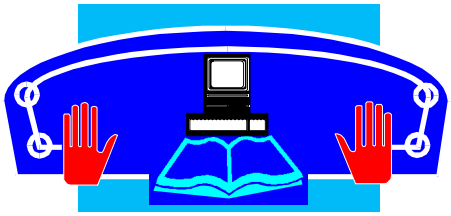

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CANADA'S TREATIES WITH ABORIGINAL PEOPLE

by
Doug Sprague

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CANADA'S TREATIES WITH ABORIGINAL PEOPLE

by

D.N. Sprague

Europeans seeking the wealth of the western hemisphere have enslaved, fought, infected, or feigned partnership with the aboriginal peoples from time of first contact. The universal theme is that every kind of resistance to European invasion has ended in some form of conquest. In the Canadian case, the prelude to subjugation was normally a treaty. The first, as early as the eighteenth century, were agreements of "peace and friendship" negotiated by representatives of the Crown and Indian people either for military alliance or neutrality in the struggle against competing colonial powers, particularly France. The French had entered into such alliances earlier than the British, but more informally. Britain solemnized its simple arrangements with a written text: in return for the peace and friendship of the Indian people, the British negotiators promised that their side would not disturb the other in its essential hunting and fishing territories. Significantly, at the end of the era of inter-imperial reivalry by Britain's occupa-

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

tion of the St Lawrence valley in 1760, the British generals agreed not to disturb the Indian people formally in alliance with the French.[2]

Several "peace and friendship" treaties followed elsewhere in the Atlantic region after 1760, however, the supremacy of Great Britain in North America, formalized by the Peace of Paris in 1763, set the stage for a new kind of treaty-making announced by Royal Proclamation on 7 October 1763. The multi-faceted document indicated how Quebec was to be assimilated into the newly expanded empire, and how colonial expansion unfettered by inter-imperial war might proceed westward without expensive conflicts with Indian people. The Quebec aspects of the Proclamation were soon replaced by other arrangements repudiating the assimilationist intentions proclaimed in 1763, but the key aspects of the aboriginal-colonial relations announced as British policy in 1763 were never repudiated by Great Britain, nor by the Government of Canada after Confederation in 1867. On that account, the significance of the Royal Proclamation of 7 October 1763 for Canadian Indian treaty matters was and continues to have primary importance.[3]

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[2] The "peace and friendship" treaties are discussed in George Brown and Ron Maguire, Indian Treaties in Historical Perspective (Ottawa: Department of Indian Affairs, 1979), 11, 19-20, 49.

[3] According to Brown and Macquire, Treaties in Historical Perspective, 49, "the most significant date in Canadian Indian Treaty matters is 7 October 1763 when . . . the British Sovereign directed that all endeavors to clear the Indian title must be by Crown purchase."

While asserting that the absolute title (sovereignty) of all territory was vested in the British Crown, the Proclamation conceded that the power to dispose (plenum dominium) even by the Crown itself, depended upon prior surrender of the Indian interest in lands sought by others. Moreover, representatives of the Crown specifically commissioned for the task were the sole and exclusive agents for negotiating such agreements with Indian people. In the language of the Proclamation:

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

What followed after 1763 was a new kind of negotiation with Indian people: face to face meetings between specially commissioned agents and representatives of "the several Nations or Tribes" to negotiate a lump-sum payment for lands

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

as needed for an expanding settler population. Ironically, one of the first applications of the new policy was to accommodate a displacement of persons from the older British colonies who, having first declared themselves independent from Great Britain (in protest against the Proclamation of 1763 and several other administrative adjustments over which colonists had no control), then achieved victory in their separatist war against the former mother country in 1783. The first large-scale application of the treaty-making "requirement enunciated in 1763, was, therefore, to make land available for Loyalist refugees after the American Revolution. Over the next thirty years there were almost twenty other "land surrenders" negotiated as purchases from Indian people prior to the Crown opening up such areas t-o settlers. [5]

By the 1810s, Imperial authorities were beginning to complain that the existing means of fulfilling the purpose of the Proclamation was placing excessive demands on the colonial treasury. In 1818 a third kind of treaty emerged to meet the complaint of the excessive expense of awarding lump-sum payment for each surrender of Indian land for settlement. J.R. Miller describes the new approach as one that shifted the cost of extinguishing Indian title from the Crown to the Indians themselves. Gone was the system of outright purchase. In came a scheme of district by district

