

Interpretation of the Prairie Treaties

NORMAN ZLOTKIN

Respect for the unique position of Canada's First Peoples—and more generally for the diversity of peoples and cultures making up the country—should be a fundamental characteristic of Canada's civic ethos.

Report of the Royal Commission on Aboriginal Peoples, v. 1, 685.

Introduction

Prairie First Nations and the federal and provincial governments disagree on whether the numbered treaties are land surrender documents. In this paper, I suggest that the Supreme Court of Canada decision in *Delgamuukw v. British Columbia*¹ will make it easier for treaty First Nations from the prairies to contend that the written versions of their treaties are inaccurate statements of their solemn agreements with the Crown. The decision will enable them to put forward their own understanding of their treaties, based on their own oral histories. *Delgamuukw* also indicates the kinds of limitations a court would place on “treaty title” if it found a prairie treaty was not a land surrender document. More generally, *Delgamuukw* illustrates the inappropriateness of litigation as a method of resolving the complex, ongoing issues between First Nations and the Crown.

Notes will be found on pages 194–196.

The Prairie Treaties

Following the policy set out in the Royal Proclamation of 1763, the Crown negotiated 11 “numbered” treaties between 1871 and 1921 with the First Nations inhabiting the northern and western parts of the Dominion of Canada east of the Rocky Mountains.²

The written versions of the numbered treaties covering the Prairie Provinces (as well as parts of northeastern British Columbia, north-western Ontario and the Northwest Territories) indicate they are land surrender documents. Governments read the treaties in this fashion, and rely on the land surrender provisions as one source of their ownership and authority over lands and resources.

In form, the 11 post-Confederation numbered treaties closely resemble one another. In the words of the Honourable Alexander Morris, who negotiated Treaties 3 through 6:

The treaties are all based upon the models of that made at the Stone Fort in 1871 and the one made in 1873 at the north-west angle of the Lake of the Woods with the Chippewa tribes, and these again are based, in many material features, on those made by the Hon. W. B. Robinson with the Chippewas dwelling on the shores of Lakes Huron and Superior in 1860 [sic].³

Although differing in certain details, the written versions of the numbered treaties contain the same core provisions as the Robinson treaties of 1850. In exchange for surrendering “all their right and title” to their lands, the First Nations were to receive annuities in perpetuity and “reserves” for their own use. Treaties Nos. 1 to 7 (1871-1877),⁴ which were designed to open the west to agricultural settlement, were also to provide tools, livestock and seed grain to those First Nations who took up farming.⁵ The numbered treaties also included a guarantee of hunting and fishing rights.

There are major differences between the treaties as they are written in English and the First Nations’ understanding of the agreements they signed. The First Nations view the treaties as representing a recognition by the Crown of their inherent sovereignty. First Nations believe that, by means of their treaties, they entered into ongoing political arrangements with the Crown by which they “retained sovereignty over their people, lands, and resources, both on and off the reserves, subject to some shared jurisdiction with the appropriate government bodies on the lands known as ‘unoccupied Crown lands’.”⁶ They do not view either historic or modern treaties as fixed contracts, but rather as a means of establishing ongoing political and legal relationships between

Aboriginal collectivities and the Crown. In their view, relationships established through treaties should be based on a mutual recognition and affirmation of rights and interconnections between both parties.

Looking at these different perspectives in more detail, the written texts of the numbered treaties include land surrender provisions, by which First Nation parties surrender their rights over great expanses of territory. In exchange, the treaties include the following rights and benefits to be retained or given to First Nations.

- (1) Reserves were to be established within the ceded territories for the exclusive use and benefit of the First Nations that signed the treaties.
- (2) Small cash payments were to be given to members of the First Nation parties to the treaties. Thereafter, annuity payments would be given to them and their descendants.
- (3) In the prairie treaties, farming implements and supplies were promised as an initial outlay. Thereafter, hunting and fishing materials such as nets and twine were to be furnished on an annual basis.
- (4) Rights to hunt, fish and trap over the ceded territories were guaranteed.
- (5) The government was to establish and maintain teachers and schools on reserves.
- (6) Flags, medals and suits of clothing were to be given to the chiefs and headmen of each band.
- (7) In the prairie treaties, a “medicine” chest for the use of the First Nations was promised.

