
Domesticating Doctrines: Aboriginal Peoples after the Royal Commission

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The 1996 *Report of the Royal Commission on Aboriginal Peoples* addressed the difficulties inherent in the domestication of Aboriginal and treaty rights in Canada. While Aboriginal peoples can now legitimately question the injustice of colonial encounters and lay claim to pre-existing rights within the nation states in which they live, it is also becoming increasingly clear that these states can extensively modify, infringe, or extinguish indigenous rights. The Report indicated that Aboriginal peoples require the choice and the ability to pursue objectives that differ from those of the Canadian state. Furthermore, Aboriginal peoples desire greater control over the development of their land and resources so that it conforms more to their values and objectives. This article questions whether the Commission's recommendations with respect to Aboriginal and treaty rights to land and resources have been effectively taken into consideration in subsequent legislative and jurisprudential developments.

The author's analysis demonstrates that the recommendations and proposals with respect to treaties, treaty making, Aboriginal land base, Aboriginal title, the Canadian government's fiduciary obligation to Aboriginal peoples, and Metis rights to land and governance have yet to be sufficiently observed. While the Report has certainly influenced government policy, Aboriginal peoples are nevertheless denied the recognition of Aboriginal and treaty rights to lands and resources in the manner recommended by the Commission.

Le *Rapport de la Commission royale sur les peuples autochtones* de 1996 étudiait les difficultés reliées à la domestication juridique des droits autochtones et issus de traités au Canada. Les peuples autochtones peuvent remettre en question l'injustice de la colonisation et réclamer des droits pré-existants à l'intérieur des États dans lesquels ils vivent, mais il devient de plus en plus évident que ces États peuvent modifier, enfreindre ou anéantir ces droits dans une large mesure. Le Rapport indiquait que les peuples autochtones demandent le choix et la possibilité de viser des objectifs différents de ceux que s'est fixés l'État canadien. Ces peuples aspirent également à un plus grand degré de contrôle sur leurs terres et ressources qui refléterait mieux leurs propres buts et valeurs. Cet article étudie l'importance accordée aux recommandations de la Commission en ce qui concerne les droits autochtones et issus de traités dans la législation et jurisprudence subséquentes.

L'analyse que fait l'auteur des développements qui ont suivi le Rapport montre que les recommandations faites dans le cadre de ce rapport à l'égard des traités, de leur conclusion, des terres autochtones, des titres autochtones, de l'obligation fiduciaire du gouvernement canadien à l'égard des peuples autochtones ainsi que des droits à la terre et à l'autodétermination des Métis n'ont pas encore été suivies de manière satisfaisante. Bien que le Rapport ait eu une influence certaine sur les politiques gouvernementales, les peuples autochtones n'ont toujours pas droit à une reconnaissance de leurs droits, particulièrement ceux issus de traités, d'une manière qui serait conforme à ces recommandations.

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Introduction

Aboriginal peoples have enjoyed some substantial gains with respect to Aboriginal and treaty rights in recent years. There is a growing recognition in Canada and internationally that indigenous peoples are entitled to exercise fundamental responsibilities within their traditional territories. In Australia the existence of Aboriginal title has been recognized, and a debate about its contemporary survival has reached the legislatures, courts, and general populace.¹ In New Zealand the binding nature of the Treaty of Waitangi has been acknowledged, and steps have been taken to ensure that the Maori have sufficient land to sustain their culture.² In Guatemala reconciliation with the indigenous Mayan population has begun through the findings of the Commission for Historical Clarification.³ In Malaysia courts have accepted the principle that indigenous peoples have rights to the use and occupation of their traditional territories.⁴ The courts of Norway, Sweden, and Finland have recognized certain resource rights of the indigenous Sami; the legislatures have granted them political representation at the national level.⁵ Columbia's recent constitution recognizes indigenous rights; numerous court decisions interpreting these provisions have given a large

¹ See *Mabo v. Queensland (No. 2)* (1992), 107 A.L.R. 1, 175 C.L.R. 1 (H.C.); R. Bartlett, "The High Court of Australia Upholds Native Title and Rejects Racist State Legislation" [1995] 2 C.N.L.R. 47; *Wik Peoples v. Queensland* (1996), 141 A.L.R. 129 (H.C.); R. Bartlett, "The Fundamental Significance of *Wik v. State of Queensland*" [1997] 2 C.N.L.R. 1.

² See *New Zealand Maori Council v. Attorney General*, [1987] 1 N.Z.L.R. 641 (C.A.); K. Coates *et al.*, *Living Relationships: The Treaty of Waitangi in the New Millennium* (Wellington: Victoria University Press, 1998); B.D. Gilling, "The Maori Land Court in New Zealand: An Historical Overview" (1993) 13 Can. J. Native Stud. 17; J.G.A. Pocock, "Law, Sovereignty and History in a Divided Culture: The Case of New Zealand and the *Treaty of Waitangi*" (1998) 43 McGill L.J. 481.

³ Commission for Historical Clarification, *Guatemala Memoria del Silencio* (Guatemala: CEH, 1999), online: American Association for the Advancement of Science <<http://hrdata.aaas.org/ceh/report/english/toc.html>> (date accessed: 21 November 2000).

⁴ The Constitution of Malaysia gives the national government legislative responsibility over the "Welfare of aborigines" (*Malaysian Federal Constitution*, Ninth Schedule, List 1, s. 16). This clause was interpreted in *Adong bin Kinwau v. Johor* (1996), [1997] 1 Malayan L.J. 418. In this case the Jakun tribe of the Orang Asli population of peninsular Asia was awarded compensation for the loss of fifty-three thousand acres of ancestral lands taken by the state government and used to build a dam to supply water to Singapore.

⁵ See L. Sillanpaa, *Political and Administrative Responses to Sami Self-Determination: A Comparative Study of the Public Administrations in Fennoscandia on the Issue of Sami Land Title as an Aboriginal Right* (Helsinki: Finnish Society of Sciences and Letters, 1994); F. Kormso, "Nordic Security and the Saami Minority: Territorial Rights in Northern Fennoscandia" (1988) 10 Hum. Rts. Q. 509; T. Svensson, "The Attainment of Limited Self-Determination among the Sami in Recent Years" (1995) 8 L. & Anthropology 267.

measure of protection to Aboriginal title and jurisdiction.⁶ In the United States Native Americans have been successful in expanding jurisdiction in tribal law-making power and economic development.⁷ In Canada the proprietary nature of Aboriginal title and the liberal interpretation of ancient treaties has been recognized and affirmed by the country's highest court.⁸ Finally, indigenous peoples from around the world met together for a decade and articulated a charter of rights and responsibilities for themselves and the states with which they associate in the *Draft Declaration of Indigenous Rights*.⁹

While positive in many ways, these developments have not come without a price: Aboriginal peoples continue to sustain great losses in their relationships with settler states, even though the maturity of the colonial relationship is somewhat less oppressive than in the past. Aboriginal peoples can now legitimately question the injustice of colonial encounters and thereby lay claim to pre-existing rights within the nation states in which they live. Nevertheless, it is becoming increasingly clear that these same states can extensively modify, infringe, or extinguish indigenous rights. The domestication of Aboriginal rights represents yet another stage in colonialism's expansion that contains both positive and negative implications for Aboriginal peoples. In some respects the colonial relationship is less oppressive and coercive than it has been in the past. Most Aboriginal peoples are no longer subjected to explicit policies

⁶ Columbia's constitution contains many articles dealing with the rights of its indigenous populations. See *Political Constitution of Columbia*, arts. 63, 72, 96, 171, 246, 286, 287, 329, 330. Columbia's Constitutional Court has been active in interpreting these judgments. See e.g. *Constit. Ct. Judgment T-257 (1993) (Case of Asociacion Evangelica Nuevas Tribus)* (confirming territorial rights); *Constit. Ct. Judgment T-188 (1993) (Case of Crispin Laoza)* (governmental accountability for failure to demarcate indigenous lands). For commentary on the development of indigenous provisions in Columbia's constitution, see National Organization of Indigenous Peoples of Columbia, "Columbia: A Multiethnic and Pluricultural Society" in M. Léger, ed., *Aboriginal Peoples: Toward Self-Government*, trans. A. Bennett (Montreal: Black Rose Books, 1994) 65.

⁷ For an introduction to this development in law, see C.F. Wilkinson, *American Indians, Time and the Law: Native Societies in a Modern Constitutional Democracy* (New Haven, Conn.: Yale University Press, 1987); for policy, see G.P. Castile, *To Show Heart: Native American Self-Determination and Federal Indian Policy, 1960-1975* (Tucson, Ariz.: University of Arizona Press, 1998); F.P. Prucha, *The Great Father: The United States Government and the American Indians* (Lincoln, Neb.: University of Nebraska Press, 1984); for Native American perspectives, see A. Josephy Jr. et al., eds., *Red Power: The American Indians' Fight for Freedom* (New York: American Heritage Press, 1971).

⁸ See e.g. M. Asch, ed., *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality, and Respect for Difference* (Vancouver: University of British Columbia Press, 1997).

⁹ See E.I.A. Diaz, "Equality of Indigenous Peoples under the Auspices of the United Nations: Draft Declaration on the Rights of Indigenous Peoples" (1995) 7 *St. Thomas L. Rev.* 493; S.J. Anaya, *Indigenous Peoples in International Law* (New York: Oxford University Press, 1996) at 151-82; S.H. Venne, *Our Elders Understand Our Rights: Evolving International Law Regarding Indigenous Peoples* (Penticton, B.C.: Theytus Books, 1998) at 107-71.

of forced assimilation that attempt to completely eradicate their societies and cultures.¹⁰ Instead, it is widely presumed that Aboriginal peoples will continue to exist within their respective nations, and that indigenous land, governments, and practices will be reconciled to fit within national settler states. For some, this represents a chance for a better standard of living in terms of such measures as education, housing, and per capita income. For others, however, lockstep conformity with the state and its goals foreshadows a substantial loss of independence and separate cultural development. From this perspective, the subordination of Aboriginal rights to legal procedures of modification, infringement, or extinguishment does not facilitate strong national relationships. Assimilation and the loss of Aboriginal nations and culture are seen as a continuing threat from this standpoint, even if the context within which it occurs is changing. Many Aboriginal peoples are therefore demanding that surrounding states limit their legal and judicial intrusions into indigenous affairs.

Canada's Royal Commission on Aboriginal Peoples ("Commission") recognized that Aboriginal nations should be able to pursue a different mode of living if this was their choice, and made recommendations to limit state intrusions.¹¹ While the Commission did not take a position that was against national development in Canada, most chapters in the *Report of the Royal Commission of Aboriginal Peoples* ("Report") draw upon indications by Aboriginal peoples of preferences for development that differ from the kind of development pursued by Canada. Indigenous people appearing before the Commission made repeated references to pursuing their own relationships of spirituality, culture, and tradition when relating to the land and others.¹² These positions are not, by and large, against economic and social expansion in the broader nation state. In fact, these aspirations can even be complementary with it.¹³ They demonstrate that Aboriginal peoples wish to share more of the direct benefits of develop-

¹⁰ For examples of these policies in the Americas, see T. Berger, *A Long and Terrible Shadow* (Toronto: Douglas and McIntyre, 1991).

¹¹ The Royal Commission on Aboriginal Peoples was initiated in the months following the failure of constitutional reform in the Meech Lake Accord and the armed confrontation between the Mohawks and the Canadian state at Oka, Qc. The Commission was established on 26 August 1991 and issued its final report five years later, in November 1996. Its mandate was to "investigate the evolution of the relationship among aboriginal peoples ... the Canadian government, and Canadian society as a whole." Furthermore, the Commission was asked to "propose specific solutions, rooted in domestic and international experience, to the problems which have plagued those relationships." See Canada, *Report of the Royal Commission on Aboriginal Peoples, Vol. 1: Looking Forward and Looking Back* (Ottawa: Supply and Services, 1996) at 2 [hereinafter *Royal Commission, Vol. 1*].

¹² See e.g. Canada, *Report of the Royal Commission on Aboriginal Peoples, Vol. 2: Restructuring the Relationship* (Ottawa: Supply and Services, 1996) at 435-64 [hereinafter *Royal Commission, Vol. 2*].

¹³ See J. Borrows, "'Landed' Citizenship: Narratives of Aboriginal Political Participation" in W. Kymlicka & W. Norman, eds., *Citizenship in Diverse Societies* (New York: Oxford University Press, 2000) 326.

ment. Aboriginal peoples also show a desire to have greater control over how development is undertaken to ensure that the development better conforms to their values and objectives.

Aboriginal peoples told the Commission that certain conditions were necessary to enable them to pursue their particular goals. The Commission recognized many of these aspirations and embodied them in its recommendations. The Report noted that Aboriginal peoples need the Crown to implement, renew, and fulfill the terms of their historic treaties.¹⁴ The Report indicated that Aboriginal peoples require a process to establish new treaties between the Crown and non-treaty nations in regions where no treaties exist.¹⁵ The Commission wrote that Aboriginal peoples require a larger land base over which they can be self-governing to secure culturally appropriate land and resource use.¹⁶ It declared that Aboriginal peoples need policies and principles that would recognize Aboriginal title as a legal interest in land and that would require Aboriginal consultation or consent prior to federal and provincial use of that land.¹⁷

¹⁴ *Royal Commission, Vol. 2, supra* note 12 at 49. Recommendation 2.2.2 reads as follows:

The parties implement the historical treaties from the perspective of both justice and reconciliation.

See also Recommendation 2.2.3:

The federal government establish a continuing bilateral process to implement and renew the Crown's relationship with and obligations to the treaty nations under historical treaties, in accordance with the treaties' spirit and intent (*ibid.* at 57).

¹⁵ See Recommendation 2.2.6:

The federal government establish a process for making new treaties to replace the existing comprehensive claims policy ... (*ibid.* at 64).

¹⁶ See Recommendation 2.4.2:

Federal, provincial and territorial governments, through negotiation, provide Aboriginal nations with lands that are sufficient in size and quality to foster Aboriginal economic self-reliance and cultural and political autonomy (*ibid.* at 574).

¹⁷ See Recommendation 2.4.1:

Federal policy and all treaty-related processes (treaty making, implementation and renewal) conform to these general principles:

- a) Aboriginal title is a real interest in land that contemplates a range of rights with respect to lands and resources;
- b) Aboriginal title is recognized and affirmed by section 35(1) of the *Constitution Act, 1982*;
- c) The Crown has a special fiduciary obligation to protect the interests of Aboriginal people, including Aboriginal title;
- d) The Crown has an obligation to protect rights concerning lands and resources that underlie Aboriginal economies and the cultural and spiritual life of Aboriginal peoples (*ibid.* at 573).

The Commission stated that the Crown should actively pursue its special fiduciary obligation to preserve Aboriginal lands and resources.¹⁸ It recommended the negotiation and implementation of Metis rights to land and governance.¹⁹ Finally, it recognized that Aboriginal peoples require Canada's attentiveness and responsiveness to the international legal principles that outline the government's responsibility for recognizing and protecting Aboriginal rights, lands, and resources.²⁰ This article explores the Commission's recommendations in these areas and questions Canada's reactions to its proposals. It examines the treatment of treaty and Aboriginal rights in Canadian legislatures and courts since the Report's release and demonstrates how this treatment has fallen short of the Commission's recommendations. Since the federal and provincial governments and courts have failed to implement the Commission's recommendations for improvements to the relationship of Aboriginal peoples with their lands, Aboriginal peoples are increasingly associated with and influenced by national development, yet are unable to significantly influence the terms by which this development occurs. Recent developments with respect to treaty and Aboriginal rights will therefore be compared with the proposals put forward by the Report to determine the distance that must still be covered for Aboriginal peoples to enjoy stronger relationships with their lands and resources.

