

Treaty 8 and Traditional Livelihoods: Historical and Contemporary Perspectives

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Conflicting governmental and Indian perceptions of the traditional livelihood promises of Treaty 8 persist to this day, and have been the subject of court cases and other attempts at resolution. Thus, a review of the historical basis of the differing views is undertaken. In order to explore future-oriented solutions, the authors canvass potential remedies, including attitudinal and policy changes. The article is placed within the context of the broader changes nationally and internationally, such as the Waitangi Tribunal in New Zealand.

Introduction

Over the past two decades in Canada, treaty and Aboriginal issues have assumed increasing importance and attention. A great number of Native issues have been brought forcefully to public attention.¹ These range from Native claims and court cases to protests over land and resource rights, such as at Oka in Quebec, Meares Island in British Columbia, the Temagami Wilderness in Ontario, the Innu in Labrador and the Lubicon in Alberta. These conflicts often have deep historic roots and are representative of the grievances and unresolved relationships between Canada and Aboriginal Canadians. Mirroring the continuing importance of treaties as an area of conflict, for example, the Royal Commission on Aboriginal People identified "the legal status, implementation and future evolution of aboriginal treaties, including modern-day agreements" as part of its research mandate (Canada, 1991, p. 13).

In Canada, treaties are the most visible and long-term manifestation of the relationship between the Canadian Crown (or the British, prior to Confederation) and Aboriginal peoples. From the government's perspective, the treaties were fairly straightforward agreements to secure title to traditional Native land and resources so that they could be used for settlement and resource development. Military alliances and peaceful relations between European settlers and Aboriginal nations were also considerations, particularly

in the early treaties. From the Aboriginal perspectives (especially in western Canada), the treaties were viewed as a compact with the Queen's representatives. This compact was to ensure their physical and cultural survival as well as to confirm peaceful and enduring relations with the European newcomers (Foster, 1987, pp. 195-200). Other Aboriginal concerns were protection from encroaching settlers, relief from hardship and illness, and the enhancement of future possibilities for their people through promises of benefits and assistance, such as education, agricultural and hunting-related implements, and cash. The legacy of the treaties is that, in many cases, the government and Aboriginal sides fundamentally disagree about the nature of the treaties, what each side gave up and gained, and what promises were actually made. This is vividly exemplified in the case of Treaty 8 by the ongoing controversy surrounding the content and implementation of treaty promises about traditional hunting, fishing and trapping livelihoods.

Signed in 1899, with adhesions in 1899 and 1900, Treaty 8 covered the traditional lands of the Cree and Dene of northern Alberta, northeastern British Columbia, northwestern Saskatchewan and the adjoining area of the Northwest Territories south of Great Slave Lake. Unlike the treaties signed in the southern "fertile belt" of the prairie provinces, the government's primary objective for Treaty 8 was not to open Aboriginal lands for agricultural settlement, but rather to acquire potentially rich mineral and petroleum deposits. Treaty 8 was negotiated during the gold rush in the Yukon of the late 1890s. As with more southerly treaties, provision was made for agricultural implements, but the interests of the Cree and Dene signatories were reflected in promises relating to their traditional livelihoods (Canada, 1899, p. 12).

Conflicting governmental and Indian perceptions of the traditional livelihood promises persist to this day, and have been reflected in court cases and other attempts at resolution. These include the treaty review processes begun by the Grand Council of Treaty 8 of Alberta, the Treaty 8 Tribal Association of British Columbia, the Northwest Territories Treaty 8 Tribal Council and the Treaty 8 Prince Albert Tribal Council of Saskatchewan. The crux of the treaty interpretation dispute centres on two facets of Treaty 8: one is the actual written document and the provisions it contains, and the other is the whole area of verbal promises and negotiations, often termed the "spirit" of the treaty (Daniel, 1987, p. 47).

In addition to disagreement over the document and spirit of Treaty 8, its subsequent interpretation over the almost one hundred ensuing years is a contentious area. Events that followed its signing have changed the context of the treaty considerably. For example, six years later, in 1905, the provinces of Alberta and Saskatchewan were created out of the southern part of what had been the Northwest Territories, and they included much of the Treaty 8 area.

Broader economic interests were also important, as non-renewable and renewable resource extraction, as well as farming in some regions, gradually became permanent and dominant factors in the treaty area. More recently, environmental degradation also became an issue. With the changing conditions, provisions regarding hunting, trapping and fishing have taken on added, and more complex, significance.

The aim of this paper is to examine the controversy surrounding the traditional livelihood promises of Treaty 8, to analyze the major areas of contention and to suggest possible remedies. We will look at the negotiation process and the promises contained in the treaty, as well as its implementation in Alberta up to 1940.² We are concerned with the history of implementation to 1940 because this is the time period when most of the major changes occurred. However, the historical momentum of this issue has persisted beyond 1940, into the 1990s, and shows few signs of abating. Undoubtedly, it will also affect future matters, such as the comprehensive claim negotiations of the Dene peoples of the Northwest Territories who are within the Treaty 8 area. In our analysis, we will draw on recent field research and on materials gathered by the Indian Association of Alberta's Treaty and Aboriginal Rights Research group (TARR) in interviews conducted with Cree and Dene elders in the 1970s to document their understanding of the promises made during the treaty negotiations. As well, we incorporate the results of several unpublished research studies that have been completed on the post-treaty period (McCardle, 1976, and Daniel, 1977). As part of our approach, we develop an analytical framework to understand the implementation of Treaty 8, centring on four points: the authority to interpret the treaty; the substantive debate over the meaning of the treaty; the governmental (or jurisdictional) control over hunting, fishing and trapping livelihoods; and the differing social philosophies underlying the conflict that surrounds the treaty. As well, we provide an update of some of the current concerns of the Treaty 8 chiefs. Given our public policy interests, we will conclude by reviewing current experiences with some avenues and alternatives for resolving the disputes regarding treaty rights and traditional livelihoods, including a selective overview of a United Nations study, the New Zealand's Waitangi Tribunal, the lessons from modern treaties, court decisions, constitutional change and finally the Royal Commission on Aboriginal Peoples. We conclude that political will and a public consensus are required to develop future-oriented solutions.

I. Treaty 8: Context, Negotiation and Native Perspectives

1. *Historical Context*

It is clear that treaties are one of the basic elements in the relationship between the Government of Canada and the Aboriginal peoples who negotiated

and signed them. To appreciate the meaning that each party attached to a treaty, and the expectations that they had of its role, an understanding of the context of the treaty is important. Both Indian and European nations had their own traditions of treaty making prior to the negotiations and signing of the numbered treaties of western Canada. These treaties had various purposes within both the Indian and European traditions, including, for example, establishing peace between the parties and ensuring the territorial integrity of the participants.

International treaties between European nations are well known. Aboriginal nations also entered into treaties among themselves, such as the treaty between the Dakota and Ojibwa communities in Manitoba in 1866. Chief H'damani of the Dakota explained that "the Dakota acquired from the Ojibwa the right to live in and use the Turtle mountains; the Ojibwa were often resident there." H'damani gave the chief warrior of the Ojibwa four horses and five sacred pipes to cement their land-sharing relationship (Elias, 1988, p. 29).

The numbered treaties in western Canada were signed in the historical context of over 200 years of fur trade relations between Aboriginal and Euro-Canadian peoples. The relationship that developed was based on mutual interdependence, and this influenced the expectations that were brought to treaty negotiations.

Indian political thought at the time of the treaties has received little historical attention. The most useful starting point is the assumption that the basis of the native legal system . . . is that the concept and practise of reciprocity is of fundamental importance. . . . Reciprocity, mutual obligation, governed interpersonal and kinship relationships but it is also basic to the Indian approach to the fur trade and I suggest to treaty making. [Friesen, 1985, pp. 35-36]

Moreover, at the time of the signing of many of the prairie treaties, the Indian economy was under tremendous stress due to factors such as the decline of the bison herds. Friesen argues that the need for security, traditionally based on reciprocal relationships, and the need to negotiate peace agreements with potentially hostile strangers were strong motivating factors for Aboriginal peoples in these areas to enter into treaties: "The need for reciprocal relationships and the search for security are, I believe, the basis of Indian political thought and attitudes at the making of western treaties" (Friesen, 1985, p. 36).

The initial Indian perception of Treaty 8 was that they had successfully

entered into a reciprocal relationship that would afford them security in the future:

This picture of a post-treaty life in which Indians would remain free and independent, but with government assistance to fall back on and the prospect of greater opportunities in the fur trade, seems to have been responsible for removing many of the Indians [*sic*] doubts. [Daniel, 1987, p. 79]

This view was consistent with expectations developed during the previous two centuries of the fur trade. As Alberta historian John Foster points out, elaborate fur trade ceremonies and protocols that stood the test of time for over two hundred years attest to the compact that was developed: the partners in the mutual relationship were regarded as "we" rather than "we-they." Foster extends the concept of compact in the fur trade to subsequent treaty negotiations:

Two peoples, culturally distinct, interacted on a fair and equitable basis. Each party to the pact could make demands on the other. . . . Negotiating from a position of instability and potential chaos and crises, the Indian leaders sought to reaffirm (in the treaties) the traditional basis of Indian-white relations—a compact. In this they believed they were successful. They believed the representatives of the white community saw it in a similar light. [Foster, 1987, p. 199]

2. *Treaty 8 Negotiations—the Indian perspective*

Three main accounts of the Treaty 8 negotiations have been completed in the past two decades by Fumoleau (1976), Daniel (1977, 1987) and Madill (1986). The principal historical account written at the time the treaty was signed is by Charles Mair (1908), a member of the Treaty 8 Commission. Elders were interviewed by the Indian Association of Alberta in the 1970s and the Grand Council of Treaty 8 in the 1990s, and corroborated that the Native view of Treaty 8 was of a negotiated agreement, where they sought and were assured protection of their interests. Repeatedly, elders reported that their grandfathers and leaders had not agreed to the treaty until they were assured that their livelihood would be protected "as long as the sun shines and the rivers flow" (TARR, 1972: Isadore Willier, Wabasca). One elder, Jean Marie Mustus, a grandson of key Treaty 8 negotiator Mostos, retold the story of Treaty 8 negotiations as handed down in the oral tradition, which places emphasis on verbatim understandings of important speeches:

As the promises were made, there were many I overlooked and

did not accept. I was very cautious as I was beginning to understand what he was talking about. It was only after I was certain what he was promising me and what he was planning to do that I shook hands with him. What he said was written on a piece of hide and he made reference to the sun and the water, that is when I shook his hand. "They tried to make changes," said my grandfather, "but I would not let them." [Jean Marie Mustus, Jussard, 1975, cited in Price, 1987, pp. 144-45]

The Aboriginal view of their role in negotiating Treaty 8 is borne out by the Treaty Commissioners in their report, where they outlined some of the concerns they encountered and additional promises they made to achieve the agreement. In the area of hunting, trapping and fishing, the general concerns of the Indians were recorded in clear terms:

There was expressed at every point the fear that the making of the treaty would be followed by the curtailment of the hunting and fishing privileges, and many were impressed with the notion that the treaty would lead to taxation and enforced military service. We pointed out that the Government could not undertake to maintain Indians in idleness; that the same means of earning a livelihood would continue after the treaty as [had] existed before it, and that the Indians would be expected to make use of them." [Canada, 1899, p. 5]

The Indians made it clear that they were worried about their ability to carry on their traditional lifestyle. The commissioners found it necessary to address their concerns, and the report indicated the way they sought to allay these fears in order to achieve the treaty:

Our chief difficulty was the apprehension that the hunting and fishing privileges were to be curtailed. The provision in the treaty under which ammunition and twine is to be furnished went far in the direction of quieting the fears of the Indians, for they admitted that it would be unreasonable to furnish the means of hunting and fishing if laws were to be enacted which would make hunting and fishing so restricted as to render it impossible to make a livelihood by such pursuits. But over and above the provision, we had to solemnly assure them that only such laws as to hunting and fishing as were in the interest of the Indians and were found necessary in order to protect the fish and fur-bearing animals would be made, and that they would be as free to hunt and fish after the treaty as they would be if they never entered into it.

We assured them that the treaty would not lead to any forced interference with their mode of life, that it did not open the way to the imposition of any tax, and that there was no fear of enforced military service. [Canada, 1899, p. 6]

The issue of hunting fishing and trapping rights was a pivotal aspect of Treaty 8 negotiations at Lesser Slave Lake in 1899. Through its contact with missionaries and the RCMP prior to the treaty, it became clear to the Government of Canada that Indian concerns revolved around their worries over the loss of hunting and fishing rights. Thus, in his opening remarks, David Laird, the chief federal commissioner, stressed the continuance of Aboriginal rights to hunt and fish: "Indians have been told that if they make a treaty they will not be allowed to hunt and fish as they do now. This is not true. Indians who take treaty will be just as free to hunt and fish all over as they are now" (Mair, 1908, p. 58).

Aboriginal negotiators emphasized their concerns, but were unwilling to accept what the government offered without explicit assurances. In his reply to Commissioner Laird, Principal Chief Kinosayoo questioned the treaty benefits: "I can only understand that the Indians will benefit to a very small degree from your offer" (Mair, 1908, p. 59). Commissioner Ross responded by stating that, "As all the rights you now have will not be interfered with, therefore anything you get in addition must be a clear gain" (Mair, 1908, p. 61). These assurances by the government were confirmed by Father Lacombe: "Your forest and river life will not be changed by the Treaty" (Mair, 1908, p. 63).

In fact, sociologist Richard Daniel concludes that

On the basis of oral and archival evidence it would seem that the treaty would not have been signed if the Indians had not been given assurances they would be as free to hunt, fish and trap after the treaty as before. They were given assurances that the government was only interested in conserving wildlife for their benefit. [Daniel, 1977, p. 95]

Thus, through the negotiation of Treaty 8, principal Indian leaders sought to preserve their physical and cultural livelihood in a rapidly changing economic and social environment. It can be argued that they undertook to achieve this protection not only through negotiating the best deal possible, but also to re-establish a relationship of mutual obligation with the Euro-Canadians, now represented by the federal government. In other words, they wanted to regain the essence of the relationship that had worked so well for them in their fur trading experiences with the Europeans. It was their initial

perception that Treaty 8 achieved this goal and protected their traditional livelihood.

However, the Native perception was challenged shortly after the treaty was signed. It appeared that the interpretation of the Cree and Dene differed sharply from that of the government over what rights were actually negotiated. In effect, reports of the agreement as it was negotiated were substantially different from what was represented in the written treaty document.

II. Treaty 8 and Hunting, Fishing and Trapping Rights

In the manner of the other "numbered treaties," Treaty 8 sets out basic provisions relating to the peaceful coexistence between Indians and "Her Majesty's other subjects," some protection for Indians' rights and a number of specific promises. As the government was motivated to enter into treaties by a desire to clear the title to land so that settlement, and in the case of Treaty 8 mineral development, could proceed unhampered, treaties customarily contained clauses whereby Aboriginal title was surrendered:

And whereas, the said Commissioners have proceeded to negotiate a treaty with the Cree, Beaver, Chipewyan and other Indians, inhabiting the district hereinafter defined and described, and the same has been agreed upon and concluded by the respective bands at the dates mentioned hereunder, the said Indians do HEREBY CEDE, RELEASE, SURRENDER AND YIELD UP to the government of the Dominion of Canada, for Her Majesty the Queen and Her successors for ever, all their rights, titles and privileges whatsoever, to the lands included within the following limits, . . . TO HAVE AND TO HOLD the same to Her Majesty the Queen and Her successors for ever. [Canada, 1899, 12; emphasis in original]

Central to the issue of hunting and trapping rights, the treaty made certain specific promises:

And Her Majesty the Queen HEREBY AGREES with the said Indians that they shall have right to pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered as heretofore described, subject to such regulations as may from time to time be made by the Government of the country, acting under the authority of Her Majesty, and saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes. [Canada, 1899, p. 12; emphasis in original]

As with treaties concluded on the prairies, Treaty 8 promised to provide

land in quantities suitable for agricultural pursuits, agricultural implements and livestock, should these be desired at a later time. However, the importance of hunting and trapping was acknowledged:

The aforesaid articles, machines and cattle to be given one for all for the encouragement of agriculture and stock raising; and for such Bands as prefer to continue hunting and fishing, as much ammunition and twine for making nets annually as will amount in value to one dollar per head of the families so engaged in hunting and fishing. [Canada, 1899, p. 14]

Brief though these are, the above passages comprise the entirety of hunting, fishing and trapping provisions in Treaty 8. In the course of the implementation of the treaty, much attention has been devoted to interpreting these passages.

An important aspect of the treaty is not only what it consists of, but also how it might have been understood. For example, one post-treaty account from Fort Chipewyan suggests that the written document was different from the one that was agreed to. According to the Métis interpreter, the protection of traditional livelihoods was not properly represented in the text of the Treaty:

I interpreted the words of Queen Victoria to Alexandre Laviolette, Chief of the Chipewyans and his band. . . . I know, because I read the Treaty to them, that there was no clause in it which said they might have to obey regulations about hunting. They left us no copy of the Treaty we signed, saying that they would have it printed and send a copy to us. When the copy came back, that second clause (that they shall promise to obey whatever hunting regulations the Dominion Government shall set) was in it. It was not there before. I never read it to the Chipewyans or explained it to them. I have no doubt that the new regulation breaks that old treaty. It makes me feel bad altogether because it makes lies of the words I spoke then for Queen Victoria. [Mercredi, 1939, in Fumoleau, n.d., p. 79]

Regarding the written version of the treaty, it is important to keep in mind that the Aboriginal signatories had no hand in drafting the document. How the terms were understood and whether they reflected Aboriginal interests are matters of conjecture. As one author notes, "It is obvious, then, that one cannot determine the Government's policy on Indian hunting rights merely by discussing the actual provisions of the treaty, although one may attribute to the text a role in misleading the Indian understanding of Government's

intentions" (McCardle, 1976, p. 27). Hence, it is necessary to consult other sources to get some sense of the Native perspective.

As we have seen, the oral tradition of the Aboriginal parties to the treaties has been recognized as an important source of information on the treaty negotiation, particularly from the perspective of the Cree and Dene participants. The experience of other treaty negotiations, for example on the western prairies, is that verbal promises were considered by the Native side to be extremely important, and speeches of significance were memorized with considerable accuracy (see Hall, 1984, pp. 323-24).

The oral tradition of elders of the Lesser Slave Lake area (the location of important Treaty 8 negotiations) and other Treaty 8 areas in Alberta was recorded in interviews conducted in the 1970s. The themes of these interviews confirm the elders' understanding that there would be no restrictions in the pursuit of their livelihoods. "The main discussion of the treaty by most elders concerns hunting fishing and trapping and how the rights to pursue their traditional livelihood were not given up and were even strongly guaranteed in the treaty to last forever. Giving up land would not interfere with the Indian's pursuit of his livelihood, and the Indians only signed the treaty on this condition" (Hickey, 1987, p. 106). These interviews revealed another theme: the sense of betrayal following the treaty over the continuing erosion of their livelihoods through government regulations related to hunting, fishing and trapping rights (TARR, 1972-75)

Based on the documentary and oral history evidence, it would appear that the verbal explanation of the commissioners about the crucial matter of subsequent regulation of Indian hunting and trapping livelihoods, reiterated in the commissioners' report, promised that only those regulations which would benefit conservation of game and fish would be introduced, and only for Indian benefit (TARR, 1972-75, p. 6). This is at variance with the open-ended power and control the actual treaty text gives the government to restrict the right of the Indian: "to pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered as heretofore described, subject to such regulations as may from time to time be made by the Government of the country . . ." (Canada, 1899, p. 12). This discrepancy over the subsequent regulation of Indian hunting, fishing and trapping in turn resulted in a bitter legacy: a fundamental First Nations-Canadian governments disagreement over treaty implementation that persists into the 1990s.