According to the First Nation understanding, treaties confirmed principles and rights, which were to be enjoyed by First Nations in perpetuity. These principles and rights include the following:

- (1) First Nations retained their sovereignty over their people, lands and resources both on and off reserve, subject to some shared jurisdiction over the lands known as “unoccupied Crown lands.” This is understood as the recognition of the right of self-government.
- (2) The Crown promised to provide for First Nation economic development in exchange for the right to use the lands covered by treaty.
- (3) The treaties promised revenue sharing between the Crown and First Nations.⁷

Though the numbered treaties use the language of extinguishment, the First Nations who signed them do not see them as extinguishment documents but as agreements with the Crown to establish ongoing political and social relations and to allow European settlement. From a First Nation perspective, the “surrender” of Aboriginal rights and title was not on the table when the prairie treaties were negotiated.

The language often used by First Nations to express the goal of the treaty process is “sharing” with non-Aboriginal people, but it is sharing based on a clear recognition of the legitimacy of underlying Aboriginal title. As Professor Leroy Little Bear of Harvard University states:

The Indian concept of land ownership is certainly not inconsistent with the idea of sharing with an alien people. Once the Indians recognized them as human beings, they gladly shared with them. They shared with Europeans in the same way they shared with the animals and other people. However, sharing here cannot be interpreted as meaning the Europeans got the same rights as any other native person, because the Europeans were not descendants of the original grantees, or they were not parties to the original social contract. Also, sharing certainly cannot be interpreted as meaning that one is giving up his rights for all eternity.⁸

Chief Harold Turner of the Swampy Cree Tribal Council indicates that the concept of sharing is broadly held within Aboriginal communities and was the basis of Aboriginal negotiations with Canada from the time of the historic treaties. As he stated during the hearings of the Royal Commission on Aboriginal Peoples:

Our ancestors did not sign a real estate deal as you cannot give away something you do not own. No, the treaties were signed as our symbol of good faith to share the land. As well, the treaties were not signed to extinguish our sovereignty and our form of government.⁹

As for the question of the nature of ownership and underlying title, Professor Little Bear states:

[Living Aboriginal peoples] are not the sole owners under the original grant from the Creator; the land belongs to past generations, to the yet-to-be-born, and to the plants and animals. Has the Crown ever received a surrender of title from these others?¹⁰

The *Sioui* Case

In order to understand the effect of *Delgamuukw* on treaty First Nations in the Prairies, one must first examine the 1990 Supreme Court decision in *R. v. Sioui*.¹¹ *Sioui* involved the exercise of treaty rights to hold a traditional religious ceremony within a provincial park in Quebec. Four Hurons were charged with cutting down trees, camping and making fires in a provincial park, contrary to the Quebec *Parks Act*.¹² The right to practice traditional customs and religious rites was the subject of a treaty made in 1760.¹³

The judgment deals with several issues. It repeats the rule from earlier cases that treaties and statutes relating to Indians should be liberally construed and uncertainties resolved in favor of the Indians.¹⁴ It states that the question of capacity to enter a treaty must be seen from the point of view of the Indians at the time of the treaty.¹⁵ As is the situation with Aboriginal rights, First Nations can have treaty rights on lands for which they did not have Aboriginal title.¹⁶ *Sioui* holds that an agreement concerning something other than territory, such as political or social rights, can be a treaty¹⁷ within the meaning of section 88 of the *Indian Act*,¹⁸ (and, presumably, within the meaning of section 35 of the *Constitution Act, 1982*).