¹⁸ See Recommendation 2.4.1:

Federal policy and all treaty-related processes (treaty making, implementation and renewal) conform to these general principles:

- c) The Crown has a special fiduciary obligation to protect the interests of Aboriginal people, including Aboriginal title;
- d) The Crown has an obligation to protect rights concerning lands and resources that underlie Aboriginal economies and the cultural and spiritual life of Aboriginal peoples (*ibid.*).

¹⁹ *Report of the Royal Commission on Aboriginal Peoples, Vol. 4, Perspectives and Realities* (Ottawa: Supply and Services, 1996) at 252-53 [hereinafter *Royal Commission, Vol. 4*]. See Recommendation 4.5.9:

Federal, provincial and territorial governments

- b) be prepared to ... consider longer-term land use agreements with Métis nations ...

See also Recommendation 4.5.10:

The governments of Canada and of relevant provinces and territories

- a) be prepared to negotiate immediately ... on the manner in which Métis self-government will be recognized ...

²⁰ See text accompanying note 239; *Royal Commission, Vol. 2, supra* note 12 at 566-68.

I. Treaties

Before non-indigenous peoples came to the shores of Great Turtle Island (North America), Aboriginal peoples often made treaties between their nations to establish relationships with one another and their lands.²¹ The alternatives to such measures could be distrust, petty grievance, violence, and war. These treaties were written in the hearts and minds of the respected record keepers and were recorded on wampum, rock, and trees. These treaties were sacred and were often given the highest regard and respect. The failure to abide by these agreements could bring economic hardship, political instability, or even war to those parties failing to do so.²² This early pattern of treaty making was already entrenched in North America when people not indigenous to this continent arrived from distant shores. Such agreements demonstrate the ability of peoples to pursue different paths; they also became a model to guide early relationships between the peoples.²³

A. Peace and Friendship Treaties

The first treaties entered into between Aboriginal peoples and non-Aboriginal peoples were of peace, friendship, and respect. Their terms affirmed the notion that different peoples should be free to pursue different objectives. Such treaties were frequently made according to the protocols and form that Aboriginal peoples had established amongst themselves prior to the arrival of Europeans.²⁴ As before, such treaties were also kept in mind and recorded by the leaders of the Aboriginal peoples. In time, however, a change in the old forms eventually began to occur as these treaties were increasingly recorded in writing by the newly settling peoples as well. While these treaties were still regarded as sacred and were to be given the highest honour and respect, their interpretation could no longer be made solely according to Aboriginal perspectives. Interpretation had to be attentive to the ideas and attitudes of non-Aboriginal peoples. More than ever, treaties became the product of a cross-cultural

²¹ For examples in the Great Lakes area, see V. Lytwyn, "A Dish with One Spoon: The Shared Hunting Grounds Agreement in the Great Lakes and St. Lawrence Valley Region" in D. Pentland, ed., *Papers of the Twenty-Eighth Algonquian Conference* (Winnipeg: University of Manitoba, 1997) 210.

²² Conflict between Aboriginal nations prior to contact in the Great Lakes area is recounted in W.V. Kintz, *The Indians of the Western Great Lakes, 1615-1760* (Ann Arbor, Mich.: University of Michigan Press, 1940) at 53, 60, 82-89, 196-202, 251-62.

²³ See R.A. Williams Jr., *Linking Arms Together: American Indian Treaty Visions of Law and Peace 1600-1800* (New York: Oxford University Press, 1997).

²⁴ See e.g. W. Fenton, "Structure, Continuity, and Change in the Process of Iroquois Treaty Making" in F. Jennings et al., eds., *The History and Culture of Iroquois Diplomacy* (Syracuse: Syracuse University Press, 1985) 3; W.R. Jacobs, *Diplomacy and Indian Gifts: Anglo-French Rivalry along the Ohio and Northwest Frontiers, 1748-1763* (Stanford, Cal.: Stanford University Press, 1950).

dialogue.²⁵ Nevertheless, different interpretations often arose, along with great misunderstandings, which sometimes led to violent conflict.²⁵ Despite these setbacks, treaties remained the basis upon which the parties directed their relationships, as well as the land and resource use. Therefore, these early treaties of peace, friendship, and respect still have meaning in Canada.

Canadian courts have considered the meaning of these treaties on many occasions in recent years. They have adopted special interpretive principles to respect the ancient origins and cross-cultural context in which these first treaties were negotiated. Earlier cases such as *Jones v. Meehan*²⁷ in the United States, and *R. v. White and Bob*,²⁸ *R. v. Taylor and Williams*,²⁹ and *R. v. Nowegijick*³⁰ in Canada, had been significant in developing principles that helped to span the cultural and temporal divide that separated the courts from these ancient agreements. In 1985 the Supreme Court of Canada affirmed these unique canons of construction when examining a 1752 treaty of peace and friendship in *R. v. Simon*.³¹ These ideas were further entrenched in 1990 when the Court examined a 1752 treaty in *R. v. Sioui*.³² More recently, in 1999, the Court gathered these principles and applied them to a 1760 peace and friendship treaty in *R. v. Marshall*.³³ The principles these cases espouse are important for understanding the relationship between Aboriginal peoples and the Crown because they lead the interpreter to contemplate the possibility that the written words of a treaty document alone may not contain the full meaning of the treaty.³⁴ They direct the courts to take a large, liberal, and generous approach to the issues at hand, resolving any ambiguities in favour of Aboriginal peoples. The treaties are therefore to be construed as the Aboriginal peoples understood them, and interpreted in a purposive, flexible man-

²⁵ See R. White, *The Middle Ground: Indians, Empires, and Republics in the Great Lakes Region, 1650-1815* (Cambridge: Cambridge University Press, 1991). White explores this thesis throughout his book.

²⁶ Unfortunately, armed conflict was not uncommon between Aboriginal and non-Aboriginal peoples east of Lake Huron when treaties broke down. See F.W. Rowe, *Extinction: The Beothucks of Newfoundland* (Toronto: McGraw-Hill Ryerson, 1977); A.G. Bailey, *The Conflict of European and Eastern Algonkian Cultures, 1504-1700: A Study in Canadian Civilization* (Sackville, N.B.: Tribune Press, 1937); O.P. Dickason, *Canada's First Nations: A History of Founding Peoples from Earliest Times* (Toronto: McClelland and Stewart, 1992) at 149-62.

²⁷ 175 U.S. 1, 20 S. Ct. 1 (1899).

²⁸ (1964), 50 D.L.R. (2d) 613, 52 W.W.R. 193 (B.C. C.A.), aff'd, [1965] S.C.R. vi, 52 D.L.R. (2d) 481.

²⁹ (1981), 34 O.R. (2d) 360, [1981] 3 C.N.L.R. 114 (C.A.).

³⁰ [1983] 1 S.C.R. 29, 144 D.L.R. (3d) 193.

³¹ [1985] 2 S.C.R. 387, 24 D.L.R. (4th) 390.

³² [1990] 1 S.C.R. 1025, 70 D.L.R. (4th) 427 [hereinafter *Sioui* cited to S.C.R.].

³³ [1999] 3 S.C.R. 456, 177 D.L.R. (4th) 513 [hereinafter *Marshall I*].

³⁴ See L.I. Rotman, "Taking Aim at the Canons of Treaty Interpretation in Canadian Aboriginal Rights Jurisprudence" (1997) 46 U.N.B.L.J. 11.

ner.³⁵ This approach holds great promise for Aboriginal peoples who want to preserve ancient understandings of their relationship to the land. It also enables Aboriginal peoples to conceive of their relationship with non-Aboriginal peoples based on terms different from those that the settlers establish amongst themselves.³⁶

Despite the presence of principles of liberal treaty interpretation, however, many decisions can still be found that perfunctorily recite these canons without seeming to apply them in any genuine way. This is detrimental to the implementation of these agreements and helps to facilitate assimilation. Each time a court stumbles over a treaty's meaning because it lacks information or evidence, this creates a bias in favour of the Crown, to the detriment of Aboriginal people. This bias occurs since Aboriginal peoples most often bear the burden of proof in treaty cases, while the Crown does not have to substantiate the benefits that it receives from the agreements. The Crown's position is unaccountably the default position, yet this was not discussed or agreed to by the parties during the treaty negotiations. As a result, doubt is cast on Aboriginal peoples' treaty claims for differential treatment, while Crown rights are automatically assumed to be the standard by which every person's rights and conduct are judged. This homogenizing tilt constrains Aboriginal preferences and compels the assimilation of Aboriginal peoples. For example, Crown land use within treaty areas is exercised with few limits or restrictions. In contrast, Aboriginal peoples often have to struggle against numerous constraints and obstacles to exercise treaty rights to hunt, fish, or harvest resources on these same lands. Most treaty negotiations do not specify that the Crown, and not Aboriginal peoples, should receive more benefits from treaty rights.

The Commission recognized that the interpretation of treaties in court cases usually occurs "in a narrow and ultimately frustrating context".³⁷ It lamented that the "context does not invite a broad look at what the treaty was all about from the perspective of the First Nation party."³⁸ Nevertheless, a narrow perspective is also taken on the other side, as the courts do not analyze the Crown's rights acquired under these agreements either. The principles developed to provide for large, liberal, and generous

³⁵ For a contrary position, see *R. v. Howard*, [1994] 2 S.C.R. 299 at 306-307, 115 D.L.R. (4th) 312 [hereinafter *Howard* cited to S.C.R.]; *Eastmain Band v. Canada (Federal Administrator)* (1992), [1993] 1 F.C. 501 at 518, (*sub nom. Quebec (A.G.) v. Eastmain Band*) 99 D.L.R. (4th) 16 (C.A.), leave to appeal to S.C.C. refused, [1993] 3 S.C.R. vi, 104 D.L.R. (4th) vii (note) [hereinafter *Eastmain Band* cited to F.C.], for the court's refusal to apply liberal interpretive principles in modern treaties. For criticism of this view, see S. Grammond, "Aboriginal Treaties and Canadian Law" (1994) 20 *Queen's L.J.* 57 at 74-75.

³⁶ See J. (sákéj) Youngblood Henderson, "Empowering Treaty Federalism" (1994) 58 *Sask. L. Rev.* 241 at 250-69.

³⁷ *Royal Commission*, Vol. 2, *supra* note 12 at 31.

³⁸ *Ibid.*

interpretations of the treaties do not seem to extend the examination that far. This seems to occur for two reasons. First, there are often evidentiary deficiencies in cases that make it difficult for judges to discern the understanding of the parties at the time an agreement was reached. Second, the legal framework of treaty interpretation assumes pre-eminent Crown authority over the matter in dispute in the absence of sufficient evidence to prove the rights of First Nations. These limitations support the Commission's observation that the "courts seldom have an opportunity to address more fundamental but controversial treaty questions such as whether the treaty nation's Aboriginal title to its traditional territories was effectively extinguished."³⁹

These deficiencies are illustrated in *R. v. Peter Paul*,⁴⁰ which concerned a right to harvest trees for commercial purposes under early peace and friendship treaties on Canada's east coast.⁴¹ Here the New Brunswick Court of Appeal held that Mr. Peter Paul, the defendant, had not established the asserted treaty rights. As in most treaty rights cases, the court did not take sufficient measures in implementing generous interpretive principles; therefore, the burden of proof was on the Aboriginal peoples to establish their harvesting rights in the area. As a result, the court's approach in this case did not resolve ambiguities in favour of the Aboriginal peoples when considering whether Aboriginal title had been extinguished in the area so as to give the Crown rights over the timber in dispute. The failure to apply liberal interpretive principles to the very framework of the law stifles Aboriginal understandings of the treaty and reinforces the status quo.⁴² This result is illustrated in *Peter Paul*: immediately after the need to interpret treaties in a broad and liberal manner was noted, the next paragraph declared, "In any event," and went on to quote from the clause at issue in the treaty, without stating how this clause would benefit from these doctrines of liberal interpretation.⁴³ Indeed, this case makes it appear as if the special canons of treaty construction are irrelevant in determining "fundamental but controversial questions" sur-

³⁹ *Ibid.*

⁴⁰ (1998), (*Sub nom. R. v. Paul*) 158 D.L.R. (4th) 231, [1998] 3 C.N.L.R. 221 (N.B. C.A.) [hereinafter *Peter Paul* cited to D.L.R.].

⁴¹ For descriptions of Mi'kmaq/Crown relations in this period, see W.C. Wicken, "Re-examining Mi'kmaq-Acadian Relations 1635-1755" in S. Departie et al., eds., *Habitants et marchands, Twenty Years Later: Reading the History of Seventeenth- and Eighteenth-Century Canada* (Montreal: McGill-Queen's University Press, 1998) 93; W.C. Wicken, "'Heard It from Our Grandfathers': Mi'kmaq Treaty Tradition and the *Syliboy* Case of 1928" (1995) 44 U.N.B.L.J. 145; W.C. Wicken, "The Mi'kmaq and Wuastukwiuk Treaties" (1994) 43 U.N.B.L.J. 241.

⁴² I want to be clear that in the argument that follows I am focussing on the court's exposition of legal principles. I am not saying anything about the substantive outcome in *Peter Paul*: e.g. there may or may not be a treaty right in the circumstances of this case, but that does not excuse the courts from reasoning in a manner consistent with established treaty and constitutional presumptions in making their case.

⁴³ *Peter Paul*, *supra* note 40 at 245.

rounding the structural legal burdens faced by Aboriginal peoples in litigating their rights.

Furthermore, when the New Brunswick Court of Appeal reviewed the lower court's findings concerning commercial harvesting rights, it held that there "was insufficient evidence on which a consistent conclusion could be reached."⁴⁴ The lack of evidence on this point led the court to write, "Even though a liberal interpretive approach is required, the result must be realistic."⁴⁵ It held that "conjecture ... cannot result in the realistic interpretation of the Treaty."⁴⁶ By such reasoning, the status quo is preserved and the Crown is not disturbed in its use or possession of land, even though it has not legally justified its assumed pre-eminent position. Yet that there was insufficient evidence on which to provide a realistic interpretation of the treaty surely must also lead to the conclusion that it would be conjecture to assume that the Crown has superordinate rights in the area under dispute. Such issues, however, are usually not explored in treaty cases. As a result, Aboriginal peoples' rights under treaties are domesticated and placed in a subordinate position relative to the Crown.⁴⁷ Such a result reinforces the Commission's conclusion that the law is "suffused with the values and assumptions of imperial treaty makers."⁴⁸ The law should resist these values and employ liberal principles of treaty interpretation to question assumptions that grant residual powers to the Crown.⁴⁹

The history of Canadian federalism reveals that this path has been followed in other constitutional cases.⁵⁰ For example, the *Reference Re Secession of Quebec*⁵¹ indicated that the federal system was only partially complete "according to the precise terms of the *Constitution Act, 1867*" because the "federal government retained sweeping powers which threatened to undermine the autonomy of the provinces."⁵² As a result, courts have had to "control the limits of the respective sovereignties" since "a review of the written provisions of the Constitution does not provide the entire picture"⁵³ of the Canadian federal structure. In this vein, the courts helped to facilitate "democratic participation by distributing power to the government thought to be most

⁴⁴ *Ibid.* at 246.

⁴⁵ *Ibid.*

⁴⁶ *Ibid.*

⁴⁷ See I. Schulte-Tenckhoff, "Reassessing the Paradigm of Domestication: The Problematic of Indigenous Treaties" (1998) 4 *Rev. Const. Stud.* 239.

⁴⁸ *Royal Commission, Vol. 2, supra* note 12 at 31.

⁴⁹ This approach has been followed in the United States where the "reserved rights" doctrine states that those rights not expressly dealt with are reserved to the Indians. See *United States v. Winans*, 198 U.S. 371, 25 S. Ct. 662, 49 L. Ed. 1089 (1905).