III. Implementation of the Hunting, Fishing and Trapping Promises of Treaty 8

Signing Treaty 8 was an act of trust on the part of the Aboriginal people. They were reassured by the commissioners and familiar mediators (traders

and missionaries) that their main concerns would be honoured, and they had made it clear that they would not sign unless their hunting, fishing and trapping rights were guaranteed. From the government's perspective, it was not necessary for the foreseeable future to devote significant resources, such as land or agricultural implements, to northern reserves for the foreseeable future. As miners and settlers were not yet invading in significant numbers, the government did not feel it was required to devote much attention to the northern Indians. However, following the signing of Treaty 8, the political influence of these miners and settlers increased so that they competed directly with Native interests over land and resources. Settlers came to be represented by the provincial governments of Alberta and Saskatchewan in 1905, and these governments gained control over natural resources in 1930. Gradually, they were able to exert influence over Indian hunting, fishing and trapping, and thus over the implementation of Treaty 8. The manner in which this transfer of control or jurisdiction occurred, and the general implementation of Treaty 8, changed over time and is exemplified in three time periods: from the signing of the Treaty in 1899-1900 until Alberta's provincial status in 1905; from 1905 until Alberta gained control over lands and resources in 1930; and from 1930 until 1940.

1. Treaty 8 Implementation: 1899-1905

For six years following the signing of Treaty 8, the federal game act was in force in all but the southernmost part of the treaty area. The regulations that had the greatest effect in the area were the ban on bison hunting and suppression of the use of poison, a practice disapproved of by treaty Indians but employed by some non-Natives and Métis. The federal government justified extending the ban on bison hunting because these creatures were endangered and required protection. Lifting the ban was anticipated once the animals became plentiful again. However, bison remained inaccessible for treaty hunters even after their numbers increased, and this caused disappointment among Indians because they saw it as a betrayal of what had been promised by treaty (McCardle, 1976, pp. 46-47).

In the period immediately after the treaty was signed, non-Native competition in hunting and trapping was insignificant. The end of the gold rush stemmed the influx of newcomers and settlement was slow to advance in most areas. Only in the Lesser Slave Lake and Peace River areas did Indian communities request reserves. The way of life of the Treaty 8 Indians did not change significantly over the next few years. However, during this time the political power and control of the expanding southern settler population was to alter the balance of power in the Treaty 8 area, resulting in the formation of the province of Alberta (and Saskatchewan) in 1905.

2. Treaty 8 Implementation in Alberta: 1905-1929

The Province of Alberta was created in 1905 from the district of Alberta and another part of the Northwest Territories. The establishment of the government of Alberta did not have an immediate effect on the traditional economy of Native people in northern regions; however, a process of jurisdictional change began that would come to have significant impacts. From 1905 to 1929, control of the natural resources of Alberta was in the hands of the federal government, until enactment of the *Natural Resources Transfer Agreement* in 1930 transferred jurisdiction to the province.

Initially, the Province of Alberta adopted game legislation that was a modified version of the 1903 *Northwest Territories Game Ordinance*. This was amended in 1907 to form a new *Alberta Game Act*. Neither of these acts applied to the area of the province north of 55° latitude, the Treaty 8 area. Although Indians formed the majority of hunters and trappers in the area, they were not exempted specifically, nor was the application of laws to Indians acknowledged to be under federal authority, as in Saskatchewan. Rather, the legislation did not apply to any persons hunting for domestic purposes in the northern region of the province (McCardle, 1976, p. 50; Daniel, 1977, pp. 161-62)

The federal government sought to maintain its jurisdiction over Indians and their traditional economic activities by amending the *Indian Act* in 1906 to exempt Indians in the prairie provinces and the Northwest Territories from the application of provincial game laws without the consent of the Superintendent General of Indian Affairs. However, in the pro-agricultural Liberal government of Laurier, the Superintendent General was not necessarily committed to defending Indians' treaty rights. From 1905 until 1911, this position was filled by Frank Oliver, publisher of the *Edmonton Bulletin* and noted advocate for settlers' interests. In an editorial in 1880, Oliver wrote:

The interests of the white settlers are paramount to those of the Indians, and to retrograde so as to place them secondarily to the latter would be to cast doubt upon the Territories and the advantages they hold out to settlers. [Oliver in Daniel, 1977, p. 113]

Oliver continued to hold these views throughout his term of federal office, and is recorded in the House of Commons *Debates* of 1911, as stating:

. . . it is not right that the requirements of the expansion of white settlement should be ignored, . . . that is, that the right of the Indian should be allowed to become a wrong to the white man. [Oliver in Daniel, 1977, p. 119]

The issue behind the 1906 Indian Act amendment was one of jurisdiction: if game legislation was primarily concerned with wildlife conservation, it was a provincial responsibility and applicable to Indians; if it represented regulation of Indians' activities, it was under federal jurisdiction. With Oliver as Minister of the Interior and Superintendent General of Indian Affairs, the settler society perspective prevailed:

At one point, in 1908, the Deputy Superintendent General of Indian Affairs took the position that Indians were not subject to a provincial ban on hunting beavers, only to be instructed by the secretary of Frank Oliver, the Superintendent General, "... to tell the Indians that they cannot kill beaver, because there are provincial laws against the killing of beaver." [Oliver in Daniel, 1977, p. 163]

Cree and Dene interests were not well represented in the Government of Alberta, as Indians in Alberta did not have the right to vote in provincial elections until 1965. Consequently, their constituencies were represented by non-Aboriginal settlers and entrepreneurs who were generally committed to northern development (Oliver in Daniel, 1977, p. 123).

From 1908 to 1912, the control of Indian hunting practices moved gradually into provincial hands. Following Oliver's instructions regarding beaver hunting, Treaty 8 Indians were subject to provincial bans. In 1909, the Lieutenant-Governor acquired the responsibility to lift the beaver ban temporarily in the Treaty 8 area to meet Indian needs; however, in order to protect treaty rights, monitoring by the federal government was required, which was not forthcoming. The rapid spread of settlement in the province at this time led officials to predict the natural demise of the fur trade. Still, in 1910 the Alberta Chief Game Guardian believed that Treaty 8 Indians were exempt from provincial game laws. In that year an Alberta Supreme Court decision (*R. v. Stoney Joe*³) decided that jurisdiction over Indian hunting and trapping was overlapping, giving the province control only in the absence of federal legislation, which rendered the *Alberta Game Act* of 1907 applicable to Treaty 8 Indians. The federal response was influenced by the provision in the game act exempting persons hunting for domestic purposes north of the 55th parallel, which was considered sufficient protection for northern Indians. The Superintendent General instituted a compromise for southern Indians, whereby regulations governing closed seasons and bag limits would apply, but licensing fees would be waived. This solution was accepted by the Province of Alberta, and the *Alberta Game Act* was amended in 1912 to enable the Lieutenant-Governor to refund licensing fees to Indians. Apparently the federal government was satisfied; it did not seek further legal opinion (or

exercise its right to legislate) on the *Stoney Joe* decision, although it has been suggested that the *Indian Act* of 1906 provided a strong case for federal jurisdiction. Thus, the federal government willingly permitted the province to assume control over Indian hunting and trapping (McCardle, 1976, pp. 58-61).

Treaty 8 Indians protested that provincial restrictions contravened their treaty rights to hunt and trap for food, if not commercially. In 1913, Chief Lavolette of the Chipewyan Band of Fort Chipewyan was fined for killing beaver, and complained that this was contrary to treaty provisions that allowed killing beaver for food. The Department of Indian Affairs responded that the treaty allowed for regulations to be made from time to time, and that provincial laws were not challengeable and adequately protected Indian interests. In 1914, the Indian Agent from Fort Smith argued that the beaver ban was unnecessary for conservation in the Athabasca area and was the cause of considerable hardship among the Treaty 8 Indians. Again, the *Stoney Joe* decision was invoked and the policy was rationalized as leniency in applying regulations to the north (McCardle, 1976, pp. 62-63).

During the years following 1916, a change in Indian Affairs administration brought greater relaxation to hunting and trapping regulations, although the federal government remained unwilling to challenge provincial jurisdiction over Indian hunting. A statement from the Justice Department in 1917 highlighted the federal government's power to override provincial game laws in the Native interest, whether based on treaties or the constitution. Nonetheless, the Superintendent-General of the day asserted that the province had undisputed jurisdiction, and that this was ultimately in the Native interest. His deputy was concerned about charges of breach of faith of the treaty, but provincial policy continued to be enforced (McCardle, 1976, pp. 64-66, 68).

In 1917, the Canadian Parliament ratified an international agreement (between United States and Great Britain) that further restricted Aboriginal hunting rights in Canada. The *Migratory Birds Convention Treaty* set seasons and limits to hunting all migratory birds except for scooters (McNeil, 1983, p. 46). The regulations were not enforced in the Treaty 8 area until about 1922, and were protested vigorously for the hardship they would cause. The only protection offered the Indians was the now customary leniency in enforcement. However, as in more recent court cases (see, for example, the 1964 *Sikyee* decision), the treaty allowed for restrictions only for certain reasons, and the *Migratory Birds Convention Act* contravened this treaty principle (McCardle, 1976, pp. 66-67).

It has been suggested that the federal government did not press for recognition of its control or jurisdiction over Indian hunting and protection of treaty rights for a number of reasons. For example, the depletion of game,

the spread of disease and death in the Native population, the fragmentation of the fur trade and the general demoralization of the Aboriginal population led to the widespread belief that hunting and the fur trade were moribund. In 1923, the Deputy Superintendent-General, Duncan Scott, wrote that "no stringency of regulations can do more than postpone the final disappearance of the fur-bearing animals and the complete alteration in the source of native livelihood" (McCardle, 1976, p. 74). Consequently, the federal government sought special privileges only for Native hunters in remote areas, encouraged Indians to adopt other means of livelihood and approached the province of Alberta for leniency in enforcing game legislation for humanitarian, rather than legal or constitutional, reasons.

