minister Pierre Elliot Trudeau was successful in repatriating the Canadian Constitution. This event signified that Canada had finally become its own country and not just another colony of Great Britain. For Treaty First Nations, repatriation meant that their existing Treaty relationship with the Federal Crown would have clear constitutional protection. Section 35 of the *Constitution Act, 1982* states:

> 35(1) The existing aboriginal[1] and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
> (2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit, and Métis peoples of Canada.
> 3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.
> (4) Notwithstanding any provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.[2]

The entrenching of existing Treaty rights in the Canadian Constitution did not address the interpretative approach that was to be used in the definition and identification of the rights referred to in section 35[3]. The interpretative approach for Aboriginal and Treaty rights was first enunciated in the case of *R.*

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v. *Sparrow*. However, there are questions about the true meaning of the *Treaties. The* Federal Government has maintained that the only Treaty rights that will be recognized are those found in the written text of the Treaties[4]. The Treaty First Nations know that the Treaties are much more than what was written down. Through our oral tradition, we know that there were many promises that did not make it into the written text of the Treaty. This is why the Treaty First Nations focused on the spirit and intent of the Treaties. The reason for the different viewpoints is in part based on cultural differences. Research into Treaty Seven has found:

> Even aside from the possibility that the government deliberately misrepresented its intentions just to get the First Nations to sign, there are many areas where there was room for misunderstanding and miscommunication. Perhaps more importantly, the two sides had different cultural traditions for remembering their history. In the Euro-Canadian cultures, history was written down, whereas in the First Nations cultures, history was transmitted orally in stories passed on by the elders. It was important that these stories be accurate precisely because they were not written down. The First Nations people [were] facing an incoming and soon-to-be-dominant [Euro-Canadian] culture [which] could formally record its own discourse and that viewed the Aboriginal culture as inferior.[5]

To deal with these differences, this chapter will focus on the spirit and intent[6] of the Treaties.

The focus on the spirit and intent will be addressed in three ways. First, I will examine how the Treaties were considered by both First Nations and the British Crown. Second, I will address how Treaty Eight[7] originated. Third, I will consider both the

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written text and the Elders' (oral) understanding of the treaties. Specifically, I want to analyze the issue of land surrender; Peace and Friendship Agreements; reserves; education; and the Treaty right to hunt, fish, and trap. This chapter will demonstrate that there are many differences between the two, often opposing, understandings of the Treaties. In addition, this chapter will show that the Treaties are much more than the written text.

2.2 Understanding the Treaty-Making Process

The treaty making process in Canada has a long history. The First Nations, the British Crown and to a smaller extent, the French[8], have had considerable experience in this area. Originally, Treaties between either the British Crown or French and First Nations were made for peaceful purposes, alliances, or to ensure neutrality. The recent Report of the Royal Commission On Aboriginal Peoples (hereinafter cited as RCAP) stated:

> Treaties between the Aboriginal and European Nations (and later between the Aboriginal nations and Canada) were negotiated and concluded through a Treaty making process that had roots in the traditions of both societies. They were the means by which European nations reached a political accommodation with the Aboriginal nations to live in peaceful co-existence and **to share the land and resources** of what is now Canada. [Emphasis added][9]

Prior to European contact, the First Nations made many Treaties with individual Nations and Confederacies[10]. The Treaties served a number of objectives as RCAP noted:

When the Europeans arrived on the shores of North America they

> were met by Aboriginal nations with well established diplomatic processes - in effect, their own continental treaty order. Nations made treaties with other nations for purposes of trade, peace, neutrality, alliance, the use of territories and resources, and protection.
>
> Since interaction between the nations was conducted orally, and the peoples involved often had different languages and dialects, elaborate systems were adopted to record and maintain these treaties. Oral traditions, ceremonies, protocols, customs and laws were used to enter into and maintain commitments made amongst the various nations.
>
> Aboriginal nations formed alliances that continued into [and throughout] the contact period, with treaties serving to establish and solidify the terms of the relationship. Protocols between nations were maintained conscientiously to ensure that friendly and peaceful relations prevailed.[11]

Clearly, the Treaty First Nations had some idea of what they were getting into when they were negotiating the numbered Treaties. Treaty First Nations had a wealth of prior experience negotiating Treaties and alliances with other First Nations. In addition, they spent a lot of time meeting and visiting[12] with other First Nations. This enabled First Nations to have a good understanding of what the Treaty Commissioners were offering and whether or not they could trust[13] the "Queen's representatives".

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

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

pope. ...

> European jurists began to systemize their understanding of treaty law in the seventeenth century, drawing on Roman legal treatises as well as a growing body of European diplomatic precedents. From Roman law, they adopted the essential principle pacta sunt servanda - treaties shall be honoured in good faith.[14]

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

> While European treaties borrowed the form of business contracts, Aboriginal treaties were modeled on the forms of marriage, adoption, and kinship. They were aimed at creating living relationships, and like a marriage, they required periodic celebration, renewal and reconciliation. Also, like a marriage, they evolved over time; the agreed interpretation of the relationship developed and changed with each renewal and generation of children, as people grew to know each other better, traded, and helped defend each other. This natural historic process did not render old treaties obsolete, since treaties were not a series of specific promises in contracts; rather they were intended to grow and flourish as broad, dynamic relationships, changing and growing with the parties in context of mutual respect and shared responsibility.
>
> Despite these differences, Europeans found no difficulty adapting to Aboriginal protocols in North America. They learned to make condolence before a conference with the Six Nations, to give and receive wampum, to smoke the pipe of peace on the prairies, to speak in terms of 'brothers' (kinship relations), not 'terms and conditions' (contract relations). Whatever may have come later, diplomacy in the first centuries of European contact in North America was conducted largely on a common ground of symbols and ceremony. The treaty parties shared a sense of solemnity and the

intention to fulfill their promises.[15]

It is difficult to comprehend why it has taken so long to have the spirit and intent of the Treaties recognized. It is obvious that if the Treaty Commissioners followed First Nations' traditions when negotiating the Treaties then the interpretation of the Treaty rights should not only follow what is written down. There were two sides to the negotiations and as a result, equal weight should be given to the Treaty First Nations' understanding[16]. The following sections will demonstrate the importance of the spirit and intent of the Treaties.

2.3 Origins of Treaty Eight

An important element in understanding Treaty Eight is the long lapse between the signing of Treaty 7 in 1877 and the signing of the Treaty in 1899. One has to wonder why no other Treaties were signed during this period. Therefore, the history leading up to the signing of Treaty Eight remains significant.

One problem faced by First Nations living north of Treaty Six was their imminent danger of starvation. The time after the transfer of Rupert's Land[17] to Canadian jurisdiction was especially hard on First Nations. These were times of famine and it became apparent that the missionaries and the Hudson's Bay Company did not want to continue "looking after" the Indians. Both groups sent letters to the Federal Government requesting aid. However, the

Government refused to either help the Indians or to sign a Treaty with them as their territory was not needed for settlement purposes.[18]

The flash point leading up to the signing of Treaty Eight was the Klondike Gold Rush. In Madill's research paper on Treaty Eight, he found:

> With the advent of prospectors and settlers to the Lake Athabasca, Great Slave Lake, and parts of the Peace River region during the Klondike gold rush of 1897-98, the federal government prepared to extend the Indian treaty system to the unceded area north of Treaty Six and south of the Great Slave Lake. The negotiations for Treaty Eight were conducted during the summer of 1899 with Cree, Beaver, and Chipewyan bands and subsequent adhesions were signed between 1900 and 1914. It was estimated that Treaty Eight negotiations would encompass 2700 Indians and 1700 mixed bloods or Métis, whose rights also had to be considered. Hence two commissions were established: treaty commission to draft the treaty and secure the adhesion[19] of the various tribes, and a separate half-breed commission to deal with Métis claims concurrently and in close consultation with the treaty commissioner.[20]

Treaty Eight was signed in 1899 between the Cree, Saulteaux, Dene[21], and the Treaty Commissioners representing the Federal Crown. It covers most of Northern Alberta, the Northwestern part of Saskatchewan, Northeastern British Columbia and the Northwest Territories (south of Great Slave Lake). As previously stated, one of the problems that has occurred is the differences in understandings of what Treaty Eight entails. The Federal Government holds that the true meaning of the Treaty is what is written in the text. However, the First Nations have a distinct and far reaching

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understanding of the Treaty. Unfortunately for Treaty First Nations, it is apparent that Treaty Eight was not the only Treaty where the Treaty Commissioners made oral promises that did not make it into the written text of the Treaty.[22]

2.4 Land Surrender And Peace and Friendship

At issue in understanding Treaty Eight is its underlying purpose. Was its central purpose to achieve land surrender or to establish peace and friendship between the signatory nations or create an economic relationship. The Federal Government takes the position that Treaty Eight is a land surrender Treaty. They rely their position on the preambular statement on their written text of the Treaty which states:

> AND WHEREAS, the said Commissioners have proceeded to negotiate a Treaty with the Cree, Beaver, Chipewyan, and other Indians, inhabiting the district hereinafter defined and described, and the same has been agreed upon and concluded by the respective bands at the dates mentioned hereunder, the said Indians **DO HEREBY CEDE, RELEASE, SURRENDER AND YIELD UP** to the Government of the Dominion of Canada, for Her Majesty the Queen and Her successors for ever, all their rights, titles and privileges whatsoever, to the lands included within the following limits, ...(emphasis added)[23]

This is at variance with the First Nations' understanding. The First Nations believe that Treaty Eight is, among other things, a peace and friendship Treaty. It was the Treaty First Nations' belief that they had no right to sell the land. The Creator owns the land and we cannot sell what is not ours.[24] As a result, our forefathers would have only agreed to share the land with

non-Native settlers.

There is increasing doubt as to whether or not the Treaty Commissioners explain the issue of land surrender and extinguishment of Indian title properly and clearly to Treaty First Nations. Judge Morrow in the *Re: Paulette* held that First Nations have an arguable case. Most recently, RCAP agreed with this statement. They found:

> Throughout the negotiation of the numbered treaties the commissioners did not clearly convey to First Nations the implications of the surrender and cession language in treaty documents. The discussion about land proceeded on the assumption, on the First Nations side, that they would retain what they considered to be sufficient land within their respective territories, while allowing the incoming population to share their lands. Many nations believed they were making treaties of peace and friendship, not treaties of land surrender. It is probable that treaty commissioners, in their haste to conclude the treaties, did not explain the concept of land surrender.[25]

I would go one step further than the Royal Commission. The Treaty Commissioners could not have explained to First Nations that by signing the Treaties they were surrendering their land. It was impossible to do so because they did not speak the languages of First Nations nor did they have the services of competent translators who could explain the European notions about ownership of land. Instead, the First Nations believed that they were signing Treaties of peace and friendship[26]. All that was agreed by First Nations was that they would share "six inches of top soil" for **some** of their traditional territories that would be required for

agricultural livelihood for the non-Native settlers. Eva Louise Laboucan (Driftpile First Nation) had this to say about the Treaty:

> They were promised that the land was still theirs. They never surrendered. The Queen asked them if the white people came this way, could they use this land for living. The First Nations told them "just six inches, just the top from the ground, just the ploughing and nothing else.[27]

In support of this notion that the Treaty was of peace and friendship, one only has to refer to the Treaty Commissioner's Report, the written text of the Treaty and the Treaty First Nations' oral understanding.

In the Treaty Commissioner's Report, he stated that the purpose of the negotiations was:

> to obtain the consent thereto of Her Indian subjects inhabiting the said tract, and to make a Treaty, and arrange with them, so that there may be **peace and goodwill** between them and Her Majesty's other subjects...(Emphasis added)[28]

This quotation supports the First Nations' viewpoint all that was discussed was peace and friendship agreements. If you add in the fact that the Federal Crown wanted to negotiate Treaty Eight with the Treaty First Nations in order to avoid violence between First Nations and the non-Native settlers[29], then this issue becomes even clearer. It is clear that the issue of peace[30] was discussed between First Nations and the Treaty Commissioners as evidenced even by the terms of the written text of the Treaty. It states that "they will maintain the peace between each other, and between themselves and other tribes of Indians, and between themselves and others of Her

Majesty's subjects[31]."

In addition, the Peace and Friendship[32] purpose of the Treaty is supported in interviews with Treaty Eight First Nations' Elders. Jean Marie Talley (Assumption First Nation) states:

> Another meeting was held. At this time, the Government representative (the money man) told him "we are not giving you money because we have ulterior motives. We are giving you money to sign a Treaty of Peace." The Treaty was made for as long as the sun will shine, the rivers will flow, and the grass will grow. This will ensure peace among us.[33]

These peace and friendship principles are something that all Treaty First Nations believe in. For example, Elder Adam Delaney from Treaty 7 stated:

> The world is round and each society has been given the right to exist in this world within its territory, This is how the Creator arranged it. Therefore, the traditional territory of the Blackfoot Nation was given to our people by our Creator. We respected and protected this traditional territory with our minds and our hearts and we depended on it for what it encompasses for our survival. Everything that we needed for our way of life and survival existed in our traditional territory, such as herbs for medicine, roots, rivers, game animals, berries, vegetables, the buffalo ... Because of the way we hold this land, **I do not believe that our Indian leaders at Blackfoot Crossing gave up this territory but offered to share it with the White man in exchange for peace and friendship between each other and other tribes.** (emphasis added)[34]

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

> The Crown asked First Nations to share their lands with settlers, and First Nations did so on the condition that they would retain adequate land and resources to ensure the well-being of their nations. The Indian parties understood they would continue to maintain their traditional governments,

> their laws and their customs and to co-operate as necessary with the Crown. There was substantive agreement that the treaties established an economic partnership from which both parties would benefit. Compensation was offered in exchange for the agreement of First Nations to share. The principle of fair exchange and mutual [com]pensation in the form of annual payments or annuities, social and economic benefits, and the continued use of their lands and resources.
>
> These principles, which were part and parcel of the treaty negotiations, were agreed upon throughout the oral negotiations of Treaties 1 through 11. They were not always discussed at length, and in many cases the written versions of the treaties are silent on them. In these circumstances, the parties based their negotiations and consent on their own understandings, assumptions and values, as well as on the oral discussions. First Nations were assured orally that their way of life would not change unless they wished it to. They understood that their governing structures and authorities would continue undisturbed by the treaty relationship. They also assumed, and were assured, that the Crown would respect and honour the treaty agreements in perpetuity and that they would not suffer - but only benefit - from making treaties with the Crown. They were not asked, and they did not agree, to adopt non-Aboriginal ways and laws for themselves. They believed and were assured that their freedom and independence would not be interfered with as a result of the treaty. They expected to meet periodically with their treaty partner to make the necessary adjustments and accommodations to maintain the treaty relationship.[35]

It is evident that the Treaty is much more than the written text. Treaty First Nations firmly believe that they were signing Treaties of peace and friendship and agreeing to share some of their traditional territories. First Nations would not and could not have agreed to sell their lands. This can be attributed to the translation problems that occurred in the Treaty negotiations.

2.4.1 Translation Problems

In connection with understanding the Treaty First Nations'

perspective, one also needs to address the problems with translation. There are two dimensions to consider, one: the effectiveness of the translators; and two: the problems of translating sophisticated, complicated concepts of the Euro-Canadian and First Nations parties into the languages of the respective participants. These concepts required trained, knowledgeable, and skilled translators. It is apparent that the translators, hired by the Federal Crown, lacked the skills necessary to effectively discharge their duties entrusted to them. This is evident by examining the following from Treaty 7:

> Most of the First Nations languages are very descriptive and thorough in composition; consequently, much is lost in attempts to translate them accurately - in this case into English. The First Nations languages are verb-centred, while the English language is noun-centred. This alone make literal translation extremely difficult. ... The point to be understood here is that the translation process failed at Blackfoot Crossing. The official reports on the narrative that took place at Blackfoot Crossing indicate that the commissioners spoke at great length in reading the official documents to the chiefs in English and that then the interpreters were called upon to translate their presentation in full. However, the official records of the narrative indicate that the chiefs were only given one-sixth of the presentation of the commissioners. Consequently, the Blackfoot expression "Anahka aipoihka iipitsinnim aniistoohpi" (**The person speaking has choked considerably that which is spoken**) is often used in the Blackfoot elders' stories about the narrative that took place at Blackfoot Crossing.(emphasis added)[36]

Did the translators tell the Treaty First Nations everything about the Treaty? It is very apparent that they did not.

The second dimension to consider is that many English words

(in the written text) do not translate into Cree, Saulteaux, or Dene. For example, these languages do not have words for or the ideas of "Cede", "Release", "Surrender" or "Yield Up". These terms are known and defined legal concepts. They are terms which could not have been translated by interpreters who are not familiar with the meaning of these legal terms. Therefore, they could not translate these terms into the equivalent Cree, Dene, or Saulteaux concepts. For First Nations, these concepts would have been and continue to be culturally nonsensical. At the core of First Nations cultural framework lies the notion of *wak koo towin*. *Wak koo towin* contains the laws setting out the living and continuing relationship between First Nations, the land, and the Creator. This is a relationship that First Nations were not and are not free to extinguish.

Others have noted the difficulties that which I have raised. In the case of *Re: Paulette*[37], Dr. Judy Helm stated to the court:

> How could anybody put in the Athapaskan language through a Métis interpreter to monolingual Athapaskan hearers the concept of relinquishing ownership of land, I don't know, of people who have never conceived of a bounded property which can be transferred from one group to another. I don't know how they would be able to comprehend the import translated from English into a language which does not have those concepts, and certainly in any sense that Anglo-Saxon jurisprudence would understand. So this is an anthropological opinion and it has continued to puzzle me how any of them could possibly have understood this. I don't think they could have. This is my judgment.[38]

Dr. Helm is supporting the idea that it was impossible for the

Treaty First Nations to have surrendered their traditional territories. The Treaty First Nations did not have the same concepts about land ownership as the Euro-Canadians did. This issues was addressed by RCAP. It found:

> Under these circumstances, conceptual and language barriers would have been difficult to overcome. In many cases this would have meant that the parties had to rely on the trustworthiness, good intentions, and good faith of the other treaty partner and the ability to understand one another better through time. At the time of treaty making, First Nations would not have been sufficiently cognizant of British laws and perspectives, since their previous interaction and exchanges had been primarily through trade relationships. When treaty commissioners proposed a formula (called a land quantum formula) to determine how much land would be reserved for Indian nations, for example, it is doubtful that they would have understood the amount of land entailed in one square mile. Similarly, terms such as cede, surrender, extinguish, yield, and forever give up all rights and titles appear in the written text of the treaties, but discussion of the meaning of these concepts is not found anywhere in the records of treaty negotiations.[39]

Treaty First Nations Elders are adamant in their positions that they did not agree to "cede", "release", "surrender" or "yield up" their traditional territories. All First Nations found within the numbered Treaty areas are consistent in their position that they agreed only to share some of their traditional territories required for agricultural settlement.

2.5 Reserves

When considering the reserve issue from a Treaty First Nations' viewpoint, three important concerns come up. One is the considerable concerns with the size of the reserves. Two is the

location of the First Nations' reserves. Three, the issue of fraudulent losses must be addressed.

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

> And Her Majesty hereby agrees and undertakes to lay aside reserves for such bands as desire reserves, the same not to exceed in all one square mile for each family of five for such families as may elect to reside on reserves, or in that proposition for larger of smaller families or individual Indians as may prefer to live apart from band reserves, Her Majesty undertakes to provide land in severalty to the extent of 160 acres to each Indian, the land to be conveyed with a proviso as to non-alienation without the consent of the Governor General in Council of Canada, the selection of such reserves, and lands in severalty, to be made in the manner following, namely, the Superintendent General of Indian Affairs shall depute and send a suitable person to determine and set apart such reserves and lands, after consulting with the Indians concerned as to the locality which may be found suitable and open for selection.[40]

One of the main problems that occurred because of the written text was the reserve size. The text is quite clear that all the Treaty Commissioners were offering was 640 acres per family of five or 160 acres to individual Indians. What will be demonstrated in this section is that the Treaty First Nations understood that they were retaining much more land than their present reserves. The Treaty First Nations intended to keep most of their lands to maintain their traditional livelihoods. All that they agreed to do was share some of the land with the non-Native settlers. Unfortunately, it will be found that there was not an equitable sharing of the land.

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In order to address Treaty First Nations concerns, the Treaty Commissioner made the following promise to Treaty First Nations:

> We had to very clearly explain to them that the provision for reserves and allotments of land were made for their protection, and to secure to them in perpetuity a fair portion of the land ceded[41], in the event of settlement advancing.[42]

Another aspect to consider was the First Nations concerns that the reserves needed to be selected at once and that they would be confined to the reserves. The Treaty Commissioner said:

> As to the extent of the country treated for it made it impossible to define reserves or holdings set apart in the future, and the Indians were satisfied with the promise that this would be done when required. There is no immediate necessity for the general laying out of reserves or the allotting of land. It will be quite time enough to do this as advancing settlement makes necessary the surveying of the land. Indeed, the Indians were generally averse to being placed on reserves. It would have been impossible to have made a treaty if we had not assured them that there was no intention of confining them to reserves.[43]

This promise made to the First Nations is consistent with the notion of the *skun gun*. Treaty First Nations believe that they retained a significant portion of the geography of Treaty Eight. This would be secured through the creation of reserves and land allotments. The problem surrounding the creation of the reserves has been to date the unwillingness of the Federal Crown to recognize and acknowledge the *skun gun*. Until now, the Federal Crown has maintained the position that the creation of reserves was intended to be a one time allotment of either 160 acres per person or 640 acres per family of five. In addition, the Federal Crown

wants to rely on the date of first survey population in determining the size of the reserves. This is in direct contradiction of the Treaty First Nations viewpoint.

The Dene people of Assumption were concerned with the size of their reserves. Jean Marie Talley related the following story:

> So when the government officials finally convinced Zamma (Chief at that time) to request for land, he said that he wanted land within these mountains be given to his people because our people are increasing in numbers. Someday the population will increase. We have to make some sort of arrangement. We request that our people be free to hunt, fish, and trap within this area without having to ask for licenses, without having to pay for licenses or pay for anything. That is what Zamma had told him (Jean Marie Talley) what he wanted for land for his people.
>
> They recorded what he said and that they would comply with his request. This was supposed to be our reserve for the use of future generations as well as generations end.[44]

Zamma was a man with a lot of foresight[45]. He knew that the population figures of the Treaty First Nations would increase. As a result, he wanted enough land so that his people would never have to worry about overcrowding.

As a result of Government policy, the reserves in Treaty 8 are much smaller[46] than is needed for First Nations. In the T.A.R.R. interviews, the following point supports that claim: "Several Elders believe that their reserves are too small and one, William Okeymaw, insists that the treaty promised that more land would be provided if the reserves became overcrowded."[47] As First Nations populations are increasing, it is apparent that more land[48] is

needed to counter this trend. There is not enough land for either meaningful economic development or agriculture. If the Federal Crown was to comply with its promises of more land to Treaty 8 First Nations then reserve size would not be an issue.

The approach of the Federal Crown has resulted in First Nations reserves being smaller than needed. This approach has resulted in the reserves in Treaty Eight comprising roughly .0034% of the total land base[49]. These figures are based on the existing reserves within Treaty Eight measured against the approximately 325,000 square miles contained therein.