⁵⁰ See P. Bobbit, "Methods of Constitutional Argument" (1989) 23 *U.B.C. L. Rev.* 449.

⁵¹ [1998] 2 S.C.R. 217, 161 D.L.R. (4th) 385 [hereinafter *Secession Reference*].

⁵² *Ibid.* at para. 55.

⁵³ *Ibid.*

suitied to achieving the particular societal objective” with regard to the diversity of the component parts of Confederation.⁵⁴ The Court’s historic approach has resulted in the distribution of political power in Canada between the provinces and the central government. Provincial power has been significantly strengthened under this interpretation.

Applying these principles to treaty interpretation, would it not also be possible to strengthen the position of Aboriginal peoples in the Constitution and regard the federal system as only partially complete in relation to Aboriginal peoples? Treaties are constitutional documents⁵⁵ that could be interpreted in a way that facilitates Aboriginal autonomy in Canada. In keeping with the courts’ interpretation of provincial rights, it could similarly be argued that the “federal government retained sweeping powers” relative to Aboriginal peoples, contrary to most treaty relationships “which threatened to undermine the autonomy” of Aboriginal groups. Furthermore, since the “written provisions of the Constitution [do] not provide the entire picture” relative to Aboriginal peoples, and treaties can be read to present a more balanced picture, the courts could also “control the limits of the respective sovereignties” by distributing appropriate powers to the Aboriginal governments. If the courts can strengthen provincial powers by drawing on federalism’s unwritten principles to fill in the “gaps in the express terms of the constitutional text”,⁵⁷ can they not also “facilitate the pursuit of collective goals”⁵⁸ of Aboriginal nations by drawing on the written and oral principles embodied in the treaties? Federalism could be applied in this manner when interpreting treaties to question assertions of Crown sovereignty that purportedly diminished Aboriginal powers to function as an equally integral part of the federal structure in Canada. That the courts choose not to follow this familiar course when delineating treaty rights reveals a skewed application of constitutional law. It creates a bias in law against treaties and in favour of other non-Aboriginal constitutional instruments.

Not all cases, however, are deficient in their recitation and application of generous interpretive principles. For example, in the 1999 *Marshall I* decision, the Supreme Court of Canada appropriately used these canons to refuse to “turn a positive Mi’kmaq trade demand” in a 1760 treaty “into a negative Mi’kmaq covenant”.⁵⁹ The issue in dispute was whether a treaty clause, stating that the Mi’kmaq could only trade in government appointed “Truck houses”, protected a contemporary right to trade for

⁵⁴ *Ibid.* at para. 58.

⁵⁵ See B. Ryder, “The Demise and Rise of the Classical Paradigm in Canadian Federalism: Promoting Autonomy for the Provinces and First Nations” (1991) 36 McGill L.J. 308.

⁵⁶ Treaties have been described as constitutional documents in the *Royal Commission*, Vol. 2, *supra* note 12 at 22, 36-37.

⁵⁷ *Secession Reference*, *supra* note 51 at para. 53.

⁵⁸ *Ibid.* at para. 59.

⁵⁹ *Supra* note 33 at para. 52.

commercial purposes, given that Truck houses ceased to exist over two hundred years ago.⁶⁰ The Court held that a contemporary commercial right could be sustained. It arrived at this conclusion through a flexible approach to the evidence that chose from "among the various possible interpretations of the common intention ... the one which best reconciles the Mi'kmaq interests and those of the British Crown."⁶¹ As a result, this case is an excellent example of the application of liberal and generous interpretive principles. It effectively demonstrates how a court can be attentive to Aboriginal perspectives in the adjudication of Aboriginal rights. Nevertheless, despite this positive treatment, the Court still managed to interpret the treaty as a whole in a way that subordinates Aboriginal peoples within Canada. The aspects of the decision that potentially imperil Aboriginal difference appear when the Court subjects treaty rights to unilateral governmental regulation and limits their scope to sustenance purposes.

The Court's unfortunate circumspection of the right in question was prompted by its concern that Mi'kmaq trading rights "would open the floodgates to uncontrollable and excessive exploitation of the natural resources."⁶² While this potential exists in any group's use of a resource, there was no discussion of the legal limits imposed on Aboriginal fishers' right to trade by Mi'kmaq law and custom.⁶³ The background of Aboriginal law would presumably form part of the backdrop against which the treaty should be interpreted. Furthermore, the Court did not acknowledge the Crown's culpability in facilitating the uncontrollable use and excessive exploitation of the resource in question over the past one hundred years.⁶⁴ Despite the Crown's mismanagement of the resource and the continuing existence of Mi'kmaq law, the Court nevertheless chose to grant the right to regulate the fishery to the federal government. It did not explore the possibilities for enforceable Mi'kmaq management or co-management regimes that solely or equally called upon Mi'kmaq law-making authority in the regulation of the resource,⁶⁵ as counselled by the Commission.⁶⁶ Furthermore, the Court restricted the scope of the Mi'kmaq right to "necessaries", which were described as "not a right to trade for economic gain" or the "accumulation of wealth", but "day-to-day" needs that "would not exceed a sustenance life-style."⁶⁷

⁶⁰ For the role of historians in this case, see J.G. Reid *et al.*, "History, Native Issues and the Courts: A Forum" (1998) 28 *Acadiensis* 3.

⁶¹ *Marshall I*, *supra* note 33 at para. 13.

⁶² *Ibid.* at para. 57.

⁶³ For the importance of Aboriginal law and custom in Aboriginal rights litigation, see J. Borrows, "With or Without You: First Nations Law (in Canada)" (1996) 41 *McGill L.J.* 629.

⁶⁴ See D.R. Matthews, "'Constructing' Fisheries Management: A Values Perspective" (1995) 18 *Dal. L.J.* 44.

⁶⁵ See C. Notkzke, "A New Perspective in Aboriginal Natural Resource Management: Co-management" (1995) 26 *Geoforum* 187.

⁶⁶ Co-management is discussed in *Royal Commission*, Vol. 2, *supra* note 12 at 665-79.

⁶⁷ *Marshall I*, *supra* note 33 at paras. 58-60.

Such an approach demonstrates the Court's view that the Crown is the paramount party in the treaty relationship. The characterization of Aboriginal peoples' rights under treaties as "narrow in ambit and scope",⁶⁸ while the Crown's rights under the same treaty are broad and plenary, illustrates the continuing colonial nature of the Crown-Aboriginal treaty relationship. It demonstrates the problems that Aboriginal peoples still encounter in attempting to pursue a course of life that is guided by their own principles and objectives.

The restrictive findings in *Marshall I* were confirmed a few weeks later. In *Marshall II*⁶⁹ the Supreme Court of Canada was asked to rehear *Marshall I* by the West Nova Fishermen's Coalition, which was concerned about the potential lack of non-Mi'kmaq regulatory authority over the east coast fishery. In the aftermath of violent clashes and vociferous public criticism arising from the first decision, the Court seized this opportunity to clarify its earlier opinion while simultaneously dismissing the application to rehear the case.⁷⁰ In doing so, the Court re-framed the context of the original decision and placed the treaty's limitations in very plain terms. For example, it observed that the treaty did not support a general right to take resources throughout the province.⁷¹ It emphasized that *Marshall I* could not be extended to support a right to take resources other than eels.⁷² It reiterated that both the provincial and federal governments had to regulate the rights guaranteed within the treaty.⁷³ It indicated that the government could regulate the right to fish for "necessaries" to "produce a moderate

⁶⁸ *Ibid.* at paras. 57, 58.

⁶⁹ *R. v. Marshall*, [1999] 3 S.C.R. 533, 179 D.L.R. (4th) 193 [hereinafter *Marshall II*].

⁷⁰ The West Nova Fishermen's Coalition sought a rehearing of *Marshall I* and a further trial on the issue of justification for the infringement of treaty rights. The coalition was concerned about the potential application of the judgment to lobster fishing. The Court denied the rehearing, indicating that the issue of justification was not raised in argument in the courts below. Furthermore, the Court said the coalition's application was based on a misconception of the scope of the earlier, *Marshall I* opinion. The earlier decision concerned eel fishing under a particular treaty, not a general right to take resources throughout the province.

⁷¹ The Court wrote that the "treaties were local and the reciprocal benefits were local. In the absence of a fresh agreement with the Crown, the exercise of the treaty rights will be limited to the area traditionally used by the local community with which the separate but similar treaty was made" (*Marshall II*, *supra* note 69 at para. 17).

⁷² The Court held, "The September 17, 1999 majority judgement did not rule that the appellant had established a treaty right 'to gather' anything and everything physically capable of being gathered. The issues were much narrower and the ruling was much narrower" (see *ibid.* at para. 20).

⁷³ On the government's power to regulate treaty rights, the Court held that the "government's power to regulate the treaty right is repeatedly affirmed" and that "the government's general regulatory power is clearly affirmed" (see *ibid.* at paras. 24-28). It also observed that treaty rights were "limited by the rights of others", and therefore "the government must ultimately be able to determine and direct the way in which rights interact" (*ibid.* at paras. 24, 25).

livelihood” and not be found to be infringing the treaty right.⁷⁴ Finally, the Court accentuated the notion that the government could regulate the treaty right in such a manner as to give priority to non-Aboriginal interests in situations warranted by “regional/economic dependencies”.⁷⁵ In sum, the Court found that present Mi’kmaq treaty rights are largely contingent on Canadian judicial recognition, are subject to national and local infringement and regulation, do not extend to the accumulation of wealth, and may give way to non-Aboriginal objectives.

The domesticating elements of colonialism that caused so much concern amongst Aboriginal peoples testifying before the Commission are evident in *Marshall II*. Aboriginal peoples, by and large, view peace and friendship treaties as creating bilateral relationships that are not subject to the overriding authority of any one party. They do not interpret peace and friendship treaties as granting non-Aboriginal governments or courts the power to determine ultimate allocations of lands and resources. They believe that power was to be shared, and decisions about the treaties’ meanings were to be resolved through further treaty councils. Courts could take guidance from this perspective when faced with disputes over the meaning of these treaties and send the parties back to peace and friendship councils to resolve their differences through negotiation and agreement. Parliament and the courts have yet to accept this interpretation of peace and friendship treaties. The lack of consensus between Aboriginal peoples and Canada on this point makes peace fragile, and friendship somewhat elusive.

B. Numbered Treaties

Many of the same challenges that are apparent in the interpretation of peace and friendship treaties are also manifest in the construction of the more recent post-Confederation numbered treaties. Numbered treaties were signed in Canada between 1871 and 1921; geographically, they cover most of northern and western Ontario, the three prairie provinces, and the newly realigned Northwest Territories.⁷⁶ There are substantial questions about the effect and meaning of these treaties. While the courts frequently characterize these treaties as “sacred”,⁷⁷ it is also increasingly becoming clear that these solemn promises can be modified, infringed, or extinguished by the Crown as long as this course of action can be justified.⁷⁸ The Crown should not have plenary power in treaty matters when it was not acquired or reserved during the negotiated oral agreements. Thus, while the recognition of the sacred nature of these

⁷⁴ *Ibid.* at para. 36.

⁷⁵ *Ibid.* at para. 41.

⁷⁶ Negotiations for certain of these treaties are partially recorded in A. Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories Including the Negotiations on Which They Were Based* (Saskatoon: Fifth House, 1991).

⁷⁷ *R. v. Badger*, [1996] 1 S.C.R. 771, 133 D.L.R. (4th) 324 [hereinafter *Badger*].

⁷⁸ *Ibid.* See e.g. *R. v. Côté*, [1996] 3 S.C.R. 139, 138 D.L.R. (4th) 385 [hereinafter *Côté*].

agreements facilitates Aboriginal choice, their subjugation to wider Canadian legislative objectives simultaneously narrows the bounds within which this choice can be exercised. The circumscription of treaty rights in this manner makes it difficult for Aboriginal peoples to pursue objectives that may differ from those of Canada. For example, according to current treaty law, it will be very difficult to choose to exercise an Aboriginal right to hunt if this exercise is found to be visibly incompatible with a non-Aboriginal right to take up the land for settlement purposes.⁷⁹ Similarly, under certain treaties it will be extremely difficult to choose to use the land for Aboriginal spiritual purposes if the Crown occupies the land in a manner “incompatible with the exercise of [Aboriginal religious] activities”.⁸⁰

Many cases demonstrate how courts have interpreted the wording of treaties in ways that allow pan-Canadian rights to expand at the expense of diminishing Aboriginal control. The Supreme Court in *R. v. Horseman*⁸¹ expressed the Crown’s supposed “pre-eminent” position in this way when speaking of the federal government’s modification or merger of Treaty 8 under the Natural Resources Transfer Agreement of 1930: “[T]he power of the Federal Government to unilaterally make such a modification is unquestioned.”⁸² The federal government should not have power that was not contemplated or agreed to by the parties, yet the Court simply cites earlier unreflective case law that assumes this power without indicating its basis.⁸³

Creeping pan-Canadianism at the expense of Aboriginal choice under the courts’ interpretations of treaty rights is also evident in *Badger*. In this case the Supreme Court found that land “required or taken up” for settlement, mining, lumbering, trading, and other purposes would not be available for Indians “earning a livelihood” in the same manner as before the treaty existed.⁸⁴ The Court found this reduction of Aboriginal choice was acceptable even though a “promise that this livelihood would not be affected was repeated to all bands who signed the treaty.”⁸⁵ Aboriginal choice is diminished by this interpretation because visible non-Aboriginal development is sufficient to defeat the treaty right.⁸⁶ There seems to be no limit on non-Aboriginal development that would adequately protect areas of land for Aboriginal peoples to pursue their traditional livelihood. Yet the shrinking land base available to Aboriginal people

⁷⁹ *Côté, ibid.*

⁸⁰ *Sioui, supra* note 32 at 1072.

⁸¹ [1990] 1 S.C.R. 901, 108 N.R. 1 [hereinafter *Horseman* cited to S.C.R.].

⁸² *Ibid.* at 934.

⁸³ See the dissent of Wilson J. in *Horseman, ibid.*, which raises this issue.

⁸⁴ *Supra* note 77 at para. 29.

⁸⁵ *Ibid.*

⁸⁶ For an excellent analysis of the Crown’s supposed pre-eminence in similar treaty clauses, see P. Macklem, “The Impact of Treaty 9 on Natural Resource Development in Northern Ontario” in Asch, *supra* note 8, 97.

under the notion of “visible incompatible use” is not contemplated in the treaty.⁸⁷ In *Badger* the Court observed that neither the Crown nor Aboriginal peoples had ever envisioned that Aboriginal choice would become as bound as it is today when they negotiated Treaty 8.⁸⁸ Given the absence of agreement on the largely unforeseen effects of subsequent settler development on treaty lands, it is not clear why treaties should be construed in a way that decreases Aboriginal rights for the benefit of the Crown.

These issues raise important questions regarding not only the scope of the peace and friendship treaties and the numbered treaties, but also the adequacy of law in determining answers to these questions. If, as the Commission proposed, “it is doubtful in many cases that the First Nations participating in the numbered treaties knew that the written texts they signed differed from the oral agreements they concluded,”⁸⁹ why should Aboriginal peoples, rather than the Crown, watch their land use options decrease? On the whole, the courts’ liberal interpretative principles do not seem to be up to the task of addressing this larger issue.⁹⁰ The courts are institutionally limited to is-

⁸⁷ In fact, in one notable case concerning Treaty 11, *Re Paulette and Registrar of Titles (No. 2)* (1973), 42 D.L.R. (3d) 8 at 33, 9 C.N.L.C. 307 (N.W.T. S.C.), rev’g (1973), 39 D.L.R. (3d) 43 (N.W.T. S.C.), rev’d on other grounds (1975), 63 D.L.R. (3d) 1 (N.W.T. C.A.), aff’d on other grounds (1976), [1977] 2 S.C.R. 628, 72 D.L.R. (3d) 161 [hereinafter *Re Paulette* cited to D.L.R.], the court held that

it is almost unbelievable that the Government party could have ever returned from their efforts [to sign a treaty] with any impression but that they had given an assurance in perpetuity to the Indians in the territories that their traditional use of land was not affected.

