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The Journey of Reconciliation: Understanding our Treaty Past, Present and Future

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"Reconciliation means working together to correct the legacy of past injustice."
Nelson Mandela, December 16, 1995

The death of Nelson Mandela reminds us of his greatest accomplishment: the reconciliation of the peoples of South Africa. For Mandela, reconciliation meant building long-term relationships, merging interests and developing a common understanding of history and aspirations. It meant the end of hatred and indifference, and the start of a future together. It is no wonder that Mandela's life has inspired so many people in countries around the world.

Canadians would do well to consider how Mandela's example might reshape our own country. Canada has a legacy of injustice, centuries of exploitation of Aboriginal people and Aboriginal resources, broken promises and destructive interventions.[2] The outcomes include discouraging statistics relating to health and educational attainment, Third World living conditions on some reserves, loss of culture, language and family ties through residential schools, and lack of opportunity for youth.

Non-Aboriginal Canadians may see this as "the Indian problem." But this label would not have been Mandela's way. Mandela did not focus on "the Afrikaner problem" or the "townships problem." He tried to change the methods of engagement between polarized and distrustful peoples, a process that is never over, but can be a way forward.

Rather than an Indian problem, the relationship between Aboriginal and non-Aboriginal peoples in Canada is a Canadian problem. All Canadians are parties to the treaties that have been signed between the Crown and Aboriginal peoples. We need to understand that regardless of when we or our ancestors may have come to this country, we are all treaty people.

Few non-Aboriginal people understand the contents of these treaties or appreciate their significance. The treaties may seem to be documents signed by distant officials in an irrelevant past. By contrast, Aboriginal people may see the treaties as symbols of a promise of mutual respect – a solemn covenant which continues despite lack of compliance by governments.

The historic treaties signed in the 19th and early 20th centuries – when some Aboriginal peoples faced the threat of extinction from disease and starvation – were drafted by the Crown and reflect the Crown's interests, rather than the understanding of the Aboriginal signatories. These treaties have not been honoured and are in need of renewal. The modern treaties signed since a seminal Supreme Court of Canada decision in 1973, while far from perfect, are paving the way for a more constructive relationship in many of the parts of Canada that they cover.

A better understanding of the role of treaties in shaping Aboriginal and non-Aboriginal relationships can help us find the way forward. How can we collectively address the fact that much of the land non-Aboriginal Canadians live on and benefit from was taken from Aboriginal peoples through

[2] "*A series of misguided and harmful government policies in our past has shaken First Nations confidence in our relationship*" – quote from January 24, 2012 joint Statement by Prime Minister Harper and Assembly of First Nations National Chief Sean Atleo after the Crown – First Nations gathering, available at *http://pm.gc.ca/eng/news/2012/01/24/crown-first-nations-gathering-outcome-statement*

treaties which have not been honoured by our governments, or was never surrendered at all? We can start by learning about how we got to where we are today, and we can work constructively, not to forget past injustice, but to change our collective future.

What are treaties and why did governments enter into them?

HISTORIC TREATIES

"*A treaty represents an exchange of solemn promises between the Crown and the various Indian nations. It is an agreement whose nature is sacred.*"[3]
The Supreme Court of Canada, 1996

"Treaties serve to reconcile pre-existing Aboriginal sovereignty with assumed Crown sovereignty."[4]
The Supreme Court of Canada, 2004

First Nations in North America had treaties amongst themselves long before the arrival of Europeans, and understood the concept of a solemn engagement between nations for mutual benefit. They had treaties in place to govern the use of lands and resources, to clarify roles and to provide a mechanism for good relationships amongst nations. Treaty protocol involved ceremonies, feasts, speeches, storytelling and the exchange of ceremonial gifts such as wampum belts, which symbolically described the relationship. For example, the 1701 treaty between the Haudenosaunee and the Anishinabek nations was recorded on a wampum belt made from shells, stitched together to form an image of a bowl with one spoon, symbolizing their agreement to share their hunting grounds.[5]

Early Treaties between European and Aboriginal Nations

The motivation for European nations to enter into treaties with Aboriginal people evolved over time. Initially, treaties were essential for the survival of Europeans in a land where they were greatly outnumbered and not necessarily welcomed. Soon, commercial interests and access to the lucrative fur trade drove partnerships with Aboriginal nations. Finally, as European settlement increased, the motivation for treaties became acquisition of land for settlers, access to forestry and mineral resources, and legal title to land. What began as a partnership based on equality and mutual respect gradually eroded as European power in North America increased, and the relationship moved from one of equal partnership to one of inequality and restriction.

