Will *Delgamuukw* Eclipse the Prairie Sun?
Implications for the Prairie Treaties

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> What we speak of and do now will last as long as the sun shines and the river runs, we are looking forward to our children's children, for we are old and have but few days to live.
>
> Mistahwahsis, Fort Carlton (22 August, 1876)[1]

Thus spoke Mistahwahsis, a leading chief of the Saskatchewan River Cree, on the eve before the signing of Treaty Number Six, employing an image that was already hackneyed.[2] The Treaties, those solemn compacts that are, or should be, fundamental to a fit and proper relationship between First Nations and the rest of Canadian society,[3] were supposed to last forever. They have survived, even though (according to a common assumption across virtually the entire spectrum of enlightened Canadian opinion) the whole history of Canada has been littered with broken covenants, unfulfilled promises, and legitimate expectations dashed.[4] Indeed the Treaties have now been re-invigorated, rescued from obscurity on occasion by a vigilant Supreme Court,[5] and enshrined in our Constitution by section 35 of the 1982 *Constitution Act*.

Notes will be found on pages 221–225.

The Treaties are especially important to the Prairie Provinces where practically the entire landmass is notionally covered by Treaties 1, 2, 3, 4, 5, 6, 7, 8 and 10.[6] Despite occasional rumours of potential claims by the Dakota Indians[7] and the Métis, federal and provincial governments have confidently operated on the assumption that the question of Aboriginal title has been settled on the Prairies. As the shocks from the *Delgamuukw* decision reverberated through British Columbia, Prairie governments believed they could adopt the stance of detached observers.

That detachment may yet prove to be justified, but the security of the Crown's title is not quite so clear as it once was. In the wake of the *Delgamuukw* decision, while the sun may still shine and the rivers yet flow, two lawsuits have recently been filed by Treaty groups in the Province of Alberta. Similar claims are anticipated by First Nations in other parts of the Prairie Provinces, which call into question what has long been regarded as the very essence of the Treaties.

Chief Florence Buffalo has filed one of the lawsuits in the Alberta Court of Queen's Bench on behalf of the Samson Cree Nation claiming, among other things, a declaration of unextinguished Aboriginal title and existing aboriginal and treaty rights in, under and to all the natural resources in central Alberta between the Oldman and North Saskatchewan Rivers and extending as far east as the 112th Meridian of Longitude,[8] together with an alleged Treaty right to shared use of the surface of that land. She also seeks special and general damages in the amount of $10 billion against each of the defendant federal and provincial Crowns, together with an accounting for the value of all natural resources, extracted from the land, and all royalties, revenues and other payments related to such extraction.[9]

The Statement of Claim in the other lawsuit was filed on the same date as that of the Samson Cree Nation (26 February 1999) on behalf of all of the Indian Bands in Treaty Seven. In that action, the Plaintiffs claim a declaration that they have not ceded, released, surrendered or yielded up their Aboriginal title and right to the Treaty Seven Territory[10] and that they continue to possess a legal interest in it. They do not quantify the amount of damages they seek against the defendant federal and provincial Crowns, but do indicate that the award should be based upon a breach of fiduciary duty and loss of Treaty rights and benefits and be augmented by exemplary, punitive, and aggravated damages.[11]

It is not the purpose of this paper to comment specifically on these particular pleadings (the writer has no involvement in either of the actions) but rather to consider the basic issue which they raise—the validity, interpretation and legal effectiveness of the Prairie Treaties.

It is abundantly clear that neither action can possibly succeed if the written text of the Treaties is accepted. Treaty Six, to which the Samson Cree Nation had adhered in 1877,[12] declared in its opening substantive clause:

> The Plain and Wood Cree Tribes of Indians, and all other the Indians inhabiting the district hereinafter described and defined, do hereby cede, release, surrender and yield up to the Government of the Dominion of Canada for Her Majesty the Queen and her successors forever, all their rights, titles and privileges, whatsoever, to the lands included within the following limits ...

And then after describing the territorial boundaries of the Treaty, which included the northerly portion of Chief Buffalo's claim, the Treaty text continued:

> And also all their rights, titles and privileges whatsoever, to all other lands, wherever situated, in the North-West Territories, or in any other Province or portion of Her Majesty's Dominions, situated and being within the Dominion of Canada;
>
> The tract comprised within the lines above described, embracing an area of one hundred and twenty-one thousand square miles, be the same more or less;
>
> To have and to hold the same to Her Majesty the Queen and her successors forever;

Similarly, Treaty Seven declares:

> And whereas the said Commissioners have proceeded to negotiate a treaty with the said Indians; and the same has been finally agreed upon and concluded as follows, that is to say: the Blackfeet, Blood, Piegan, Sarcee, Stony and other Indians inhabiting the district hereinafter more fully described and defined, do hereby cede, release, surrender, and yield up to the Government of Canada for Her Majesty the Queen and her successors forever, all their rights, titles and privileges whatsoever to the lands included within the following limits, ...
>
> ... and also all their rights, titles and privileges whatsoever, to all other lands wherever situated in the North-West Territories, or in any other portion of the Dominion of Canada:
>
> To have and to hold the same to Her Majesty the Queen and her successors for ever:

On their face, these Treaty provisions would seem to be a complete answer to the Plaintiffs' claims, in the absence of any other provision in the Treaties themselves that might purport to replace or preserve the aboriginal interests so exhaustively surrendered. Both Treaties Six and Seven do, of course, promise reserves, and preserve the right to hunt throughout the surrendered tract. Treaty Six also promises protection for existing fishing practices. None of these provisions, however, go any significant distance towards validating the Plaintiffs' sweeping claims.

Both the Samson Cree Nation and the Treaty Seven Plaintiffs acknowledge the existence of the Treaties in their Statements of Claim.

In the Queen's Bench action, the Samson Cree Nation declares:

> 11. According to the printed version of *Treaty No. 6*, the Plain and Wood Cree tribes of Indians and other Indians ceded, released, surrendered and yielded up to the Government of the Dominion of Canada for Her Majesty the Queen all their rights, titles and privileges whatsoever to lands contemplated by the Treaty in consideration of the recognition, retention and granting of various rights and benefits. However, under *Treaty No. 6*, the Indian tribes and Indian Nations party thereto or who adhered thereto as a minimum did not cede, release, surrender or yield up any rights, titles and privileges whatsoever to Natural Resources.
>
> 12. At the time of the adhesion in 1877 to *Treaty No. 6* by Plaintiffs' ancestors, Plaintiffs had aboriginal title and rights to the lands and Natural Resources of the Traditional Lands. In *Treaty No. 6*, the Indians party thereto and more particularly the ancestors of the Plaintiffs through their adhesion and in virtue of the negotiations, undertakings, commitments and representations of Her Majesty's representatives, agreed only to share the surface of the Traditional Lands with Her Majesty the Queen. This was the intention and understanding of the Indian signatories and adherents. Plaintiffs and their ancestors did not surrender by *Treaty No. 6* their aboriginal title and aboriginal rights in and to the Natural Resources.
>
> 13. Despite adhesion to *Treaty No. 6*, Plaintiffs and their ancestors have continued to have existing and unextinguished aboriginal title and rights in and to the Natural Resources.

In the Federal Court action the Treaty Seven Plaintiffs recite the provisions that appear to provide for the complete extinguishment of all land-related rights, but then proceed to say:

> 39. Contrary to the above provisions in Treaty 7 the Plaintiffs deny that they ceded, released, surrendered or yielded up their Aboriginal title or right over the Treaty 7 Territory.
>
> 40. The Plaintiffs understanding was that Treaty 7 was a treaty of peace and that they were agreeing to share the Treaty 7 Territory with the Crown in exchange for the promises made during Treaty 7 discussions by the representatives of the Crown.
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> 41. The Plaintiffs further state that Treaty 7 does not mention the resources, either renewable and non-renewable, on the Treaty 7 Territory and it is not the understanding of the Plaintiffs that they ceded, released, surrendered or yielded up their Aboriginal title or right to such resources.