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

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

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

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

Another aspect to consider is the locations of the First Nations' reserves. Former President of the Indian Association of Alberta, Dr. Harold Cardinal contends that the First Nations tended to take their reserves around the waterways:

> Many of the reserves that were taken by the Indians were situated around or in close proximity to lakes and rivers. The underlying purpose in so locating the reserves was to give the people access to one of their traditional means of livelihood - fishing. Therefore, when the land was taken for a reserve, the headland-to-headland concept was adopted. This means that

> parts of the waters, lakes or rivers were incorporated into the reserves so that the Indians there could continue to fish and hunt water fowl unmolested. The government has yet to acknowledge ownership by the Indians of those portions of land under water.[50]

This statement by Dr. Cardinal is important because there are many problems with the lakes and rivers in the Treaty Eight region. By having ownership of the waters in our traditional territories, the Treaty First Nations should have more security in protecting the cleanliness and pristineness of the water supply. The water is not only important for consumption but there is the significance of protecting the fish stocks.

Another problem that also results in overcrowding is the Federal Government appropriated reserve lands from First Nations. RCAP found:

> Some prairie treaty nations never received their full entitlement of reserve lands and therefore never had the opportunity to try farming. Moreover, in the land rush that accompanied the building of the Canadian Pacific Railway, many First Nations lost parts of their reserves. In Southern Saskatchewan alone, close to a quarter million acres of reserve land had been sold by 1914. In very few instances were First Nations willing vendors; usually they were subject to relentless pressure from government officials and local settlers to part with their land. Sometimes reserve lands were expropriated for railway easements or the needs of neighboring municipalities. In other cases, reserve lands were lost through questionable transactions involving government officials and land speculators. In a famous case, documented in the 1970's by the Federation of Saskatchewan Indian Nations, forensic evidence established that fraudulent deeds for lands belonging to the White Bear First Nation Community had been typed up in the office of the local Indian Superintendent.[51]

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As a result of the demonstrated fraudulent losses, all Treaty First Nations should examine this area closely. First Nations people need to: talk to their Elders; review any documents pertaining to leasing or surrendering reserve land; and if necessary, survey their reserves. This will ensure that First Nations can claim their full allotment of reserve land. It is necessary to determine how much more reserve land will be needed for future generations.

2.6 Hunting, Fishing, and Trapping Rights

One of the main stumbling blocks to the signing of Treaty Eight for the Treaty First Nations was their fear that the Treaty would interfere with their right to continue making a living through hunting, fishing, and trapping. The First Nations were adamant in the Treaty negotiations and stated that if their demands were not met then there would be no Treaty. Their fears were allayed when the Commissioner made the following promise.

> Our chief difficulty was the apprehension that the hunting and fishing privileges were to be curtailed. The provision in the treaty under which ammunition and twine is to be furnished went far in the direction of quieting the fears of the Indians, for they admitted that it would be unreasonable to furnish the means of hunting and fishing if laws were to be enacted which would make hunting and fishing so restricted as to render it impossible to make a livelihood by such pursuits. But over and above that provision, we had to solemnly assure them that only such laws as to hunting and fishing as were in the interest of the Indians and were found necessary in order to protect the fish and fur-bearing animals would be made, and that **they would be free to hunt and fish after the treaty as they would be if they never entered into it.** (Emphasis added)[52]

It is interesting to note that despite the promises made to

First Nations that "they would be still free to hunt, fish, and trap as if they had never entered into treaty", the written text of the Treaty has had a negative impact on First Nations' opportunities to hunt, fish, and trap. The Treaty states:

> And Her Majesty the Queen HEREBY AGREES with the said Indians that they shall have the right to pursue their usual vocations of hunting, trapping, and fishing throughout the tract surrendered as heretofore described, subject to such regulations as may from time to time be made by the Government of the country, acting under the authority of Her Majesty, and saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes.[53]

It is apparent from the terms of the written text that there are severe limitations on the Treaty right to hunt, fish, and trap. First Nations are to be subject to game regulations and there are going to be limitations on the locations where they could hunt. In considering the importance of the Treaty right to hunt, I want to examine both archival and documentary evidence and Elders' testimony to demonstrate that the written text does not reflect the Elders' understanding. In an affidavit by James K. Cornwall, he said:

> 1. I was present when Treaty 8 was made at Lesser Slave Lake and Peace River crossing.
> 2. The treaty, as presented by the Commissioners to the Indians for their approval and their signatures, was apparently prepared elsewhere, as it did not contain many things that they held to be of vital importance to their future existence as hunters and trappers and fishermen, free from the competition of the white man. They refused to sign the treaty as presented to them by the Chief Commissioner.
> 3. Long discussions took place between the Commissioners and

the Indian Chiefs and Headmen, with many prominent men of various bands taking part. The discussion went on for days, the Commissioners had unfavourably impressed the Indians, due to their lack of knowledge of the bush Indians' mode of life, by quoting Indian conditions on the Prairie. Chief Moostos disposed of the argument by telling the Chief Commissioner that "a Plains Indian turned loose in the bush would get lost and starve to death".

4. As the Commissioner's instructions from Ottawa required the Treaty to be signed first at Lesser Slave Lake before proceeding North, and as the white population living in the Indian Territory had been requested by the Government, prior to the coming of the Commission, to be prepared to deal with them as such, the whites had done everything in their power to assist the Commissioners, by using every honourable influence that was possible.

5. The Commissioners finally decided, after going into the whole matter, that what the Indians suggested was only fair and right but they had no authority to write into the Treaty. They felt sure the Government on behalf of the Crown and the Great White Mother would include their request and they made the following promises to the Indians: -

a- Nothing would be allowed to interfere with their way of making a living, as they were accustomed to and as their forefathers had done.

b- The old and the destitute would always be taken care of, their future existence would be carefully studied and provided for, and every effort would be made to improve their living conditions.

c- They were guaranteed protection of their way of living as hunters and trappers, from white competition; they would not be prevented from hunting and fishing as they had always done, so as to enable them to earn their living and maintain their existence.

6. Much stress was laid on one point by the Indians, as follows: They would not sign under any circumstances, unless their right to hunt, trap, and fish was guaranteed and it must be understood that these rights they would never surrender.

7. It was only after the Royal Commission had recognized that the demands of the Indians were legitimate, and had solemnly promised that such demands would be granted by the Crown, also, after the Hudson's Bay Company Officials and Free Traders, and the Missionaries, with their Bishops, who had the full confidence of the Indians, had given their word that they could rely fully on the promises made in the name of QUEEN VICTORIA, that the Indians accepted and signed the Treaty,

> **which was to last as long as the grass grew, the river ran, and the sun shone - to an Indian this means FOREVER.**[54] (Emphasis added)

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

> First Nations were not supposed to lose anything by entering into the Treaty. They were supposed to keep all of their hunting and fishing rights and their way of life. They were gaining their medical, schooling and they were given equipment for farming. This was supposed to lead to a better way of life instead of just hunting, trapping, and fishing.[55]

Horseman recognized that Treaty Eight guaranteed the right to hunt included the right to hunt for commercial purposes. It found:

> An examination of the historical background leading to the negotiations of Treaty 8 and the other numbered treaties leads inevitably to the conclusion that the hunting rights reserved by the treaty included hunting for commercial purposes. The Indians wished to protect the hunting rights which they possessed before the treaty came into effect and the federal government wished to protect the native economy which was based on those hunting rights."[56]

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

> The Indians indicated to the Treaty 8 Commissioners that they wanted assurances that the government would look after their

> needs in times of hardship before they would sign treaty. The Commissioners responded by stressing that the government did not want Indians to abandon their traditional economic activities and become wards of the state. Indeed, one of the reasons that the Northwest Game Act of 1894 had been enacted was to preserve the resource base of the native economies outside of the organized territories. The government feared that the collapse of these economies would throw a great burden onto the state such as had occurred when the bison economy of the prairies had failed.
>
> [C]ommercial provision hunting was an important aspect of the commercial hunting economy of the region from the onset of the fur trade in the late 18th century. However, no data exists that makes it possible to determine what proportion of the native hunt was intended to obtain provisions for domestic use as opposed to exchange.
>
> Furthermore, in terms of economic history, I am not sure any attempts to make such distinctions would be very meaningful in that Indians often killed animals, such as beaver, primarily to obtain pelts for trade. However, the Indians consumed beaver meat and in many areas it was an important component of the diet. Conversely, moose, caribou, and wood buffalo were killed in order to obtain meat for consumption and for trade. Similarly, the hides of these animals were used by Indians and they were traded. **For these reasons, differentiating domestic hunting from commercial hunting is unrealistic and does not enable one to fully appreciate the complex nature of the native economy following contact.** (emphasis added)[57]

In one sense, this case represents a profound advance with respect to the kinds of livelihood rights which courts are prepared to recognize as accruing to them by virtue of their Treaties. Within Treaty Eight territory, the Horseman decision is a mixed blessing. For Treaty Eight First Nations in the Northwest Territories and northeastern British Columbia, Horseman confirms the continuing existence of their right to hunt for purposes of commerce. Unfortunately, for Treaty Eight First Nations living in Alberta and

Saskatchewan, the Supreme Court of Canada took away this right by application of the NRTA. I will analyze the case of *Horseman* in more detail in my next chapter.

2.6.1 1930 Natural Resource Transfer Agreement

One of the objectionable actions of the Federal Government was to transfer responsibilities of the wildlife and natural resources to the three Prairie provinces (Manitoba, Saskatchewan, and Alberta). The problem that has arisen is that First Nations have no historic relationship with any of those provinces. Alberta and Saskatchewan did not even exist when Treaty Eight was negotiated. As a result, Treaty First Nations want to maintain their bilateral Treaty relationship with the Federal Crown because their sacred Treaties were made with the Federal Crown.

One unfortunate result of the *1930 Natural Resource Transfer Agreement*[58] (hereinafter referred to as the 1930 NRTA) is the impact on the Treaty right to hunt, fish, and trap. Section 12 of the 1930 NRTA reads:

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

Section 12 of the 1930 NRTA serves three purposes for the

Federal Government. First, it transfers jurisdiction over wildlife to the three Prairie provinces and thus forces First Nations to abide by Provincial laws. Second, the Treaty right has been restricted to hunting, fishing, and trapping for food purposes. This is a dramatic reduction in the right promised in the Treaty. Finally, this section has severely limited the scope of the Treaty right. First Nations can only hunt, without being subject to provincial laws, on unoccupied Crown lands and lands to which we may have a right of access.

First Nations were not pleased with the way that the *1930 Natural Resource Transfer Agreement* came into effect with their Treaty. The bitterness with this agreement is echoed in the statement made by Mr. Okeymaw:

> None of the reserves had any knowledge of the changes that were made in 1930. (*1930 Natural Resource Transfer Agreement*) No one was approached. No Chief and Council were approached and told that they (the Federal Government) were giving the provinces these powers. **No consent was obtained.** (emphasis added)[59]

If you consider the issue of the Federal Crown transferring responsibility of regulating wildlife to the Provinces, the Federal Government had no right to do this without consulting First Nations. When the treaties were made, both the Federal Government and Treaty First Nations were equal parties. This is the basis of the bilateral relationship. You do not and cannot change the relationship without the consent of the other party. It is akin to

the Federal Government making a Treaty with the United States of America and the United States unilaterally changing the treaty to suit their own purposes. Why do the same thing to First Nations?

Another effect of the transfer of powers to the provinces was the increased contact that First Nations had with the Provincial governments. This infuriates First Nations citizens. Kenneth Nanemahoo of the Bigstone First Nation provides a good summary of the situation:

> The people used to go as far as they could until they found game. As a result of losing our Treaty rights to hunt, fish and trap, we have to go to Fish and Wildlife to obtain a fishing license before setting a net in the river.[60]

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

> The restrictions imposed on him by game laws were incomprehensible to the Indian. He understood that some were necessary for the protection of wildlife, but he believed that they should strictly applied to the ones wasting the resources, not the Indian who depended on hunting for his existence. Instead of protecting the Indian's freedom to hunt, trap and fish, the Government first allowed it to be eroded, and then restricted. This was the cause of immeasurable physical suffering, and a rapid deterioration of the Indians economic structure. Failure to honour this Treaty obligation was a serious breach of trust on the part of the Canadian Government.[61]

I believe that this quote is very revealing. To my knowledge, the sun has not stopped shining, the rivers have not stopped flowing and the grass has not stopped growing. Therefore, it would be safe to assume that Treaty Eight First Nations' hunting,

fishing, and trapping rights still exist. There should be no restrictions imposed on Treaty Eight First Nations. The Federal Government has seriously breached its obligations to Treaty Eight First Nations.

2.7 Education

Another contentious issue for the Treaty First Nations with the Federal Crown is education. Education, and more specifically, post secondary education, has been a controversial issue for many years. There are questions on whether post-secondary education[62] is a burden on the taxpayers or whether the Federal Government has been breaching this Treaty obligation. In examining this area, I want to consider the history of this treaty right for post-secondary education and residential schools.

Treaty First Nations were determined that education would be an essential element of their Treaty. This is demonstrated in the following quotation:

> Kinosayo asked for and received assurances that the Treaty would be good forever and the government would be "willing to give means to instruct children as long as the sun shines and the water runs, so that our children **grow up ever increasing in knowledge.**" (Emphasis added)[63]

The assurances that Kinosayo received are described in the Commissioner's Report:

> As to education, the Indians were assured that there was no need of any special stipulation, as it was the policy of the Government to provide in every part of the country, as far as the circumstances would permit, for the education of Indian

> children, and that the law, which was as strong as a treaty, **provided for non-interference with the religion of the Indians** in schools maintained or assisted by the Government. (Emphasis added)[64]

It is evident that the oral promises that Kinosayo had secured are not present in the written text of Treaty Eight[65]. This is apparent by the length of the term in Treaty Eight dealing with education. "Further, Her Majesty agrees to pay the salaries of such teachers to instruct the children of the said Indians as to Her Majesty's Government of Canada may seem advisable."[66] I believe that since the oral promise requested by Kinosayo are not present in the written text of the Treaty, it has caused hardships for Treaty First Nations trying to access this Treaty right.

Former National Chief of the Assembly of First Nations, Ovide Mercredi said it best when he described this issue at a lecture given at the University of Saskatchewan:

> You have a right to a school in your community. Wouldn't you think that means education or just a building? What does this mean? Well, I think you would want to say that it means education .... A place of learning.
>
> How do you interpret the Treaty? According to the English text that the people didn't understand or the way it was translated to them. ...[67]

At present, the Federal Government does not recognize a Treaty right to education, be it elementary, secondary, or post-secondary. This is direct violation to the promises made to Kinosayo at the time of the Treaty. "We want our children to grow up ever

increasing knowledge"[68]. At the turn of the century, it might have been sufficient to send Indian children just to elementary and junior high. Eventually, it may have been extended to include high school. But, when you examine this issue in 2001, "ever increasing in knowledge" does equal post-secondary education[69]. Therefore, it is a Treaty right and it must be funded properly.

2.7.1 Residential Schools

Non-compliance with the Treaty right to education also can be seen in the following cases. One, residential schools were a blatant violation of the idea of non-interference. Two, the effects of residential schools need to be addressed.

Before considering the shameful past of the residential schools, it will be demonstrated that First Nations had their own models of education that worked well prior to European contact.

> In the old days the Indian peoples had their own system of education. Although the system was entirely informal and varied from tribe to tribe and location to location, it had one great factor working for it - it worked. The Indian method, entirely pragmatic, was designed to prepare the child for whatever way of life he was to lead - hunter, fisherman, warrior, chief, medicine man, or wife, and mother.
>
> Children of each sex were trained to perform the various functions that would be expected of them once they assumed their eventual place in the social strata. Generally, the band elders or wisemen, in conjunction with the parents, were responsible for the value orientation of the child. This **education-to-a-purpose** enabled the child gradually to become a functioning contributing part of his society. Since all of the social institutions of his society were intact, he was able to become a part of and relate to a stable social system. His identity was never a problem. His education had fitted him

> to his society; he knew who he was and how he related to his world and the people about him. (emphasis added)[70]

This beautiful system where everyone knew their role in the community was eventually affected by the introduction of the residential schools. The idea, that women were not the "slaves" of men but that each gender had its specific role, was ultimately affected by the residential schools. The Federal Government forced Indian parents to send their children to these schools. If the parents did not comply then they faced the possibility of going to jail or worse, having their children forcibly removed from them.

The first effect of the residential schools was the "abduction" of these children from their natural environment. Generally, these schools were many miles away from their communities. Even when they were located close to their communities, the children were confined in the residential schools away from their families. As a result, the teachings that the children should have received from their parents, Elders and other members of the community were lost to them. In its place was a regime set up to make the Indian children into good little Christians. Harold Cardinal in his book, The Unjust Society described the day to day situation for these children:

> Residential schools were no bed of sweet balsam for the young Indian student. Often as early as the age of five, he was yanked forcibly from his parents' arms and taken scores of miles away to the residential school, where a system of harsh discipline combined with an utterly foreign environment quite

> literally left him in a state of shock. No effort was made to ease his introduction. He was jerked out of bed at six o'clock in the morning, made to kneel at the side of his bed to thank God, presumably for letting him sleep until six, marched army fashion to communal washrooms, then to a chapel for morning prayers, back to a school dining room where he had to listen to interminable Latin or English graces before he could touch the rapidly cooling gruel on the slab table before him. Then it was back to his room for half an hour. He hadn't been allowed to speak once until now, and all too soon he had to march to a cold, cheerless classroom where the day started with still more prayers. So it went, daylong and day after day - march to lunch, march to play periods of half an hour each afternoon, march to bed by eight o'clock.[71]

Unfortunately for these young students, these programs were not intended to make them into brilliant scholars. Instead, they were there to learn how read and write and nothing more than that. Beyond these elementary skills, the boys were taught to be good labourers and the girls were taught various skills to make them into good domestic servants or housewives.

Contrary to the promises made by the Treaty Commissioners, these schools did have a strong impact on both the spirituality and the lives of many First Nation peoples. The harmful effect on First Nations has been clearly demonstrated in the literature[72] on residential schools. To summarize these findings, it can be said that the overall objectives of the residential schools[73] was to take away their original languages and replace it with English or French, to take away the First Nations' identity and unfortunately in fulfilling this plan, there were many, many instances of physical and sexual abuse.

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I personally have heard many stories of the punishment the First Nations' students received if they spoke their traditional language. One devastating result of this physical abuse is that many of the people who survived these schools would not teach their language to their children. They did not want their children to suffer the same abuse. As a result, one long term effect of these schools is many First Nations people have grown up not being able to speak their own language.

The loss of culture mandated by the policies of residential schools as set up for the Federal Government by the churches has had detrimental effects on First Nations' identities. Too many stories have recently surfaced that the children in these schools were taught to be ashamed of who they were. They were told that their ceremonies were pagan and would have no place in 'modern day' society. It has only been recently that First Nations have been able to overcome the effects of the policies and reclaim their cultural practices.

One of the greatest impacts of these schools on individuals, families, communities, and Indian organizations was the sexual abuse endured by the Indian children. This topic has captured media attention because of the sheer volume and horror of stories of sexual abuse which are coming from the survivors of these schools. As a result, the church[74] formally apologized for these actions. In

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addition, the Federal Government is beginning to pay compensation to some of the victims. The only response I have to this is that it is about time. The survivors of the Japanese internment received money for their treatment during the Second World War and it is only fitting that the First Nations are also entitled to compensation and reparation costs to First Nations communities because they have been dramatically impacted by the actions of the residential schools. These reparations would be in addition to individual claims. However, I would urge First Nations' leaders to watch these negotiations carefully. Too many of our people will see $20,000 or less as a good sum of money when other people are receiving $50,000 or more.

Furthermore, in order to combat the widespread deleterious effects of residential schools, there is a clear need to have First Nations schools established and administrated by First Nations. Harold Cardinal discusses this in Rebirth of Canada's Indians. He stated:

> The need for good schools in Indian communities is becoming more urgent. These goals should have two goals: (a) providing adequate and appropriate educational opportunity, where skills to cope effectively with the challenge of modern life can be acquired; (b) creating the environment where Indian identity and culture will flourish.[75]

As First Nations begin to administer their own schools, the cultures and languages can be reintroduced to the children from whom it had been indirectly stolen. A concerted effort will be

needed to accomplish this goal. However, in time, it is my hope and dream that all First Nations will be able to speak and learn in their own language. I believe that this should lead to more First Nations practicing their culture.

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1.One problem with this quotation is the fact that the drafters of the Constitution are not giving full recognition to Aboriginal peoples or their rights. I believe it is important to capitalize Aboriginal.

2.*Constitution Act, 1982,* Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11, s.35.

3.For this thesis, I will be focusing on two areas: the Federal Government's viewpoint and the Treaty First Nations' viewpoint. However, I have to recognize that there are other groups that may have concerns with some of the topics to be raised in this paper. For example, some of the prairie provinces will be concerned about land, natural resources, and wildlife. The reason for their concern are the obligations raised as a result of the *1930 Natural Resource Transfer Agreement*.

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

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

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

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

As was referred to in the introduction, the federal government's position is further undermined by the *Marshall* decision. However,

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it is important to deal with the Federal Government's viewpoint because this position is what Treaty First Nations have to overcome in finally getting the recognition of the spirit and intent of their sacred Treaties.

5.Treaty 7 Elders and Tribal Council with Walter Hildebrandt, Dorothy First Rider and Sarah Carter, *The True Spirit and Original Intent of Treaty 7*, (Montreal: McGill-Queen's University Press, 1996), at 124. [hereinafter Treaty 7 Elders]

6.The reason why I am emphasizing the spirit and intent of the numbered treaties is simple. The numbered treaties are much more than what was written down. It will be demonstrated in my thesis that Treaty First Nations had a completely different understanding than the written text.

7.This Treaty holds special significance to me because I am from the Sucker Creek Cree First Nation. It was only 12 miles from my reserve where Treaty No. 8 was originally negotiated in 1899. I have tried, since starting my academic career, to learn more about Treaty Eight. This thesis is not exhaustive on this subject matter. It will only deal with some of the problem areas from Treaty Eight.

8.It was recognized in the case of *R.* v. *Sioui* that both the English and the French desired to make Treaties with First Nations. Lamer J. (as he then was) stated:

> "Both the French and the English recognized the critical importance of alliances with the Indians, or at least their neutrality, in determining the outcome of the war between them and the security of the North American colonies.
>
> Following the crushing defeats of the English by the French in 1755, the English realized that control of North America could not be acquired without the co-operation of the Indians, Accordingly, from then on they made efforts to ally themselves with as many Indian nations as possible. The French, who had long realized the strategic role in the success of any war effort, also did everything they could to secure their alliance or maintain alliances already established."

R. v. *Sioui*, [1990] 3 C.N.L.R. 127 at 146.

9.Canada, *Report of the Royal Commission on Aboriginal Peoples*, Looking Forward, Looking Back, Volume 1, (Ottawa: Minister of Supply and Services Canada, 1996), at 119. [hereinafter RCAP]

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

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

Ibid. at 120-121.

11.**Ibid.** at 119-120.

Karl N. Llwellyn and E. Adamson Hoebel, *The Cheyenne Way: Conflict and Case Law in Primitive Jurisprudence*, (Norman, Oklahoma: University of Oklahoma Press, 1941). See also John Henry Provinse, "The Underlying Sanctions of Plains Indian Cultures", thesis, University of Chicago, 1934; John C. Ewers, *The Blackfeet: Raiders on the Northwest Plains*, (Norman, Oklahoma; University of Oklahoma Press, 1958); and John C. Ewers, *The Horse in Blackfeet Indian Culture, With Comparative Material From Other Western Tribes*, (Washington, D.C.: U.S. Government Printing Office, 1955).

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

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

Ibid. at 168.