The position of Treaty 8 hunters in Alberta was highlighted by comparison with federal legislation enacted in 1917 to protect game in the Northwest Territories from depletion by transient hunters. The *Northwest Game Act* was revised explicitly to protect Aboriginal hunting rights by defining special privileges for Native hunters in the NWT. According to the Superintendent-General of Indian Affairs:

One of the essential things in connection with this act is to protect the game of the Northwest Territories for the inhabitants of that country. It is their main source of food supply, and if any person is allowed to go in there and indiscriminately slaughter whatever he thinks fit the Indians and the inhabitants of that enormous territory will be deprived of their food supply and will become pensioners on the Government, which would entail large appropriations by this Parliament for supplying them with food. . . . We are anxious to conserve the animal life, not only for the sake of the animals themselves but to ensure the food supply of the native peoples. [McCardle, 1976, p. 69]

Although not specifying Aboriginal inhabitants initially, subsequent comments clarified that the legislation was primarily for their benefit. Ultimately, however, its effectiveness in protecting the traditional Aboriginal economy from serious encroachment proved to be limited.

In Alberta, encroachment by non-Native trappers and hunters was noted as early as 1917 in the Fort McKay area. A brief period of high fur prices following World War I brought great numbers of White trappers who posed a serious threat to wildlife and the Aboriginal economy. Although fur prices declined by 1920, improvements in transportation, such as the Alberta Great Waterways Railway to Fort McMurray, drew increasing numbers of White trappers to the northern provinces and the Northwest Territories. The newcomers crowded out Aboriginal trappers through practices such as

widespread use of poison, designed to clear an area of fur bearers, unlike the Indians' methods, which were geared to long-term productivity. In 1923, Charles Stewart, the federal Minister of the Interior, expressed concern in the House of Commons over the welfare of the Indians:

It cannot be denied that in northern Ontario, northern Manitoba, and indeed in the northern portions of Alberta and Saskatchewan, the white man is becoming a very strong competitor of the Indian in trapping and in hunting. We are receiving constant complaints from the Indians that they are being driven off their hunting grounds. It is generally conceded that the white man is a much more zealous hunter, covers a greater extent of territory, and takes more fur than the Indians, and is denuding the hunting grounds of the red man to such an extent that it is becoming a serious problem. [Stewart in Daniel, 1977, p. 165]

The province benefitted from non-Native trapping practices by instituting a tax on furs in 1920. The tax was levied on fur traders, who passed it on to trappers by lowering the price paid for furs, a practice which drew complaints from Fort Chipewyan trappers (Stewart in Daniel, 1997, p. 169).

Competition between Native hunter/trappers and non-Native trappers resulted in clashes and the threat of violence. The only alternative to trapping for most northern Indians was government relief, as agriculture was not viable in the area. In 1922, leaders of the Cree and Chipewyan bands at Fort Chipewyan demanded that reserves larger than those intended for agriculture under Treaty 8 be established to protect their hunting and trapping grounds from White trappers. In the Northwest Territories in 1923, seven large preserves were established exclusively for Native use. Provincial governments were reluctant to follow this example; however, in the same year, the *Alberta Game Act* was amended to permit the creation of "areas in which the Indians would have rights over those of white trappers, and in which we could possibly limit the catch of white trappers" (Hoadley in Daniel, 1977, p. 172). Indians in Alberta, aware of the preserves in the Northwest Territories, were critical of the inability of federal representatives to establish similar preserves in Alberta (Hoadley in Daniel, 1977, pp. 170-73).

As both Indian retaliation against White hunters and relief costs to support Indians increased in 1923, the Department of Indian Affairs pressed for the creation of Indian trapping preserves. However, initial receptiveness on the part of Alberta had changed:

The Province of Alberta agreed to consider only those proposals which would give equal rights to Indians and whites. In other

words, if Indians received exclusive areas, whites must also receive exclusive areas and both would have to pay a license fee. This stance created an obvious impasse: the creation of areas for the exclusive use of white trappers would be seen as a violation of Treaty 8. [Hoadley in Daniel, 1977, p. 174]

By 1928, Alberta professed agreement in principle for the creation of Indian hunting and trapping preserves, and only disagreed on the size of the areas. By the time the *Natural Resource Transfer Agreement* was negotiated, Alberta still claimed to support the concept of preserves, but no final agreement was ever reached (Hoadley in Daniel, 1977, pp. 175-77).

Concurrent with negotiations for Indian hunting territory, Alberta and the federal government engaged in talks designed to hand control over natural resources to the province. The federal government also undertook negotiations with the Saskatchewan and Manitoba governments regarding natural resources. Provincial control would reduce considerably the influence of the federal government over hunting and trapping in Alberta. In the early negotiations leading to the *Natural Resources Transfer Agreement*, the federal government proposed to Alberta the following clause regarding Native hunting and trapping rights:

To all Indians who may be entitled to the benefit of any treaty between the Crown and any band or bands of Indians, whereby such Indians surrendered to the Crown any lands now included within the boundaries of the Province, the Province hereby assures the right to hunt and fish on all unoccupied Crown lands administered by the Province hereunder as fully and freely as such Indians might have been permitted to so hunt and fish if the said lands had continued to be administered by the Government of Canada. [Pubic Archives of Canada, RG10, vol.6820, file 492-4-2, pt.1]

Treaty 8 Cree and Dene did not participate in these federal-provincial negotiations, even though they were directly affected by the transfer of control over natural resources from the federal government, with whom they had signed treaties, to the provincial governments.

3. *Implementation and Provincial control: 1930-1940*

The *Natural Resources Transfer Agreement* was concluded in 1929 and became part of the *British North America Act* in 1930. It contained certain provisions intended to safeguard Indian hunting, fishing and trapping rights, and the result of negotiations is found in section 12 of the *Alberta Natural Resources Act*:

In order to secure to the Indians of the Province the continuance of the supply of game and fish for their support and subsistence, Canada agrees that the laws respecting game in force in the Provinces from time to time shall apply to the Indians within the boundaries thereof, provided, however, that the said Indians shall have the right, which the Province hereby assures to them, of hunting, fishing and trapping game and fish for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access. (*Alberta Natural Resources Act, 1930* in Daniel, 1977, pp. 177-78]

Had they been consulted and involved in the natural resource transfer negotiations, Treaty 8 Indians might well have protested the distinction between subsistence and commercial purposes of hunting, fishing and trapping as contrary to the provisions and spirit of the treaty, which, in their understanding, recognized the importance of the commercial fur and fish trade in their livelihood. Thus, section 12 represented an increase in provincial interference with Aboriginal livelihoods. Beyond protecting subsistence hunting, commercial hunting was not exempt from provincial control. The province also had jurisdictional control over hunting on occupied Crown lands, and the ability to declare lands "occupied." In effect, the provincial government had considerable control over Indian hunting and trapping (McCardle, 1976, pp. 84-86).

Widespread unemployment caused by the depression of the 1930s brought another invasion of White trappers to the north. From the early 1920s until 1940, Indian Affairs officials recognized that trapping practices of White outsiders were responsible for the serious decline in the game population. Moreover, when White trappers moved in to deplete an area of game, Native trappers saw no point in doing otherwise themselves, resulting in widespread decimation of game. The necessity of policing White trappers drew government officials to interfere with Indian hunting and trapping as well (Daniel, 1977, pp. 166-69).

The Alberta government wanted to foster a healthy trapping industry in the province. Since the imposition of the fur tax in the 1920s, trapping had become an important source of revenue, spurring an interest in wildlife management. While recognizing that exclusive preserves for Indian hunting and trapping were effective conservation measures, the provincial government was more concerned with protecting its source of revenue. The steps that it took to protect Aboriginal hunting were belated, inadequate and guided by the familiar principles of uniform application of regulations to both Native and non-Native trappers. In 1935, access to the territory from Wood Buffalo Park

east to the Saskatchewan border was restricted to those trappers who were already there. However, the area was used very intensively, so this regulation had little beneficial effect. The Chipewyan Band protested the loss of their trapping areas to non-Native trappers (Daniel, 1997, pp. 179-81).

In 1937, other voices were added to support Aboriginal hunting and trapping rights. Bishop Breynat, who had been instrumental in persuading the Cree and Dene to sign the treaty, collected twenty-one affidavits recording the sworn statements of credible Native and non-Native eye witnesses to Treaty 8 negotiations, such as that of Peace River's Jim Cornwall. These affidavits asserted that Indians "were promised that nothing would be done or allowed to interfere with their way of making a living as they were accustomed to and as their ancestors had done" (Fumoleau, 1973, p. 340). The affidavits represent a clear statement of the spirit of Treaty 8. However, this testimony, which Breynat forwarded to Ottawa, apparently fell on deaf ears.

The federal government had reasons both of principle and practicality behind its desire for exclusive Indian hunting and trapping preserves. Treaties constituted legal agreements between Indians and the federal government, though the enforceability of the provisions that they contained and the legal status of outside promises were largely undefined. Jurisdiction over "Indians and lands reserved for Indians" remained a federal area of responsibility under section 91(24) of the *BNA Act* of 1867 and this had legal and practical implications: for example, it was the responsibility of the federal government to provide welfare for Aboriginal people who could not provide for themselves in the face of serious non-Native competition. Alberta was able to benefit from the fur tax while the federal government incurred the cost of social assistance.

In 1938, federal-provincial talks about establishing preserves for Indian and Métis hunting continued. The federal government offered to finance fur development projects if Alberta would establish areas where non-Native trappers were excluded. Provincial officials wanted more than this—they wanted the federal government to assume more of the burden of welfare for the Métis than mere trapping enhancement programs.⁴ After 1938, the provincial attitude toward special Indian trapping and hunting rights became increasingly unsympathetic, in spite of twenty years of negotiation with Indian Affairs. Rather than supporting the hunting preserve approach, in 1939 the province enforced a registered trap line system that was seen as a poor substitute. Official provincial policy was to show no preference for Indian trappers in the allocation of trap lines; game officers were often drawn from the local settler population and were unsympathetic to Indian interests. The system did not alleviate overtrapping in densely used areas, and it continued to be unpopular with Indians through the following decade. It was not until

fur prices declined significantly in the late 1950s that Indians were able to take greater control of trap lines vacated by non-Native trappers. By this time, the industry itself was in decline and was not profitable enough to provide a viable livelihood for the Treaty 8 population (Daniel, 1977, pp. 184-86).