[5] See tabulation in Brown and Maguire, Indian Treaties in Historical Perspective, xvii-xix.

promises of annual payments, "annuities?" more than amply funded by the revenue flowing to the Crown from sales of Indian lands to settlers. In Miller's characterization, "the Indians indirectly funded most of the purchase price of their land through installment payments made from revenues derived from the land."[6] Almost twenty such arrangements (all in present-day southern Ontario) were made over the next several decades as the new norm for meeting the terms of the Proclamation of 1763.[7]

A final step in the evolution of Canadian treaty making occured in 1850. The newly autonomous Province of Canada (an experimental union of present-day Ontario and Quebec created in 1840), began to anticipate the exploitation of mineral resources and pockets of agricultural land in the geographically enormous, thinly populated territory north of Lakes Huron and Superior. William Benjamin Robinson, the commissioner for the task, negotiated a surrender of Indian title to the whole vast region in two brief meetings with representatives of the aboriginal occupants on 7 and 9 September 1850. Since the "Robinson treaties" affected twice as much territory as all previous treaties combined, in that aspect alone they signaled a bold departure from earlier practice. They represented an equally important step in the

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[6] J.R. Miller, Skyscrapers Hide the Heavens: A History of Indian-White Relations in Canada (Toronto: Universtiy of Toronto press, 1989), 93.

[7] Brown and Maguire, Indian Treaties in Historical Pers~ective, xix-xxi.

evolution of the Canadian form of treaty-making with Indian people in a second respect, as well. In addition to the standard commitments to pay annuities, and the ceremonial assurance that Indian people could continue to hunt and fish on their ancestral lands as much as possible as before, the second innovation was a promise of a reserve of territory for each band signatory to the treaty. Robinson explained to his superiors that while the reserve-promise was a novelty, the innovation was necessary as a cost-saving measure:

> In-allowing the Indians to retain reservations of land for their own use I was governed by the fact that they in most cases asked for such tracts as they had heretofore been in the habit of using for purposes of residence and cultivation . . . by securing these to them and the right of hunting and fishing over the ceded territory, they cannot say that the Government takes from their usual means of subsistence and therefore have no claims for support 8

Had Robinson negotiated cession of all rights without some land reserved for the exclusive use and benefit of the Indian people, then, in his opinion, the Crown would become burdened with the responsibility for the maintenance of every aboriginal person in a territory larger than all the settled parts of Canada combined. The promise of reserves emerged, then, as the cost effective means for securing extinguishment of aboriginal title over much larger tracts than had been the case in any negotitations before 1850.

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

The two Robinson treaties were so effective> they became the normal legal formality when the expanded province of Canada emerged as the new Dominion of Canada with ambitious plans to colonize the even larger areas west of Lakes Huron and Superior.[9] In fact, every Canadian treaty after Confederation fit the basic Robinson recipe: they were negotiated by specially commissioned officers of the Crown to extinguish title to relative large expanses of territory; they offered vague assurances concerning existing hunting and fishing rights; and promised reserves as well as annuities. All were consistent with the terms of the Proclamation of 1763. All were cheaper means of taking surrenders than the earlier British form, and cheaper still than the American alternative of dictating terms of treaty after military conquest. .

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

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

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

Since Canada was completely familiar with the well-established treaty making tradition before Confederation, the Robinison-style treaties that followed 1870 were the entirely predictable response to the Rupert's Land Order with respect to Indian people on the Canadian prairies. The only improvisation was extending the principles of 1763 from "tribes" of Indian people to any other "corporation, company, or Individual" in the territory at the time of the transfer. The reason was simple: Metis people in the HBC's District of Assiniboia (present day southern Manitoba) had taken direct action under Louis Riel to secure such recognition in 1869-70, and Britain pressured Canada into a negotiated settlement in April, 1870.[11] A bill to give effect to the results of the negotiations appeared in the Canadian Parliament in May. By the Manitoba Act, the small District of Assiniboia became the fifth province in Confederation with special rights for Metis people because of their dual (Indian and European) ancestry. That was the essential background to Britain's Order in Council of 23 June 1870

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

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

requiring similarly equitable treatment for persons anywhere in the transferred territory--Manitoba or elsewhere.