A close examination of many of the numbered treaties raises these same doubts. See Treaty 7 Elders and Tribal Council *et al.*, *The True Spirit and Original Intent of Treaty 7* (Montreal: McGill-Queen’s Press, 1996) at 210-12; R. Fumoleau, *As Long as This Land Shall Last: A History of Treaty 8 and 11, 1870-1939* (Toronto: McClelland and Stewart, 1976).

⁸⁸ See *Badger*: “Since the Treaty No. 8 lands were not well suited to agriculture, the government expected little settlement in the area” (*supra* note 77 at para. 55). Also: “No doubt the Indians believed that most of Treaty No. 8 land would remain unoccupied and so would be available to them for hunting, fishing and trapping” (*ibid.* at para. 57).

⁸⁹ *Royal Commission, Vol. 1, supra* note 11 at 173. See also the comments of Morrow J. in *Re Paulette*, where he wrote, “[I]t is almost unbelievable that the Government party could have ever returned from their efforts with any impression but that they had given an assurance in perpetuity to the Indians in their territories that their traditional use of land was not affected” (*supra* note 87 at 33).

⁹⁰ In fact, in the twentieth century, there were a select number of “modern” treaties that followed the numbered treaties and that were signed between Aboriginal peoples and the Crown (*e.g.* the Williams Treaty of 1923 in Ontario; the 1975 James Bay and Northern Quebec Agreement in Quebec). These courts have found that these treaties should not have benefited from the large, liberal, and generous interpretive principles of earlier agreements. See *Howard, supra* note 35 at 306; *Eastmain Band, supra* note 35 at 518.

suings opinions on a case-by-case basis that often cannot adequately assess the larger treaty context.

If the courts cannot effectively comprehend and implement treaties, one wonders whether they are the best organizational or administrative bodies to entrust with this task. In keeping with this sentiment, the Commission observed that “at some point we may have to stop looking to the courts for assistance.”⁹¹ It recommended that other processes and institutions should be initiated as an alternative to the courts to complete the parties’ incomplete treaty agreements.⁹² In this spirit, the Commission outlined a two-pronged approach to place the resolution of treaty disputes in a broader policy and institutional context. First, the terms of the treaties must be capable of being revisited to implement, revise, enter, and renew these agreements.⁹³ Second, institutions need to be created that take the burden of treaty matters out of the courts and into a more responsive, broad, and flexible framework.⁹⁴ These recommendations from the Report and the degree to which they have been fulfilled will now be addressed.

C. Treaty Initiatives

1. Entering, Implementing, and Renewing Treaties

The Royal Commission made numerous recommendations for the Crown and Aboriginal peoples to enter, implement, and renew treaties.⁹⁵ While there have been some noteworthy and high-profile initiatives in this regard, the parties’ approaches to treaty making have largely fallen short of the proposals put forward by the Commission. The Commission recommended that the treaty process proceed through a coordinated legislative effort by enacting a new Royal Proclamation and creating a detailed legislative scheme to administer the treaty process. This has not occurred. Instead, the provincial, federal, and First Nations governments have, for the most part, elected to proceed with treaty efforts under province-wide or regional policy initiatives. While this approach may allow for a greater responsiveness to local conditions, a policy approach does not impose the same discipline and accountability on the actors as would be found in a legislatively mandated initiative. This policy paradigm also suggests that Aboriginal peoples are mostly being “managed” by governments as an internal municipal concern, instead of being treated as peoples with distinct and separate rights and responsibilities. Some may describe this process as the domestica-

⁹¹ *Royal Commission, Vol. 2, supra* note 12 at 36.

⁹² *Ibid.* at 47.

⁹³ Recommendations 2.2.2 to 2.2.14 (*ibid.* at 49-87).

⁹⁴ Recommendations 2.2.15 to 2.2.17 (*ibid.* at 87-94).

⁹⁵ See *Royal Commission, Vol. 1, supra* note 11.

tion of colonialism, when Aboriginal peoples are treated as entities that must ultimately be subordinated by the Canadian state.⁹⁶

Even more problematic than the failure to create an executive and legislative framework for treaty making, however, is that in many instances the contemporary treaty process reduces, rather than enhances, Aboriginal control and choice. The Commission did not, however, envision the purpose of treaties in this way: instead, it noted that “[t]reaty making does not require the parties to surrender their deepest beliefs and rights as a precondition for practical arrangements for coexistence.”⁹⁷ Treaty making should provide a means for bringing about justice and reconciliation,⁹⁸ and for recognizing and affirming the unique relationships that Aboriginal peoples have with their lands and the newcomers.⁹⁹ Therefore treaties should not require the modification of either society to “fit” within the framework of the other, particularly in circumstances where this would substantially damage the fabric or values of their respective communities. Yet such a view of the treaty relationship does not seem adequately fulfilled at present. In fact, in many cases it seems as if the contemporary treaty relationship requires Aboriginal conformity with Canadian practices, customs, traditions, and laws.

Indeed, while there are many positive developments in the pursuit of treaty relationships (found in examples such as the Yukon and Nunavut Land Claims Agreements, the Nisga’a and Sechelt treaties, and the Manitoba Framework Agreement), these developments may contain as much cause for concern as for celebration. Even though these agreements certainly increase the options available to Aboriginal peoples, they simultaneously limit opportunities to pursue objectives that may differ in significant ways from those of Canada. Perhaps this circumscription is to be expected in any negotiated process where “give and take” is found on both sides of the table. On balance, however, Aboriginal peoples are giving up much more in this process than they are gaining. At the same time, Canada seems to be giving up much less with respect to its governmental structure and system of landholding. The notion of reconciliation that underlies and justifies treaties, according to the Commission, is more concerned with reconciling Aboriginal peoples to Canada than it is with reconciling Canada to the existence of different social, cultural, and political indigenous entities within the state. For the most part, therefore, modern treaties require that Aboriginal peoples conform to Canadian values and law, yet they do not demand that Canada simultaneously conform to Aboriginal ideologies and law. The imbalance that is being replicated in contemporary treaty relationships does not bode well for the survival of

⁹⁶ See Schulte-Tenckhoff, *supra* note 47.

⁹⁷ *Royal Commission*, Vol. 2, *supra* note 12 at 20.

⁹⁸ *Ibid.* at 37-38.

⁹⁹ See Canada, Royal Commission on Aboriginal Peoples, *Treaty Making in the Spirit of Co-existence: An Alternative to Extinction* (Ottawa: Supply and Services, 1995).

Aboriginal social and political regimes that differ from those found in the rest of Canada. The following example illustrates this point.

The *Nisga'a Final Agreement* is an attempt by the governments of Canada, British Columbia, and the Nisga'a Tribal Council to produce a "just and equitable settlement" that "will result in reconciliation and establish a new relationship among them."¹⁰⁰ The good faith and efforts of so many Nisga'a and Canadian citizens to arrive at the *Final Agreement* is worthy of the highest honour and praise. The agreement is ambitious, providing for collective Nisga'a ownership of approximately two thousand square kilometres of land in the Nass Valley watershed in northwest British Columbia. The proposed treaty covers such diverse issues as land titles, minerals, water, forests, fisheries, wildlife, governance, administration of justice, fiscal relations (including taxation), cultural property, and dispute resolution. Many of these provisions provide significant benefits for Nisga'a people that are far greater than anything contemplated under the *Indian Act*.¹⁰¹ These benefits cannot be ignored, particularly when they appear to have the broad support of the people for whom they were negotiated. An appropriate question to ask, however, is whether escaping the *Indian Act* is the only relevant standard for judging the agreement. This is a tricky inquiry to pursue, particularly when there are numerous criteria by which the agreement could be measured, many of which are positive. For the purposes of this article, it is relevant to ask whether the *Final Agreement* should also be judged by the scope it allows to the Nisga'a to pursue a path to development that differs from Canada's own pervasive economic, social, and political structures. In my judgment, while there is much that is laudable in the *Final Agreement*, there is also much that foreshadows a substantial loss for the Nisga'a in economic, social, and political terms.¹⁰²

The Nisga'a may encounter the following potential losses as a result of the *Final Agreement*. Approximately 1,992 square kilometres of land that the Nisga'a will hold as a fee simple interest in the treaty can be alienated¹⁰³ and thus conceivably be unavailable for Nisga'a use or possession at some time in the future.¹⁰⁴ If any future Aboriginal rights are found by the courts to exist, they will be held by Canada and not the

¹⁰⁰ *Nisga'a Final Agreement*, initialled 4 August 1998, at 1 [hereinafter *Final Agreement*].

¹⁰¹ R.S.C. 1985, c. I-5.

¹⁰² For differing opinions on the Nisga'a Agreement, see (1998/99) 120 BC Studies for commentary devoted to the agreement.

¹⁰³ *Final Agreement*, *supra* note 100 at 32, c. 3, s. 4(a).

¹⁰⁴ While it may seem unlikely that Nisga'a people will lose access to their land given the government power they will retain over alienated land, its potential future loss to them should not be entirely dismissed. The Alaska Land Claims Settlement provided that Indians lands would be held in fee simple, and while the provisions there were given in a different context, many groups lost their lands. See T. Berger, *Village Journey: The Report of the Alaska Native Review Commission* (New York: Hill and Wang, 1985).

Nisga'a.¹⁰⁵ The structure of Nisga'a governance significantly departs from, and in most respects replaces, the traditional House (wilps) system of government.¹⁰⁶ Some important Nisga'a law-making authority will be subject to certain provincial and federal laws, either through equivalency or paramountcy provisions.¹⁰⁷ Nisga'a institutions or court decisions will ultimately be subject to the discipline of the British Columbia Supreme Court.¹⁰⁸ Individual Nisga'a taxation will be collected under general revenues.¹⁰⁹ Finally, disagreements in respect of the *Final Agreement* are supervised by non-Nisga'a Canadian courts.¹¹⁰ Such provisions could represent a substantial challenge to Nisga'a attempts to fashion their lives in different economic, social, and political terms from those of the majority around them. Therefore, though the treaty represents some of the highest aspirations of Aboriginal peoples and Canadians in creating a relationship of mutuality and respect, it also contains a number of elements that potentially make Canadian visions of law, politics, and development the standard by which Nisga'a life may ultimately be judged.

2. Treaty Institutions: Getting Out of the Courts

In addition to recommending the creation, renewal, and implementation of treaties, a second prong of the Commission's approach to treaties involved recommendations that institutions be created to remove treaty disputes from the courts and place them in a more responsive, broad, and flexible framework.¹¹¹ In particular, the Commission suggested that both treaty commissions and an independent lands and treaty

¹⁰⁵ The Nisga'a have agreed to release to Canada any other Aboriginal rights that are not dealt with in the *Final Agreement*:

If, despite this Agreement and the settlement legislation, the Nisga'a Nation has an aboriginal right, including aboriginal title, in Canada, that is other than, or different in attributes or geographical extent from, the Nisga'a section 35 rights as set out in this Agreement, the Nisga'a Nation releases that aboriginal right to Canada (*Final Agreement*, *supra* note 100, General Provisions, s. 26).

¹⁰⁶ Many of the responsibilities of wilps will be effectively replaced by the Nisga'a Lisims Governments and Nisga'a Village Governments. While this is not expressly in the agreement, a review of the powers of these governments makes this evident. See *ibid.* at 159-60, c. 11, Nisga'a Government, ss. 2-8.

¹⁰⁷ See *ibid.* at 25 (incidental impact provisions), 66-68 (forestry equivalency provisions), 159 (federal/provincial "paramountcy" in environmental protection).

¹⁰⁸ See *ibid.* at 162-63 (concerning judicial review of administrative decisions by Nisga'a Institutions), 193 (concerning an appeal from Nisga'a court to the B.C. S.C.).

¹⁰⁹ See *ibid.* at 217.

¹¹⁰ See *ibid.* at 239.

¹¹¹ See Recommendations 2.2.15 to 2.2.17 (*Royal Commission*, Vol. 2, *supra* note 12 at 92-94).

tribunal be created.¹¹² The Commission's objective for each institution was to produce an administrative structure and environment that would "promote and permit treaty processes to succeed."¹¹³ Such treaty commissions were to be established by Canada or relevant provinces as permanent, neutral, and independent bodies that would "facilitate and oversee negotiations in treaty processes."¹¹⁴ They would accomplish this goal by fact finding, monitoring and setting standards for negotiation, conducting research, supervising cost sharing, mediating disputes, providing remedies, and engaging in binding or non-binding arbitration to resolve certain disputes. They would be hands-on organizations that would ensure that the day-to-day integrity of negotiations was maintained.

A lands and treaty tribunal, in contrast, would be more circumspect in its operation and deal with the resolution of specific claims (outstanding treaty implementation issues) and more strictly procedural matters relative to treaty creation and renewal.¹¹⁵ For specific claims, the tribunal would review federal funding, monitor the good faith of the bargaining process, adjudicate claims, and provide remedies to Aboriginal claimants where such action would be appropriate.¹¹⁶ Such a tribunal could, *inter alia*, review the adequacy of funding, supervise the negotiation of interim relief agreements, and arbitrate disputes referred to it on a consensual basis.¹¹⁷ Both of these institutions (treaty commissions and the lands and treaty tribunal) are absolutely necessary for Aboriginal peoples to gain greater control of their lands and resources; furthermore, the Commission strongly recommended their use. The expertise, neutrality, and independence of treaty commissions and a treaty tribunal would assist in widening the scope of the treaty relationship.

¹¹² The Royal Commission was not the first body to recommend the creation of an Indian Claims Commission, though the institutions proposed by the Commission contemplate broader authority than the previously recommended treaty tribunals and commissions. An Indian Claims Commission was proposed by the Trudeau government in the White Paper of 1969 when it intended to discontinue most Indian rights, and an Indian Claims Commission was created in the United States in 1946. See K. Lysyk, "The United States Indian Claims Commission" in P. Cumming & N. Mickenberg, eds., *Native Rights in Canada*, 2d ed. (Toronto: Indian-Eskimo Association, 1972) 243.

¹¹³ *Royal Commission*, Vol. 2, *supra* note 12 at 90-91.

¹¹⁴ *Ibid.* at 92.

¹¹⁵ See Recommendation 2.4.32:

The tribunal be established by federal statute operative in two areas:

- a) settlement of specific claims, including those removed by the Aboriginal party from the broader treaty-making, implementation and renewal process; and
- b) treaty-making, implementation and renewal processes (*ibid.* at 602).

¹¹⁶ *Ibid.* at 603.

¹¹⁷ *Ibid.*

These institutions were recommended to help overcome the difficulties in the application of interpretive principles, the assumptions underlying the growth of Crown land use, and the presumptions about the diminishing nature of Aboriginal land use. It is likely that the courts, Crown, Parliament, and provincial legislatures will continue to subjugate Aboriginal peoples within their structures, leaving little room for Aboriginal innovation and difference, unless these more neutral and independent institutions are established for treaty supervision.