Sioui states that a treaty with a First Nation is an agreement *sui generis* that is neither created nor terminated according to the rules of international law.¹⁹ A treaty is characterized by the intention to create obligations, the presence of mutually binding obligations, and a certain measure of solemnity.²⁰ The historical context is important in determining whether a document is a treaty.²¹ Factors useful in determining the existence of a treaty include: continuous exercise of a right in the past and at present; the reasons why the Crown made a commitment; the situation prevailing at the time of signature; evidence of relations of mutual respect and esteem between the negotiators; and the subsequent conduct of the parties.²² If there is ambiguity as to whether a document is a treaty, the court must look at extrinsic evidence to determine its legal nature.²³ Most importantly, the Court stated that a treaty cannot be extinguished without the consent of the Aboriginal parties.²⁴

The treaty in *Sioui* did not define the territory over which the customs and religious rites could be exercised. Therefore, the Court held that the treaty must be interpreted by determining the intention of the parties at the time it was entered into.²⁵ The Court concluded that both parties contemplated that the rights guaranteed by the treaty could be exercised over the entire territory frequented by the Hurons at the time, so long as the carrying on of the customs and rites was not incompatible with the current use made by the Crown of the territory.²⁶

Justice Lamer stated it has to be assumed that the parties intended to reconcile the Hurons' need to protect the exercise of their customs and the desire of the British to expand.²⁷

In other words, as long as the exercise of the treaty right is not incompatible with the government's use of the Crown lands in question, the treaty right remains available for use by the treaty First Nation. But if the government selects or allows a use of the land that is incompatible with the exercise of the treaty right, then the treaty right becomes unexercisable at that location. *Sioui* does not recognize any requirement that the First Nation be consulted over the land use and its potential effect on treaty rights.

This approach was followed by the Supreme Court in *R. v. Badger*,²⁸ which articulates a "visible incompatible use" test when determining whether prairie treaty First Nations can exercise treaty rights to hunt as guaranteed by the *Natural Resources Transfer Agreement*. Once again, the treaty First Nation has no input into the decision whether land can be put to uses inconsistent with treaty hunting rights.

***Delgamuukw* and Treaty Interpretation**

In *Delgamuukw*, the Supreme Court took the opportunity to confirm its approach to oral history in the treaty context, as set out in *Sioui* and the earlier cases, *R. v. Simon*²⁹ and *R. v. Taylor*.³⁰ In addressing the Aboriginal rights question in *Delgamuukw*, Chief Justice Lamer wrote:

In cases involving the determination of Aboriginal rights, appellate intervention is also warranted by the failure of the trial court to appreciate the evidentiary difficulties inherent in adjudicating Aboriginal claims when, first, applying the rules of evidence and, second, interpreting the evidence before it. As I said in *Van der Peet*, at para. 68:

In determining whether an aboriginal claimant has produced evidence sufficient to demonstrate that her activity is an aspect of a practice, custom or tradition integral to a distinctive aboriginal culture, *a court should approach the rules of evidence, and interpret the evidence that exists, with a consciousness of the special nature of aboriginal claims, and of the evidentiary difficulties in proving a right which originates in times where there were no written records of the practices, customs and traditions engaged in. The courts must not undervalue the evidence presented by aboriginal claimants simply because that evidence does not conform precisely with the evidentiary standards that would be applied in, for example, a private law torts case.*³¹ [Emphasis in original.]

The Court justifies this approach by reference to the legal nature of Aboriginal rights in Canadian law, rights which are “aimed at the reconciliation of the prior occupation of North America by distinctive Aboriginal societies with the assertion of Crown sovereignty over Canadian territory.”³² When dealing with evidence, courts are to give “due weight to the perspective of Aboriginal peoples.”³³

The Court goes on to state that:

Notwithstanding the challenges created by the use of oral histories as proof of historical facts, the laws of evidence must be adapted in order that this type of evidence can be accommodated and placed on an equal footing with the types of historical evidence that courts are familiar with, which largely consists of historical documents. This is a long-standing practice in the interpretation of treaties between the Crown and Aboriginal peoples.³⁴

