# The Country Is Very Wide and There Is Room for All: Treaties as Solemn Engagements to Consult

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**The Country Is Very Wide and There Is Room for All[1]:**
**Treaties as Solemn Engagements to Consult**

*Pax sevetur, pacta custodcantur (Peace should be preserved, agreements should be respected).*[2]

*The law came into being well before the State, and there are reasons to believe that it will outlive it.*[3]

*Where there is no vision, the people perish: but he that keeps the law, happy he is*.[4]

Lawyers have a gift for introducing complexity where there should be simplicity. And so it has become with "the duty to consult". From a concept that, I submit, has been present in the relations between the Crown and those to whom it owes protection since Magna Carta, the principle has taken many forms - the sovereign's increasing accountability to Parliament, the decline of the royal prerogative and the development of representative and constitutional democracy. This has all been a struggle towards effective representation.

There is no effective representation indeed no democracy and certainly no honour in the Crown without consultation and necessary accommodation. As the Supreme Court of Canada stated in *Reference Re Secession of Quebec*:

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[1] Alexander Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories including the Negotiations on which They were Based and Other Information Relating Thereto* (Toronto, Belfords, Clarke & Co., 1991) at 231. In the Preface to his book, Lieutenant-Governor Morris noted that, "The question of the relations of the Dominion of Canada to the Indians of the North-West, is one of great practical importance. The work, of obtaining their good will, by entering into treaties of alliance with them, has now been completed in all the region from Lake Superior to the foot of the Rocky Mountains."

[2] The canon *Antigonus*, first Church Council of Carthage, 348 AD, cited in Alain Supiot, *Homo Juridicus: On the Anthropological Function of the Law*, (London: Verso, 2007) at 92.

[3] Supiot, *supra* note 2, at 148.

[4] *The King James Bible*, Proverbs 29: 18.

> Democracy is commonly understood as being a political system of majority rule. It is essential to be clear what this means. The evolution of our democratic tradition can be traced back to the *Magna Carta* (1215) and before, through the long struggle for Parliamentary supremacy which culminated in the English *Bill of Rights* in 1688-89, the emergence of representative political institutions in the colonial era, the development of responsible government in the 19th century, and eventually, the achievement of Confederation itself in 1867. "[T]he Canadian tradition", the majority of this Court held in *Reference re Provincial Electoral Boundaries (Sask.)*, [1991] 2 S.C.R. 158, at p. 186, is "one of evolutionary democracy moving in uneven steps toward the goal of universal suffrage and more effective representation". Since Confederation, efforts to extend the franchise to those unjustly excluded from participation in our political system - such as women, minorities, and aboriginal peoples - have continued, with some success, to the present day. [5]

This hard won right to be consulted pervades our political, social, economic, and personal lives. Why does it become so difficult to achieve and so fraught with tests, triggers, thresholds and downright barriers when Crown/Aboriginal relations are at issue? I once referred to the *Van der Peet* test as "death by a thousand definitions".[6] The law on Crown/Aboriginal consultation is headed that way.

The constitutional goal for this country and the manner of achieving it imbued the Reasons of the Supreme Court in the *Reference Re Secession of Quebec*. The Court wrote:

> … The *Constitution Act, 1867* was an act of nation-building. It was the first step in the transition from colonies separately dependent on the Imperial Parliament for their governance to a unified and independent political state in which different peoples could resolve their disagreements and work together toward common goals and a common interest. …
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> …
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> … Canada's independence from Britain was achieved through legal and political evolution with an adherence to the rule of law and stability. The proclamation of the *Constitution Act, 1982* removed the last vestige of British authority over the Canadian Constitution and re-affirmed Canada's commitment to the protection of

[5] *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, para. 63.
[6] Peter W. Hutchins, "From Calder to Mitchell: Should the Courts Patrol Cultural Borders?" (Paper presented to the Osgoode Hall Law School Continuing Legal Education 2001, Constitutional Cases Fifth Annual Analysis of the Constitutional Decisions of the Supreme Court of Canada, April 12, 2002) [unpublished].

its minority, aboriginal, equality, legal and language rights, and fundamental freedoms as set out in the *Canadian Charter of Rights and Freedoms*.[7]

**Consultation and Accommodation Have been the Constant Theme of the Principal Cases Over the Past Century**

Lawyers and the judiciary in the field of the law applying to Aboriginal peoples have, as in virtually every other field, engaged in pigeonholing. The law has been sub-divided into numerous categories – the honour of the Crown, the fiduciary duty, obligation of justification, minimum impact of laws and regulations, the duty of good faith, principles of interpretation of treaties, constraints on Crown discretion, the test for Aboriginal right, the test for Aboriginal title, the meaning of section 91(24), the meaning of section 35, the meaning of the *Royal Proclamation of 1763*, negotiation rather than litigation and – now the latest station of the Cross - consultation and accommodation. But when we expend the effort to connect those dots, all the right thinking decisions boil down to one proposition: the honourable and, post-1982, the constitutional conduct of the Crown in Aboriginal matters is to learn from and understand the First Peoples through consultation with their leaders, their communities, and their Elders. It involves taking heed of their history and cultures and then fashioning legislation, policy, development options and the myriad of other governmental actions in a way that best accommodates those peoples.

Let us look for ourselves.

In *Province of Ontario v. Dominion of Canada and Province of Quebec*, the Supreme Court considered what the right thing to do was in the light of the 1850 Robinson treaties.[8] In declaring the appropriate conduct of the Crown, the Court, in addition to introducing the subsequent themes of honour of the Crown, liberal and favourable construction of treaties and laws applicable to Indian affairs, also mentioned the quality

[7] *Reference Re Secession of Quebec, supra* at paras. 43-46 [*emphasis added*].
[8] *Province of Ontario v. Dominion of Canada and Province of Quebec; In re Indian Claims* (1895), 25 S.C.R. 434.

of "generosity".[9] That is a human quality very rarely seen in the conduct of the Crown's representatives.

