

The Honour of First Nations – The Honour of the Crown

The Unique Relationship of First Nations with the Crown

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1. What are treaties?

A simple definition of “treaty” is that it is a contract, the instrument that has become a large part of our professional and domestic lives. A contract is an agreement between two groups of people to do things for each other in respectful ways. However, “treaty” is more frequently used to identify a formal beneficial agreement between countries. The North American Free Trade Agreement and the proposed global treaty to cut greenhouse gases are functional examples. “Peace treaties,” on the other hand, do not enjoy such bilateral support if they are written by the victors and imposed on the vanquished. Therefore, in cases such as the 1919 Treaty of Versailles, the word “treaty” may be a misnomer. Usually treaties continue only if the signatories find them advantageous and will include an escape clause.

These examples do not adequately depict the agreements between the Crown and Canada’s First Nations. Unlike commonplace contracts the First Nations treaties have no time limit: they last forever. Unlike normal treaties they cannot be broken by either party: they contain no means of escape. Finally, they are unlike peace treaties because there was no war: neither party held a dominant position. In fact, the only manner by which they resemble typical contracts or treaties is that they were intended to benefit both parties.

Canada’s courts have described these treaties as *sui generis*¹ or unique. They outline what the Europeans who came to the part of North America that is now Canada pledged to First Nations in exchange for access to their land.

If the usual definitions of “treaty” are imperfect and render the word inadequate for the historic understanding reached with First Nations, what word should be used? I prefer “covenant,” a word

¹ *R. v Guerin* (1984), 13 D.L.R. (4th) 321, [1984] 2 S.C.R. 335.

with biblical origins, which religious cultures apply to their affiliation with God. A covenant is also a formal promise under oath, or an agreement that will survive forever. A religious ceremony forging a promise between two parties and God establishes a covenant. Common law distinguishes a covenant from a normal contract with a seal to signify the unusual solemnity of the promise. At the conclusion of each treaty negotiation the parties shared a pipe, a ceremony as solemn for First Nations as the seal was for Europeans. During treaty discussions missionaries sat with Crown representatives, an affirmation of the Crown's solemn position.

Danny Musqua, a Saulteaux Elder from my province, put it aptly when he described Treaty 4, made by his forebears: "We made a covenant with Her Majesty's government, and a covenant is not just a relationship between people; it's a relationship between three parties, you (the Crown) and me (First Nations) and the Creator."² First Nations view treaties and the treaty relationship as sacred.

2. Why were treaties made?

The origins of treaties in North America between First Nations and Europeans can be found in the 1500s³ when fur traders made business agreements with First Nations for furs and provisions. In the following century treaties were negotiated between the colonies that would eventually become the United States and the Iroquois Confederacy. An important precedent was the Great Peace of 1701 when 1,300 representatives of 40 First Nations gathered in Montreal to make a treaty that ended a century of war between the confederacy and New France.⁴ Later in the 1700s there were peace and friendship

² Cardinal, H. and W. Hildebrandt, *Treaty Elders of Saskatchewan: Our Dream is That Our Peoples Will One Day Be Clearly Recognized as Nations*. (Calgary: University of Calgary Press, 2000).

³ Canada. Royal Commission on Aboriginal Peoples. *Report on the Royal Commission of Aboriginal Peoples*. Vol. I, *Looking Forward, Looking Back*. (Ottawa: Canada Communication Group, 1996).

⁴ Havard, Gillies, *The Great Peace of Montreal of 1701*. (Montreal & Kingston: McGill Queen's University Press, 2001).

treaties between First Nations and Maritime colonial governments that allowed European settlement.

The British Crown had long used treaty making around the world to acquire new territories, establish military and economic alliances, and build peaceful relations with other nations.

On the other side, First Nations also had a long-standing tradition of making treaties between tribes to settle land disputes and end wars, and to make trade and marriage arrangements.

The legal framework for making treaties with First Nations in the last 250 years is the *Royal Proclamation* of King George III. It was issued in 1763, four years after the defeat of France, and established strict procedures for British territorial expansion in North America. Regarded by Canada's First Nations as their *magna carta*, the proclamation recognized them as nations and stipulated that only the British government could acquire their lands, thus preventing acquisition by private individuals or companies. And the only means by which First Nations' lands could be acquired was through treaty with the Crown.