In addition to their principal claim that they had not agreed to the surrender of their lands and the natural resources, the Plaintiffs also advanced alternative claims. The Samson Cree Nation alleges that the surrender of their interest in their traditional lands and the natural resources was conditional on the fulfilment of the Treaty promises by the Crown, which they assert have not been fulfilled.[13] The Treaty Seven Plaintiffs allege that if their ancestors did, indeed, surrender their Aboriginal title and rights they did so only for the purpose of permitting the federal Crown to hold the lands and resources in trust for their benefit. They allege that by purporting to alienate some of the Treaty Seven lands and resources within the Treaty area to private parties, and by purporting to transfer the whole of its interest to the Province of Alberta, by the 1930 *Natural Resources Transfer Agreement*, the federal Crown breached its trust obligation to the Plaintiffs, and compensation is now due.

Not long ago, such a frontal attack on the written text of the Treaties would have seemed quixotic. Treaties for the cession of Indian land rights have been part of Canada's history since long before Confederation. In the *Calder* case,[14] Justice Emmett Hall, in a dissent now vindicated by the *Delgamuukw* decision, declared:

> Surely the Canadian treaties, made with much solemnity on behalf of the Crown, were intended to extinguish the Indian title. What other purpose did they serve? If they were not intended to extinguish the Indian right, they were a gross fraud and that is not to be assumed.[15]

It is true that in *Simon v. The Queen,* the Supreme Court repudiated the notion that Treaties, by definition, must include a land cession.[16] Nevertheless, it has remained quite willing to enforce extinguishment provisions included in the text of a Treaty, even against a First Nation whose representatives may never have signed the agreement. In *Attorney General of Ontario v. Bear Island Foundation*[17] the Supreme Court unanimously affirmed the lower courts' rejection of a claim of Aboriginal rights and title to the Temagami region of northeastern Ontario. The Ontario government had relied upon the 1850 Robinson Huron Treaty under the terms of which the Indian parties had "fully freely and voluntarily surrender[ed], cede[d], grant[ed], and convey[ed] unto Her Majesty, her heirs and successors forever, all their right, title, and interest to, and in the whole of" a vast portion of northern Ontario, including the Temagami region. The Temagami people, however, alleged that they had never entered into the 1850 Robinson Huron Treaty, although it was established in evidence that they had received Treaty Annuities and a small reserve. The Supreme Court tersely noted:

> It is unnecessary, however, to examine the specific nature of the aboriginal right because, in our view, whatever may have been the situation upon the signing of the Robinson-Huron Treaty, that right was in any event surrendered by arrangements subsequent to that treaty by which the Indians adhered to the treaty in exchange for treaty annuities and a reserve.[18]

The *Bear Island* decision would appear to be clear authority for the proposition that the legal effectiveness of the extinguishment provisions of a Treaty is not dependent upon the explicit acquiescence of those terms by each Treaty First Nation. However, the primary proposition advanced by the Samson Cree Nation and the Treaty Seven Bands is not that they should not be bound by the terms of their respective Treaties—the point unsuccessfully advanced by the Temagami in *Bear Island*. What these new Plaintiffs are alleging is that the *real* Treaties are not the ones set out in the heretofore accepted written texts.

Scarcely more than a decade ago, such a suggestion would have been readily dismissed. In *R. v. Horse*[19] a group of Treaty Six Indians were charged with night hunting by means of lights, contrary to the Saskatchewan *Wildlife Act*. Under Paragraph 12 of the *Natural Resources Transfer Agreement* Indians were required to obey the laws of the Province unless they were hunting for food on unoccupied Crown lands or other lands to which they had a right of access. The land on which they were hunting was privately owned, and they were hunting without the permission of the owner. Among the defences which counsel advanced

on behalf of the accused was the argument that the Indians of Treaty Six had a right of access to privately owned land because, under the terms of the Treaty, their ancestors had only agreed to share the land with incoming settlers, rather than to give it up. In the Supreme Court of Canada, Justice J.W. Estey, for a unanimous Court, noted that the text of Treaty Six provided that:

> Her Majesty further agrees with her said Indians that they, the said Indians, shall have right to pursue their avocations of hunting and fishing throughout the tract surrendered as hereinbefore described, subject to such regulations as may from time to time be made by her Government of her Dominion of Canada, and saving and excepting such tracts as may from time to time be required or taken up for settlement, mining, lumbering or other purposes by her said Government of the Dominion of Canada, or by any of the subjects thereof, duly authorized therefor, by the said Government.[20]

Since the lands on which Mr. Horse and his companions were hunting had been taken up for settlement by one of Her Majesty's subjects, the Court seemed to be clearly of a mind to dismiss this claim. However, counsel for the Accused insisted that the historical record would vindicate the claim that Treaty Six had guaranteed his clients access to privately owned land for hunting purposes. He requested that the Court examine the record of the negotiation of the Treaty as compiled by the pre-eminent Treaty Commissioner, Lieutenant Governor Alexander Morris. Justice Estey was clearly uncomfortable with this suggestion:

> I have some reservations about the use of this material as an aid to interpreting the terms of Treaty No. 6. In my view the terms are not ambiguous. The normal rule with respect to interpretation of contractual documents is that extrinsic evidence is not to be used in the absence of ambiguity; nor can it be invoked where the result would be to alter the terms of a document by adding to or subtracting from the written agreement. This rule is described in *Cross on Evidence* (6th ed. 1985), at pp. 615-16:
>
> > Extrinsic evidence is generally inadmissible when it would, if accepted, have the effect of adding to, varying or contradicting the terms of a judicial record, a transaction required by law to be in writing, or a document constituting a valid and effective contract or other transaction. Most judicial statements of the

> rule are concerned with its application to contracts, and one of the best known is that of Lord Morris who regarded it as indisputable that:
>
> > Parol testimony cannot be received to contradict, vary, add to or subtract from the terms of a written contract or the terms in which the parties have deliberately agreed to record any part of their contract. [*Bank of Australasia v. Palmer,* [1897] A.C. 540, at p. 545][21]

Justice Estey proceeded to note that the rule requiring the liberal interpretation of Indian treaties in favour of the Indians adequately protected their interests and was not incompatible with the parol evidence rule:

> The parol evidence rule has its analogy in the approaches to the construction of Indian treaties. This Court in *Simon v. The Queen*, [1985] 2 S.C.R. 387, was concerned with the proper interpretation of an Indian treaty by the courts. Dickson C.J. stated at p. 404: "An Indian treaty is unique; it is an agreement *sui generis* which is neither created nor terminated according to the rules of international law". An early judgment in *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29, referred more broadly to the rules of interpretation properly applicable in a court of law to an Indian treaty. Dickson J. (as he then was) there stated, at p. 36: " ... treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indians".[22]

After noting that parol evidence rule also applied to the interpretation of international treaties, Justice Estey went on to say: "In my opinion there is no ambiguity which would bring in extraneous interpretative material." [23] Nevertheless, he did ultimately agree to examine Morris' account "as a useful guide to the interpretation of Treaty No. 6" and a means of seeing the Treaty "in its overall historical context." [24] After reviewing the Treaty Commissioner's narrative, Justice Estey concluded that the historical record was entirely congruent with the plain meaning of the Treaty's written terms and affirmed the convictions.

While the *Horse* decision was somewhat ambiguous on the question of the application of the parol evidence rule,[25] it left little doubt about the Supreme Court's belief in the primacy of the written Treaty text.