Of course the cases of *Guerin v. Canada* and *R. v. Sparrow* solidified the law on the fiduciary duty binding of the Crown.[10] It is in the very nature of fiduciaries or trustees to avoid conflict of interest and act in the best interest of the beneficiaries. This, of course, includes full disclosure appropriate to the matter at hand[11] as well as listening to and acting upon the position and expectations of the beneficiary. As Dickson J. said in *Guerin*:

> The oral representations form the backdrop against which the Crown's conduct in discharging its fiduciary obligations must be measured. They inform and confine the field of discretion within which the Crown was free to act. *After the Crown's agents had induced the band to surrender its land on the understanding that the land would be leased on certain terms, it would be unconscionable to permit the Crown simply to ignore those terms.* When the promised lease proved impossible to obtain, the Crown, instead of proceeding to lease the land on different, unfavourable terms, should have returned to the band to explain what had occurred and seek the band's counsel on how to proceed. *The existence of such unconscionability is the key to a conclusion that the Crown breached its fiduciary duty.* Equity will not countenance unconscionable behaviour in a fiduciary, whose duty is that of utmost loyalty to his principal. …The Crown cannot promise the band that it will obtain a lease of the latter's land on certain stated terms, thereby inducing the band to alter its legal position by surrendering the land, and then simply ignore that promise to the band's detriment. …[12]

This sounds to me very much like the duty to consult and accommodate.

Of course, the Court in *Sparrow* went further and addressed explicitly the obligation to consult. In speaking of government's conservation and management plans, the Court stated:

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[9] *Ibid.* at 535, where Lord Sedgewick, discussing the principles of the law that apply to the claims of Indians, wrote: "the governing motive being that in all questions between Her Majesty and "Her faithful Indian allies" there must be on her part, and on the part of those who represent her, not only good faith, but more, there must be not only justice, but generosity. The wards of the nation must have the fullest benefit of every possible doubt."

[10] *Guerin v. Canada* (1984), 13 D.L.R. (4th) 321 (S.C.C); *R. v. Sparrow*, [1990] 1 S.C.R. 1075.

[11] *Blueberry River Indian Band v. Canada*, [1995] 4 R.S.C. 344.

[12] *Guerin, supra* at 344 [*emphasis added*].

> The objective is rather to guarantee that those plans treat aboriginal peoples in a way ensuring that their rights are taken seriously.[13]

The Court continued:

> Within the analysis of justification, there are further questions to be addressed, depending on the circumstances of the inquiry. These include the questions of whether there has been as little infringement as possible in order to effect the desired result; whether, in a situation of expropriation, fair compensation is available; and, whether the aboriginal group in question has been consulted with respect to the conservation measures being implemented. The aboriginal peoples, with their history of conservation-consciousness and interdependence with natural resources, would surely be expected, at the least, to be informed regarding the determination of an appropriate scheme for the regulation of the fisheries.
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> We would not wish to set out an exhaustive list of the factors to be considered in the assessment of justification. Suffice it to say that recognition and affirmation requires sensitivity to and respect for the rights of aboriginal peoples on behalf of the government, courts and indeed all Canadians.[14]

In *Osoyoos Indian Band* the Court of Appeal for British Columbia circumscribed the Crown's authority to expropriate reserve lands by stating:

> … only the minimum interest required in order to fulfill that public purpose, thus ensuring a minimal impairment of the use and enjoyment of Indian lands by the band.[15]

It is difficult to see how this would be accomplished without consultation. The resulting "minimal impairment" surely reflects accommodation.

In *Luuxhon* and *Makivik* the B.C. Supreme Court and the Federal Court respectively found that there is a legally binding duty on the Crown to negotiate treaties in good faith.[16] The record in both cases demonstrated that the Crown had not properly consulted

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[13] *Sparrow*, (1990), 70 D.L.R. (4th) 385 at 416.
[14] *Ibid.* [*emphasis added*]
[15] *Osoyoos Indian Band v. Oliver (Town)*, [2001] 3 S.C.R. 746, 2001 SCC 85, para. 52.
[16] *Luuxhon v. Canada*, [1999] 3 C.N.L.R. 89 (1999), 66 B.C.L.R. (3d) 165; *Makivik Corporation v. Canada*, [1999] 1 F.C. 38.

with the Aboriginal peoples affected and rather than accommodate them had, in the case of *Luuxhon*, proceeded to conclude an agreement in principle with the neighbouring nation substantially overlapping the Gitanyow's claim territory and, in the case of *Makivik*, attempted to proceed with the establishment of a National park within the claim traditional territory of the Nunavik Inuit.