The first application of the *Royal Proclamation* and its treaty making provisions was in the area north of the Great Lakes, designated as Upper Canada in 1791. The methodology would be later employed to make the 11 numbered treaties in the territories Canada purchased from the Hudson's Bay Company in 1870. Although this region was beyond the jurisdiction of the proclamation, the Canadian government recognized that First Nations there had the same rights to their ancestral land as did those in Upper Canada.

The need for treaties was simple: First Nations possessed territory the Crown wanted settled with Europeans. This was especially the case with the numbered treaties. At the same time, First Nations appreciated the benefit of European technology and were willing to share their land with farmers under certain conditions. The economic benefits offered in negotiations convinced First Nations to sign the treaties and allow settlement. Not everything discussed was documented, however. The

omissions were not deemed significant because First Nations negotiators could not read and write. Besides, treaty dialogue did not focus on barter, but on accommodation and trust. The two sides were talking about harmoniously sharing an immense and abundant territory. First Nations were promised the choice of continuing their hunter-gatherer economy or adopting the settlers' agriculture economy and receiving the necessary training and implements.

The numbered treaties were meant to initiate an ongoing liaison between First Nations and the Crown for as long as the sun shines, the waters flow and the grass grows. They were not meant to be land sales, but a structure for creating political, economic and social associations between First Nations and newcomers. The promises made by Crown negotiators reflected First Nations' world views and philosophies.

3. Where have treaties been concluded?

Pre- and post-Confederation governments have made 68 treaties with First Nations, covering most of Ontario and the Prairies, and parts of Vancouver Island, the Northwest Territories and Atlantic Canada. These do not include peace and friendship treaties. The numbered treaties, their year, their area in present-day Canada and the First Nations who are parties to them are as follows:

- Treaties 1 and 2, 1871, southern Manitoba and Saskatchewan, Ojibway and Cree
- Treaty 3, 1873, Lake of the Woods region of Ontario, Saulteaux (Ojibway)
- Treaty 4, 1874, southern Saskatchewan (Qu'Appelle region), Cree and Saulteaux (Ojibway)
- Treaty 5, 1875, central and northern Manitoba, Saulteaux (Ojibway) and Swampy Cree
- Treaty 6, 1876, central Saskatchewan and Alberta, mostly Plains and Woodlands Cree
- Treaty 7, 1877, southern Alberta, Blackfoot and others
- Treaty 8, 1899, northern Alberta and northeast corner of B.C., Cree, Dene, Dogrib and others
- Treaty 9, 1905, northern Ontario (James Bay region), Ojibway, Cree and others

- Treaty 10, 1906, northern Saskatchewan (Peace River region), primarily Dene and Métis
- Treaty 11, 1921, western part of Northwest Territories, primarily Dene and Métis of the Mackenzie region

4. Why did Canada enter treaty?

In the area of Canada managed by the Hudson's Bay Company (the North West or Rupert's Land) relations between First Nations and Europeans developed in pace with the fur trade's expansion. Company agents learnt First Nations' protocols and used this knowledge to cultivate alliances with their hosts. However, when the new government of Canada bought Rupert's Land from the Hudson's Bay Company in 1870 for 300,000 British pounds, First Nations leaders were, not surprisingly, enraged. This territory had been sold without their consent and they received no money. So conflict resulted. Surveyors sent by the government were barred, as were other non-First Nations, making settlement impossible. In the meantime, American territorial ambition threatened, causing anxiety for the Canadian government. Preventing U.S. appropriation necessitated upholding Canadian sovereignty through settlement and by laying a transcontinental railway, pursuant to John A. Macdonald's National Policy. These measures were unachievable without access.

When the U.S. pursued its western expansion it waged wars against the indigenous inhabitants, a venture that practically bankrupted its government. Canada's government wisely decided on a peaceful policy. Fortunately, First Nations were amenable.

5. Why did First Nations enter treaty?

First Nations' chagrin over the Rupert's Land transaction was tempered by changing economic reality: commercial slaughter of buffalo and other wildlife diminished hunting opportunities; meanwhile, fur prices had dropped. Without immunity to European diseases First Nations faced health problems.

Salvation lay in the new economy, First Nations believed, and this meant learning the ways of the newcomers and acquiring new skills, such as farming.

They did not, however, want their way of life to be assimilated to the European culture. They believed that through treaties they could advance economically and protect their traditions. Most important, they also wanted peace.