Over the next decade, a flurry of Robinson-style treaties with prairie Indians was not, however, accompanied by a series of Manitoba-Act concessions for Metis people outside Canada's fifth province. Still, by a revision of the Dominion Lands Act in 1879,[12] Canada did take account of the oversight and appeared to set the stage for orderly accommodation of all interests in any territory prior to development under Canadian auspices. In effect, Canada promised a three stage sequence of accommodation of all aboriginal people prior to any future territorial development. The first step would be that which had already taken place on most of the Prairies by 1879: negotiation of treaties with the Indian people. The second step involved surveys to fit the land into a pattern of legally describable parcels of expected development. Then the metes and bounds of promised reserves would be ascertainable. At the same time, the pattern of occupancy of original settlers would be documented,[13] and settlers of part Indian ancestry would receive a

12 The amendment of the 1872 statute empowered the Cabinet to set aside land "to such extent, and on such terms and conditions, as may be deemed expedient" to satisfy "half breed" claims. Statutes of Canada (1879), Chapter 31: "An Act to amend and consolidate the several Acts respecting the Public lands of the Dominion," section 125(e).

13 The Dominion Lands Act provided two ways of confirming the titles of original settlers: free grants by virtue of occupation from a time before Indian treaty; or free grants by virtue of occupation for agricultural develop-

special grant in recognition of their inherited share of the Indian title. The last stage would involve administative confirmation of Indian reserves and original-settler claims. Then all other lands would be freely open for development. In theory, no conflicts could arise between the competing claims of aboriginal people and succeeding waves of newcomers in pursuit of Canadian sanctioned development because all such claims would be known and accommodated in advance of granting any resources to newcomer companies or individuals. In practice, however, there were major shortcomings and failures at every stage of the process and in every geographical locale where treaty activity occurred between 1871 and 1921, the first and last dates of Canadian treaties with aboriginal people since Confederation.

The most typical shortcoming of stage one is that large numbers of people were left out of the treaty-making process, were brought in later without compensation for intervening damages, or never came under treaty at all. The Metis people left out of treaty discussion on the Prairies beyond Manitoba did not receive any consideration of their claims until long after most of the treaties were negotiated, and the token payments granted are usually considered

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ment after treaty but before date of general survey. See section 114 under "Homestead" and section 6(g) under "Powers of Governor in Council" of the Dominion Lands Act (1872). The same rights continued to the last revision of the same statute in 1927. See Revised Statutes of Canada (1927), Chapter 113, sections 10 and 74(c).

derisory amounts in comparison with value received.[14] In the more northerly parts of the territories, comprehensive claims are still a matter of inconclusive negotiations. In British Columbia, instead of negotiating treaties and reserves, the government assigned reserve parcels without troubling with the extinguishment of aboriginal title in general.[15] The one valid, overall generalization concerning the making of treaties is that extinguishment negotiations occurred sporadically, and only where Canada hoped for large returns from new areas of expected boom: Treaties 1 to 7 (1871-1877) extinguished Indian title to the Prairies and Northwestern Ontario to clear the way for the Canadian Pacific Railway and agricultural settlement; Treaty 8 (1899-1900) covered access to the Yukon territory during the gold rush that began in 1897; Treaty 9 (1904) followed silver discoveries and expected hydroelectric and pulp and paper development along the routes of newly projected rail lines in northern Ontario; Treaty 10 (1909) served a similar purpose in northern Saskatchewan; and Treaty 11 (1921) followed Imperial Oil's first oil gusher at Norman Wells in 1920.[16] Other vast areas of the north (like most of British

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[14] See, for example, Clem Chartier, "Aboriginal Rights and Land Issues: The Metis Perspective," in Menno Boldt and J. Anthony Long, eds., The Quest for Justice: Aboriginal Peoples and Aboriginal Rights (Toronto: University of Toronto Press, 1985), 58-60.

[15] Brown and Maguire, Indian Treaties in Historical Perspective, 41- 43. See also Dennis Madill, British Columbia Indian Treaties in Historical Perspective (Ottawa: Department of Indian and Northern Affairs, 1981).