In *Marshall (No. 2)*, Justice Binnie announced: "Aboriginal people are entitled to be consulted about limitations on the exercise of treaty and aboriginal rights." [17] The Court continued, invoking the justification test in *Sparrow* and *Badger* and the need to consider the special circumstances in each case as instructed by *Delgamuukw*.[18] The content of the duty to consult must be appropriate to the circumstances and the nature of the infringement:

> … The Court has emphasized the importance in the justification context of consultations with aboriginal peoples. Reference has already been made to the rule in *Sparrow*, *supra*, at p. 1114, repeated in *Badger*, *supra*, at para. 97, that:
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> > The special trust relationship and the responsibility of the government vis-à-vis aboriginals must be the first consideration in determining whether the legislation or action in question can be justified.
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> The special trust relationship includes the right of the treaty beneficiaries to be consulted about restrictions on their rights, although, as stated in *Delgamuukw*, *supra*, at para. 168:
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> > The nature and scope of the duty of consultation will vary with the circumstances.
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> This variation may reflect such factors as the seriousness and duration of the proposed restriction, and whether or not the Minister is required to act in response to unforeseen or urgent circumstances. As stated, if the consultation does not produce an agreement, the adequacy of the justification of the government's initiative will have to be litigated in the courts.[19]

[17] *R. v. Marshall (No. 2)*, [1999] 3 S.C.R. 533, para. 43.
[18] *Sparrow, supra* ; *R. v. Badger*, [1996] 1 S.C.R. 771; *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010.
[19] *Marshall (No. 2), supra* at para. 43.

And, of course, the Chief Justice in *Delgamuukw* linked consultation and accommodation (negotiation) with the true way of reaching the reconciliation so often urged by the Court. He wrote:

> … Ultimately, it is through negotiated settlements, with good faith and give and take on all sides, reinforced by the judgments of this Court, that we will achieve what I stated in *Van der Peet*, *supra*, at para. 31, to be a basic purpose of s. 35(1) – "the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown". Let us face it, we are all here to stay.[20]

We should not forget the important separate Reasons of Justice LaForest in *Delgamuukw* which include his preference for "a process of negotiation and reconciliation".

> On a final note, I wish to emphasize that the best approach in these types of cases is a process of negotiation and reconciliation that properly considers the complex and competing interests at stake. This point was made by Lambert J.A. in the Court of Appeal, [1993] 5 W.W.R. 97, at pp. 379-80:
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> > So, in the end, the legal rights of the Indian people will have to be accommodated within our total society by political compromises and accommodations based in the first instance on negotiation and agreement and ultimately in accordance with the sovereign will of the community as a whole. The legal rights of the Gitksan and Wet'suwet'en peoples, to which this law suit is confined, and which allow no room for any approach other than the application of the law itself, and the legal rights of all aboriginal peoples throughout British Columbia, form only one factor in the ultimate determination of what kind of community we are going to have in British Columbia and throughout Canada in the years ahead.[21]

Perhaps one final example of the Court's direction in regard to specific Crown action is the restriction of the Crown's "administrative discretion".[22] In *Adams* the Court dismissed what it referred to as "an unstructured discretionary administrative regime" and required one geared to accommodate the existence of Aboriginal rights:

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[20] *Delgamuukw*, *supra* at para. 186 [*emphasis added*].
[21] *Delgamuukw*, *supra* at para. 207 (LaForest) [*emphasis added*].
[22] *R. v. Adams*, [1996] 3 S.C.R. 101.

> … In light of the Crown's unique fiduciary obligations towards aboriginal peoples, Parliament may not simply adopt an unstructured discretionary administrative regime which risks infringing aboriginal rights in a substantial number of applications in the absence of some explicit guidance. If a statute confers an administrative discretion which may carry significant consequences for the exercise of an aboriginal right, the statute or its delegate regulations must outline specific criteria for the granting or refusal of that discretion which seek to accommodate the existence of aboriginal rights. In the absence of such specific guidance, the statute will fail to provide representatives of the Crown with sufficient directives to fulfil their fiduciary duties, and the statute will be found to represent an infringement of aboriginal rights under the *Sparrow* test.[23]

In each of these cases, the courts were addressing either what is now referred to in consultation parlance as "prior to proof" rights,[24] or clarifying the constraints on Crown action on First Nations' property or treaties.

**The Inherent Rights of Treaty First Nations**

A proper analysis of the rights and interests held by Treaty First Nations involves distinguishing what we refer to as, first, "Treaty rights", second, "Treaty protected Aboriginal rights", and, third, "undisturbed inherent rights". The source of the first type – "Treaty rights" – is the Treaty itself whereas the source of the second and third type is inherency with no dependency upon Crown recognition and certainly not on grants from the Crown. What the Treaty does, however, with respect to Treaty protected rights is to provide protection and security for exercise of inherent Aboriginal rights through explicit undertakings by the Crown that take on constitutional characteristics.

Examples of what I call "Treaty rights" would be the "new" rights negotiated by the parties to the Treaty, such as the provision of agricultural assistance, annuities, provision of equipment for harvesting activities, the medicine chest in Treaty No. 6, the promises of aid in time of famine. On the other hand, "Treaty protected Aboriginal rights" would include any of the First Nation's rights that were expressly protected in Treaty, including

[23] *Ibid.* at para. 54.
[24] *Haida Nation v. British Columbia (Minister of Forests),* [2004] 3 S.C.R. 511, 2004 SCC 73 at paras. 26-38.

the rights to continue traditional harvesting activities, the reserve land set aside out of the traditional territories, the authority and governance of the Chiefs.

Examples of the third category - "undisturbed inherent rights" - would be a people's culture, spirituality, language, and social dynamic, all of which includes a continuing cultural and spiritual connection to land throughout traditional territory, spiritual sites, burial sites, archaeological sites and other areas of particular cultural importance throughout the traditional territory. No one who reads the Treaty conferences, hears or reads the oral traditions and oral history of the Treaty peoples and considers the jurisprudence as developed over the past forty years could seriously contend that Treaty First Nations had abandoned these aspects of their existence as a people through the Treaties.

For Treaty First Nations these considerations are of great practical importance. Are the findings by the Courts on Aboriginal title, Aboriginal rights, those things that make First Nations people who they are, indeed the Aboriginal rights part of section 35 of *Constitutional Act, 1982* inapplicable to Treaty First Nations? Of course not and any such suggestion should be vigourously challenged.