6. What treaties and the Crown mean to First Nations

Throughout treaty negotiations, First Nations leaders stressed their need for education. They saw agriculture as the way to sustain their people. From their oral tradition we have learned they were willing to share their land, not surrender it, in exchange for the Queen's generosity and security. This was not exactly what Ottawa had in mind: it needed dominance, not sharing, to exercise sovereignty and enable settlement. That prerogative eluded the understanding of First Nations negotiators and had they realized it there might have been a different outcome.

The treaties have two components – written documents and First Nations' understanding based on their oral history. This second element covers verbal undertakings made by Crown negotiators. To comprehend the spirit and intent of treaty, it is necessary to recognize the validity of both components.

If you distill treaties to their lowest common denominator, they were essentially a blueprint for harmony. When the treaty parties came together, they were basically trying to answer the question, "How are we going to live together?"

The idea of a treaty being created for mutual gain appears to have governed the thinking of First Nations leaders. Chief Peguis,⁵ anticipating settlement and its consequences as early as 1857, wrote to the Aborigines Protection Society in England demanding that

⁵ Great Britain, *Report of the Select Committee on the Hudson's Bay Company*, 1857.

before whites “take possession of our lands we wish that a fair and mutually advantageous treaty be entered into with my tribe.”

During negotiations for Treaty 3 in 1873 the principle of mutual advantage was advanced by Chief Mawedopenais:

All this is our property where you have come...This is what we think, that the Great Spirit has planted us on this ground where we are, as you were where you came from...Our hands are poor but our heads are rich, and it is riches that we ask so that we may be able to support our families as long as the sun rises and the water runs...*The sound of the rustling of the gold is under my feet where I stand*; we have a rich country; it is the Great Spirit who gave us this; where we stand upon is the Indians' property, and belongs to them.⁶

First Nations view treaties as sacred agreements and hold both treaties and the Crown in great reverence. When I was treaty commissioner I heard representatives of the Federation of Saskatchewan Indian Nations (FSIN) and Elders speak about treaties and the Crown in consistent terms: treaties created a lasting relationship with the Crown and her subjects, with the Creator as witness. The FSIN further stated that treaties are referred to in reverence – reverence for the ancestors who signed them with the Crown with the Creator as witness. The treaty commissioners who represented the British Crown demonstrated a great reverence for their Queen who was head of state and church.

Treaty 6 Cree Elder Norman Sunchild said that when First Nations negotiators finally agreed to the treaty, the commissioner took the promises in his hand and raised them to

⁶ The *Manitoban*, as cited in Alexander Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories Including the Negotiations on Which They Were Based*, Saskatoon: Fifth House Publishers, 1991.

the skies, placing the treaties in the hands of the Great Spirit.⁷ Alma Kytwayhat, another Treaty 6 Cree Elder, said, “It was the [Queen] who offered to be our mother and us to be her children and to love us in the way we want to live.”⁸ These sentiments were voiced time and again throughout Saskatchewan.

7. Honour of the Crown

Canadians have inherited the British tradition of acting honourably for the sake of the Sovereign. This convention has roots in pre-Norman England, a time when every yeoman swore personal allegiance to the king and anyone who was charged with speaking or acting on behalf of him bore an absolute personal responsibility to lend credit to the king’s good name. Should he fail in this responsibility or cause embarrassment, he was required to answer personally to the king with his life and fortune. The Crown was not an abstract or an imaginary essence in those days, but a real person whose powers and prestige were directly dependent on the conduct of his advisors, captains and messengers. The concept of the Honour of the Crown of course became more complex and bureaucratic as it evolved. The sovereign is now insulated from personal involvement in the affairs of state. It is noteworthy that the American colonists, during the 18th century agitations that preceded their revolution against British authority, appealed to the Honour of the Crown to protect them from men they described as “the king’s evil ministers.” They distinguished between the Crown *per se*, which traditionally stood for what is just and honourable, and the government of the day which was susceptible to corruption and misconduct.

Appealing to the Honour of the Crown was an appeal not merely to the sovereign as a person, but to a traditional bedrock of principles of fundamental justice that lay beyond persons and beyond politics. It is precisely this distinction that rests at the heart of our ideals of “human rights” today.

⁷ Cardinal, H. and W. Hildebrandt, *Treaty Elders of Saskatchewan: Our Dream is That Our Peoples Will One Day Be Clearly Recognized as Nations*. (Calgary: University of Calgary Press, 2000).

⁸ Cardinal and Hildebrandt.