The British sought treaties in order to build relationships with Aboriginal people, establish trade alliances and improve their own physical security. They were relative latecomers and the French and

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[3] Justice Cory, writing for the majority of the Supreme Court of Canada at para. 41, *R v Badger* [1996] 1 SCR 771.
[4] Chief Justice McLachlin speaking for the Supreme Court of Canada in *Haida Nation*, [2004] 3 S.C.R. 511 at para. 20.
[5] See John Borrows, *Canada's Indigenous Constitution*, (Toronto, University of Toronto Press, 2010) at p. 130.

the Dutch had already established relationships with Aboriginal peoples. The 1664 Treaty of Albany established the first formal alliance between the British and Aboriginal people in North America.

Through this treaty, the British sought to ally themselves with the Iroquois, who were more powerful and numerous than they were, and strengthen their position against other European nations in North America. The text of the Treaty of Albany was written on parchment by the British. For their part, the Iroquois presented the British with a two row wampum belt, symbolizing the two parallel paths that each nation would take, neither trying to steer the other's vessel, but travelling in peace, friendship and mutual respect.

The French also entered into treaties with the Aboriginal peoples, adopting their diplomatic protocols. For example, Champlain entered into a military and trade alliance with the Montagnais in 1603 and participated with them in battles against the Iroquois in 1609 and 1610.[6] There are few written records of the treaties between the French and Aboriginal peoples, as the French adopted the Aboriginal protocol of keeping treaties alive through regular feasts, speeches and gifts, rather than the European practice of written agreements. The French understood that the written document would mean little to their Aboriginal allies compared to regular ceremonies which maintained and revitalized the treaty relationship according to Aboriginal diplomatic practices.

The British and French each entered into alliances with different Aboriginal nations. These early treaties are often referred to as peace and friendship treaties and were primarily focused on relationship-building for military and trade purposes.

The primary European commercial interest at the time was securing furs for export to Europe. Treaties were also used for military purposes by the French and British as a way to gain allies in their conflicts – primarily the fight between Britain and France for control of North America – and assistance in defending their respective colonies. The importance of Aboriginal people as military allies gradually diminished after Britain's conquest of New France in 1760.[7] Increasing settlement was also shifting the balance of power and population towards the European newcomers. However, Britain was still in a vulnerable position in North America and recognized the importance of harmonious relationships with Aboriginal people to the safety of its colonies.

Increased pressure for land from settlers caused abuses and chaos, so following the cession of New France to Britain, King George III issued the Royal Proclamation of 1763. The Royal Proclamation set out protocols for dealing with Aboriginal people, recognizing their title to land, and providing that only the Crown could purchase land from First Nations. The Royal Proclamation was intended to "*provide a solution to the problems created by the greed which hitherto some of the English had all too often demonstrated in buying up Indian land at low prices*."[8]

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[6] See Olive Patricia Dickason, *Canada's First Nations, A History of Founding Peoples from Earliest Times*, (Don Mills, Ontario, Oxford University Press, 2009) at p. 78 and pp. 99-100.

[7] The 1763 Treaty of Paris formally transferred New France from France to Great Britain.

[8] As stated by Justice Lamer in *R v Sioui*, [1990] 1 S.C.R. 1025 at 1064.

The Proclamation attempted to impose rules and protect Aboriginal people from "*great frauds and abuses*"[9] that had been perpetrated when Indian lands were purchased, recognizing that exploiting Aboriginal people would be harmful to everyone. The Proclamation applies to a large part of Canada, and sets out a western boundary for the colonies. Lands to the west of this boundary were considered "Indian Territories," where there could be no settlement, trade or purchase of land except through the Crown. The Royal Proclamation and the 1764 Treaty of Niagara established principles for dealing with Aboriginal people and recognized their right to land and to self-government[10] – principles that were eroded in subsequent treaties.

Land Cession Treaties

As European settlement increased, the focus of treaty-making from the European perspective shifted to securing land and preventing conflicts between Aboriginal people and settlers. The American war of independence and ensuing loss of the British colonies south of the border in 1783 added to the pressure for land, bringing more than 30,000 United Empire Loyalist refugees to what is now Canada, as well as Aboriginal allies of the British such as the Six Nations.

With the arrival of increasing numbers of colonists, settlers began to push for lands held by Aboriginal peoples, leading to a series of land surrender treaties beginning in 1764.[11]

Subsequent treaties, such as the Robinson Treaties of the 1850's and the 11 "numbered treaties" reached between 1871 and 1921, focussed on gaining control of vast areas of Aboriginal land, either for settlement in the south, or for resource exploitation in the north. These treaties also established small reserves for the exclusive use of the Indians, which government representatives considered to be a small price to pay in exchange for the Indians ceding and releasing their rights to much larger areas of land[12] which had been their traditional land base. Indeed, it was a small price: Indian reserves make up just 0.2 percent of the total land mass of Canada, much of it in remote areas considered to be of little value.[13]

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[9] From the text of the Royal Proclamation, available online *at http://www.aadnc-aandc.gc.ca/eng/1370355181092/1370355203645#a6*

[10] See John Borrows, Wampum at Niagara: The Royal Proclamation, Canadian Legal History and Self-Government, in *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality and Respect for Difference* (Vancouver: University of British Columbia Press, 1997), Michael Asch, ed. at p. 155.