**The Historic Treaties and the Continuation of Inherent Rights**

The First Nations party to the historic Numbered Treaties solemnly and in good faith agreed to treat with the Crown respecting their territories stretching from Ontario across the Western Plains and up to Northeastern British Columbia and the Northwest Territories. In the decades following the conclusion of the Treaties and continuing to this day, these Treaty First Nations found themselves faced with positions of government and industry that distorted and continue to distort the history of the treaty process, the understanding of their ancestors when engaging in that process and the representations and undertakings on behalf of the Crown by its Treaty Commissioners.

That historical and cultural distortion consisted of claims by the Crown and industry that the Numbered Treaty process involved Treaty First Nations surrendering all rights,

interests and connection with their vast traditional territories in return for a set of Treaty rights, such as reserves, economic assistance, primarily agricultural, annuities and a variety of other treaty entitlements.

The surrender of rights was not, in fact, what happened and to propose it did is a denial of the centuries of social, political and commercial relations between the First Nations themselves and latterly between the First Nations and the European trading companies such as the Hudson's Bay Company; it pre-supposes that peoples in the space of one decade of their millennia of existence would abruptly abandon willingly and knowingly everything of importance to their society – cultural identity, spirituality, identification with a homeland, the land and resources that had maintained their peoples through time and, not the least, their self-identification as a people.

Seen in this light, the contentions of government and industry are not only implausible but risible. And it is for this reason that preservation of the fountain-head of inherency and the ageless flow of inherent rights to culture, religion, language, nationhood, governance and self-determination as well as a continuing connection to the homeland remain vitally important for Treaty First Nations. The message of this paper is that First Nations' inherent rights are largely intact notwithstanding the Treaties.

Treaty peoples were not stripped of everything important to them by the treaty process; to the contrary, they were assured and believed that their inherent rights as peoples were being recognized, secured and assisted by the Crown. In return, the Treaty First Nations agreed to share their lands and resources as well as jurisdiction and governance.[25] These

[25] Alain Supiot, *supra* at p. 87, has written that:

> In the concept of the *alliance*, things are grasped only through persons: the alliance was conceived first of all as a particular kinship bond. … Kinship bonds are thus the detour by which a long-term relationship of obligation may be created. <u>But the things and services to which this relation of obligation applies remain necessarily undefined at the moment at which the alliance is sealed; the content of the obligation will depend on the chance events of the lives of those bound by the alliance</u> <u>and their respective needs.</u> We still retain this type of arrangement in our legal heritage, in which a relation of obligation is derived from an artificial bond assimilated to a kinship bond. [*Emphasis added*].

*See also*, John Ralston Saul, *A Fair Country: Telling Truths about Canada* (Toronto, Viking Canada Toronto, 2008) at p. 51, where he writes,

would be exercised by their Chiefs in their sphere and by the government in Ottawa in respect of the settlers, all of this taking place under the "watchful eye of the Sovereign".[26] For the Treaty First Nations, exclusive rights to lands and resources was transformed into collective First Nation / European interests and their heretofore complete sovereignty transformed into a form of internal or merged sovereignty.[27]

Lieutenant-Governor Alexander Morris, the Queen's Commissioner for Treaty No. 4, Treaty No. 5 and Treaty No. 6 made representations and undertakings on behalf of the Queen reflecting this perspective. On the matter of **sharing territory** he stated on September 7, 1876 during negotiations on Treaty No. 6:

> "… the country is very wide and there is room for all".[28]

On the subject of the **effect of the Treaty** on existing rights and activities, he stated on August 22:

> "What I have offered does not take away your living, you will have it then as you have it now, and what I offer now is put on top of it." [29]

And again on August 23:

> "I want the Indians to understand that all that has been offered is a gift, and they still have the same mode as living as before." [30]

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> "In all their formal sessions with British and Canadian officials, the Cree were negotiating on the basis of Witaskewin – how people, not necessarily coming out of the same nation, can live together. It is an idea of carefully negotiated and continually renegotiated peaceful co-existence. That idea of co-existence is based on a related concept of sharing, which includes the idea of sharing the space, and is dependent upon Wahakohtoin, which means relationships that work because they follow a complex, unwritten code of ethics. The outcome is intended to be Miyo-wicehtowin – good, healthy, happy, respectful relationships."

[26] During the negotiations of Treaty No. 6 at Forts Carlton and Pitt, Lieutenant-Governor Morris told the assembled First Nations, "You may rest assured that when you go to your reserves you will followed by the watchful eye and sympathetic hand of the Queen's Councilors." Morris, *supra* at 212.
[27] *See* Binnie J.'s discussion in *Mitchell v. Minister of National Revenue,* [2001] 1 S.C.R. 911 (S.C.C.).
[28] Morris, *supra* at 231.
[29] *Ibid.* at 211.
[30] *Ibid.* at 221.