The Supreme Court of Canada resurrected the notion of the Honour of the Crown in its landmark decision on *Guerin v. R.* S.C.C. 1984⁹ where it first stated that the government has a fiduciary duty towards First Nations. By unanimously rebuking government privilege the court marked a milestone in restoring a system of law based on principles rather than persons. Defining “fiduciary duty of the Crown,” the court restored the concept of holding ministers to a standard of fairness that demands forethought as to what conduct lends credibility and honour to the Crown, instead of what conduct can be technically justified under the current law. The Supreme Court clearly rebuked the notion that a minister’s reasons to act can be defended on the grounds of political expediency. In *Marshall No. 1*, 1999, the Supreme Court outlined with clarity the principles that underlie the high standard of the Honour of the Crown as follows:

This appeal puts to the test the principle, emphasized by the Supreme Court on several occasions, that the Honour of the Crown is always at stake in its dealings with Aboriginal people. This is one of the principles of interpretation set forth in the *Badger Case*, Supreme Court of Canada. Interpretations 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 fulfill its promises. No appearance of “sharp dealings” will be sanctioned.

This principle that the Crown’s honour is at stake when the Crown enters into treaties with First Nations dates back at least to the Supreme Court of Canada’s decision in 1895 in *Ontario v. The Dominion of Canada and the Province of Quebec*. In that decision Gwynne, J. dissenting, stated:

“The terms and conditions expressed in treaty instruments that have to be performed by or on behalf of the Crown have always been regarded as

⁹ *R. v Guerin* (1984), 13 D.L.R. (4th) 321, [1984] 2 S.C.R. 335.

involving a trust graciously assumed by the Crown to the fulfillment of which with the Indians, the fate and Honour of the Crown is pledged.”¹⁰

The Honour of the Crown is not limited to the interpretation of legislation, or the application of treaties. As I see it, the Honour of the Crown also refers to the same essential commitment that all Canadians understand as embodied in two words, “justice” and “fairness.” The Honour of the Crown is much broader than a mere interpretation of s. 91(24) of the *Constitution Act*, 1867. In every action and decision the women and men who represent the Crown in Canada should conduct themselves as if their personal honour and family names depended upon it. The idea of the Honour of the Crown is not merely an empty slogan, but absolutely central to the historical relationship between the sovereign and the subject.

The people serving within our system of Parliamentary government must sometimes choose between “blind obedience” to a political master and “justice.” Which is the greater duty – to obey the ministers of the Crown or to respect the principles of justice for which the Crown stands? Honour truly lies in loyalty to the fundamental values that are behind the Crown’s authority. This dialectical tension is inherent in our gradual evolution as Canadians, from colony to a country, and from a traditional constitutional monarchy to a modern liberal society, grounded in direct democracy and respect for human rights and their protection through an independent judiciary.

8. Honour of the First Nations

In its response to the Report of the Royal Commission on Aboriginal Peoples in January 1998, Canada reflected on the past and future place of its treaties. In “Gathering Strength”¹¹ the government acknowledged that:

¹⁰ *R. v. Marshall*, [1999] 3 S.C.R. 456.

¹¹ Canada. *Gathering Strength: Canada’s Aboriginal Action Plan*. (Ottawa: Canada Communication Group, 1997).

- the treaties between the Crown and First Nations are the basic building blocks in the creation of our country, and
- a vision for the future should build on the recognition of the rights of Aboriginal people and on the treaty relationship

The Supreme Court of Canada will not allow the treaty relationship to go unrecognized in the future. Treaties are part of the Constitution and must be honoured.

First Nations take exactly the same view of honour as the tribal people who inhabited Britain when the Normans arrived. Tribal leaders owed their status and authority to their honesty and good names. Treaties were made between people and between families and secured by personal honour. Every individual was personally bound to uphold the agreement, and to honour and renew the living relationship among peoples that the treaty represented.

The challenge we face is to create conditions in Canada wherein all people and all communities enjoy a high quality of life. First Nations must take their rightful place in the Canadian state. The First Nations must be recognized as one of three founding groups of our country, along with the French and the British.

The treaties are unique. They created a fundamental political relationship. From the First Nations perspective, they have a strong spiritual component because they are covenants between themselves, the Crown and the Creator.

A revitalized treaty relationship has the potential to be a unifying force that will redefine and enrich what it means to live together, as Canadians, today and far into the future.