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

> "To the Indians of Canada, the treaties represent an Indian Magna Carta. The treaties are important to us, because we entered into the negotiations with faith, with hope for a better life with honour. We have survived for over a century on little but that hope. Did the white man enter into them

> with something less in mind? Or have the heirs of the men who signed in honour somehow disavowed the obligation passed down to them? The Indians entered the treaty negotiations as honourable men who came to deal as equals with the queen's representatives. Our leaders at the time thought they were dealing with an equally honourable people. Our leaders pledged themselves, their people and their heirs to what was done then."

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

14.RCAP, *supra* note 9 at 121.

15.**Ibid.** at 129-130.

16.For Treaty Eight First Nations, it has taken one hundred years for the Courts to finally recognize this point. As a result of the *Marshall* decision (*R.* v. *Marshall*, [1999] 4 C.N.L.R. 161), our oral tradition will be used to determine the spirit and intent of the Treaties.

17.Another issue for First Nations was the "sale" of Rupert's Land to the Dominion of Canada.

> "Many First Nations were angry with this transaction because Hudson's Bay Company had no right to sell their traditional territories. This anger and sense of betrayal was felt during the Treaty 4 negotiations.
>
> The compensation given to the Hudson's Bay Company in exchange for their rights in Rupert's Land became an issue that required enormous diplomatic skill on Morris' part before negotiations, when the Indians demanded that they be given the payment, since they were the owners of the land."

RCAP, *supra* note 9 at 168.

18.The history of the time leading up to the signing of Treaty Eight is described in Richard Price's <u>The Spirit of the Alberta Indian Treaties</u> from pages 56-71.

Price, Richard, *The Spirit of the Alberta Indian Treaties*, (Edmonton: Pic Pica Press, 1987). [hereinafter Price]

19.The issue of adhesion is a very important one. It was not possible for the Treaty Commissioners to meet with all of the First Nations in the area now covered by Treaty Eight. Therefore, the

Commissioners met with some of the First Nations at a later date.

One of the problems that has occurred is due to the Treaty Commissioner's missing more than one First Nation. One of the groups missed was the Lubicon Cree First Nation. The Lubicons have been trying to get a Treaty and reserve status for the past 100 years. However, due to the federal government's unwillingness to address this situation, the Lubicons are still waiting. Although it is not possible to address the Lubicon issue in this paper, it must be remembered that the Lubicon Cree situation represents a black mark in Canadian history.

20.Madill, Dennis F.K. *Treaty Research Report: TREATY EIGHT*, (Ottawa: Treaties and Historical Research Centre, Indian and Northern Affairs Canada, 1986), at page vii.

21.One of the differences that the reader will notice is the change in the names from Beaver to Dene. The reason for this is that most First Nations are updating their names to reflect their historic titles. In addition, their names also reflect their languages. As a result, the Beaver are known as the Dene.

22.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, the following is stated about missing promises made in the Treaties:

> "When Treaties, Numbers One and Two, were made, certain verbal promises were unfortunately made to the Indians, which were not included in the written text of the treaties, nor recognized nor referred to, when these treaties were ratified by the Privy Council. This, naturally, led to misunderstanding with the Indians, and to widespread dissatisfaction among them."

The Honourable Alexander Morris, P.C., *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 Publishers, 1991) at 126.

23.Treaty No. 8, Made June 21, 1899 and Adhesions, Reports, Etc., (Ottawa: Queen's Printer and Controller of Stationary, 1966), at 12. [hereinafter *Treaty No. 8*]

24.For example,

> "Mi'k ai'stoowa was a statesman and a well-respected leader of his people for many years. ... he had been asked about his

> position on lands and surrender. In response he picked up some grass with his left hand and dirt with his right hand, and as he held up his left hand, he said, "This you can have"; then, holding up his right hand with the dirt, "This is for me and my people forever." ... All of our leaders have been well instructed by their teachers in their stewardship responsibilities for the land. They would never knowingly sell or give away their land. According to the spiritual laws of our people, this is a responsibility given to us by the Giver of Life."

Treaty 7 Elders, *supra* note 5 at 18.

25.RCAP, *supra* note 9 at 172-173.

26.It will become evident in the upcoming pages that Treaty Eight First Nations believed that they were signing Treaties of Peace and Friendship. See Footnote 33.

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

28. *Treaty No. 8*, *supra* note 23 at 12.

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

> "The federal government decided to negotiate with the Aboriginals largely because its own agents foresaw violence against the White settlers if Treaties were not established. However, this was not based on particular threats or claims on the part of the Aboriginals, who simply wished to carry out direct negotiations with the government to recompense them for the lands they occupied prior to White settlement."

Frideres, *supra note* 4 at 47.

I disagree with Frideres' notion that First Nations wanted to sell their traditional territories. It will be demonstrated throughout this section that all the First Nations agreed to do was sign a Treaty of peace and friendship and share six inches of topsoil with the non-Native settlers.

30.My father, Harold Cardinal informed me that their was in fact some skirmishes between the First Nations and the non-Native people before Treaty Eight was signed. The non-Native people coming into our territory were very disrespectful. They were in a hurry to get to the Klondike that they disregarded the First Nations by going

through First Nations' territories without their permission. There are some reports that some of the non-Native people were trapping with poison. Consequently, there was some violence that occurred and it speeded up the process to begin negotiations for a peace and friendship Treaty.

31.*Treaty No. 8, supra* note 23 at 14.

32.Price, *supra* note 18 at 94.

33. Interview with Elder J.M. Talley, (1991) Assumption, Alberta.

34. Treaty 7 Elders, *supra* note 5 at 85.

35. RCAP, *supra* note 9 at 174 - 175.

36. Treaty 7 Elders, *supra* note 9 at 23-24.

37.*Re: Paulette et and the Registrar of Titles* (No. 2) [1973] 6 W.W.R. 97 and 115, 39 D.L.R. (3d) 45.

38. Price, *supra* note 18 at 95.

39.RCAP, *supra* note 9 at 175.

40. *Treaty No. 8, supra* note 23 at 12-13.

41.As was explained earlier in this chapter, Treaty First Nations did not agree to "cede" their traditional territories. We agreed to sign a Treaty of Peace and Friendship and share some of our traditional territories with the non-Native settlers.

42.*Treaty No. 8, supra* note 23 at 7.

43.**Ibid.**

44.Interview with Elder, J.M. Talley, (1991) Assumption, Alberta.

45.In a Native Studies class taught at the University of Alberta by Professor Richard Price, the following story was related:

> "On one of the Hobbema reserves, a Chief devised a plan related to his Bands' reserve size. He proposed to walk in the four directions to pace out the reserve size. He wanted to walk as far as he could in one day to set the parameters of one side of the reserve. He believed that this would ensure that the reserve would be large enough to handle all of the

> future generations. However, this idea was dismissed. As a result, the reserve sizes currently in Hobbema were the ones allotted to those Treaty Six First Nations."

The idea proposed by the Chief would have been seen as ridiculous to some people in those times but I believe that he had great foresight on the population increase that was to happen in the future. If you factor in seventh generation thinking, then this Chief was a wise man who followed our traditions.

46. There are other factors that may have lead to Treaty First Nations not receiving their full allotment of reserve lands. In Saskatchewan, it was found that there was a shortfall in land received by the Treaty First Nations. There are many reasons for this shortfall. One: many First Nations individuals were not present during the initial survey. It was found that many people were away practicing their traditional pursuits of hunting, fishing, trapping, and gathering. Two: many First Nations joined the reserves after the survey. Three: there were some First Nations' individuals who transferred from other communities.

Consequently, the Federation of Saskatchewan Indian Nations, the province of Saskatchewan and the Federal Government made an agreement so that Treaty First Nations would receive millions of dollars to purchase their land back on a willing seller, willing buyer basis. This is known as Saskatchewan Treaty Land Entitlement.

Wright, Cliff, Treaty Commissioner, *Report and Recommendations on Treaty Land Entitlement*, May, 1990, at 30-35 and 43-59.

I believe that Saskatchewan First Nations are leading the way with respect to Treaty Land Entitlement. I know that there are some agreements in Alberta but it is proceeding on a band by band basis. This means that it is going to take that much longer for Treaty First Nations in Alberta to catch up with their brothers and sisters in Saskatchewan.

47.Price, *supra* note 18 at 97.

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

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

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

50.*The Unjust Society*, *supra* note 13 at 41.

51.Report of the Royal Commission on Aboriginal Peoples, Restructuring the Relationship, Part Two, Volume 2, (Ottawa: Minister of Supply and Services Canada, 1996), at 475.

See Stewart Raby, "Indian Land Surrenders in Southern Saskatchewan", The Canadian Geographer, 17/1 (1973) and J.R. Miller, *Skyscrapers Hide the Heavens: A History of Indian and White Relations in Canada*, rev. ed. (Toronto: University of Toronto Press, 1989).

52.Treaty No. 8, *supra* note 23 at 6.

53.**Ibid.** at 12.

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

55.Interview with Elder, F.O. Okeymaw, (1991),Driftpile, Alberta.

56.*R.* v. *Horseman*, [1990] 3 C.N.L.R. 95 at 100.

57.**Ibid.** at 101-102.

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

59. Interview with Elder, F.O. Okeymaw, (1991), Driftpile, Alberta.

60. Interview with Elder, K. Nanemahoo (1991), Bigstone Cree Nation, Alberta.

61.Fumoleau, *supra* note 54 at 307.

62.In response to some criticisms that First Nations receive a "free" education, the following story was related to me. After the Treaty was signed, the federal Crown gained control over the vast natural resources from First Nations' traditional territories. Since the Crown was only promised six inches of topsoil from First

Nations, the Crown is holding all the money it receives from these revenues in trust for First Nations. With respect to education, First Nations are supplied with money each month from the trust that the Federal Crown holds. Therefore, when these funds were cut in the late 1980's, it was understandable that First Nations were upset.

63.Price, *supra* note 18 at 79.

64.Treaty No. 8, *supra* note 23 at 6.

65.In his book, The Unjust Society, Harold Cardinal had the following to say about education. "The Indian people clearly understood that **free education** would be provided. This they were promised verbally - if the commissioners' report can be taken at face value. Yet the written guarantee in the treaty contains no such thing. Deceived again by the noble white man."

The Unjust Society, supra note 13 at 43.

66.**Ibid.** at 13.

67. Mercredi, Ovide, "Canadian Myths - Aboriginal and White Relations", University of Saskatchewan, Saskatoon, February 27, 1997.

68.In considering the meaning of "ever increasing in knowledge", you only have to go as far back as the entrenchment of existing Aboriginal and Treaty rights in the *Constitution Act, 1982*. With the Supreme Court of Canada decision in *R.* v. *Sparrow*, the scope of the Aboriginal and Treaty rights changed.

Sparrow defines existing Aboriginal and Treaty rights in the following manner:

> The word "existing" makes it clear that the rights to which s. 35(1) applies are those that were in existence when the *Constitution Act, 1982* came into effect. This means that extinguished rights are not revived by the *Constitution Act, 1982*.
>
> ...the word "existing" suggests that those rights are "affirmed in a contemporary form rather than in their primeval simplicity and vigour."

R. v. *Sparrow*, [1990] 3 C.N.L.R. 160 at 169-171.

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Historically, the Federal Government could have been right that the treaty right to education only went as far as high school. However, with *Sparrow*, the Federal Government is wrong on this issue. "Ever increasing in knowledge" in a contemporary manner means post-secondary education. In addition, there should be no limit as to how long the Treaty First Nations go to school. If the student wants to go more than four years to get a Masters Degree or a Doctorate or to be a doctor, lawyer or any other professional, then the student should be able to continue in his/her studies. By doing this, the Federal Government would be following the spirit and intent of the Treaty.

69. I would like to refer to Ovide Mercredi's words. The Treaty Commissioner promised to "teach your children (referring to the First Nations) our laws". Where does any student learn about Canadian law. They either take Political Science or they attend law school. Consequently, this is the source of the Treaty right for Treaty Five First Nations.

70.*The Unjust Society, supra* note 13 at 52.

71.**Ibid.** at 85-86.

72.The issue of residential schools is a topic that would be better addressed in another paper. For the purposes of this thesis, I am going to refer to residential schools briefly. There are a number of books that have come out on this subject. Four of the more notable ones are: Johnston, Basil, Indian School Days, (Toronto: Key Porter Books, 1988); Miller J.R., Shingwauk's Vision: A History of Native Residential Schools (Toronto: University of Toronto Press, 1996); Milloy, John, A National Crime: The Canadian Government and the Residential School System, 1879 to 1986 (Winnipeg: University of Manitoba Press, 1999); and Chrisjohn, Roland The Circle Game: Shadows and Substance in the Indian Residential School Experience in Canada, (Penticton: Theytus Books, 1997).

73.Harold Cardinal had this to say about the missionaries in the residential schools:

> "The unvarnished truth is that the missionaries of all Christian sects regarded the Indians as savages, heathens or something even worse. They made no attempt to understand Indian religious beliefs, virtually no attempt to appreciate Indian cultural values and paid little heed to Indian ways. The true purpose of the schools they established was to process good little Christian boys and girls - but only Christians of the sect operating the school. In those early church schools, academic knowledge occupied one of the back

> seats. Since the Indian was expected to live in isolation from the rest of society, obviously all the education he needed was a bit of reading, writing, figures, and some notion of hygiene."

The Unjust Society, supra note 13 at 53.

74. In the recent Royal Commission on Aboriginal Peoples, they reported that:

> "Selfless Christian duty and self-interested statecraft were the foundations of the residential school system. The edifice itself was erected by a church/government partnership that would manage the system jointly until 1969. In this task, the churches - Anglican, Catholic, Methodist, and Presbyterian - led the way."

RCAP also found that:

> "By 1992, most of the churches had apologized, regretting, in the words of one of the Catholic texts, `pain, suffering and alienation that so many have experienced.' However, as they told the minister in a joint communication through the Aboriginal Rights Coalition in August 1992, they wanted it recognized that they `share responsibility with government for the consequences of residential schools', which included not only `individual cases of physical and sexual abuse' but also `the broader issue of cultural impacts'."

RCAP, supra note 9 at 335 and 380-381.

75. Cardinal, Harold, *Rebirth of Canada's Indians*, (Edmonton: Hurtig Publishers, 1977), at 78.

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Chapter Three: The Supreme Court of Canada's Interpretation of the Spirit and Intent of the Treaties

3.1 Introduction

The second chapter demonstrated the two very different viewpoints of the Treaty First Nations and the Federal Government on the meaning of the numbered Treaties. The interpretation of the Treaty becomes problematic when the courts get involved. The courts do not have the knowledge base required to adequately examine First Nations' Treaty rights. Therefore, most cases result in findings which go against Treaty First Nations. For example, in the recent case of *Sawridge Band* v. *Canada*[1], Muldoon J. made the following statements about the numbered Treaties in Alberta:

> So there was a *quid pro quo* inherent in Treaties 6, 7, and 8. The Canadian Government wanted to open the Prairies to eastern Canada settlement - expansionism Canadian style, kept non-murderous with the help of the mounted police - and the Indians, in their straitened circumstances of that different world wanted the **dependent status into which they bargained themselves seemingly forever.** ... The government's payments work another evil, too. They are an eternal charge on the country's taxpayer,...(Emphasis added)[2]

Muldoon's language well illustrates the problem of having the courts interpret Treaty rights. My last chapter demonstrated that from a Treaty First Nations' standpoint, the reason for signing

Treaty Eight was to ensure peaceful relations between the First Nations and the non-Native people. With respect to the dependent status of First Nations, the problem is not the Treaty. Instead, I would respectfully argue that over one hundred years of colonialism has contributed to the current status of First Nations. In addition, Muldoon J. is making the same mistake as other ill-informed Canadians about First Nations' Treaty rights. These rights are not a burden on the Canadian taxpayers. Financing Treaty rights comes from the Treaty First Nations' share of the natural resources. Even though Muldoon's decision was overturned because of a reasonable apprehension of bias it demonstrates the inaccurate portrayal of the Treaty relationship by the courts[3]. I have included this portion of the judgment to show the danger of having the courts as the only body determining the meaning of the Treaties.

In this chapter, I will examine whether the Supreme Court of Canada has properly interpreted the spirit and intent of the Treaties. First, I will set out the various interpretation principles as enunciated in *R.* v. *Badger*[4]. Second, I will examine how the courts have dealt with the meaning of the Treaties. Third, I will analyze Section 12 of the 1930 Natural Resource Transfer Agreement [hereinafter 1930 NRTA]. I want to consider the honour of the Crown and the duty created by Section 12 of the 1930 NRTA for

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Alberta, Saskatchewan, and Manitoba. Fourth, I will examine the case of *R.* v. *Horseman*[5]. Fifth, I will address the absurd decision by Cory J. in this case. Finally, I will consider the Treaty right of commercial hunting and whether it should be protected by section 88 of the *Indian Act*.

3.2 Treaty Interpretation Principles

When considering whether the Supreme Court of Canada has properly interpreted the spirit and intent of the Treaties, we must keep in mind the various interpretation principles established by the court. One of the first instances where the court established the Treaty interpretation principles was in the case of *R.* v. *Nowegijick*[6]. It stated: 'treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indians."[7] The court also adopted the American decision of *Jones* v. *Meehan*[8] which states: "Indian treaties must be construed, not according to the technical meaning of their words, but in the sense in which they would naturally be understood by the Indians."[9] Ultimately, these principles from *Nowegijick* have been adopted in later Supreme Court of Canada decisions. For example, in cases like *Horseman* and *Badger*, the starting point for the court is these principles.

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

the true meaning of the Treaties. Therefore, if there is any question about the meaning of the Treaties, then they must be interpreted in the First Nations' favour. More importantly, the court must also take into account the First Nations' understanding[10] of the Treaties.

In the case of *Badger*, the Supreme Court of Canada laid out the following principles:

> At the outset, it may be helpful to once again set out some of the applicable principles of interpretation. First, it must be remembered that a treaty represents an exchange of solemn promises between the Crown and the various Indian nations. It is an agreement whose nature is sacred. Second, the honour of the Crown is always at stake in dealing with Indian people. Interpretations of treaties and statutory obligations which have an impact upon treaty or aboriginal rights must be approached in a manner which maintains the integrity of the Crown. No appearance of "sharp dealing" will be sanctioned. Third, any ambiguities or doubtful expressions in the wording of the treaty or document must be resolved in favour of the Indians. A corollary to this principle is that any limitations which restrict the rights of the Indians under treaties must be narrowly construed. Finally, the onus of proving that an aboriginal or treaty right has been extinguished lies upon the Crown. There must be "strict proof" of the fact of extinguishment" and evidence of a clear and plain intention on the part of the government to extinguish treaty rights.[11]

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

I find the issue of extinguishment to be problematic. Prior to

the introduction of Section 35[12] of the Constitution Act, 1982, the Supreme Court of Canada had no problem allowing the Federal Government to extinguish Aboriginal and Treaty rights. This is evidenced in *Horseman* where Cory J. stated "the right of the federal government to act unilaterally in that matter is unquestioned."[13] However, with the entrenchment of Aboriginal and Treaty rights in the Constitution, the Federal Government no longer has the right to unilaterally alter the Treaties. In addition, I believe that the Federal Government should have never had that right in the first place. If there are any discussions as to the meaning of the Treaties, then it should have been completed in the traditional manner, nation to nation. Representatives of the Federal Crown and the Treaty First Nations should have met to discuss issues that affect both parties. I will deal with this issue in greater detail when I examine the honour of the Crown.

3.3 Understanding the Numbered Treaties

The courts have taken a very narrow view of the numbered Treaties. Very few of the judges recognize that the numbered Treaties are not land surrender Treaties but rather they are peace and friendship Treaties where the Treaty First Nations agreed to share the land with the non-Native settlers. There have been a number of cases that have examined the meaning of the Treaties. First, I will address aspects of the *Re: Paulette*[14] decision.

Second, I will look at Wilson J.'s dissenting judgment in *Horseman*. Third, I will analyze the notion that Indian treaties are *sui generis* and how the court has defined the Treaties in the *Simon* decision. Fourth, I will consider how the court dealt with oral tradition in the *Delgamuukw*[15] case. Finally, I will examine the latest ruling for Treaty interpretation from the recent *Marshall* decision.

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

> Most witnesses were firm in their recollection that land was not surrendered, reserves were not mentioned, and the main concern and chief thrust of discussions centred around the fear of losing their hunting and fishing rights, the Government officials always reassuring them with variations of the phrase, as long as the sun shall rise in the east and set in the west, and the rivers shall flow, their free right to hunt and fish would not be interfered with.[16]

It is significant that the Elders in the Northwest Territories believe that their numbered Treaties were not land surrender Treaties. I believe that this finding is indicative for the First Nations from any of the numbered Treaties. It demonstrates the viability of the oral tradition. Based on the information of the Elders, Morrow J. stated:

> On the evidence before me I have no difficulty finding as a fact that the area embraced by the caveat has been used and occupied by an indigenous people, Athapascan-speaking Indians, from time immemorial, that this land has been occupied by

> distinct groups of these same Indians, organized in societies and using the land as their forefathers had done for centuries, and that those persons who signed the caveat are chiefs representing the present-day descendants of these distinct Indian groups.[17]

This finding by Morrow J. contradicts historians and the courts who rely on the Doctrine of Discovery. Many people have accepted the racist belief that Indians were savages, pagans, heathens, they did not live in organized societies and they were not using the land "properly". Based on this notion, England and France were somehow able to claim the land in North America. Unfortunately, the courts have adopted this racist belief and recognized that the Crown owns the underlying title in this country[18]. However, with findings like Morrow J., it is apparent that First Nations will finally be able to neutralize the racist Doctrine of Discovery and the courts will be forced to acknowledge that First Nations own the land in this country.

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

> ... there was either a failure in the meeting of the minds or that the treaties were mere "peace" treaties and did not effectively terminate Indian title - certainly to the extent that it covered what is normally referred to as surface rights - the use of the land for hunting, trapping, and fishing.[19]

This is one of the rare occasions where a judge has acknowledged that there are questions about the true meaning of the numbered

Treaties. Morrow J. recognized the spirit and intent of the Treaties. He was the first judge to find that there was no meeting of the minds on the issue of land surrender. Therefore, I would argue that Treaty First Nations did not surrender the land but rather signed a Treaty of peace and friendship[20]. Although, this case is not a Supreme Court of Canada decision[21], it is the first step in acknowledging that the true owners of the land are First Nations.

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

> The interpretative principles developed in *Nowegijick* and *Simon* recognize that Indian treaties are *sui generis*. These treaties were the product of negotiation between very different cultures and the language used does not reflect, and it should not be expected to reflect, with total accuracy each party's understanding of their effect at the time they were entered into. This is why the courts must be especially sensitive to the broader historical context in which such treaties were negotiated. They must be prepared to look at that historical context in order to ensure that they reach a proper understanding of the meaning that particular treaties held for their signatories at the time. ...
>
> In other words, to put it simply, Indian treaties must be given the effect the signatories obviously intended them to have at the time they were entered into even if they do not comply with today's formal requirements. Nor should they be undermined by the application of the interpretative rules we apply today to contracts entered into by parties of equal bargaining power.[22]

I have to agree with most of what Wilson J. said about the numbered Treaties. It is important to consider what the signatories were

considering when they were negotiating the Treaties. There were two very distinct cultures involved and because of that, there was logically going to be some misunderstanding.

However, I would add a couple of things to Wilson J.'s dissent. First, with respect to existing Treaty rights, I would refer to the *Sparrow* case. The court found, with respect to existing Aboriginal and Treaty rights, *Sparrow* "suggests that those rights are affirmed in a contemporary form rather than in their primeval simplicity and vigour.[23]" The court must look at the Treaty rights in a current manner. This means it must consider what the Treaty rights mean today in 2001 and not when Treaty Eight was signed in 1899. If this process is followed then it will have the effect of modernizing the Treaty and more importantly, it will reflect what our forefathers intended when they signed the Treaties.