The Court relies on *Sioui* and *Taylor* for the liberal rules of treaty interpretation, and goes on to quote Chief Justice Dickson in *Taylor*, who said that given that most Aboriginal societies “did not keep written records,” the failure to take into account oral history would “impose an impossible burden of proof” on Aboriginal peoples, and “render nugatory” any rights that they have.³⁵

It must be kept in mind that most treaty litigation has occurred in the context of hunting and fishing rights. Although hunting rights are of great importance to treaty First Nations, in cases such as *Taylor* and *Simon*, it has been unnecessary for the courts to address basic questions concerning the relationship between First Nations and the Crown. Litigation in Canada has not addressed fundamental questions such as the treaty relationship between the First Nation parties and the Crown. Crown sovereignty has been assumed without question. And, prior to 1982, treaty cases were decided in the context of Parliamentary sovereignty. Parliament was sovereign, and had no legal duty to recognize treaty rights. Parliament had the authority to limit or even abolish treaty rights without the consent of the First Nation parties to the treaties. Legislation inconsistent with the continued exercise of treaty rights took priority over treaty rights, even if Parliament had not considered the effects of proposed legislation or regulation on treaties.³⁶

Since the coming into effect in 1982 of section 35(1) of the *Constitution Act, 1982*, Parliament has not been able to interfere with constitutionally protected treaty rights without meeting the justification test developed by the Supreme Court in *Sparrow*.³⁷

***Delgamuukw* and “Treaty Title”**

To summarize, *Delgamuukw* may make it easier for First Nations to put before the courts their own understandings, based on their oral histories, of the prairie treaties. However, oral histories will not provide clear answers to many of the difficult questions around treaty interpretation. Litigation occurs on a case-by-case basis, and requires a dispute between parties. Most treaty litigation has occurred in the context of a prosecution by the Crown for an alleged violation of federal or provincial legislation in which the defendant has raised a treaty rights defence. With few exceptions,³⁸ courts have not had to address the difficult question of whether the numbered treaties are land surrender treaties.

If land issues are litigated and oral histories are given serious consideration, courts may find that some or all of the prairie treaties are not land surrender treaties. Courts may conclude that prairie treaty First Nations have an existing “treaty title,” which is similar to Aboriginal title in some ways but different in others because of the treaty relationship.

It must also be recalled from *Delgamuukw* that Aboriginal rights, including Aboriginal title, even though recognized and affirmed by section 35(1) of the Constitution Act, are not absolute.³⁹ Those rights may be infringed by federal and provincial governments⁴⁰ if the infringements satisfy the two-stage test for justification: first, the infringement must be in furtherance of a legislative objective that is compelling and substantial;⁴¹ and second, the infringement must be consistent with the special fiduciary relationship between the Crown and Aboriginal peoples.⁴² The range of legislative objectives that can justify the infringement of Aboriginal title is fairly broad. As stated in *Delgamuukw*, most of these objectives can be traced to the reconciliation of the prior occupation of North America by Aboriginal peoples with the assertion of Crown sovereignty. Such reconciliation entails the recognition that distinctive Aboriginal societies exist within, and are part of, a broader social, political and economic community.⁴³

The list of governmental activities that can justify the infringement of Aboriginal title is wide-ranging. *Delgamuukw* lists agriculture, forestry, mining, hydroelectric development, general economic development, protection of the environment and endangered species, the building of infrastructure and the settlement of foreign populations to support these aims as the kinds of objectives that will allow infringement. Whether a particular measure or government act can be justified by reference to one of those objectives is ultimately a question of fact to be determined on a case-by-case basis.⁴⁴

Given the conclusion in *Delgamuukw* that Aboriginal rights are not absolute, it is extremely unlikely that future courts would find treaty rights or treaty title to be absolute. In *Delgamuukw*, the Supreme Court held that three aspects of Aboriginal title are relevant to the manner in which the fiduciary duty operates with respect to the second stage of the justification test.⁴⁵ These aspects are likely to be found most relevant to treaty title.