On the matter of the **peoples' future security**, the Lieutenant-Governor stated:

> "Now the whole burden of my message from the Queen is that we wish to help you in the days that are to come, we do not want to take away the means of living that you have now, we do not want to tie you down;" [31]

On the Treaties as **alliances between self governing peoples and nations**, Lieutenant-Governor Morris said:

> "And now, Indians of the plains, I thank you for the open ear you have given me; I hold out my hand to you full of the Queen's bounty and I hope you will not put it back. We have no object but to discharge our duty to the Queen and towards you. Now that my hand is stretched out to you, it is for you to say whether you will take it and do as I think you ought – act for the good of your people"[32]
>
> … "I trust that God will bless this bright day for our good, and give your Chiefs and Councillors wisdom so that you will accept the words of your Governor. I have said."[33]

Indeed in the Preface to his book, Governor Morris opened by saying:

> The question of the relations of the Dominion of Canada to the Indians of the North-West, is one of great practical importance. The work, of obtaining their good will, by entering into treaties of alliance with them, has now been completed in all the region from Lake Superior to the foot of the Rocky Mountains.[34]

**The Procedural Rights Arising from Treaties**

But for those who seek more "black letter" indications for the obligation to consult and accommodate treaty peoples what about the procedural rights flowing from their treaty relationship with the Crown. The leitmotif of the "modern law of Aboriginal and treaty rights" was identified by Justice Binnie in *Mikisew*:

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[31] *Ibid.* at 233.
[32] *Ibid.* at 208.
[33] *Ibid.* at 209.
[34] *Ibid.* at Preface.

> The fundamental objective of the modern law of aboriginal and treaty rights is the reconciliation of aboriginal peoples and non-aboriginal peoples and their respective claims, interests and ambitions.[35]

Reconciliation is not achieved through breaking faith with history and attempting to profit from the breach.

In *Marshall*, Justice Binnie considered the historical context of the Treaty of Peace and Friendship, signed on March 10, 1760 under consideration in that case, and how that context informed the purpose and intent of the treaty, which was reconciliation.[36]

Far from tolerating unilateral Crown conduct within Treaty territory, the Supreme Court has stressed that these compacts are in fact expressions of the rededication of the Crown's engagement towards First Nations. As Justice Binnie expressed it in *Mikisew*, speaking of Treaty Eight:

> … Treaty making is an important stage in the long process of reconciliation, but it is only a stage. What occurred at Fort Chipewyan in 1899 was not the complete discharge of the duty arising from the honour of the Crown, but a rededication of it.[37]

Justice Binnie went on to find that, in addition to the substantive rights, treaties give rise to procedural rights:

> As stated at the outset, the honour of the Crown infuses every treaty and the performance of every treaty obligation. Treaty 8 therefore gives rise to Mikisew procedural rights (e.g. consultation) as well as substantive rights (e.g. hunting, fishing and trapping rights). Were the Crown to have barrelled ahead with implementation of the winter road without adequate consultation, it would have been in violation of its *procedural* obligations, quite apart from whether or not the Mikisew could have established that the winter road breached the Crown's *substantive* treaty obligations as well.[38]

[35] *Mikisew Cree First Nation v. Canada*, [2005] 3 S.C.R. 388, para. 1.
[36] *R. v. Marshall*, [1999] 3 S.C.R. 456 at paras. 3, 4.
[37] *Mikisew, supra* at para. 54
[38] *Ibid.* at para. 57 [*emphasis added*].

And as Justice Binnie further held in *Mikisew*, procedural rights and procedural duties are a matter of broad and general importance to the First Nation/Crown relations. He observed:

> … Beyond that, however, the principle of consultation in advance of interference with existing treaty rights is a matter of broad general importance to the relations between aboriginal and non-aboriginal peoples. It goes to the heart of the relationship and concerns not only the Mikisew but other First Nations and non-aboriginal governments as well.[39]

The fundamental importance of prior consultation discussed in *Mikisew* had been spelled out in *Halfway River First Nation*, where the British Columbia Court of Appeal expressed how inseparable consultation was from the other criteria for a justified infringement of an Aboriginal or treaty right.

> […] even though there was a sufficiently important legislative objective, the petitioners rights were infringed as little as possible, and the effects of the infringement are outweighed by the benefits to be derived from the government's conduct, justification of the infringement has not been established because the Crown failed in its duty to consult. It would be inconsistent with the honour and integrity of the Crown to find justification where the Crown has not met that duty.[40]

In *Haida*, the Chief Justice had further insisted on the importance of procedural rights as an expression of the special nature of the First Nation/Crown and a necessary condition to the attainment of its objective of reconciliation:

> The jurisprudence of this Court supports the view that the duty to consult and accommodate is part of a process of fair dealing and reconciliation that begins with the assertion of sovereignty and continues beyond formal claims resolution. Reconciliation is not a final legal remedy in the usual sense. Rather, it is a process flowing from rights guaranteed by s. 35(1) of the *Constitution Act, 1982*.[41]

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[39] *Mikisew, supra* at para. 3 [emphasis added].
[40] *Halfway River First Nation v. British Columbia (Ministry of Forests)*, (1999), 178 D.L.R. (4th) 666, at 167.
[41] *Haida supra* at para. 32 [*emphasis added*].

In *Makivik*, Richard A.C.J. recognized that the Crown has procedural obligations towards Aboriginal people that flow from the treaty process. While the British Columbia Supreme Court has applied *Makivik* to the Crown's procedural obligations in the British Columbia treaty process[42], the recent Federal Court judgment in *Dene Tha' First Nation* in the context of the Mackenzie Gas Pipeline confirmed that Treaty 8 constituted "as a minimum, a constitutionally equivalent agreement with Canada about its rights" to a land claims settlement[43]. It also made interesting statements as to the "state of mind" with which the government should engage into consultation:

> Consultation is not consultation absent the intent to consult. Consultation cannot be meaningful if it is inadvertent or *de facto*. Consultation must represent the good faith effort of the Crown (reciprocated by the First Nation) to attempt to reconcile its sovereignty with pre-existing claims of rights or title by the First Nation.[44]

**Consulting the Crown's "loyal Indian allies"**

In my experience, the peoples' whose ancestors signed historic treaties are among the prominent victims of consultation specificity. In the face of the "cede, release and surrender" language in the treaties, the Crown has limited its duty to consult to circumstances where a "Treaty right", as described above, may be infringed, and refuses to acknowledge that it must also consult where inherent rights are at issue.[45] To do so it has started, of course, with the erroneous assumption that all Aboriginal rights and interests were knowingly and voluntarily ceded and surrendered by those ancestors.