Second, I would have to respectfully disagree with Wilson J.'s assessment that the Treaty was entered into by parties of unequal bargaining power. Inequality arose after the signing of Treaty Eight. What has happened since the Treaties were signed reflects the goal of the Federal Government to assimilate First Nations. The Federal Government wanted to place First Nations on reserves with the goal that we would come to accept the Canadian way of life and eventually become ordinary Canadian citizens. The Government then

used the *Indian Act* to control virtually every aspect of our lives. As it applies to Treaties, we have to consider the Pass System and the fact that First Nations could not hire lawyers[24] out of band funds. These two policies prevented First Nations from finding out how other First Nations were being treated and it prevented them from being involved in any cases interpreting Treaty rights. As a result, the courts started accepting the backwards notion that it gave permission to the Federal Government to do whatever it wanted with respect to First Nations and their Treaty rights.

Another case to consider is *Simon*. The court recognized that "a treaty with the Indians is unique, that it is an agreement *sui generis* which is neither created nor terminated according to the rules of international law.[25]" It is hard to comprehend what the court means by *sui generis*. I believe that the court used this term to describe the Treaties because they have difficulties interpreting the Treaties.

It is interesting how the court defined the Treaties. It stated:

> In my view, Parliament intended to include within the operations of s.88 all agreements concluded by the Crown with the Indians, whether land was ceded or not. None of the Maritime treaties of the eighteenth century cedes land. To find that s.88 applies only to land cession treaties would be to limit severely its scope and run contrary to the principle that Indian treaties and statutes relating to Indians should be liberally construed and uncertainties resolved in favour of the Indians.[26]

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The court is expressly rejecting the proposition that only agreements concerning land cession can be considered Treaties. Its decision can be described as applying the *Nowegijick* test. Yet, its approach on the issue of land surrender and the numbered Treaties have not been consistent with this principle. The courts have been making obiter comments on this issue but it has not addressed this issue directly.

The fourth case that I will examine is *Delgamuukw*. Although this case deals with Aboriginal title and the land claim of the Gitksan Wet'suwet'en, Lamer C.J., (as he then was) made a very important finding. He stated:

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

This decision by the court is an important but still problematic one for First Nations. It is recognizing the equivalency of the oral tradition to the written word. It also allows Treaty First Nations to present oral tradition so that their Treaty rights will

finally be fully recognized as understood by First Nations.

The final case I want to examine is the *Marshall* decision. I believe that this decision will allow Treaty First Nations to have the spirit and intent of their Treaties recognized. In the case of *Marshall* v. *The Queen*, the court found:

> Firstly, even in a modern commercial context, extrinsic evidence is available to show that a written document does not include all of the terms of an agreement.
>
> Secondly, even in the context of a treaty document that purports to contain all of the terms, this Court has made it clear in recent cases that all extrinsic evidence of the historical and cultural context of a treaty may be received even absent any ambiguity on the face of the treaty.
>
> Thirdly, where a treaty was concluded verbally and afterwards written up by representatives of the Crown, it would be unconscionable for the Crown to ignore the oral terms, while relying on the written terms.[28]

Even though the Marshall decision dealt with the Treaty of 1760-61, the decision has huge ramifications for all Treaty First Nations. I believe that once you take into account what the court said in *Delgamuukw* and continued in *Marshall*, Treaty First Nations have the opportunity for the courts to recognize that the numbered Treaties were peace and friendship Treaties. This will lead to an acceptance that all First Nations agreed to do was sign a Treaty of peace and friendship, share six inches of topsoil with non-Native settlers and begin a new economic relationship with the Federal Crown. The only aspect that is of any concern is overcoming one hundred years

of precedents.

3.4 Section 12 of the 1930 NRTA

One of the factors that has affected the Treaty right to hunt is how the court has applied section 12 of the 1930 NRTA. Section 12 states:

> 12. In order to secure to the Indians of the Province the continuance of the supply of game and fish for their support and subsistence, Canada agrees that the laws respecting game in force in the Province from time to time shall apply to the Indians within the boundaries thereof, provided, however, that the said Indians shall have the right, which the Province hereby assures to them, of hunting, trapping, and fishing game and fish for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access.[29]

Section 12 of the 1930 NRTA has three effects on the Treaty right to hunt. First, as was found in *Cardinal*[30], the provinces are required to establish Wildlife Acts in order to fulfill their obligation that there is a continuing supply of game and fish. Second, as will be shown in the decision in *Horseman*, Treaty First Nations can hunt for food purposes only. Third, First Nations can hunt on unoccupied Crown lands and lands to which they may have a right of access. As will be shown in the *Horseman* case, Cory J. believes this is an expansion for the Treaty right to hunt. I do not agree with this assessment. I believe that this was an attempt to make the decision more palatable for First Nations.

A crucial question in this regard is the issue of honour of

the Crown. Courts have always maintained that the honour of the Crown[31] is utmost. The problem here is that the 1930 NRTA was agreements between the Federal Government and Alberta, Saskatchewan, and Manitoba. Treaty First Nations of these territories were not involved in the process[32]. Therefore, there are many questions as to whether the Treaty First Nations should have to uphold the Agreement. Horseman's lawyer made the following points:

> Firstly, it is argued that when it is looked at in its historical context, the 1930 Transfer Agreement was meant to protect the rights of the Indians and not to derogate from those rights. Secondly, and most importantly, it is contended that the traditional hunting rights granted to Indians by Treaty 8 could not be abridged in any way without some form of approval and consent given by the Indians, the parties most affected by the derogation, and without some form of compensation or *quid pro quo* for the reduction in the hunting rights. Thirdly, it is said that on policy grounds the Crown should not undertake to unilaterally change and derogate the treaty rights granted earlier. To permit such a course of action could only lead to the dishonour of the Crown. It is argued that there rests upon the Crown an obligation to uphold the original native interests protected by the treaty.[33]

However, when the court has had the chance to uphold the honour of the Crown, it chose not to do so. The court should not have allowed section 12 of the 1930 NRTA to affect the Treaty right to hunt. The reason is straight forward. If the NRTA is going to negatively impact Treaty rights then First Nations should have been involved in the negotiations. But, unfortunately, there was no consultation.

Cory J. is of the opinion that Treaty rights may be

unilaterally abridged. It is respectfully submitted that Cory J. is absolutely wrong. The time has come for the court to start telling the federal government that unilateral actions will no longer be tolerated. If legislation is going to affect Aboriginal or Treaty rights then First Nations must be involved. This policy was recognized in the case of *R.* v. *Sioui*. The court found:

> It would be contrary to the general principles of law for an agreement concluded between the English and the French to extinguish a treaty concluded between the English and the Hurons. It must be remembered that the treaty is a solemn agreement between the Crown and the Indians, an agreement the nature of which is sacred. The very definition of a treaty thus makes it impossible to avoid the conclusion that a treaty cannot be extinguished without the consent of the Indians concerned. Since the Huron's had the capacity to enter into a treaty with the British, therefore, they must be the only ones who would give the necessary consent to its extinguishment.[34]

This aspect of the *Sioui* case[35] should have made it even harder for the court to accept the infringement on the Treaty right to hunt by the 1930 NRTA without consultation. As of 2000, these negotiations have yet to take place. Again, this further challenges the validity of Cory J.'s decision.

Another problem with the NRTA is the fact that section 12 (Section 13 for Manitoba) has created a duty[36] for Alberta, Saskatchewan, and Manitoba. Each of the provinces is required to ensure that there is enough wildlife to fulfil the Treaty right to hunt[37]. However, it is apparent that the provinces are not living up to this obligation. I will briefly examine three areas to

demonstrate the breach of this responsibility to Treaty First Nations.

First, in Alberta, the provincial government has on many occasions given out timber licenses to foreign investors. For the Treaty Eight First Nations, these licenses extend throughout most of their traditional territory. Unfortunately, the province did not consider the effects of increased logging on the wildlife. In addition, the pulp mills, which goes along with the increased logging activities, harm the environment. The consequences of having pulp mills in the territories is that most of our pristine lakes and rivers will soon no longer be able to sustain the fish populations and eventually the water will not be fit to drink. This is only the start of the breach of the duty by Alberta to the Treaty Eight First Nations.

Another example is the oil and natural gas exploration in Alberta. Many oil companies are drilling and building more roads in Northern Alberta. This exploration has had a detrimental effect on Treaty First Nations. A case in point would be the Lubicon Cree First Nation.

> Until the winter of 1979, oil and natural gas development in the Lubicon territory had been minimal. In the 1950's, eleven wells were drilled. In the 1960's, the number of new wells roughly doubled to twenty-three. In the early 1970's, the number again doubled to about fifty, many of them in the Marten area. ... Then the boom hit. In 1979, the Iranian revolution interrupted oil supplies from the Persian Gulf,

> forcing world prices higher and making the extension of all-weather roads into the Lesser Slave Lake interior.[38]

It would seem that Alberta was more interested in finding oil and natural gas than considering the effects of increased exploration on Treaty First Nations. In the book, Drumbeat, Richardson says:

> In 1980, the Alberta government and oil companies launched a major invasion of the Lubicon lands. Dozens of oil companies began moving in, building roads, cutting seismic lines, drilling wells, putting in pipelines, and so on. They scared away or killed much of the game that the Lubicon had always depended upon for food and furs.
>
> Between 1979 and 1982, more than 400 oil well were drilled within a 24 kilometer (15 mile) radius of the Lubicon community of Little Buffalo Lake. Traditional hunting and trapping trails were taken over and turned into private oil-company roads, posted with "no trespassing" signs and protected by guards and gates. Traplines were systematically bulldozed on orders from the province and oil companies. Game was deliberately chased out of the area by firing rifles into the air, a sport entered into with such enthusiasm that some workers described it as being "almost like a competition."
>
> Between 1979 and 1983, the number of moose taken by the Lubicon Lake people dropped from an average of more than 200 to under 20 per year. Annual income from trapping dropped from more than $5000 per trapper to less than $400. Local hide and handicraft buyers were told not to buy from Lubicon Lake. Dependency on welfare soared from under 10 per cent in 1981 to more than 95 per cent in 1983.
>
> Destruction of the Lubicon Lake traditional economy was not simply the unfortunate result of contact between a traditional Aboriginal society and a modern industrial state. It was the calculated result of a deliberate provincial government legal strategy.[39]

The provincial government tactics contributed to a marked change in the Lubicon's traditional lifestyle. The Lubicon people went from

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being self-sufficient to having to rely on government support. As such, it has caused many social problems within the community. There is increased alcohol and drug abuse, and more suicides, just to name a few. The fact that Alberta knew of the problems that it would cause with the oil exploration is damning. It is a serious breach of Alberta's duty to Treaty Eight First Nations.

Another area that I want to consider is the numbers of wildlife in Alberta, Saskatchewan, and Manitoba. In Saskatchewan, there have been many outcries by non-Native people that the Treaty First Nations and the Métis have been over-hunting. For that reason, they have surmised that the decline in the wildlife populations can be attributed to the hunting practices of First Nations and the Métis. Unfortunately, the non-Native people do not consider that there are many other factors for the reduction in wildlife. In every province, there has been an abundance of oil exploration, mining, settlement, building roads, logging and many other things happening that impact on the wildlife populations. Therefore, it is up to the individual provinces to determine the current numbers of wildlife. Then, the conservation officers can figure out how many animals can be safely taken each year. Utilizing *Sparrow*, the conservation officers must consult with First Nations and the Métis to determine how much fish and game are needed for their food purposes.

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3.5 Horseman

First, I will go through the facts of the case. Second, I will examine the definition of the Treaty right to hunt from the case. Third, I will analyze the merger and consolidation theory. Fourth, I will examine the decision in this case. Finally, I will address s. 42 of the *Wildlife Act*, s. 88 of the *Indian Act* and deal with the issue whether Mr. Horseman was engaged in a commercial activity when he sold the bear hide. It is also important to note that I respectfully disagree with Cory's decision in this case. He has missed many important factors in reaching his *quid pro quo*. I am more inclined to agree with the dissenting judgment of Wilson J. and I will be referring to her dissent as I address each of these issues.

Mr. Horseman was hunting in the territory covered by Treaty Eight. He was successful in killing a moose. The moose was too large for him to carry alone so he went back to the reserve for some assistance. Upon returning to the moose, Horseman was surprised to find that a grizzly bear had started to eat the carcass. The grizzly bear did not like Horseman's presence so it attacked. Horseman then killed the bear in self-defence.

One year later, Horseman came upon some dire straits and he needed some money to buy some food for his family. As a result, he obtained a license that enabled him to hunt a bear and sell its

hide to a licensed dealer. Instead of killing another bear, Horseman sold the hide from the bear he killed a year earlier. Consequently, Horseman was charged under section 42 of the Wildlife Act with trafficking. Section 42 states:

> No person shall traffic in any wildlife except as is expressly permitted by this Act or by the regulations.
> 1(s) "traffic" means any single act of selling, offering for sale, buying, bartering, soliciting or trading;[40]

An important point that the court accepted was the Treaty right to hunt included hunting for food and for commercial purposes. Cory J. stated:

> An examination of the historical background leading to the negotiations for Treaty 8 and the other numbered treaties leads inevitably to the conclusion that the hunting rights reserved by the treaty included **hunting for commercial purposes**. The Indians wished to protect the hunting rights which they possessed before the treaty came into effect and the federal government wished to protect the native economy which was based upon those hunting rights. It can be seen that the Indians ceded title to the Treaty 8 lands on the condition that they could reserve exclusively to themselves "their usual vocations of hunting, trapping, and fishing throughout the tracts surrendered..." (Emphasis added)[41]

Certain aspects of this decision by Cory J. were important for Treaty First Nations. It was the first time that the Supreme Court of Canada recognized that the Treaty right to hunt also included hunting for commercial purposes. It is also very important because it brings into question the validity of judicial precedents on the Treaty right to hunt. The question that arises is whether the judges had the proper definition of the Treaty right to hunt with

which to make an informed decision. I do not believe that they did because each decision has further restricted the Treaty right to hunt. Unfortunately, Cory J. does not consider this fact and eventually makes a very bad decision for Treaty First Nations.

The final area that I want to examine is the merger and consolidation theory adopted in this case but though apparently reversed in the *Badger* case by Cory J. Based on its interpretation of section 12 of the 1930 NRTA, the court has decided to restrict the commercial right to hunt. There are three important cases that the court refers to. First, in *Cardinal* v. *The Attorney General of Alberta*, it was stated:

> The opening words define its purpose. It is to secure to the Indians of the Province a continuing supply of game and fish for their support and subsistence. It is to achieve that purpose that Indians within the boundaries of the Province are to conform to Provincial game laws, subject, always, to their right to hunt and fish for food.

Second, in *Frank* v. *The Queen*:

> It would appear that the overall purpose of section 12 of the NRTA was to effect a merger and consolidation of the treaty rights theretofore enjoyed by the Indians but of equal importance was the desire to restate and reassure to treaty Indians the continued enjoyment of the right to hunt and fish for food.

Finally, in *Moosehunter* v. *The Queen*, the court found:

> The Agreement had the effect of merging and consolidating the treaty rights of the Indians in the area and restricting the power of the Provinces to regulate the Indians right to hunt for food. The right of the Indians to hunt for sport or commercially could be regulated by Provincial game laws but

the right to hunt for food could not.[42]

There are a lot of problems with this theory as accepted by the Court. First, I do not believe that the judges in these cases understood that the Treaty right to hunt included hunting for commercial purposes. Second, as was stated earlier, the Treaty cannot be changed by an agreement between the Federal Government and the Provinces. Treaty First Nations must be involved in those negotiations and that has not occurred. Third, there is an important aspect that the court does not acknowledge. The Treaty was signed by representatives of the Federal Government and Treaty First Nations. The provinces of Alberta and Saskatchewan did not even exist in 1899 when Treaty Eight was signed. Therefore, how can the court allow a third party to come in and establish rules for First Nations?

Unfortunately, Cory J. used the merger and consolidation theory to justify his decision related to a *quid pro quo* and the Treaty right to hunt. He found:

> In addition, **there was in fact a *quid pro quo* granted by the Crown for the reduction in the hunting right.** Although the Agreement did take away the right to hunt commercially, the nature of the right to hunt for food was substantially enlarged. The geographical areas in which Indian people could hunt was widely extended. Further, the means employed by them in hunting for their food was placed beyond the reach of the provincial governments. For example, they may hunt deer with night lights and with dogs, methods which are or may be prohibited to others. Nor are the Indians subject to seasonal limitations as are all other hunters. That is to say, they can

> hunt ducks and geese in the spring[43] as well as the fall, just as they may hunt deer at any time of the year. Indians are not limited with regard to the type of game they may kill. That is to say, while others may be restricted as to the species or the sex of the game they may kill, the Indians may kill for food both does and bucks; cock pheasants and hen pheasants; drakes and hen ducks. It can be seen that the *quid pro quo* was substantial. Both the area of hunting and the way in which hunting could be conducted was extended and removed beyond the reach of provincial governments.
>
> The true effect of para. 12 of the Agreement was recognized by Laskin J., as he then was, in *Cardinal, supra*, where he wrote:
>
> [Section 12] is concerned rather with Indians as such, and with guaranteeing to them a continuing right to hunt, trap, and fish for food regardless of provincial game laws which would otherwise confine Indians in parts of the Province that are under provincial administration. *Although inelegantly expressed, s.12 does not expand provincial legislative power but contracts it.* Indians are to have the right to take game and fish for food from all unoccupied Crown lands (these would certainly not include Reserves) and from all other lands they may have a right of access. There is hence, by virtue of the sanction of the *British North America Act*, 1930, a limitation upon provincial authority regardless whether or not Parliament legislates. (Emphasis added in original)[44]

In order to rationalize the fact that Treaty First Nations lost the commercial right to hunt, Cory J. believes that Treaty First Nations gained enlarged geographical areas and manners in which they may hunt. In looking at this decision, all Treaty First Nations received was the right to spotlight. Everything else that Cory J. refers to Treaty First Nations already had. I have major problems with Cory J. saying that Treaty First Nations agreed to this exchange. Again, I have to refer to the fact that no one has ever approached Treaty First Nations to discuss the *quid pro quo*.

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This decision is contrary to what was promised during the Treaty negotiations. The Treaty Commissioner made the following promises to Treaty Eight First Nations:

> Our chief difficulty was the apprehension that the hunting and fishing privileges were to be curtailed. The provision in the treaty under which ammunition and twine is to be furnished went far in the direction of quieting the fears of the Indians, for they admitted that it would be unreasonable to furnish the means of hunting and fishing if laws were to be enacted which would make hunting and fishing so restricted as to render it impossible to make a livelihood by such pursuits. But over and above that provision, **we had to solemnly assure them that such laws as to hunting as were in the interest of the Indians and were found necessary in order to protect the fish and the fur bearing animals would be made, and that they would be free to hunt and fish after the treaty as they would be if they never entered into it.** (Emphasis added)[45]

The Commissioner promised that Treaty First Nations would be able to continue hunting, fishing, and trapping in the same way they had before the Treaty as they would be if they never entered into the treaty. Treaty First Nations would be able to continue their traditional lifestyle. It is important to note that hunting and fishing rights were extremely important to Treaty First Nations. This point was acknowledged in an affidavit by James Cornwall, where he stated:

> Much stress was laid on one point by the Indians, as follows: They would not sign under any circumstances, unless their right to hunt, trap, and fish was guaranteed and it must be understood that these rights they would never surrender.[46]

It is important to note that not all of the judges in the Supreme Court accept this notion of a *quid pro quo*. Wilson J. in her

dissent adopted the information noted above about the importance of the Treaty right to hunt. She also accepted the following points:

> Indeed, it seems to me to be of particular significance that the Treaty 8 Commissioners, historians who have studied Treaty 8 and Treaty 8 Indians of several different generations unanimously affirm that the government of Canada's promise that hunting, fishing and trapping rights would be protected forever was the *sine qua non* for obtaining the Indians agreement to enter into Treaty 8. Hunting, fishing and trapping lay at the centre of their way of life. Provided that the source of their livelihood was protected, the Indians were prepared to allow the government of Canada to "have title" to land in the Treaty 8 area.[47]

With the exception of the statement about surrendering title to the land, I would agree with Wilson J. on her portrayal of the Treaty right to hunt. If the Treaty Commissioners had not promised that Treaty First Nations would have been able to continue hunting, fishing and trapping, the Treaty might still be waiting to be signed. If it was very important in the past, then I do not understand how Cory J. can think that the *quid pro quo* was sufficient for present First Nations. I do not believe it is and I do not think that Treaty First Nations would even now accept the exchange.

It is also important to note Cory J. ignored the basic Treaty interpretation principles as set out in *Nowegijick* and in *Badger*. It should be a straight forward application for the court to remember that if there are any questions about the Treaties then it must be interpreted in the First Nations' favour. It is also very

easy to remember the honour of the Crown is utmost. However, I do not see either of these principles in Cory J.'s decision. Instead, the judge is taking away the commercial right to hunt for an alleged *quid pro quo*. As per *Sparrow*, the Sovereign's intention must be clear and plain in order to extinguish an Aboriginal or Treaty right. There is nothing in s. 12 of the 1930 NRTA to suggest that the drafters wanted to extinguish the commercial right to hunt. Instead, s. 12 of the 1930 NRTA is affirming the Treaty right to hunt for food. Therefore, I would argue that commercial right to hunt still exists.

Another possibility interpreting section 12 of the 1930 NRTA was raised by Wilson J. She stated:

> ...one should view para, 12 of the Transfer Agreement as an attempt to respect the solemn agreement embodied in Treaty 8, not as an attempt to abrogate or derogate from that treaty. While it is clear that para. 12 of the Transfer Agreement adjusted the areas within the which Treaty 8 Indians would thereafter be able to engage in their traditional way of life, given the oral and archival evidence with respect to the negotiation of Treaty 8 and the pivotal nature of the guarantee concerning hunting, fishing and trapping, one should be extremely hesitant about accepting the proposition that para. 12 of the Transfer Agreement was also designed to place serious and invidious restrictions on the range of hunting, trapping and fishing related activities that Treaty 8 Indians could continue to engage in. In so saying I am fully aware that this Court has stated on previous occasions that it is not in a position to question an unambiguous decision on the part of the federal government to modify its treaty obligations. We must, however, be satisfied that the federal government did make an "unambiguous decision" to renege on its Treaty 8 obligations when it signed the 1930 Transfer Agreement.[48]

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Wilson J. makes an significant observation when she accepted the importance of the oral and archival evidence supporting the Treaty right to hunt, fish, and trap. I believe that section 12 of the 1930 NRTA only dealt with affirming the Treaty right to hunt. It was not meant to deal with the commercial right to hunt that Treaty First Nations possessed. There is no "clear and plain intent" necessary to extinguish the commercial right to hunt. Therefore, I have some reservations about Wilson J. accepting the Federal Government's right to make an "unambiguous decision". I have to raise the question what is the importance of the honour of the Crown if the Court allows the Federal Government to take these unilateral actions.