First, Aboriginal title encompasses the right to exclusive use and occupation of land. The court states that this is relevant to the degree of scrutiny to be given to the infringing measure or action.⁴⁶ In contrast, treaty title may not involve the exclusive use and occupation of lands, but a shared responsibility between First Nations and the Crown. The example given by the Court, however—that governments may have to accommodate the participation of Aboriginal peoples in resource development⁴⁷—seems to fit a model of shared responsibility.

Second, the Crown's fiduciary obligation may be satisfied by involving Aboriginal peoples in decisions concerning their lands.⁴⁸ Involving treaty First Nations in decisions concerning Crown lands would also fit a model of shared responsibility. With Aboriginal title, the Court suggests that in most cases the standard will be significantly higher than mere consultation.⁴⁹ Shared decision-making, rather than mere consultation, may fit the First Nation understanding of treaty rights. The Court states that some cases may even require the full consent of an Aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to Aboriginal lands.⁵⁰ This would be particularly true for treaty First Nations, because without the guarantees of continued hunting and fishing rights, they would not have signed the treaties.

Third, lands held pursuant to Aboriginal title have an economic component. This suggests compensation is relevant to the question of justification. Fair compensation will ordinarily be required when Aboriginal title is infringed.⁵¹ Compensation would be just as relevant when considering the infringement of treaty rights.

Alternatives to Litigation

Although *Delgamuukw* provides a more positive environment for treaty First Nations when they engage in litigation, one would not expect treaty First Nations to rush to court. Just as the *Delgamuukw* case does not settle the many outstanding issues between the Gitksan and Wet'suwet'en nations and the Crown, litigation will not settle the most basic issues between treaty First Nations and the Crown. First Nations see the purpose of their treaties with the Crown as the

creation of an ongoing relationship based on mutual respect and accommodation. Such a relationship cannot be achieved through litigation. Treaty First Nations, Canada and the provinces must work out together a means of living with one another in the new millennium. A satisfactory relationship must involve respect for the “spirit and intent”⁵² of the treaties rather than a denial of the basic nature of the treaty relationship.

For some time there has been a consensus among organizations representing First Nations that their treaty relationship with the Crown must be re-examined and renewed. The Bilateral Constitutional Task Force on Treaties and Treaty Rights found that “Treaty First Nations were unanimous in the call for a process in which treaty issues could be negotiated and resolved.”⁵³ At the 1987 First Ministers Conference on Aboriginal Matters, the Assembly of First Nations put forward a proposed constitutional amendment that would have committed the Government of Canada “to clarify, renovate or implement ... each treaty ... [at the request of] the aboriginal peoples concerned.”⁵⁴ The results of such negotiations would be set out in either an amendment to a treaty, an adhesion to a treaty, or a new treaty.⁵⁵ In 1992 the Charlottetown Accord recognized the necessity for such a renewal process.⁵⁶

In 1996, the Royal Commission on Aboriginal Peoples recommended that “the federal government establish a continuing bilateral process to implement and renew the Crown’s relationship with and obligations to the treaty nations under the historical treaties, in accordance with the treaties’ spirit and intent.”⁵⁷ It went on to list principles of interpretation to be used in the treaty renewal process along with the following basic presumptions:

There is a presumption in respect of the historical treaties that

- treaty nations did not intend to consent to the blanket extinguishment of their Aboriginal rights and title by entering into the treaty relationship;
- treaty nations intended to share the territory and jurisdiction and management over it, as opposed to ceding the territory, even where the text of an historical treaty makes reference to a blanket extinguishment of land rights; and
- treaty nations did not intend to give up their inherent right of governance by entering into a treaty relationship, and the act of treaty making is regarded as an affirmation rather than a denial of that right.⁵⁸