Until three years ago, therefore, the prospects for any challenge to the extinguishment provisions of any of the Prairie Treaties would have seemed distinctly unfavourable. There was a widespread understanding,

reflected in Justice Hall's judgment in *Calder* that the very purpose of the numbered Treaties was to obtain the surrender by the Indians of their land and resource claims. The *Horse* case suggested that while the courts were prepared to look at extrinsic historical evidence, it was only as a guide to interpretation and to provide context for the Treaty text. *Bear Island* indicated that the written terms of a Treaty would be enforced against a particular First Nation if it accepted Treaty benefits, even if it might not have given its conscious acquiescence to the written terms.

Those apparent certainties have been thrown into question, however, by more recent pronouncements of the Supreme Court. In *R. v. Badger*[26] the Court revisited the question of the right to hunt on private lands. It distinguished *Horse* by indicating that a distinction should be drawn between "occupied" private lands (which had been dealt with in the earlier decision) and "unoccupied" private lands which were arguably at issue in the more recent case.[27] Of possibly greater significance than the hunting rights issue,[28] however, was Justice Cory's comments, for the majority, on Treaty interpretation:

> [W]hen considering a treaty, a court must take into account the context in which the treaties were negotiated, concluded and committed to writing. The treaties, as written documents, recorded an agreement that had already been reached orally and they did not always record the full extent of the oral agreement: see Alexander Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories* (1880), at pp. 338-42; *Sioui, supra*, at p. 1068; *Report of the Aboriginal Justice Inquiry of Manitoba* (1991); Jean Friesen, *Grant me Wherewith to Make my Living* (1985). The treaties were drafted in English by representatives of the Canadian government who, it should be assumed, were familiar with common law doctrines. Yet, the treaties were not translated in written form into the languages (here Cree and Dene) of the various Indian nations who were signatories. Even if they had been, it is unlikely that the Indians, who had a history of communicating only orally, would have understood them any differently. As a result, it is well settled that the words in the treaty must not be interpreted in their strict technical sense nor subjected to rigid modern rules of construction. Rather, they must be interpreted in the sense that they would naturally have been understood by the Indians at the time of the signing.[29]

The suggestion that there might be a distinction between the agreement reached orally and the written text raises a potentially troublesome question. Which then are the actual treaties? The documents we have labelled and accepted as treaties for more than a hundred years? Or

the verbal understandings reached with the different groups of Indian signatories? The recent case of *R. v. Sundown*[30] also emphasizes the importance of the particular understanding reached at the time the Treaty was made. Justice Cory, speaking for a unanimous Court, declared:

> Treaty rights, like aboriginal rights, are specific and may be exercised exclusively by the First Nation that signed the treaty. The interpretation of each treaty must take into account the First Nation signatory and the circumstances that surrounded the signing of the treaty. Lamer C.J. was careful to stress the specific nature of aboriginal rights in *R. v. Van der Peet*, [1996] 2 S.C.R. 507. At para. 69 he wrote:
>
> > The fact that one group of aboriginal people has an aboriginal right to do a particular thing will not be, without something more, sufficient to demonstrate that another aboriginal community has the same aboriginal right. The existence of the right will be specific to each aboriginal community. [Emphasis added.][31]
>
> This principle is equally applicable to treaty rights. Dickson C.J. and La Forest J. also emphasized the specific nature of aboriginal and treaty rights in *R. v. Sparrow,* [1990] 1 S.C.R. 1075, when they discussed the correct test to apply under s. 35(1) of the *Constitution Act, 1982*. At p. 1111 this appears:
>
> > We wish to emphasize the importance of context and a case-by-case approach to s. 35(1). Given the generality of the text of the constitutional provision, and especially in light of the complexities of aboriginal history, society and rights, the contours of a justificatory standard must be defined in the specific factual context of each case. [Emphasis added][32]
>
> Thus, in addition to applying the guiding principles of treaty interpretation, it is necessary to take into account the circumstances surrounding the signing of the treaty and the First Nations who later adhered to it.[33]

As the Court had noted in *Badger,* Treaty negotiations were often not all conducted in one place or with the same parties:

> The Indian people made their agreements orally and recorded their history orally. Thus, the verbal promises made on behalf of the fed-

> eral government at the times the treaties were concluded are of great significance in their interpretation. Treaty No. 8 was initially concluded with the Indians at Lesser Slave Lake. The Commissioners then travelled to many other bands in the region and sought their adhesion to the Treaty. Oral promises were made with the Lesser Slave Lake band and with the other Treaty signatories and these promises have been recorded in the Treaty Commissioners' Reports and in contemporary affidavits and diaries of interpreters and other government officials who participated in the negotiations.[34]

Does this suggest that each of the nine different Treaties applicable to land in the Prairie Provinces should really be seen as many times that number of binding agreements? That would seem to be a misreading of the Court's comments. Notwithstanding the increased emphasis on context and the Indian point of view, nothing in either the *Badger* or the *Sundown* case suggests that the actual Treaty is anything other than the written document. While the Court may be increasingly insistent on considering the Indian point of view before committing itself to any particular interpretation of a Treaty term, it has not yet endorsed the view that the oral understanding, rather than the written text, is the *real* Treaty, or that the written text should be disregarded if it is contradicted by historical evidence of a completely inconsistent Indian viewpoint. Nevertheless, the increasing sensitivity of the Court to the Indian understanding of Treaty terms may provide some encouragement to those who, like the Samson Cree Nation and the Treaty Seven Plaintiffs, may wish to mount a direct challenge to the written text of the Treaties themselves.

The suggestion that the numbered Treaties did not actually involve a cession of land and resource rights is not entirely new. Indeed it was advanced in the Supreme Court of the Northwest Territories in 1973 in connection with Treaties Eight and Eleven, when Justice Morrow found that a group of 16 Indian chiefs from the western portion of the Territories had presented a *prima facie* case that their bands had possessed Aboriginal rights to the territories north of the 60th parallel found within the boundaries of Treaties Eight and Eleven, and that there was sufficient doubt that the Aboriginal title of the Indians had been extinguished by the two Treaties to permit the chiefs to register a caveat on the lands of the Territories giving notice of their claim.[35]

The case, which was based on a Registrar of Land Title's reference to the Supreme Court on the question of the registrability of a caveat, proceeded in a rather unusual manner. The Crown immediately objected to the Court's jurisdiction to hear the matter and when it failed on that motion, it withdrew from the case. Although the Court appointed

a local lawyer as *amicus*, it does not appear that he attempted to call any evidence to support the validity of the written text of the treaty.[36] The evidence of the historians, anthropologists and Elders called by the caveators thus went in virtually unchallenged and uncontradicted. The decision was overturned by a majority in the Northwest Territories Court of Appeal, without reference to the strength or weakness of the caveators' case.[37] The Supreme Court of Canada unanimously upheld the Court of Appeal's decision on the narrow ground that caveats could not be registered against unpatented Crown lands under the federal *Land Titles Act*.[38]

The evidence led in the Supreme Court of the Northwest Territories in the *Paulette* case emphasized that there were no reserves in the Northwest Territories. This lent some plausibility to the claims of several Elders that land issues had not been dealt with during the negotiation of Treaty Eleven and at the adhesions to Treaty Eight with respect to the Indians living north of the 60th parallel.[39] Whatever might have been the case in the Northwest Territories in the 1970s, where witnesses to Treaty Eleven were still available to testify, the documentary evidence provides an ample basis for demonstrating that the Indians of the Prairie Provinces were well aware that the subject matter of the Treaties was land. There is also some evidence that they understood that their rights to natural resources were also being surrendered.