That concept of honour was the basis of the First Nations leaders' understanding of what they were doing when they entered into treaties with the British Crown. They were entering into a personal relationship – a kinship – with British subjects and most crucially, a personal relationship with the British sovereign. The treaty was, therefore, about adoption and family within which a perpetual connection was modelled on the mutual respect and responsibilities of a family. It was presumed, based on traditions and

values, that the sovereign would assume personal responsibility to see that the spirit of kinship and mutual benefit was respected in practice.

9. Future role of the Crown in treaty implementation

There are important judicial and constitutional grounds for full treaty implementation. The *Reference re. Secession of Quebec, 1998*¹² provides advice on how to approach this. The Supreme Court's decision recognizes the limitations of the law and the courts for conducting purely political processes. The decision comes from the court's detailed examination of the fundamental principles underlying the Canadian constitution, particularly the circumstances in which the duty to negotiate arises. As such, it offers considerable guidance in determining whether a duty to negotiate treaty implementation exists, as well as the legal enforceability of such a duty.

The court identified four fundamental principles of the Constitution:

- Federalism
- Democracy
- Constitutionalism and the rule of law
- Protection of minorities.

In describing these principles in general, the court stated:

Although these underlying principles are not explicitly made part of the Constitution by any written provision, other than in some respects by the oblique reference in the preamble to the *Constitution Act, 1867*, it would be impossible to conceive of our constitutional structure without them.

The principles dictate major elements of the architecture of the Constitution itself, and are as such its lifeblood.

¹² Reference re. Secession of Quebec, [1998] 2 S.C.R.

The principles assist in the interpretation of the text and the delineation of spheres of jurisdiction, the scope of rights and obligations, and the role of our political institutions. Equally important, observance of and respect for these principles is essential to the ongoing process of constitutional development and evolution of our Constitution as a “living tree,” to invoke the famous description in *Edwards v. Attorney-General for Canada* [1930] A.C. 123 (P.C), at p.136. As this court indicated in *New Brunswick Broadcasting Co. v Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 S.C.R. 319, Canadians have long recognized the existence and importance of unwritten constitutional principles in our system of government.¹³

With respect to the federalism component particularly, the court stated:

Federalism is the political mechanism by which diversity could be reconciled with unity....

The principle of federalism recognizes the diversity of the component parts of Confederation, and the autonomy of provincial governments to develop their societies within their respective spheres of jurisdiction.¹⁴

The court later makes the link between federalism and “the pursuit of collective goals”:

The principle of federalism facilitates the pursuit of collective goals by cultural and linguistic minorities which form the majority within a particular province.¹⁵

¹³ Reference re. Secession of Quebec.

¹⁴ Ibid.

¹⁵ Ibid.

Explaining the role of democracy as a fundamental principle of Canada's Constitution, the court commented:

...democracy is fundamentally connected to substantive goals, most importantly, the promotion of self-government. Democracy accommodates cultural and group identities: *Reference re Provincial Electoral Boundaries*, at p. 188. Put another way, a sovereign people exercises its right to self-government through the democratic process.¹⁶

Describing the two-headed principle of constitutionalism and the rule of law, the court states:

Simply put, the constitutionalism principle requires that all government action comply with the Constitution. The rule of law principle requires that all government action must comply with the law, including the Constitution.¹⁷

The court gave three additional examples of this principle:

First, a constitution may provide an added safeguard for fundamental human rights and individual freedoms which might otherwise be susceptible to government interference. Although democratic government is generally solicitous of those rights, there are occasions when the majority will be tempted to ignore fundamental rights in order to accomplish collective goals more easily or effectively. Constitutional entrenchment ensures that those rights will be given due regard and protection.

Second, a constitution may seek to ensure that vulnerable minority groups are endowed with the institutions and rights necessary to maintain and promote their identities against the assimilative pressures of the majority.

¹⁶ Reference re. Secession of Quebec.

¹⁷ Ibid.