First Nations and Canadian governments have recently made some progress in inaugurating treaty institutions. There have been detailed discussions and negotiations between the federal government and Aboriginal groups to replace the Indian Claims Commission with an independent claims body to improve the effectiveness of the specific claims process.¹¹⁸ While the full implementation of this claims body has reportedly been stalled over a disagreement about the size of the fiscal envelope for the new tribunal, there have been some positive developments. In May 2000, for example, the federal government announced that it would agree to limited changes in the Indian Claims Commission that would provide greater authority in mediating disputes. While the mandate of the Indian Claims Commission needs to be made much broader, that discussions have occurred and that some small gains have been made indicates that there is a recognition of the desirability of an independent institution to deal with land claims. A lands and treaty tribunal can be considered a key institution to assisting Aboriginal peoples in overcoming the colonial nature of the management of their lands and resources.¹¹⁹

The introduction of treaty commissions to explore issues relating to historic treaties or to oversee negotiations in modern agreements has seen slightly more success. Two significant examples representing different models of how treaty commissions may function are apparent in Saskatchewan and British Columbia. While both treaty commissions were introduced prior to the Report, the Commission cited them each as examples of what could be accomplished if the parties worked together.¹²⁰ While the British Columbia Treaty Commission has recently had success in overseeing the successful negotiation of its first agreement in principle with the Sechelt Nation of the

¹¹⁸ Department of Indian and Northern Affairs Canada, News Release 1-98123, "Gathering Strength Anniversary Marks Progress" (7 January 1999).

¹¹⁹ In noting the benefits of claims commissions I am not unaware of the critique of these institutions in the United States; see e.g. H. Rosenthal, *Their Day in Court: A History of the Indian Claims Commission* (New York: Garland Publishing, 1990). In designing these institutions in a Canadian context, it is important that lessons be learned from the problems encountered in the U.S.

¹²⁰ *Royal Commission*, Vol. 2, *supra* note 12 at 90.

sunshine coast,¹²¹ it has, on the one hand, had some difficulties in persuading the parties to the process to follow some of its recommendations.¹²² The Saskatchewan Treaty Commission, on the other, is an excellent example of how institutions can work to bridge the historic and future treaty relationships of the parties.

The Office of the Treaty Commissioner in Saskatchewan was established in 1989 to review issues relating to treaty land entitlement and education in that province. It saw some success in its initial efforts, but the office was reconstituted in 1997 with established guiding principles¹²³ and a work plan¹²⁴ to discuss issues of mutual interest. This has led to some impressive results, including the collection of Saskatchewan treaty elders' understandings of the relationship, and the establishment of an Exploratory Treaty Table to examine issues such as child welfare, education, shelter, health, justice, treaty annuities, and hunting, fishing, trapping, and gathering. Following an extensive review of these issues, the Office of the Treaty Commissioner of Saskatchewan made some sound recommendations to the parties to help them further build upon their relationship.¹²⁵ A central suggestion was that a new paradigm be created based on the treaty partnerships rather than on the outmoded and problematic *Indian Act*.¹²⁶ Building on recommendations found in the Report, the treaty commission

¹²¹ Department of Indian and Northern Affairs Canada, News Release 1-98130, "Progress Continues as Canada, British Columbia and Sechelt Release Consultation Draft Agreement in Principle" (26 January 1999).

¹²² From 1997 to 1998 there was a period of turmoil within the British Columbia Treaty Commission as the chief commissioner, Alex Robertson, left the commission because of failures of government parties to respond to recommendations concerning interim measures and Aboriginal title. In spring 2000 the Sechelt people rejected the agreement in principle negotiated by their leaders and revived their land claims case against the Crown.

¹²³ Guiding principles included statements that the treaties are a fundamental part of the relationship between Treaty First Nations in Saskatchewan and the Crown; it is desirable to arrive at a common understanding of Treaties 4, 5, 6, 8, and 10 as they apply in Saskatchewan; there are differences in views over the content and meaning of the treaties, which the parties are committed to exploring (the Treaty First Nations believe that the treaties have not been implemented according to their spirit and intent, including oral promises, while the government of Canada relies primarily on the written texts of the treaties as the embodiment of the Crown's obligations); a renewed Office of the Treaty Commissioner will be an effective intergovernmental mechanism to assist both parties in the bilateral process, and in the identification and discussion of treaty and jurisdictional issues. See *Statement of Treaty Issues: Treaties as a Bridge to the Future* (Saskatoon: Office of the Treaty Commissioner, 1998) c. 4 [hereinafter *Statement of Treaty Issues*].

¹²⁴ The Work Plan included three objectives: to build on a forward-looking relationship that began with the signing of the treaties in Saskatchewan; to reach a better understanding of each other's views of the treaties and of the results expected from the exploratory treaty discussions; and to explore the requirements and implications of treaty implementation based on the views of the two parties (*ibid.*).

¹²⁵ *Ibid.* at 71-82.

¹²⁶ This paradigm shift was suggested not only for the Crown, but also for First Nations that "may wish to reconsider how they are organized politically." In so noting, the treaty commission picked up

stated that a new paradigm in Saskatchewan could only be initiated as the general public became more aware of the context of the treaty relationship and the benefits that *non-Aboriginal* people receive as a result of these historic agreements.¹²⁷ The treaty commission's focus affirms the notion that non-Aboriginal peoples also have treaty rights in the province. The treaty commission hopes that the further identification and resolution of issues of mutual concern will proceed, such as the continuance of common, exploratory, fiscal, and governance treaty tables, as a greater appreciation for the treaty relationship develops through public acts of renewal and general public education.¹²⁸ The actions of the Office of the Saskatchewan Treaty Table appear to be among the most encouraging initiatives within Canada to strengthen and renew the treaty relationship. Unlike the courts, where little can be done in a holistic way to address the variety of issues that need attention, treaty commissions can provide the mechanisms for people to create and rebuild a common stock of positive experiences through official and unofficial interactions. Such actions are critically important for Aboriginal peoples in their acquisition and maintenance of a measure of control over the affairs of their governance and economic development.

D. Summary

As this section has shown, the treaty relationship between Aboriginal peoples and the Crown is being simultaneously diminished and strengthened. The courts are interpreting historic treaties in a manner that will, over time, significantly erode the land base that Aboriginal peoples may require for their livelihood. Furthermore, the parties are negotiating new treaties in which Aboriginal peoples conform largely to non-Aboriginal structures, values, and processes. Finally, other treaty initiatives are being managed through policy forums without the benefit of the discipline and accountability that legislative enactment can provide. Nevertheless, there are numerous other activities currently underway that positively attempt to renew, strengthen, implement, or create treaty relationships. The recommendations of the Commission are thereby generally followed, as the Commission had placed treaties in a central position for building the relationship between Aboriginal peoples and the Crown. In fact, many other recent and significant initiatives have taken place. Important steps have been taken in

on the Commission's recommendation that Aboriginal peoples reconstitute themselves as nations. See Recommendation 2.3.7, *Royal Commission, Vol. 2, supra* note 12 at 234-36. In support of its position, the treaty commission noted, "Indian Act Bands, created by the federal government during an earlier era, may not be appropriate building blocks for First Nations in a treaty partnership" (*Statement of Treaty Issues, supra* note 123 at 73).

¹²⁷ *Statement of Treaty Issues, ibid.*

¹²⁸ The Office of the Treaty Commissioner of Saskatchewan suggested such acts as placing monuments at treaty-making sites, holding annual treaty gatherings, delivering programs on treaties in the schools, exploring the reissuance of treaty suits, medals, and flags, initiating essays and scholarships on treaties, and proclaiming a treaty awareness day (*ibid.* at 75).

the Umbrella Final Agreement,¹²⁹ the Nunavut Agreement,¹³⁰ treaty land entitlement agreements in Manitoba,¹³¹ the Labrador Inuit land claim and Agreement-in-Principle,¹³² the initiation of treaty processes in the Treaty 8 area,¹³³ and the Treaty Commemoration Statement signed by the Nova Scotia Mi'kmaq, Canada, and Nova Scotia to acknowledge their long-standing treaty relationship.¹³⁴ These actions are significant and substantial, illustrating the parties' commitments to treaties as an instrument for building their relationships. Notwithstanding the positive aspects of these developments, the elements that work to constrict this relationship indicate that much more needs to be done before the treaty relationship may be considered to be mutually beneficial for both Aboriginal peoples and the Crown.

II. Aboriginal Title

Aboriginal title received its first significant review under the *Constitution Act, 1982*¹³⁵ subsequent to the release of the Report. The decision of *R. v. Delgamuukw*¹³⁶ was handed down a full year after the Report's release, and its appearance stalled certain initiatives for a time while the parties reviewed the implications of the case for policy development. *Delgamuukw* considered the claim of the Gitksan and

¹²⁹ This agreement between the Council for the Yukon Indians, the government of Canada, and the government of the Yukon sets out substantive benefits and a process that will guide individual Yukon First Nations in individually negotiated agreements. See online: Indian and Northern Affairs Canada <http://www.inac.gc.ca/pr/agr/umb/index_e.html> (date accessed: 5 March 2001).

¹³⁰ *The Nunavut Land Claims Agreement Act*, S.C. 1993, c. 29. Nunavut became a public government on 1 April 1999 and is a significant exercise of public government by the Inuit of the eastern Arctic.

¹³¹ The *Manitoba Treaty Land Entitlement Framework Agreement* will transfer 445,452 hectares of land to nineteen First Nations to make up for a shortfall in allocation at the time the reserves were created, under treaties 1, 2, 3, 4, 5, 6, and 10. See Backgrounder attached to Indian and Northern Affairs Canada, News Release 2-00130, "Wuskwi Sipiik Cree Nation Acquires New Reserve Land" (28 April 2000). The *Manitoba Treaty Land Entitlement Framework Agreement* was signed by nineteen First Nations, Canada, and Manitoba on 29 May 1997. See online: Indian and Northern Affairs Canada <http://www.inac.gc.ca/nr/prs/j-a2000/00130bk_e.html> (date accessed: 21 November 2000).

¹³² This claim by the Labrador Inuit was submitted in 1977 and an agreement in principle was announced on 18 December 1998. The Labrador Inuit Land Claims Agreement was initialled 10 May 1999. See online: Government of Newfoundland and Labrador <<http://www.gov.nf.ca/liaaip/default.htm>> (date accessed: 21 November 2000).

¹³³ A declaration of intent was reached with Treaty 8 Nations to begin a treaty and self-government process.

¹³⁴ The Mi'kmaq of Nova Scotia have also entered into an innovative legislative arrangement to transfer administrative jurisdiction over education in an agreement called *An Act Respecting Education on Mi'kmaq Reserves in Nova Scotia*, S.N.S. 1998, c. 17 [hereinafter *Mi'kmaq Education Act*].

¹³⁵ Section 35, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

¹³⁶ [1997] 3 S.C.R. 1010, 153 D.L.R. (4th) 193 [hereinafter *Delgamuukw*].

Wet'suwet'en¹³⁷ peoples to Aboriginal title and self-government over approximately fifty-eight thousand square kilometres of land in (what is now called) northwest British Columbia.¹³⁸ The decision indicated that Aboriginal title was a constitutionalized "right to the land itself", which could be used "for a wide variety of purposes".¹³⁹ The decision halted responses to the Report because both supporters and critics of Aboriginal rights argued that this case made "new law and changed traditional legal concepts."¹⁴⁰ This perception required that the parties ensure that their pursuit of the Commission's recommendations was still in accordance with the law. After careful review, some parties largely returned to dealing with Aboriginal title issues as they had prior to the release of *Delgamuukw*,¹⁴¹ while others argued that the decision required a dramatic change.¹⁴² A detailed inspection of the judgment makes it clear that the decision aligns with many of the assumptions that reinforce the Commission's treatment of Aboriginal title.¹⁴³

¹³⁷ The Wet'suwet'en are an Athabaskan-speaking people, and the Gitksan are associated with the Tsimshian language group. Their territories are located in or near village sites on the Skeena, Babine, and Bulkley Rivers. See G. Wa & D. Uukw, *The Spirit in the Land* (Gabriola, B.C.: Reflections, 1992).

¹³⁸ Hereditary Chief Alice Jeffrey summarized their action: "The Gitksan people feel we have absolute title and ownership to our land" (A. Jeffrey, "Remove Not the Landmark" in F. Cassidy, ed., *Aboriginal Title in British Columbia: Delgamuukw v. The Queen* (Lantzville, B.C.: Oolichan Books, 1992) 58 at 61).

¹³⁹ *Delgamuukw*, *supra* note 136 at paras. 140, 117.

¹⁴⁰ See e.g. L. Grindlay, "Native Bands Rejoice at Top Court's Ruling" *The Vancouver Province* (12 December 1997) A4. See also A. Purvis, "Our Home and Native Land" *Time Magazine* 150:26 (22 December 1997) 18. Other Aboriginal people also expressed the opinion that this decision was a fundamental change. Chief Joe Mathias of the First Nations Summit, an organization representing a majority of First Nations in British Columbia, similarly expressed his opinion that the decision is a major change, stating it "restores the rule of law and justice for First Nations" (P. Barnsley, "New Trial Order in *Delgamuukw v. B.C.*" *Windspeaker* 15:9 (January 1998) 2). Furthermore, non-Aboriginal people generally not supportive of Aboriginal rights also noted the changes brought about by *Delgamuukw*. See e.g. G. Gibson, "The Land-Claims Ruling Is a Breathtaking Mistake" *The [Toronto] Globe and Mail* (16 December 1997) A21. One columnist reported that the court "drastically undermined the Crown ownership of 94 per cent of the land mass of B.C." (T. Lautens, "How to Make Indian Land Claims Go Away" *The Vancouver Sun* (28 February 1998) A23). See also T. Morley, "A Distant Court, An Imprudent Decision" *The Vancouver Sun* (20 December 1997) A21; M.H. Smith, "What the Court Ignored in *Delgamuukw*" *The Globe and Mail* (7 January 1998) A15.

¹⁴¹ E.g. Premier Glen Clark commented that "to their credit" the Nisga'a did not change their position on their treaty as a result of *Delgamuukw* (G. Clark, Address (Faculty of Law, University of Toronto, 15 October 1998) [unpublished]).

¹⁴² See e.g. K. McNeil, *Defining Aboriginal Title in the 90's: Has the Supreme Court Finally Got it Right?* (Toronto: Roberts Centre for Canadian Studies, 1998).

¹⁴³ See J. Borrows, "Sovereignty's Alchemy: An Analysis of *Delgamuukw v. British Columbia*" (1999) 37 *Osgoode Hall L.J.* 537.

For example, both the Commission and *Delgamuukw* suggested that negotiations were more appropriate than litigation to resolve issues of Aboriginal title. The Commission wrote that these negotiations should be placed in a treaty framework and resolved in a principled way. It observed that “[n]egotiation is the best and most appropriate way to address these issues, and land claims policies should be replaced by treaty processes, primarily under the auspices of regional treaty commissions, with Aboriginal Lands and Treaties Tribunals performing supplementary functions.”¹⁴⁴ The Commission’s linkage of Aboriginal title and treaties, facilitated by a process of legislatively enacted commissions and tribunals, draws upon its discussion concerning the centrality of treaties. In dealing with issues of Aboriginal title, the Commission recommended enlarging the inadequate land base of Aboriginal peoples in recognition of the historic wrongs that had been perpetrated against them,¹⁴⁵ and providing an economic base on which they could build their communities.¹⁴⁶ In line with the Commission’s approach to treaty issues, it envisioned that the best way to deal with Aboriginal land was “through legitimate processes of consultation and negotiation enshrined in legislation”.¹⁴⁷ The Commission further developed its reliance on negotiations and attempted to expand the scope of these negotiations by defining Aboriginal title in a broad and generous way. Specifically, the Commission observed:

The law of Aboriginal title provides a firm foundation for contemporary protection of Aboriginal lands and resources. It imposes extensive obligations on the Crown to protect them. These duties of the Crown oblige Parliament to enact fair and effective institutional processes to facilitate negotiated solutions. The law requires government not to rely simply on the public interest as justification for limiting the exercise of Aboriginal rights but to act in the interests of Aboriginal peoples when negotiating arrangements concerning their lands and resources.¹⁴⁸

In support of the central supposition that the law of Aboriginal title could support a negotiation-based regime to increase the Aboriginal land base, the Commission de-

¹⁴⁴ *Royal Commission, Vol. 2, supra* note 12 at 430.