But there is more to a duty to consult and accommodate in the context of treaty. The historic treaties were concluded with a view to seeking peace and order in advance of

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[42] *Makivik Corp. v. Canada (Minister of Canadian Heritage), [1999] 1 F.C. 38, paras. 1, 105(b); Luuxhon et al. v. Canada et al., [1999] 3 C.N.L.R. 89, paras. 41, 44*
[43] *Canada (Environment) v. Dene Tha' First Nation, 2006 FC 1354*, at para. 74.
[44] Ibid. at para. 113.
[45] Peter W. Hutchins, ""Cede, Release and Surrender": Treaty-Making, the Aboriginal Perspective and the Great Juridical Oxymoron Or Let's face It – It Didn't Happen Here" in Maria Morellato ed., *Aboriginal Law: Developments since Delgamuukw*, (Canada Law Book) (forthcoming in 2009).

European settlement from the Eastern Seaboard to Vancouver Island. They were, in effect, treaties of peace and alliance. For the First Nations, particularly those on the Great Plains, the treaties were and continue to be a centrepiece of their history and their culture. They are solemn covenants made not only with the sovereign but with the Creator. And as the Supreme Court has recognized in several instances, the treaties led not only to substantive rights but also to procedural or process rights.[46] All this has a great deal to do with the continuing duty on the Crown to consult and accommodate the treaty peoples, whatever the specific content or the specific silences in their treaty.

In *R. v. Marshall*, Justice Binnnie considered the historical context of the Treaty of Peace and Friendship, under consideration in that case, signed on March 10, 1760, and how that context informed the purpose and intent of the treaty. He found that the purpose and intent was reconciliation.

> The treaties were entered into in a period where the British were attempting to expand and secure their control over their northern possessions. The subtext of the Mi'kmaq treaties was reconciliation and mutual advantage.
>
> I would allow this appeal because nothing less would uphold the honour and integrity of the Crown in its dealings with the Mi'kmaq people to secure their peace and friendship, as best the content of those treaty promises can now be ascertained.[47]

The relationship between the British Crown and the Mi'kmaq people, and the resulting treaties, was also considered by the Supreme Court in *Simon v. The Queen*.[48] *Simon* established in the jurisprudence the recognition that treaties involving peace, alliance or trade were not mere political expressions but were legal instruments binding on the Crown. Chief Justice Dickson found a similar "subtext" of reconciliation and mutual advantage in the treaty of 1752:

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[46] *Mikisew Cree First Nation v. Canada*, [2005] 3 S.C.R. 388; *Luuxhon et al. v. Canada et al., [1999] 3 C.N.L.R. 89.*
[47] *R. v. Marshall*, [1999] 3 S.C.R. 456 at paras. 3, 4 [*emphasis added*].
[48] *Simon v. The Queen*, [1985] 2 S.C.R. 387

> The Treaty was entered into for the benefit of both the British Crown and the Micmac people, to maintain peace and order as well as to recognize and confirm the existing hunting and fishing rights of the Micmac. In my opinion, both the Governor and the Micmac entered into the Treaty with the intention of creating mutually binding obligations which would be solemnly respected. ...
>
> ...
>
> Finally, it should be noted that several cases have considered the Treaty of 1752 to be a valid "treaty" within the meaning of s. 88 of the *Indian Act* (for example, *R. v. Paul*, *supra*; and *R. v. Atwin and Sacobie*, *supra*). The Treaty was an exchange to solemn promises between the Micmacs and the King's representative entered into to achieve and guarantee peace. It is an enforceable obligation between the Indians and the white man and, as such, falls within the meaning of the word "treaty" in s. 88 of the *Indian Act*."[49]

The role of treaties in reconciliation of the parties was acknowledged with respect to the struggle for North America during the Seven Years War by the Supreme Court of Canada in *R. v. Sioui*.[50] Justice Lamer (as he then was) pointed to the policy of the British and French combatants in seeking reconciliation with the Indian nations to secure alliances and maintain alliances:

> The mother countries did everything in their power to secure the alliance of each Indian nation and to encourage nations allied with the enemy to change sides. When these efforts met with success, they were incorporated in treaties of alliance or neutrality. This clearly indicates that the Indian nations were regarded in their relations with the European nations which occupied North America as independent nations. The papers of Sir William Johnson (The Papers of Sir William Johnson, 14 vol.), who was in charge of Indian affairs in British North America, demonstrate the recognition by Great Britain that nation-to-nation relations had to be conducted with the North American Indians. As an example, I cite an extract from a speech by Sir Johnson at the Onondaga Conference held in April 1748, attended by the Five Nations:
>
> > Brethren of the five Nations I will begin upon a thing of a long standing, our first Brothership. My Reason for it is, I think there are several among you who seem to forget it; It may seem strange to you how I a Foreigner should know this, But I tell you I found out some of the old Writings of our Forefathers which was thought to have been lost and in this old

[49] *Simon v. The Queen*, [1985] 2 S.C.R. 387 at paras. 24, 51.
[50] *R. v. Sioui*, [1990] 1 S.C.R. 1025.