In 1817, in the Red River Valley of what is now Manitoba, Lord Selkirk entered into a Treaty with certain Ojibwa and Cree chiefs for the cession of all of the land within two miles on either side of the Red River, from its mouth to the junction with the Red Lake River in what is now Minnesota, and for two miles on either side of the Assiniboine River from its mouth to the Rivière aux Champignons, located a little to the west of Portage La Prairie.[40] In return for this land, the Ojibwa and Cree were each promised one hundred pounds of good and merchantable tobacco annually to be delivered to the Forks of the Red and Assiniboine in the case of the Ojibwa, and to Portage La Prairie in the case of the Cree.[41]

As the years passed, the Selkirk Treaty became a source of controversy and confusion. Some Indians claimed that no Treaty was ever signed, others that the Chiefs who signed it did not know what they were subscribing to, still others that the Chiefs had not sold the land, but only leased it for a season, and yet others that the Chiefs had sold land, but not the land described in the deed. Many Métis questioned the validity of the Treaty on the grounds that the Indians who had executed it were relative newcomers to the country and possessed no Aboriginal title there.[42] It may be possible to doubt the understanding of

the Chiefs who entered into the Selkirk Treaty as to the purport of their actions. But the very controversy that grew up around it ensured that the Indians in the area that was to be encompassed by Treaty One became well aware of the nature of land cession treaties. In 1869, before the Hudson's Bay Company had given up its rights to Rupertsland, a group of new settlers from Canada learned very quickly that the Indians were well aware of the boundaries of the Selkirk Treaty and were very anxious to negotiate new Treaty arrangements with the incoming Canadian authorities. It was also very clear that the Indians understood that land would be the central focus of the new Treaty relationship. The settlers attempted to establish themselves along Rat Creek, a stream to the north of the Assiniboine, which flowed into the Whitemud River. They were immediately accosted by members of the Portage Band under Chief Yellow Quill who pointed out that they were trespassing on land not covered by the Selkirk Treaty, and warned them off. The settlers appealed to Hudson's Bay Company Governor William McTavish who dispatched James McKay, a respected Métis member of the Council of Assiniboia, to intercede with the Band. After considerable discussion, the Councillor was able to persuade the Band to accept the following temporary arrangement:

> We, the undersigned Indians of Portage la Prairie, have, in accordance with Gov. McTavish's request, agreed among ourselves to allow any Canadians who may come with the intention of settling, to settle at Rat Creek on the lower, or the east side, and on the whole of the farming land down to the Portage and downwards to Manitobah Lake.
>
> We strongly object to any old settlers going up to Rat Creek to settle, we mean those who have settled below this for some time past ... We give a lease of the land above mentioned for the term of three years, fully expecting that some arrangements will be made with us before the expiration of the three years, about our lands. We further agree to allow the settlers that may settle at Rat Creek the privilege of going three miles landward, to the mountain, or into the woods for their building timber or for firewood.[43]

After the transfer of Rupertsland to Canada, the problem of settlers establishing themselves and cutting wood outside of the Selkirk Treaty area resurfaced, prompting another Chief of the Portage Band to post the following notice on the church door in the community of Portage la Prairie:

> To all whom it may concern
>
> Whereas the Indian title to all lands west of the Fifty mile boundary line at High Bluff has not been extinguished &
>
> Whereas those lands are being taken up & the wood thereon cut off by parties who have no right or title thereto,
>
> I hereby warn all such parties that they are infringing on lands that as yet virtually belong to the Indians & do hereby caution them to desist, on pain of forfeiting their labour.[44]
>
> Moosoos His Mark

The Métis witness to the Notice,[45] who would seem to have forwarded a copy of it to Lieutenant Governor Adams G. Archibald, explained the reason for the Chief's action:

> The Chief complains that people come and cut wood without leave and permission and that it is not right.
>
> That the woods belong to the Indians and it seems to them that the people are stealing.
>
> That in the smallest bargains, an agreement is come to between parties but here there was none, and he would like to have some understand [*sic*] about it.
>
> The Chief says that the most of the tribe are out on the Hunting grounds and that he was left in charge, and that it is not right to cut their wood without even consulting them.[46]

The Portage Band was not alone in seeking an understanding concerning their lands. When the prospective Lieutenant Governor William McDougall made his abortive attempt to enter the Hudson's Bay Company Territory from the United States in the late autumn of 1869, he was met by the Ojibwa Chief Kewetaosh and his band from the vicinity of Roseau River. The Chief demanded to know if it were true that Canada had purported to buy his land from the Hudson's Bay Company.

> He then proceeded to lay claim to the country from Pembina to the Assinaboine, and from the high lands on the west to the Lake of

> the Woods. He said his ancestors had never sold their title to any part of it—they had only lent as much as a man could see under a horse's belly on both sides of the River to the Company, and he now wanted to know what I was going to do with his land. ...
>
> I replied to his speech through an interpreter ... I was glad to see him and his band, and hoped we would be able to make a satisfactory agreement about any land of his we might require. I explained the nature of the arrangement with the H. B. Company, which I assured him left his rights, whatever they might be just as they stood before.... I then produced a map of the Territory and asked him to point out the bounds of the land to which he and his band laid claim. This proposal was evidently something he did not expect, and a good deal of consultation took place between him and his companions. I told them that I merely wished to find out the extent of the country they claimed; that I was not prepared either to admit their claim or deny it, but before we could negotiate, I must know what it was they pretended to own—that there were other Indian bands, especially towards the Lake of the Woods, who would probably claim some part of the territory he had described as belonging to his band. It then came out that three chiefs—"Peguis,"[47] near Lake Winnipeg, "Fox," of Prairie Portage, and "Gros Oreille" of Oak Point, towards Lake of the Woods, and himself, agreed last winter upon a division of the country between them, and that his claim was to be limited to the country bounded by Scratching River and the Government Road on the north, Pembina Mountain on the West, White mouth River on the East and the American Boundary on the South.[48]

William McDougall subsequently reported from his Pembina exile[49] that he had received a friendly letter from "the Indian Chief 'Pegwis', who lives at Winnipeg, in which he strongly condemns the conduct of the French half-breeds ... He wishes to see me, to shake hands and bargain about his land."[50] At his first interview with the newly arrived Lieutenant Governor Archibald, Chief Henry Prince, son of Peguis, raised the question of payment for his lands.[51] So too did a delegation of six chiefs, including the son of "Les Grandes Oreilles," who met the Lieutenant Governor two days after the interview with Chief Prince. They indicated that they had been waiting all summer, having been informed that Archibald would make a Treaty with them "about their lands" as soon as he arrived.[52]

Lieutenant Governor Archibald diverted these requests by promising that he would meet the Indians the following spring and make a

Treaty with them at that time. By the end of May 1871, the Portage Band began to lose patience. It met in council and passed a number of resolutions, which they forwarded to the Lieutenant Governor. They objected to the manner in which they were being treated by the settlers and to the fact that their band members were being imprisoned for violations of Canadian law before a Treaty had been made. They demanded payment of £5 for every member of their band who might be arrested and £1 per day for every day that such a member was detained in prison. The Band explained these unusual resolutions as follows:

> Why we pass these resolutions at our council held today is because that we never have yet seen or received anything for the land and the woods that belong to us, and the settlers use to enrich themselves. We might not have felt so hard at the present time at the usage we have rec[d] of late, had we ever rec[d] any remuneration for the said lands & woods that ... [illegible] belong to us. ... We feel sorry to have to express these resolutions at our Council today, but ... [illegible] necessity compels us to do so. We always thought & wished to be friendly with you (the settlers) but can now see that you look upon us as children & we feel that you are treating us the same.
>
> What was said last fall by the Governor we still remember all. We were promised by Governor Archibald that we should be treated with etc. early this spring.[53]

It will be seen therefore, that before the first of the Numbered Treaties was entered into, the documentary record gives considerable evidence that the Indian parties were well aware that the subject matter of the Treaties would be land, and they were also concerned about at least one of the natural resources connected with land—namely timber. Their understanding of the issues was sophisticated and they resented being treated like children. Indeed it was the Indians, far more than the government, who were insistent upon a bargain involving lands.