[11] See *A History of Treaty-Making in Canada at http://www.aadnc-aandc.gc.ca/eng/1314977704533/1314977734895*; also Thomas Isaac, Aboriginal Law Commentary and Analysis (Saskatoon: Purich Publishing Ltd. 2012) at 145.

[12] See D.N. Sprague, "Canada's Treaties with Aboriginal Peoples," (1996) 23 Man L.J. 341 at 343.

[13] From Aboriginal Affairs and Northern Development Canada website, *http://www.aadnc-aandc.gc.ca/eng/1100100034846/1100100034847#THE_INDIAN_RESERVE_LAND_BASE_IN_CANADA4*

Treaties 1-11 cover much of northwestern Ontario, all three Prairie provinces and parts of the Northwest Territories (NWT).[14] In the areas covered by these treaties, Aboriginal people surrendered title to more than 99 percent of their land in exchange for small reserves, gifts and annuities. For example, Treaty 3 provided for one-time benefits such as cash payments and agricultural implements, as well as ongoing benefits such as schools, $1,500 per year to the First Nation for the purchase of ammunition for hunting and twine for fishing nets, $25 per year as salary for the Chief and $5 per year per person.[15] The annuities or annual payments remain fixed at the same rate to this day – e.g., Treaty 3 beneficiaries continue to receive $5 per person per year in exchange for the surrender of 55,000 square miles of land by their ancestors.

Many of the historic treaties, particularly the treaties in which land was ceded to the Crown, were negotiated and signed during a period when Aboriginal populations had been decimated by European diseases, wars, loss of wildlife upon which they relied, such as the buffalo, and settler pressures for the best agricultural land. The Aboriginal share of the total population of Canada had slid from an estimated 70 percent in 1763 to only 1.3 percent in 1921,[16] so the land cession treaties were signed during a demographic low point, on terms that were not very favourable to the Aboriginal peoples.

The somewhat one-sided nature of these agreements reflected commonly held views at the time, including: that Europeans brought civilization to Aboriginal people; that land was not truly occupied unless it was cultivated; that Aboriginal people were not Christians and therefore had no legal rights; and that the British Crown acquired title to lands through the "doctrine of discovery," which held that there was no underlying Aboriginal title to land, only title for the European "discoverer" of the land.[17]

Historic treaties were also signed in the Maritimes,[18] but these were peace and friendship treaties, and did not include the ceding of any lands by the Aboriginal peoples. In addition, many parts of Canada were not the subject of any historic treaties. As a result, Aboriginal title to land in the Maritimes, Quebec, most of British Columbia, the Yukon and parts of the NWT was never surrendered to the British Crown or to the Canadian government.

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[14] For a map showing areas of Canada covered by historic treaties, *see http://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ/STAGING/texte-text/htoc_1100100032308_eng.pdf*

[15] The text of Treaty 3 can be found on the Aboriginal Affairs and Northern Development Canada website at *http://www.aadnc-aandc.gc.ca/eng/1100100028675/1100100028679*

[16] Statistics Canada, *Historical Statistics of Canada*. Table A125-163: Origins of the population, census dates, 1871 to 1971, online at: *http://www.statcan.gc.ca/pub/11-516-x/sectiona/4147436-eng.htm*

[17] For a critique of the doctrine of discovery, see Harry LaForme, *Section 25 of the Charter, Section 35 of the Constitution Act, 1982, Aboriginal and Treaty Rights – 30 Years of Recognition and Affirmation* 62 S.C.L.R. (2d) 627.

[18] Between 1713 and 1762, a series of peace and friendship treaties were signed between the British and the Mi'kmaq and the Maliseet. See Thomas Isaac, *Aboriginal and Treaty Rights in the Maritimes* (Saskatoon: Purich Publishing Ltd., 2001) at 24.

MODERN TREATIES

"To us, a treaty is a sacred instrument. It represents an understanding between distinct cultures and shows respect for each other's way of life. We know we are here for a long time together."[19]

By the 1970's, there were still vast areas of Canada where Aboriginal people had not surrendered title to the land, including much of British Columbia and the territories, Quebec and the Maritimes. Successive governments avoided dealing with the issue, hoping that settlement by non-Aboriginal people and the exercise of sovereignty by the Crown had extinguished Aboriginal title, if it existed at all.