> valuable Record I find, that our first Friendship Commenced at the Arrival of the first great Canoe or Vessel at Albany . . . (The Papers of Sir William Johnson, Vol. I, 1921 at 157-158).[51]

Justice Lamer in deciding upon the legally binding nature of the instrument at issue and characterizing it as a treaty, relied upon the context of European struggle for hegemony in Canada and their absolute reliance on Indian allies to accomplish this goal:

> Following the crushing defeats of the English by the French in 1755, the English realized that control of North America could not be acquired without the co-operation of the Indians. Accordingly, from then on they made efforts to ally themselves with as many Indian nations as possible. The French, who had long realized the strategic role of the Indians in the success of any war effort, also did everything they could to secure their alliance or maintain alliances already established.
> …
>
> Next, the policy of the British toward the Indians in territorial matters has to be considered. In quite general terms, the evidence shows that during the Seven Years' War the British had adopted a conciliatory attitude toward the Indians because of the lesson they had learned from their earlier defeats at the hands of the French. As I mentioned earlier, they had realized the important role the Indians would necessarily play in the war between the mother countries. The British had also understood the importance for the security of the colony of continuing peace with the Indians once the war was over. I adopt the observations of Bisson J.A. in describing Murray's attitude to the Hurons (at p. 1728):
>
> > [TRANSLATION] In this connection, the reference to customs in treaty D-7 takes on particular importance, as Murray held the Hurons in high regard and undoubtedly wanted to be as much help to them as possible.[52]

The 1854 Treaty between certain Nanaimo Tribes and the Hudson's Bay Company came under examination by the British Columbia Court of Appeal in the case of *R. v. White and Bob*.[53] Mr. Justice Norris, while considering whether this treaty fell within the meaning of the term treaty in what was then section 87 of the *Indian Act*, reviewed the

[51] *Ibid*. at 1053 [*emphasis added*].
[52] *Ibid*. at 1053, 1054, 1070-1071.
[53] *R. v. White and Bob*, 50 D.L.R. (2d) 613.

essence of the treaty process and concluded that at the heart of the process lay the imperative of obtaining the goodwill and cooperation of the Indian nations. He wrote:

> In the section "Treaty" is not a word of art and in my respectful opinion, it embraces all such engagements made by persons in authority as may be brought within the term "the word of the white man" the sanctity of which was, at the time of British exploration and settlement, the most important means of obtaining the goodwill and co-operation of the native tribes and ensuring that the colonists would be protected from death and destruction. On such assurance the Indians relied. In view of the argument before us, it is necessary to point out that on numerous occasions in modern days, rights under what were entered into with Indians as solemn engagements, although completed with what would now be considered informality, have been whittled away on the excuse that they do not comply with present day formal requirements and with rules of interpretation applicable to transactions between people who must be taken in the light of advanced civilization to be of equal status. Reliance on instances where this has been done is merely to compound injustice without real justification at law.[54]

Mr. Justice Cory had occasion several years later in *R. v. Sundown* to address one of the Numbered Treaties.[55] While determining if the building of hunting shelters in Provincial Parks was covered by the terms of Treaty No. 6, Mr. Justice Cory reiterated his principles of interpretation summarized in *Badger* and went on to say:

> Treaties may appear to be no more than contracts. Yet they are far more. They are a solemn exchange of promises made by the Crown and various First Nations. They often formed the basis for peace and the expansion of European settlement. In many if not most treaty negotiations, members of the First Nations could not read or write English and relied completely on the oral promises made by the Canadian negotiators. There is a sound historical basis for interpreting treaties in the manner summarized in Badger. Anything else would amount to be a denial of fair dealing and justice between the parties.[56]

As Justice Sedgewick so aptly put it in *Province of Ontario v. Dominion of Canada and Province of Quebec*, surely there is an obligation, not only legal but moral, on the Crown to continue to make every effort to consult with and accommodate its "loyal Indian

[54] *Ibid.* at 649 [*emphasis added*].
[55] *R. v. Sundown*, [1999] 1 S.C.R. 393.
[56] *Ibid.* at para. 24.

allies". [57] What might the prospective Aboriginal or treaty right be? It would be the right as a treaty partner to be dealt with honourably by the other treaty partner and to be accommodated just as the Europeans were accommodated by the First Nations at contact and through the historic treaties.

***Nullus commodum capere potest de injuria sua propria*: No one shall take advantage of his own wrong.**

I have recently been involved in three Judicial Reviews before the Federal Court challenging the decisions of the Governor-in-Council to authorize the construction of pipelines through Treaty One territory in Southern Manitoba. The Applicants were the seven First Nations signatories of Treaty One. It is important to note that the parties are awaiting decisions in these Applications and so the eventual outcome is unknown.

However, the factual context of the Applications does illustrate the current challenges facing treaty peoples. The Crown and industry take the position that no duty to consult survived the conclusion of Treaty One because no inherent rights in the territory survived. They say the burden is on the First Nations to establish what "interests" might be deserving of Crown attention and that in any event pipeline development is benign in its impact on the territory. The First Nations contend that not only is the Crown violating the historic understanding of what the treaty relationship was meant to signify – it has failed to live up to specific undertakings given in the Treaty. The Crown profits from the access to and use the territory gained by the Treaty whole failing to acknowledge or fulfill its side of the bargain.