During the negotiations themselves, land issues were paramount. Spokespersons for the Indians put forward a proposal that would have resulted in their retention of large tracts of land that they could use as a source of resource income. As Lieutenant Governor Archibald reported: "... the Indians seem to have false ideas about the meaning of a Reserve. They have been led to suppose that large tracts of ground were to be set aside for them as hunting grounds, including timber lands, of which they might sell the wood as if they were proprietors of the soil." [54]

The Treaty Commissioners rejected this proposal, arguing that since the Indians would be able to hunt over the unoccupied portion of the Treaty lands there was no need for reserves larger than would be necessary for them to use for farming purposes should they choose to take up that vocation. After long and hard bargaining, and the granting of a number of concessions in other areas, including the amount of the annuities, the Indians accepted a treaty which contained clauses respecting lands similar to those proposed by the Crown's representatives.[55]

The documentary record shows that the question of mineral rights was raised and expressly dealt with during the negotiations of another of the Numbered Treaties—Treaty Three, concluded in 1873. As Treaty Commissioner Lieutenant Governor Alexander Morris reported:

> They asked what reserves would be given them, and were informed by Mr. Provencher that reserves of farming and other lands would be given them as previously stated, and that any land actually in cultivation by them would be respected. They asked if the mines would be theirs; I said if they were found on their reserves it would be to their benefit, but not otherwise. They asked if an Indian found a mine would he be paid for it, I told them he could sell his information if he could find a purchaser like any other person.[56]

The historical record discloses that throughout the negotiation of the numbered treaties in the 1870s the Indian parties were remarkably well informed about the previous proceedings in connection with other Treaties. Thus the Indians who gathered to sign Treaty Two at Manitoba Post in late August of 1871 were reported to be fully familiar with the terms of Treaty One concluded at Lower Fort Garry just 18 days earlier.[57] A striking example of the rapid and effective communication occurred in 1876, when Treaty Commissioners were dispatched to what is now Northern Manitoba to take adhesions from various bands to Treaty Five, concluded in the previous year. Thomas Howard, one of these Commissioners arrived at The Pas on 5 September 1876, just 13 days after Treaty Six had been concluded more than 350 kilometres up the Saskatchewan River. He attempted to obtain the Band's agreement to the terms of Treaty Five but encountered a real problem because Treaty Six contained more generous provisions with respect to reserve size and initial cash payments:

> ... I proceeded to explain the terms of the treaty that I desired to receive their adhesion to. The Chiefs immediately stated that they wanted to make a treaty of their own, and it was only after great

> difficulty that I could make them understand that in reality it was not a new treaty they were about to make.
>
> They had heard of the terms granted the Indians at Carlton, and this acted most prejudicially at one time against the successful carrying out of my mission; but I at last made them understand the difference between their position and the Plain Indians, by pointing out that the land they would surrender would be useless to the Queen, while what the Plain Indians gave up would be of value to her for homes for her white children. They then agreed to accept the terms offered if I would agree to give them reserves where they desired; …[58]

A common issue raised by several of the Indian parties throughout a number of the Treaty negotiations which further demonstrated the general awareness of the Indian negotiators of relevant events in the Euro-Canadian world was the question of the Hudson's Bay Company's sale of Rupertsland to Canada. As early as April 1871, Chief Sweetgrass, the leading Cree Chief who would sign Treaty No. 6 at Fort Pitt in 1876, sent a message from Edmonton to Lieutenant Governor Archibald: "We heard our lands were sold and we did not like it; we don't want to sell our lands; it is our property, and no one has a right to sell them." [59]

At the negotiation of Treaty Four in what is now Southern Saskatchewan the discussions were held hostage for a considerable period in a dispute concerning the Hudson's Bay Company. All speakers deferred to Chief "Gambler" until the matter was talked through. The Chief was fairly vague at first in describing the cause of the Indian's complaint. But he did accuse the Company of stealing the land, in terms that clearly suggested that he understood the land to include the natural resources. On the fourth day of the negotiations the following exchange occurred:

> THE GAMBLER: "When one Indian takes anything from another we call it stealing, and when we see the present we say pay us. It is the Company I mean."
>
> LIEUT-GOV. MORRIS: "What did the Company steal from you?"
>
> THE GAMBLER: "The earth, trees, grass, stones, all that which I see with my eyes."[60]

Finally, although Chief Gambler would not clearly articulate the issue, Chief Pis-qua[61] stepped forward at the end of the long day and put the troublesome question on the table:

> Pis-Qua (the plain) pointing to Mr. McDonald, of the Hudson's Bay Company—"You told me you had sold your land for so much money, £300,000. We want that money.[62]

The Lieutenant Governor was able to fend off this request by indicating that the payment of money to the Company for the sale of its rights did not stand in the way of Her Majesty paying the Indians for their rights.

While many more examples could be given, the documentary records of the Treaty negotiations and the preceding events would seem to offer ample evidence that the Indian parties understood that a purchase of land was a central purpose of the Treaties. There is also evidence from at least some of the negotiations that they also understood that natural resources, including timber and minerals were included in the surrenders that they made.

Although it only surfaces sporadically, there is also considerable evidence from the years following the making of the Treaties that the Indian parties understood that they had surrendered their Aboriginal title in return for the Treaty rights of reserves, annuities, and other benefits. Often the evidence of this understanding occurred when Aboriginal spokespersons complained about the non-fulfilment of Treaty promises, as for example in the case of the meeting of Treaty Six and Four Chiefs near Fort Carlton in the summer of 1884 to air their grievances. After reciting a number of complaints, the Chiefs are reported to have declared:

> That requests for redress of these grievances have been again & again made without effect. They are glad that the young men have not resorted to violent measures to gain it. That it is almost too hard for them to bear the treatment received at the hands of the government after its "sweet promises" made to get their country from them. They now fear they are going to be cheated.[63]

A similar point was made by spokesperson Louis O'Soup on the occasion of the 1911 Delegation of Saskatchewan and Manitoba Indians to Ottawa. O'Soup and others had collected grievances from a number of Bands in the southern portions of the Prairie Provinces and travelled down to Parliament Hill to confront Minister of Indian Affairs Frank Oliver with them. One of the grievances related to a requirement that Indians should pay duty on gifts of horses that were made to them by their U.S. friends and relatives. As O'Soup explained:

> Long ago we never saw a boundary line. The people on either side just travelled across. Our friends are across the boundary line and

> when we go to see them they give us some small ponies and when we bring [them] to this side of the line they are taken away from us, no matter how small, if we have not $12.50 to pay for the horse. We find it hard because we are poor. We don't blame you. The people of the United States are rich and so are Canadians but you take our little ponies from us although we gave you the country and you are making money on the country we gave you and we have not money to pay for the ponies. The Indian thinks the Gov't is hard, because the pony is not worth much to a white man but the Indian can ride about on him and see his neighbour.[64]

Even into the late 1960s similar comments can be found. For example, in the well-known polemic by Harold Cardinal, *The Unjust Society,* [65] the following passage concerning the Treaties can be found:

> Our people talked with the government representatives, not as beggars pleading for handouts, but as men with something to offer in return for rights they expected. To our people, this was the beginning of a contractual relationship whereby the representatives of the queen [*sic*] would have lasting responsibilities to the Indian people in return for the valuable lands that were ceded to them.
>
> The treaties were the way in which the white people legitimized in the eyes of the world their presence in our country. It was an attempt to settle the terms of occupancy on a just basis, legally and morally to extinguish the legitimate claims of our people to title to the land in our country. There never has been any doubt in the minds of our people that the land in Canada belonged to them. Nor can there have been any doubt in the mind of the government or in the minds of the white people about who owned the land, for it was upon the basis of white recognition of Indian rights that the treaties were negotiated. Otherwise, there could have been nothing to negotiate, no need for treaties. In the language of the Cree Indians, the Indian reserves are known as *the land that we kept for ourselves* or *the land that we did not give to the government*. In our language, *skun-gun*.[66]

In the early 1970s federal government funding for Aboriginal organizations, and in particular, for land claims research, led to a number of programs in which Elders were interviewed to gain their perspective on the meaning of the Treaties. The writer participated in some of those efforts, on behalf of the Indian Association of Alberta and the Federation of Saskatchewan Indians. The material collected was undoubtedly of considerable value, but like all oral histories varied greatly in quality and

reliability. Some informants were so concerned about the accuracy of what they would relate that they would not speak of any event that they had not personally witnessed. Others told fantastic tales of devious conspiracies—how the white men gathered together all of the smartest people from all of Europe to meet in Winnipeg for weeks so that they could calculate the most effective means to trick the Indian out of his lands. During these research projects, the story of the "top six inches" was uncovered. The assertion that at the Treaty negotiations the white man had told the Indians that he only wanted the top six inches of the soil to allow his people to farm and that the title to everything else would remain with the Aboriginal people.[67] The story was far from universal, however. It competed with other accounts claiming that the Indians had not sold any land at all, that they only agreed to share it with the newcomers, that they had sold the land, but not the animals, that they had sold the land but not the trees or the grass.