IV. Analysis: The Implementation of Treaty 8 and Native Hunting, Fishing and Trapping Rights

The implementation of Treaty 8 has been characterized by change in the relative political power of Treaty 8 Indians, the Alberta government and the federal government:

... it must be concluded that Indian control over the wildlife resources of Northern Alberta has been declining since 1899, more or less in an inverse relationship to the control over these resources exercised by the Government of Alberta. [Daniel, 1977, p. 186]

This general process can be discerned from the preceding sketch of the implementation of Treaty 8 over four decades. However, the manner in which Indian treaty rights were eroded was not simple or straightforward, but rather involved a number of underlying issues, attitudes and political forces. We have identified four factors that we believe to be crucial in this process:

1. *Jurisdictional Control over Native Hunting, Fishing and Trapping*

The most significant result of the implementation of Treaty 8 from its signing in 1899 until 1940 was the loss by the Dene and Cree signatories of the ability to control and protect their hunting, fishing and trapping livelihood. They have asserted in subsequent testimony that they were promised by government negotiators that nothing would be allowed to harm the pursuit of their traditional livelihoods, and that any regulations would be made for Native benefit (Fumoleau, 1973, pp. 339-41; Hickey, 1987, p. 106). The effect of transferring Native jurisdiction over their traditional livelihood to the federal government was far-reaching. Combined with the *Indian Act* of 1876 and subsequent Indian legislation, as well as the developing division of powers between the federal and provincial governments (culminating in the *Natural Resources Transfer Agreement* in 1930), the Aboriginal interest was stripped of any real capability to enforce its control over hunting, fishing and trapping. Indians were unable to exercise their right to participate in the 1930 federal-provincial negotiations where their treaty rights were at stake. As it was, they were reliant on the protection of the federal government and found themselves in competition with the demands of the increasingly powerful settler population.

2. *The Authority to Interpret the Treaty*

The questions surrounding the interpretation of Treaty 8 were not restricted to the provisions of the Treaty, but also to who would determine them. In the first forty years of implementation, Native signatories protested repeatedly that the rights they had negotiated were not being honoured. For its part, the federal government reserved to itself the power to determine its obligations and which of these it would defend. Later, the province also assumed a role in interpreting the treaty, asserting that certain provisions gave it the right to legislate in the area of Indian hunting and trapping. Alberta argued that since conservation was the ultimate goal, regulations did not contravene Indian treaty rights. The federal government's acquiescence to this interpretation, contrary to that of the Indians, highlighted the importance of the power to interpret the terms and spirit of the treaty.

3. *The Meaning of Hunting and Trapping Rights in Treaty 8*

Terms in the treaty document itself were subjected to detailed analysis to determine whether binding promises were intended, and some provisions were compared with similar passages in other treaties to discern the intended—or enforceable—meaning.

Treaty 8 protects the right of Indians to "pursue their usual vocations of hunting, trapping and fishing," which, at the time the treaty was signed, included the sale of the products. Commercial activities soon came under severe restriction, and treaty rights were interpreted to protect only subsistence production. McCardle argues that there is no basis for distinguishing the meaning of "vocation" from that of "avocation," and thus no differentiation in rights was intended (McCardle, 1977, pp. 341-46).

Another important aspect of Treaty 8 was the "saving" clause, which permitted the government to enact legislation from time to time to limit traditional Aboriginal economic activities and to exempt certain tracts of land from Indian hunting and trapping. The intended rationale for legislation was conservation, and this ultimately justified all regulations. Undoubtedly an element of legitimate concern was involved; the demise of the plains bison provided a clear example of the need for conservation. Nevertheless, two questions remain: did the "saving" clauses represent the agreement reached during treaty negotiations; and, were all conservation measures actually in the Native interest? The latter became a particularly important issue when conservation measures were applied to Native and non-Native hunters and trappers on an equal basis. The eventual result was degradation of the resource base and the Native economy rather than their protection.

Finally, the "spirit" of the treaty must be considered. Testimony, affidavits and documents question the validity of the written document to accurately describe the agreement that was reached. The conditions surrounding

treaty negotiations cast doubt on the possibility of a clear understanding of the treaty by both parties. The whole area of implementation depends fundamentally on the exact nature of the spirit, as well as the terms, of the treaty.

4. *Differing Social Philosophies*

There are a great number of attitudes about society and government that are not shared by Aboriginal and Euro-Canadian cultures and, not surprisingly, some of these philosophical differences emerge in the implementation of Treaty 8. Arguably they had a profound effect on implementation, influencing political will, public sentiment and public institutions.

A basic attitude of the predominant settler population of Alberta and its representatives in the provincial legislature was that land and resources in the province should be available for farming and other forms of commercial development, and this should take precedence over the Native economy. For example, Treaty 8 lists "settlement, mining, lumbering, trading or other purposes" (Canada, 1899, p. 12) as legitimate reasons for superseding Native hunting rights on specific tracts of land. This attitude is similar to the principles underlying most European and New World colonial expansion, requiring that Aboriginal societies be restricted, transformed or removed as part of the process of resource development and the establishment of an industrial capitalist economy. At points of conflicting land use patterns, traditional Native economies were often seen as impediments to settlers' access to resources and an illegitimate use of land. The fundamental nature of this philosophical stance impinged on the political will of governments to honour treaty provisions and on public opinion in an era of frontier expansion.

Linked with belief in the primacy of development was the attitude that progress was inevitable, and that primitive hunting and trapping was destined to disappear. This had a direct effect on the attitudes of bureaucrats charged with upholding Indian treaty rights. Indian signatories to Treaty 8 were seeking permanent protection for their livelihood, but the government and its negotiators saw the provisions supporting hunting and trapping as interim measures until Indians were assimilated into the non-Native society and economy. Adopting this perspective, the federal government failed to provide effective protection for Indian hunting and trapping rights and to defend them against competing interests.

The final point concerns the issue of individual versus collective rights in the liberal democratic philosophy of the non-Native population. Treaties acknowledged the collective rights of Aboriginal peoples, including the right to hold land collectively, and special rights over access to resources, such as medical care, education and taxation. These rights were not well understood and appeared to contradict the principle of fundamental equality of all citizens

with respect to the law and government. Alberta was adamant in denying any special consideration for Indian hunters and trappers, regardless of treaty rights or other Aboriginal rights, and regardless of humanitarian reasons. Instead, any special consideration Indians received was presented in universal terms, such as the initial exemption of the area north of 55° latitude from Alberta game laws. This principle may have served as both a reason and a popular pragmatic rationale for Alberta's attitude toward the Aboriginal economy, as it justified unrestricted access to natural resources. As Daniel summarizes:

Although restrictions on Indian hunting, fishing and trapping rights have been supported by a variety of arguments to suit specific conditions, they have tended to rest on two ideological pillars: non-discrimination between Indians and whites; and conservation. . . . The fundamental conflict, however, is not between proponents and opponents of conservation but between competing users of wildlife resources. The attempt by the provincial government to allocate resources on a "non-discriminatory" basis has been in conflict with Indian views, firmly held although often vaguely defined, of their special and paramount rights to these resources. [Daniel, 1977, pp. 186-87]

We have drawn these four factors from the discussion of Treaty 8—jurisdiction, authority to interpret the treaty, the meaning of the Treaty promises and the underlying social philosophy—in an attempt to highlight the major forces that resulted in the loss of the ability of the Cree and Dene of Treaty 8 to control and protect their traditional livelihood. What remains is to turn to a 1993 perspective and look at possible remedies for this situation.

V. Conclusions: Treaty 8 and Traditional Livelihoods from the Perspective of the 1990s

Much has changed in western Canada since the signing of Treaty 8. As we have discussed, the treaties have been subject to reinterpretation by federal and provincial governments with changes in economic and demographic conditions. More recently, the whole issue of the rights of Aboriginal peoples in Canada has received considerable attention and has necessitated a rethinking of the nature of treaty agreements. Since the 1960s, a decade where Aboriginal people were granted the right to vote and found their rights threatened through the federal government's 1969 White Paper on Indian Policy, Canada has reevaluated the role of Aboriginal people within Canadian society and government. In 1973, the Supreme Court of Canada's decision on the *Calder* case, recognizing Nisga'a land rights, led to a reversal of the federal

government's position and its development of claims policies covering both Aboriginal and treaty rights (Asch, 1984, p. 64; Weaver, 1981, p. 198). The comprehensive claims policy established a basis for negotiation of unextinguished Aboriginal rights, and the specific claims policy dealt with claims flowing from unfulfilled treaty obligations (or the *Indian Act*).

Since 1973, both comprehensive and specific claims policies have been revised a number of times. Under the 1982 specific claims policy, the federal government undertook to fulfil its outstanding lawful obligations related to several circumstances, including "the non-fulfilment of a treaty or agreement between Indians and the Crown" (Canada, 1982, p. 20). This aspect of the policy provides a basis for Treaty 8 Indians to advance a claim concerning the loss of their traditional livelihoods. In 1985, the Treaty 8 Chiefs and Indian Affairs Minister David Crombie agreed to establish a Treaty 8 Renovation process to "deal with past grievances and establish a sound relationship to move into the future" (Canada, 1986, p. i). In his report to Minister Crombie, Frank Oberle, M.P., recommended that "a Treaty Commission should be established . . . to permit the federal government and the native communities in the Treaty 8 region to fulfil their respective roles in implementing treaty renovation." (Canada, 1986, pp. 91-92). Oberle's recommendations were not adopted by the Mulroney government, although by the spring and summer of 1991 the pressure of public opinion and other factors led this same government to establish a Royal Commission on Aboriginal Peoples, which is mandated to examine "the legal status, implementation and future evolution of aboriginal treaties, including modern-day agreements."

From the perspective of the 1990s, an implication of these changes for the Cree and Dene signatories of Treaty 8 or its adhesions is that the long-standing government interpretation of treaty rights is no longer taken for granted. Called into question are the exact nature of the Treaty 8 promises regarding Native livelihoods, and the basic questions remain: what rights did Treaty 8 people have prior to the signing of the treaty that may still exist; what rights did the treaty extinguish; and what rights did the treaty protect or confer?