The matter came to a head in 1973 with the game-changing *Calder* case. In this decision, the Supreme Court of Canada found that Aboriginal title to land continues to exist unless validly extinguished by the Crown. The court stated:

> . . . the fact is that when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries. This is what Indian title means . . . [20]

The court in *Calder* was split on the issue of whether the Nisga'a title to land had been extinguished by certain proclamations, but the decision was significant in foreclosing the argument by some governments that Aboriginal title no longer existed or had never existed. It was now clear that unless there had been a surrender of land rights in a treaty, or other valid extinguishment, Aboriginal title continued to exist.[21]

As a result of the *Calder* decision, the federal government began negotiating what are referred to as "modern treaties" or "comprehensive claims agreements" to try to clarify the status of land and achieve greater legal certainty. As of January 2014, more than 25 modern treaties[22] have been reached. Modern treaties include the *James Bay Northern Quebec Agreement*, the Nunavut land claims agreement, agreements covering much of the Yukon and NWT, and a few agreements in British

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[19] Chief Joseph Gosnell, Speech to the British Columbia Legislature, December 2, 1998, on the Nisga'a Treaty, quoted in BC Studies No. 120, Winter 1998/99 at 9.

[20] *Calder v. AG British Columbia*, [1973] S.C.R. 313 at 328, Judson J. speaking for 3 members of the court in what is considered the majority decision. The decision was split 3:3:1 and the actual declaration of Aboriginal title which the Nisga'a sought was denied on the basis of a technicality by Pigeon J. who held the deciding vote. The law had been changed however, as both the majority and the minority decisions recognized that Aboriginal title flows from the original use and occupation of the land, not from some grant or recognition by European powers, and that without a clear act of extinguishment such as a treaty, Aboriginal title to the land continues to be in force.

[21] The Supreme Court of Canada later clarified in *R. v. Sparrow* [1990] 1 S.C.R. 1075 that Aboriginal title could only be extinguished through a treaty or through clear federal legislation. Since the enactment of the *Constitution Act, 1982*, unilateral extinguishment of Aboriginal or treaty rights, even by clear federal legislation, is no longer possible, although these rights may be infringed or affected in certain ways, in accordance with criteria set out by the Supreme Court of Canada in cases such as *R. v. Sparrow* [1990] 1 S.C.R. 1075.

[22] A map showing areas covered by modern treaties can be found at *http://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ-AI/STAGING/texte-text/mprm_pdf_modrn-treaty_1383144351646_eng.pdf*

Columbia, such as the Nisga'a agreement. There are also approximately 90 ongoing comprehensive claims negotiations[23] with First Nations across Canada where Aboriginal people have not surrendered their title to land.

These comprehensive land claim and self-government agreements, reached after 1973, are called "modern treaties" in contradistinction to "historic treaties," which were signed before 1923.[24] Collectively, modern treaties cover nearly half of Canada's land mass, water and resources.

The first modern treaty was the 1975 *James Bay Northern Quebec Agreement*. It was negotiated relatively quickly after the Cree and Inuit of northern Quebec, who had been ignored in plans to develop the massive James Bay Hydroelectric Project, obtained an injunction preventing the development. Although this decision was later overturned, the court ruling brought the Quebec and federal governments and Hydro Quebec to the negotiating table with the Cree and Inuit. The 1975 treaty provided $225 million in compensation to the James Bay Cree and the Inuit of northern Quebec, defined land rights and harvesting rights, and established new local First Nation governments as well as joint consultative bodies with Aboriginal and government officials to advise on environmental and resource management issues.[25]

The James Bay treaty has been amended more than 20 times[26] to address implementation issues, resolve differences of interpretation and provide for further hydroelectric developments. Unlike historic treaties, modern treaties contain amending provisions, and recognize the need for ongoing discussion and dialogue in a rapidly changing world.

The *Nunavut Land Claims Agreement* covers the largest land mass of any modern treaty. It is unique in that it uses a public governance model and resulted in the 1999 creation of a new territory, Nunavut, from land formerly in the NWT. In Nunavut, with a land mass of 1.9 million square kilometres, the Inuit represent 86 percent of the total population[27] of about 32,000 people.[28] Under the agreement, the Inuit exchange Aboriginal title to all their traditional land in the Nunavut Settlement Area for rights and benefits including:

- ownership of about 18 per cent of the land in Nunavut, including mineral rights to two percent of these lands

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[23] For details of current comprehensive claim negotiations, see *http://www.aadnc-aandc.gc.ca/eng/1373385502190/1373385561540#table*

[24] The Williams Treaty of 1923 is considered the last historic treaty, and there were no treaties from 1923 to 1973.

[25] For more details, see the Makivik Corporation website at *http://www.makivik.org/history/jbnqa/*, also *Quebec (Attorney General) v. Moses* [2010] 1 SCR 557.

[26] Thomas Isaac, *Aboriginal Law Commentary and Analysis*, Purich Publishing Ltd, Saskatoon, 2012 at 174.