Given the considerable volume of evidence from historical documents relating to the Indian understanding of the Treaties and the pre-*Delgamuukw* jurisprudence on Treaty interpretation, it might have seemed pointless to attempt to challenge the Treaty provisions which purport to extinguish Indian interests in lands and resources outside of reserves. That, however, may no longer be the case. Two aspects of the *Delgamuukw* decision in particular have introduced a considerable element of uncertainty.

The first relates to oral tradition. Following up his admonition in the *Van der Peet* case to respect the Aboriginal perspective and to interpret the laws of evidence in a manner which respects the difficulties inherent in the attempts by Aboriginal people to prove their claims, Chief Justice Antonio Lamer declared in *Delgamuukw* that:

> This appeal requires us to ... adapt the laws of evidence so that the aboriginal perspective on their practices, customs and traditions and on their relationship with the land, are given due weight by the courts. In practical terms, this requires the courts to come to terms with the oral histories of aboriginal societies, which, for many aboriginal nations, are the only record of their past. Given that the aboriginal rights recognized and affirmed by s. 35(1) are defined by reference to pre-contact practices or, as I will develop below, in the case of title, pre-sovereignty occupation, those histories play a crucial role in the litigation of aboriginal rights.
>
> A useful and informative description of aboriginal oral history is provided by the *Report of the Royal Commission on Aboriginal Peoples* (1996), vol. 1 (*Looking Forward, Looking Back*), at p. 33:

> The Aboriginal tradition in the recording of history is neither linear nor steeped in the same notions of social progress and evolution [as in the non-Aboriginal tradition]. Nor is it usually human-centred in the same way as in the western scientific tradition, for it does not assume that human beings are anything more than one--and not necessarily the most important--element of the natural order of the universe. Moreover, the Aboriginal historical tradition is an oral one, involving legends, stories and accounts handed down through the generations in oral form. It is less focussed [*sic*] on establishing objective truth and assumes that the teller of the story is so much a part of the event being described that it would be arrogant to presume to classify or categorize the event exactly or for all time.
>
> In the Aboriginal tradition the purposes of repeating oral accounts from the past is broader than the role of written history in western societies. It may be to educate the listener, to communicate aspects of culture, to socialize people into a cultural tradition, or to validate the claims of a particular family to authority and prestige. ...
>
> Oral accounts of the past include a good deal of subjective experience. They are not simply a detached recounting of factual events but, rather, are "facts enmeshed in the stories of a lifetime". They are also likely to be rooted in particular locations, making reference to particular families and communities, This contributes to a sense that there are many histories, each characterized in part by how a people see themselves, how they define their identity in relation to their environment, and how they express their uniqueness as a people.

Many features of oral histories would count against both their admissibility and their weight as evidence of prior events in a court that took a traditional approach to the rules of evidence. The most fundamental of these is their broad social role not only "as a repository of historical knowledge for a culture" but also as an expression of "the values and mores of ... [that] culture": ... [References omitted] Dickson J. (as he was then) recognized as much when he stated in *Kruger v. The Queen*, [1978] 1 S.C.R. 104, at p. 109, that "[c]laims to aboriginal title are woven with history, legend, politics and moral obligations". The difficulty with these features of oral histories is that they are tangential to the ultimate purpose of

> the fact-finding process at trial--the determination of the historical truth. Another feature of oral histories which creates difficulty is that they largely consist of out-of-court statements, passed on through an unbroken chain across the generations of a particular aboriginal nation to the present-day. These out-of-court statements are admitted for their truth and therefore conflict with the general rule against the admissibility of hearsay.
>
> 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 ... [references omitted]. To quote Dickson C.J., given that most aboriginal societies "did not keep written records", the failure to do so would "impose an impossible burden of proof" on aboriginal peoples, and "render nugatory" any rights that they have (*Simon v. The Queen*, [1985] 2 S.C.R. 387, at p. 408). This process must be undertaken on a case-by-case basis.[68]

The injunction to place oral histories on an equal footing with traditional documentary does not, of course, mean that the documentary evidence should be disregarded, or that the word of the Elders will always be accepted. Those challenging such testimony, however, will bear some special burdens. The events referred to will be beyond the personal knowledge of the witnesses. In some senses Elders will be testifying as quasi-experts in the oral tradition of their people, but there will be only very limited possibilities for the Crown to test or challenge their expertise. The Crown is also very unlikely to be able to find its own witnesses from within the Aboriginal communities to dispute the Plaintiffs' version of the tribal tradition. A good understanding of the history of the Plaintiff's community will undoubtedly be of great assistance, both in cross-examination of opposing witnesses and in placing a coherent account of the Treaties based on the documentary evidence before the Court. So too will a sympathetic understanding of the influences and social pressures which might lead people to a sincere belief in an unreliable version of past events. No one would not expect to obtain an accurate, complete, and disinterested understanding of the history of Canadian Banking at a convention of Prairie grain farmers, but if you appreciate the relationship between banking and farming, you can still obtain some information of value from the farmers on the subject.

The second manner in which the *Delgamuukw* decision has made an assault on the Treaties more likely and attractive relates to the definition of Aboriginal title itself. Prior to the decisions in *Van der Peet* and *Adams,* Aboriginal title was generally assumed to be merely the bundle of Aboriginal rights that related to the land.[69] The *Adams* case made it clear that Aboriginal title was more than this but did not tell us just what it was. However, in *Delgamuukw,* Chief Justice Lamer declared:

> As *Adams* makes clear, aboriginal title confers more than the right to engage in site-specific activities which are aspects of the practices, customs and traditions of distinctive aboriginal cultures. Site-specific rights can be made out even if title cannot. What aboriginal title confers is the right to the land itself.[70]

If the previous understanding of the meaning of Aboriginal title had been maintained, one might have questioned the utility of challenging the extinguishment provisions of the Treaty. After all, on ordinary contract principles if it is clear that the Crown's principal objective in entering into the Treaties was to obtain a surrender of Aboriginal title, and if it were shown that such a surrender was not given, one might conclude that the Agreements were a nullity, either on the basis of *non est factum* or a complete failure of consideration. Such a finding would call into question the existing Treaty rights of the Prairie Indians, and if they were then required to prove Aboriginal rights to the use of particular resources in particular areas based upon the date of European contact, they might have great difficulty in doing so, particularly when one appreciates the historical migrations of the different tribal groups. Certainly it would have been very difficult to claim ownership of the entire oil and gas and other mineral resources of the Prairies based on an integral to culture and date of contact model. However, by holding that Aboriginal title entitles the title holders to use lands for any purpose not incompatible with traditional use, the Supreme Court has made challenges to the essential validity of the Treaties much more attractive.