Cory J. made the following points about the Treaty right to hunt:

> It is thus apparent that although the Transfer Agreement modified the treaty rights as to hunting, there was a very real *quid pro quo* which extended the native rights to hunt for food. In addition, although it might well be politically and morally unacceptable in today's climate to take such a step as that set out in the 1930 Agreement without consultation with and concurrence of the native people's affected, nonetheless the power of the federal government to unilaterally make such a modification is unquestioned and has not been challenged in this case.
>
> Further, it must be remembered that Treaty 8 itself did not grant an unfettered right to hunt. That right was to be exercised "subject to such regulations as may from time to time be made by the Government of the country." This provision is clearly in line with the original position of the

> Commissioners who were bargaining with the Indians. The Commissioners specifically observed that the right of the Indians to hunt, trap and fish, as they had always done would continue with the proviso that these rights would have to be exercised subject to such laws as were necessary to protect the fish and fur bearing animals on which the Indians depended for their sustenance and livelihood.[49]

Unfortunately, Cory J. is again following the written text of the Treaty. He is ignoring the oral tradition and the Treaty interpretation principles from *Nowegijick* to restrict the Treaty right to hunt. I would be more inclined to accept Wilson J.'s comments on this issue. She found:

> I have difficulty in accepting my colleague's conclusion that the Transfer Agreement involved some sort of expansion of these hunting rights. Moreover, it seems somewhat disingenuous to attempt to justify any unilateral "cutting down of hunting rights" by the use of terminology connoting a reciprocal process in which contracting parties engage in a mutual exchange of promises.[50]

This is an important finding by Wilson J. She is concluding that Cory J.'s judgment is mistaken. Cory J. is searching for a way to justify his decision in this case while ignoring the interpretation principles established by the Court. The fact that this was the first case that the Court recognized the Treaty right to hunt was for food and commercial purposes should make the Court reconsider previous case law. It should not be looking for a way to make this decision fit into bad law.

The last aspect of the case that I want to examine is section 42 of the *Wildlife Act* and the sale of the bear hide. Cory J.

stated:

> At the outset it must be recognized that the *Wildlife Act* is a provincial law of general application affecting Indians not *qua* Indians but rather as inhabitants of the province. It follows that the Act can be applicable to Indians pursuant to the provisions of s.88 of the *Indian Act* so long as it does not conflict with a treaty right. It has been seen that Treaty 8 hunting rights have been limited by the provisions of the 1930 Transfer Agreement to the right to hunt for food, that is to say, for sustenance for the individual Indian or the Indian's family. In the case at bar the sale of the bear hide was part of a "multi-stage process" whereby the product was sold to obtain funds for the purposes which might include purchasing food for nourishment. The courts below correctly found that the sale of the bear hide constituted a hunting activity that had ceased to be that of hunting "for food" but rather was an act of commerce. As a result it was no longer protected by Treaty 8, as amended by the 1930 Transfer Agreement. Thus the application of s.42 to Indians who are hunting for commercial purposes is not precluded by s.88 of the *Indian Act*.[51]

I have already stated earlier that I do not believe that the judges from the cases dealing with the Merger and Consolidation Theory had all the of the facts in making their decisions. It was not until the case at bar that the Court recognized that the Treaty right to hunt included hunting for commercial purposes. With that in mind, I believe that Cory J. was wrong in dismissing the protections of Section 88 of the *Indian Act*. The commercial right to hunt is an existing Treaty right. Therefore, s.42 of the *Wildlife Act* should not affect the Treaty right to hunt because of the protections of s.88 of the *Indian Act*. As stated in *Simon*:

> The purpose of section 88 was decided in the case of *R.* v. *George* which states: the purpose of which was to make

> provincial laws applicable to Indians, so as to preclude any interference with rights under treaties resulting from the impact of provincial legislation.
>
> The effect of s. 88 of the *Indian Act* is to exempt the Indians from provincial legislation which restricts or contravenes the terms of any treaty. However, in *Kruger* v. *The Queen*, it was decided that in the absence of treaty protection or statutory protection, Indians are brought within provincial regulatory legislation. In reference to Indian treaties and s.88: "The terms of a treaty are paramount; in the absence of a treaty, provincial laws of general application apply."[52]

Simon is quite clear. If there is a conflict between a Treaty right and a provincial law of general application, then the Treaty right prevails. In this case, *Horseman* has a guaranteed Treaty right which includes hunting for food and commercial purposes[53]. This should preclude Horseman from prosecution under section 42 of the *Wildlife Act*.

Another way to view the application of the *Wildlife Act* was raised by Wilson J. She decided:

> I have already suggested that while the federal government may have the power to regulate trafficking in wildlife provided that such regulation is in the interest of the Indians, the provincial government has no power to regulate Indian practices that fall within the Indians' traditional way of life and that are linked to their support and subsistence. Insofar as Treaty 8 Indians are concerned, the government of Alberta is limited to regulation of purely commercial and sport hunting.
>
> The trial judge stated:
>
> Keeping in mind the necessity of making factual findings in every case that comes before the court, I find that Mr. Horseman sold the grizzly bear hide in a manner, and for the purpose of subsistence and exchange." I find that Mr.

> Horseman did not engage in a commercial transaction that is one having profit as a primary aim.
>
> She concluded that Mr. Horseman's actions fell outside the range of activities which the province of Alberta could regulate by means of the *Wildlife Act*. This result accords with common sense. While the province may be able to limit the Indians' right to traffic in hides where such trafficking forms part of a commercial venture or is the result of sport hunting, it does not, in my view, have the power to regulate an isolated sale that is the result of an act of self-defence. All the more so when the hide was sold by Mr. Horseman, as the trial judge found on the facts, not for commercial profit but to buy food for his family.[54]

Wilson J. is upholding the notion that Horseman was not engaging in a purely commercial transaction. Horseman was only trying to feed his family. She is following the oral tradition by recognizing that the Treaty right to hunt was for food and commercial purposes. This in itself is a positive step.

With regard to Horseman engaging in a "multi-stage process", I would have to respectfully disagree. Horseman was simply acting out of self-defence. He did not go hunting with the thought process that I am going to kill a grizzly bear. Instead, he was hunting to help feed his family. When he received the license the next year, he did not go hunting for another bear but rather he sold the original bear hide. Cory J. did not recognize that it is a traditional First Nations' practice not to waste the resources. We do not hunt bears unless we are absolutely forced to do so. Horseman should have been commended for his actions instead of

charging him with trafficking. I would have to agree with Wilson J. finding on this issue. She found:

> I believe it is important to emphasize that all parties were agreed and that the trial judge so found that Mr. Horseman was legitimately engaged in hunting moose for his own use in the Treaty 8 area when he killed the bear in self-defence. Mr. Horseman did not kill the bear with a view in selling its hide although he was eventually forced to do so a year later in order to feed himself and his family. The sale of the bear hide was an isolated act and not part of any planned commercial activity.[55]

I do not mean to belabour the point but again another aspect of Cory J.'s decision was proven wrong. It makes it hard for Treaty First Nations when a judge is allowed to make such a bad decision and nothing is done about it. All First Nations can hope for is for a later decision to overturn this bad judgment or for the Federal Government to sit down and negotiate with Treaty First Nations on the spirit and intent of the Treaties. In this next section, I will examine possible alternatives to the courts.

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1. *Sawridge Band* v. *Canada* [1995] 4 C.N.L.R. 121

2. **Ibid.** at 156.

3. *Sawridge Band* v. *Canada* Doc. A-779-95, A-807-95 (Fed. C.A.) 3 Admin. L.R. (3d) 69.

I believe that the Federal Court of Appeal had the opportunity to censure Judge Muldoon for his very racist judgment. I harken to Dickson J.'s words in *Simon* that:

> "It should be noted that the language used by Patterson J., (in the *Syliboy* case), reflects the biases and prejudices of another era in our history. Such language is no longer acceptable in Canadian law and indeed is inconsistent with a growing sensitivity to native rights in Canada."

R. v. *Simon* [1986] 1 C.N.L.R. 153, [1985] 2 S.C.R. 387 at 399 [hereinafter *Simon*].

I do not believe that simply referring to "his Lordships colorful language" is sufficient especially when Judge Muldoon is making racist statements. For example, he said the following with respect to oral tradition:

> That surely is the trouble with oral history. It just does not lie easily in their mouth of the folks who transmit oral history to relate that <u>their</u> ancestors were ever venal, criminal, cruel, mean-spirited, unjust, cowardly, perfidious, bigoted, or indeed, aught but noble, brave, fair and generous, etc. etc.
>
> In no time at all historical stories, if ever accurate, soon become morally skewed propaganda, without objective verity. Since the above mentioned pejorative characteristics, and more, are alas common to humanity they must be verily evinced by everybody's ancestors, as they are by the present day descendants, but no one, including oral historians wants to admit that. Each tribe or ethnicity in the whole human species raises its young to believe that they are "better" than everybody else. Hence, the wars which blighted human history. So ancestor advocacy or ancestor worship is one of the most counter-productive, racist, hateful and backward- looking of all human characteristics, or religion, or what passes for thought. People are of course free to indulge in it "perhaps it is an aspect of nature" but it is that aspect which renders oral history highly unreliable. So saying, the Court is most

> emphatically not mocking or belittling those who assert that because their ancestors never developed writing, oral history is their only means of keeping their history alive. It would always be best to put some of their stories into the earliest possible time in order to avoid dome of the embellishments which renders oral history so unreliable."

Sawridge Band v. *Canada* [1996] 1 F.C. 3 (T.D.), at 101-102.

I find Muldoon J.'s language to be very offensive. I am aware that Muldoon J. did not have the benefit of recent decisions of *Delgamuukw* and *Marshall* but that does not excuse his decision. I find his continued references to Nazis, apartheid, and comparing First Nations to animals appalling. This judgment is an example of what can go wrong when First Nations bring their cases to court. For solutions to this problems, see Chapter 4.

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

5. *R.* v. *Horseman* [1990] 2 C.N.L.R. 95 [hereinafter *Horseman*]

6. *R.* v. *Nowegijick* [1983] 2 C.N.L.R. 89. [hereinafter *Nowegijick*]

7. *Ibid.* at 94.

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

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

10. *R.* v. *Marshall*, [1999] 4 C.N.L.R. 161 [Hereinafter *Marshall*]

11. *Badger, supra* note 4 at 92.

12. Section 35(1) of the Constitution Act, 1982 states:

> "The existing Aboriginal and Treaty rights of the Aboriginal peoples of Canada are hereby recognized and affirmed."

Section 35(2) defines Aboriginal peoples as including "Indians, Inuit, and Métis."

13. *Horseman, supra* note 5 at 106.

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

15. *Delgamuukw* v. *British Columbia* [1998] 1 C.N.L.R. 14.

16. *Re: Paulette,* supra note 14 at 123.

17. **Ibid.** at 129.

18.See *R.* v. *Sparrow,* [1990] 3 C.N.L.R. 160 at 177.

The court stated:

> "It is worth recalling that while the British policy towards the native population was based on respect for their right to occupy their traditional lands, a proposition to which the *Royal Proclamation of 1763* bears witness, there was from the outset never any doubt that sovereignty and legislative power, and indeed the underlying title, to such lands vested in the Crown."

19. *Re: Paulette, supra* note 14 at 141.

20.I am aware that *Re: Paulette* focuses on Treaty Eight First Nations in the Northwest Territories. However, as was demonstrated in my last chapter, **all** Treaty First Nations believe that their sacred Treaties were peace and friendship Treaties and not land surrender Treaties.

21. Morrow J.'s decision was overturned by the Northwest Territories Court of Appeal and the Supreme Court of Canada but it was done on a different issue.

See *Re: Paulette* [1976] 2 W.W.R. 193, 63 D.L.R. (3d) 1, 9 C.N.L.C. 342 (N.W.T.C.A.) (Reversed on other grounds), 9 C.N.L.C. 403, [1977] 1 W.W.R. 321, 72 D.L.R. (3d) 161 (S.C.C.) (Affirmed on other grounds)

22. *Horseman, supra* note 5 at 109.

23. *R.* v. *Sparrow* [1990] 3 C.N.L.R. 160 at 171.

24.The Royal Commission on Aboriginal Peoples made the following points on the inability of First Nations to hire lawyers. It found:

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> "In a 1927 amendment, the superintendent general acquired a powerful new weapon in his arsenal - the right to require that anyone soliciting funds for Indian legal claims obtain a license from him beforehand. Conviction could lead to a fine or imprisonment for up to two months. Official explanation once again focused on the need to protect Indians, this time from unscrupulous lawyers and other "agitators". ...
>
> The effect of this provision was not only to harass and intimidate national Indian leaders, but to impede Indians all across Canada from acquiring legal assistance in prosecuting claims until the clause was repealed in 1951."

Canada, *Report of the Royal Commission on Aboriginal Peoples*, Looking Forward, Looking Back, Volume 1, (Ottawa: Minister of Supply and Services Canada, 1996) at 296.

See Section 149A of the revised *Indian Act* (R.S.C. 1927, chapter 98). See NAC/RG10, volume 6810, file 470-2-3, volume 8, quoted in John Leslie and Ron Maquire, *The Historical Development of the Indian Act*, second edition, (Ottawa: Department of Indian Affairs and Northern Development, Treaties and Historical Research Centre, 1978) at 121.

25. *Simon, supra* note 3 at 169.

26. **Ibid.** at 174.

27. *Delgamuukw, supra* note 15 at 49-50.

28. *Marshall, supra* note 10 at 172.

29. *Horseman, supra* note 5 at 100.

30. See *Cardinal* v. *The Attorney General of Alberta*, 7 C.N.L.C. 307.

31.The notion of the honour of the Crown has been dealt with in many Supreme Court of Canada decisions. In *Marshall*, the Court affirmed this notion. It accepted Cory J.'s findings in *Badger*. He stated:

> "... the honour of the Crown is always at stake in its dealings with Indian people. Interpretation of treaties and statutory provisions which have an impact upon treaty or aboriginal rights must be approached in a manner which

> maintains the integrity of the Crown. It is always assumed that the Crown intends to fulfil its promises. No appearance of "sharp dealing" will be sanctioned."

Marshall, supra note 10 at 189.

Therefore, I would respectfully argue that to allow section 12 of the 1930 NRTA to infringe on First Nations' treaty right to hunt violates the honour of the Crown. I believe that future Court cases after *Marshall* will recognize this concept and it will provide First Nations with the opportunity to have *Horseman* overturned.

32. The fact that Treaty First Nations were not included in the 1930 NRTA negotiations is an important one. In my last chapter, Fred Oliver Okeymaw said that:

> "none of the reserves had any knowledge of the changes that were made in 1930. No one was approached. No Chief and Council were approached and told that the Federal Government were giving the provinces these new powers. **No consent was obtained**." (Emphasis added)

Interview with Elder, F.O. Okeymaw, (1991),Driftpile, Alberta.

It is also important to recognize that Horseman's lawyers made the same argument.

> "The appellant argues that the Transfer Agreement of 1930 was not signed by the Indians. Since they were not a party to it, they could have not agreed to any restriction of their hunting and fishing rights and that these rights could not have been lost as a result of the operation of what has been called the "merger and consolidation theory."

Horseman, supra note 5 at 102.

Both of these quotations are important because it stresses the point that First Nations were not involved in any of the negotiations. The question becomes how can an agreement which affects the Treaty right to hunt be allowed to do so if Treaty First Nations were not even invited to the process. The raises serious questions about the honour of the Crown and the court should not allow the 1930 NRTA to have any affect on First Nations or their rights.

33. *Horseman, supra* note 5 at 102-103.

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34. *R.* v. *Sioui* [1990] 3 C.N.L.R. 127 at 152.

35. 1990 was a landmark year for cases dealing with Aboriginal and Treaty rights. The Supreme Court of Canada came down with three important decisions: *Horseman, Sioui, and Sparrow.* All of these cases came down within six months of each other. It is interesting that there are aspects of *Sioui* and *Sparrow* that could have been used to consider *Horseman* in a different way. Unfortunately, Cory J. ignored both the Treaty interpretation principles and the case law from the other two decisions in making his preposterous *quid pro quo* argument.

36.The theory that there is a duty created by Section 12 of the 1930 NRTA for the three prairie provinces was referred to in an article by Monique Ross and Cheryl Sharvit. It is their contention that:

> "The current regulatory scheme by which the province allocates and manages timber harvesting rights over traditional lands of the Cree and Dene could be challenged as a breach of Treaty 8. The treaty grants its Aboriginal signatories and their descendants the right to gain their subsistence through hunting, trapping and fishing. Obviously, the exercise of these rights depends upon the existence and health of habitat and ecosystems, the survival of wildlife populations and access to wildlife. The terms of the treaty, including its oral terms demonstrate that the parties did not agree to allow the government to promote the depletion or degradation of natural resources and ecosystems for the benefit of the dominant industrial society and to the detriment of Aboriginal peoples' rights, whose exercise depends on resource preservation and health. Accordingly, provincial allocation, use and management of forest resources which jeopardizes a right to gain subsistence from hunting, trapping or fishing amounts to an infringement of this fundamental right. At a minimum, provincial forestry legislation which prevents or restricts the exercise of these treaty rights should be subjected to a justification test under s. 35(1) of the *Constitution Act*, 1982. Treaty 8, coupled with s. 35(1), arguably imposes an obligation on the province to develop a forest management regime which does not unjustifiably infringe these rights."

Monique M. Ross and Cheryl Y. Sharvit, "Forest Management in Alberta and Rights to Hunt, Trap, and Fish Under Treaty 8", (1997) 36 Alta L. Rev. 645 at 647.

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The province did not consult with Treaty Eight First Nations when it allowed a number of pulp mills to be built in our traditional territory. As will be shown, the effects of these mills and other government interference has caused suffering within First Nations' communities. This will be the source of future cases against Alberta, Saskatchewan and Manitoba.

There is some legal precedent to Ross and Sharvit's claims. In British Columbia, the Tsawout Band made a claim to stop expansion in their traditional fishing territory. Meredith J. made some very important findings in the *Claxton* case. He said:

> "Finally, the commitment of the Crown to the preservation of the whole of the fishery has conferred upon the Indians a very important right continuing to the present day. The grant of a License of Occupation leading to the construction of a breakwater and a marina would constitute an injury, an erosion of that right. The injury would be irreparable.
>
> For these reasons, I hold that the Tsawout Band in entitled to an injunction that the License of Occupation is of no force or effect as it purports to permit the construction of the marina, parking lot and breakwater in contravention of the contractual lot of the Band binding on the Province to carry out the fishery "as formerly" in Saanicton Bay. The Band is also entitled to the injunction sought to restrain interference and diminution of the fishery threatened by the construction of the foregoing works."

Claxton et al v. *Saanichton Marina, Ltd. and A.G.B.C.* [1987] 4 C.N.L.R. 48 at 61-62.

I believe that Treaty Eight First Nations could use *Claxton* as a basis to force the Province of Alberta to consider its actions before proceeding with further expansion of logging in northern Alberta. All of the pulp mills in our territory are having an impact on the Treaty right to hunt. *Claxton* would allow Treaty First Nations to fight for an injunction to prevent further erosion of our rights.

37. My main argument in this section is that the Federal Government had no right to negotiate the 1930 NRTA with Alberta, Saskatchewan, and Manitoba without inviting the Treaty First Nations affected by the Agreement. It is a breach of the honour of the Crown especially when the 1930 NRTA affects two important Treaty areas: the natural resources and the Treaty right to hunt.

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One argument that I have to address is the duty, created by section 12 of the 1930 NRTA on the above mentioned provinces, to ensure a continuing supply of game and fish. I want to acknowledge that I believe that Section 12 of the 1930 NRTA should not affect the Treaty right to hunt. However, there is a duty owed to Treaty First Nations. It may be a short lived one especially if Treaty First Nations challenge to the validity of the 1930 NRTA. However, based on current law, I would be remiss if I did not address the duty and the breach of it by the provinces.

38. Goddard, John, The Last Stand of the Lubicon Cree, (Vancouver: Douglas & McIntyre, 1991) at 75.

39. Drumbeat: Anger and Renewal in Indian Country, edited by Boyce Richardson, (Toronto: Summerhill Press Ltd., 1989) at 239-240.

40. *Horseman, supra* note 5 at 100.

41. **Ibid.**

42. *Horseman, supra* note 5 at 103.

43.I believe that Cory J. made a mistake in his decision. Prior to 1982, First Nations could not hunt in the fall because of the *Migratory Birds Convention*. See *Sykyea* v. *The Queen*, [1964] S.C.R. 642.

44. **Ibid.** at 104-105.

45. **Ibid.** at 111.

46. **Ibid.**

47. **Ibid.** at 111-112.

48. **Ibid.** at 114-115.

49. **Ibid.** at 105.

50. **Ibid.** at 118.

51. **Ibid.** at 106.

52. *Simon, supra* note 3 at 174-175.

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53. If the court will accept that the Treaty right to hunt includes hunting for commercial purposes then it will open up all of the Treaty areas. Every Treaty First Nations person will be able to engage in this process. I have some strong reservations for this. Yes, it would mark a great victory for Treaty First Nations that the court is finally implementing the spirit and intent of the Treaties. However, I would be worried about over-hunting and depletion of the resources. I believe that this is where the application of *Sparrow* would come in. Whereby, the Fish and Wildlife Department would meet with Treaty First Nations' representatives to discuss conservation issues. (It would be a similar process as what occurred in Saskatchewan where the Federation of Saskatchewan Indian Nations, the Métis Nation of Saskatchewan and the Provincial Government came to an agreement to stop spotlighting.) This cooperation is needed in order to protect the wildlife.

54. *Horseman, supra* note 5 at 118-119.

55. **Ibid.** at 108.

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Chapter Four: Alternatives to the Courts

4.1 Introduction

As was demonstrated in the third chapter, the Supreme Court of Canada[1], at times, does not properly apply its interpretative guidelines when considering the spirit and intent of the Treaties. Treaty First Nations find this to be unacceptable. As such, it is important to analyze various alternatives to utilizing the courts. There are three options that will be examined that are more reflective of the historic nation to nation relationship that Treaty First Nations are purportedly enjoying with the Federal Crown.

Treaty First Nations have many reasons for not accepting the courts. One of the main factors is that our forefathers did not accept the notion that a foreign court system would interpret our sacred Treaties. It was our belief that if there was a question about the true meaning of the Treaties then representatives of the Treaty First Nations and representatives of the Federal Crown would convene a meeting to discuss these issues. This belief is echoed in a statement made by the Chiefs of Treaty 6 and 7 in their response to the *Charlottetown Accord*. They stated:

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> The "Unity Package" proposes that the Canadian courts interpret First Nations laws. This again is interference. It is only when there is a disagreement over a Treaty obligation that affects both of our governments that we need to meet. It was not the agreement under Treaty 6 and 7 that Canadian courts would unilaterally interpret these obligations. We would only agree to a tribunal composed equally of Treaty people and people of the Crown to interpret these obligations in accordance with the consensual process established pursuant to our sacred Treaties.[2]

This quotation demonstrates that Treaty First Nations feel very strongly that the courts should not be the only bodies allowed to interpret Treaties and Treaty rights. Therefore, it is important to find suitable alternatives to the court system.

This issue is not only limited to the Treaty First Nations in the west. The Iroquois Confederacy have similar beliefs. The Two Row Wampum Belt confirms that:

> When the Haudenosaunee first came into contact with the European nations, treaties of peace and friendship were made. Each was symbolized by the Gus-Wen-Tah or Two Row Wampum. 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, traveling 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 and their customs and their ways. We shall each travel the river together, side by side, but in our own boats. Neither of us will try to steer the other's vessel.[3]

The basic principle of the Two Row Wampum Belt is fairly unambiguous. It is designed to allow both the First Nations' government(s) and the non-Native government(s) to work side by

side, with each government respecting each other's differences. It also sets out the relationship between the two governments. When the courts start making decisions on the true meaning of the Treaties, it violates the principles of the Two Row Wampum Belt.