[27] From Statistics Canada 2011 census data – see table on Aboriginal population of Canada at *http://www12.statcan.gc.ca/nhs-enm/2011/as-sa/99-011-x/2011001/tbl/tbl02-eng.cfm*

[28] From Statistics Canada 2011 Census data *at http://www12.statcan.gc.ca/census-recensement/2011/as-sa/fogs-spg/Facts-pr-eng.cfm?Lang=eng&GC=62*

- the creation of the territory of Nunavut, with an elected government to represent the interests of all Nunavut residents, while respecting Inuit values
- capital transfer payments of $1.148 billion over 14 years and a $13 million Training Trust Fund for the establishment of the Government of Nunavut
- equal representation of Inuit and government representatives on wildlife management, resource management and environmental boards
- the right to harvest wildlife on lands and waters throughout the Nunavut Settlement Area
- a share of federal government royalties from oil, gas and mineral development on Crown lands
- the right to negotiate with industry for economic and social benefits from the development of non-renewable resources on Inuit Owned Lands
- the right of first refusal on the sporting use or commercial development of renewable resources in the Nunavut Settlement Area
- the creation of three federally funded national parks.[29]

The Nunavut Tunngavik Inc., which represents the Nunavut Inuit, describes the benefits of their treaty in this way:

> A key goal of the Agreement is to encourage self-reliance. This includes the cultural and social well-being of Inuit. Much of Inuit life and spirit is tied to wildlife. The Agreement protects Inuit rights to hunt, fish *and* trap. The Agreement is intended to ensure more contracts, jobs and training for Inuit. Inuit will also benefit from income and other opportunities from mineral, oil and gas resources in Nunavut. These might come from Inuit Owned Lands or from Crown lands.
>
> While Nunavut will be a territory with a public government, it is also the Inuit homeland. The Agreement will try to protect this reality by giving special duties to Inuit organizations like Nunavut Tunngavik Incorporated with respect to language, culture and social policy. The Agreement also creates a number of boards that allow for joint management of all lands, waters and wildlife resources. Inuit work on an equal basis with Government through these boards. There will be joint management of planning and impact review, negotiated benefits agreements and resource revenue sharing. Together, Inuit and Government will shape the future of Nunavut.
>
> The Nunavut Land Claims Agreement will be a living document. It will grow with time. It is a foundation on which Inuit can build their future. It will not be forgotten as long as Inuit remember its promises and hold themselves – and Government – to them.[30]

The public governance model was viable in Nunavut because of its majority Inuit population. All other modern treaties involve First Nations who are a minority within their province or territory.

One of the primary goals of modern treaties from government's perspective is for clarity about rights to lands and resources to facilitate investment and development. This is achieved by defining

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[29] Much of this summary is taken from the Kitikmeot Inuit Association website at *http://kitia.ca/en/our-lands/land-claims*

[30] From *A Plain Language Guide to the Nunavut Land Claims Agreement,* prepared by the Nunavut Tunngavik Inc., available online at *http://www.tunngavik.com/documents/publications/2004-00-00-A-Plain-Language-Guide-to-the-Nunavut-Land-Claims-Agreement-English.pdf*

categories of land which the First Nation "owns," as well as other lands within its traditional territory where hunting and fishing rights may be exercised. From a First Nation perspective, self-government, economic development and a relationship of mutual respect are critical objectives. Some modern treaties include self-government agreements, while others deal only with land-related issues. The *Nisga'a Final Agreement*, involving the First Nation which brought the *Calder* case to the Supreme Court of Canada, is an example of a modern treaty encompassing both land claim and self-government provisions in a province where Aboriginal people are a small percentage of the provincial population (5.4 percent) but may form a large percentage within their traditional territory.

In the Yukon, 11 modern land claims and self-government agreements have been reached,[31] settling the majority of claims in the Yukon and bringing much greater certainty for governments and resource development companies as to respective rights over lands and resources. The result has been greater economic development, increased prosperity for all Yukoners and self-government for 11 out of 14 Yukon First Nations.[32]

The Yukon agreements provide that Yukon First Nations, which make up 23 percent of the Yukon's population,[33] receive title to 44,000 square kilometers of land as Settlement Land (approximately 9 percent of the Yukon's total land) over which they have ownership rights, in addition to equal participation in a number of Yukon-wide management bodies, such as the Fish and Wildlife Management Board, the Land Use Planning Council and the Heritage Resources Board. Yukon First Nation members retain hunting and fishing rights over the rest of the Yukon within their traditional territories other than on privately-owned land.[34] The agreements also provide for compensation of $260 million, the creation of several large special management areas that are protected from development, forestry harvesting rights, protection of cultural and heritage resources, resource revenue sharing, and economic opportunities including training. The self-government agreements recognize traditional forms of decision-making and provide for broad self-government powers similar in scope to the powers of provinces.[35]

The Yukon agreements embody a number of important principles: the need for *reconciliation*, which is the understanding that collectively, all parties need to work together to reconcile their differing needs and interests, and build a new kind of society; the principle of *mutual consultation*; and

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[31] The Yukon negotiations began in 1973, prior to the federal government's development of its comprehensive claims policy or its policy on the inherent right to self-government. As a result, while the land claim agreements are treaties, the Yukon self-government agreements do not have the status of treaties, although they have the force of law.