¹⁴⁵ The Commission noted, however, that efforts to increase the Aboriginal land base extend beyond remedies and entitlements. It observed, “Expanding the Aboriginal land base is not just about honouring past obligations or paying a moral debt to Aboriginal people. It is about laying a firm consensual foundation for a new relationship between Aboriginal and non-Aboriginal Canadians, one of fair sharing of Canada’s enormous land mass, of mutual reconciliation and peaceful co-existence” (*ibid.*).

¹⁴⁶ The Commission noted in this regard that “[w]ithout adequate lands and resources, Aboriginal peoples will be pushed to the edge of economic, cultural and political extinction” (*ibid.* at 574).

¹⁴⁷ *Ibid.* at 570.

¹⁴⁸ *Ibid.* at 568.

voted a lengthy chapter to issues of lands and resources in the second volume of its Report.¹⁴⁹

Delgamuukw supports the Commission's notion that negotiation is the best way to resolve issues of Aboriginal title. La Forest J. indicated that "the best approach in these kinds of cases [dealing with title] is a process of negotiation and reconciliation that properly characterizes the complex and competing interests at stake."¹⁵⁰ Similarly, Lamer C.J.C. wrote that section 35 of the *Constitution Act, 1982* provides a solid base on which negotiations about Aboriginal rights can be built, observing that the "Crown is under a moral, if not a legal, duty to enter into and conduct those negotiations in good faith."¹⁵¹ The decision as a whole therefore seems to support the idea that the parties should resolve the issue of Aboriginal title through negotiation. Indeed, the sending of *Delgamuukw* back to trial due to a defect in the pleadings and the expansion of the rules of evidence to incorporate Aboriginal oral history indicate the uncertainties involved in litigation that could make negotiation more attractive for both parties. Furthermore, the decision's expanded scope of Aboriginal title as a "right to exclusive use and occupation of the land"¹⁵² in areas where the province has conventionally considered itself as holding full Crown title may also create some incentives for the province to enter into negotiations. On the other hand, that Aboriginal title can be infringed by the provincial government through "compelling and substantial" legislative objectives that can justify the infringement of Aboriginal title¹⁵³ may bring Aboriginal groups to the table. Thus, negotiation of title through a meaningful process seems to be a theme that runs through both the Commission's and the Supreme Court's writings on Aboriginal title, while illustrating the importance of treaties to the resolution of this issue.

A. Congruence: Aboriginal Title, the Commission, and the Supreme Court

In addition to their similar emphases on negotiation, the Commission and the Supreme Court seem to characterize Aboriginal title similarly. First, the Commission described Aboriginal title as a "real interest in land that contemplates a range of rights with respect to lands and resources," which is "recognized and affirmed by section

¹⁴⁹ *Supra* note 12, c. 4. This chapter covered concerns such as the significance of land to Aboriginal peoples, the loss of most of this land to settlers through misunderstanding and injustice, and the inadequacy of current federal claims processes to deal with the loss that Aboriginal peoples experienced.

¹⁵⁰ *Delgamuukw*, *supra* note 136 at para. 207.

¹⁵¹ *Ibid.* at para. 186.

¹⁵² *Ibid.* at para. 117.

¹⁵³ *Ibid.* at para. 161.

35(1)."¹⁵⁴ Similarly, the Court also characterized Aboriginal title under subsection 35(1) as a substantial interest in land: "the right to exclusive use and occupation of the land held pursuant to that title for a variety of purposes which need not be aspects of those aboriginal practices, customs and traditions which are integral to distinctive aboriginal cultures."¹⁵⁵ Second, the Commission stated that the "Crown has a special fiduciary obligation to protect the interests of Aboriginal people, including Aboriginal title."¹⁵⁶ In the same manner, the Court held that the "fiduciary relationship between the Crown and aboriginal peoples demands that aboriginal interests be placed first."¹⁵⁷ Third, the Commission found that the "Crown has an obligation to reconcile the interests of the public with Aboriginal title."¹⁵⁸ In a parallel description, the Court also noted that subsection 35(1) is directed at the "reconciliation" of Aboriginal prior occupation with the interests of other Canadians under the sovereignty of the Crown: "Aboriginal rights are a necessary part of the reconciliation of aboriginal societies with the broader political community of which they are part."¹⁵⁹ The Court then provided a test to assist the government in reconciling the interests of the public with Aboriginal title.

The Commission's concept of Aboriginal title was clearly influential for the Court in *Delgamuukw*: the Report was cited several times in the decision. In some respects the Commission and the Court's definition of Aboriginal title articulates a substantially greater interest than previous cases had recognized. This creates the potential for greater Aboriginal access to land and for stronger regimes that may allow for greater innovation in the allocation of lands and resources. This would support the Commission's recommendations for an increased Aboriginal land base and greater Aboriginal control over that land. As such, the decision partially overcomes the historical bias against Aboriginal land holdings that had been present in earlier cases.

In *St. Catherine's Milling and Lumber v. R.*, Lord Watson wrote that the tenure of the Indians was a personal and usufructuary right.¹⁶⁰ This narrow view of Aboriginal title largely prevailed through the first one hundred years of Canada's history. While this view of title was somewhat broadened in *Calder v. British Columbia (A.G.)*¹⁶¹ in 1973, and questioned in *R. v. Guerin*,¹⁶² it was still unclear how broadly this interest would be characterized until *Delgamuukw* was decided. The notion of Aboriginal title

¹⁵⁴ *Royal Commission, Vol. 2, supra* note 12 at 573.

¹⁵⁵ *Delgamuukw, supra* note 136 at para. 117.

¹⁵⁶ *Royal Commission, Vol. 2, supra* note 12 at 573.

¹⁵⁷ *Delgamuukw, supra* note 136 at para. 162.

¹⁵⁸ *Royal Commission, Vol. 2, supra* note 12 at 573.

¹⁵⁹ *Delgamuukw, supra* note 136 at para. 161.

¹⁶⁰ (1888), 14 A.C. 46 at 54 (P.C.).

¹⁶¹ [1973] S.C.R. 313, 34 D.L.R. (3d) 145.

¹⁶² [1984] 2 S.C.R. 335, 13 D.L.R. (4th) 321 [hereinafter *Guerin* cited to S.C.R.].

that largely prevailed until *Delgamuukw* produced a regime that discounted Aboriginal title, and did not create many incentives to deal creatively with Aboriginal peoples. The broader characterization of the nature of Aboriginal title in *Delgamuukw* supported the Commission's view that Crown-Aboriginal negotiations should support the provision of "lands that are sufficient in size and quality to foster Aboriginal economic self-reliance and cultural and political autonomy."¹⁶³ Furthermore, the Court's view that infringements of Aboriginal title can only be seemingly justified where governments "accommodate" the participation of Aboriginal peoples in the development of resources, conferral of fee simples, and reduction of economic barriers to Aboriginal peoples use of their land¹⁶⁴ also strengthens the Commission's recommendations. These holdings could support the regime recommended by the Commission by which land would be selected and allocated on the basis of different categories that provide different degrees of control to the Crown and Aboriginal peoples.¹⁶⁵ Thus, the way that *Delgamuukw* accommodates the recommendations of the Commission creates an environment that fosters the implementation of the Report, and blazes a trail away from assimilation.

B. Differing Views: The Incongruity between the Commission and the Court

As outlined in the Report, the Commission's view of Aboriginal title is attractive and feasible, yet presents potential problems for implementation in two ways. First, the Commission's characterization of Aboriginal title is incomplete: it fails adequately to account for this law's more problematic aspects that could work to undermine the enlargement of an Aboriginal land base. Second, *Delgamuukw* presents other unforeseen challenges to the use of Aboriginal title as a vehicle for expanding the Aboriginal land base that the Commission did not fully consider. While positive in many respects, *Delgamuukw* has some elements that could pose significant challenges for Aboriginal peoples as they extricate themselves from a colonial relationship while increasing their land base. The qualities of incompleteness and subsequent developments can be dealt with together when exploring the current challenges in expanding the Aboriginal land base by relying on the issues relating to Aboriginal title.

¹⁶³ *Royal Commission*, Vol. 2, *supra* note 12 at 574.

¹⁶⁴ *Delgamuukw*, *supra* note 136.

¹⁶⁵ Recommendation 2.4.10:

Negotiations aim to describe the territory in question in terms of three categories of land. Using these three categories will help to identify, as thoroughly and precisely as possible, the rights of each of the parties with respect to lands, resources and governance (*Royal Commission*, Vol. 2, *supra* note 12 at 581).

Aboriginal peoples would have full rights of ownership and jurisdiction of Category I lands, Category II lands would facilitate co-management regimes, and Category III lands would be Crown lands.

The Commission did not adequately take account of the fact that Aboriginal title prior to *Delgamuukw* was described as a burden on Crown title. This concept of title was reinforced in *Delgamuukw* and presents some challenges to the expansion of an Aboriginal land base that the Commission did not address. The Court wrote that “Aboriginal title is a burden on the Crown’s underlying title.”¹⁶⁵ Since “aboriginal title crystallized at the time sovereignty was asserted,” the Crown’s assumption of this aspect of the property relationship was justified “because it does not make sense to speak of a burden on the underlying title until that title existed.”¹⁶⁷ The Crown’s tautological assumption of underlying title limits Aboriginal choice in a most profound way because it has been interpreted to require the reconciliation of Aboriginal title with the assertion of Crown sovereignty, and therefore, Crown use of the land.¹⁶⁸ Underlying Crown title diminishes Aboriginal title (and could work to prevent the Commission’s recommendations for the expansion of the size and Aboriginal control of a land base) because most Crown uses may be sufficient to displace Aboriginal use. For example, the Court noted, since

distinctive aboriginal societies exist within, and are a part of, a broader social, political and economic community, over which the Crown is sovereign, there are circumstances in which, in order to pursue objectives of compelling and substantial importance to that community as a whole (taking into account the fact that aboriginal societies are part of that community), some limitation of those rights will be justifiable. Aboriginal rights are a necessary part of the reconciliation of aboriginal societies with the broader political community of which they are part; limits placed on those rights are, where the objectives furthered by those limits are of sufficient importance to the broader community as a whole, equally a necessary part of that reconciliation.¹⁶⁹

This excerpt demonstrates how limits can be placed on Aboriginal title to ostensibly reconcile this interest with the broader social, political, and economic interests of the entire Canadian community. The Commission did not foresee the development of a concept of Aboriginal title that was so fully and unfairly referenced to the interests of others. Even though the Court was clear in stating that the provinces could not extinguish Aboriginal title through their activities, it did allow for a broad infringement of the Aboriginal interest in land. The Commission did not have this development in sight when writing about how the concept of Aboriginal title could support the broadening of an Aboriginal land base. In fact, the Commission indicated that “[t]he law

¹⁶⁵ *Delgamuukw*, *supra* note 136 at para. 145.

¹⁶⁷ *Ibid.*

¹⁶⁸ *Ibid.* at para. 165.

¹⁶⁹ *Ibid.* at para. 161, quoting *R. v. Gladstone*, [1996] 2 S.C.R. 723 at para. 73, 137 D.L.R. (4th) 648.

requires government not to rely simply on the public interest as justification for limiting the exercise of Aboriginal rights.”¹⁷⁰

Unfortunately, the Court did not view the issue of public interest as a justification for limiting Aboriginal rights in the same light as the Commission. In fact, contrary to the Commission, the Court articulated the idea that infringement of Aboriginal title could occur for a broad range of non-Aboriginal legislative objectives:

In the wake of *Gladstone*, the range of legislative objectives that can justify the infringement of aboriginal title is fairly broad. Most of these objectives can be traced to the *reconciliation* of the prior occupation of North America by aboriginal peoples with the assertion of Crown sovereignty, which entails the recognition that “distinctive aboriginal societies exist within, and are a part of, a broader social, political and economic community”. In my opinion, the development of agriculture, forestry, mining, and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations to support those aims, are the kinds of objectives that are consistent with this purpose and, in principle, can justify the infringement of aboriginal title.¹⁷¹

This justificatory test for the infringement of Aboriginal title conflicts with the Commission’s theory of Aboriginal title. For the Court, colonialism is a justifiable infringement of Aboriginal title (as if the interference with another nation’s independent legal rights were a minor imposition or at the fringes of the parties’ relationship). It permits the (re)settlement of foreign populations to support the expansion of non-indigenous societies. The Commission did not take this view. It never envisioned such a broad view of infringement. Calling colonization “infringement” is an immense understatement. While these “infringements” must be “consistent with the special fiduciary relationship between the Crown and aboriginal peoples,”¹⁷² the effect of the Court’s treatment of “infringement” is to make Aboriginal land rights subject to Can-

¹⁷⁰ *Royal Commission*, Vol. 2, *supra* note 12 at 568.

¹⁷¹ *Delgamuukv*, *supra* note 136 at para. 165. In commenting on this paragraph, it has been observed that “[t]he fact that many of these objectives fall within provincial jurisdiction suggests that ‘how’ not ‘whether’ rights have been infringed, is the proper focus of future discussions between the parties” (C. Bell, “New Directions in the Law of Aboriginal Rights” (1998) 77 Can. Bar Rev. 36 at 62). For a critique of the infringement of constitutional Aboriginal rights, see K. McNeil, “How Can Infringements of the Constitutional Rights of Aboriginal Peoples Be Justified?” (1997) 8 Const. F. 33.

¹⁷² *Delgamuukv*, *ibid.* at para. 162.

ada's objectives.¹⁷³ This doctrine does not augment Aboriginal choice, and instead creates pressures towards assimilation.¹⁷⁴

The Commission did not foresee the overarching power that the Court's concept of title would grant to the federal and provincial governments. In light of the current law one may question whether the Commission's recommendations are persuasive and accurate enough to convince governments to expand Aboriginal lands. This question is even more pertinent when it appears as though governments can continue to diminish Aboriginal interests as long as they have a valid legislative objective and pursue this activity in accordance with their fiduciary duty. The many interim steps that the Commission states that the government could undertake to remedy the lack of Aboriginal access to land may therefore be undercut by the Court's concept of Aboriginal title in *Delgamuukw*. One may wonder, for example, whether this conception of title subverts the government's legal incentives to provide Aboriginal access to natural resources and co-management regimes¹⁷⁵ when its power may be so strong as compared to that of Aboriginal peoples. This query leads to a discussion of the fiduciary duty of the Crown when infringing Aboriginal rights. A fuller analysis and understanding of this obligation may explain the incentives that the government could have for expanding Aboriginal land rights.

III. Fiduciary Duties

When the Crown infringes Aboriginal title while pursuing a valid legislative objective, it must do so "in a manner consistent with the special fiduciary relationship between the Crown and Aboriginal peoples".¹⁷⁶ The Court has found that the application of this obligation requires "different articulations of the fiduciary duty" according to the variety of "legal and factual context[s]" in which issues of Aboriginal rights are framed.¹⁷⁷ The Commission was of the view that the Crown's fiduciary duties towards Aboriginal peoples "requires governments to take active steps to protect Aboriginal lands and resources."¹⁷⁸ It found that section 35 of the *Constitution Act, 1982* and in-

¹⁷³ "[B]oth the federal and provincial governments" can exercise this power (*ibid.* at para. 160).

¹⁷⁴ The pressure created by the assertion of sovereignty places Aboriginal people in a dependent feudal relationship with the Crown. The United States Supreme Court observed in *Cherokee Nation v. Georgia*:

They have in Europe sovereign and semi-sovereign states and states of doubtful sovereignty. But this states [Indian Nations], if it be a states, is still a grade below them all: for not to be able to alienate without permission of the remainder-man or lord, places them in a state of feudal dependence (30 U.S. (5 Pet.) 1 at 26-27, 8 L. Ed. 25 (1831)).