Treaty First Nations have a similar principle to the Two Row Wampum. We also believe that we would respect each other's laws when we were in each other's territory. For example, a Treaty First Nations person would know that if he/she broke a Canadian law then that person would be subject to the Canadian justice system. Conversely, if a non-Native person broke a First Nations' law then he/she would be involved in the healing process to rectify the situation.

In this chapter, I will examine three possible solutions to the problems that Treaty First Nations are facing with the courts. First, I will examine the possibility of having First Nations' representation on the Supreme Court of Canada. Second, I will examine the recommendation of the Royal Commission on Aboriginal Peoples in setting up a Treaty Tribunal to deal with Treaty grievances. Finally, I will analyze the situation in Saskatchewan where the Office of the Treaty Commissioner is working with both the Federation of Saskatchewan Indian Nations and the Federal Government on a Treaty initiative. Any of these solutions would be an improvement over the current court system.

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4.2 Revisions to the Supreme Court

One of the many recommendations of the Royal Commission is to adjust the Supreme Court of Canada. RCAP stated:

> We believe that the Supreme Court of Canada should include at least one Aboriginal member. At any time, the federal government could appoint an Aboriginal person to fill a vacancy on the court. We believe that a requirement that one of the justices be Aboriginal should be subject of a constitutional amendment. This would require provincial unanimity whether it involved designating one of the existing nine seats or expanding the court.

As was stated previously, it is obvious that the court does not understand the significance of the spirit and intent of the Treaties. An Aboriginal judge might be able to explain and educate[4] the judges on the importance of Aboriginal and Treaty rights. In addition, the Aboriginal judge could serve as a protector of our rights. This amendment would not shift interpretation of Aboriginal and Treaty rights from the courts. However, until a separate Treaty tribunal is implemented, this could be a beginning.

We can find support for this notion by briefly examining Quebec's representation on the Supreme Court of Canada. After Confederation, Parliament was considering the makeup of the Supreme Court of Canada. It made the following revision:

> A second change for Quebec occurred when a provision was added by amendment during the debate in Parliament specifying that at least two of the judges of the court must be selected from the Quebec bar. Since the total number of judges had been reduced from seven to six in the Liberal bill, this meant that

> Quebec was to be guaranteed a third of the justices of the court.[5]

The main reason that Quebec is guaranteed representation on the Supreme Court of Canada relates to their civil law system. Another aspect is the fact that the English and French are considered the founding nations in this country. Consequently, the French are guaranteed representation on the Supreme Court.

In 1949, Canada was moving away from having the Judicial Committee of the Privy Council as the highest court in the country. It wanted to revise the court system to install the Supreme Court of Canada as the top court in the land. One of the amendments was:

> As part of the transition to the final court of appeal, the number of judges was increased to nine, Quebec received a guarantee of three judges, an increase in one.[6]

For the reasons mentioned earlier, Quebec is still assured a number of seats at the Supreme Court. As First Nations, we have similar grounds to be guaranteed at least one seat on the Supreme Court. Although, it has not been recognized politically, First Nations have been living on this land, we call Turtle Island, since time immemorial. We have our own governments, justice systems, languages, culture, and traditions. We also have serious reservations about having the courts continuing to interpret our sacred Treaty rights. However, in order to prevent a further deterioration of our rights, we need to have at least one First Nations Supreme Court of Canada judge[7].

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4.3 Treaty Options

One of the recommendations of the recent Royal Commission on Aboriginal Peoples calls for the formation of a Treaty Tribunal. This option is viable because it is important to move Treaty issues away from the courts and into negotiations. RCAP recommended:

> Federal companion legislation to the Royal Proclamation provided for the establishment of an independent administrative tribunal, to be called the Aboriginal Lands and Treaty Tribunal.
>
> First, the tasks must be appropriate for the body to which they are assigned. This is the principle of institutional competence. It means, for example, that multi-dimensional and complex public policy decisions of wide-ranging importance should be made through a political process by persons accountable to those they represent, not an adjudicative body independent of the parties. On the other hand, the resolution of disputes with less sweeping ramifications, depending more on judgments about the specifics of particular issues, can be appropriately entrusted to a body that is, and is seen to be, informed, open, impartial, and independent.
>
> Second, before the body is established, its design, jurisdiction, procedures, and powers must have been the subject of wide consultation and broad agreement. Its composition must be representative of those affected by the issues to be decided. This is the principle of inclusiveness.
>
> Third, the powers and procedures of the body must be compatible with a process that is participatory, informal and inexpensive. This is the principle of accessibility. An adversarial model dominated by lawyers, in which the decision-making body plays an essentially passive role, is unlikely to meet these objectives. For these reasons, the body must have the capacity to deal comprehensively with the issues before it, and its decisions should be final, subject only to limited rights of reconsideration and judicial review.
>
> Fourth, any body entrusted with responsibilities related to implementing the Commission's recommendations for a renewed relationship between Aboriginal and non-Aboriginal people must

> have available the ingredients for fully informed, thoughtful, and wise decisions. These can be supplied through representations made at public hearings, the expertise and the knowledge of its members, staff and consultants, and the results of the research. This is the principle of responsive deliberation.
>
> One of its principle roles will be ensure a just resolution of existing specific claims, related mostly, but not exclusively to lands and resources. This tribunal will have the responsibility not only of monitoring the fairness of the bargaining process by which most specific claims should be settled, but also, where no agreement is reached, for adjudicating outstanding substantive issues and making final and binding decisions on the merits of these claims.[8]

A tribunal is exactly what First Nations need to address their various Treaty grievances. It has been demonstrated throughout this thesis that there are problems with understanding the spirit and intent of the Treaties and how the courts are wrongly interpreting Treaty rights. As such, this tribunal would allow Treaty First Nations to move their concerns out of the adversarial court system and into negotiations.

An area that could be examined[9] by the Treaty Tribunal are the implications of the agreement to share only the six inches of topsoil with the non-Native settlers. The validity of the Canadian Land Titles System and *the 1930 Natural Resource Transfer Agreement* could be questioned. When the six inch principle is applied, the Treaty First Nations have three possible options with respect to restitution for the land loss, loss of use and the misappropriation of the natural resources. One, the land system currently in place

in British Columbia, Alberta, Saskatchewan, and the Northwest Territories would no longer have the force and effect of law. The land would revert back to the control of the Treaty Eight First Nations. This, however, would be impractical because of all the complications related to this solution. A more reasonable solution would be for the Federal Crown to come to an arrangement with Treaty Eight First Nations and the provinces of Alberta, Saskatchewan, and Manitoba such that all unoccupied Crown Land which is not currently being used would come under the control of Treaty Eight First Nations. This land could then be equally divided between all Treaty Eight First Nations.

Two: there would have to be compensation provided for the lost use and enjoyment of the lands. The specific amount would be to provide for the past, present, and future loss of the land. This settlement should occur where it is unrealistic to give back the actual land to the First Nations. This settlement should allay the fears of non-Native people. These are the fears that if the land is "given" back to the First Nations, then the non-Native people will lose their homes and property.

Three, the six inches of topsoil given to settlers obviously did not include the natural resources either above or below the ground. Compensation, therefore, for these lost natural resources must be considered. Vast oil patches, timber and other natural

resources have been considerably depleted. Moneys should be provided to First Nations for both past and present revenue. An arrangement could be made to share these resources or revenues with the First Nations.

There is also the consideration of whether the Federal Government even had the right to transfer the natural resources to Manitoba, Saskatchewan, and Alberta in *the 1930 Natural Resource Transfer Agreement*. According to the major principle of Canadian property law, specifically *nemo dat qui non habet*, you cannot sell or transfer something if you do not own it. Following *nemo dat*, Canada had no right to transfer these natural resources to the provinces because Canada did not own them. All Canada gained from Treaty Eight was the ability to share the land with the Treaty Eight First Nations. The Treaty First Nations did not agree to part with these resources. Furthermore, the Treaty First Nations' oral histories clearly state that their leaders made specific and unambiguous statements to the opposite[10]. For example, Elder Eva Louise Laboucan's statement "Just six inches, just the top from the ground, just the ploughing and nothing else[11]". Therefore, I would support the call for immediate negotiations between all three parties (the Federal Government, the three Prairie Provinces and the Treaty First Nations) to discuss the percentage of revenues owed to First Nations and their share of these revenues in the

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future.

Another area for the tribunal to consider would be the issue of reserve land. First Nations believe that they kept significant portions of their traditional territories. Harold Cardinal says that this notion of retained lands is called the *skun gun.* We believed that the *skun gun* was important so we could continue hunting, fishing, trapping, and gathering. In addition, land was needed for agriculture and the fact that our populations would be increasing in the future.

Another important aspect is the headland to headland concept stated by Harold Cardinal. In the Treaty and Aboriginal Rights Research (hereinafter referred to as (T.A.R.R.) Interviews with Elders Program, Richard Lightning of T.A.R.R. conducted the following interview with Jean-Marie Mustus, Sucker Creek Reserve. In the interview, Mr. Mustus talked about the parameters of the Sucker Creek Reserve and the Driftpile Reserve:

> The treaty Indians were given reserves and surveying was carried out. This particular reserve of Sucker Creek contains a lot of water. Sucker Creek has a total of 55,000 acres, and Driftpile contains 65,000 acres. The reserves are adjacent to the (Lesser Slave) lake and the water takes a large portion of the reserve. The reserve was 25 miles in length when it was given and each band chose to have 12 miles a piece. The Driftpile reserve is quite large, and so is Sucker Creek, but they have a lot of water. A large part of the 55,000 acres is not good for cultivation; so they will not have any use for it.[12]

An interesting point about the size of the Sucker Creek reserve

came out in the interview with Joseph Willier of the Sucker Creek Reserve. Mr. Willier contends that a large portion of the Sucker Creek reserve consists of the Lesser Slave Lake. The lake portion of the reserve was chosen to help maintain the fishing aspect of the First Nations' way of life. Therefore, Mr. Willier's statements raises the following question. Does the Sucker Creek First Nation own part of the Lesser Slave Lake? If the answer is yes, then it is apparent that First Nations should be able to participate in any environmental process that will affect Lesser Slave Lake. This would presumably include examining the pulp mills that affect Lesser Slave Lake. Any review would have to ensure that these pulp mills do not irreparably harm Lesser Slave Lake. Also, as water becomes more scarce, First Nations would want to be able to preserve and protect Lesser Slave Lake for future generations.

Interviews with Treaty Eight Elders, of different areas, identify a common concern. Namely, the fact that the reserve size was not acceptable to any of the First Nations. Fred Oliver Okeymaw, Driftpile First Nation, had this to say about the land in the Lesser Slave Lake area.

> To his understanding, when the treaty was signed, all the land in the Lesser Slave Lake areas - Grouard Bay to the Lesser Slave Lake area of Sawridge - was to be preserved for the natives of the Lesser Slave Lake.
>
> The Government of Canada had it all figured out that they would give First Nations little pieces of land here and there ... [the] Government had it set out that yes we would give

> Keenosayo's Band part of where Sucker Creek is, Driftpile, Sawridge and Swan River.
>
> It was the understanding at the Treaty that the land in the Lesser Slave Lake area was to be preserved/retained because the First Nations owned the land.[13]

It was interesting to hear what Fred Oliver Okeymaw had to say about the reserves in the Lesser Slave Lake area because that is my people's territory. One part of the history that did not come out in the interview was about Keenosayo. The interviewer did not ask about how or who requested the particular reserves. From my peoples' oral history, I know that Keenosayo was one of five brothers who lived in the Lesser Slave Lake area. Each of the brothers chose different reserves located around Lesser Slave Lake. The government records, however, have the appearance that it was five different unrelated people selecting the reserves. Therefore, when Mr. Okeymaw talks about the land being preserved for First Nations, each of the brothers picked their reserves to suit that purpose. This is the source of the belief that the land in the Lesser Slave Lake area is owned by the Treaty First Nations. However, through government actions, all that the Treaty Eight First Nations own in the Lesser Slave Lake area today are the little bits and pieces of land as described by Mr. Okeymaw.

4.4 The Office of the Treaty Commissioner

Throughout Canada, First Nations are negotiating with the Federal Government on many issues. It is my belief that

Saskatchewan First Nations are at the forefront in dealing with their various Treaty concerns. In the 1970's, the Federation of Saskatchewan Indian Nations concluded a land claims agreement with the Federal Government. Treaty First Nations were going to receive more land to add to their existing reserves. Unfortunately, in the early 1980's, the Federal Government pulled out of the agreement. In response, the Federation of Saskatchewan Indian Nations, along with four of its member bands filed suit against the Federal Government to have the original terms of the initial agreement fulfilled. Thankfully, cooler heads prevailed and it was decided that the land issue should be brought before an independent tribunal. As a result, the Office of the Treaty Commissioner was formed.

> The Federation of Saskatchewan Indian Nations and the Government of Canada created the first Office of the Treaty Commissioner in 1989 with a mandate to review Treaty land and education entitlement. The Office presented a report to the parties on Treaty land entitlement in May 1990. This report provided the foundation for negotiations between the FSIN, Canada, and Saskatchewan resulting in the Saskatchewan Treaty Land Entitlement Framework Agreement for twenty-eight First Nations in Saskatchewan. The Office of the Treaty Commissioner continued its work in Treaty Land Entitlement until its mandate expired in March 1996.[14]

Saskatchewan Treaty Land Entitlement is a good example of what can happen when First Nations' government(s) and the Federal Government negotiate instead of litigate. The Office of the Treaty Commissioner (hereinafter OTC) was renewed after its initial

mandate expired. Judge David Arnot was appointed Treaty Commissioner and a new mandate was created. The OTC now deals with the following areas:

> The OTC is an independent and impartial office. Its mandate is to facilitate exploratory Treaty discussions between the FSIN and the government of Canada on the nature of Treaty relationships as well as on the following specific Treaty issues:
>
> - child welfare;
> - education;
> - shelter;
> - justice;
> - Treaty annuities; and
> - hunting, fishing, trapping, and gathering.
>
> The exploratory Treaty discussions are held between representatives of the government of Canada and the Federations of Saskatchewan Indian Nations. The Government of Saskatchewan is also represented at the Treaty discussions; however, Saskatchewan is present as an observer only, out of respect for the special Treaty relationship between First Nations and Canada. The parties have adopted a number of important objectives for their discussions:
>
> - to build a forward-looking relationship that began with the signing of Treaties in Saskatchewan;
> - to reach a better understanding of each other's views on the Treaties; and
> - to explore the requirements and implications of Treaty implementation.[15]

I have been impressed with the early success of this new mandate. The OTC wanted to learn more about the spirit and intent of the Treaties from the First Nations and government of Canada's viewpoints. As such, it commissioned two reports. The first one was entitled My Dream: That We Will Be One Day Clearly Recognized As First Nations, by Harold Cardinal and Walter Hildebrandt. Judge

Arnot made the following comments on My Dream:

> *My Dream* adds new understanding to our common body of knowledge. The Elders shared their Treaty knowledge, demonstrating their trust in our process and their belief that the Office of the Treaty Commissioner will handle this new knowledge responsibly. *My Dream* is an insightful, albeit preliminary, report which provides a broad conceptual framework for viewing Treaties from First Nations' world views based on the spiritual foundations of the Cree, Saulteaux, Assiniboine, and Dene peoples. In doing so, it also sets the context for understanding First Nations' perspectives on the meaning of the Treaties and the nature of the Treaty relationship.
>
> The authors outline the First Nations' understandings of Treaties and Treaty responsibilities according to the First Nations family paradigm for Treaty making. In entering into Treaty relationships, First Nations adopted their new Treaty partner and considered these new relations as sacred and enduring. According to Treaty Six Elder, George Cannepotatoe:
>
> "...The Treaty Commissioner had come over to shake their hands, and the Commissioner offered to be related to them and he wanted the rest of the white people to have a relationship with them... in our way we made those commitments through and in the name of and in the force of the pipe stem. And it was the pipe stem that the Chief had Alexander Morris hold who came as the representative. That is our solemn way of doing promises."[16]

The information contained in My Dream is going to be invaluable for educating First Nations and non-Native people about the spirit and intent of the Treaties. Finally, we are at a stage in Canadian history that oral tradition is recognized as the equivalent of the written word. My Dream will allow First Nations the opportunity to present the First Nations' understanding to the Canadian public.

The other report was authored by Frank Tough, J.R. Miller and Arthur Ray. It was entitled Bounty and Benevolence: A Documentary

History of Saskatchewan Indian Treaties. Arnot made the following comments on this work:

> In researching and writing *Bounty and Benevolence*, the authors used many sources. Archival sources included records of various departments of the government of Canada, records of the Hudson's Bay Company, personal papers of some government Treaty negotiators, politicians and government officials. Secondary sources included Annual Reports of the Department of Indian Affairs, published documents such as the *Royal Proclamation of 1763*, and newspapers accounts from the Treaty area. ... *Bounty and Benevolence* ...[made the following] conclusions:
>
> "Writing about Treaties [in the past] began with advocates posing as commentators, and proceeded to an uncritical survey of the topic that dominated academic understanding for half a century. Only during the past two decades, stimulated in part by land claims research commissioned by the (then) Federation of Saskatchewan Indians, has close examination and reinterpretation been occurring. This report belongs in the unfolding process of reinterpreting the genesis, contents, and impact of the Treaties that is still going on."[17]

I believe that this source also has its merits. I know that Professor Frank Tough has been researching the history behind the creation of the *1930 Natural Resource Transfer Agreement*. He has testified on behalf of First Nations arguing that the *1930 Natural Resource Transfer Agreement* was not intended to have the impact it had on the Treaty right to hunt. Tough is providing First Nations with the opportunity to circumvent the NRTA and reinstate what was recognized in the *Horseman* case: Treaty First Nations have the right to hunt, fish, and trap for food purposes and commercial purposes.

I know that it is very early in the mandate to rate the

effectiveness of the OTC. I am pleasantly surprised at what I have seen so far and I believe that if the Federal Government is sincere in its negotiations then Treaty First Nations will have the opportunity to have their Treaties respected and recognized as they should have been when they were first signed.

In conclusion, I have provided three options that could be used to move Treaty interpretation away from the courts. I believe that the Treaty Tribunal and the Office of the Treaty Commissioner are two good examples of what can be done when the parties are serious about negotiating. I am hopeful that this process can continue and that the Treaties will continue to last as long as the sun shines, the rivers flow and the grass grows.

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1.In chapters two and three, I was heralding the court for its ruling in the *Marshall* case. I appreciate the fact that Treaty First Nations can use their oral tradition to determine the true meaning of the Treaties. However, like many First Nations, I felt dejected when the Supreme Court of Canada issued a clarification of the *Marshall* decision. It felt as if the victory we had on September 17, 1999 was now tarnished.

Former Assembly of First Nations, National Chief, Phil Fontaine had similar reservations about the clarification in *Marshall*. He made the following comments at a Confederacy meeting on December 9, 1999. He said:

> "There is a dangerous and ominous sign on the horizon. The decisions of the Supreme Court in the second *Marshall* case, in which it amended and limited its first decision, should concern us greatly. The second decision of the court was unprecedented, highly unusual. Normally, the Supreme Court does not give reasons when it refuses to re-hear a case. In deciding to give reasons and to limit the scope of the initial decision, keeping in mind the qualification ... so-called qualification ran to 40 pages, which is longer than the original decision. The court seems to have reacted improperly to public pressure, media campaigns that heighten anxieties. It did not have the courage and strength to stick by its original decision, which was the fair and correct decision. I'm sure that you are as concerned as we are here in front about the trend, about that trend and the role that the new Chief Justice, the Honourable Beverly McLaughlin, had to play in that decision and will play in future decisions. As you know, she was one of the two dissenting judges in the initial *Marshall* decision, and she has taken a very narrow interpretation of the treaty of 1763.
>
> We here call on the Supreme Court of Canada to continue to see itself as the defender of our rights, not as an agency of the governments to limit them. We call on the Supreme Court of Canada and its new Chief Justice to show independence and courage in doing the right thing without yielding to mob rule.
>
> We call on the Supreme Court of Canada to ensure that it recognizes fully and completely our inherent rights of self-governance and a participation as partners in the resources and the affluence of this land.
>
> And we call on the governments of Canada and First Nations to

> understand ... to very clearly understand that we are better off negotiating than litigating, better off compromising than stalling, better off being fair and reasonable than hard-hearted and selfish, Above all, we call on the Canadian governments and First Nation governments to treat the rights of all people, First Nations and non-First Nations alike, with respect, with reason, and with calm. It serves no one's purpose to exaggerate. It serves no one's purpose to be unreasonable. It serves no one's purpose to be provocative . It serves no one's purpose to be unreasonable. First Nations have always been and continue to be willing to be fair, just and reasonable. We call on the governments of Canada to adopt a similar strategy and ethic."

Assembly of First Nations, National Chief, Phil Fontaine, "Opening remarks by National Chief Phil Fontaine", Confederacy Dec-99, at www.afn.ca.

I am aware that this is a lengthy portion of Fontaine's speech. However, it is an extremely important part of this chapter. I believe that it is important to move the interpretation of Aboriginal and Treaty rights away from the Courts and move to a negotiating table. If the parties involved can follow the principles that Fontaine proposes then we have a chance for the proper interpretation of the spirit and intent of the Treaties to occur.

2 "A Message to all Canadians from First Nations of Treaty 6 and 7", The Globe and Mail, Thursday, September 24, 1992, at A5.

3Warren, William, *History of the Ojibway Nation*, (Minneapolis: Ross & Haines, 1957), at 219.

4.There are a number of judges who do not understand the importance of our Treaty rights. I know that some of the problem relates to the education system. For the most part, these judges do not have any background in First Nations' history, rights, culture, language, just to name a few. They presumably have not taken any Native Studies courses. The only First Nations that they encounter are the ones that appear before them in court. At that point, it is almost too late. It would be extremely difficult for these judges to receive a basic understanding of First Nations.

One possible solution was put forward by Sakej Henderson. He stated:

> "...special attention must be given by the judiciary to make

> Elders who are fluent in their Aboriginal languages and know the teachings a part of the judicial decision-making process for Indians who have offended against the treaties. Justice requires that Elders should be special masters or judges in trials that confront treaty interpretation. Alternatively, justice also requires that Treaty courts be established by Elders and Indian lawyers to interpret the treaties for offending Indians under the justice and punishment clauses. No better way exists to understand the legal order embedded in the Aboriginal languages."

James Youngblood Henderson, "Interpreting the Sui Generis Treaties", (1997) 36(1) Alta L. Rev. 46 at 96.

I have had the good fortune to listen to Sakej Henderson speak and to take a class from him. I remember Mr. Henderson raising this issue at a conference that I attended in 1996. His main contention was that it was apparent the Supreme Court of Canada does not have the necessary background to interpret the Treaties. Therefore, Elders should be appointed to the courts in order to teach these judges about the importance of our Treaty rights. I agree with this position and I hope the judges would jump at the opportunity to learn from our Elders.

5.Bushnell, Ian, The Captive Court: A Study of the Supreme Court of Canada, (Montreal: McGill Queen's University Press, 1992) at 15.

6.**Ibid.** at 275-276.

7.Since the early 1970's, the University of Saskatchewan has been running a Program of Legal Studies for Indigenous Peoples. This program has been very successful in increasing the number of students attending law schools across this country. This program has allowed two things to occur. First, there are now more First Nations lawyers who have the necessary background to fight and protect our Aboriginal and Treaty rights. Second, by having a larger pool of First Nations lawyers, it provides the justice system with a choice for selecting judges to sit on the bench. In the last ten years, we have seen a number of our people sitting as judges. Some of the notable judges are: Judge Mary Ellen Turpel-Lafond, Saskatchewan Provincial Court; Judge Murray Hamilton, Manitoba Provincial Court; Judge Tom Goodson, Alberta Provincial Court; and recently, Tony Mandamin was appointed to the Alberta Provincial Court.