[32] Three Yukon First Nations have not reached modern land claim settlements, despite years of negotiations. These are the White River First Nation, Ross River Dena Council and the Liard First Nation.

[33] Based on 2011 Census Data, Statistics Canada, online at *http://www12.statcan.gc.ca/nhs-enm/2011/as-sa/99-011-x/2011001/tbl/tbl02-eng.cfm*

[34] *Umbrella Final Agreement*, signed May 29, 1993 (Ottawa: Ministry of Supply and Services, 1993) sections 6.2.1 and 16.4.2.

[35] For more details on the Yukon agreements, see Julie Jai, "The Interpretation of Modern Treaties and the Honour of the Crown: Why Modern Treaties Deserve Judicial Deference" (2009) 26 N.J.C.L. 25.

recognition of *co-management* and *reciprocity*[36] as a means of ensuring that both First Nation and non-First Nation perspectives are considered. The co-management boards are tools for managing the ongoing relationships, and provide a forum to encourage dialogue as a foundation for ongoing reconciliation. The agreements recognize and respect a *government to government relationship*, and recognize the *right to self-government* and the right of First Nations to govern themselves according to Aboriginal values, culture, traditions and laws. The agreements also recognize the principles of conservation, sustainable development, respect for all living things and the inter-dependency of all things. They recognize the spiritual and economic *relationship of Aboriginal people with the land*, reflecting a *holistic worldview*.

The process for implementing the agreements allows the First Nations gradually to draw down self-government powers as they build capacity, and recognizes that First Nation societies are *not frozen in time*: their political institutions, economic and cultural activities may evolve over time, just as the institutions and practices in non-Aboriginal societies evolve. First Nation societies are distinct and the treaties recognize that this *Aboriginal difference* is a valuable thing that should be protected and preserved, not assimilated. Finally, the agreements provide that Yukon First Nation citizens have a right to *similar levels of public services* as other Yukoners at similar levels of taxation.

There are many signs that these agreements are having a positive effect.[37] Disputes as to the interpretation of the agreements have been few in number, and most disagreements have been worked out between the parties, without resort either to the courts or to the dispute resolution mechanisms set out in the agreements.

Relationships between First Nation and non-First Nation people in the Yukon are gradually improving, as are socioeconomic conditions for Yukon First Nation citizens. Educated First Nation youth are returning to their communities to take up positions in their own governments. Co-management or co-operative management bodies, such as the Yukon Fish and Wildlife Management Board, ensure that all Yukoners will benefit from the values, cultures and experiences of both Aboriginal and non-Aboriginal people, resulting in greater understanding by all parties.[38]

The Yukon's former Chief Medical Officer stated that "*the single biggest factor in improving the health status in the Yukon has been the movement through land claims,*

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[36] First Nation laws apply to non-First Nation people on First Nation land and vice versa, an example of the reciprocity in the agreements, and co-operative arrangements have been worked out, for example between conservation officers acting to enforce Yukon and First Nation wildlife laws.

[37] This appears to be the case for the Yukon agreements. It is not the case for all First Nations with modern treaties, particularly where there have been difficulties with the implementation of the treaties, and lack of adequate implementation funding. See for example Chapter 3, 2007 Auditor General of Canada's Report, on the *Inuvialuit Final Agreement*, available online*: http://www.oag-bvg.gc.ca/internet/English/parl_oag_200710_03_e_23827.html*

[38] For a discussion of resolving culture clashes through co-management bodies, see Michael Robinson and Lloyd Binder, "The Inuvialuit Final Agreement and Resource-Use Conflicts: Co-management in the Western Arctic and Final Decisions in Ottawa", in Monique Ross and J. Owen Saunders, eds., *Growing Demands on a Shrinking Heritage: Managing Resource Use Conflicts* (Calgary: Can. Inst. of Resources Law, 1992) at 155.

independence, devolution, letting people decide what they want to do, let people have control over their own resources like the rest of us hope we have."[39]

The resolution of long-standing grievances through modern treaties in the Yukon demonstrates that reconciliation is possible. The modern treaty negotiation process changed things, not just for Aboriginal people, but also for non-Aboriginal people, who are now subject to joint management structures, and to consultation and governance requirements that force them to take into account the perspective of Aboriginal people throughout the Yukon. This is an embodiment of the principle of reconciliation, a fairly radical change which has been achieved without blockades, without violence and without any significant litigation. In the process, perceptions have been changed, relationships have been built and many of the racist assumptions of the past have been dispelled. There has been unprecedented collaboration and intergovernmental cooperation. While much remains to be done, the parties appear to be on their way to realizing the vision articulated by Chief Elijah Smith in 1973: "*a fair and just settlement of our grievances . . . [so that] our children and their children can have a better life*."[40] In the Yukon, the axiom that "we are all treaty people" resonates with both Aboriginal and non-Aboriginal people who are reaping the benefits of reconciliation.