Columbia) have been indisputably Canadian in political geography for over a century, but aboriginal title, within the terms of the Proclamation of 1763 and Rupert's Land Order of 1870, remains unextinguished.[17]

Stage two (surveys of resources to be reserved for the exclusive use and benefit of aboriginal people) was pursued even more haphazardly than treaty making. Two factors limited the scope of surveying. One was the consideration of cost. Many Indian bands and Metis settlements were located in areas relatively remote from mainstream society. Consequently, selections for Indian reserves might be agreed to in principle--even sketched on paper--but cost conscious officials were reluctant to survey large areas of difficult

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[16] Subtle differences in the specific terms of treaties 1 to 7 are discussed in Friesen, Canadian Prairies, 138-146. Canada's overall intentions are described by R. Fumoleau, As Long as This land Shall Last: A History of Treaty 8 and Treaty 11, 0-1939 (Toronto: McClelland and Stewart, 1973) and E. Brian Titley, A Narrow Vision: Duncan Campbell Scott and the Administration of Indian Affairs in Canada (Vancouver: University of British Columbia Press, 1986).

[17] Hoping for iminent development of Northern Mineral resources Canada has resumed treaty activity in the far north under the rubric of "comprehensive claims" policy, the history and possible future of which is described in the "Collican Report." Murray Coolican, Living Treaties--Lasting Agreements: Report of the Task Force to Review Comprehensive Claims Policy (Ottawa: Department of Indian Affairs and Northern Development, 1985). With respect to British Columbia, however, Canada maintains that the pre-Confederation reserve policy of the colonial government was adequate to extinguish aboriginal title, a point the Indian people-deny. Two important cases concern BC claims: one is the Nishga claim to the Nass Valley, dismissed by the Supreme Court of Canada in Calder et al. v. Attorney General of British Columbia (1973),

terrain for small numbers of persons whose traditional resource base was not directly in the path of disruption. Alternatively, where bands were located in the way of intended development, the same officials were reluctant to "lock up" large tracts of valuable farm or timber as Indian reserves. 18 In either case, the result was the same: many bands were located on reserves significantly smaller than their treaty entitlement (130 acres per person was the typical reserve promise) or had no reserve at all. Still, the right t-o the treaty entitlement continued undiminished. [19]

Canada's reluctance to survey Metis communities in a timely manner after concluding treaties with the Indian people had the effect of diminishing even the acknowledged right of Metis settlers to their resources. Norway House, for example, was one of the oldest such settlements in Canada, dating from the 1820s. Located at the north end of Lake Winnipeg, the community was situated in a district covered

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the other is the more ambitious claim of the **Gitksan-Wet'suwet'en** chiefs to 22,000 square miles of central British Columbia, tried for 374 days between 11 May 1987 and 30 June 1990 as **Delgamuukw v.** Attorney General of British Columbia and **Attorney** General of Canada **before** the **BC** Supreme **Court.** The 394 page **reasons** for judgment was against the plaintiff. The matter is currently on appeal to the Supreme Court of Canada.

18 Canada's remarkably parsimonious administration is described most fully by **Titley** in Narrow Vision.

[19] David C. Knoll, "Unfinished Business: Treaty Land Entitlement and Surrender Claims in Saskatchewanl" in Donald J. **Purich,** cd., Introduction to Native Law Issues: **Aboriginal Rights,** Treaties and the Constitution **(Saskatoon:** Native Law Centre, 1987), 1-11.

by Treaty 5 in 1875. The first Dominion survey, however, was not undertaken until 1916. Even then, the work of the surveyor was merely to locate homesites for Metis "squatters" to purchase; the Department of the Interior never intended to map the pattern of resource utilization preparatory to the recognition of first-settlers' claims. No account was taken of the location of individuals' fish camps and traplines, only the locations of their homes in the settlement (which everyone was then ordered to pay-for at the 'rate of three dollars per acre). Such was the attention received by Metis communities in the mid-north when they were surveyed at all. Scores of others were overlooked entirely. 20

cost considerations meant that many aboriginal land rights were either ignored or remained inchoate. The other obstacle in the way of reserving aboriginal resources was Canadian federalism, first encountered in Ottawa's relations with Ontario in the 1870s. The bands in the vicinity of Lake of the Woods and Rainy Lake had made their treaty with Canada in 1873. Reserve locations were agreed to in principle over the next several years, and many were surveyed in the optimistic belief that all of the territory was Dominion

20 The overall scope of Dominion surveys, therefore, the general neglect of Metis settlements, is shown graphically on the last Dominion map of extent of survey produced in 1929 in the National Archives of Canada, National Map Collection, number 18829. The evidence for the particular case of Norway House is found in Manitoba Department of Mines and Natural Resources, Crown Lands Branch, microfilm reels R-1312 and R1297.