¹⁷⁵ *Royal Commission, Vol. 2, supra* note 12 at 632-80.

¹⁷⁶ *Delgamuukw, supra* note 136 at para. 162.

¹⁷⁷ *Ibid.*

¹⁷⁸ *Royal Commission, Vol. 2, supra* note 12 at 565.

ternational legal norms "impose extensive positive obligations on governments to recognize and protect a wide array of rights with respect to lands and resources."¹⁷⁹ The Commission stated that these aspects of law underscored the idea that the relationship between the parties is "nation-to-nation" and thus central to the "constitutional recognition and affirmation of Aboriginal rights".¹⁸⁰ Once again, while there are aspects of the Commission's articulation of the fiduciary relationship that are consistent with the reasoning in *Delgamuukw*, other aspects are inconsistent with the decision. Ultimately, a view of the decision can be taken that supports the position of the Commission, despite the inconsistencies that seem to exist between them.

A. Inconsistencies between the Commission and Court

As noted, the Commission seemed to define the fiduciary duty in a manner that supported a horizontal, "nation-to-nation" relationship between the Crown and Aboriginal peoples. This led the Commission to suggest that the Crown had a duty to protect Aboriginal lands and resources,¹⁸¹ which provided the justification for many recommendations to return the land to Aboriginal control. There are, however, other conceptions of the fiduciary relationship evident in *Delgamuukw* that may not be as favourable to Aboriginal peoples, because they seem to be based on a more hierarchical notion of the parties' relationship. The Court seems to place Aboriginal peoples in a dependent relationship with the Crown in its description of the content of Aboriginal title and its inherent limits.

For example, in dealing with the content of Aboriginal title, the Court described this interest as "a right to land itself",¹⁸² which was "held by Her Majesty for the use and benefit" of the Aboriginal group itself.¹⁸³ While the Court found that Aboriginal people may use their title lands "for a variety of purposes",¹⁸⁴ that this title is held by another makes it a subordinate and dependent interest.¹⁸⁵ The Commission did not

¹⁷⁹ *Ibid.*

¹⁸⁰ *Ibid.*

¹⁸¹ See the work of Len Rotman, who also advocates a more horizontal conception of the Crown-Aboriginal fiduciary relationship: L.I. Rotman, *Parallel Paths: Fiduciary Doctrine and the Crown-Native Relationship in Canada* (Toronto: University of Toronto Press, 1996).

¹⁸² *Delgamuukw*, *supra* note 136 at para. 140.

¹⁸³ *Ibid.* at para. 121.

¹⁸⁴ *Ibid.* at para. 117.

¹⁸⁵ This position makes Aboriginal peoples analogous to serfs, dependent on their lord to hold their land in their best interests. Feudal tenure gave important rights to the lord, vis-à-vis the tenant, that are analogous to the Crown-Aboriginal relationship:

Rights are dependent upon a lord seen as having total control of his lordship. A tenant is in by the lord's allocation. He can have no more by way of title, unless it is some obligation on the lord to keep him in, or to admit his successors. He cannot by his own

characterize the relationship in this way. There is no nation-to-nation articulation in the Court's description of Aboriginal title as there had been in the Commission's recommendations. The Court further distanced itself from the Commission and entrenched Aboriginal peoples' colonial relationship to Canada when it found, quoting *Guerin*,¹⁸⁵ that "the same legal principles governed the aboriginal interest in reserve lands and lands held pursuant to aboriginal title."¹⁸⁷ While the Court was careful to note that Aboriginal title is not "restricted to those uses which are elements of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right,"¹⁸⁸ the analogy of title to reserves is a prescription for Aboriginal assimilation. The idea that "the Indian interest in the lands is the same in both cases"¹⁸⁷ does not enlarge Aboriginal title in the way that the Commission suggests. In fact, the similarity of reserve and title land potentially restricts Aboriginal title because reserve lands are heavily regulated interests.¹⁸⁹ The Court's description does not even approach the Commission's view of the egalitarian nature of the relationship. Even though the content of Aboriginal title encompasses "a broad notion of use and possession ... which incorporates a reference to the present-day needs of aboriginal communities,"¹⁹¹ all such uses occur within the context of the Crown's position as lord over the land. The Court's expansive description of the content of Aboriginal title "for the general welfare of the band" is betrayed by the narrow construction upon which it rests. It gives Aboriginal people broad rights over a limited, diminished interest in land. As such, the Commission's view of the relationship between the Crown and Aboriginal peoples is problematically implemented by the Court in *Delgamuukw*.

Furthermore, the inherent limitations that the Court finds attached to Aboriginal lands reveal their dependent character, which is also contrary to the Commission's view. For example, in *Delgamuukw* the chief justice observed that the "content of aboriginal title contains an inherent limit that lands held pursuant to title cannot be used

transaction confer whatever title he has upon another: he can only surrender it to the lord who may then admit another. And he cannot by himself engage in dispute about the land: in principle, the lord must decide who is to be his tenant (S.F.C. Milsom, *Historical Foundations of the Common Law*, 2d ed. (London: Butterworths, 1981) at 100).

¹⁸⁵ *Supra* note 162.

¹⁸⁷ *Delgamuukw*, *supra* note 136 at para. 120, Lamer C.J.C.

¹⁸⁸ *Ibid.* at para. 124. For a critique of the restriction on Aboriginal rights by reference to Aboriginal pre-contact practices, see R. Barsh & J. Youngblood Henderson, "The Supreme Court's *Van der Peet* Trilogy: Naive Imperialism and Ropes of Sand" (1997) 42 McGill L.J. 993; B. Morse, "Permafrost Rights: Aboriginal Self-Government and the Supreme Court in *R. v. Pamajewon*" (1997) 42 McGill L.J. 1011; J. Borrows, "Frozen Rights in Canada: Constitutional Interpretation and the 'Trickster'" (1998) 22 Am. Indian L. Rev. 37.

¹⁸⁹ *Delgamuukw*, *ibid.*

¹⁹⁰ *Ibid.* at para. 121.

¹⁹¹ *Ibid.* at paras. 119-21.

in a manner that is irreconcilable with the nature of the claimants' attachment to those lands."¹⁹² This restriction significantly undermines Aboriginal title because it compels Aboriginal people to surrender their lands to the Crown if they want to use them for certain "non-Aboriginal" purposes. While the Court was anxious not to restrict Aboriginal land rights "to those activities which have been traditionally carried out on it",¹⁹³ it is difficult to read the Court's inherent limits any other way. It held that the "special bond" that makes the land part of the group's distinctive culture could provide a justification to prevent Aboriginal development if the group occupies the land "in such a fashion as to destroy its value for such a [special Aboriginal] use."¹⁹⁴ These limits are imposed on Aboriginal title lands because proof of the occupation "is determined by reference to the activities that have taken place on the land and the uses to which the land has been put by the particular group."¹⁹⁵ In such instances, if "aboriginal peoples wish to use their lands in a way that aboriginal title does not permit, then they must surrender those lands and convert them into non-title lands to do so."¹⁹⁶

Under this characterization, the Crown is in the position of being able to receive and re-designate Aboriginal lands if they are used in non-inherent ways. It is inappropriate for the Crown to be in such a position.¹⁹⁷ The subordination of Aboriginal interests in such transactions is never effectively justified by either the Commission or the Court. That Aboriginal peoples would have to "alienate" or "surrender" their lands to

¹⁹² *Ibid.* at para. 125.

¹⁹³ *Ibid.* at para. 132. An example of the increased powers Aboriginal people might enjoy relative to participation and consultation in lands and resources is found in *Nunavut Tunngavik Inc. v. Canada* (1997), 149 D.L.R. (4th) 519, 134 F.T.R. 246 (T.D.), where the minister of fisheries and oceans' allocation of fish was set aside because it did not conform to consultation requirements set out in the Nunavut Agreement. While this case may be distinguished from issues of title because consultation between the minister and the Aboriginal group was mandated by agreement, one might also find courts taking a similar stance relative to title given *Delgamuukw's* strong requirement for Aboriginal participation where title is found to exist. If British Columbia courts were to review ministerial decision making as the Federal Court did, resource allocation and management in the province would eventually undergo substantial changes.

¹⁹⁴ "For example, if occupation is established with reference to the use of the lands as a hunting ground" it cannot strip mine it; "Similarly, if a group claims a special bond with the land because of its ceremonial or cultural significance, it may not use the land in such a way as to destroy that relationship (e.g. by developing it in such a way that the bond is destroyed, perhaps by turning it into a parking lot)" (*Delgamuukw*, *ibid.* at para. 128).

¹⁹⁵ *Ibid.* These "elements of aboriginal title", referring to the traditional activities and use of the land by aboriginal people, "create" the "inherent limitation on the uses to which the land, over which such title exists, may be put" (*ibid.*).

¹⁹⁶ *Ibid.* at para. 131.

¹⁹⁷ When did Aboriginal peoples in British Columbia ever agree to the Crown being able to receive and redesignate their lands if they were used for "unauthorized" (as defined by non-Aboriginal courts) purposes?

the Crown to use them for these certain purposes indicates that the Court, despite its claims otherwise, defines the content of Aboriginal title by reference to those activities that have traditionally been carried out on the lands, and by such definition makes Aboriginal title an inferior interest. Establishing title by reference to specific practices seems to be potentially inconsistent with the Court's later statement that "aboriginal title differs from other aboriginal rights ... [which are] defined ... in terms of *activities*."¹⁹⁸ If "Aboriginal title ... is a *right to the land* itself," the Court's description of its inherent limits in terms of activities may well place Aboriginal peoples in a "legal straightjacket" with respect to their uses, and the polity with which they deal with these interests.¹⁹⁹ All this is contrary to the Commission's theory and application of the fiduciary relationship between the Crown and Aboriginal peoples, and works to diminish the force of its recommendations. Nevertheless, there is room in the Court's decision for characterizing the fiduciary relationship in a way that expands Aboriginal control over lands to which Aboriginal peoples could claim title.

B. Bridging Delgamuukw and the Commission

Despite the inconsistencies between the Commission's and the Court's characterizations of the relationship, there are points of similarity that might help to bridge the problems identified in the last section. Both seem to view the fiduciary relationship as requiring substantial protection of Aboriginal interests in land, even if they differ on the foundation of this relationship. For example, both the Commission and the Court indicate that the Crown's obligation to Aboriginal peoples "requires the government to act in the interests of Aboriginal peoples when negotiating arrangements concerning their lands and resources."²⁰⁰

The Report indicated that governmental duties with respect to Aboriginal peoples have been recognized as placing the Crown under a positive obligation to protect Aboriginal lands and resources.²⁰¹ The Court also viewed the fiduciary relationship in this manner. It recognized that the government had a positive obligation to protect Aboriginal title lands. In particular, the Court noted that the fiduciary duty in relation to Aboriginal title would have to take account of three elements: "First, aboriginal title encompasses the right to exclusive use and occupation of land; second, aboriginal title encompasses the right to choose to what uses [the] land can be put ...; and third, that lands held pursuant to aboriginal title have an inescapable economic component."²⁰²

¹⁹⁸ *Delgamuukw*, *supra* note 136 at para. 140.

¹⁹⁹ *Ibid.* One can anticipate numerous judicial contests concerning the "elements of aboriginal title" that prohibit its use "in a way that aboriginal title does not permit" (*ibid.* at para. 132).

²⁰⁰ *Royal Commission*, Vol. 2, *supra* note 12 at 566.

²⁰¹ *Ibid.* at 568.

²⁰² *Delgamuukw*, *supra* note 136 at para. 166, Lamer C.J.C.

These elements of the relationship move the Court's and the Commission's descriptions of the fiduciary relationship much closer together than had their characterizations of the source of that fiduciary relationship.

The emphasis on the similarity between the Court's and the Commission's descriptions of the fiduciary duty, rather than on the difference, lends greater support to the implementation of the Commission's recommendations. For example, the Court notes that the exclusive nature of Aboriginal title might entail the accommodation of both the participation of Aboriginal peoples in the development of resources and the conferral of fee simples, licences, and leases that "reflect the prior occupation of aboriginal title lands" and reduce "economic barriers to aboriginal uses of their lands".²⁰¹ This view is consistent with the Commission's position that lands be "purchased"²⁰⁴ by and "returned"²⁰⁵ to Aboriginal peoples and that they participate in and secure access to forest resources,²⁰⁶ mining,²⁰⁷ fishing,²⁰⁸ hunting outfitting,²⁰⁹ and water.²¹⁰ The Court's view of Aboriginal participation may even support the co-management and jurisdiction regimes recommended by the Commission.²¹¹ Furthermore, the Court's notion that Aboriginal title includes a right to "choose to what ends a piece of land can be put"²¹² could support the Commission's ideas about how consultation would require a specific "protocol" to ensure that Aboriginal peoples are consulted with respect to decisions made by governments concerning their lands. Finally, the Court's notion that Aboriginal title has an "inescapably economic aspect"²¹³ could lend support to the Commission's idea that compensation should be negotiated as "partial restitution for past and present exploitation of the nation's traditional territory, including removal of resources as well as disruption of Aboriginal livelihood."²¹⁴ Despite the differential treatment of the duty's source and their conflicting ideas about the nature of Aboriginal title, the parallels between the Court's and Commission's descriptions of the fiduciary duty's application with respect to the protection of Aboriginal interests in land support the implementation of the Commission's recommendations.

Therefore, when considering issues of Aboriginal title and fiduciary duties, it is clear that an approach could be taken that would give Aboriginal peoples greater con-

²⁰³ *Ibid.* at para. 167.

²⁰⁴ *Royal Commission, Vol. 2, supra* note 12 at 627.

²⁰⁵ *Ibid.* at 629.

²⁰⁶ *Ibid.* at 641-42.

²⁰⁷ *Ibid.* at 645.

²⁰⁸ *Ibid.* at 654-55.

²⁰⁹ *Ibid.* at 659-60.

²¹⁰ *Ibid.* at 664-65.

²¹¹ *Ibid.* at 679-80.

²¹² *Delgamuukv, supra* note 136 at para. 168, Lamer C.J.C.

²¹³ *Ibid.* at para. 169.

²¹⁴ *Royal Commission, Vol. 2, supra* note 12 at 575.

trol over lands and resources. Exclusivity, choice, and compensation are elements of Aboriginal title that broaden Aboriginal access, because they require that the government protect and significantly accommodate Aboriginal interests. Both the Court and Commission demonstrate support for these ideas. Of course, the fiduciary relationship not only allows for greater Aboriginal control in cases of Aboriginal title, but also extends to all aspects of the relationship of Aboriginal peoples with the Crown. The analysis of the obligations arising out of this relationship would vary, however, according to the specific context of the relationship.²¹⁵ Nevertheless, it is clear that the fiduciary relationship has continuing relevance for Aboriginal lands and resources in Canada, even if some troubling concerns remain with respect to the diminishment of Aboriginal choice due to the potentially dependent nature of the relationship.

IV. Metis Land and Resource Issues

The Metis Nation can fairly be regarded as a founding nation of Canada. The existence of the Metis in the west prior to Confederation was central to the economic development and expansion of the east.²¹⁶ Without their presence, the fur trade would have floundered, and political and economic development on the St. Lawrence River and eastern Great Lakes would have been severely delayed or restricted. The Metis Nation was also crucial to ushering western and northern Canada into Confederation and increasing the wealth of the nation by opening the prairies to agriculture and settlement. These developments could not have occurred without their intercession. The Dominion Parliament's unilateral attempt to survey the old northwest territories around the Red River in 1869²¹⁷ was strongly resisted by the local Metis settlements.²¹⁸ The Metis did not feel it was appropriate that they should become a part of the Dominion without their participation and consent. Therefore, after blocking the surveyors from their work, and thereby preventing Canada's expansion into this region, the Metis compelled the government of Sir John A. Macdonald to recognize their interests.