1. Current Perspectives of Treaty 8 Indians

We have looked at the efforts of Treaty 8 people to defend their hunting, fishing and trapping rights through directly petitioning government representatives, signing affidavits and conducting research. The views of participants and witnesses to the negotiation of the agreement and those of their successors are remarkably consistent. In fact, interviews conducted with Native elders at Fort Chipewyan and Sturgeon Lake as part of the research for this paper reiterate the major points that the Cree and Dene have been making since 1899.

An elder from Sturgeon Lake recalled the effects of the transfer of jurisdiction over wildlife to the Alberta government under the 1930 *Natural Resources Transfer Agreement*. An aggressive provincial game officer charged him with illegally killing a moose. The elder reported that this story had a good ending because the case was thrown out of court after he told the judge of his Treaty 8 right to be "free to hunt as long as the sun shines and the rivers flow" (Price, 1991a).

At Fort Chipewyan, an elder who is the grandson of a Chief who signed the treaty remembers and retells the story of Treaty 8 negotiations that "as long as the sun shines and the rivers flow, there will never be anybody to stop you from hunting, fishing and trapping" (Price, 1991a). This elder was concerned that the treaty promise had been eroded over time in a number of ways. The amount of ammunition provided under the treaty—a tangible treaty benefit—had continually been reduced to an insufficient amount (Price, 1991a).

Environmental degradation was also identified as an obstacle to realizing treaty rights. Another elder from the same community stressed the loss of fishing rights due to polluted water flowing into Lake Athabasca from upstream developments on the Athabasca River. Indeed, in the fall of 1991, Indian Bands at Fort Chipewyan hosted a major conference to discuss ways of mitigating environmental damage to the community from upstream developments. Moreover, the Grand Council of Treaty 8 has recently launched a major environmental study with a key objective being the blending of "community and scientific knowledge in understanding the effects of environmental impacts on the health of First Nations people . . ." (Grand Council of Treaty Eight First Nations, 1993, p. 2). In their year one report, which was largely based on workshops with local people in the north, the link to treaty concerns is reiterated in First Nation recommendations: "The need for commitment from governments (federal and provincial) to honour the spirit of Treaty 8; and to consult with Indian government(s) about resource development in a meaningful and honest manner" (Grand Council of Treaty Eight First Nations, 1993, p. 9).

Thus, the testimony of Treaty 8 elders reveals that the promises made to them in the negotiation of Treaty 8 have often been violated, to the extent that their traditional livelihood was seriously damaged. Moreover, as evidenced above, Treaty 8 organizations are beginning their own research projects in the early 1990s on environmental and treaty matters and presenting their findings to governments. Often the focus is on such crucial aspects as traditional livelihoods, environment, land rights and self-government. All of this points to the likelihood that elders and chiefs from Treaty 8 will continue to raise these issues until they receive a hearing and satisfactory resolution of their grievances.

2. *Alternatives: Implementing Treaty 8 Promises in the 1990s*

The situation that Treaty 8 Indians face in the 1990s is extremely complex. Of more immediate impact than the changing role of Aboriginal rights are the myriad of new conditions brought about by economic development and settlement in the Treaty 8 area, and the erosion of the trapping industry worldwide. Remedying the historic grievances of Treaty 8 in the modern era is not a simple matter. The environmental and economic impacts of resource development have changed the context in which Native hunting and trapping takes place, and the Native economy itself is now a more complex combination of traditional and industrial activities. Nonetheless, the control of their economy and its traditional elements remains an area of vital concern to Treaty 8 people.

We believe effective and just resolution of the conflict between Treaty 8 Indians and the provincial governments and Canada over hunting, fishing and trapping rights must acknowledge Native treaty rights over their traditional livelihoods. There are a number of examples from Canada and abroad that offer possible remedies.

a. *Treaties: An International Study*

Responding to pressure in the early 1980s from Indigenous peoples around the world, including the James Bay Cree and the Hobbema First Nations, the United Nations agreed to establish an international study on the treaties with Indigenous peoples. In his first major report, the United Nations Special Rapporteur of the Commission on Human Rights emphasized that government and Aboriginal perspectives on the status of treaties were and, in many ways, still are at variance in North America:

During the remaining part of the nineteenth century and throughout the twentieth century, State practice and legal action have been clearly coherent with the obvious intention of making all indigenous issues as privy only to "nation-States" domestic jurisdiction. One cannot help but notice that an obvious aim of this policy was and continues to be to prevent any international connotation from being given to whatever remained of the original sovereignty that States had been willing to acknowledge for indigenous nations. This is particularly evident with respect to the treaties entered into with the original inhabitants of North America. [Martinez, 1992, p. 28]

Martinez's observations illustrate the historical changes in the view that Euro-Canadian governments have accorded to treaties and the First Nations who negotiated them. For their part, representatives of some First Nations are pressing hard for recognition of the sovereign status of their governments, as

evidenced by their role in treaty signing, and the desire that the sacred trust established through the treaty agreements be honoured and acknowledged in international law.

The work of the United Nations regarding "treaties, agreements and other constructive arrangements between States and indigenous populations" (Martinez, 1992, p. 1) is ongoing, and a final report is due in 1995. At that time, recommendations will be forwarded to the United Nations. It remains to be seen what effect these will have on the United Nations and on the actions of member nations. The international arena continues to hold out promise for clarifying treaty rights issues, although the process is extremely lengthy and, as with other routes at this time, the final result is uncertain.

b. New Zealand and the Spirit of the Treaty of Waitangi

One approach that should be more seriously considered in Canada is that of the spirit of the treaties and finding concrete ways of sharing resources and management of those resources. Here the experiences of other countries can be used to suggest alternative resolutions within the framework of evolving Canadian institutions and practices.

The Waitangi Tribunal in New Zealand considered Maori claims based on the 1840 *Treaty of Waitangi*. By the 1980s, the tribunal had developed (over time) concepts based on the underlying principles of treaty relationships rather than the specific provisions of the Treaty of Waitangi. Andrew Sharp, a New Zealand political scientist, puts it this way:

The Treaty was, in a word, negotiable...the point was to find an interpretation of the meaning of the Treaty which captured its Wairua—its living spirit. . . . The content of the Treaty would be interpreted in accord with the general intentions of the signatories and not with the precise details of their agreement. . . . [I]t made the Treaty a basis for future-oriented policy rather than backward-looking rule application. [Sharp, 1990, pp. 168-69]

The subsequent effect on the courts and the government of the Waitangi Tribunal's principles of the treaty (as articulated in various decisions on Maori claims) was also important. For example, lawyer Paul Temm and the senior Queen's Counsel in New Zealand notes the enhancement of the credibility of the Waitangi Tribunal with recent court decisions: "The way in which the Court of Appeal in every judgement referred to the findings of the Waitangi Tribunal with approval gives to that body a measure of prestige. . . . It begins to look as though it is becoming the conscience of the nation" (Temm, 1990, pp. 97-98). At the same time, the national government moved forward, from time to time, with specific pieces of legislation that were respectful of the treaty: "Statutes were passed, which included in authorizing

activity, the requirement that the activity so authorized should not be contrary to the principles of the Treaty of Waitangi" (Sharp, 1990, p. 173). This modern legislation included the *State Owned Enterprises Act* (1986), the *Environmental Act* (1986), and the *Conservation Act* (1987).

At times, this legislation provided Maori leaders with a basis to launch legal claims should government activity be seen to be contrary to the principles of the Waitangi Treaty. Perhaps more importantly, however, the treaty principles using "the jurisprudence of wairua, stressing negotiation, partnership and mutual exploration of a future, had the effect of avoiding too much assertion of state sovereignty. . . . It was the analogue of the politics of moderation, compromise and future orientation" (Sharp, 1990, p. 172). Most of the larger claims in New Zealand are now the subject of intense negotiation, and negotiations were recently concluded for a comprehensive settlement of fishing rights under the treaty, albeit not without controversy over the division of the benefits among the various Maori tribes. This settlement was then incorporated into the *Treaty of Waitangi (Fisheries Claims) Settlement Act* (1992), and represented (at least for the government) a generous sharing of a national resource, particularly the commercial fishing harvest, with the Original Peoples.

In a recent paper, historian M.P.K. Sorrenson notes the changing constitutional conventions and public consciousness for treaty issues in New Zealand:

. . . governments appear to accept an obligation to adhere to the principles of the Treaty and to consult Maori opinion. . . . More broadly, I think it can be said that the Treaty has been so firmly embedded in the national psyche, more particularly with its constant reiteration at the Waitangi day ceremonies, that it can be no longer dismissed—as it was once dismissed as a "device for amusing and pacifying savages." [Sorrenson, 1993, p. 11]

In Canada, there are a few similar examples to New Zealand's emphasis on treaty principles. For example, the Canadian government's policy statement of 1973 on the specific claims stressed the importance of adherence to the *spirit* as well as the terms of the treaties (Price, 1991, p. 85). However, we still seem to be struggling to find an effective way of implementing these noble words.

c. Canada: the Lessons from Modern Treaties

Comprehensive claims agreements have been termed "modern treaties," and have at times been negotiated by First Nations who did not previously enter into treaties. Through these agreements, Aboriginal people sought to protect their livelihoods and control over some of their lands, as well as to

gain compensation monies in order to initiate economic plans for their future livelihood. As a route for redress of past wrongs and acknowledgement of their rights, claims have proved time-consuming and sometimes inconclusive, due in large part to the rigid set of guidelines imposed by the federal government, such as the requirements of extinguishment of Aboriginal title and the exclusion of self-government arrangements as part and parcel of land claims agreements (Canada, 1987). For example, the Dene of the Northwest Territories refused to ratify the claim that had been over a decade in negotiation over the extinguishment provision, and while some Dene regions chose to pursue regional claims, others (Treaties 8 and 11) seek recognition of the rights and relationship embodied in their treaties (Smith, 1993). Significant agreements have been negotiated (such as those agreements negotiated by the James Bay Cree and Northern Quebec Inuit and the Inuvialuit of the western Arctic as well as the recent Nunavut agreement of the eastern Arctic), but the process remains slow and cumbersome.