land of comparatively small value. In 1878, however, federal-provincial arbitration moved the border of Ontario from a provisional location set in 1867 well to the west to encompass virtually all of the Treaty 3 area. Since Ontario was a province in control of its resources, questions concerning the status of the reserves arose immediately. In 1888, the highest level of judicial opinion at the time (the Judicial Committee of the Privy Council of Great Britain) ruled that while the beneficial interest in the lands selected for reserve-s was Ontario's, Canada had acted within its sphere of responsibility to negotiate a surrender of the "usufructuary" aboriginal title, and the province could not prevent the federal government from fulfilling obligations incurred by the treaty.[21]

Ontario then demanded plans of every reserve selected as well as justification for the overall area in each case and Canada complied in 1890. However, several years of delay followed as the province proved reluctant to confirm the selections mutually acceptable to the Dominion and the Indian people. In 1894 the province did agree not to withold concurrence without "good reason." The reasons that surfaced over the next twenty years most frequently concerned locations too near to hydroelectric sites, or reserve selections that included valuable agricultural land, timber, or mining promise. Sporadic litigation and negotiation ended

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2 St. Catherine's Milling and Lumber Co. v. the Queen (1888).

in 1915 when the Ontario did finally agree to most of the reserve selections of the 1870s.[22]

The frustrating experience with Ontario was not beyond the memory of federal officials negotiating provincial control of natural resources with the prairie provinces in the 1920s. Since 1870, all unalienated Crown land between Ontario and British Columbia had remained "Dominion Lands" under the control of the national government to insure the fulfillment of "Dominion purposes." The foregoing discussion of reserve land should make plain that one such purpose was setting aside land in accordance with the treaties negotiated in the 1870s; but as late as the 1920s the obligation was still unfulfilled because of the cost considerations described above. Duncan Campbell Scott, the Canadian representative in the last, most frustrating meetings with Ontario to confirm the Treaty 3 reserves was Deputy Superintendant General of the Department of Indian Affairs at the time of Canada's negotiations of the resource transfer to the prairie provinces. To avoid repetition of the Ontario experience in triplicate on the Prairies, Scott insisted that "the Provinces be obligated to provide lands for Indian reserves free of cost to the Dominion in order to carry out treaty obligations."[23] The final wording of the Natural

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

23 Scott to Charles Stewart, Minister of the Interior and

Resources Transfer Agreement (NRTA) signed in December, 1929 (to come into effect in 1930) did except "reserves selected and surveyed but not yet confirmed as well as those confirmed," and the transfer of lands was qualified further by a second proviso that Canada would need additional lands (unspecified as to quantity and location) for reserves as yet unselected or surveyed. "Such areas" were to be made available "from time to time" to the point of fulfillment of Canada's "obligations under the treaties with the Indians." Upon "a-greement" by the province, the additional lands were to be transferred back to Canada, without cost, "in the same way in all respects as if they had never passed to the Province."[24] The requirement of provincial agreement, of course, meant that the Ontario experience was repeated as Scott had feared: a Saskatchewan band sought a reserve on Candle Lake in 1931, the location was accepted by Canada in 1933 and promptly vetoed by the province preferring to see the site developed as a resort area (a mutually acceptable alterna-

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Superintendent General of Indian Affairs, 9 March 1922, National Archives of Canada, RG 10, vol. 6820, file 492-4-2, pt. 1.

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

tive[25] was not found until 1951); in Alberta, a band agreed to a reserve in a remote northern part of the province in 1937[26] but the provincial Minister of Mines and Resources insisted upon retention of the mineral rights (provincial intransigence consumed seventeed years of negotation before confirmation of the reserve in 1954); in Manitoba the blanket obstacle was retention of riparian rights to facilitate hydroelectric development.[27] As late as 1974, when Canada finally created an Office of Native Claims to catalogue the overall 'balance of outstanding entitlements and other matters arising from defective administration of the treaties, literally millions of acres came into consideration, but federal-provincial wrangling continues to block settlement of most such matters.

While Canadian federalism blocks the fulfillment of Indian treaty land entitlements, still no level of government denies that there are obligations outstanding. In the case of the inchoate rights of Metis people under the Rupert's Land Order of 1870, responsibilities are systematically denied. No provincial surveys corrected the neglect of the matter by the Department of the Interior. No provincial

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

26 Alberta's early refusal to transfer land with mineral rights is discussed in Fumoleau, As Long as this Land Shall Last, 291.