And third, a constitution may provide for a division of political power that allocates political power amongst different levels of government. That purpose would be defeated if one of those democratically elected levels of government could usurp the powers of the other simply by exercising its legislative power to allocate additional political power to itself unilaterally.¹⁸

With respect to the protection of minority rights, the court stated:

Undoubtedly, the three other constitutional principles inform the scope and operation of the specific provisions that protect the rights of minorities. We emphasize that the protection of minority rights is itself an independent principle underlying our constitutional order.¹⁹

In this connection, the constitutional guarantees of First Nations and treaty rights were specifically mentioned as an underlying constitutional principle:

Consistent with this long tradition of respect for minorities, which is at least as old as Canada itself, the framers of the *Constitution Act, 1982* included in s. 35 explicit protection for existing Aboriginal and treaty rights, and in s. 25, a non-derogation clause in favour of the rights of Aboriginal peoples. The “promise” of s. 35, as it was termed in *R. v. Sparrow*, [1990] 1 S.C.R. 1075, at p. 1083, recognized not only the ancient occupation of land by Aboriginal peoples, but their contribution to the building of Canada, and the special commitments made to them by successive governments. The protection of these rights, so recently and arduously achieved, whether looked at in their own right or as part of the larger concern with minorities, reflects an important underlying constitutional value.²⁰

¹⁸ Reference re. Secession of Quebec.

¹⁹ Ibid.

²⁰ Ibid.

These fundamental principles of constitutional law have a direct application to treaty implementation.

The federalism principle also has clear relevance to the treaties. In its 1996 Final Report, the Royal Commission on Aboriginal Peoples wrote:

The treaties form a fundamental part of the constitution and for many Aboriginal peoples, play a role similar to that played by the *Constitution Act, 1867 (formerly the British North American Act)* in relation to the provinces. The terms of the Canadian federation are found not only in formal constitutional documents governing relations between the federal and provincial governments but also in treaties and other instruments establishing the basic links between Aboriginal peoples and the Crown. In brief, ‘treaty federalism’ is an integral part of the Canadian constitution.²¹

The principles of federalism are critical to an understanding of the treaty relationship as well as the Canadian constitution. The principle of democracy exists to secure the legitimacy of representative institutions exercising the right to collective self-determination on behalf of self-determining individuals. The principles of constitutionalism and the rule of law have particular relevance in light of the *Marshall (No. 1)*²² decision, which clarifies that the Crown has not conducted itself in accordance with its legal and constitutional duties to respect the treaties. The application of the principle of protection of minorities, including the protections of section 35, is self-evident.

The jurisprudence on treaty interpretation in cases such as *Marshall* shows that despite the fact that existing treaty rights have been given constitutional protection by section 35(1) of the *Constitution Act, 1982*, the rights arising under the treaties are not what they

²¹ Royal Commission on Aboriginal Peoples, *Gathering Strength*, Volume 2, Part 1.

²² R. v. Marshall.

may seem on the face of treaty documents. What was recorded in a treaty text may be incomplete and even misleading as a guide to the intentions of the parties.

The constitutionalism principle requires that all government action comply with the law and the constitution. To fulfill this most elementary expectation of constitutional law, the government must at minimum be able to know what legal rights, duties and corresponding constitutional constraints arise from the treaties.

The *Reference re. Secession of Quebec* makes it equally clear that duty to negotiate exists to ensure that our constitutional arrangements respect both the legality and legitimacy of a liberal democratic society.

In the case of First Nations treaty rights, reconciliation is also a prominent theme in the jurisprudence. In decisions such as *Van der Peet*, *Gladstone* and *Delgamuukw*, the Supreme Court has stressed the theme of reconciliation between different groups of people with different rights. In *Van der Peet*, reconciliation is described as the rationale of the constitutional guarantee of existing Aboriginal and treaty rights in section 35(1) of the *Constitution Act, 1982*:

...what s. 35(1) does is provide the constitutional framework through which the fact that Aboriginals lived on the land in distinctive societies, with their own practices, traditions and cultures, is acknowledged and reconciled with the sovereignty of the Crown. The substantive rights which fall within the provision must be defined in light of this purpose; the Aboriginal rights recognized and affirmed by s. 35(1) must be directed towards the reconciliation of the pre-existence of Aboriginal societies with the sovereignty of the Crown.²³

The Supreme Court of Canada in the *Haida Nation*²⁴ case has made it clear that treaties serve to reconcile First Nations' "pre-existing" sovereignty with the "assumed"

²³ R. v. Van der Peet, [1996] 1 S.C.R.

²⁴ *Haida Nation v. British Columbia (Minister of Forests)*.

sovereignty of the Crown. Thus, on an issue like sovereignty, something vital has been settled but new questions have arisen. It is going to be important for the treaty parties to reach an understanding on how the treaties reconciled sovereignties, and further, what this reconciliation implies for future governance arrangements. These are political questions and require a principled, careful political resolution, as the Supreme Court of Canada made clear in the *Reference re. Secession of Quebec*.