What is the legal status of treaties and treaty rights?

Modern treaties are brought into force by legislation, have the force of law and prevail over other inconsistent legislation. Both modern and historic treaties are legally enforceable and are protected by s. 35 of the *Constitution Act, 1982*, which states:

> s. 35(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 Métis peoples of Canada.

It was left for future constitutional conferences to more clearly define what was meant by "the existing aboriginal and treaty rights of aboriginal people." But although these conferences were held between 1983 and 1987, no consensus was reached as to more precise wording to put into the constitution. It was clear that treaty rights include rights from historic and modern treaties, but it was not clear what "existing Aboriginal rights" meant. As a result, the courts have played a very significant role in defining Aboriginal rights. The Supreme Court of Canada has stated that an Aboriginal right arises from activities which are part of a practice, culture or tradition integral to the distinctive culture of the Aboriginal group claiming the right.[41]

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[39] Statements of Dr. Frank Timmermans, as quoted on CBC Radio News, Whitehorse, Yukon, 7:30 am, May 26, 2000.
[40] *The Council for Yukon Indians, Together Today for our Children Tomorrow, A Statement of Grievances and an Approach to Settlement by the Yukon Indian People*, originally printed January 1973 (Brampton, ON: Charters Publishing Co. Ltd., 1977) at 35.
[41] *R. v. Van der Peet* [1996] 2 S.C.R. 507 at para. 46.

Treaty rights are somewhat clearer, as they are the rights set out in both historic and modern treaties. But the historic treaties were short, were drafted by the Crown rather than jointly and are often ambiguously worded, so courts have had a significant role in interpreting them. A series of Supreme Court of Canada cases have laid out interpretive principles, including the principle that historic treaties should be liberally construed and ambiguities or doubtful expressions should be resolved in favour of the Aboriginal signatories. This makes sense since the treaties were drafted by the Crown, the Aboriginal signatories generally could not read the treaties and were not represented by lawyers, and did not come from a cultural tradition of making treaties by written agreements.

The courts have established that while Aboriginal and treaty rights can no longer be unilaterally extinguished by governments since their entrenchment in the constitution in 1982, they can be "infringed," as long as the government can justify the infringement. For example, a government may be able to justify infringing an Aboriginal or treaty right to hunt for safety or conservation purposes.[42] The test for justifying an infringement is complex, and must be made on a case-by-case basis, but in all cases, the infringement must be consistent with the duty of the Crown to act honourably.

How are treaties interpreted and implemented today?

There are significant differences between historic and modern treaties. Historic treaties, particularly those surrendering land, were negotiated at a demographic low point for Aboriginal peoples. The First Nations involved were not represented by legal counsel,[43] were not involved in drafting the text, and the agreements themselves were short and did not provide for changing circumstances, amendments or even inflation. Differences of language, culture, legal concepts, diplomatic protocol and worldview also led to different understandings by the parties as to what had been agreed to. Aboriginal people also relied on oral representations which often did not make their way into the written text.

The result was that the text of historic treaties often represented an unfair deal for Aboriginal people and there were diverging views as to what had been agreed to. Interpretive principles established by courts recognize the disadvantage that Aboriginal people were at when these historic treaties were made and the Supreme Court has stated that both the Aboriginal and non-Aboriginal perspectives must be considered in interpreting treaties.[44] This still leaves considerable room for ambiguity and discussion as to what treaty terms like "provision of a medicine chest" might mean today.

The Aboriginal perspective on the historic treaties focuses more on what they represent – a solemn commitment to a relationship of equality and mutual respect amongst nations – rather than on

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[42] The Supreme Court of Canada set out the framework for justifying infringements of Aboriginal rights in *R v. Sparrow* [1990] 1 S.C.R. 1075.
[43] A provision of the *Indian Act* prohibiting Indians from raising money or hiring lawyers to pursue land claims was repealed in 1951.
[44] Justice Binnie in *R. v Marshall* [1999] 3 S.C.R. 456 at 478.

the words they contain. First Nations have been asking for high-level discussions with the Crown to implement historic treaties in accordance with their true spirit and intent, and Idle No More is part of a growing movement involving Aboriginal people across Canada asking that historic treaties be honoured.[45] There is a widespread view that the terms of historic treaties are not being implemented in a way which is consistent with the honour of the Crown. At a 2012 Crown-First Nation Gathering, the Government of Canada and First Nations committed "*to respect and honour our treaty relationship and advance approaches to find common ground on Treaty implementation*."[46]

In contrast to the historic treaties, modern treaties are much longer, more detailed and more complex, and are negotiated over a period of years rather than days, with all parties represented by legal counsel and professional negotiators. The process is much more inclusive and the written text more accurately reflects the Aboriginal party's understanding of the agreement. These modern treaties were negotiated in our lifetimes and come with implementation plans, amendment provisions, periodic reviews and dispute resolution clauses.