²¹⁵ E.g. issues relating to the surrender of Indian lands were also the subject of discussion in *Semiahmoo Indian Band v. Canada* (1997), [1998] 1 F.C. 3, 148 D.L.R. (4th) 523 (C.A.). This time, however, the Court's attention was focussed on the Crown's fiduciary obligations that attached to surrenders of lands under the *Indian Act*, *supra* note 101, ss. 37, 38. This case is significant because it demonstrates the flexibility that courts continue to demonstrate where there is an actionable breach of the Crown's fiduciary duty and where the interests of justice appear to demand it. See E. Meehan & E. Stewart, "Developments in Aboriginal Law: The 1995-96 Term" (1997) 8 Supreme Court L.R. (2d) 1 at 4-6, commenting on *Blueberry River Indian Band v. Canada*, [1995] 4 S.C.R. 344, 130 D.L.R. (4th) 193.

²¹⁶ See e.g. G.F.G. Stanley, *The Birth of Western Canada: A History of the Riel Rebellions* (Toronto: Longmans, Green, 1936).

²¹⁷ The Dominion's unilateral attempt to add the old northwest to Canada was legislated in the *Rupert's Land Act, 1868* (U.K.), 31 & 32 Vict., c. 105.

²¹⁸ See M. Siggins, *Riel: A Life of Revolution* (Toronto: Harper Collins, 1994).

In particular, the Red River Metis formed a provisional government that was given authority to negotiate the terms of union with Ottawa and bring the area into Confederation. Representatives of this government travelled to Ottawa as delegates of the Metis people to negotiate conditions for the entry of western Canada. They brought a locally developed Bill of Rights that expressed their demands. The negotiations were challenging, but an agreement was reached and its terms were embodied in the *Manitoba Act, 1870*.²¹⁹ The democratic legitimacy of this process was sealed through the Metis provisional government's acceptance of the agreement before the Dominion and Imperial Parliament's statutory endorsement that made it part of the constitutional law of Canada.²²⁰ The people of the Metis Nation regard the *Manitoba Act, 1870* as embodying a treaty that recognizes and affirms their nation-to-nation relationship with Canada, even though they argue that its provisions concerning land and resources have not been fulfilled.²²¹

The Commission recommended that outstanding Metis land and resource issues be resolved through negotiation on a nation-to-nation basis.²²² In this respect the Commission did not differ from the approaches outlined in the earlier sections of this article. The Commission came to this conclusion by showing that the Metis, while distinct from First Nations and Inuit peoples, should nevertheless have many of the same criteria for recognition applied to their interests that are used for other Aboriginal peoples in Canada. This would enable them to resist assimilative pressures and pursue objectives appropriate to their culture that may differ from those of Canada. The Commission made out the legal case for differential Metis land and resource use through three arguments under section 35 of the *Constitution Act, 1982*. These arguments were based on the finding that the promises made to the Manitoba Metis and embedded in the Constitution were never fulfilled, and that their land rights were severely eroded through statutory provisions and administrative processes imposed on them against their wishes.

First, the Commission noted that Metis people may have a claim to land and resources because their title and rights were not extinguished by the *Manitoba Act, 1870*

²¹⁹ (U.K.), 32 & 33 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 8. The act provided for the creation of the Province of Manitoba, French-language rights, protection for settled and common lands, distribution of 1.4 millions acres of land to Metis children, and amnesty for those who participated in the provisional government.

²²⁰ The Imperial Parliament passed the *Constitution Act, 1871* (U.K.), 34 & 35 Vict., c. 28, reprinted in R.S.C. 1985, App. II, No. 11, to give effect to the provisions embodied in the *Manitoba Act, 1870*.

²²¹ See *R. v. Dumont* (1988), 52 Man. R. (2d) 291, 52 D.L.R. (4th) 25 (C.A.), rev'd, [1990] 1 S.C.R. 279, 67 D.L.R. (4th) 159 [hereinafter *Dumont*].

²²² *Royal Commission*, Vol. 4, *supra* note 19 at 200.

or the *Dominion Lands Act, 1879*.²²³ They wrote that that since the acts “contained provisions that might be read as extinguishment measures, their legal efficacy is open to doubt owing to ambiguous wording and the massive irregularities involved in their negotiation and administration.”²²⁴ Clem Chartier, a Metis leader, expressed this same conclusion even more strongly when he wrote, “[T]he government allowed gross injustices to be perpetrated against the half-breed people through the implementation of a [land] grant and scrip system, leaving the half-breeds landless.”²²⁵ The effect of this dispossession led the Commission to its second observation, that Metis people may have a claim to land and resources because of the fiduciary obligation that the Crown owes to Metis people to act in their best interests. If, as the Commission suggested, Metis rights were extinguished due to irregularities in the negotiation and administration of their land and resource rights, this would constitute a breach of the Dominion’s fiduciary duty. Finally, the Commission suggested that Metis people have specific legal rights to lands and resources through particular provisions of these otherwise flawed legislative acts which purported to protect their interests. For example, the statutory terms negotiated by the Metis provisional government entitled Metis children to receive 1.4 million acres of land; such provisions have never been effectively implemented.²²⁶ As a result of these possibilities, the Commission concluded that Metis people have a legal right to lands and resources.

The Commission rested the argument for Metis land and resource rights on a broader foundation, however, than mere legal claims. It found that “it is clear ... that the Metis Nation is entitled, both morally and politically, to have access to land bases and land use rights to fulfil its legitimate aspirations as an Aboriginal people.”²²⁷ These findings led the Commission to make two significant recommendations for the implementation of Metis land²²⁸ and resource rights.²²⁹ It was recommended that appro-

²²³ S.C. 1879, c. 31. For further support, see P.L.H. Chartrand, *Manitoba's Metis Settlement Scheme of 1870* (Saskatoon: Native Law Centre, 1991).

²²⁴ *Royal Commission, Vol. 4, supra* note 19 at 245.

²²⁵ See C. Chartier, “Aboriginal Rights and Land Issues: The Metis Perspective” in M. Boldt, J. Long & L. Littlebear, eds., *The Quest for Justice: Aboriginal Peoples and Aboriginal Rights* (Toronto: University of Toronto Press, 1986) 54 at 57.

²²⁶ For litigation on the issue of the constitutional validity of the *Manitoba Act, 1870* and other statutes, see *Dunont, supra* note 221.

²²⁷ *Royal Commission, Vol. 4, supra* note 19 at 247-48.

²²⁸ *Ibid.* at 249:

The governments of Canada and the relevant provinces and territories be prepared to make available, through negotiations with each recognized Nation of Metis people, land bases sufficient in number, size, location and quality to permit the fulfillment of the nation’s legitimate social, cultural, political and economic aspirations.

²²⁹ *Ibid.* at 251:

The governments of Manitoba, Saskatchewan and Alberta

privately sized and located territories be given to Metis people in certain provinces to hold for their own purposes, and that these provinces recognize Metis rights to hunt, trap, and fish for food. The Commission's recommendations therefore support the recognition and negotiation of Metis rights to lands and resources; this is in accordance with the treatment of these issues identified in the discussion of Aboriginal title and fiduciary obligation above.

Despite these recommendations from the Commission, governments and the courts have been slow to recognize Metis land and resource rights. There seem to be two reasons for this failure. First, there are perennial problems with identifying who the Metis people are that section 35 was intended to protect.²³⁰ Since there has never been a government-controlled status and registration system for the Metis people, there are concerns about the identification and accountability of Metis peoples if specific individuals cannot be unequivocally identified as Metis through any accredited system. There are also concerns regarding the changing definition of the word "Metis" over time. For example, it is not settled whether "Metis" refers to the people descended from the Red River settlement, or whether the term can be used to refer to any Aboriginal mixed-ancestry person who does not identify as Indian or Inuit.²³¹ There is a further question as to whether Metis peoples are Indians for certain purposes, and could thus claim analogous rights.²³² These problems may, however, be overstated; recent cases have encountered fewer challenges with this than one might expect.²³³ For example, *Powley* provided a useful definition for "Metis" that could resolve such difficulties.²³⁴

The second, more challenging issue is that Metis rights are not yet clearly conceptualized in the way that First Nations and Inuit rights have been. This problem is illustrated by the Court's observation in *R. v. Van der Peet*²³⁵ that "the manner in which aboriginal rights are defined is not necessarily determinative of the manner in which the aboriginal rights of the Metis are defined."²³⁶ While the potential definition of Metis rights in a manner different from other Aboriginal rights actually holds out

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- a) recognize immediately that the right, of "Indians" of those provinces to hunt, trap and fish for food ... applies to all Metis persons in those provinces.

²³⁰ See C. Bell, "Who Are the Metis People in Section 35(2)" (1991) 29 Alta. L. Rev. 351.

²³¹ See *R. v. Blais*, [1997] 3 C.N.L.R. 109 (Man. Prov. Ct.).

²³² See *R. v. Grunbo* (1998), 168 Sask. R. 78, 159 D.L.R. (4th) 577 (C.A.).

²³³ See *R. v. Powley*, [1999] 1 C.N.L.R. 153 (Ont. Sup. Ct. J.) [hereinafter *Powley*].

²³⁴ *Ibid.* The case suggested that a Metis individual who claims s. 35 rights should be of Aboriginal ancestry, self-identify as Metis, and be accepted by a Metis community. I recognize that this definition still provides its challenges, but I suggest it is better than the legal vacuum that seems to discourage many judges and legislators when considering Metis rights.

²³⁵ [1996] 2 S.C.R. 507, 137 D.L.R. (4th) 289.

²³⁶ *Ibid.* at para. 67.

great promise for all Aboriginal peoples,²³⁷ it also presents challenges because no one is quite sure on what foundation Metis rights will be found to rest. This presents a real challenge for the implementation of the Commission's recommendations, because legislators seem to be taking a "wait and see" approach to Metis land rights. The procrastination in this approach, however, is contrary to the idea that Metis peoples have the legal, moral, and political rights that the Commission outlined in its overview of Metis rights.

Therefore, legislators and the courts should take up this unfinished business and place Metis rights on a more substantial conceptual ground. This would enable the Metis to counteract historic colonial practices and repel contemporary assimilative pressures. Governments could negotiate the issue of identity and other rights through treaties with Metis people; courts could be more precise and forthcoming when called upon to adjudicate Metis claims. Until there is greater clarity on this point, many judges and legislatures will continue to define these rights in a minimal fashion and await a fuller articulation of these rights at some distant date. This is a risky path to take, however, because it could lead to potential violations of the government's fiduciary obligations to the Metis people, or the parties may end up possessing substantially different rights than preferable results that may arise through negotiation. Furthermore, the delay in clarifying their rights places the Metis in a vulnerable position as a people because it prevents a fuller mobilization of their capacity to confront negative influences. Such an approach would be contrary to the Commission's recommendations.

Conclusion

The *Report of the Royal Commission on Aboriginal Peoples* remains a relevant and significant document for its consideration of Aboriginal land and resources issues. It is unsurpassed in the breadth and depth of its coverage as a document produced under the mandate of a national government. It has already enjoyed some influence in the development of government policy, and has received numerous citations through judicial consideration. While one may wish that its impact would have been greater still, there is no denying that it has contributed significantly to the development of Aboriginal rights in Canada over the past few years. Furthermore, it will continue to gain prominence, and will reach and influence audiences beyond Canada's borders. It contains important messages for the manner by which states can interact with indigenous populations more respectfully to turn the tide of troubling colonial histories.

²³⁷ See C. Bell, "Metis Constitutional Rights in Section 35(1)" (1997) 36 *Alta. L. Rev.* 180.

The Commission will enjoy this reputation at home and abroad because it drew its inspiration from sources that not only found their genesis in this country, but also had roots in the international arena. For example, the Commission cited the *Draft Declaration on the Rights of Indigenous Peoples* to argue that "international legal principles also specify that governments are under extensive obligations to protect Aboriginal lands and resources."²³⁸ This draft, prepared by a sub-commission of the United Nations Commission on Human Rights, contains strong statements about the obligation of governments to recognize and reach agreements with Aboriginal peoples over land and resources rights. For example, the Commission quotes article 26 of the draft declaration, which provides that

Indigenous peoples have the right to own, develop, control and use the lands and territories, including the total environment of the lands, air, waters, coastal seas, sea-ice, flora, fauna and other resources which they have traditionally owned and otherwise occupied or used. This includes the right to the full recognition of their laws, traditions, and customs, land-tenure systems and institutions for the development and management of resources, and the right to effective measures by States to prevent any interference with, alienation of or encroachment upon these rights.²³⁹

The Commission's willingness to draw on international sources of law and apply them in a domestic context contributed to its wider view of Aboriginal land and resource rights. Parliament, legislatures, and the judiciary could take significant guidance from the Commission's approach in this respect. Instead of treating Aboriginal peoples as municipal concerns, both governments and courts could see indigenous peoples as nations that have a right to pursue objectives that may differ from those states of which they are a part.

As this article has documented, however, courts and the legislatures have generally not regarded Aboriginal peoples in this more expansive light. The federal and provincial governments have either not acknowledged or embraced Aboriginal rights, or seen fit to subject themselves to the discipline and accountability that a legislative process might bring in the implementation of Aboriginal rights once recognized. This makes it difficult for Aboriginal peoples to articulate their concerns in a more comprehensive fashion when faced with the restrictive nature of these government initiatives or inaction. The subtle and scattered character of these policies presents a challenge to political mobilization when government initiatives are so diffuse. Similarly, courts have responded to the Commission's insights by continuing to enfold Aboriginal peoples tightly within the existing federal fabric of Canada, without changing that weave to accommodate them significantly. Courts have read Aboriginal rights to lands and resources as requiring a reconciliation that asks much more of Aboriginal peoples

²³⁸ *Royal Commission*, Vol. 2, *supra* note 12 at 566.

²³⁹ *Ibid.* at 567.

than it does of Canadians. Reconciliation should not be a front for assimilation. Reconciliation should be embraced as an approach to Aboriginal-Canadian relations that also requires Canada to accede in many areas.²⁴⁰ Yet both legislatures and courts have been pursuing a course that, by and large, asks change only of Aboriginal peoples. Canadian institutions have been employing domesticating doctrines in their response to the Commission. This approach hinders Aboriginal choice in the development of their lands and resources, rather than enhancing it.²⁴¹

Therefore, in many respects, the Commission's incorporation of international standards should point courts and legislatures to the fact that Aboriginal peoples have a relationship with land in Canada that differs from that of other Canadians. Most Aboriginal peoples want to create relationships with their land that respect and facilitate their values. They do not wish to abide by laws and policies that terminate or encroach on their rights without their consent. This article has described a few isolated instances where the courts and legislatures have recognized these principles. While these developments have been positive in some ways, they have not come without a price. Canada continually uses its legislatures to modify, infringe, or extinguish Aboriginal and treaty rights. Courts have continued to develop, support, and implement this framework. The domestication of Aboriginal and treaty rights in this way represents another stage in the development of colonialism for indigenous peoples. Such a domestication of rights does not accord with the Commission's attention to international wisdom that would grant Aboriginal peoples a greater range of choice in land and resource allocation and development. Until this fundamental tenet has found broader recognition, the potential for assimilation will remain the most important issue for most Aboriginal peoples in Canada. The Royal Commission on Aboriginal Peoples has recognized this trajectory. Greater adherence to its recommendations will allow Aboriginal nations to pursue models of development and living that ensure the continuation of their cultures.

²⁴⁰ This approach is suggested in J. Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge: Cambridge University Press, 1995).

²⁴¹ Patrick Macklem observed this process a decade earlier. See P. Macklem, "First Nations Self-Government and the Borders of the Canadian Legal Imagination" (1991) 36 McGill L.J. 382.