None of the above should be seen as suggesting that the Prairie Treaties are in mortal danger, or as minimizing the difficulties which an Aboriginal challenger to them will face. Furthermore, the symbolic importance of the Treaties to Prairie First Nations should not be discounted. Should it become clear that a particular lawsuit is more likely to tear down a Treaty than to give it an agreeable re-interpretation, many Aboriginal people may have second thoughts about pursuing it.

Nevertheless, while it would be foolish to suggest that the *Delgamuukw* decision has produced the same profound uncertainty on the Prairies that it has in British Columbia, the ground is not quite so firm under one's feet east of the Rockies today as it once was.

Notes

1 Alexander Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories, including the Negotiations on which they were based, and other Information relating thereto*, 1991, Fifth House Publishers, Saskatoon, (Originally published 1880) p. 213.

2 See. *Ibid* pp. 202, 208 and 235 for use of the sun and river images by Treaty Commissioner Morris, and pp. 219, 227 and 238 by spokesperson for the Cree. At the Treaty Six negotiation Chief Sweetgrass prayed that the Treaty should continue "as long as this earth stands and the river flows," *Ibid* p. 236.

3 See Royal Commission on Aboriginal Peoples, *Report* Vol. 1 *Looking Forward, Looking Back* pp. 178-179.

4 In this short paper it is not possible to deal with the question of whether or not Canada's Treaties with Aboriginal people have been faithfully fulfilled or not. The writer is of the view that although Treaty fulfilment was not a major concern of British and Canadian authorities in the development of their Indian policies, they did make conscientious attempts to fulfil Treaty undertakings in most cases. The majority of so-called "breaches" of the Treaties identified by modern critics of the Crown's record in this respect actually relate to questions of interpretation of what the Treaties meant. See, for example, the Royal Commission on Aboriginal Peoples comments on the "Non-Fulfilment of Treaty Promises" *ibid*. at pp. 176-178. Such clear breaches of the Treaties as did occur were more likely to be the result of inefficiencies and incompetence than malevolence—as, for example, in the case of the many outstanding Treaty land entitlements on the Prairies (which are now being addressed under formulas which appear to take into account and compensate for the delay in implementing the promises). No doubt, one could justifiably criticize the Crown for its post-1885 detribalization policy, which was clearly contrary to the basic understanding on which the Treaties were made and perhaps for its failure to maintain laws prohibiting alcohol on reserves. However, in cataloguing Treaty breaches, one should not forget that they were not always one-sided. Many of the earliest Treaties were also breached by the Indian parties who broke their engagements to maintain peace and neutrality vis-à-vis either the French or the British.

5 See *R v. Sioui*, [1990] 1 S.C.R. 1025; (1990), 70 D.L.R.(4th) 427; 56 C.C.C.(3d) 225; 109 N.R. 22; 30 Q.A.C. 280; [1990] 3 C.N.L.R. 127. The Supreme Court found that an agreement entered into by General Murray with a group of Huron Indians was a Treaty. The agreement provided that if the Hurons abandoned their French Allies and returned to their homes, they would not be molested or interrupted in their journey and would be allowed the free exercise of their religion, their customs, and the liberty of trading with the English.

6 The extreme northeastern tip of Manitoba is, by an accident of history, not included within the defined boundaries of any Treaty. Treaty Five was extended to what is now northern Manitoba in 1909-10, before Manitoba's boundaries were extended to Hudson's Bay and the 60th parallel in 1912. The area added to Manitoba almost, but did not quite coincide, with the

new Treaty Five territory on the north and east. When Treaty Nine extended to Hudson's Bay in 1929-30, the Treaty terms did not define areas outside the Province of Ontario. The small area excluded (between Cape Tatnum and the Ontario boundary) is undoubtedly dealt with by one of the Treaties or the other, however, since both contain the recital that the Indian signatories gave up "all their rights, titles and privileges whatsoever to all other lands wherever situated."

7 The Dakota have been refused the right to enter into Treaties because the eight bands now in Saskatchewan and Manitoba entered British Territory from the U.S. in 1862 following the Minnesota Sioux War. A ninth Sioux Band near Wood Mountain, Saskatchewan is largely descended from the remnants of Sitting Bull's followers who had entered Canada in 1876 following the Battle of the Little Bighorn, and never returned to the U.S. with their Chief.

8 The meridian runs just east of Vegreville and just west of Hanna, Alberta.

9 Statement of Claim, *Chief Florence Buffalo acting on her own behalf and on behalf of all the other citizens and members of the Samson Cree Nation and the Samson Cree Nation v. Her Majesty the Queen in Right of Canada and Her Majesty the Queen in Right of Alberta*, Action No.9903 03870 (Edmonton) Court of Queen's Bench of Alberta, filed 26 February, 1999.

10 The approximate area covered by Treaty Seven extends from the U.S. Border on the south, the British Columbia Border on the west, the Red Deer River on the north and a line running from the junction of the Red Deer River and the South Saskatchewan just east of the present Saskatchewan boundary, to the western end of the Cypress Hills, and then south to the 49th parallel. The north-eastern boundary does not actually follow the Red Deer River, but rather a line produced from a point east of Buffalo Lake to the junction of the Red Deer and South Saskatchewan Rivers. It will be noticed that there is a significant overlap between the two claims.

11 Statement of Claim, *Kainaiwa Nation (Blood Tribe) and Chief Chris Shade, suing on his own behalf and on behalf of the Members of The Kainaiwa/Blood Tribe, Peigan Nation and Chief Peter Strikes with a Gun, suing on his own behalf and on behalf of the Members of the Peigan Nation, Siksika Nation and Chief Darlene Yellow Old Woman Munroe, suing on her own behalf and on behalf of the Members of The Siksika Nation, Tsuu Tina Nation and Chief Roy Whitney, suing on his own behalf and on behalf of the members of The Tsuu Tina Nation, Bearspaw Band and Chief Darcy Dixon, suing on his own behalf and on behalf of the members of The Bearspaw Band, Chiniki Band and Chief Paul Chiniquay, suing on his own behalf and on behalf of the members of The Chiniki Band, Wesley Band and Chief John Snow Sr., suing on his behalf and on behalf of the members of The Wesley Band v. Her Majesty the Queen in right of Canada and Her Majesty the Queen in Right of Alberta*, File No. T-340-99, Federal Court, Trial Division, filed 26 February 1999.

12 The group that became Samson's Band adhered to Treaty Six at Blackfoot Crossing on 25 September 1877 (3 days after the signing of Treaty Seven at the same location) as part of Bobtail (Kiskaquin)'s Band.

13 The Samson Cree Nation makes other alternative claims relating to self-government and tax exemptions that will not be canvassed in this paper.