The Saskatchewan Treaty Table

In 1998, Judge David M. Arnot, the Treaty Commissioner for Saskatchewan, presented a report entitled *Treaties as a Bridge to the Future*⁵⁹ to the Minister of Indian Affairs and the Federation of Saskatchewan Indian Nations. The report was developed through an ongoing process of dialogue involving the Office of the Treaty Commissioner, the Federation of Saskatchewan Indian Nations, the Government of Canada and the Government of Saskatchewan.⁶⁰ The report outlines a vision for the future based on the treaty relationship between Saskatchewan First Nations and the Crown. The report deals with the process of an evolving treaty relationship, including the basic issues of governance and fiscal relations, issues that are unsuitable for resolution in the courts. It emphasizes the policy areas of education, child welfare and justice. The role of the government of Saskatchewan is addressed. The report recognizes the necessity of public support for the treaty process, and calls for public education and public acts of treaty renewal.

The Saskatchewan "Treaty Table" may be seen as a step towards implementing the Royal Commission recommendations on renewal of the historic treaties. It provides a model for the treaty renewal process in which to address First Nation issues in the context of their ongoing relationship with the Crown. This model also avoids the inevitable uncertainties of litigation.

Notes

- 1 [1998] 1 C.N.L.R. 14.
- 2 There are also historical treaties covering parts of British Columbia and Ontario. Prior to the Royal Proclamation, treaties of peace and friendship were signed with several First Nations of the Maritimes and Quebec.
- 3 A. Morris, *The Treaties of Canada with the Indians*, Facsimile Edition, (Toronto, Coles Publishing Co., 1971) at 285.
- 4 The complete text of Treaties Nos. 1 to 7 and adhesions thereto are found in Morris, *ibid.*, 313-375. The texts of all the numbered treaties have been published in booklets by the Queen's Printer, Ottawa.
- 5 *Ibid.*, 288.
- 6 D. Opekokew, *The First Nations: Indian Governments in the Community of Man* (Regina, Federation of Saskatchewan Indians, 1982) at 16.
- 7 *Ibid.*, 16-17.
- 8 L. Little Bear, "Aboriginal Rights and the Canadian 'Grundnorm'" in J.R. Ponting, ed., *Arduous Journey: Canadian Indians and Decolonization* (Toronto: McClelland and Stewart, 1986) at 246.
- 9 Transcripts of the Public Hearings of the Royal Commission on Aboriginal Peoples, the Pas, Manitoba, May 20, 1992, at 252.
- 10 *Supra*, note 8, at 247.
- 11 [1990] 1 S.C.R. 1025, 70 D.L.R. (4th) 427, [1990] 3 C.N.L.R.127, 56 C.C.C. (3d) 225, 109 N.R. 22 [hereinafter cited to C.N.L.R.]
- 12 R.S.Q. 1977, c. P-9.
- 13 For the story of the Treaty of 1760, see D. Schulze, "The Murray Treaty of 1760: The Original Document Discovered" [1998] 1 C.N.L.R. 1.
- 14 *Supra*, note 11, at 134.
- 15 *Ibid.*, 136.
- 16 *Ibid.*, 139. See *R. v. Adams*, [1996] 3 S.C.R. 101, [1996] 4 C.N.L.R. 1, 110 C.C.C. (3d) 97, 202 N.R. 89, and *R. v. Cote*, [1996] 3 S.C.R. 139, [1996] 4 C.N.L.R. 26, 110 C.C.C. (3d) 122, for a rejection of the proposition that claims to Aboriginal rights must be grounded in an underlying claim to Aboriginal title.
- 17 *Ibid.*
- 18 R.S.C. 1985, c. I-6.
- 19 *Supra*, note 11, at 135.
- 20 *Ibid.*, 139.
- 21 *Ibid.*, 140.
- 22 *Ibid.*, 140-141.
- 23 *Ibid.*, 143.
- 24 *Ibid.*, 152.
- 25 *Ibid.*, 155.
- 26 *Ibid.*, 157.
- 27 *Ibid.*
- 28 [1996] 2 C.N.L.R. 77, 195 N.R. 1 (S.C.C.)