The first comprehensive claims agreement concluded in Canada, the *James Bay and Northern Quebec Agreement*, holds many lessons for Aboriginal and Euro-Canadian governments alike and has been examined intensively since its inception in 1975. Although there have been numerous difficulties—including lawsuits—emerging out of the agreement, the Income Security Program (ISP) is interesting for its possible application to situations such as that of Treaty 8 people seeking to protect their traditional economy. Indeed, in the early 1990s the Fort Chipewyan Cree Band had used the ISP as a model to work out their own support system for full-time trappers. As anthropologist Harvey Feit notes, the ISP is

... one of an integrated set of provisions of that aboriginal land claims settlement which were designed to assure the continuation of hunting fishing and trapping as a viable option and means of livelihood for those Cree who practise these activities as a way of life, and for members of future generations of Cree who may wish to pursue that way of life. [Feit, 1983, p. 439]

The criteria of the ISP program ensure that only those hunters who are effectively engaged in hunting fishing and trapping activities—both in terms of time spent (in the previous year) and the proportion of their income derived from such activities—are eligible for economic support.

While certain programs, such as the ISP and wildlife co-management, may well hold possibilities for a degree of protection of traditional livelihoods, serious problems with the process of implementing the James Bay Agreement suggest a strategic and cautious approach in both settlement negotiations and subsequent implementation. In her analysis of the James Bay agreement

problems regarding environmental matters, Evelyn Peters concludes that "the lack of formal implementation structures appears to be only part of the problem. The other part has to do with the political will to live up to implementation commitments" (Peters, 1992, p. 142). In this regard, Grand Chief Ted Moses of the James Bay Cree warned the Dene and Métis of the Northwest Territories on the occasion of their 1988 agreement in principle signing that they must insist on "legally binding language" to ensure implementation (Peters, 1992, p. 143). Peters adds a final comment that Aboriginal groups must be prepared to use the courts to enforce agreements if the political will of senior levels of government cannot be secured (Peters, 1992, p. 143).

Thus, although provisions of modern treaties do hold out possibilities for supporting aspects of traditional livelihoods, the experience of claims agreements such as *James Bay* seems to suggest that caution and carefully worded agreements are wise courses of action for First Nations as they negotiate these new arrangements.

d. Canada: Court Decisions

Court challenges have been one among many strategies employed by Aboriginal organizations to publicize their concerns, with the ultimate goal of securing acknowledgment of their rights and a place at the bargaining table when these rights are discussed. Since the federal government endeavoured to sweep away the "Indian problem" with the *White Paper on Indian Policy* of 1969, there has been an intensification in the dialogue between the courts and government, spurred by Native peoples, about the constitutional, legislative and legal status of treaty and Aboriginal rights in general. Arguably, this dialogue was instrumental in bringing about an event of major importance in the history of Aboriginal relations in Canada: the recognition and entrenchment of "existing treaty and aboriginal rights of the aboriginal peoples of Canada" in section 35(1) of the *Constitution Act* of 1982. Although the content and nature of these rights were not defined, this constitutional provision has guided a number of court decisions, which in turn have expanded the definition of the protected rights. This debate essentially resulted from the efforts of Aboriginal people to protect their rights in the face of constitutional changes where they felt left out, resource development and at times environmental degradation, and declining incomes and standard of living.

Constitutional law professor Peter Hogg highlights the importance of the 1982 changes regarding treaty rights: "Section 35 of the Constitution Act, 1982 now gives constitutional protection to rights created by treaties entered into with Indian tribes or bands. . . . Section 35 operates as limitation on the powers of the federal Parliament as well as the provincial Legislatures" (Hogg, 1992, pp. 670-71).

In practice, court decisions have at times served to motivate changes in government policy, as was the result in the *Calder* case. At other times, the courts have appeared to lag well behind both government policies and public opinion regarding the content and nature of Aboriginal and treaty rights and their place within Canada, the most notable recent example being the British Columbia Supreme Court's decision in the *Delgamuukw* case. This judgement questioned whether the Gitksan and Wet'suwet'en people possessed institutions of law and culture, and found that

The plaintiffs' ancestors had no written language, no horses or wheeled vehicles, slavery and starvation were not uncommon, wars with neighbouring peoples were common, and there is no doubt, to quote Hobbs [sic], that aboriginal life in the territory was, at best, "nasty, brutish and short." [*Delgamuukw et al. v. British Columbia*, 1991, p. 13]

The *Delgamuukw* decision harkens back to attitudes prevalent in earlier times. Fortunately, the British Columbia Court of Appeal in 1993 overcame part of this decision by recognizing and confirming the existence of Aboriginal title, but the issue of inherent political rights is still under appeal.

Recently, Supreme Court judgements have pointed in the direction of changes in governmental and legal interpretations. Law professor Catherine Bell notes that the *Guerin* (1984), *Simon* (1985), *Sioui* (1990) and *Sparrow* (1990) decisions represent a "shift in premise from power to duty and honour" (Bell, 1990, p. 3). Beginning with *Guerin*, the ability of the Crown to make decisions over Native interests to their detriment was tempered with the concept of the Crown's fiduciary responsibility to act in the best interest of Canada's First Peoples. The *Sioui* decision acknowledged the nation-to-nation historical relationship between the Crown and First Nations as falling somewhere between "the kind of relations conducted with sovereign states and relations such states had with their own citizens" (*Sioui*, 1990, p. 1038). Certain limitations were put on the ability of the Crown to extinguish treaties, mainly with regard to the criteria required to prove intentional breach (for example, the English entering into an agreement with the French without Huron consent was not considered a valid method of extinguishment) (Bell, 1990, p. 3). However, Bell notes that this shift in perspective has been balanced by a different approach in the Supreme Court's decision in *Horseman v. R.* (1990), where treaty rights to hunt were seen as subject to federal power and legislative regulation. In this case, Treaty 8 was not interpreted to permit the sale of products of the hunt (in this instance, the hide of a grizzly bear slain in self-defence) to purchase food due to provisions of the Alberta Natural Resources Transfer Agreement and the *Alberta Wildlife Act* (1980). However,

Bell suggests that "the emphasis on federal power in *Horseman* is an anomaly" (Bell, 1990, p. 1) in relation to the general thrust of the court in other recent decisions on the Crown's duty and honour.

According to law professor Macklem, the judgments in both *Simon* and *Sioui* represent a shift in treaty jurisprudence toward

. . . a set of principles more sensitive to native interests, which call for broad and liberal readings of treaty rights and a relaxation of procedural requirements usually associated with actions in breach of contract. Both judgments heed the expectations of native negotiators at the time the treaty was entered into, and neither relies unduly on Anglo-Canadian values detrimental to native interests when giving meaning to abstract treaty rights. [Macklem, 1991, p. 438]

This shifting emphasis and direction are also noted by Aboriginal lawyer and Native American Studies Professor Leroy Littlebear:

The Supreme Court of Canada, in a number of recent decisions, has shown a willingness to examine and use as a basis of analysis Aboriginal land concepts which it could not fit into existing land fee categories, but found that fact was not sufficient to deny the existence of Aboriginal interest, consequently categorized it as "sui generis." This openness and willingness to accommodate Aboriginal concepts is very encouraging but it remains to be seen if other parts of government will follow. [Littlebear, 1990, pp. 175-76]

In his recent book on constitutional law, Professor Hogg outlines the meaning and definition of Indian treaties, based on his analysis of the recent decisions of *Simon* and *Sioui*:

An Indian treaty has been described as "unique" or "sui generis." It is not a treaty at international law, and is not subject to the rules of international law. It is not a contract, and is not subject to the rules of contract law. It is an agreement between the Crown and an Indian nation with the following characteristics:

1. Parties: The parties to the treaty must be the Crown, on the one side, and an Indian nation, on the other side.
2. Agency: The signatories to the treaty must have the authority to bind their principals, namely the Crown and the Indian nation.
3. Intention to create legal relations: The parties must intend to create legally binding obligations.

4. Consideration: The obligations must be assumed by both sides, so that the agreement is a bargain.

5. Formality: there must be "a certain measure of solemnity."
[Hogg, 1992, p. 684]

The recent and influential *Sparrow* decision of the Supreme Court on an Aboriginal fishing rights issue has received wide attention in the legal realm and elsewhere. The Supreme Court judges, led by Chief Justice Dickson and Justice La Forest, asserted a view of Aboriginal and treaty rights which held that any rights not intentionally and specifically terminated by federal legislation are still in effect. Further, they set out a specific test for determining whether termination can be considered to have occurred legally. This judgement stands as the most significant support for broadly defined constitutional rights (Bell, 1990, p. 3; Macklem, 1991, p. 448).

In his discussion of *Sparrow*, Professor Hogg argues that the word "existing" in section 35 of the Charter means "unextinguished" and that

... the Court concluded that s.35 should be interpreted as a constitutional guarantee of aboriginal and treaty rights. As a constitutional guarantee, s.35 had the effect of nullifying legislation that purported to abridge the guaranteed rights. . . . However, the Court held that the rights protected in s.35 were not absolute either. . . . Any law that had the effect of impairing an existing aboriginal right would be subject to judicial review to determine whether it was a justified impairment. A justified impairment would have to pursue an objective that was "compelling and substantial." The conservation and management of a limited resource would be a justified objective, but "the public interest" would be too vague to serve as a justification. If a sufficient objective were found, then the law had to employ means that were consistent with "the special trust relationship" between the government and the aboriginal peoples. . . . [T]reaty rights would have to yield to any federal law that could satisfy the *Sparrow* standard of justification; but it may be taken for granted that the standard of justification for a law impairing a treaty right would be very high indeed. [Hogg, 1992, pp. 691, 692]

Another direction is suggested by lawyer Ian Binnie, who stresses the importance attached in *Sparrow* to follow-up negotiations between the Crown and Indian First Nations: "the Court is telling the parties to return to the bargaining table to address what Chief Justice Dickson calls 'the historical burden of the current situation of native peoples' " (Binnie, 1990, p. 240).