14 *Calder v. Attorney General of British Columbia*, [1973] S.C.R. 313; (1973), 34 D.L.R. (3d) 145; [1973] 4 W.W.R. 1; 7 C.N.L.C. 91.
15 *Ibid*. at 394 (S.C.R.)
16 [1985] 2 S.C.R. 387; (1985), 24 D.L.R.(4th) 390; 23 C.C.C.(3d) 238; 62 N.R. 366; 71 N.S.R.(2d) 15; 171 A.P.R. 15; [1986] 1 C.N.L.R. 153.
17 [1991] 2 S.C.R. 570; (1991), 83 D.L.R.(4th) 381; [1991] 3 C.N.L.R. 79.
18 *Ibid*. at 575 (S.C.R.)
19 [1988] 1 S.C.R. 187; (1988), 47 D.L.R.(4th) 526; [1988] 2 W.W.R. 289; 39 C.C.C.(3d) 97; [1988] 2 C.N.L.R. 112.
20 *Ibid*. at 199. Emphasis in original quote by Justice Estey (not in the text of Treaty Six).
21 *Ibid*. at 201-202.
22 *Ibid*. at 202.
23 *Ibid*. at 203.
24 *Idem*.
25 It did appear somewhat incongruous for Justice Estey to both cite the rule which provides that extrinsic evidence cannot be received in the absence of ambiguity, to find no ambiguity, and then to consider the extrinsic evidence in any event.
26 [1996] 1 S.C.R. 771; (1996), 133 D.L.R.(4th) 324; 105 C.C.C.(3d) 289; 195 N.R. 1; 37 A.L.R.(3d) 153; 181 A.R. 321; [1996] 4 W.W.R. 457; [1996] 2 C.N.L.R. 77.
27 In fact, the Court concluded that the land on which Mr. Badger had been hunting was not "unoccupied." It reached the contrary conclusion with respect to the place where Mr. Ominiyak, one of two other individual Treaty Eight Indians whose appeals were heard jointly with Badger's, had been charged with hunting.
28 The Court concluded that Indians did have the right to hunt on unoccupied private land or land that had not been put to a use that was visibly incompatible with hunting, on the theory that Treaty Eight had guaranteed Indians the right to hunt on lands that were not taken up for settlement or other purposes. This guarantee was accepted as providing the "right of access" required by paragraph 12 of the *Natural Resources Transfer Agreement*. The actual findings in the three cases before the Court, however, indicated that the concept of "visible incompatible use" would be fairly broadly interpreted. As a result it is doubtful that Indian hunters received much of a practical victory in the case. It seems likely that in most cases where it could be said that private land was not put to such a use, the hunter would likely be able to maintain a successful due diligence defence.
29 *R. v. Badger, supra* n. 26 at 798-799.
30 *R. v. Sundown*, [1999] S.C.J. No. 13 (QL).
31 Emphasis added by Justice Cory.
32 Emphasis added by Justice Cory.
33 *R. v. Sundown, supra* n. 30 at paragraph 25.
34 *R. v. Badger, supra* n. 26 at 800-801.
35 *Re Paulette and the Registrar of Titles (No. 2)* (1973), 42 D.L.R.(3d) 8 (N.W.T.S.C.). The Court's conclusions are at pp. 39-40.

36 *Ibid*. at 11-12.

37 *Paulette v. The Queen; sub. nom. Re Paulette et al. and Registrar of Titles (No. 2)*, (1975), 63 D.L.R.(3d) 1 (N.W.T.C.A.). Four of the five judges held that the applicable Land Titles legislation did not permit the registration of caveats on unpatented Crown land. One of those four also found that Aboriginal rights and title were not caveatable interests. The fifth judge dissented and would have affirmed the lower court ruling.

38 *Paulette v. The Queen; sub. nom. Re Paulette et al. and Registrar of Titles (No. 2)*, [1977] 2 S.C.R. 628; (1976), 72 D.L.R.(3d) 161; 12 N.R. 420; [1977] 1 W.W.R. 321; [1977] C.N.L.B. (No.1) 5. Although the chiefs lost the case with respect to the caveat, they did achieve a political victory, because in the aftermath of the case the federal government agreed to enter into land claims negotiations with the NWT Dene, Gwitch'en and Inuvialuit notwithstanding the terms of the Treaties.

39 It should also be appreciated that the concept of Aboriginal title was much less certain than it is in the wake of *Delgamuukw*. In *Baker Lake (Hamlet of) v. Minister of Indian Affairs and Northern Development (No. 2)*, [1980] 5 W.W.R. 193; (1979), 107 D.L.R.(3d) 513; [1980] 1 F.C. 518; [1979] 3 C.N.L.R. 17 at 579 (F.C.) Justice Mahoney declared that the Baker Lake Inuit were "entitled to a declaration that the lands comprised in District E2 ... are subject to the aboriginal right and title of the Inuit to hunt and fish thereon." Such declaration seems confused in light of Chief Justice Lamer's pronouncements in *Van der Peet, Adams*, and *Delgamuukw*.

40 There were additional lands at Fort Douglas, Fort Daer and Grand Forks, stretching six miles in radius around those posts.

41 A copy of this Treaty may be found in Morris *Treaties* pp. 298-300.

42 The various alleged defects of the Selkirk Treaty were summarized in A.G. Archibald, letter to the Secretary of State for the Provinces, 20 December, 1870, Archibald Papers, Provincial Archives of Manitoba, MG 12 A 1, Doc. No. 155.

43 Joutupotang *et al*., Indian Agreement witnessed by Jas. McKay et al., Portage la Prairie, 14 June, 1869, reproduced in "Indian Titles in the North-West," *Toronto Globe*, 4 September, 1869. There are a number of other accounts of this incident. See, for example, "Further Correspondence by J.J. Hargrave in the *Montreal Herald* on the Beginning of the Resistance, in W.L. Morton (ed.), *Alexander Begg's Red River Journal and Other Papers Relative to the Red River Resistance of 1869-1870* (Toronto: The Champlain Society, 1956) p. 431.

44 Moosoos, Notice, 17 December, 1870, Archibald Papers, Doc. No. 150.

45 Fred Bird. Bird likely drafted the notice for Moosoos.

46 *Idem*.

47 Presumably this was a reference to Peguis's son Henry Prince, as Peguis had died 5 years earlier.

48 William McDougall to the Secretary of State for the Provinces, 5 Nov., 1869, Secretary of State for the Provinces Records, National Archives of Canada, RG 6 C 1, Vol. 316, File 995/69.

49 McDougall's attempt to enter Rupertsland in order to establish himself before the scheduled transfer of the Territory from the H.B.C. to Canada was forcibly prevented by a group of French Métis. He remained for several weeks in Pembina, in what is now North Dakota, before returning to Ontario in December of 1869.
50 William McDougall to Joseph Howe, 29 November, 1869, Secretary of State for the Provinces Records, Vol. 316, File 995/69.
51 Notes of an Interview between the Lieutenant Governor of Manitobah and Henry Prince (Miskookenu) Chief of the Salteaux and Swampies at the St. Peter's Parish School on the morning of Tuesday, the 13th Sept. 1870, Archibald Papers, Document No. 22.
52 A.G. Archibald to Secretary of State for the Provinces, 21 September, 1870, reprinted in House of Commons, *Sessional Papers (No. 20), 1871* p. 18.
53 Yellow Quill *et al*. to His Excellency the Lieutenant Governor of Manitoba, 30 May, 1871, Archibald Papers, Document No. 332.
54 Adams G. Archibald to the Secretary of State for the Provinces, 29 July, 1871, in Indian Affairs Records, National Archives of Canada, R.G. 10 , Vol. 363, File M 634.
55 The Portage Band, under Chief Yellow Quill, however, managed to exact an extra 25 square miles of reserve land for his band in addition to the 32 acres per capita offered to the other Treaty One Bands. See Morris, *Treaties* pp. 25-43 and 313-316.
56 Morris, *Treaties*, p. 50. See also p. 70.
57 *Ibid*. at pp. 31 and 41.
58 *Ibid*. at p. 162.
59 Messages from the Cree Chiefs of the Plains, Saskatchewan to His Excellency Governor Archibald, 13 April 1871, Archibald Papers, Document No. 272.
60 Morris, *Treaties* at p. 102.
61 Usually referred to as "Pasqua."
62 Morris, *Treaties* at p. 106.
63 J. Ansdell Macrae to Indian Commissioner Dewdney, 25 August 1884, in Indian Affairs Records, R.G. 10, Vol. 3697, File 15423.
64 Notes of representations made by delegation of Indians from the West, A. Gadie interpreter, 24 Jan., 1911 in Indian Affairs Records, R.G. 10, Vol. 4053, File 379, 203-1.
65 (Edmonton: Hurtig, 1969).
66 *Ibid*. at p. 29. (Emphasis in original).
67 See for example, Interview with Lazarus Roan, 30 March 1974, in Richard Price (ed.), *The Spirit of the Alberta Indian Treaties*, (Montreal: Institute for Research on Public Policy, 1980), p. 115.
68 *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 at paragraphs 84-87.
69 See, for example *Baker Lake, supra* n. 39.
70 *Delgamuukw* at paragraph 138.