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With the number of First Nations judges steadily increasing, I believe that there are now a number of suitable candidates for a position on the Supreme Court of Canada, if one were guaranteed to Aboriginal people.

8.Report of the Royal Commission on Aboriginal Peoples, Restructuring the Relationship, Volume Two, Part Two, (Ottawa: Minister of Supply and Services Canada, 1996) at 591-592.

9. The agreement to share six inches of topsoil has not been examined in any detail either by the Courts or academics. This is critical because of the ramifications for the Canadian Land Titles and Natural resources in the numbered Treaty areas. However, this analysis will be brief because the whole topic is better suited to another paper.

10.Ojibway Elder, Dr. Danny Musqua related the following story to one of my classes:

> "During the Treaty negotiations, the leaders said that we know that there is something valuable beneath the soil (the natural resources). Is this a part of the Treaty? The Treaty Commissioner said no. All we want is land for farming purposes only. Anything below the six inches of topsoil belongs to you."

It is evident that our ancestors did not "give up" the natural resources as part of the Treaties. Therefore, it is incumbent upon our leaders to sit down with their Elders in order to get the true understanding of the Treaty. This oral evidence can be used to form the basis for negotiations so that First Nations may receive a share of the natural resources.

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

12.Price, *supra* note 18 at 145-146.

13.Interview with Elder F.O. Okeymaw, (1991), Driftpile, Alberta.

14.Office of the Treaty Commissioner, 1997-1998 Annual Report, Saskatoon, 1998 at 5.

15.**Ibid.** at 5.

16.**Ibid.** at 11.

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17.**Ibid.** at 13.

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ORDER IN COUNCIL SETTING UP COMMISSION FOR TREATY 8

P.C. No. 2749

On a report dated 30th November, 1898, from the Superintendent General of Indian Affairs, stating with reference to his report of the 18th June, 1898, upon which was based the Minute of Council approved on the 27th of the same month, authorizing the appointing of Commissioners to negotiate a treaty with the Indians occupying territory to the north of that already ceded and shown in pink on the attached map, that in that report it was set forth that the Commissioner of the North West Mounted Police had pointed out the desirability of steps being taken for the making of a treaty with the Indians occupying the proposed line of route from Edmonton to Pelly River; that he had intimated that these Indians, as well as the Beaver Indians of the Peace and Nelson Rivers, and the Sicamas and Nihames Indians, were inclined to be turbulent and were liable to give trouble to isolated parties of miners or traders who might be regarded by the Indians as interfering with what they considered their vested rights; and that he had stated that the situation was made more difficult by the presence of the numerous travellers who had come into the country and were scattered at various points between Lesser Slave Lake and Peace River.

The Minister further states that the view of the Commissioner of the North West Mounted Police as to the desirability of making a treaty with these Indians being concurred in by the Indian Commissioner, and the Minister being convinced that in the public interest it was necessary to take at the earliest possible date the suggested step, it was recommended that Commissioners be appointed with full power to negotiate a treaty. An Order in Council as above stated, issued accordingly; and the preliminary arrangements are now being made.

The Minister, in this connection, draws attention to the fact that that part of the territory marked "A" on the plan attached is within the boundaries of the Province of British Columbia, and that in the past no treaties such as have been made with the Indians of the North West have been made with any of the Indians whose habitat is west of the Mountains. An arrangement was come to in 1876 under which the British Columbia Government agreed to the setting aside by a Commission subject to the approval of that Government, of land which might be considered necessary for Indian reserves in different parts of the Province, and later on the agreement was varied so as to provide that the setting apart should be made by a Commissioner appointed by the Dominion Government whose allotment would be subject to the approval of the Commissioner of Lands and Works of the Province.

As the Indians to the west of the Mountains are quite distinct from those whose habitat is on the eastern side thereof, no difficulty ever arose in consequence of the different methods of dealing with the Indians on either side of the Mountains. But there can be no doubt that had the division line between the Indians been artificial instead of natural, such difference in treatment would have been fraught with grave danger and have been the fruitful source of much trouble to both the Dominion and the Provincial Governments.

The Minister submits that it will neither be politic nor practicable to exclude from the treaty Indians whose habitat is in the territory lying between the height of land and the eastern boundary of British Columbia, as they know nothing of the artificial boundary, and, being allied to the Indians of Athabasca, will look for the same treatment as is given to the Indians whose habitat is in that district.

Although the rule has been laid down by the Judicial Committee of the Privy Council that the Province benefitting by a surrender of Indian title should bear the burdens incident to that surrender, he the Minister after careful consideration does

not think it desirable that any demand should be made upon the Province of British Columbia for any money payment in connection with the proposed treaty.

That from the information in possession of the Department of Indian Affairs it is not at present clear whether it will be necessary to set apart any land for a reserve or reserves for Indians in that part of the Province of British Columbia which will be covered by the proposed treaty, but if the Commissioners should find it necessary to agree to the setting apart of any reserve or reserves in that territory, the Minister is of opinion that the same may properly be set aside under the agreement of 1876 already referred to.

As it is in the interest of the Province of British Columbia, as well as in that of the Dominion, that the country to be treated for should be thrown open to development and the lives and property of those who may enter therein safeguarded by the making of provision which will remove all hostile feeling from the minds of the Indians and lead them to peacefully acquiesce in the changing conditions, he the Minister would suggest that the Government of British Columbia be apprised of the intention to negotiate the proposed treaty; and as it is of the utmost importance that the Commissioners should have full power to give such guarantees as may be found necessary in regard to the setting apart of land for reserves the Minister further recommends that the Government of British Columbia be asked to formally acquiesce in the action taken by Your Excellency's Government in the matter and to intimate its readiness to confirm any reserves which it may be found necessary to set apart within the portion of the Province already described.

The Minister further recommends that a certified copy of this Minute, if approved, and of the map attached hereto be transmitted to the Lieutenant Governor of the Province of British Columbia for the information of his Government.

The Committee submit the same for Your Excellency's approval.

(sgd.) R. W. SCOTT.

REPORT OF

COMMISSIONERS FOR TREATY No. 8

WINNIPEG, MANITOBA, 22nd September, 1899.

The Honourable
CLIFFORD SIFTON,
Superintendent General of Indian Affairs,
Ottawa.

SIR,—We have the honour to transmit herewith the treaty which, under the Commission issued to us on the 5th day of April last, we have made with the Indians of the provisional district of Athabasca and parts of the country adjacent thereto, as described in the treaty and shown on the map attached.

The date fixed for meeting the Indians at Lesser Slave Lake was the 8th of June, 1899. Owing, however, to unfavourable weather and lack of boatmen, we did not reach the point until the 19th. But one of the Commissioners—Mr. Ross—who went overland from Edmonton to the Lake, was fortunately present when the Indians first gathered. He was thus able to counteract the consequences of the delay and to expedite the work of the Commission by preliminary explanations of its objects.

We met the Indians on the 20th, and on the 21st the treaty was signed.

As the discussions at the different points followed on much the same lines, we shall confine ourselves to a general statement of their import. There was a marked absence of the old Indian style of oratory. Only among the Wood Crees were any formal speeches made, and these were brief. The Beaver Indians are taciturn. The Chipewyans confined themselves to asking questions and making brief arguments. They appeared to be more adept at cross-examination than at speech-making, and the Chief at Fort Chipewyan displayed considerable keenness of intellect and much practical sense in pressing the claims of his band. They all wanted as liberal, if not more liberal terms, than were granted to the Indians of the plains. Some expected to be fed by the Government after the making of treaty, and all asked for assistance in seasons of distress and urged that the old and indigent who were no longer able to hunt and trap and were consequently often in distress should be cared for by the Government. They requested that medicines be furnished. At Vermilion, Chipewyan and Smith's Landing, an earnest appeal was made for the services of a medical man. There was expressed at every point the fear that the making of the treaty would be followed by the curtailment of the hunting and fishing privileges, and many were impressed with the notion that the treaty would lead to taxation and enforced military service. They seemed desirous of securing educational advantages for their children, but stipulated that in the matter of schools there should be no interference with their religious beliefs.

We pointed out that the Government could not undertake to maintain Indians in idleness; that the same means of earning a livelihood would continue after the treaty as existed before it, and that the Indians would be expected to make use of them. We told them that the Government was always ready to

give relief in cases of actual destitution, and that in seasons of distress they would without any special stipulation in the treaty receive such assistance as it was usual to give in order to prevent starvation among Indians in any part of Canada; and we stated that the attention of the Government would be called to the need of some special provision being made for assisting the old and indigent who were unable to work and dependent on charity for the means of sustaining life. We promised that supplies of medicines would be put in the charge of persons selected by the Government at different points, and would be distributed free to those of the Indians who might require them. We explained that it would be practically impossible for the Government to arrange for regular medical attendance upon Indians so widely scattered over such an extensive territory. We assured them, however, that the Government would always be ready to avail itself of any opportunity of affording medical service just as it provided that the physician attached to the Commission should give free attendance to all Indians whom he might find in need of treatment as he passed through the country.

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

We assured them that the treaty would not lead to any forced interference with their mode of life, that it did not open the way to the imposition of any tax, and that there was no fear of enforced military service. We showed them that, whether treaty was made or not, they were subject to the law, bound to obey it, and liable to punishment for any infringements of it. We pointed out that the law was designed for the protection of all, and must be respected by all the inhabitants of the country, irrespective of colour or origin; and that, in requiring them to live at peace with white men who came into the country, and not to molest them in person or in property, it only required them to do what white men were required to do as to the Indians.

As to education, the Indians were assured that there was no need of any special stipulation, as it was the policy of the Government to provide in every part of the country, as far as circumstances would permit, for the education of Indian children, and that the law, which was as strong as a treaty, provided for non-interference with the religion of the Indians in schools maintained or assisted by the Government.

We should add that the chief of the Chipewyans of Fort Chipewyan asked that the Government should undertake to have a railway built into the country, as the cost of goods which the Indians require would be thereby cheapened and the prosperity of the country enhanced. He was told that the Commissioners had no authority to make any statement in the matter further than to say that his desire would be made known to the Government.

When we conferred, after the first meeting with the Indians at Lesser Slave Lake, we came to the conclusion that it would be best to make one treaty covering the whole of the territory ceded, and to take adhesions thereto from the Indians to be met at the other points rather than to make several separate treaties. The treaty was therefore so drawn as to provide three ways in which assistance

is to be given to the Indians, in order to accord with the conditions of the country and to meet the requirements of the Indians in the different parts of the territory.

In addition to the annuity, which we found it necessary to fix at the figures of Treaty Six, which covers adjacent territory, the treaty stipulates that assistance in the form of seed and implements and cattle will be given to those of the Indians who may take to farming, in the way of cattle and mowers to those who may devote themselves to cattle-raising, and that ammunition and twine will be given to those who continue to fish and hunt. The assistance in farming and ranching is only to be given when the Indians actually take to these pursuits, and it is not likely that for many years there will be a call for any considerable expenditure under these heads. The only Indians of the territory ceded who are likely to take to cattle-raising are those about Lesser Slave Lake and along the Peace River, where there is quite an extent of ranching country; and although there are stretches of cultivable land in those parts of the country, it is not probable that the Indians will, while present conditions obtain, engage in farming further than the raising of roots in a small way, as is now done to some extent. In the main the demand will be for ammunition and twine, as the great majority of the Indians will continue to hunt and fish for a livelihood. It does not appear likely that the conditions of the country on either side of the Athabasca and Slave Rivers or about Athabasca Lake will be so changed as to affect hunting or trapping, and it is safe to say that so long as the fur-bearing animals remain, the great bulk of the Indians will continue to hunt and to trap.

The Indians are given the option of taking reserves or land in severalty. As the extent of the country treated for made it impossible to define reserves or holdings, and as the Indians were not prepared to make selections, we confined ourselves to an undertaking to have reserves and holdings set apart in the future, and the Indians were satisfied with the promise that this would be done when required. There is no immediate necessity for the general laying out of reserves or the allotting of land. It will be quite time enough to do this as advancing settlement makes necessary the surveying of the land. Indeed, the Indians were generally averse to being placed on reserves. It would have been impossible to have made a treaty if we had not assured them that there was no intention of confining them to reserves. We had to very clearly explain to them that the provision for reserves and allotments of land were made for their protection, and to secure to them in perpetuity a fair portion of the land ceded, in the event of settlement advancing.

After making the treaty at Lesser Slave Lake it was decided that, in order to offset the delay already referred to, it would be necessary for the Commission to divide. Mr. Ross and Mr. McKenna accordingly set out for Fort St. John on the 22nd of June. The date appointed for meeting the Indians there was the 21st. When the decision to divide was come to, a special messenger was despatched to the Fort with a message to the Indians explaining the delay, advising them that Commissioners were travelling to meet them, and requesting them to wait at the Fort. Unfortunately the Indians had dispersed and gone to their hunting grounds before the messenger arrived and weeks before the date originally fixed for the meeting, and when the Commissioners got within some miles of St. John the messenger met them with a letter from the Hudson's Bay Company's officer there advising them that the Indians after consuming all their provisions, set off on the 1st June in four different bands and in as many different directions for the regular hunt; that there was not a man at St. John who knew the country and could carry word of the Commissioners' coming, and even if there were it would take three weeks or a month to get the Indians in. Of course there was nothing to do but return. It may be stated, however, that what happened was not altogether unforeseen. We had grave doubts of being able to get to St. John in time to meet the Indians, but as they were reported to be rather disturbed and ill-disposed on account of the actions of miners passing

through their country, it was thought that it would be well to show them that the Commissioners were prepared to go into their country, and that they had put forth every possible effort to keep the engagement made by the Government.

The Commissioners on their return from St. John met the Beaver Indians of Dunvegan on the 21st day of June and secured their adhesion to the treaty. They then proceeded to Fort Chipewyan and to Smith's Landing on the Slave River and secured the adhesion of the Cree and Chipewyan Indians at these points on the 13th and 17th days of July respectively.

In the meantime Mr. Laird met the Cree and Beaver Indians at Peace River Landing and Vermilion, and secured their adhesion on the 1st and 8th days of July respectively. He then proceeded to Fond du Lac on Lake Athabasca, and obtained the adhesion of the Chipewyan Indians there on the 25th and 27th days of July.

After treating with the Indians at Smith, Mr. Ross and Mr. McKenna found it necessary to separate in order to make sure of meeting the Indians at Wabiscow on the date fixed. Mr. McKenna accordingly went to Fort McMurray, where he secured the adhesion of the Chipewyan and Cree Indians on the 4th day of August, and Mr. Ross proceeded to Wabiscow, where he obtained the adhesion of the Cree Indians on the 14th day of August.

The Indians with whom we treated differ in may respects from the Indians of the organized territories. They indulge in neither paint nor feathers, and never clothe themselves in blankets. Their dress is of the ordinary style and many of them were well clothed. In the summer they live in teepees, but many of them have log houses in which they live in winter. The Cree language is the chief language of trade, and some of the Beavers and Chipewyans speak it in addition to their own tongues. All the Indians we met were with rare exceptions professing Christians, and showed evidences of the work which missionaries have carried on among them for many years. A few of them have had their children avail themselves of the advantages afforded by boarding schools established at different missions. None of the tribes appear to have any very definite organization. They are held together mainly by the language bond. The chiefs and headmen are simply the most efficient hunters and trappers. They are not law-makers and leaders in the sense that the chiefs and headmen of the plains and of old Canada were. The tribes have no very distinctive characteristics, and as far as we could learn no traditions of any import. The Wood Crees are an off-shoot of the Crees of the South. The Beaver Indians bear some resemblance to the Indians west of the mountains. The Chipewyans are physically the superior tribe. The Beavers have apparently suffered most from scrofula and phthisis, and there are marks of these diseases more or less among all the tribes.

Although in manners and dress the Indians of the North are much further advanced in civilization than other Indians were when treaties were made with them, they stand as much in need of the protection afforded by the law to aborigines as do any other Indians of the country, and are as fit subjects for the paternal care of the Government.

It may be pointed out that hunting in the North differs from hunting as it was on the plains in that the Indians hunt in a wooded country and instead of moving in bands go individually or in family groups.

Our journey from point to point was so hurried that we are not in a position to give any description of the country ceded which would be of value. But we may say that about Lesser Slave Lake there are stretches of country which appear well suited for ranching and mixed farming; that on both sides of the Peace River there are extensive prairies and some well wooded country; that at Vermilion, on the Peace, two settlers have successfully carried on mixed

farming on a pretty extensive scale for several years, and that the appearance of the cultivated fields of the Mission there in July showed that cereals and roots were as well advanced as in any portion of the organized territories. The country along the Athabasca River is well wooded and there are miles of tar-saturated banks. But as far as our restricted view of the Lake Athabasca and Slave River country enabled us to judge, its wealth, apart from possible mineral development, consists exclusively in its fisheries and furs.

In going from Peace River Crossing to St. John, the trail which is being constructed under the supervision of the Territorial Government from moneys provided by Parliament was passed over. It was found to be well located. The grading and bridge work is of a permanent character, and the road is sure to be an important factor in the development of the country.

We desire to express our high appreciation of the valuable and most willing service rendered by Inspector Snyder and the corps of police under him, and at the same time to testify to the efficient manner in which the members of our staff performed their several duties. The presence of a medical man was much appreciated by the Indians, and Dr. West, the physician to the Commission, was most assiduous in attending to the great number of Indians who sought his services. We would add that the Very Reverend Father Lacombe, who was attached to the Commission, zealously assisted us in treating with the Crees.

The actual number of Indians paid was:—

7	Chiefs at $32	$ 224 00
23	Headmen at $22	506 00
2,187	Indians at $12	26,244 00
		$ 26,974 00

A detailed statement of the Indians treated with and of the money paid is appended.

We have the honour to be, sir,

Your obedient servants,

DAVID LAIRD,
J. H. ROSS,
J. A. J. McKENNA.
Indian Treaty Commissioners.

STATEMENT of Indians paid Annuity and Gratuity Moneys in Treaty No. 8, during 1899.

—	Chiefs.	Head-men.	Other Indians.	Cash Paid each Band.	Total Cash Paid.
				$ cts.	$ cts.
LESSER SLAVE LAKE					
Keenoostayo's Band (Crees)—					
Chief at $32	1	.....	.....	32 00	
Headmen at $22	.....	4	.....	88 00	
Other Indians at $12	.....	.....	241	2,892 00	
					3,012 00
Captain's Band (Crees)—					
Headman	.....	1	.....	22 00	
Other Indians	.....	.....	22	264 00	
					286 00
PEACE RIVER LANDING.					
Duncan Tastawit's Band (Crees and Beavers)—					
Headman	.....	1	.....	22 00	
Other Indians	.....	.....	46	552 00	
					574 00
VERMILION.					
Ambroise Tete-Noire's Band (Beavers)—					
Chief	1	.....	.....	32 00	
Headman	.....	1	.....	22 00	
Other Indians	.....	.....	148	1,776 00	
					1,830 00
Tall Cree Band (Crees)—					
Headman	.....	1	.....	22 00	
Other Indians	.....	.....	64	768 00	
					790 00
DUNVEGAN.					
Beaver Band—					
Headman	.....	1	.....	22 00	
Other Indians	.....	.....	33	396 00	
					418 00
RED RIVER POST, PEACE RIVER.					
Crees paid as part of Band—Cree Band at Vermilion—					
Indians	.....	.....	66	792 00	
					792 00
FORT CHIPEWYAN.					
Chipewyan Band—					
Chief	1	.....	.....	32 00	
Headmen	.....	2	.....	44 00	
Other Indians	.....	.....	407	4,884 00	
					4,960 00
Cree Band—					
Chief	1	.....	.....	32 00	
Headmen	.....	2	.....	44 00	
Other Indians	.....	.....	183	2,196 00	
					2,272 00
SMITH'S LANDING.					
Chipewyan Band—					
Chief	1	.....	.....	32 00	
Headmen	.....	2	.....	44 00	
Other Indians	.....	.....	280	3,360 00	
					3,436 00
FOND DU LAC.					
Chipewyan Band—					
Chief	1	.....	.....	32 00	
Headmen	.....	2	.....	44 00	
Other Indians	.....	.....	376	4,512 00	
					4,588 00

STATEMENT of Indians paid Annuity and Gratuity, &c.—*Concluded.*

—	Chiefs.	Headmen.	Other Indians.	Cash Paid each Band.	Total Cash Paid.
				$ cts.	$ cts.
FORT MCMURRAY.					
Cree and Chipewyan Bands—					
Headmen	.....	2	.....	44 00	
Other Indians	.....	.....	130	1,560 00	
					1,604 00
WABISCOW.					
Cree Band—					
Chief	1	.....	.....	32 00	
Headmen	.....	4	.....	88 00	
Other Indians	.....	.....	191	2,292 00	
					2,412 00
Total	7	23	2,187	.....	26,974 00

SUMMARY.

7	Chiefs at $32	$ 224 00
23	Headmen at $22	506 00
2,187	Other Indians at $12	26,224 00
2,217		$ 26,974 00

Certified correct,

DAVID LAIRD,
J. H. ROSS,
J. A. J. McKENNA.
Indian Treaty Commissioners.

WINNIPEG, MAN., September 22, 1899.

TREATY No. 8.

ARTICLES OF A TREATY made and concluded at the several dates mentioned therein, in the year of Our Lord one thousand eight hundred and ninety-nine, between Her most Gracious Majesty the Queen of Great Britain and Ireland, by Her Commissioners the Honourable David Laird, of Winnipeg, Manitoba, Indian Commissioner for the said Province and the Northwest Territories; James Andrew Joseph McKenna, of Ottawa, Ontario, Esquire, and the Honourable James Hamilton Ross, of Regina, in the Northwest Territories, of the one part; and the Cree, Beaver, Chipewyan and other Indians, inhabitants of the territory within the limits hereinafter defined and described, by their Chiefs and Headmen, hereunto subscribed, of the other part:—

WHEREAS, the Indians inhabiting the territory hereinafter defined have, pursuant to notice given by the Honourable Superintendant General of Indian Affairs in the year 1898, been convened to meet a Commission representing Her Majesty's Government of the Dominion of Canada at certain places in the said territory in this present year 1899, to deliberate upon certain matters of interest to Her Most Gracious Majesty, of the one part, and the said Indians of the other.

AND WHEREAS, the said Indians have been notified and informed by Her Majesty's said Commission that it is Her desire to open for settlement, immigration, trade, travel, mining, lumbering, and such other purposes as to Her

Majesty may seem meet, a tract of country bounded and described as hereinafter mentioned, and to obtain the consent thereto of Her Indian subjects inhabiting the said tract, and to make a treaty, and arrange with them, so that there may be peace and good will between them and Her Majesty's other subjects, and that Her Indian people may know and be assured of what allowances they are to count upon and receive from Her Majesty's bounty and benevolence.

AND WHEREAS, the Indians of the said tract, duly convened in council at the respective points named hereunder, and being requested by Her Majesty's Commissioners to name certain Chiefs and Headmen who should be authorized on their behalf to conduct such negotiations and sign any treaty to be founded thereon, and to become responsible to Her Majesty for the faithful performance by their respective bands of such obligations as shall be assumed by them, the said Indians have therefore acknowledged for that purpose the several Chiefs and Headmen who have subscribed hereto.