- 29 [1985] 2 S.C.R. 387, [1986] 1 C.N.L.R. 153, 23 C.C.C. (3d) 238, 24 D.L.R. (4th) 390, 71 N.S.R. (2d) 15, 171 A.P.R. 15, 62 N.R. 366.
- 30 [1981] 3 C.N.L.R. 114, 62 C.C.C. (2d) 227, 34 O.R. (2d) 360 (S.C.C.)
- 31 *Supra*, note 1, at 47.
- 32 *Ibid.*
- 33 *Ibid.*, 48.
- 34 *Ibid.*, 49-50.
- 35 *Ibid.*, 50.
- 36 See, for example, *R. v. Sikyeya*, [1964] S.C.R. 642, 49 W.W.R. 306, 44 C.R. 266, 50 D.L.R. (2d) 80, *R. v. George*, [1966] S.C.R. 267, 47 C.R. 382, 55 D.L.R. (2d) 386, 33 C.C.C. 137, *Hamlet of Baker Lake v. Minister of Indian Affairs*, [1979] 3 C.N.L.R. 17, [1980] 1 F.C. 518 (F.C.T.D.)
- 37 *R. v. Sparrow*, [1990] 1 S.C.R. 1075, [1990] 3 C.N.L.R. 160, [1990] 4 W.W.R. 410, 46 B.C.L.R. (2d) 1, 70 D.L.R. (4th) 385, 56 C.C.C. (3d) 263, 111 N.R. 241.
- 38 e.g., *Re Paulette*, [1973] 6 W.W.R. 97 and 115, 39 D.L.R. (3d) 45, 42 D.L.R. (3d) 8, reversed on other grounds [1976] 2 W.W.R. 193, 63 D.L.R. (3d) 1. affirmed on other grounds [1977] 2 S.C.R. 628, [1977] 1 W.W.R. 321, 72 D.L.R. (3d) 161, 12 N.R. 420 (N.W.T.).
- 39 *Supra*, note 1, at 75.
- 40 *Ibid.*
- 41 *Ibid.*
- 42 *Ibid.*, 76.
- 43 *Ibid.*, 78.
- 44 *Ibid.*
- 45 *Ibid.*
- 46 *Ibid.*
- 47 *Ibid.*, 79.
- 48 *Ibid.*
- 49 *Ibid.*
- 50 *Ibid.*
- 51 *Ibid.*, 79-80.
- 52 For a discussion of what is meant by the “spirit and intent” of the treaties, see the Assembly of First Nations & Canada, *Report of The Bilateral Constitutional Task Force on Treaties and Treaty Rights* (Ottawa, 6 February 1987) at 6-9. The Report was prepared for consideration by the participants in the Aboriginal constitutional process prior to the 1987 First Ministers Conference on Aboriginal Affairs [FMC]. See also H. Cardinal, “Treaties Six and Seven: The Next Century” in I. A. Getty and D. B. Smith, ed., *One Century Later[:] Western Canadian Reserve Indians Since Treaty 7* (Vancouver: University of British Columbia Press, 1978) 132; Opekokew, *supra*, note 6, at 11-13.
- 53 *Ibid.*, 10.
- 54 Doc. 830-276/016, s. 35.02(1), (2). The proposed amendment was tabled at a Ministerial Meeting in Ottawa, 13 March 1987, prior to the 1987 FMC.
- 55 *Ibid.*, s. 35.02(3).

- 56 Meeting of the First Ministers and Aboriginal and Territorial Leaders, "Charlottetown Accord—Draft Legal Text, October 9, 1992," s.35.6(2)-(6). This text did not receive formal approval from governments before the referendum in October 1992.
- 57 *Report of the Royal Commission on Aboriginal Peoples*, v. 2, 57.
- 58 *Ibid.*, 58.
- 59 D. M. Arnot, *Statement of Treaty Issues: Treaties as a Bridge to the Future* (Saskatoon: Office of the Treaty Commissioner, 1998).
- 60 *Ibid.*, vii.