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

government has recognized ancestral rights with free grants and assurances of continued usage or appropriate compensation for interruption of traditional means of subsistence.[28] Metis interests are regarded simply as "squatters" claims. In certain parts of Alberta, Metis "squatters" have received a measure of consideration, but as a matter of public charity, here and there, rather than an aboriginal right worthy of systematic recognition.[29]

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

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[28] Section 34 of the Crown Lands Act, Chapter 340 in the current statutes of Manitoba (RSM 1987)is typical in its declaration that unauthorized occupants of Crown lands have no pre-emptive claim to ownership "by any length of possession."

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

1. The basis of aboriginal claims is more contractual than a matter of primary legal obligation.
2. For the protection of the interests of society as a whole, the government's response to aboriginal claims is necessarily adversarial.
3. Claims resolution has to be sensitive--even subordinate--to the larger demands of more significant constituencies.

With such a pattern of presuppositoins informing and deforming the treaty claims resolution process, one could not expect more than what in fact has occured: less than 30 settlements out of more than 400 validated cases by 1987.[30] By 1990, however, it seemed that Canada had reached the threshold of a significant breakthrough because of a new pattern of legal realities enunciated by the Supreme Court interpreting constitutional changes proclaimed in April, 1982.

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

> (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
>
> (2) In this Act, 'aboriginal peoples of Canada' includes the Indian, Inuit, and Metis peoples of Canada.

30 Knoll, "Unfinished Business," 34. See also Cliff Wright, Report and Recommendations on Treaty Land Entitlement (Regina: Office of the Treaty Commissioner, 1990).

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

The judicial clarification of constitutionally protected rights has proved more extensive than what even the most optimistic observors had hoped-for from political leaders in conference. Most recently the Court has declared that any aboriginal right is "existing" if by custom or by treaty an aboriginal group or individual enjoyed a resource or tradition not legally extinguished by 17 April 1982.[31] The test of legal extinguishment is whether the the right in question was subject to infringment by a competent authority for a legitimate purpose with compensation to the aboriginal people adequate to do honour to the Crown. More important to

[31] Sparrow v. the Queen (1990).

the court than cataloging the list of supposed rights is the process for their enforcement: the burden of proving an infringement is upon the aboriginal gorup or individual; the obligation to justify is the government's.[32] In defining the terms for proving infringement and justification of trespass the Supreme Court has removed any legal basis for the several presuppositions blocking the fulfillment of treaty obligations since the creation of the Office of Native Claims in 1974. By 1990, the reverse of each of the presuppositons 'distinguished above had become the constitutionally correct postion:

1. Any agreement between competent representatives of an aboriginal people and the Crown that creates mutually binding obligations on the parties is a "treaty,"[33] and all such agreements as well as other existing aboriginal rights affirmed in section 35 are more than contractual promises, they are fundamental, constitutionally protected rights defining primary legal obligations.[34]
2. Canada has a fiduciary responsibility to guarantee the promises of the Crown to aboriginal people[35] and the three prairie provinces, in particular, have a

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32 Sparrow.

33 Simon v. the Queen (1985); and R.v.Sioui (1990).

34 Nowegijick v. the Queen (1983); Horseman v. the Queen (1990); and Sparrow.

35 R. v. Guerin (1984) and Sparrow.

constitutional obligation not to frustrate Canada in the fulfillment of outstanding, treaty land entitlements as the quid pro quo in the NRTA for the enlargement of provincial powers in other respects.[36]

3. The competition between incoming commercial or individual interests against a constitutionally protected aboriginal right has to be decided on the basis of meeting the aboriginal right first; and in the accommodation of the aboriginal right, government must err 'towards the maximum reasonable benefit as originally promised.[37]

The full implications of the judicial decisions reached by the Supreme Court since 1982 can scarcely be imagined at present. Clearly, however, the Court expects a dramatic change in relations between governments and aboriginal peoples. Whether the Court's removal of the legal basis for the continuing postponement of Canada's outstanding treaty obligations is enough to make a difference in the future remains to be seen, but what is clear in the early 1990s is that continuing delays leave governments extremely vulnerable to expensive lawsuits that they are increasingly likely

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[36] Horseman.

37 Jack v. the Queen (1980); Simon; and Sparrow.

to lose. From that perspective, the legal history of Canada's treaties with aboriginal peoples has reached an interesting turning point, even though the shape of future developments remain obscure.

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