AND WHEREAS, the said Commissioners have proceeded to negotiate a treaty with the Cree, Beaver, Chipewyan and other Indians, inhabiting the district hereinafter defined and described, and the same has been agreed upon and concluded by the respective bands at the dates mentioned hereunder, the said Indians DO HEREBY CEDE, RELEASE, SURRENDER AND YIELD UP to the Government of the Dominion of Canada, for Her Majesty the Queen and Her successors for ever, all their rights, titles and privileges whatsoever, to the lands included within the following limits, that is to say:—

Commencing at the source of the main branch of the Red Deer River in Alberta, thence due west to the central range of the Rocky Mountains, thence northwesterly along the said range to the point where it intersects the 60th parallel of north latitude, thence east along said parallel to the point where it intersects Hay River, thence northeasterly down said river to the south shore of Great Slave Lake, thence along the said shore northeasterly (and including such rights to the islands in said lakes as the Indians mentioned in the treaty may possess), and thence easterly and northeasterly along the south shores of Christie's Bay and McLeod's Bay to old Fort Reliance near the mouth of Lockhart's River, thence southeasterly in a straight line to and including Black Lake, thence southwesterly up the stream from Cree Lake, thence including said lake southwesterly along the height of land between the Athabasca and Churchill Rivers to where it intersects the northern boundary of Treaty Six, and along the said boundary easterly, northerly and southwesterly, to the place of commencement.

AND ALSO the said Indian rights, titles and privileges whatsoever to all other lands wherever situated in the Northwest Territories, British Columbia, or in any other portion of the Dominion of Canada.

TO HAVE AND TO HOLD the same to Her Majesty the Queen and Her successors for ever.

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

And Her Majesty the Queen hereby agrees and undertakes to lay aside reserves for such bands as desire reserves, the same not to exceed in all one square mile for each family of five for such number of families as may elect to reside on reserves, or in that proportion for larger or smaller families; and for such families or individual Indians as may prefer to live apart from band reserves,

Her Majesty undertakes to provide land in severalty to the extent of 160 acres to each Indian, the land to be conveyed with a proviso as to non-alienation without the consent of the Governor General in Council of Canada, the selection of such reserves, and lands in severalty, to be made in the manner following, namely, the Superintendent General of Indian Affairs shall depute and send a suitable person to determine and set apart such reserves and lands, after consulting with the Indians concerned as to the locality which may be found suitable and open for selection.

Provided, however, that Her Majesty reserves the right to deal with any settlers within the bounds of any lands reserved for any band as She may see fit; and also that the aforesaid reserves of land, or any interest therein, may be sold or otherwise disposed of by Her Majesty's Government for the use and benefit of the said Indians entitled thereto, with their consent first had and obtained.

It is further agreed between Her Majesty and Her said Indian subjects that such portions of the reserves and lands above indicated as may at any time be required for public works, buildings, railways, or roads of whatsoever nature may be appropriated for that purpose by Her Majesty's Government of the Dominion of Canada, due compensation being made to the Indians for the value of any improvements thereon, and an equivalent in land, money or other consideration for the area of the reserve so appropriated.

And with a view to show the satisfaction of Her Majesty with the behaviour and good conduct of Her Indians, and in extinguishment of all their past claims, She hereby, through Her Commissioners, agrees to make each Chief a present of thirty-two dollars in cash, to each Headman twenty-two dollars, and to every other Indian of whatever age, of the families represented at the time and place of payment, twelve dollars.

Her Majesty also agrees that next year, and annually afterwards for ever, She will cause to be paid to the said Indians in cash, at suitable places and dates, of which the said Indians shall be duly notified, to each Chief twenty-five dollars, each Headman, not to exceed four to a large Band and two to a small Band, fifteen dollars, and to every other Indian, of whatever age, five dollars, the same, unless there be some exceptional reason, to be paid only to heads of families for those belonging thereto.

FURTHER, Her Majesty agrees that each Chief, after signing the treaty, shall receive a silver medal and a suitable flag, and next year, and every third year thereafter, each Chief and Headman shall receive a suitable suit of clothing.

FURTHER, Her Majesty agrees to pay the salaries of such teachers to instruct the children of said Indians as to Her Majesty's Government of Canada may seem advisable.

FURTHER, Her Majesty agrees to supply each Chief of a Band that selects a reserve, for the use of that Band, ten axes, five hand-saws, five augers, one grindstone, and the necessary files and whetstones.

FURTHER, Her Majesty agrees that each Band that elects to take a reserve and cultivate the soil, shall, as soon as convenient after such reserve is set aside and settled upon, and the Band has signified its choice and is prepared to break up the soil, receive two hoes, one spade, one scythe and two hay forks for every family so settled, and for every three families one plough and one harrow, and to the Chief, for the use of his Band, two horses or a yoke of oxen, and for each Band potatoes, barley, oats and wheat (if such seed be suited to the locality of the reserve), to plant the land actually broken up, and provisions for one month in the spring for several years while planting such seeds; and to every family one cow, and every Chief one bull, and one mowing-machine and one reaper

for the use of his Band when it is ready for them; for such families as prefer to raise stock instead of cultivating the soil, every family of five persons, two cows, and every Chief two bulls and two mowing-machines when ready for their use, and a like proportion for smaller or larger families. The aforesaid articles, machines and cattle to be given one for all for the encouragement of agriculture and stock raising; and for such Bands as prefer to continue hunting and fishing, as much ammunition and twine for making nets annually as will amount in value to one dollar per head of the families so engaged in hunting and fishing.

And the undersigned Cree, Beaver, Chipewyan and other Indian Chiefs and Headmen, on their own behalf and on behalf of all the Indians whom they represent, DO HEREBY SOLEMNLY PROMISE and engage to strictly observe this Treaty, and also to conduct and behave themselves as good and loyal subjects of Her Majesty the Queen.

THEY PROMISE AND ENGAGE that they will, in all respects, obey and abide by the law; that they will maintain peace between each other, and between themselves and other tribes of Indians, and between themselves and others of Her Majesty's subjects, whether Indians, half-breeds or whites, this year inhabiting and hereafter to inhabit any part of the said ceded territory; and that they will not molest the person or property of any inhabitant of such ceded tract, or of any other district or country, or interfere with or trouble any person passing or travelling through the said tract or any part thereof, and that they will assist the officers of Her Majesty in bringing to justice and punishment any Indian offending against the stipulations of this Treaty or infringing the law in force in the country so ceded.

IN WITNESS WHEREOF Her Majesty's said Commissioners and the Cree Chief and Headmen of Lesser Slave Lake and the adjacent territory, HAVE HEREUNTO SET THEIR HANDS at Lesser Slave Lake on the twenty-first day of June, in the year herein first above written.

Signed by the parties hereto, in the presence of the undersigned witnesses, the same having been first explained to the Indians by Albert Tate and Samuel Cunningham, Interpreters.

Father A. LACOMBE,
GEO. HOLMES,
†E. GROUARD, O.M.I.
W. G. WHITE,
JAMES WALKER,
J. ARTHUR COTÉ,
A. E. SNYDER, Insp. N.W.M.P.,
H. B. ROUND,
HARRISON S. YOUNG,
J. F. PRUD'HOMME,
J. W. MARTIN,
C. MAIR,
H. A. CONROY,
PIERRE DESCHAMBEAULT,
J. H. PICARD,
RICHARD SECORD,
M. MCCAULEY.

DAVID LAIRD, *Treaty Commissioner,*
J. A. J. MCKENNA, *Treaty Commissioner,*
J. H. ROSS, *Treaty Commissioner,*
his
KEE NOO SHAY OO x *Chief,*
mark
his
MOOSTOOS x *Headman,*
mark
his
FELIX GIROUX x *Headman,*
mark
his
WEE CHEE WAY SIS x *Headman,*
mark
his
CHARLES NEE SUE TA SIS x *Headman,*
mark
his
CAPTAIN x *Headman,* from Sturgeon
mark Lake.

In witness whereof the Chairman of Her Majesty's Commissioners and the Headman of the Indians of Peace River Landing and the adjacent territory, in

behalf of himself and the Indians whom he represents, have hereunto set their hands at the said Peace River Landing on the first day of July in the year of Our Lord one thousand eight hundred and ninety-nine.

Signed by the parties hereto, in the presence of the undersigned witnesses, the same having been first explained to the Indians by Father A. Lacombe and John Boucher, interpreters.

DAVID LAIRD, *Chairman of Indian Treaty Commissioners,*
his
DUNCAN x TASTAOOSTS, *Headman of Crees*
mark

A. LACOMBE.
†E. GROUARD, O.M.I., Ev. d'Ibora,
GEO. HOLMES,
HENRY MCCORRISTER,
K. F. ANDERSON, Sgt., N.W.M.P.
PIERRE DESCHAMBEAULT,
H. A. CONROY,
T. A. BRICK,
HARRISON S. YOUNG,
J. W. MARTIN,
DAVID CURRY.

In witness whereof the Chairman of Her Majesty's Commissioners and the Chief and Headmen of the Beaver and Headman of the Crees and other Indians of Vermilion and the adjacent territory, in behalf of themselves and the Indians whom they represent, have hereunto set their hands at Vermilion on the eighth day of July, in the year of our Lord one thousand eight hundred and ninety-nine.

Signed by the parties hereto in the presence of the undersigned witnesses, the same having been first explained to the Indians by Father A. Lacombe and John Bourassa, Interpreters.

DAVID LAIRD,
Chairman of Indian Treaty Coms.,
his
AMBROSE x TETE NOIRE, *Chief Beaver Indians.*
mark
his
PIERROT x FOURNIER, *Headman Beaver Indians.*
mark
his *Headman*
KUIS KUIS KOW CA POOHOO x *Cree*
mark *Indians.*

A. LACOMBE,
†E. GROUARD, O.M.I., Ev. d'Ibora,
MALCOLM SCOTT,
F. D. WILSON, H. B. Co.,
H. A. CONROY,
PIERRE DESCHAMBEAULT,
HARRISON S. YOUNG,
J. W. MARTIN,
A. P. CLARKE,
CHAS. H. STUART WADE,
K. F. ANDERSON, Sgt., N.W.M.P.

In witness whereof the Chairman of Her Majesty's Treaty Commissioners and the Chief and Headman of the Chipewyan Indians of Fond du Lac (Lake Athabasca) and the adjacent territory, in behalf of themselves and the Indians whom they represent, have hereunto set their hands at the said Fond du Lac on the twenty-fifth and twenty-seventh days of July, in the year of Our Lord one thousand eight hundred and ninety-nine.

Signed by the parties hereto in the presence of the undersigned witnesses, the same having been first explained to the Indians by Pierre Deschambeault, Reverend Father Douceur and Louis Robillard, Interpreters.

DAVID LAIRD,
Chairman of Indian Treaty Coms.,
his
LAURENT x DZIEDDIN, *Headman*,
mark
his
TOUSSAINT x *Headman*,
mark

(The number accepting treaty being larger than at first expected, a Chief was allowed, who signed the treaty on the 27th July before the same witnesses to signatures of the Commissioner and Headman on the 25th.)

his
MAURICE x PICHE, *Chief of Band.*
mark

G. BREYNAT, O.M.I.,
HARRISON S. YOUNG,
PIERRE DESCHAMBEAULT,
WILLIAM HENRY BURKE,
BATHURST F. COOPER,
GERMAIN MERCREDI,
his
LOUIS x ROBILLARD,
mark
K. F. ANDERSON, *Sgt., N.W.M.P.*

Witness, H. S. YOUNG.

The Beaver Indians of Dunvegan having met on this sixth day of July, in this present year 1899, Her Majesty's Commissioners, the Honourable James Hamilton Ross and James Andrew Joseph McKenna, Esquire, and having had explained to then the terms of the Treaty unto which the Chief and Headmen of the Indians of Lesser Slave Lake and adjacent country set their hands on the twenty-first day of June, in the year herein first above written, do join in the cession made by the said Treaty, and agree to adhere to the terms thereof in consideration of the undertakings made therein.

In witness whereof Her Majesty's said Commissioners and the Headman of the said Beaver Indians have hereunto set their hands at Dunvegan on this sixth day of July, in the year herein first above written.

Signed by the parties thereto in the presence of the undersigned witnesses, after the same had been read and explained to the Indians by the Reverend Joseph Le Treste and Peter Gunn, Interpreters.

J. H. Ross,
J. A. J. MCKENNA, } *Commissioners*,
his
NATOOSES x *Headman*,
mark

A. E. SNYDER, *Insp. N.W.M.P.*
J. LE TRESTE,
PETER GUNN,
F. J. FITZGERALD.

The Chipewyan Indians of Athabasca River, Birch River, Peace River, Slave River and Gull River, and the Cree Indians of Gull River and Deep Lake, having met at Fort Chipewyan on this thirteenth day of July, in this present year 1899, Her Majesty's Commissioners, the Honourable James Hamilton Ross and James Andrew Joseph McKenna, Esquire, and having had explained to them the terms of the Treaty unto which the Chief and Headmen of the Indians of Lesser Slave Lake and adjacent country set their hands on the twenty-first

day of June, in the year herein first above written, do join in the cession made by the said Treaty, and agree to adhere to the terms thereof in consideration of the undertakings made therein.

In witness whereof Her Majesty's said Commissioners and the Chiefs and Headmen of the said Chipewyan and Cree Indians have hereunto set their hands at Fort Chipewyan on this thirteenth day of July, in the year herein first above written.

Signed by the parties thereto in the presence of the undersigned witnesses after the same had been read and explained to the Indians by Peter Mercredi, Chipewyan Interpreter, and George Drever, Cree Interpreter.

A. E. SNYDER, *Insp., N.W.M.P.*,
P. MERCREDI,
GEO. DREVER,
L. M. LE DOUSSAL,
A. DE CHAMBOUR, O.M.I.
H. B. ROUND,
GABRIEL BREYNAT, O.M.I.,
COLIN FRASER,
F. J. FITZGERALD,
B. F. COOPER,
H. W. MCLAREN,

J. H. ROSS, } *Treaty*
J. A. J. MCKENNA, } *Commissioners,*
his
ALEX. x LAVIOLETTE, *Chipewyan Chief,*
mark
his
JULIEN x RATFAT, } *Chipewyan*
mark } *Headmen,*
his
SEPT. x HEEZELL, }
mark
his
JUSTIN x MARTIN, *Cree Chief,*
mark
his
ANT. x TACCARROO, } *Cree Headmen.*
mark
his
THOMAS x GIBBOT, }
mark

The Chipewyan Indians of Slave River and the country thereabouts having met at Smith's Landing on this seventeenth day of July, in this present year 1899, Her Majesty's Commissioners, the Honourable James Hamilton Ross and James Andrew Joseph McKenna, Esquire, and having had explained to them the terms of the Treaty unto which the Chief and Headmen of the Indians of Lesser Slave Lake and adjacent country, set their hands on the twenty-first day of June, in the year herein first above written, do join in the cession made by the said Treaty, and agree to adhere to the terms thereof in consideration of the undertakings made therein.

In witness whereof Her Majesty's said Commissioners and the Chief and Headmen of the said Chipewyan Indians have hereunto set their hands at Smith's Landing, on this seventeenth day of July, in the year herein first above written.

Signed by the parties thereto in the presence of the undersigned witnesses after the same had been read and explained to the Indians by John Trindle, Interpreter.

A. E. SNYDER, *Insp. N.W.M.P.*,
H. B. ROUND,
J. H. REID,
JAS. HALY,
JOHN TRINDLE,
F. J. FITZGERALD,
WM. MCCLELLAND,
JOHN SUTHERLAND.

J. H. ROSS, } *Treaty*
J. A. J. MCKENNA, } *Commissioners,*
his
PIERRE x SQUIRREL, *Chief,*
mark
his
MICHAEL x MAMDRILLE, *Headman,*
mark
his
WILLIAM x KISCORRAY, *Headman,*
mark

The Chipewyan and Cree Indians of Fort McMurray and the country thereabouts, having met at Fort McMurray, on this fourth day of August, in this present year 1899, Her Majesty's Commissioner, James Andrew Joseph McKenna, Esquire, and having had explained to them the terms of the Treaty unto which the Chief and Headmen of the Indians of Lesser Slave Lake and adjacent country set their hands on the twenty-first day of June, in the year herein first above written, do join in the cession made by the said Treaty and agree to adhere to the terms thereof in consideration of the undertakings made therein.

In witness whereof Her Majesty's said Commissioner and the Headmen of the said Chipewyan and Cree Indians have hereunto set their hands at Fort McMurray, on this fourth day of August, in the year herein first above written.

Signed by the parties thereto in the presence of the undersigned witnesses after the same had been read and explained to the Indians by the Rev. Father Lacombe and T. M. Clarke, Interpreters

A. LACOMBE, *O.M.I.*,
ARTHUR J. WARWICK,
T. M. CLARKE,
J. W. MARTIN,
F. J. FITZGERALD,
M. J. H. VERNON.

J. A. J. MCKENNA, *Treaty Commissioner*,
his
ADAM x BOUCHER, *Chipewyan Headman*,
mark
his
SEAPOTAKINUM x CREE, *Cree Headman*,
mark

The Indians of Wapiscow and the country thereabouts having met at Wapiscow Lake on this fourteenth day of August, in this present year 1899, Her Majesty's Commissioner, the Honourable James Hamilton Ross, and having had explained to them the terms of the Treaty unto which the Chief and Headmen of the Indians of Lesser Slave Lake and adjacent country set their hands on the twenty-first day of June in the year herein first above written, do join in the cession made by the said Treaty and agree to adhere to the terms thereof in consideration of the undertakings made therein.

In witness whereof Her Majesty's said Commissioner and the Chief and Headmen of the Indians have hereunto set their hands at Wapiscow Lake, on this fourteenth day of August, in the year herein first above written.

Signed by the parties thereto in the presence of the undersigned witnesses after the same had been read and explained to the Indians by Alexander Kennedy.

A. E. SNYDER, *Insp. N.W.M.P.*,
CHARLES RILEY WEAVER,
J. B. HENRI GIROUX, *O.M.I., P.M.*,
MURDOCH JOHNSTON,
C. FALHER, *O.M.I.*,
ALEX. KENNEDY, *Interpreter*,
H. A. CONROY,
(Signature in Cree character).
JOHN MCLEOD,
M. R. JOHNSTON.

J. H. Ross, *Treaty Commissioner*,
his
JOSEPH x KAPUSEKONEW, *Chief*,
mark
his
JOSEPH x ANSEY, *Headman*,
mark
his
WAPOOSE x *Headman*,
mark
his
MICHAEL x ANSEY, *Headman*,
mark
his
LOUISA x BEAVER, *Headman*,
mark

ORDER IN COUNCIL

RATIFYING TREATY No. 8.

EXTRACT from a Report of the Committee of the Honourable the Privy Council, approved by His Excellency on the 20th February, 1900.

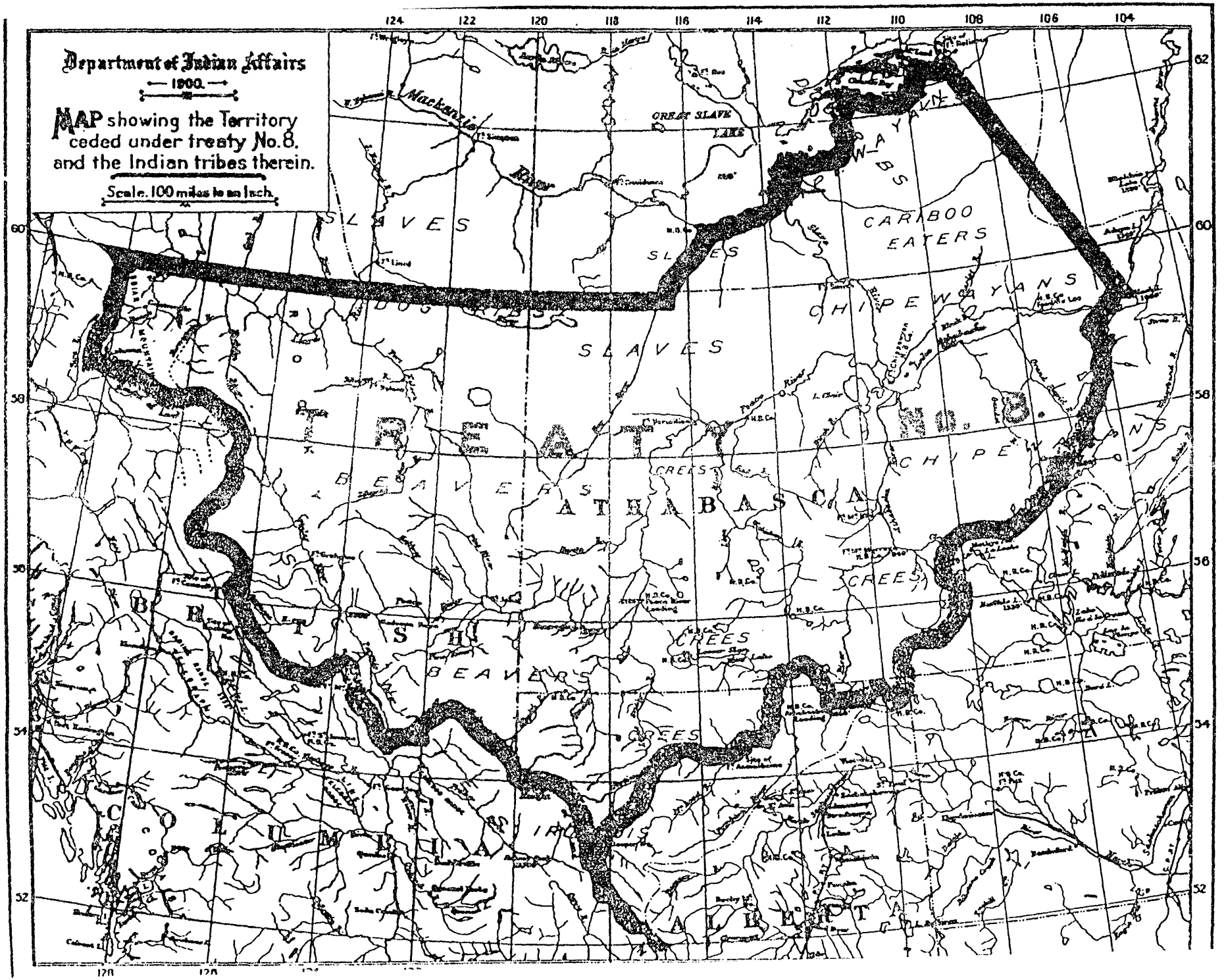
On a Memorandum dated 8th February, 1900, from the Superintendent General of Indian Affairs, submitting for Your Excellency's consideration the accompanying Treaty made by the Commissioners, the Honourable David Laird, James Andrew Joseph McKenna, Esquire, and the Honourable James Hamilton Ross, who were appointed to negotiate the same, with the Cree, Beaver, Chipewyan and other Indians inhabiting the territory,—as fully defined in the Treaty—lying within and adjacent to the Provisional District of Athabasca.

The Minister recommends that the Treaty referred to be approved, and that the duplicate thereof, which is also submitted herewith, be kept of record in the Privy Council and the original returned to the Department of Indian Affairs.

The Committee submit the same for Your Excellency's approval.

JOHN J. McGEE,
Clerk of the Privy Council.

The Honourable
The Superintendent General of Indian Affairs.


Department of Indian Affairs
1900.
MAP showing the Territory ceded under treaty No.8. and the Indian tribes therein.
Scale. 100 miles to an Inch.
Mackenzie
GREAT SLAVE LAKE
SLAVES
CARIBOO EATERS
CHIPEWAYANS
BEAVERS
CREES
ATHABASCA
BRITISH COLUMBIA
ALBERTA
124
122
120
118
116
114
112
110
108
106
104
62
60
58
56
54
52