Beyond these important recent decisions, the Supreme Court will, in all likelihood, continue to be challenged with its handling of Aboriginal and treaty rights issues. For example, First Nations will no doubt continue to argue that their treaties with the Crown are "nation-to-nation" international treaties and that the courts should provide greater recognition of Aboriginal traditions and institutions. Legal scholars will also challenge the court to think in new ways "The borders of Canadian legal imagination must be redrawn so as to include the aspiration of native people to have greater control over their individual and collective destinies" (Macklem, 1991, p. 456); and to build on previous lines of thinking regarding the fiduciary and trust relationships between the Crown and Aboriginal peoples (Slattery, 1992, pp. 275, 281).

Thus, progress has been made in establishing the constitutional guarantees of treaty and Aboriginal rights and the Supreme Court is urging both the federal Crown and First Nations to undertake further discussions to clarify the meaning of these rights. However, until the principles underlying the current jurisprudence on treaties evolve further, the courts will continue to be a risky and expensive vehicle for pursuing Aboriginal and treaty rights. Still, courts are likely to remain an important route for protecting these rights, as they have been in the past.

e. Canada: Constitutional Amendment and the Royal Commission on Aboriginal Peoples

The events leading up to the 1982 repatriation of the Canadian constitution took place during a time of concern for First Nations people in Canada. For example, the Indian Association of Alberta approached the British government and also sought legal remedies in Britain to gain a firmer recognition of the treaties. Eventually, Canada agreed to entrench "existing aboriginal and treaty rights" in section 35(1), and to negotiate the content of these rights in a series of First Ministers conferences, held between 1983 and 1987. However, these conferences did not come to any agreement on the definition of Aboriginal and treaty rights.

When the constitution was repatriated in 1982, it was done without the blessing of Quebec. The desire to be responsible for "bringing Quebec into the constitutional fold" prompted the Conservative government to propose the Meech Lake Accord in 1990. After intensive closed-door debate between provincial leaders and federal cabinet members, an agreement was presented before the provincial legislatures for approval. The province of Newfoundland, following the lead of the premier, did not approve of the accord. Significantly, the accord was also blocked in Manitoba through the actions of a single Aboriginal voice, that of MLA Elijah Harper, carrying the message that the constitution should recognize Canada's three founding nations, not only the

two European ones. Harper's well-publicized stance was reinforced in the public mind by the events at Oka in 1990, as well as other protests across Canada, including that at the Oldman River in Alberta. Thus, out of the ashes of the Meech Lake Accord emerged more widespread recognition of the necessity of full involvement by First Nations in future constitutional amending processes.

The next effort at amending the constitution came in 1992, in the form of the Charlottetown Accord, but this too was received with mixed opinions by many First Nations. This process was more inclusive, and more importantly, the representatives of Aboriginal organizations present at the negotiating table had more influence on the final result. A significant portion of the package of proposed amendments dealt with First Nations concerns in areas of Aboriginal self-government, designating constitutional processes to deal with Aboriginal concerns and guaranteed Aboriginal representation in the Senate. In the final text of the agreement (Canada, 1992), many provisions relating to Aboriginal issues were left in very general form. Fiscal relations of concern to Treaty 8 nations, for example, were to be subject to further negotiation. The proposal included entrenching the inherent right of self-government, but "its justiciability should be delayed for a five-year period through constitutional language and a political accord" (Canada, 1992, p 17). In addition, First Nations self-government was phrased as "the inherent right of self-government within Canada" (Canada, 1992, p. 16), and any laws passed by First Nations governments "may not be inconsistent with those laws [presumably federal and provincial] which are essential to the preservation of peace, order and good government in Canada" (Canada, 1992, p. 20).

In terms of their input into the recent constitutional amending process, the Grand Council of Treaty Eight First Nations asserted four key treaty rights areas requiring constitutional reform, namely "recognition of inherent rights and title, formalization of the bilateral process, fiscal relations," and finally a "consent" or notwithstanding clause regarding their distinctive form of governance (Grand Council of Treaty Eight First Nations, 1992, pp. 7-8).

The Charlottetown Accord proposed that treaty rights be interpreted "in a just, broad and liberal manner taking into account the spirit and intent of the treaties in the context in which the specific treaties were negotiated" (Grand Council of Treaty Eight First Nations, 1992, p. 20). Further, the Government of Canada was to be committed to participate "in good faith in a process to clarify or implement treaty rights, or to rectify terms of treaties when agreed to by the parties" (Grand Council of Treaty Eight First Nations, 1992). Certainly, for most Canadians, these terms represented real progress in the negotiations between the First Nations negotiations and the federal and provincial governments. However, the Accord also provided for provincial

involvement, an area long contested by some Treaty First Nations:

The governments of the provinces should also be committed, to the extent that they have jurisdiction, to participation in the above treaty process when invited by the government of Canada and the Aboriginal peoples concerned or where specified in a treaty. [Grand Council of Treaty Eight First Nations, 1992, p. 20]

The Charlottetown Accord received mixed reviews from Aboriginal Canadians, including strong criticism from some Alberta First Nations. The Grand Council of Treaty Eight did not take a final position on the Charlottetown accord because of the divergence of views of its members. Chiefs from treaty areas 6 and 7 (in central and southern Alberta) criticized the Charlottetown Accord "domesticating" of their treaties by making them subject to interpretation within Canada, and claimed the Accord "did not honour the binding sacred trust obligations set out in our sacred Treaties" (*Globe and Mail*, 24 September 1992).

With the defeat of the Charlottetown Accord, the questions of recognizing treaty and Aboriginal rights, such as the inherent right of self-government, threatened to slip quietly off the public and constitutional agenda, had it not been for the Royal Commission on Aboriginal Peoples (RCAP). The Commission was established on 27 August 1991 to "examine a broad range of issues concerning aboriginal peoples in Canada" (Canada, 1991). The terms of reference were recommended by former Chief Justice Brian Dickson and the intention was that the work of the Commission would "complement, and not substitute for, current efforts at constitutional reform" (Canada, 1991).

As part of the mandate of the Royal Commission, considerable research has been conducted by treaty First Nations on the history of the treaties and elders' understanding of their spirit, intent and nature. Much of this work is currently in progress, so it remains to be seen what influence it will have on the Commission's recommendations, let alone government actions. However, an inkling of the train of thought of the Commission is demonstrated in its report on self-government and the constitution, *Partners in Confederation* (RCAP, 1993). Generally, the report analyzes Canadian law and history to determine whether a constitutional amendment, or approval by federal or provincial governments, is necessary to implement First Nations self-government. The Commission suggests that

... the right of self-government would include an *actual* right to exercise jurisdiction over certain core subject-matters, without the need for court sanction or agreements with the Crown. The core areas would include matters of vital concern to the life and

welfare of the community that, at the same time, do not have a major impact on adjacent jurisdictions and do not rise to the level of overriding national or regional concern. [RCAP, 1993, p. 38; emphasis in original]

The Commission has not been without criticism. This was evident, for example, in 1993 when Commissioner Blakeney resigned in protest over the Commission's propensity for a problem-oriented rather than a solution-oriented approach. However, more recently Commission co-chairman Georges Erasmus seemed cognizant of these and other concerns (Bell, 1993). Early in 1994, Erasmus suggested that the final report will be comprehensive, thorough, and practical: "Above all, we want to be practical. Is there a starting point to get the ball rolling? One that doesn't give the bureaucrats and politicians an excuse to do nothing?" (*Globe and Mail*, 7 January 1994). It remains to be seen how the Royal Commission will finally deal with a variety of issues, but it is clear that Aboriginal peoples and many other Canadians hold definite expectations for the recommendations of this important commission.

3. *Concluding Comment*

Cree and Dene peoples of Treaty 8 have made the point clearly and repeatedly that their traditional livelihoods did not receive the protection and support that they believe was guaranteed in the treaty negotiations. What they now seek is redress for this situation. The events of the almost one hundred years since the treaty was signed have introduced many complicating factors, and rectifying the unfulfilled treaty promises will not be an easy matter. However, recent actions by Canadian courts and governments suggest movement toward acknowledging the treaty rights of Treaty 8 people to control and support their traditional economy.

Flowing from the recognition of treaty rights, we believe there are a number of ingredients essential to resolving the conflict over Treaty 8 hunting, fishing and trapping in a fair manner and to redressing past wrongs. A fundamental component is political will, without which the Commission's recommendations may well go unheeded. Political will is the necessary link between the unresolved problems surrounding Treaty 8 and committing the human and financial resources required to alleviate them. In recent times, the work of Aboriginal peoples, through a variety of means to bring their situation to public attention, has been instrumental in changing the situation in Canada. However, a broad public consensus favouring justice for Canada's Aboriginal peoples is still ultimately necessary for widespread acceptance of workable solutions. The hope remains that Canadian citizens will recognize treaty and Aboriginal rights—including treaty rights to traditional livelihoods—

and accord the treaties, both old and new, their proper place in the fabric of Canadian history and society.

Notes

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- 1 The terms "Aboriginal," "Native" and "Indian," as well as names of specific Aboriginal groups (such as Dene and Cree) have been used interchangeably to reflect both historical and contemporary usages, and for accuracy.
- 2 While the focus of our research is on Alberta, research from other provinces—Saskatchewan and Manitoba (Waldram, 1988) and British Columbia (Brody, 1988)—document that the loss of traditional livelihoods is not confined to Alberta alone.
- 3 *R. v. Stoney Joe*, Supreme Court of Alberta (per Charles Stuart J.S.C.), unreported; copy of judgement (n.d.) enclosed with Fleetham to Departmental Secretary, DIA, 26 October 1910, in PAC RG-10, 6732:420-2A. In addition, McCardle (1976, p. 58) reports that this case involved "the application of a game law to member of the Treaty 7 Stoney Band at Morley, convicted for killing big game out of season and illegally selling the heads. Judge Stuart stated . . . that if an Indian band had *not* been declared subject to the game laws, and was not under any *federal* game law, then it would automatically become subject to the Provincial game laws in force in its area."
- 4 The federal government declined to provide for the Métis, and in 1938 Alberta passed the *Métis Betterment Act* establishing 10 areas of exclusive Métis use in the vicinity of Métis communities.

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