The Supreme Court simultaneously linked the pre-existing sovereignty of the First Nations to the reconciliation achieved in the treaties. This judicial observation points the way to an examination of the treaty relationship as one of political reconciliation. It also suggests that treaty implementation can be the vehicle which puts discussion of sovereignty within a framework that emphasizes sharing, accommodation and mutuality as opposed to unilateralism and separation. There is even an existing theoretical basis for this framework of treaty implementation – treaty federalism.

The commitments made in the treaties bind the Crown, regardless of internal divisions in federal and provincial governments. In the federal structure of Canada, the federal government has inherited the duty to honour the treaties and the companion duties to implement them. In the words of Lord Denning of the English Court of Appeal, “No Parliament should do anything to lessen the worth of these guarantees. They should be honoured by the Crown in respect of Canada...”²⁵

In a federal state, although other levels of government have important roles to play, it is the Canadian government that has the constitutional responsibility to take leadership on treaty implementation. The role of provincial governments is controversial among First Nations. They say, correctly, that they made treaties with the Crown. If the Crown has chosen to complicate matters by dividing up authority to make laws among different layers of government, that is an internal matter to the Crown. The Treaty First Nations

²⁵ R v. Secretary of State for Foreign and Commonwealth Affairs, Ex p. Indian Association of Alberta.

often refer to their “bilateral” relationship with the Crown, and to the treaty implementation process as a “bilateral process” involving only the Treaty First Nations and the Crown in right of Canada.

In theory the Crown is indivisible; in reality the Crown’s authority is fragmented. In theory the Crown is sovereign, with absolute power; in reality, we live in a democratic state, in which theoretically absolute sovereign authority came under the rule of law centuries ago and is now exercised by a Parliament elected by popular support, by an executive branch of government drawn from that Parliament, overseen by an independent judiciary, and constrained by a complex web of written constitutional texts and unwritten principles and conventions. The Supreme Court has been clear that Crown constraints are a part of the framework of subsection 35(1). As the court observed in *R. v. Sparrow*:

Section 35 calls for a just settlement for Aboriginal peoples. It renounces the old rules of the game under which the Crown established courts of law and denied those courts the authority to question sovereign claims made by the Crown.²⁶

Crown sovereignty, including provincial sovereignty, is constrained under subsection 35(1) by its obligations to First Nations peoples. The courts have jurisdiction to question the Crown’s actions. Freedom is increased when the Crown is obliged to observe constitutional limitations on its power; section 35(1) falls within this tradition.²⁷

10. Conclusion

To date, the Canadian government has not formulated a policy to guide its officials in the implementation of treaties or, to put it in terms that Canada might more comfortably embrace, to reconcile the divergent views on the treaties of the Crown and First Nations. It can be argued that the *Royal Proclamation of 1763* already contains such a policy

²⁶ *R. v. Sparrow* (1990), 70 D.L.R.

²⁷ Borrows, John, “Let Obligations Be Done” in Foster, Hamar, Heather Raven and Jeremy Webber, eds., *The Calder Case* (UBC Press, 2007).

because it committed the Crown to a method of acquiring First Nations lands with their informed, collective consent. This was clearly a major source of Crown policy when it made the numbered treaties. The proclamation, however, did not suggest how the treaties, once made, should be honoured, fulfilled or implemented. Perhaps it is time for a new proclamation.

The federal government now acknowledges that the policies of the past were harmful and that the continuation of these policies demands reconciliation. In recent decades, the federal government has advanced in addressing such concepts as the inherent right to self-government and to reconciliation with respect to residential schools. Over the last 40 years, the federal government has increasingly emphasized with First Nations' distinctive cultural and societal characteristics, their right to political autonomy within the Canadian federation and the need for economic development so they can fully participate in the Canadian economy.

Contemporary federal policy is based on the implicit recognition that past policies of promoting cultural assimilation of First Nations or confining them to reserves are no longer legitimate.

Despite these acknowledgements the national political processes have failed to correct the problems and have left us all with an unfinished agenda. The Royal Commission on Aboriginal Peoples made recommendations that would have dramatically altered the landscape for First Nations. Despite some positive developments flowing from the commission's final report, it is difficult to discern any consistent or sustained policy development that would address the place of First Nations within the Canadian federation since the defeat of the Charlottetown Accord in the 1992 referendum.

It can be argued that Canada's current policy towards the treaties is one of deliberate avoidance of the issue. In the absence of a policy to redress treaty injustice, and seemingly by default, the courts have been given the task of determining the meaning of

treaties. It is clear that existing laws and policies of the Canadian government do not attempt to reconcile the divergent views on the treaties or advance their implementation.