However, modern treaties are not without implementation problems. The Land Claims Agreement Coalition, which brings together all First Nations with modern treaties, has identified a number of implementation issues, which have been echoed in Senate and UN reports.[47] These include the absence of a government-wide approach to treaty implementation, with Aboriginal Affairs and Northern Development Canada being the only department which feels an obligation to implement the provisions of the treaties, despite the fact that many treaty provisions lie within the mandate of other government departments. Other problems include the need for a commitment to achieve the goals of the agreements as opposed to a narrowly defined approach to interpreting obligations, the refusal of the federal government to agree to arbitration of disputes and the lack of an independent oversight body to review implementation.[48]

Cathy Towtongie, President of Nunavut Tunngavik Inc., the Inuit organization implementing the Nunavut Land Claims Agreement and Co-Chair of the Coalition said:

> The Government of Canada must fulfill its duties and obligations in our modern treaties. These agreements apply to almost half of Canada and the rights they define are protected by the Constitution. The Royal Proclamation showed the way 250 years ago. It spoke against frauds and abuses and upheld the honour of the Crown.[49]

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[45] *The spirit and intent of the Treaty agreements meant that First Nations peoples would share the land, but retain their inherent rights to lands and resources. Instead, First Nations have experienced a history of colonization which has resulted in outstanding land claims, lack of resources and unequal funding for services such as education and housing*. From Idle No More Manifesto at http://www.idlenomore.ca/manifesto.

[46] Crown – First Nations Gathering Outcome Statement, January 24 2012, at *http://pm.gc.ca/eng/news/2012/01/24/crown-first-nations-gathering-outcome-statement*

[47] See the Land Claims Agreement Coalition website *at http://www.landclaimscoalition.ca/implementation-issues/*

[48] From the 2008 Senate Report, *Honouring the Spirit of Modern Treaties: Closing the Loopholes*, available online at *http://www.parl.gc.ca/Content/SEN/Committee/392/abor/rep/rep05may08-e.pdf*

[49] From October 8, 2013 press release at The Creating Canada symposium, hosted by the Land Claims Agreements Coalition, at *http://www.landclaimscoalition.ca/assets/131007_RP_Symposium_Press_Release_3.pdf*

Can we find the way forward together?

Canadians as a people are parties to treaties, and they share the benefits and obligations. For both historic and modern treaties, the courts have made it clear that Canadians, through their governments, must behave in a way that is consistent with the honour of the Crown.[50] When there are ambiguities in treaty language, they must be resolved in favour of Aboriginal people. Courts have recognized that treaty rights are not frozen in time but must be updated to provide for their modern exercise and the common intent and perspectives of both parties must be considered.[51] Canadians should meet, but also move beyond these legal minimums and seek reconciliation between Aboriginal and non-Aboriginal people as a matter of fairness and good social and economic policy.

Reconciliation operates on many levels. At an individual level, it is the reconciliation of Aboriginal and non-Aboriginal Canadians. In the legal context, it is reconciling the fact that when the British arrived and asserted sovereignty, Aboriginal people with their own societies, cultures and laws were already occupying the land.[52] In the treaty context, it means reconciling different perspectives to arrive at a mutual understanding of what a treaty means and then implementing it. At a practical level, it is the reconciliation of competing interests in situations such as the building of a pipeline or the harvesting of trees.

Engaging in a process of reconciliation involves:

- acknowledging past harm and unjust treatment of Aboriginal people over more than 400 years, not just occasionally but consistently
- accepting the legacy of mistrust and damaged relationships as a reality but not an intractable barrier to progress if non-Aboriginal Canadians accept their own status as treaty people
- understanding the importance of treaties as ongoing relationship-building instruments, with past, present and future meaning
- recognizing the social and economic benefits for everyone in changing current relationships and moving beyond past practices
- committing to a relationship with Aboriginal people based on mutual objectives, trust and collaboration, and putting in place joint processes to resolve disputes.

It is likely that a long-term commitment to working together is the hardest component of the journey of reconciliation. This is because it involves some uncertainty, it involves change for everyone and it is never over. But it is from this kind of enduring relationship that treaty people are most likely

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[50] In *Haida Nation* [2004] 3 S.C.R. 511, the Supreme Court of Canada stated "The honour of the Crown also infuses the processes of treaty making and treaty interpretation" at para. 19.
[51] These principles of treaty interpretation are summarized in *R. v. Marshall* [1999] 3 S.C.R. 456 at para. 78.
[52] As Chief Justice Lamer stated at para. 186 in *Delgamuukw* [1997] 3 S.C.R. 1010, a basic purpose of s. 35(1) of the *Constitution Act, 1982* was "*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.*"

to find workable ways to resolve disputes peacefully, to establish a joint process for implementing the spirit and intent of historic treaties, and to make progress in education, health and economic development that will create long-term benefits for all.