In our Application for Judicial Review in one of these cases, we posed the following questions:

> This Application asks the question: can one party to a Treaty continue in breach of its Treaty obligations while invoking and taking advantage of the Treaty

[57] *The Province of Ontario v. The Dominion of Canada and the Province of Quebec (In re Indian Claims)* (1895), S.C.R. Vol. XXV 434

> benefits it has derived? Specifically in this case, can the Crown continue to derive the benefit of access to the territories of the Applicants that it purports to have obtained from concluding Treaty One while in continued breach of its Treaty obligations towards the Applicants a) by failing to have provided complete and adequate compensation for the lands taken up for "immigration and settlement"; b) by authorizing activity beyond the purposes of "immigration and settlement" stipulated in the Treaty, in this instance Keystone, without providing the requisite compensation to the Applicants or negotiating special arrangements with the First Nations; and c) by using Treaty One Traditional territory for Keystone when the Crown has not yet fulfilled outstanding lawful obligations admitted by the Crown and which have existed for over a century, the whole without any consultation or accommodation whatsoever with respect to the First Nations' rights, interests and concerns.[58]

The mischief can only be corrected by dialogue undertaken in a relationship of mutual respect, as foretold by the Treaties.

**The Social and Cultural Impact of Violating the Rights of Treaty First Nations**

I wish to raise one more aspect of the treaty relationship that has not been noticed by the Courts and as far as I know not much by anyone else.

In a recent cross-examination on his affidavit, Elder Pete Waskahat of Treaty Six answered through the interpreter in the following exchange:

> Q. And if I -- if I may just go to the last paragraph of his Affidavit, it also seems that when we are doing our work as lawyers to improve our practices, and make them appropriate, that part of having a good mind and a good heart is to appreciate the significance of the Treaty relationship and the First Peoples.
>
> A Yes, he said you understood that correctly. He said, and to follow up on that, many times when we, as the Indian people, sit down and think about our situation here in this country, and the relationship that was entered into with the Crown through Lieutenant Governor Morris and our Elders, our forefathers at that time, he said the thing that has to be understood is they made a relationship at that time. They became brothers, cousins, that way, and they -- and that this relationship was equal. One was not over another, but that's what really bothers Indian people in our history is that that part was never understood, that it seemed like there's an imposition from

[58] Applicants' Record in *Brokenhead Ojibway Nation et al. v. The Attorney General of Canada et al.* Federal Court No: T-225-08, Volume II at p. 587.

> one side over the other, and it shouldn't be that way. The understanding was that on our -- on our land, we -- we are the ones that run our lands, that that's our domain. And over there, the commissioner said that he would bring his people. They have their own systems and laws too. But that they would respect the systems that were there, and if anything was to change, either in the other system or in our system, that we would sit down first and talk about it, and he said that's what's been missing, he says, and that's something that people need to know.[59]

For Treaty First Nations, the sacred treaty that their ancestors concluded with the Sovereign and the Creator are the heart of their relationship with the newcomers and a sacred blueprint for the ongoing relationship of equals, one implying, as Elder Waskahat asserted, respect for the systems that were there "and if anything was to change, either in the other system or in our system, that we would sit down first and talk about it, and he said that's what's been missing, he says, and that's something that people need to know".[60]

Why is it so difficult to understand that virtually every society on earth holds events or moments dear and would take great exception and offense to them being denigrated or ignored? To experience such disparagement is to experience an attack on one's culture, one's history, one's sense of who one is and often one's spirituality and beliefs (examples of such would attacks include the defiling of synagogues, cemeteries and mosques; the burning of the national flag; the assassinations of Lincoln, Martin Luther King, Jr. and the Kennedy brothers).

The denigration of Aboriginal peoples' culture and society, I suspect, is one of the most serious impacts on treaty peoples in this resolute determination of the Crown to pretend that there is no consultation to be done as First Nations have no continuing interests in their ancient territories. In a moving account of the devastating impact the reserve policy had on his people of the Crow Nation, Grand Chief Plenty Coups recalled that upon being

[59] Transcripts of Cross-Examination on Affidavit of Pete Waskahat on February 4, 2009 in *Sawridge Band v. Her Majesty the Queen*, Federal Court of Appeal File No: A-154-08 at pp. 9-10
[60] *Ibid.*

confined to a reserve, "…the hearts of my people fell to the ground, and they could not lift them up again. After this nothing happened. There was little singing anywhere."[61]

The injustices that flow from the denial of the culture and rights of First Nations peoples are deepened because they are currently sanctioned by the common law. The Supreme Court of the United Stated in the ground breaking anti-segregation case of *Brown v. the Board of Education* remarked that the separation of races "had an extremely detrimental effect upon the education of children particularly when the policy 'had the sanction of law'".[62] Dealing with a Kansas judgment challenging the "separate but equal" principle established in *Plessy v. Ferguson*, the Chief Justice had the courage to break with the past to chart a new and just path, saying:

> Whatever may have been the extent of psychological knowledge at the time of *Plessy v. Ferguson*, this finding [by a Kansas Court] is amply supported by modern authority. Any language in *Plessy v. Ferguson* contrary to this finding is rejected.[63]

Consultation and accommodation, as I have tried to illustrate, was not invented by the Chief Justice in *Haida*.[64] It has in fact been the leitmotif of all the great judgments at least since *Province of Ontario v. Dominion of Canada and the Province of Quebec.*[65] It is not an obscure eddy. It is an integral part of the great "stream of justice" as it flows on, enhanced by greater understanding, increased insights, and perhaps, I should add, decreased Eurocentric arrogance and forgetfulness.

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[61] Grand Chief Coup, of the Crown Nations, cited in Jonathan Lear, *Radical Hope – Ethics in the Face of Cultural Devastation*, (Boston: Harvard University Press, 2006) at 2.
[62] *Brown v. Board of Education*, 247 U.S. 483 (1954) at pp. 491-492 [*Brown*].
[63] *Ibid.* at pp. 494-495 [*emphasis added*].
[64] *Haida*, *supra*.
[65] *The Province of Ontario v. The Dominion of Canada and the Province of Quebec (In re Indian Claims)* (1895), S.C.R. Vol. XXV 434.