Treaties, by their nature, are agreements. One party to an agreement cannot undertake an investigation of its obligations without considering fully and fairly the views of the other party. This is especially true given the special relationship that exists between the Crown and First Nations, and the obligations of the Crown to deal honourably with First Nations in relation to their rights. While the Honour of the Crown is always at stake in the fulfillment of treaty rights, it can also involve a fiduciary duty as stated by the Supreme Court of Canada.

It is apparent that policies are needed to authorize the officials of both parties to undertake a joint process of determining what the treaties mean and of implementing their findings. This policy must be enabling, not restrictive. It must authorize officials to undertake treaty implementation discussions in a respectful manner. It must mandate serious exploration and negotiations. Each side must develop objectives and guidelines for a process that will produce practical as well as principled outcomes.

Such actions could be encouraged with respect to Saskatchewan's numbered treaties if the Governor General of Canada, the Lieutenant-Governor of Saskatchewan and the Chief of the Federation of Saskatchewan Indian Nations were to sign a joint declaration affirming their mutual commitment to the treaty relationship.

In the modern context treaty implementation fundamentally requires a tripartite approach. From a contemporary Canadian constitutional perspective this should not be seen as a controversial recommendation.

A more elaborate proposal is having the federal government ask the Queen to issue a new Royal Proclamation to govern a new treaty approach. Such a declaration would supplement the *Royal Proclamation of 1763* and restore the fundamental principles between First Nations and the Crown of the bilateral nation-to-nation relationship, the

treaty making tradition and, most important, the method for treaty implementation and renewal.

The Crown also includes the provinces. Saskatchewan, like the federal government, has developed policies on treaty land entitlement and negotiating First Nations' self-government. And as with the federal government, these policies authorize negotiations with First Nations with the objective of reaching agreements. However, Saskatchewan's government has traditionally taken the position that it was not a party to the treaties, since the province did not exist at the time all but one of the treaties were negotiated. Consequently it has no policy framework to mandate participation by the Crown in right of Saskatchewan in discussions to examine and implement the treaties and the treaty relationship.

This position of non-participation cannot be sustained if it becomes a barrier to treaty implementation. The process of treaty implementation, therefore, includes increasing the awareness and altering the behaviour of government officials, who have been advised they have no role to play in implementing the treaties. Treaty implementation includes not only the making of large decisions at high levels, but also the changing of thought processes of all government officials to enable them to turn their minds to the potential impact of their work upon the rights and interests of the many Treaty First Nations.

When the treaties are shown to have been dishonoured or ignored by the Crown, and treaty rights are shown to have been elevated to constitutional status in theory yet ignored and marginalized in practice, surely there is a duty to engage in negotiations to place these rights in their proper place. Failure to do so would represent profound disrespect for the constitution, the rule of law and other fundamental principles that support our constitutional structure.

The treaties were negotiated agreements of a confederal nature and thus were inherently instruments of reconciliation when they were made. In *Reference re. Secession of Quebec*, the Supreme Court made it clear that a demand for secession is purely political

and the resulting duty to negotiate is equally political. The task is to attempt to reconcile divergent interests, rights and duties, with no presumption this can be accomplished even if all parties approach the task in good faith.

By contrast, in the context of the treaties, demand for implementation of already legally protected rights is based upon principles of constitutionalism and the rule of law and must be enforceable by the courts. The concluding words of the majority judgment in *Delgamuukw* state:

Ultimately, it is through negotiated settlements, with good faith and give and take on all sides, reinforced by the judgments of this Court, that we will achieve what I stated in *Van der Peet, supra*, at para. 31, to be a basic purpose of s. 35(1) – “the reconciliation of the pre-existence of Aboriginal societies with the sovereignty of the Crown”. Let us face it, we are all here to stay.²⁸

Discussions to reconcile disparity between the words of treaty text and the true extent of the constitutional rights are inherently founded upon rights and obligations in the realm of law as well as politics. The rulings of the courts have built a compelling case for the Canadian government and First Nations to establish proper treaty implementation. The courts will compel the Crown and First Nations to negotiate in good faith. Both parties will be constrained by the principles of the treaties and the treaty relationship. The objective of a treaty implementation must be a real and lasting reconciliation.

²⁸ *Delgamuukw v. British Columbia*.